complaint

Mr O has complained about advice he received from S4 Financial Ltd to invest further money in the Invicta Film Partnership No 22 (2004/5) in 2010. In particular, Mr O has said that the individual investment wasn't suited to his balanced risk profile, and that, in recommending the investment, S4 also failed to create the overall balanced risk portfolio that was agreed at the outset. Mr O has said that this has led to substantial losses within his portfolio.

background

The background to this complaint is set out in my provisional decision dated 21 August 2020, a copy of which is attached.

In that decision, I said that I was minded to not uphold the complaint, for reasons which are also set out in that decision.

In summary, I concluded that S4 had demonstrated failings in the way it had described the risk associated with the original Invicta investment in 2005. Although S4 had said that it was, in isolation, suited to a balanced risk profile, I concluded that it was a high risk investment and that S4's description belied the reality of the risks it posed.

But I was also satisfied that Mr O was aware, and was justified in believing, that the investment formed part of an overall balanced portfolio which S4 was creating for him. Having considered the asset split within that portfolio, along with specific factors which would contribute to the creation of such a portfolio for Mr O, I concluded that the investment could reasonably be described as suitable.

S4's response to the provisional decision

S4's representative has responded to the provisional decision on S4's behalf, saying that it broadly accepted the outcome, but wished to add the following points in summary:

S4's reasonable perception of Mr O's understanding

- The provisional decision found that Mr O was aware of the nature of the investment and the attendant risks. It also found that Mr O was provided with clear advice about the risks and had been furnished with documentation which he would have read and understood. Furthermore, had Mr O not understood matters, he would have raised this with S4.
- But the representative asked that I consider S4's alternative position, which didn't depend on the actual knowledge or understanding of Mr O. This was that S4 had concluded, and was entitled to conclude, that Mr O was capable of understanding the advice given to him and the documents provided, and that S4 was entitled to rely on the fact that Mr O had signed individual high net worth certificates.
- In other words, the representative said, S4's advice and approach was reasonable, given its assessment of Mr O's level of understanding. And advice ought to be given in terms appropriate to the recipient.
- Therefore, even if Mr O claimed that he didn't understand the advice being given, this didn't mean that the advice was unsuitable – S4 had given the recommendation in a manner appropriate for Mr O.
- S4 was entitled to rely on Mr O querying anything he didn't understand, and that he was a relatively sophisticated investor who was capable of making informed choices and understanding formal documents issued to him.
- To the extent that the provisional decision said that matters were understood by Mr O, S4 was also entitled to expect that they would have been understood and acted reasonably in proceeding on that basis.
- To illustrate the point, the representative identified alternative findings that it said could and should be made in relation to a property partnership recommended in December 2005 - but said that similar findings should be made in the majority of the decisions:

- Instead of finding that Mr O was capable of understanding the high net worth certificate, concluding that S4 was entitled to believe that he understood it and had signed it, as it was appropriate for him to do so.
- Instead of finding that Mr O could fairly be described as an intelligent, capable individual who had the capacity to understand what was being proposed, concluding that S4 was entitled to characterise him in this manner and propose an investment on the basis that he understood what was being proposed.
- Instead of finding that if Mr O had not understood the investment, he would have raised this, concluding that, as he hadn't raised any queries, Mr O *had* understood the nature of the investment.
- Instead of finding that Mr O would have wanted to satisfy himself that he understood the proposal before proceeding, concluding that S4 was entitled to believe that Mr O had so satisfied himself.
- Instead of finding that Mr O wouldn't have believed all the investments held within his portfolio to carry a balanced risk rating, concluding that S4 was entitled to proceed on the basis that he would have understood that a portfolio can properly be described as balanced, despite individual investments carrying a higher level of risk.

Separation of complaints

S4's representative also submitted further commentary on our decision to consider seven of Mr O's complaints separately, saying the following in summary:

- The provisional decisions for the seven complaints consistently approached the complaints on the basis that it was necessary to consider the investments as being part of an overall portfolio. The decisions found that the individual investments constituted relatively small percentages of the overall portfolio and that a balanced risk portfolio need not consist of only balanced risk investments. It was commonplace to diversify a balanced portfolio using a range of higher and lower risk investments.
- But the representative didn't agree that there were in fact seven separate complaints here – all seven were complaints about elements of a single investment portfolio and so couldn't be considered as complaints about those elements as if they were standalone investments.
- There was also a point of public policy here. Our scheme was designed as an informal dispute resolution service for dealing with relatively low value complaints. It wasn't the intention of Parliament that we should, by purporting to separate complaints, claim a jurisdiction many times the monetary limit applicable under FSMA s.229(4).
- As set out in S4's letter of 9 April 2015, it had asked this service to identify the source of our alleged power to "split" complaints and for an explanation of the reasoning behind the splitting of the complaints, but it was unclear as to whether this had ever been fully addressed.
- If the complaint was regarded as seven separate complaints, this service would in theory have the jurisdiction to award over £1m – a dispute of this magnitude would ordinarily be determined in the Business & Property Courts and was wholly contrary to our scheme's purpose.
- At the very least, Mr O's complaints about his participation in the Invicta scheme should be considered as a single complaint – the two complaints related to the same scheme. I had wrongly concluded that the investment in 2010 was S4's responsibility because it had advised on the same scheme in 2005.
- The representative said that, as the claims had failed, the issue was academic – but S4 wished to express the point so that it would not be thought that the point about separating complaints had been abandoned.
- I had concluded that S4 had advised Mr O to make a further investment in Invicta 22, but there was no evidential basis for this finding. S4 had denied that advice was given, there was no suitability letter and S4 had said that it was a direct offering to Mr O, which pointed against advice having been given.
- Furthermore, the representative said, my finding was that these matters didn't necessarily mean that no verbal advice had been given – but this inverted the burden of proof, in that there was no evidence that advice had been given.

- I had also found that the decision to make the investment in 2010 was based on advice given in 2005. But S4 disagreed that advice given in 2005 was relevant to the decision to invest further five years later, especially where the point of the original advice had been to produce the tax advantage. The effect envisaged by the original advice had therefore already successfully completed, and was in part acknowledged by the finding that the 2010 investment was made on a separate and distinct basis.
- Mr O had also previously incorrectly alleged that S4 had given him advice on another investment – he had a propensity for complaining about matters in respect of which S4 had not advised him.

Mr O's response to my provisional decision

Mr O didn't agree with the conclusion I had reached. Indeed, he made many lengthy submissions on my previous decision, running to some 35 pages. It would not be appropriate to repeat each and every one of those points here, but I can assure Mr O that I have considered them all. Instead I will provide a summary of his points as follows:

- All S4 had done from the start was increase the risk in his portfolio – which had been balanced risk in nature until the high risk investments were added.
- My summary of his complaint was that which had been used by S4 in its acknowledgement letter of 24 September 2013 to his complaint. S4's formal response, dated 5 December 2013, correctly clarified the complaint as being that Mr O had been mis-sold a number of investments, on the grounds that they were misrepresented and inappropriate for his needs. His complaint submitted to this service reiterated this.
- By "manipulating" the grounds for complaint, I had changed the focus of my response to considering the portfolio as a whole, as opposed to considering whether individual investments were appropriate for him – and whether they'd been misrepresented.
- I had agreed that certain individual investments were inappropriate for a balanced risk investor, but in justifying my conclusion, I had followed S4's approach, whereby each investment is looked at individually and said to represent a certain percentage of the overall portfolio. This was not fair or reasonable – rather the cumulative impact of the high risk investments needed to be considered, as that cumulative impact was substantial.
- I had said that Mr O would have tolerated high risk ventures for a very small percentage of his portfolio if they were offset by lower risk investments, but he had actually said that this would be tolerable only if they were offset by very low risk investments. I had in a number of instances isolated only the initial part of that statement, but this wasn't indicative of acceptance of a cascade of high risk investments.
- He couldn't see how I had mitigated the high risk investments with lower risk investments. I had significantly understated the amount of high risk investments, whilst simultaneously overstating the value of lower risk investments. This was caused by inaccurate information provided by S4 and my omission of a number of key investments which increased the risk significantly.
- S4 had been clear from the start that Mr O's intention was to reduce volatility and risk within his portfolio. This was set out in S4's own response to his complaint. But the reality was that both volatility and risk had increased.
- My view that it was highly unlikely that Mr O believed all of the investments to carry a balanced risk rating was "unlawful", as per the conclusion of a judicial review into a previous ombudsman's findings on these cases. This also directly contradicted the findings of another ombudsman when upholding a case Mr O brought against a different business, in which the ombudsman had said that:
  "if the business wanted to recommend a higher risk investment for inclusion in Mr O's ostensibly balanced risk portfolio…it was up to the business to make this clear to Mr O when making the recommendation, which the business failed to do."
- I had concluded that the higher risk nature of the investments was implied through the disclosure of the risks associated with the type of scheme. But S4 wasn't clear, fair and not misleading in its description of the investments, as required by the FCA. My findings weren't consistent with this. The individual investments were described as being "balanced" and this was unequivocally misrepresentation. There was only one instance, which wasn't the subject

of this complaint, where there was evidence that an investment had been described as being high risk.

Mr O then set out greater detail on the above points, as follows – I'm using his own subheadings:

Lack of consideration of the overall cumulative impact of high risk investments

- My approach of looking at the percentage of each individual investment as a percentage of the overall portfolio wasn't fair or reasonable – the cumulative impact of the high risk investments needed to be considered – and this was substantial.
- My approach suggested that at least £1.5m of assets which had been individually assessed as high risk were cumulatively suitable for a balanced risk portfolio.
- I had said in the decision that, individually, the further Invicta investment represented a higher than balanced risk, and that only by inclusion in an overall balanced portfolio could this be considered to be suitable for Mr O. But this approach was illogical, and not fair or reasonable. The individual investments were described as "balanced" which was misrepresentation and there had to be repercussions for this.
- My provisional decision to not uphold the complaint was based on the higher risk investments being balanced by low risk investments. But the lower risk investments didn't exist to the extent that an overall balanced risk was maintained. Mr O said that, for every suitability letter where the investment was described as "balanced", the recommendation had the cumulative effect of further increasing risk in his portfolio. This, he said, was illustrated by pie charts he included in his response. Nearly of all of S4's recommendations were high risk, if not very high risk.
- S4's own representation of the investments as balanced risk, which I'd said belied the reality of the situation, meant that it would itself not have been capable of appreciating the overall exposure to risk in his portfolio.
- I had looked at each investment selectively, but if they were looked at cumulatively it was clear that S4 didn't create a balanced risk portfolio.

Incomplete and inaccurate information provided by S4

- S4 relied on poor information produced by its information system – this included significant errors and excluded many high risk investments.
- No cash balances were held as investments – it just so happened that, in some instances, there was cash on a particular date pending investment.
- Individual investment values were wrong in a number of cases.
- In one instance, Mr O's mortgage of £353,000 and a children's account of £48,109 were included as cash balances. But the children's cash account never existed
- Many of the dates on the schedules were wrong.
- One of the investments, for £50,000 - included in the fixed income allocation - was a high risk investment which reduced to zero value. Another was of a similar risk, although the money was returned. But neither could reasonably be included in the category of low risk investments.
- Cash calls on certain property investments were categorised as fixed income, when they were high risk commercial property investments.
- The film partnership tax liabilities hadn't been deducted from the portfolio and the tax risk hadn't been assessed.
- The bare trusts for the children hadn't been deducted from the total portfolio.
- One investment in particular, a tax mitigation scheme which wasn't the subject of this complaint, had a "true" cost of £101,015 and contained a tax risk for many years. S4 artificially reduced the ongoing cost of the investment – and this was the case with a number of investments.
- A previous ombudsman had concluded that an investment wasn't to be assessed as less risky at the point of sale just because risks haven't crystallised and caused loss at the current point of assessment. But I hadn't taken this into account.
- The VCT "paid to date" figures were net of tax relief, whilst the value and growth figures were included gross of tax relief.

- Certain of the higher risk investments weren't included in the schedules I relied upon. They needed to be, as the tax rebates were designed to be reinvested to generate sufficient returns to meet the liabilities they created. A previous ombudsman had assessed these investments against the portfolio. I had disregarded them, but included the Invicta investment so that I could deem it to be a suitable recommendation. This wasn't a fair or reasonable approach.
- PEP and ISA valuations hadn't been updated between June 2009 and September 2010.
- On a number of occasions, the date that an investment was input into the system was used, rather than when it was actually established.
- Mr O had raised discrepancies with S4 when the reports were issued, for example in an email dated 14 June 2011 he commented that investments appeared to have disappeared, others had changed and one was still showing when it shouldn't.
- The errors meant that Mr O was unable to reconcile the analysis I had performed with the facts of the situation. S4's own inability to accurately record the portfolio undermined the supposition that it had maintained a balanced risk portfolio. The reality, including the true cost and liabilities associated with the investments, would have demonstrated that S4 was, from day one, creating a high risk portfolio.
- No checks had been undertaken on the accuracy of the information.

Inaccurate and incomplete analysis performed by the Ombudsman

- Mr O said that I had significantly understated the amount of high risk investments, whist simultaneously overstating the value of lower risk ones.
- Mr O set out a list of all new individual investments recommended by S4, and those which had been recommended by the predecessor advising firm, which Mr O considered contributed to the cumulative risk rating of his portfolio. This included a risk rating as defined by Brewin Dolphin for each investment.

With specific regard to the Invicta restructure, Mr O said the following:

- My analysis had used a portfolio valuation of £2.13m as at September 2010, with property exposure being around 20% of the portfolio (£422,000), property invested in pension funds being £67,000 and 25% being invested in lower risk assets.
- But a mortgage of £353,000 was outstanding and a children's account of £48,109 was included as a cash balance. The children's cash account never existed.
- The amount in Bare Trusts needed to be removed and the "Enigma" investments corrected to the amount paid, rather than the valuation figure of £99,484.
- This gave a portfolio value of £1.52m. Pension fund assets of £377,000 needed to be adjusted for, and liabilities of £456,000 needed to be deducted to give a true portfolio valuation. Including this, and other, further small amounts, high risk assets now totalled £1.82m.
- The property held in the pension fund now totalled £103,585 rather than the £67,000 I had quoted.
- As at September 2010, the percentage for tax based non-property schemes was 60% (£912,039), that for property schemes (tax and non-tax based) was 31.1% (£473,070), and other high risk investments accounted for 28.9% (£440,000).
- The total amount invested in property was by this time 35.4%.
- There was no cash held as investments – only small amounts pending reinvestment.
- Non-managed cash and bonds were recorded as being £401,109, but this didn't exist. This represented a mortgage of £353,000 and a fictitious children's bank account of £48,109.
- The fixed income amount as at 22 September 2010 was £68,551. But within this was included a high risk investment which reduced to zero, and a further cash call (both high risk property transactions), and so the true fixed income amount was £23,433.
- Huge amounts of high risk investments had been added. The fixed income was being used against the equity components of the balanced risk portfolio, and no very low risk investments were recommended by S4.

- Mr O took exception to my representation of him as being a balanced/aggressive investor. He said that there was no suitability letter which recorded this and the report dated 22 September 2010 clearly stated that his attitude to risk over the last review period could realistically be described as balanced.
- The Invicta investment was designed and recommended as exactly that - not a tax mitigation scheme. S4 had introduced tax planning to optimise portfolio performance, as indicated in the commentary on its website.
- Cash and fixed income investments were an extremely small percentage of the portfolio, and over 35% was invested in property when property funds were added in. The true percentage for high risk investments was over 100% of the portfolio, and given that the scheme was designed to form part of an overall balanced portfolio, the total of high risk investments should be considered rather than individual investments in isolation.

Mr O then set out further points for my consideration:

- In most instances I hadn't included in my assessment the high risk investments recommended by the previous advising business. Given the high risk nature of these investments and the stated objective of reducing volatility and risk within the portfolio, only low risk investments should have been recommended.
- But the high risk investments only increased over time, whilst those appropriate for a balanced risk portfolio didn't.
- Mr O further reiterated that there were no cash investments held in his portfolio – any such balances were the result of the timing of investments or straightforward errors.
- A cash investment was very different from cash held pending reinvestment. And the fixed income amount in the portfolio never approached anything near the target amount of 20%.
- The ombudsman who had considered complaints about film partnership investments recommended by the previous advising firm had said that they carried risks above those highlighted by that business.
- He'd also said that an investment wasn't to be assessed as less risky at the point of sale just because potential risks hadn't been crystallised and caused loss at that particular point.

Mr O also provided visual representations of his investment portfolio over time, saying as background information that there had always been three distinct parts to his portfolio: the assets which existed and continued to be managed by him, namely the Fidelity Unit trusts, PEPs and ISAs, the Friends Provident policy and the share/fund accounts with NatWest and Hargreaves Lansdown; the portfolio which S4 was creating; and the pension fund.

Mr O said that the existing assets were viewed by S4 as being higher risk due to the relatively large equity components.

Market definition of a "balanced" risk portfolio

Mr O noted my comment that that there were no hard and fast rules in terms of what constitutes a balanced risk portfolio. But, he said, the market definition of a balanced risk portfolio was quite specific – it was a mix of equities and bonds – and the greater the percentage of equities, the higher the risk.

Mr O included risk classifications as set out by Brewin Dolphin, and said that investments recommended by S4 fell within risk levels nine and ten – on a risk scale of one to ten (ten being the highest). It was clear that Brewin Dolphin would not incorporate the vast majority of the recommended investments as suitable for a balanced risk portfolio – and this was true of every provider Mr O had looked at.

Weighting of high risk investments and consideration of "latitude"

Mr O said that any latitude which might be given to including higher risk investments wasn't borne out, as the high percentage of high risk investments wasn't balanced by lower risk investments.

There was in any case no scope for greater latitude here. Although I had cited as a key aspect Mr O's acceptance of the specific risks posed, Mr O rejected the notion that he had accepted specific risks other than those which S4 had presented to him as being appropriate for a balanced risk portfolio. And a number of those risks had in any case been misrepresented or omitted.

I had also said that Mr O accepted that commercial property would form a part of his portfolio, but this was presented to him by S4 as being part of the balanced risk portfolio. I had said that, as S4 had been willing to commit the balanced risk description in its own documents, it was difficult to see how Mr O would be expected to form any other view. But my comments relating to "greater latitude" suggested that he should in fact have formed an alternative view.

The only evidence I had "provided" to substantiate this comment was from a letter of complaint to the provider of property partnerships which had been recommended by S4, which had said that the existence of the associated loans wasn't an issue or concern for him. However, this was taken out of context and they weren't his own words – but rather written by S4 in an attempt to deflect responsibility for the losses he incurred. It was also made in the context of wanting assurance that there would be no further losses as a result of the loans.

The loans were in fact an issue for Mr O, given that he was receiving threatening letters about loans linked to one investment in particular. It was therefore a leap to take this comment and apply it unilaterally to all of the investments.

Furthermore, although I had concluded that awareness of the additional risks wouldn't have altered Mr O's decision making, in his original letter of complaint he had said that if he'd been made aware of the significant risks, he wouldn't have invested.

Incorrect inclusion of pension fund monies with the "other" investments

Mr O said that it was correct practice to view pension funds separately from other investments, given that they were ring fenced for retirement. Two other financial advisers Mr O had spoken to affirmed this view.

But if they were to be included, Mr O said, S4 had dramatically increased the risk to which they were exposed. He said that he'd incurred losses from the high risk pension investments of around £169,000 as a result – leaving him with around £170,000 (illiquid due to the nature of the investment) instead of the £900,000 which should otherwise have been expected from typical returns in a pension fund.

Disregard of the performance aspects of the portfolio

Mr O said that the performance of the portfolio had been completely ignored. A balanced risk portfolio should have significant growth over the relevant period and, if a balanced risk portfolio had been created, the substantial losses shouldn't have occurred.

According to the Brewin Dolphin Balanced Portfolios, over the 15 years from December 2004 to December 2019, the return over that period should have ranged from 134.1% at risk level "three" to 237.8% at risk level "eight".

As Mr O was a balanced risk investor, he failed to see how he had lost so much money. Any balanced risk portfolio would have performed well over the last 15 years, showing significant gains rather than losses. But it hadn't performed to expectations because of the very high risk nature of the investments recommended by S4. Out of seven property partnerships, four had reduced to zero value, three of which were in the pension funds. The others had also dropped by significant percentages.

Misrepresentation of risks by S4

Mr O said that nearly all of the investments recommended by S4 described as balanced and suitable for his risk profile were too high risk, both generally and in the context of his personal risk profile.

Mr O said that I had concluded that they were high risk and that misrepresentation had occurred in some instances, but I had said that there should be no repercussions.

However, the deciding ombudsman in the complaints against the previous advising firm had reached different conclusions, Mr O said. That ombudsman had said that, whilst it was permissible for the portfolio of a balanced risk investor to hold some high risk investments, there was no indication that the business had recommended the investments in question on that basis – rather, Mr O was entitled to believe that they carried a balanced risk rating. The ombudsman said that if the business wanted to include a high risk investment in an ostensibly balanced portfolio, it was up to the business to make this clear to Mr O, which it had failed to do in that instance.

Mr O's view was that S4 hadn't recommended any investments to him as higher risk investments forming part of an overall balanced portfolio – it was unequivocal that every investment was described by S4 as being "balanced".

Mr O said that this service was providing two contradictory conclusions. The first required S4 to clearly state the individual risk rating of investments at the time of each recommendation, whereas the second suggested it was reasonable to recommend a higher risk product for an overall balanced portfolio, irrespective of whether this was specifically stated.

I had also said that the higher risk nature of the investment was implied through the disclosure of the many risks associated with it, although I had also agreed that, in a number of instances, higher risks weren't disclosed. Mr O couldn't understand how S4 had been clear about the nature of the investments when making its recommendations. The FCA requirement was that a firm must pay due regard to the information needs of its clients and communicate to them in a way that is clear, fair and not misleading.

Mr O couldn't understand how the conclusion could be drawn that S4 had in this case been fair, clear and not misleading. He could only conclude that the findings of the previous ombudsman were consistent with the FCA's requirements, whereas my own were not. Only in one instance, which was not the subject of this complaint, had an investment been described as high risk.

I had said that S4's intention was to convey the overall risk of the portfolio when referring to recommendations as balanced, but S4 had specifically described on investment in 2010 as higher risk. It had said that, in isolation, the investment was higher risk than his stated profile of "balanced". I had also said that S4's assertion that this investment in isolation could be described as balanced belied the reality of its features. As S4 was referring to the investment itself as balanced, Mr O queried as to how this could not be described as misrepresentation.

Mr O also challenged my statement that it was highly unlikely that he would have believed all of his investments to have borne a balanced risk rating. He noted that I said that this was endorsed by his own comments relating to other property investments being designed to balance the more volatile aspects of his portfolio. But these weren't his own comments, Mr O said. Rather, they were taken from the suitability letters.

It was therefore reasonable for him to conclude that all of the investments recommended were balanced in nature, and cumulatively formed a balanced portfolio. But as had been demonstrated, it was far from balanced.

The ombudsman does not comply with the Judicial Review

Mr O said that the Judicial Review of the initial findings in these cases set out the following:

> *"9. With respect to the Merits Decisions, these apply to the First Claimant only. It seems to me that it is arguable that the Defendant erred in his approach to whether the investment advice by the First Interested Party was suitable. The first claimant was described as a "Balanced Investor" or having a "Risk Profile Balanced". There is* ***evidence*** *that when a* ***riskier investment*** *was being discussed, the First Claimant was* ***specifically informed*** *of its greater risk. That* ***did not apply to the investments about which the First Claimant complains****.*
>
> *10. In the circumstances and in the* ***absence of specific evidence*** *that the First Claimant actually understood that the product being advised about was of greater risk, it was* ***arguably unlawful*** *for the Defendant to reject his complaints on the basis that the First Claimant* ***knew***

> ***or should have known that the risk was higher than a balanced risk*** *and that the advice given was therefore suitable."* (Mr O's emphasis)

I had said in my findings that I didn't think Mr O, appreciating the risks involved in the individual investments, would have believed all of them to carry a balanced risk rating. But Mr O said that I had failed to provide specific evidence that he understood they would carry a higher risk. This theme of "speculation" was, according to Mr O, recurring and also featured in my conclusion that, with regard to a property partnership investment, knowledge of undisclosed specific risks would have altered his decision making.

Mr O said that he *did* believe all of his investments to carry a balanced risk rating, as this was what he was being told by S4 – the experts. In the findings of the deciding ombudsman in the cases against the previous advising firm, he had said that the investments were described as balanced risk and it was therefore reasonable for Mr O to take that message away and rely on it.

Whilst Mr O was flattered by the description attributed to him of being an intelligent capable individual who would have capacity to understand what was being proposed, he said my conclusion that it was unlikely he would have believed all of his investments to carry a balanced risk rating was contrary to the previous ombudsman's findings, and those of the judicial review.

Mr O said it was insufficient to speculate that he knew the investments were anything other than balanced risk, given how they were presented by S4. And the judicial review had been clear that any such claim was "unarguably unlawful".

S4's lack of compliance with the Principles of the Financial Conduct Authority

Mr O set out the high level principles as required by the FCA, as follows:

- Integrity – A firm must conduct its business with integrity.
- Skill, care and diligence – A firm must conduct its business with due skill, care and diligence
- Management and Control – A firm must take care to organise and control its affair's responsibly and effectively, with adequate risk management systems.
- Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.
- Communications with clients – A firm must pay due regard to the information needs of its clients and communicate information to them that is clear, fair and not misleading.
- Conflicts of Interest – A firm must take reasonable care to manage conflicts of interest fairly both between itself and its customers and between a customer and another client.
- Customers: relationship of trust – A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgement.

Mr O said that, to act with integrity would have required S4 to honestly and accurately disclose the true risk profile of the investments. But I'd concluded that S4 had failed, in some instances, to disclose a number of key risks.

I had also concluded that the investment represented a higher than balanced risk rating, but S4 was of the belief that they were balanced in isolation. S4 couldn't therefore be described as displaying skill care or diligence.

Regarding management and control, Mr O said that he'd already highlighted the extent of the inaccuracy of S4's information system – and in the absence of a properly functioning system, it couldn't possibly have properly monitored his risk exposure, which resulted in unsuitable recommendations.

Mr O questioned whether S4 had any regard to his interests, or whether it was simply driven by a desire to generate revenue. It ignored his risk profile and objectives, principally that of reducing risk in his portfolio, instead recommending high risk products.

Conflicts were clearly created in a number of situations, Mr O said. Firstly, when it asked him for a loan and then, when arranging a separate investment between one of its clients and other clients.

In Mr O's view, the two most significant breaches in the principles were its lack of due regard to his information needs and communication of information that was clear, fair and not misleading. He was also unable to rely on its judgment in giving suitable recommendations.

An independent view

Mr O asked an Independent Financial Adviser (IFA) to review the portfolio. His view had been that a balanced portfolio can be made up of low, medium and higher risk investments, but the key was to ensure that higher risk investments didn't outweigh the lower risk ones.

The IFA's view was that Mr O's portfolio was very high risk in nature, with little low risk investment to offset the high risk schemes – and that the risk had been exacerbated by reinvesting tax rebates into further non-approved tax schemes, thereby magnifying the risk and future tax liabilities. Also, no account had been made of all the higher risk equity in the portfolio.

The IFA also commented that, when Mr O had been planning to use some investment funds to pay for an extension on his main property, he was advised to remortgage and invest the proceeds for the short term in equity funds and a further high risk investment - instead of drawing on investment funds. This increased the overall risk to which he was exposed, along with increasing the mortgage to its maximum amount.

In summary, Mr O said that it was difficult to see how the conclusions I had reached were fair and reasonable. The provisional decision was driven by the figures I had presented, but these weren't representative of the true facts of the situation.

Although I had said that Mr O would have tolerated high risk ventures for a small percentage of his portfolio, these were never offset by lower risk investments.

Mr O said that he was continually mis-sold investments which were misrepresented and inappropriate for his needs. All investments were sold to him as "balanced". As I had concluded that they couldn't reasonably be described as balanced, but S4 asserted that they were, Mr O couldn't understand how this wasn't misrepresentation.

In closing, Mr O said that S4 had failed to abide by the FCA principles of communicating with clients, along with skill, care and due diligence – and it was "arguably unlawful" to reject his complaint on the basis that he knew, or ought to have known, that the risk was higher than "balanced".

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I'm required by the Financial Services and Markets Act 2000 (FSMA) and DISP to determine the complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the complaint.

When considering what's fair and reasonable, I need to take into account relevant: law and regulations; regulators' rules, guidance, standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

S4's responses to my provisional decision

S4's representative has asked that I consider alternative findings – such as, for example, S4 being entitled to conclude that Mr O understood the investment and associated risks, rather than being capable of understanding them. And that its advice was therefore reasonable in that slightly different context.

I appreciate the point being made here, but I don't think it makes a meaningful difference to my overall view on the aspects for which those alternative analyses have been provided, for reasons which I'll explore further below.

Separation of complaints

I've thought carefully about the further representations on this, but remain of the view that this complaint should be considered separately and on its own merits. I'll explain why.

S4's representative has said that the provisional decision has repeatedly made the point that the investments should be considered as a part of an overall portfolio, and so they shouldn't be treated as stand-alone investments when thinking about whether they are separate complaints.

The definition of a complaint within the FCA's handbook when Mr O submitted his complaint(s) to this service was as follows:

"any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service or a redress determination, which:

1. *(a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
2. *(b) relates to an activity of that respondent, or of any other respondent with whom that respondent has some connection in marketing or providing financial services or products, which comes under the jurisdiction of the Financial Ombudsman Service."*

I accept that "*activity*" could reasonably refer to either the creation of an overall portfolio or to advice about an individual investment. But I think the word "product" would be much more closely aligned to an individual investment, irrespective of whether that product formed part of an overall portfolio.

But even if another interpretation was possible here, I've also taken into account the nature and timings of the "activity" here, i.e. the recommendations for the individual investments. This wasn't a situation in which a portfolio was created as a single piece of investments advice, involving all of the recommended investments, and which took place after one meeting, or even over a short period of time. As I've already noted previously, these instances of advice took place over a period of six or more years.

And so, whilst the continuing objective may have been to fit the investments into an overall portfolio, I don't think they could reasonably be said to be part of a single, overarching investment plan.

They were distinct pieces of investment advice, with their own suitability assessments and letters of recommendation. And they fulfilled quite different objectives within the overall portfolio. For example, the tax planning schemes (such as this) with the prospect of tax rebates were, as I said in the provisional decision, more akin to wealth maintenance rather than wealth creation through investment returns on the original capital. I appreciate Mr O disagrees with this conclusion, and that they weren't designed as tax mitigation strategies, but I'll address that presently. The non-tax based schemes on the other hand were investments which were expected to produce a return on those capital amounts.

I've also noted the comment about this being a matter of public policy and a query as to what would have been intended by Parliament when setting up this service. But I've also thought about this from the opposing perspective. If I were to agree with S4's representative, the entirety of a consumer's relationship with an advising firm, over a period of potentially decades, and incorporating many instances of financial advice, could be said to be the provision of an investment portfolio – by the representative's reckoning, a single financial service or "activity". And extending the representative's logic in this way, complaints about the provision of advice on quite different products, many years apart, would also need to be considered as a single complaint because they were designed to create an overall portfolio.

I don't think this was Parliament's intention. I would also challenge this perspective on the basis of the likely, and somewhat perverse, result of a situation whereby a complaint was made on a single aspect of a firm's advice, subsequently addressed and decided by this service, which was then followed by a later complaint about a different piece of advice. According to the scenario outlined above, this would need to be dismissed because the overall provision of a portfolio had already been

"assessed" – on the basis that the original complaint about a separate piece of investment advice had had a determination on it.

This would surely be nonsensical, and cannot have been the intention of Parliament. The only way in which this could make any sense would be for the advising business, upon receipt of a complaint about an individual piece of advice, to then review every piece of advice it had given throughout the relationship - as I've said, potentially over decades -with its client. But businesses understandably don't do this – they restrict their consideration to the individual piece of advice in question, albeit perhaps against the background of a wider portfolio. And notably S4 also hasn't done this here. It actively (and justifiably as endorsed by both this service and the courts) sought to deem certain of Mr (and Mrs) O's investments outside of our jurisdiction by separating out instances of investment advice, even before the complaints had been referred to this service, as evidenced by its final response letter to Mr O – and so it was unwilling to consider the entirety of the investment advice, or the whole portfolio, given over the many years of its relationship with Mr O.

It may have been the case that Mr O submitted his concerns about all of the investments at the same time. But this isn't uncommon. A review of advice over many years can reveal in a consumer's eyes many instances of what they consider to be unsuitable recommendations – and so they submit those concerns together.

But Mr O might just as readily have submitted these concerns separately. And having addressed the individual merits of a case involving, say, a tax based scheme, I must consider whether S4 would then have sought to dismiss a complaint, perhaps a year later, about a non-tax based property partnership investment on the basis that a complaint about the "overall portfolio" had already been addressed. I think this is unlikely. S4 would have addressed the individual merits of that further investment – and done so on the basis that it was a separate complaint.

Mr O should not therefore be penalised in terms of the potential scope of an overall monetary award for having raised his concerns about many investments in a single complaint letter. As such, I don't think the scope of Mr O's complaints, or our ability to consider them individually, should be fettered by his decision to submit his concerns about several instances of advice at the same time.

I appreciate the point that this serves to increase the potential liability of S4 if awards were to be made, but with respect, this is beside the point. Given my comments above, I don't think the proposition of considering Mr O's concerns about separate pieces of investment advice as one complaint is fair, reasonable or tenable.

Specific further points raised about the Invicta 22 "cash call" investment.

S4's representative has said that there was no evidential basis for my finding that S4 had given Mr O advice to invest further in the Invicta investment. S4 had in fact denied that advice had been given, saying that it was direct offering. And that I had inverted the burden of proof here.

But I disagree – in my provisional decision I noted an email sent to Mr O on 6 October 2010 in which S4 had said it needed to talk about the further investment. I considered it likely that S4 did then talk to Mr O about it, and that as he'd invested further, he'd received at least verbal advice to do so.

I also noted other situations in which Mr O had been offered an opportunity to enhance an initial investment which had been originally recommended by S4, and that in those circumstances, S4 had recommended that he do so.

And to clarify, I don't need absolute proof here that Mr O received advice from S4 to invest further into Invicta – I need to be satisfied that, on balance, it was more likely than not that this was the case. Given the circumstances outlined above, I remain of the view that this is what happened here.

Mr O's response to my provisional decision

Mr O has made specific preliminary comments in advance of more detailed discussion under separate headings. For ease of reference, I'll follow the same format in addressing those points, but will, for reasons which will hopefully become clear, leave my further assessment of the assets contained within Mr O's portfolio to the end.

Mr O has said that all S4 had done from the start was to increase the risk in his portfolio, which had been balanced risk in nature until those higher risk investments were added. But as I've set out in the provisional decision, and as has been seemingly accepted by both Mr O and the IFA from whom he's sought a further opinion, a balanced risk portfolio may contain some higher risk investments, which would be expected to be balanced out by other lower risk investments. To the extent that this has been achieved in this instance I'll discuss later in this decision.

Mr O has also objected to my summary of his complaint, saying that by mischaracterising this I had changed the focus of my response to a consideration of the portfolio as a whole, as opposed to whether the individual investments were suitable for him.

But I feel I should point out Mr O's own view on the nature of his complaint has seemingly changed over time. For example, in his initial complaint to S4 dated 17 September 2013, it wasn't particularly explicit as to whether Mr O was complaining about the risk rating of individual investments or the alleged failure of S4 to establish an overall balanced portfolio. A concluding remark towards the end of the complaint letter would, however, perhaps suggest the latter:

"*You have failed to manage my portfolio as one of Balanced Risk Profile."*

S4 acknowledged the complaint on 24 September 2013, saying that:

"It is important that we clarify your grounds for complaint. Our understanding of your complaint in summary is that:

- *In recommending the investments detailed in your letter, the firm has failed to create the balanced risk portfolio that was agreed at the outset and that this has led to substantial losses within your portfolio."*

Mr O didn't appear to object to that description. S4 then issued its final response letter on 5 December 2013, setting out its understanding of Mr O's complaint as follows:

"That you were mis-sold a number of investments on the grounds that they were

- *Misrepresented*
- *inappropriate for your needs."*

Mr O then submitted his complaint to this service, setting out the following as grounds for complaint:

"It was against this (balanced) definition, which I assessed the suitability of investments that were recommended. Every recommendation from S4 clearly stated Balanced and it was against the background of this that Investments were made. I expected S4's knowledge to recommend appropriate investments against this Risk Profile. I would not be prepared to tolerate anything that could be deemed to be of high risk unless for a very small percentage of my portfolio which could be offset by a very low risk investment. If this was not the case they should have been clearly defined to me as being of high risk. Not one ever was.

On all recommendations, I relied on the knowledge and expertise of S4 to give me the appropriate advice against a backdrop of a balanced risk profile. We agreed a Balanced Risk Profile and according to their correspondence every recommendation they have made clearly states the investment met this profile. Balanced."

The adjudicator then assessed the merits of Mr O's complaint, and taking his cue from Mr O's description above, summarised the complaint as follows:

"Specifically you've complained:

- *S4's recommendation wasn't appropriate for your risk profile. The investment exposed your capital to a greater level of risk than you were willing to take.*

- *The investment resulted in a substantial and unexpected loss many years later.*
- *The investment was highly illiquid.*
- *S4 did not undertake sufficient due diligence and research.*
- *S4 failed to make clear the associated risks."*

To which Mr O later responded as follows in his letter dated 28 May 2018:

I do not understand why he (the adjudicator) has expanded this as above the complaint was quite clear - the grounds for my complaint were - from S4's letter dated 24th September 2013 - ***"It is important that we clarify your grounds for complaint. Our understanding of your complaint in summary is that: In recommending the investments detailed in your letter, the firm has failed to create the balanced risk portfolio that was agreed at the outset and that this has led to substantial losses within your portfolio."*** (my emphasis)

So this was the last version of Mr O's complaint – from Mr O directly - which this service received. And I consider this to be consistent with the manner in which I too set out the grounds for his complaint.

Mr O has, somewhat uncharitably in my view (and I'll address some of the language used, and implications made, by Mr O in his response to my provisional decision presently), contended that I've manipulated the grounds for complaint and thereby changed the focus of my response. But taking the above into account, I cannot agree that if any manipulation of the complaint has occurred over time, this has been on the part of either this service or S4.

It has in any case been possible for me to decide both whether the investment would have been suitable in isolation for a balanced risk investor, or cumulatively as a part of a balanced risk portfolio – and I set out my reasoning on both perspectives in my provisional decision. For clarity, I concluded that in isolation I didn't think it could be deemed suitable for a balanced risk investor because of the risks involved. But I did say that, depending on the overall asset split, it could form part of a balanced risk portfolio. I appreciate that Mr O is of the view (as described in his most recent version of the complaint) that he understood each investment to bear a balanced risk rating, but I'll address this in further detail later on in this decision.

Mr O has also said that I've focussed on his statement that he would have tolerated high risk ventures for a small percentage of his portfolio if they were balanced out by lower risk investments. He's said that in many instances I've isolated only the first part of that sentence. But I'm afraid this isn't the case – at no point in the provisional decision have I indicated that he was willing to accept high risk investments, in isolation, without there being the balancing effect of corresponding lower risk investments. I don't therefore consider that there has been any misrepresentation here.

Mr O's further argument is that I had significantly understated the higher risk investments whilst simultaneously overstating the lower risk investments. My comment on this is quite straightforward – in reaching the conclusions I did about the assets splits within Mr O's portfolio at the time of the advice, I've (justifiably in my view) relied upon the financial reports which were issued to Mr O on a yearly basis setting out valuations of his portfolio. Whilst I can see that on occasion Mr O queried the content of those reports and requested more detail, I couldn't find anything approaching the level of detail to which Mr O has gone to in response to my provisional decision in attempting to correct those valuations. As such, I considered them to be a reliable indicator of the portfolio content and valuation at the time.

Having reviewed the valuations further in light of Mr O's response to my provisional decision, my view remains that, albeit with certain amendments, they are broadly representative of the portfolio position at the times they were issued. But I've left my further assessment of the asset split to the end of this decision.

Mr O has then commented on S4's statement within its response to his complaint that the intention from the start was to reduce volatility and risk within his portfolio – whereas the reality was that both

had increased. But whilst that may have been the overall objective, it omits the second part of the complaint response which referred to agreed target allocations, including a 30% target for commercial property exposure. This is in my view reasonably indicative of conversations around a bespoke portfolio, which complemented Mr O's understanding of investment risk and preparedness and tolerance to invest higher amounts in less conventional investments. Again, I deal with these issues in more detail presently.

My view as expressed in the provisional decision that it was highly unlikely that Mr O would have believed all of his investments to be balanced risk was "unlawful", Mr O has said, as per the conclusion of the judicial review. For now, I'll simply remind Mr O that this was not a judgement following a judicial review, but comments made by the judge when considering whether to permit the application for judicial review. No judicial review findings were made, as the previous decisions on this case were quashed by consent. But even if those comments formed part of substantive findings by the court, a crucial missing word here in Mr O's quote was "*arguably"* unlawful, and only then in the absence of specific evidence to support the previous ombudsman's finding. For the reasons I'll set out later, I consider the situation of supporting evidence to be quite different.

Mr O has also commented that it was my conclusion that the high risk nature of the investment was implied through the disclosure of the attendant risks. I do think that the risks set out by S4 would, to an intelligent, capable individual such as Mr O, have suggested an investment which presented a higher risk than might otherwise be associated with balanced risk investments. For example, the possibility of total loss of the investment is not something which might be expected to be associated with a more mainstream balanced risk investment, where fluctuations as a result of market performance might otherwise be expected – along with the safety net of Financial Services Compensation Scheme (FSCS) protection if the institution providing the investment failed.

So I don't think that finding is unfair or unreasonable. But it must also be read in the context of my other findings on this matter, which were - broadly – that Mr O was nevertheless entitled to believe that higher risk investments would be balanced out to produce an overall balanced but bespoke, risk portfolio.

As to Mr O's preliminary comments relating to S4's adherence, or otherwise, to regulatory principles and obligations, I'll address these under the dedicated subheading below.

Lack of consideration of the overall cumulative impact of high risk investments

I don't consider that Mr O's criticism of my approach is fair – I have quite explicitly considered Mr O's individual investment against the backdrop of his overall portfolio valuation, which has by its very nature included a consideration of the cumulative impact of the various investments. I may have referred predominantly to percentages, but this is in my view a perfectly acceptable method of assessing an impact that this type of proportion of particular investments would have on a portfolio.

It's Mr O's view that all high risk investments recommended, including those recommended by the predecessor advising firm, should be included in the portfolio valuation, which has, certainly for complaints about later investments, resulted in an impossible situation portrayed by Mr O of the "investments" held exceeding 100% of the portfolio valuation. But many of the previously recommended investments which Mr O wanted to be included no longer held a value by that point, having fulfilled the purpose of, for example, producing significant tax rebates.

And whilst this makes no difference to my own ability to assess the portfolio and the proportions of high risk investment contained therein, I've also noted the way in which Mr O has taken into account the cumulative effect of high risk investments in the portfolio, particularly in reducing the portfolio value by the amount of exposure to potential (as yet unrealised) future tax liabilities, whilst simultaneously increasing the value of the overall "investment", or exposure, in those high risk schemes, even though they no longer held a value for the purposes of the reports.

This had the inevitable effect of increasing the percentage of high risk investments in Mr O's versions of the valuations, resulting in the type of scenario referred to above, where a category of investments is said to represent more than 100% of the valuation. Even if I were to agree that the exposure to

future tax liabilities should be included, which I'm afraid I don't, for reasons I explain below, that exposure shouldn't be double counted for the purpose of increasing "exposure", but then also reducing the size of the portfolio.

Mr O has also said that my approach suggested that at least £1.5m of higher risk assets would be cumulatively suitable for a balanced risk portfolio. This was, of course, not the case. The percentages I inferred from the valuation reports were very different to those recently provided by Mr O, and it was those lower proportions which I deemed to be suitable for a balanced risk portfolio. And those percentages of high risk investments are discussed in more detail in the later section relating to the asset splits.

I would further provide the same answer to Mr O's assertion that the lower risk investments were overstated and that there was a failure on S4's part to properly balance the portfolio. I relied upon the detail contained within the valuation reports, which I discuss in more detail later.

I do think that Mr O has a valid point relating to S4's own description of the individual investment belying the reality of the situation, and that this might mean that it would have been incapable of assessing the overall exposure to risk in the portfolio. But I don't need to rely on S4's view of either individual or overall risk when assessing the actual risk to which the portfolio was exposed – and whether this was suitable for Mr O. The description of the assets held, and a determination on the percentages, and cumulative exposure, of/to those assets, is sufficient for me to be able to determine whether it reasonably constituted a balanced risk portfolio which was suitable for Mr O.

And finally, in this section, I firmly reject Mr O's criticism that I've looked at this investment selectively – I've considered the nature of the individual investment and then assessed whether this, in light of both its own value and taking into account the proportion of other higher risk assets held, was suitable for an overall balanced risk portfolio for him.

Incomplete and inaccurate information provided by S4

Mr O has said that S4 relied upon poor information produced by its information system. I accept that this may have been true in some minor respects, but I should also say that, just because Mr O disagrees with the way in which some of the information has been presented, this doesn't mean it was wrong. And as I set out at the end of this decision, I'm afraid I don't agree with much of Mr O's own analysis of the valuations produced by S4.

As stated previously, Mr O's position is that the film partnership tax liabilities hadn't been deducted from the portfolio, but should have been. Notwithstanding my comments above about the double counting of investment "exposure" and "liabilities" to increase the exposure on the one hand and reduce the portfolio value on the other, the return on the reinvested tax rebates (with further tax relief provided by the VCTs for example), was intended to offset any future liability to income tax produced by the film partnership. It was further predicted that Mr O would have retired at around 50, and so his marginal rate of income tax may well have reduced when that tax became due. As tax mitigation, or deferral, schemes, the expected return on the rebates needed to achieve a "hurdle" rate, and if it did so, Mr O would have remained in profit.

Furthermore, any future liability to tax would have the inevitable effect of either naturally reducing the value of the portfolio when it became due if other investments needed to be encashed, or being paid for by surplus cash held outside of the portfolio. I therefore think it wasn't unreasonable to exclude potential future liabilities, before they actually became due, in the valuations.

But importantly this doesn't mean I've assessed the high risk investments as being any less risky. The probability of the tax liability in the film partnerships, not to mention the possibility of future claw back of tax relief by HMRC, was very real – and formed part of the risks highlighted in the description of the product.

As regards the reporting of the "paid to date" figures for the VCTs, this is really no different from a grossed up pension fund's performance being compared against the value of premiums actually paid by the policyholder. So I don't think the way this was presented was necessarily unreasonable. And I don't in any case think this has had an impact on the overall valuation of the portfolio – the grossed up value is the actual value for the purposes of the portfolio valuation.

Mr O has also said that certain of the higher risk investments weren't included in the schedules I relied upon. That appears to be the case for three investments, two of which were established just days before that particular valuation was produced – but I have in any case added them to my further analysis of the portfolio where appropriate. A further property partnership wasn't included on any of the investments – but similarly, I have added that into my further assessment for when that investment's value should have become a part of the portfolio.

Other tax based investments didn't feature in the valuations, but where they weren't, those schemes had no residual value, having produced the necessary losses to achieve the payment of tax rebates. And the reason I have included an investment such as Invicta is only where it is the subject of the complaint, and would – or should - have been counted as having a value in the portfolio at that point.

It would seem difficult to me to discuss the impact of that additional investment without bestowing it with a value as at the point the funds were invested. But even if I didn't include the cost or value of the investment, this would simply have the effect of reducing the amount of the high risk investments which I've otherwise concluded were contained in the portfolio.

As to the date of the input of investments being used instead of the date that they were established, S4 has said that there may have been instances where the start date for some investments was recorded as that of the contract note rather than when the investment was actually made. But I don't think this has had a material effect on either S4's ability to manage Mr O's portfolio or my own to assess the suitability of the investments, including this one, when they were made.

S4 has also said that, in respect of the PEP and ISA valuations between June 2009 and September 2010, it was reliant upon Mr O to provide this information. Up until June 2009, Mr O was providing a full breakdown of the holdings he was himself managing, but S4 has said that after this Mr O only provided "headline valuation information". By July 2009, Mr O had once again provided the relevant information and the valuations were updated. S4 has provided copies of the interim valuations between June 2009 and September 2010, in which the high value ISAs were attributed a value, but the breakdown of individual shares was absent. Instead, it described the holding as "Value Only Equities".

I appreciate that Mr O may disagree with S4's explanation, but I don't in any case think that it would make a meaningful difference to the outcome here. The breakdown of individual shares held in the ISAs may have been missing for a time, but their overall values, which is the important aspect in terms of attributing a value to a particular asset class, did change during that period.

Mr O also said that he had himself raised queries and discrepancies over some of the detail contained in the reports in an email dated 14 June 2011. These errors meant that Mr O had been unable to reconcile the analysis I had performed. But as I set out at the end of this decision, I'm satisfied that I've been able to properly assess the portfolio valuations – and determine whether it enabled S4 to create the balanced risk portfolio he was justified in expecting.

Regarding the "cash calls" on certain property investments being categorised as fixed income, I address those matters in the complaints where this is a relevant consideration in those valuations.

Inaccurate and incomplete analysis performed by the Ombudsman

As I've said previously, I'll address the further specific points made by Mr O regarding the asset splits in his portfolio when this investment was made at the end of this decision. There are, however, two other points made by Mr O under this heading which I should address here.

Mr O has objected to my comment relating to his aggressive/balanced risk rating recorded in September 2010 being indicative of his risk attitude one month later. I've thought about Mr O's point that the report said that he had maintained a balanced risk profile throughout the last review period. But that review period ended in September 2010 and this further investment occurred in October 2010, after the point at which the aggressive/balanced risk rating had been attributed to him.

I don't think this makes a material difference, however, as I in any case assessed in my provisional decision whether the asset split in September 2010 was consistent with a balanced portfolio – and concluded that it was.

Secondly, Mr O has contended that the Invicta investment was designed and recommended as exactly that - not a tax mitigation scheme. He said that S4 had introduced tax planning to optimise portfolio performance, as indicated in the commentary on its website.

But I'm afraid that I find it highly improbable that Mr O wasn't aware that this investment was designed as means of obtaining tax rebates. And indeed when the investment produced a loss on the initial stake of £67,500, yet generated tax rebates over the following years amounting to £172,644, I haven't seen any evidence that Mr O queried the loss or reduction in value of his initial investment. I'm therefore quite comfortable with the position that Mr O was aware of – and understood - the tax mitigation (or deferral) strategy envisaged by this scheme.

Market definition of a "balanced" risk portfolio

Mr O has contended that, contrary to my comment that there were no hard and fast rules in the creation of a balanced portfolio, the market definition is quite specific – it is a mix of equities and bonds. I'm afraid I can't agree with Mr O on this point. A balanced portfolio can take many guises, and most certainly would not be restricted to bonds and equities. To suggest this excludes the inclusion of property, cash or money market instruments, and several other types of financial instrument.

Furthermore, what might be an array of entirely "balanced" risk investments for one balanced risk investor in the creation of a balanced portfolio might take the form of a range of high and low risk investments for another. And so I stand by my previous comment, in that there are no set rules for the creation of a balanced risk portfolio.

Mr O has, with the assistance of information from Brewin Dolphin, said that the investment complained of fell within the top two risk ratings, eight or nine on a scale of one to ten, and that Brewin Dolphin would not in any case incorporate the vast majority of the investments recommended by S4 in a balanced risk portfolio.

It's unclear to me whether this is information which that firm has provided to Mr O, or has been inferred by Mr O from his own research. But I don't think that really matters. I would simply reiterate here what I've said above. Different portfolios will have a different asset split – and on the basis of an understanding of the risk involved, high risk investments might reasonably be included. The evidence here is that a bespoke portfolio was being created for Mr O, with his agreement on some target asset allocations. Therefore, what I must determine is whether the ultimate portfolio arrived at could be fairly described as being "balanced", and appropriately so for Mr O.

Weighting of high risk investments and consideration of "latitude"

It's Mr O's view that there was no scope for latitude in the creation of a balanced risk portfolio. He rejected the notion that he had accepted specific risks other than those which had been presented to him as being appropriate for a balanced risk portfolio.

I'll set out my further view on Mr O's likely awareness that not all of his investments carried a balanced risk rating in a later section. But it was factors such as those very risks, of which Mr O was aware by reason of them being included in the suitability letter, which in my view *did* provide greater latitude in creating a balanced risk portfolio. For example, Mr O was accepting of the prospect, no matter how remote, of losing his entire investment, and also accepted the other specified risks.

As I've said above, a balanced risk portfolio for one person can be quite different to that for another. And my view on this is that Mr O was the type of individual who was prepared to accept the inclusion of higher risk investments if there was balance in the form of lower risk ones. And he has himself agreed with this proposition.

Mr O was also an investor with a significant investment portfolio and, by my understanding, prior to his early retirement, a sizeable annual income. This would ordinarily mean that Mr O had a higher capacity for loss, as he had the means of replacing lost capital through earnings. But I also think this reasonably feeds into his tolerance for high risk investments, especially those which might have deferred a higher rate tax on his income to a point when his income was significantly lower.

Moreover, Mr O was capable of appreciating and understanding the risks involved in the recommended investment.

It's also notable that, in his response, Mr O has referred to six different versions of a Brewin Dolphin "balanced" portfolio, thereby perhaps unintentionally lending credence to the notion that there are simply no set rules which govern the creation of a balanced portfolio. The different levels and percentages of performance over 15 years for those different balanced portfolios must of course suggest differing types and percentages of higher and lower risk assets.

My view, and associated criticism of S4's approach as set out in the provisional decision, is that a description of an individual investment being suited to a balanced risk profile might reasonably be construed as it, in and of itself, representing a moderated level of risk. And this wasn't the case here – the investment in my view represented a higher than "balanced", or moderated risk. But importantly, a "balanced portfolio", whilst moderated by way of its profile of a range of differently risk rated investments, doesn't necessarily equate to one which bears an overall "medium" risk, for example. Again, the Brewin Dolphin range of balanced portfolios bears this out, ranging in its offering from a very low risk balanced portfolio to one described as high investment risk.

And so my view, which is wholly consistent with this, remains that a balanced risk portfolio for Mr O might reasonably contain a greater percentage of high risk investments than might be the case, say, for an investor who had none of the characteristics attributed to Mr O above.

I've also noted comments such as the following in an email sent by Mr O to S4 on 4 July 2010:

"Property - if you take MP 40 the valuation is flattered by not including the funding hedge. Sell the property now and the valuation is something like 290. Let's get something that shows value post swap termination and some details of swap maturity. If they have hedged the funding profile these will be deeply underwater for some time."

This strikes me as being the commentary of someone who is, if not a specialist, fairly well versed in investments generally – and therefore likely to understand the nature of the risks as described for the investments complained of.

I've also given further consideration to what Mr O would have understood S4 to mean by a "balanced risk" portfolio it was creating for him. Given his general understanding of investments, and his comments about his own management of aspects of the portfolio, I think it's reasonable to assume that Mr O knew what a balanced risk portfolio might look like.

As contained in the financial report of March 2004 prepared by S4's predecessor, Mr O was told the following:

"At present, your capital fund (including cash) comprises 53% equities, 47% non-equities and 0% structured products & hedge funds. This compares to our asset allocation for a balanced investor of 45% equities, 35% non-equities & structured products and 20% hedge funds. The non-equity element of your portfolio consists largely of cash and you have no exposure to commercial property or hedge funds.

We recommend that a portion of most portfolios be invested in absolute return hedge funds as they have both low correlation with equity markets and low overall volatility, with the main objective of providing consistent positive returns through both "bull" and "bear" markets. We also recommend commercial property as an essential part of a balanced portfolio since performance is relatively uncorrelated with equities. You may also wish to consider structured products as a replacement for bonds at this stage of the fixed interest market."

This therefore compared Mr O's existing version of a balanced portfolio (and one which he has reconfirmed by saying that it should be a mix of equities and bonds) with that firm's preferred asset split. This was, in a slightly varied form, carried over into Mr O's relationship with S4.

And as illustrated by the six different Brewin Dolphin balanced portfolios mentioned by Mr O, they can feature varying levels of high and low risk investments, tailored to an individual's risk profile – which itself would be guided by factors such as risk understanding and awareness, tolerance to risk, and capacity for loss.

In its annual reports, S4 consistently described a "balanced" risk category as follows, or in very similar formats:

"A Balanced Investor is looking for a balance of risk and reward, and whilst seeking higher returns than might be obtained from a low risk investment, recognises that this brings with it a higher level of risk and that the value of their investment may fluctuate in the short term. They would feel uncomfortable if the overall value of their investments were to fall significantly over a short period and would be upset to see their capital significantly eroded."

This made no mention of specific assets which might be held, or their weightings in the overall portfolio. Indeed, although Mr O has in his complaint said that he would only have been willing to tolerate a small percentage of high risk investments if this was balanced out by very low risk investments, at no point have I seen this requirement appearing in the suitability letters or the annual reports. Rather, specific target allocations to achieve a balanced profile for Mr O were agreed. I therefore need to determine whether the portfolio adhered to those target allocations, and if not, to what extent this might have compromised its balanced nature. And I discuss that in more detail in the later section relating to the asset split.

Mr O has also taken out of context my comment relating to him being unable to form a different view from S4 when it had committed to its balanced risk description. This was in reference to the overall portfolio, rather than the individual investment, which I said Mr O would reasonably have been entitled to conclude would bear a balanced risk. And I stand by that finding.

Mr O has said that the only evidence I had provided (I'll comment later on my ability to actually "provide" evidence rather than rely upon it) to substantiate my comments on there being greater latitude here in the creation of a balanced risk portfolio was the letter he had sent to the provider of the property partnerships – in which he had said that the existence of the associated loans wasn't an issue or concern for him. Mr O said that these were S4's words rather than his own, in an attempt to deflect responsibility for the losses incurred. It was also, Mr O said, made in the context of him seeking assurance that there would be no further losses as a result of the loans.

The comment in that letter isn't in any case the only evidence upon which I've relied on in concluding that Mr O was an investor for whom some latitude could be exercised in adding high risk investments to an overall balanced portfolio – as I've said above, Mr O has at other points indicated acceptance of high risk investments to be balanced out by lower risk ones, and other aspects of his financial circumstances indicated that he could accommodate them. There is also the matter of the known high risk investment in August 2010 – which I discuss further, along with the wider implications for Mr O's acceptance of risk, in a later section.

But I also find the prospect of Mr O writing something in a complaint, on the instruction of a third party, which didn't reflect his actual view to be remote. And I have difficulty in understanding why, if he was seeking assurance about there being further losses on the loans, he would concede that the existence of the loans wasn't an issue for him. I'm afraid that makes little sense to me – Mr O simply had to acknowledge the existence of the loans to seek reassurance that no further losses would be incurred on them. An admission of knowledge and acceptance of the loans, with there being no issues or concerns about them, wouldn't in my view have served a complaint about their effect on the investment particularly well.

I note that Mr O has also said, in the context of the property partnerships, that although I had concluded that awareness of further undisclosed risks wouldn't have altered his decision, he had said in his letter of complaint that this wasn't the case – and that he wouldn't have invested.

But whilst I acknowledge Mr O's position here, I need to also take into account that this was commentary made whilst bringing his complaint. I must place greater weight on what was said and

done, and what was more likely than not to have been the case, when the advice was given. In this instance, I remain of the view that awareness of those additional risks wouldn't have changed Mr O's decision to invest – for the reasons already given in my provisional decisions for those particular investments, and those which I set out further below.

Incorrect inclusion of pension fund monies with the "other" investments

Mr O has said that, in accordance with two other financial advisers he had spoken to, it was correct practice to separate pension funds from investment funds. I think this point is in any case arguable - but as I've previously noted, Mr O's primary aim for his investment portfolio was the prospect of retiring early.

And so I think the inclusion of the pension funds in the overall portfolio is reasonable – and even if Mr O retired before he was able to start drawing on those funds, their later availability would nevertheless have likely factored into the decision making around this.

I've also noted his comments on the risk to which those pension funds were exposed, but I'll address the extent to which they may have been imperilled by this investment - or the overall portfolio - later in this decision.

Disregard of the performance aspects of the portfolio

Mr O's point about the performance of the portfolio is valid, but only as a rough guide to what might be expected of a balanced risk portfolio. And this would in any case be revealed in the valuation of the portfolio from one year to the next.

I appreciate that Mr O's portfolio may have fluctuated or reduced in value after September 2010, but I think it's worth noting here that, between the first valuation I've assessed in November 2005 and that of September 2010, Mr O's overall portfolio value increased from approximately £1.3m to £2.05m.

Misrepresentation of risks by S4

Mr O's view here is that I've said that, although S4 misrepresented the risk level of the investment, there should be no repercussions. But what I've actually concluded is that Mr O was entitled to believe that S4 was creating a balanced risk portfolio for him. And if the overall level of risk to which he was ultimately exposed was incompatible with a balanced risk portfolio, then I would agree that there should be repercussions – in that I would uphold the complaint.

Mr O has said that my conclusions were at odds with those of the ombudsman who had decided cases against S4's predecessor firm, in that if the firm wanted to include high risk investments in a balanced portfolio, it should have made this clear to Mr O. Mr O's position, which is broadly aligned with this, was that, with one exception – the original Invicta investment - no investment had been recommended to him as higher risk. They had all been described as balanced risk and that's what he understood them to be.

But if I accept that S4 misrepresented the risk of the individual investment, I also have to take into account whether it would actually have made a difference if S4 had explicitly said that the investment carried a high risk, but was nevertheless compatible with the balanced risk portfolio. I would note here that, although I acknowledge that Mr O maintains he considered all of his investments to bear a balanced risk rating, of the seven investments which are the subject of these complaints, there was only one instance – in the original recommendation to invest in Invicta in 2005 - where the investment itself was represented as suitable for a balanced risk profile, *without* the accompanying statement that it was suitable as part of the portfolio being built for him.

In thinking about whether an explicit high risk categorisation in the suitability letter would have made a difference here, I've given careful consideration to what Mr O has said about the one investment which was described as exactly that and recommended to him in August 2010. This, I think, is a reliable indicator of the attitude which Mr O might have adopted for other investments. And he's said that his attitude to investment risk was the same at this point as it had been since the start of his relationship with S4.

Mr O has said that this recommendation in August 2010 caused him to think carefully about the investment and the overall portfolio. And to quote from his letter of 12 June 2017 in response to the adjudicator's view, he said the following:

"If S4 were providing a recommendation to me of anything other than Balanced I would have expected them to make it clear on the Suitability Letter. There was only one occasion where they deemed it necessary/appropriate to do. This was in August 2010. It was very clear on this occasion and it made me consider the investment in a very different light. ***I only entered into the investment on the basis that my entire portfolio was deemed appropriate for a Balanced Risk Profile".*** (my emphasis)

By this, Mr O cannot have meant that he considered all of the investments to be balanced risk – it had just been made clear to him that at least one would be high risk in nature. The logical interpretation here is that Mr O knew that there might be one or more high risk investments in his portfolio, but he was willing to accept this if the portfolio as a whole was balanced risk. And not just at that point – to reiterate, Mr O has emphatically said that his attitude to risk was still balanced, as he has also said it was throughout the relationship with S4.

The risks of that particular investment were significant, as set out in the suitability report dated 5 August 2010. It was in fact described as a highly speculative investment, with very much a binary outcome – either significant gains, or a total loss, and within a relatively short period of time given the nature of the investment - albeit S4 said that the latter could be used to recover a proportion of the investment sum under "cessation of trade rules for close companies" if Mr O had paid sufficient tax in the previous and current tax years. There was also reference in the suitability report to an "in depth" discussion about the risks, and Mr O being comfortable with these.

I appreciate that it might be Mr O's position that a *series* of investments described by S4 as being high risk, rather than one in isolation, would have given him greater pause for thought and caused him to challenge the nature of the portfolio being created by S4. But these investments didn't occur at the same time – they were spread over a period of six years. And with the repeated assurance that they nevertheless complimented a balanced risk portfolio, I think Mr O would have accepted this, as he did with the explicitly high risk Enigma investment in August 2010.

Furthermore, by July 2010, Mr O would have been unambiguously aware that a particular high risk associated with two property schemes had materialised and necessitated a further injection of funds.

And so I've also thought carefully about what the investment in August 2010, which Mr O has himself highlighted was described as being high risk, might mean in terms of his willingness to accept high risk investments generally in a balanced risk portfolio, and an acceptance that the proportion of those higher risk assets might place him at the higher risk end of a range of potential balanced portfolios.

As background here, Mr O has said that, by the time of the property partnership (called MPPP58) cash call in July 2010, he had invested approximately £1.8m in high risk investments, of which £473,000 was invested in property. And Mr O has said that this was mitigated by £23,433 of fixed income investments. This has contributed to Mr O's conclusion that the portfolio wasn't appropriate for a balanced risk investor. I disagree with the valuation of the high risk investments, for reasons I've already set out and which I'll address further later on. But this was nevertheless Mr O's view of matters.

But by July 2010, there had also been another "cash call" on a different property partnership (called MPPP62) in September 2009, in addition to the loan to value covenant breach which resulted in the cash call for MPPP58.

There are a couple of important points to consider here. The first is that, by July 2010 at the latest, as I've said above, Mr O can have been under no illusions as to the risks to his capital posed by the property partnership investments. Even if, as is argued by Mr O, he was unaware that they carried a higher than balanced risk rating when originally recommended to him, there was the very real prospect (rather than future possibility) of a total loss of capital without the injection of further funds –

along with the possibility that this would need to be repeated in the future. The previously undisclosed risk of break costs from a swap contract which might arise as a result of a loan to value covenant breach, and ensuing forced sale, knowledge of which Mr O has said would unequivocally have changed his view on this investment – in his own words, he "*would not have touched these investments*" - had been realised.

And according to Mr O, a significant percentage of his portfolio had by this time been invested in similar types of property schemes (six in MPPP schemes alone).

Yet Mr O was still prepared to invest approximately £25,000, with an additional geared loan of around £75,000, in a further, unambiguously high risk, product recommended to him by S4 one month later.

My view is that it might reasonably be expected that, if Mr O considered either that all of his investments carried a balanced risk rating, or that a very small percentage of his portfolio held in high risk investments was balanced out by other very low risk investments, given the risks he must by then have appreciated were posed by the MPPP investments alone, he would at the very least by that point have challenged the proposed addition of a further £25,000 high risk investment – along with the description of the previous MPPP investments individually as being suited to a balanced risk investor. But I've seen no evidence that this happened.

In fact, email correspondence in June 2010 between Mr O and S4 relating to several of his existing investments could reasonably be described as Mr O expressing frustration at the performance of his investments, but no commentary as to whether the risks posed by them were inappropriate for him.

Mr O's recorded risk rating had, by September 2010, increased from "balanced" to "balanced aggressive", which might reasonably imply a willingness to increase further the amount of high risk investments held. But Mr O has disputed this – he has in fact taken exception to the suggestion that he has ever been anything other than a balanced risk investor, including at the point when he made the further high risk investment in August 2010.

I think the August 2010 investment tells me three things: firstly that, as I said in the provisional decision, Mr O cannot have believed all of his investments to have carried a balanced risk rating; secondly, that he was prepared for there to be higher risk investments (not restricted to that recommended in August 2010) in his portfolio; and thirdly, given the proportion of MPPP investments by the time of the further high risk investment in August 2010, that he was prepared for high risk investments to represent a significant percentage of a balanced portfolio – which in my view further endorses the conclusion that some latitude could be applied in the creation of that portfolio for Mr O.

And I must also question as to why Mr O would have reacted any differently to being told at other times that the proposed investment was high risk, but nevertheless formed part of the overall balanced risk portfolio. If he was prepared to accept the reassurance that it did, as was the case in August 2010, it seems likely to me that he would still have decided to invest on other occasions – including this one - as well.

Mr O has also challenged my comment about his acceptance of property investments to balance out more volatile aspects of his portfolio, saying that these weren't his own comments, but rather taken from the suitability letters.

But, again, there are a few issues here. The first is that I'd query as to why, if the commentary appeared in suitability letters but wasn't true, Mr O didn't challenge this at the time. And when he was repeating those comments in the letter of complaint, I also note that Mr O didn't say that this notion *wasn't* acceptable to him and that all investments must be balanced in nature.

But perhaps most compelling of all in relation to my view of Mr O's acceptance of high risk investments in his portfolio is the presence of instances where Mr O has indicated that he would be prepared to accept this – such as the example above from August 2010.

I think it could reasonably be argued that the above commentary lends itself well to the conclusion that Mr O must have been aware, at the very latest by July 2010, that his balanced portfolio contained many high risk investments – but made no complaint on that basis, and was in fact prepared to invest in further high risk schemes such as that in August 2010.

I nevertheless think it's still plausible that Mr O believed that S4 was creating a balanced portfolio for him, albeit tailored according to targeted percentages of assets. And I think that S4, having committed to creating this, was dutybound to do so.

What I conclude from the above is, as I've set out elsewhere, that Mr O was an individual who was prepared to accept some high risk investments in his portfolio, and would most likely have been aware, by July 2010 at the latest, that some of those which had been described by S4 as being balanced risk, such as the MPPPs, in fact carried considerably higher risks. And he accepted this.

So, as with the provisional decision, I maintain that, in order to determine whether this investment was suitable for Mr O, I need to consider whether the overall portfolio, including this investment, was suitable for him – not whether each investment was either balanced risk in nature, or suitable in isolation.

The ombudsman does not comply with the Judicial Review

Mr O has rejected my finding that, appreciating the risks involved in the investment, he would have been aware that it carried a higher than balanced risk rating. And he has quoted from the statement made by the judge when giving permission to seek Judicial Review (see my previous comments on this – this was not a Judicial Review finding) that said, in the absence of specific evidence for this, the finding was "unarguably unlawful".

I think Mr O meant to say here that it was "arguably unlawful". But I don't think this matters, as there is in any case specific evidence I have relied upon here in concluding that Mr O would have appreciated that the investment bore a higher than balanced risk rating. Much of that reasoning is contained within my provisional decision, and centres around the detail provided to Mr O of the risks themselves and Mr O's capacity to understand the nature and ramifications of those risks involved.

For example, the Invicta investment risks, as set out in my provisional decision, were as follows:

- *The recommendation to invest in the film partnership was based upon its interpretation of current tax legislation, which may be subject to change by HMRC.*
- *The assumptions relating to tax relief and taxable profit assumed that Mr O would ordinarily be resident in the UK for tax purposes. If his residential status changed, Mr O may need to compensate the other partners for any loss which might result from him no longer meeting the required tax criteria.*
- *If the expected income for 2005/06 wasn't forthcoming, it might be appropriate to elect an alternative tax year for relief purposes, but if this wasn't within the next three years, the tax relief benefit may be lost.*
- *There was currently no market or mechanism for exit from the partnership prior to "1 day after the sixteenth year-end". This was restricted under the partnership agreement.*
- *Depending upon the individual partners' tax position, the actual amount of tax relief available couldn't be accurately determined and the envisaged full amount of approximately £173,000 might not be reclaimable.*

My view is that these features clearly set the investment apart from more mainstream type investments – and ones with which Mr O would have been familiar through what he has described as his own management of his share and equities portfolio, which formed the mainstay of his portfolio prior to the involvement of both S4 and the preceding advisory firm.

And perhaps the most notable risks were contained in the warnings about the view HMRC might take on the matter of tax rebates in the future, summarised in my provisional decision as follows:

"Regarding HM Revenue & Customs (HMRC) approval, S4 said that clients who had invested in film partnerships using Section 42 allowances (the relief which allowed the cost of producing UK films to generate a loss - which could then be offset against other income
over a three year period) had successfully secured their tax rebates.

It couldn't rule out the possibility that HMRC would decide to not approve the claim, but it cited several factors which it considered minimised that risk; guidance from HMRC's own notes, along with legal opinion; a five year track record of clients successfully claiming rebates; rarity of retrospective legislation by HMRC; and HMRC confirmation that a properly established Section 42 scheme wouldn't be affected by recent press releases or releases in the forthcoming pre-budget report.

The partnership was described as a limited liability partnership, with each partner being taxed on their share of the partnership profits, but liability not exceeding the value of the partner's initial cash stake. But S4 said that partners may be at risk if they didn't adhere to the partnership agreement or any loan secured under that agreement."

As the investment was designed to create a partnership "loss", as set out in the suitability letter, which could be offset against tax liabilities, the prospect of tax rebates was clearly the driving force behind the investment. But the possibility of those rebates being challenged by HMRC existed – and therefore the scheme could fail, possibly in its entirety.

As with the general features of the investment, I would suggest that this type of risk, with no FSCS investment protection in place, would individually be incompatible with a balanced risk rating.

And I think Mr O would have been aware of that. As I've said above, in terms of Mr O's capacity to understand the investment and the associated risks, Mr O has said that he also managed his own share and equity portfolio. I think it's therefore likely that he had sufficient financial awareness to understand the description of the investment – and that it was quite different from the features and risks associated with an investment which could in itself be described as balanced, or individually suiting a balanced risk profile.

But, importantly, for the reasons given in the preceding section, even if a different interpretation could be applied here, and S4 needed to have been specific about the higher risk rating borne by the investment for Mr O to appreciate this, I think it's likely that Mr O would nevertheless have proceeded – with the reassurance that it formed part of an overall balanced risk portfolio.

S4's lack of compliance with the principles of the Financial Conduct Authority

Mr O has said that S4 failed to adhere to its regulatory obligations on a number of counts. I'll address them in turn.

Firstly, Mr O has said that, as S4 failed to disclose a number of key risks associated with certain property partnerships, it failed to act with integrity. But I don't think that allegation can stand here. As I said in my provisional decision, my view is that S4 clearly set out the key risks of this investment.

Mr O then argued that, as S4 had categorised the investment as being suitable for a balanced risk profile, it had failed to display skill, care and diligence. I'm inclined to agree with Mr O here – and indeed have said so in the provisional decision. I don't think the investment could, in isolation, be said to carry a balanced attitude risk. But I would also refer to all other commentary I've made about why the risk of the investment shouldn't be considered in isolation.

I've thought about Mr O's view that, due to the inaccuracies of its information system, it couldn't have properly managed his exposure to investment risk. I think the omissions in the valuations brought to my attention by Mr O were quite minor, and at least two of the three were reasonable given the proximity of the investments to the date of the valuation. I don't therefore agree that S4 was unable to manage his exposure to investment risk on this basis.

Mr O has also said that conflicts of interest were created in a number of situations. But the situation to which I think Mr O is referring has in any case been deemed to be one where no advice was given by S4. And even if it were the case that a conflict of interest had arisen in other situations, I don't think it impacts on my assessment of this particular investment, where no such conflict appears to have been present.

Mr O concluded his opinion on these matters by saying that the most serious breaches had been in S4's lack of due regard to his information needs and communication of that information – he thought it had been misleading. He also said he'd been unable to rely on S4's judgement in giving suitable recommendations.

As I've previously said, I don't think S4's description of the investment as being suitable for a balanced profile, in isolation, was plausible. But this failure wouldn't mean that a complaint should automatically be upheld, if other conditions are present which serve to mitigate that failing.

And for the reasons given, this is my view here. The failure to accurately describe the risk rating of the investment was mitigated by: Mr O's likely appreciation that it represented a higher than balanced risk; and the likelihood that, even if it had been described as a high risk investment, Mr O would have in any case invested on the basis of the reassurance that it nevertheless formed part of an overall balanced risk portfolio – as demonstrated by the investment in August 2010.

An independent view

Mr O has sought a third party opinion from an IFA on the portfolio. Notably, that IFA has said that a balanced portfolio can consist of low, medium and high risk investments, so long as the higher risk ones were balanced out by those bearing low risk.

My comment here would be that this is entirely consistent with my own view, in that it was entirely possible for Mr O's portfolio to comprise of a range of differently risk rated investments, rather than there being a selection of, for example, only medium risk investments.

The further view expressed by the IFA has been that Mr O's portfolio was very high risk in nature and that there had been a failure to balance out the higher risk investments with lower risk ones. Tax rebates had been reinvested into further non-approved tax schemes, thereby exacerbating the risks.

But if Mr O received tax rebates in cash which were then reinvested, this would be reflected in the overall asset split, and risk rating, of the portfolio. And furthermore, the risks of these schemes were known to Mr O, and likely understood. Additionally, insofar as it's possible to have a "typical" balanced risk portfolio - and I'd refer to my comments above relating to the different guises this might take - I don't think that this would fit the bill of a typical "medium" risk balanced portfolio, to which I suspect Mr O's IFA may be referring. For example, as previously noted, Mr O had agreed that 30% would be invested in property, including commercial property schemes, the risks of which had been (with notable exceptions which are covered in those complaints) clearly set out. The issue I must decide is whether the proportion of these types of investments adhered to the agreed asset allocations - and was suitable in an overall balanced portfolio structure for Mr O.

The asset split within the portfolio

Mr O has disagreed with my analysis of the asset split within the valuation. I've therefore reassessed the valuation and its constituent parts, with further input where necessary from S4. I'm conscious of the fact that Mr O may still disagree with the methodology of the valuation, for some of the reasons I've already mentioned above, but also on issues such as the inclusion of the pension assets and assets earmarked for his children. But I remain of the view that my conclusions in those matters are reasonable.

But there may also remain disagreement over the precise value of some of the investments cited below, and it's possible, despite my best efforts to attribute as accurate a figure as possible to them, as well as the resulting percentages, that there may yet be discrepancies which either party might be able to identify. But I'm nevertheless confident that these would not be so great, even if amounting to a few percent difference in the proportions of the relevant asset classes, as to undermine my overall conclusions.

I've firstly thought carefully about the inclusion of the bare trusts and unit trust savings plans put in place for the children. Mr O has said that these shouldn't have been included in the portfolio, but I'm afraid I'm inclined to disagree. Notwithstanding that the value of at least the unit trusts could be

realised if the need arose, I think the portfolio was designed to meet the overall family objectives, hence my comment in the provisional decision about this being part of a "life plan" for Mr O *and* his family. The primary goal for Mr O was early retirement, hence the inclusion also of the pension funds. But this could only realistically be achieved if he felt he had sufficient provision in place for his children, be that for funding further education or giving them a good financial start in adult life.

So I don't think that the inclusion of both of these sets of investments in the portfolio valuation is unreasonable. But even if a different interpretation could reasonably be applied here, their exclusion wouldn't make a significant difference to the portfolio valuation.

With regard to the valuation of the Enigma investment, Mr O has said that this was shown in the valuation as representing £99,484, when only £24,871 had been invested. I think Mr O is right here – and for consistency with other valuations where the gearing through loans hasn't been included in the valuation, my view is that lower amounts should be used. This reduces the overall valuation as at September 2010 to £2.05m, but the further Invicta investment of £12,170 still represented only 0.6% of Mr O's overall portfolio, as set out in the provisional decision.

Mr O has said that the percentage of tax based non-property schemes was by this time 60% (£912,039), property schemes (tax and non-tax based) was 31.1% (£473,070), and other high risk investments accounted for 28.9% (£440,000) of the portfolio.

This isn't right though. And the error is quite clear to see when the overall percentage of these investments, according to Mr O, amount to 120% of the portfolio valuation. Components of a portfolio valuation cannot cumulatively exceed 100%. As I've commented on earlier in this decision, Mr O has, in his calculation, included all of the tax based non-property schemes which by that time had produced tax rebates to varying degrees and therefore no longer retained a value for the purposes of the valuation report.

Excluding the VCTs, and other than this further Invicta investment, there were no tax based non-property investments within the valuation by this point. The Enigma investment was included in the "certificated holdings" section. Reducing the value of the Enigma investment to £24,871 means that, as at the September 2010 valuation, tax based non-property investments amounted to the value of the VCTs - £108,000 – plus this further Invicta investment, so a total of £120,170. This therefore represented 6% of the portfolio value.

Mr O has said that there were further non-tax based investments within the portfolio by this stage which should also be categorised as high risk. But again, on some of these Mr O has used the initial investment rather than the actual values. For example, Matrix ABL had a value of £29,356, rather than the investment amount quoted by Mr O of £50,000. The Arch Cru investment of £50,000 had been sold by September 2010, and so didn't form part of the valuation. The MP Waste to Energy investments retained their overall value of £100,000 (£30,000 of this invested in the pension). The Climate Finance investment had a value of £25,000 and the CoFunds Unit Trusts were valued at £129,275 rather than the initial investment amount of £215,000 quoted by Mr O.

By this time, the CoFunds unit trust no longer contained investment in the Legal & General Cash Fund or the Apollo Balanced Growth Fund as it did at outset – although a small amount remained in the Investec Cautious Managed Fund. So I think by this point the CoFunds unit trust could reasonably be said to represent a high risk investment.

And so the further non-tax based high risk investments represented a total of £258,631 within the portfolio, or 13%.

The amount in the valuation represented by high risk (so excluding property fund investment) property (tax and non-tax based) was £321,000, (including £106,000 in the pensions), or 16%. Total property exposure, including property funds, was £421,914, or 21% of the total portfolio. I should point out here that, in his response to my provisional decision, Mr O counted MP Waste to Energy twice, once in the Property category and then again in the "other high risk investments" category.

So the total amount represented by high risk investments was by this point approximately £700,000, or 34%.

For the reasons already given, I don't think it's appropriate to exclude the pension assets, but this would in any case only serve to slightly increase that percentage (and as set out above, £106,000 of the property investments were held within the pension).

Mr O has said that the amount of £353,000 recorded as cash in the valuation, within the mortgage offset account, should be deducted. But if this was cash held in an account to offset the interest payable on a mortgage, which was in any case more than adequately covered by the value of the property, my view is that this should properly be considered as a cash asset.

It's also Mr O's position that the children's cash account, amounting to £48,109, didn't exist. So I've put this to S4 and asked for its comments. It's said that it believes the children's cash account was first disclosed to it in 2007, but that as it was a "non-managed" asset it wasn't initially included in portfolio valuations. But it was later included in the valuations, at some point in 2009, at Mr O's request. S4 also has no record of Mr O saying that it was incorrect or inaccurate, until it was asked to remove it in November 2010.

It's difficult to know for certain whether the children's cash account existed, and, if so, whether the value attributed to it was accurate. But if it didn't, even for a brief time, it seems to me an oddly specific inclusion in a valuation for S4 to have simply manufactured, and the amount wasn't so significant, against the wider portfolio value, to artificially bolster the cash position, if indeed this was in any sense S4's intention at that time. So I haven't removed it from the overall portfolio, but even if I did, as it represented around 2% of the portfolio I don't think this would make a significant difference to the outcome.

But I also don't in any case consider that cash, in its simplest "deposit" form, would constitute a significant part of a balanced investment portfolio. And this also doesn't include any cash which Mr O might have held outside of the portfolio.

Mr O has said that just £23,433 was held in fixed income funds. In arriving at this figure, Mr O has removed Matrix ABL and the MPPP58 cash call investment from the amount of £68,551. This wasn't the total amount of fixed income in the portfolio, however – fixed income amounting to a further £91,852 was held in other areas, according to the valuation, in all likelihood holdings in bond funds.

But I accept that, even if they provided a fixed income, both Matrix ABL and the MPPP58 cash call could reasonably be described as high risk investments, so if I add those to the overall percentage of high risk holdings, this produces a figure of approximately £737,000, or 36%.

Mr O has said that, overall, 120% of the portfolio, or £1.825m, was held in high risk investments. For the reasons given above, I disagree with Mr O's assessment of the proportion of high risk funds held – the amount of the portfolio valuation represented by high risk investments was around £737,000, or 36% - but this does in any case somewhat disregard the remainder of Mr O's portfolio. With the accurate value of high risk investments, the remainder in the portfolio amounted to approximately £1.3m. And this was held in a number of more mainstream investments which might reasonably fit the bill of inclusion in a balanced risk portfolio.

The IFA from whom Mr O has sought a second opinion said that the high risk investments schemes excluded other high risk investments in the remainder of the portfolio. But I've considered the actual asset split (on the basis of the £2.13m valuation in September 2010), which, other than the amendments set out above, I've no reason to believe was incorrect. This was recorded as follows:

Absolute Return	£182,879	7.1%
Asia Pacific/Japan Equity	£26,374	1.0%
Cash	£44,951	1.7%
European Equity	£42,220	1.6%
Fixed Interest	£68,551	2.7%
Global Equity	£2,043	0.1%

Rest of World Equity	£11,184	0.4%
Property	£348,009	13.5%
Specialist Equity	£42,000	1.6%
UK Equity	£91,282	3.5%
US Equity	£39,942	1.5%
Asset Allocation Funds	£187,607	7.3%
Private Equity & Finance	£100,000	3.9%
Tax Based Property - EZTs	£27,003	1.0%
Tax Based Equity - VCT & EIS	£108,133	4.2%
Direct Equity Holdings	£387,651	15.0%
Non-Managed Cash & Bonds	£401,109	15.5%
Non-Managed Funds	£18,804	0.7%
(Main Residence)	(£450,000)	(17.4%)

Total value £2,129,743

In my provisional decision, I set out my understanding of the ratio between the main asset classes as being - for the whole portfolio - as follows:

Absolute Return	11%
Cash/Fixed Interest/Bonds	25%
Equities	33%
Property	20%
Private Equity/Finance/VCTs/Tax Schemes	11%

Amendments have needed to be made to the valuation, as set out above. But I also consider it useful to refer to the breakdown used by S4 in its valuation, which excludes tax based schemes. Notwithstanding the above amendments, I've no reason to doubt that the further breakdown of the non-tax based portfolio below, as set out in the September 2010 valuation, was broadly correct.

Absolute Return	£229,780	19.4%	Target 20%
Fixed Interest	£160,403	13.5%	Target 15%
Equity	£301,948	25.4%	Target 30%
Property	£394,911	33.3%	Target 25%
Private Equity & Finance	£100,000	8.4%	Target 10%

The issue of target percentages is somewhat complicated by the removal of tax based schemes from that section. This would imply that there was no specific target in mind for the amount which could be held in such schemes, and this is consistent with S4's view that it shouldn't be considered as a part of an investment portfolio. But my view is that, where they retain a value, they should be included. This is aligned with what I've said above relating to how these schemes should be represented for valuation purposes. But it remains the case that no targets were seemingly allocated to tax based schemes.

S4 was nevertheless tasked with creating a balanced risk portfolio for Mr O, and so I need to determine whether Mr O's overall exposure to high risk investments, and the balancing effect of lower risk investments, was compatible with this. I've revisited this matter on the basis of the above amendments. And I consider a reasonable methodology for determining this would be to assess any breaches in the non-tax based investments target, combined with my own view as to whether that breach, and the nature of that breach (for example, was it in mainstream funds which might not be categorised as high risk), in conjunction with the amount of other high risk tax based investments held, and all the other factors at play here which I've set out above, pushed the portfolio beyond the realms of what could reasonably be described as a balanced risk portfolio. And specifically, given what I've said above about the type of latitude which might reasonably be employed in the creation of a balanced risk portfolio, taking account of factors such as risk awareness and capacity for loss - a balanced risk portfolio for Mr O.

So I've thought carefully about this. In the targeted section above, the amount held in property was 33.3%. This comfortably exceeded the target of 25%. This was as a percentage of the portfolio

excluding tax based investments. Of the whole portfolio, property represented 21%, and excluding property funds, high risk property investment stood at 16%.

So I've also given further consideration as to whether this percentage of all types of property, breaching as it did the target set for that asset class, and combined with the amounts of high risk investments held in various tax and non-tax based schemes, including the Invicta restructure, resulted in a portfolio which presented too much risk for Mr O – and therefore rendered the recommendation to invest in the Invicta restructure unsuitable.

The Invicta cash call investment wasn't in property, and therefore didn't contribute to, or exacerbate, that breach of the target percentage. But it didn't need to be to increase Mr O's overall exposure to high risk investments. And the overall percentage of high risk investments against the whole portfolio, including tax and non-tax based schemes, was by this time 36%.

The percentage of equities, against the whole portfolio, was 15%. Therefore, as a proportion of the whole portfolio, Mr O held approximately 36% in high risk schemes, 15% in equities, and 49% in other investments, including those representing lower risk.

S4 had been tasked, by its own admission, with reducing volatility and risk in Mr O's portfolio. It viewed the existing assets held by Mr O when the relationship began, notably the significant proportion of equities in the portfolio, as being the higher risk and more volatile feature of his holding.

It sought to balance this out – and diversify the portfolio - by investing in commercial property and other types of assets. And I don't think the position that property investments are less volatile than equities is unreasonable. Property prices tend to be cyclical in nature, and tend to decline in line with general economic downturns, whereas equities tend to react to market conditions, and fluctuate more frequently, in a more immediate sense.

As indicated in comments made by S4 in previous financial reports, it had been seemingly left to Mr O to manage his exposure to equities, certainly those held in ISAs and unit trusts, and he was aware that, to create the balanced portfolio envisaged by S4, the amount of equities would need to reduce, to be balanced out by an increasing level of investment in other asset classes, such as commercial property. And this is what had happened since 2005. The proportion of equities held as a percentage of the whole portfolio had reduced from 57% in 2005 to 15% in 2010.

To the extent that the overall risk was appropriately managed, other investments provided balance to the high risk investments, with the proportion of equities having reduced over time. So although the overall percentage of high risk investments stood at 36% of the whole portfolio, due to a reduction in the amount of equities held, this was balanced out by a greater amount of other investments, including those which would be considered lower risk.

Summary

There was a balance of investments here. I appreciate that Mr O may still consider that this was skewed too heavily in favour of high risk investments, and I remain of the view that S4's description of the nature of the original Invicta restructure in isolation as being suited to a balanced risk profile was misleading – it should have identified it as being high risk, even if it then described it as being suitable within an overall balanced portfolio being created for Mr O. For the reasons given, my view is that a "high risk" description of the individual investment wouldn't have changed Mr O's decision to proceed. But in any case, my overall view on both the need to take account of the investment's place in Mr O's portfolio, along with the above proportions of higher risk investments within the overall portfolio, remains the same as that set out in my provisional decision.

On a fair and reasonable analysis of the facts, and in the context of all of my previous comments about Mr O's understanding of the product's features, his likely awareness that his investments bore a range of risks, his tolerance to high risk investments as a proportion of his overall portfolio, capacity for loss, and the latitude which might reasonably be applied to the creation of a balanced portfolio on the basis of all of these factors, I think that 36% invested in high risk schemes, and in the context of

other investments held, was an amount which might reasonably be considered suitable for a balanced portfolio for Mr O.

In closing, as I've alluded to above, I've noted with some dismay some of the language and terminology used by Mr O in response to my provisional decision. Mr O has, at various points said that I've manipulated the complaint, speculated, attempted to isolate investments, chosen to ignore, failed to consider, condoned and justified the business' actions and "provided" evidence to support my findings.

What concerns me about this is less the possibility that this might undermine what I consider to have been a fair, impartial and thorough assessment of the facts, but more that Mr O might himself have the impression that there has been some kind of bias towards the business here – and that he may consider that he has been unfairly treated.

As a reminder, we are a free and impartial service, with no agenda, bias or vested interest in making findings which favour either party to a complaint. It's perhaps inevitable that the "losing" party may feel dissatisfied with the outcome, and I appreciate that Mr O may well be frustrated with the length of time it's taken to decide these cases - for which I apologise, but with the caveat that they have undoubtedly been quite complex in nature and have required some in depth investigation and consideration.

But I would seek to reassure Mr O that none of the above allegations made about my findings apply here. And as a reminder, Mr O is entitled to reject my findings.

my final decision

For the reasons given, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 16 January 2021.

Philip Miller
Ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mr O has complained about advice he received from S4 Financial Ltd to invest further money in the Invicta Film Partnership No 22 (2004/5) in 2010. In particular, Mr O has said that, in recommending the investment, S4 failed to create the balanced risk portfolio that was agreed at the outset. And that this has led to substantial losses within his portfolio.

background

No suitability report was issued for the further investment. S4 has said that this was because this was a direct offer from Invicta to existing clients, and that it gave no advice to Mr O. But my understanding is that, in October 2010, Mr O invested a further £12,170 into the Invicta film partnership he'd first entered into in March 2005 - a sale and leaseback arrangement. The partnership would obtain the rights to films and then lease them back to the production company to produce the films, with the agreement that this would then provide income to the partnership.

The original investment in this scheme in 2005 was by way of the £67,500 capital contribution from Mr O, together with £382,500 loan funding. The loan would be repaid on behalf of the investors from the revenue received by the partnership, creating a partnership "loss" which could be offset against Mr O's tax liabilities.

S4 had said that, on the basis of the £450,000 gross investment, Mr O could be eligible to claim tax relief on around 95% of the investment over the first three years of the trading partnership. Total relief could be expected to be around £60,000 by July/August 2005, a further £57,000 by July/August 2006 and a final payment of £56,000 by July/August 2007.

As the partnership loan amounts were repaid, the partnership should generate taxable profits for the sum invested of around £17,000 in year four to approximately £50,000 in year 15. Income tax would be paid on that profit, expected to be in the region of £7,000 in year 5, rising to around £20,000 by year 16.

S4 had confirmed in 2005 that the nature of the investment suited Mr O's balanced risk profile.

S4 included a section entitled "Specific Risks attached to This Investment", which included the following:

- The recommendation to invest in the film partnership was based upon its interpretation of current tax legislation, which may be subject to change by HMRC.
- The assumptions relating to tax relief and taxable profit assumed that Mr O would ordinarily be resident in the UK for tax purposes. If his residential status changed, Mr O may need to compensate the other partners for any loss which might result from him no longer meeting the required tax criteria.
- If the expected income for 2005/06 wasn't forthcoming, it might be appropriate to elect an alternative tax year for relief purposes, but if this wasn't within the next three years, the tax relief benefit may be lost.
- There was currently no market or mechanism for exit from the partnership prior to *"1 day after the sixteenth year-end".* This was restricted under the partnership agreement.
- Depending upon the individual partners' tax position, the actual amount of tax relief available couldn't be accurately determined and the envisaged full amount of approximately £173,000 might not be reclaimable.

S4 said that the film risk was "minimal", on the basis that, although the tax relief would be dependent upon the films being certified by the Department of Culture, Media and Sport, if that wasn't forthcoming, the partnership would seek to ensure that Mr O was entitled to sell the film or request that the partners be released from their obligations. As no surplus was envisaged from the sale, Mr O shouldn't have any trading profits or losses, or a disposal of assets as a gain which he'd have to declare in a self-assessment tax return.

The loan risk was also described as "minimal". The funds required to meet the minimum rental obligations would be deposited with the financial institution providing the security for those minimum rentals. The lender would also request that additional or alternative security would be provided if the credit standing or the financial institution providing the security fell to unacceptable levels.

Regarding HM Revenue & Customs (HMRC) approval, S4 said that clients who had invested in film partnerships using Section 42 allowances (the relief which allowed the cost of producing UK films to generate a loss - which could then be offset against other income over a three year period) had successfully secured their tax rebates.

It couldn't rule out the possibility that HMRC would decide to not approve the claim, but it cited several factors which it considered minimised that risk; guidance from HMRC's own notes, along with legal opinion; a five year track record of clients successfully claiming rebates; rarity of retrospective legislation by HMRC; and HMRC confirmation that a properly established Section 42 scheme wouldn't be affected by recent press releases or releases in the forthcoming pre-budget report.

The partnership was described as a limited liability partnership, with each partner being taxed on their share of the partnership profits, but liability not exceeding the value of the partner's initial cash stake. But S4 said that partners may be at risk if they didn't adhere to the partnership agreement or any loan secured under that agreement.

According to the financial review which took place on 22 September 2010 - so approximately three weeks prior to the further Invicta investment, Mr O's circumstances were recorded as follows:

- He was 50, and taking a sabbatical after previously working for the investment arm of a major bank.
- He was married with two children, and owned a home worth approximately £1m, with a £324,000 offset mortgage.
- His and Mrs O's invested portfolio was valued at around £2.58m.
- He was keen to maintain a growth profile for the investment portfolio, but wanted to reduce the overall volatility of the underlying investments, preferring to target absolute returns over out-performance of the stock market.

Mr O's risk attitude at that time was described as being "balanced/aggressive". This was described as follows:

"A Balanced Aggressive investor is generally market aware and understands and is willing to accept a higher level of risk (including a small exposure to overseas markets) in return for the potential for higher returns in the longer term. They recognise that this may result in the value of their portfolio fluctuating, possibly significantly, in the short term."

The complaint

Mr O complained to S4 in September 2013. The following is a summary of Mr O's submissions to S4 and then to this service:

- His risk profile was that of a balanced risk investor. Every recommendation given by S4 clearly stated that it was suited to this. He would have tolerated high risk ventures for a very small percentage of his portfolio, but only if they were offset by lower risk investments.
- S4 had suggested that he'd known that certain investments, including this one, were speculative in nature, but this wasn't the case - and S4 always defined them as being suited to a balanced risk profile.
- Being categorised as a high net worth (HNW) investor only meant that he had investible assets of £250,000 or more - not that he had any understanding of the investments recommended by S4.
- He didn't have a high tolerance for investment loss - he had commitments to fund and was seeking early retirement.
- The total invested through S4, including this scheme, was in the region of £2m. Outstanding losses and liabilities amounted to approximately £1.3m. Over the same period of time, a balanced portfolio should have grown by about 50%.
- His pension funds had also been reduced by about a third.
- He'd been advised to invest in inappropriate high risk investments, and he had no idea where he stood financially. This was having a significant impact on him and his family.
- Most of the recommended investments outside of his pension funds, including this one, appeared to be based upon tax mitigation advice - but there were others relating to commercial property, enterprise trust zones, and venture capital trusts.
- The investments designed to mitigate tax had been portrayed as being straightforward, but were in fact opaque and misleading, resulting in his tax affairs being impossible to understand.
- He didn't need the cash from the tax rebates - it was at the adviser's initiation, and liabilities had been created with no preservation of capital or steady growth. Rather, he'd sustained significant losses.
- As a result of some of the tax mitigation schemes, he was receiving demands for payment of tax rebates from HMRC, for which he would need to encash ISAs to fund.

S4's response to the complaint

The below is a summary of S4's response to Mr O and its submissions to this service. It includes general commentary on the relationship between Mr O and S4, but also specifics relating to the Invicta investment:

- Mr O became a client of S4 Financial in September 2004 - he had been one of 20 founding shareholders in the company.
- Before this, Mr O had been a client of a specialist tax planning and portfolio management firm, during which time he'd become aware of tax planning strategies which could be employed to defer income tax he was paying. S4 understood that it was during this period that Mr O first became aware of tax planning initiatives such as Enterprise Zone Trusts and film partnerships.
- As a result, whilst a client of that firm, Mr O entered into two sale and leaseback film partnerships and a property partnership.
- Mr O was certified as a HNW individual by the previous firm - this meant he was exempt from the prohibition on unregulated promotions, and by signing the HNW certificate, he confirmed he was willing to accept unregulated investment promotions. Mr O signed several of these certificates over the years.
- Mr O was keen to ensure that his income was dealt with in a tax efficient manner and the investment planning was geared toward this.
- Mr O understood the nature of the schemes he participated in and he was keen to continue with them as a client of S4. And by the time he became a client, he'd already received tax rebates amounting to some £300,000.
- Mr O was aware of the structure of the tax "deferral" schemes. With regard to the film partnerships, he knew he would start to repay the tax in the future as the loans were repaid from the film producer. He was never personally liable for the loans created, but would need to pay tax on the income as it arose.
- S4 considered Mr O to be a financially astute and sophisticated individual. He was an active investor, often offering commentary on the information and updates which S4 provided.
- Mr O's financial position meant that he was in a position to make investments and absorb any losses from them - his tolerance to loss was high.
- S4 provided Mr O with clear and detailed information about the investments through suitability reports and information memoranda, which disclosed the associated risks.
- Mr (and Mrs) 0 intended to retire at age 55. The objective was to maximise tax efficiency through the use of ISAs and other tax efficient schemes.
- In advance of annual reviews, S4 asked Mr (and Mrs) 0 to complete annual review questionnaires which set out their personal and financial objectives - this enabled S4 to update the position. S4 was unable to find a record of Mr (or Mrs) 0 indicating a change of approach or in their capacity for loss.
- Mr (and Mrs) O's portfolio had increased in value over the period in which they'd been clients of S4 - this included tax refunds and credits which enabled the offsetting of income tax. The strategy had been very tax efficient, resulting in significant tax credits from HMRC. It was S4's view that the various schemes had largely met the objectives.
- Many of the investments were made to make a total loss, but they were successful in achieving the overall objective and the tax losses had been for Mr O's benefit. Mr O had needed to pay virtually no income tax over a period of ten years.
- In situations where a total loss was incurred, Mr O's reaction was to consider further investment in similar companies to ensure the losses were offset against his taxable income, rather than having any regard for the investment itself.
- Any subsequent investigations into the schemes by HMRC were unforeseeable at the outset and were beyond S4's control.
- Each of the investments individually and combined were in line with the target asset allocation agreed with Mr O.
- S4 employed a holistic financial planning strategy to meet Mr O's specific objectives - this entailed the growth of existing capital, regular investments into the portfolio and carrying out effective tax planning.
- The financial plan was to spread the investments across the main investment classes with a view to reducing overall volatility and risk. A balanced asset allocation was agreed, with a real return target of 4% over the term of the plan.
- The investment portfolio was designed to follow the balanced asset allocation plan, but Mr O was fully aware that the tax mitigation schemes were by no means balanced - they were aggressive tax mitigation vehicles. As such, they must be separated from the investment decisions.

Specifically in relation to the complaint about the Invicta Film Partnership No 22 (2004/5), S4 said the following:

- It recommended that Mr O invest in the scheme in March 2005 and it was clear that its purpose was the tax benefit it offered. The suitability letter said, *"the full cost of the films should be capable of being written off against the partners' current or past liabilities to UK income tax and/or capital gains tax".*

- It recommended that Mr O invest £67,000, topped up with a loan of £382,500 to make a total investment of £450,000. Mr O could expect to be eligible for tax relief on 95% of the investment over the first three years of the trading partnership.
- It said that, on the basis that tax relief would be claimed against income, but would otherwise be subject to 40% tax, total reliefs for 2005, 2006 and 2007 could amount to approximately £60,000, £57,000 and £56,000 respectively.
- Mr O was aware from the outset that the partnership needed to generate a loss to achieve the expected tax benefits.
- It was made clear that the recommendation was being made in line with current tax legislation which may be subject to change. Specifically, S4 said that it couldn't *"rule out the chance that the Revenue may not approve the claim at any stage".*
- Mr O also signed a separate film partnership risk warning in which he acknowledged that the scheme wasn't regulated and so wasn't covered by the Financial Services Compensation Scheme (FSCS).
- Mr O was also informed that the partnership must engage in trading activity and that *"any potential profit share is purely speculative and there is no guarantee that the hurdle rates may be achieved. In the situation that the hurdle rates are not achieved, then the investor may lose* some *or all of the tax benefit initially granted".*

Separating the complaints

S4 also made representations relating to the decision of this service to consider seven of Mr O's complaints (which had been determined by another ombudsman to be within our jurisdiction) separately - this complaint forms one of those seven.

In support of its position, S4 said that the service it provided was full service planning. It provided continuous investment advice on a wide range of investment opportunities and financial planning issues - including pension planning, tax mitigation and investment planning. The service was provided in respect of Mr (and Mrs) O's overall portfolio and wasn't confined to individual investments or schemes.

The same ombudsman has considered the issue of whether this complaint should be considered in isolation. He said in his determination on this that it should, noting several aspects. He firstly considered whether a recommendation had been given to Mr O to invest further funds into the film partnership.

He observed that there wasn't much information relating to the investment, but Mr O had been able to provide an email from S4 dated 6 October 2010, which whilst not containing an express recommendation to invest, said that *"Also just need to have* a *chat about Enigma* ***as well"*** (the ombudsman's own emphasis).

This indicated to the ombudsman that a conversation was to take place between Mr O and S4 about the further Invicta investment. He thought it was fair to conclude that such a conversation did take place and that S4 recommended that Mr O proceed with the investment of further funds into the Invicta scheme.

The ombudsman also noted that the transaction took place more than five years after the original investment. He therefore concluded that it should be considered as a discrete piece of investment advice on its own merits.

I note that S4 has reserved the right to comment further on this, but hasn't done so to date. Therefore, in the absence of any further representations from either party on this issue, I don't intend to comment upon this further.

Our investigation into the merits of the complaint

Our adjudicator considered the complaint and concluded that it shouldn't be upheld. He said the following:

- The investment was unregulated - but he was satisfied that it was reasonable for S4 to categorise Mr O as an investor for whom a UCIS could be deemed suitable.
- In support of this conclusion, he noted that Mr O had worked for international banks in derivative operations and had held a very senior role relating to this at one particular bank - although he acknowledged Mr O's statement that this had been a technical role rather than an investment role.
- The evidence didn't suggest that Mr O had dealt with UCIS investments such as film partnerships as part of his job, but he did have previous experience of that type of investment as a client of a previous firm.
- The nature of Mr O's employment would have provided him with an understanding of risk beyond that of an ordinary investor. Given Mr O's business acumen and experience with derivatives, he'd be more familiar than most in dealing with complex and detailed documents. And Mr O wouldn't have invested if he hadn't understood the information provided by S4.

- By 2010, Mr O had experience of film partnership investments, and had also put further funds into existing schemes following restructuring announcements.
- Given Mr O's previous experience and knowledge, it wasn't inappropriate for S4 to recommend that he invest additional funds into the Invicta partnership.
- Mr O would have been aware that, in being offered the scheme by S4, it was treating him as someone they regarded as being able to understand the types of risks associated with the investment.
- By 2010, Mr O had already invested in a number of similar schemes, which would have given him the opportunity to become acquainted with the paperwork, design and workings of the schemes.
- In terms of the amount invested, whilst not unsubstantial, Mr O would have realised how this fitted in with his overall financial position. And the amount itself didn't render his participation in it unsuitable.

Mr O disagreed with the adjudicator's assessment. He said the following, including reference to more general matters relating to the relationship with S4 as a whole, and those specifically related to the Invicta investment:

- He had never worked in a business role in derivatives and had never been involved in areas such as risk, finance, credit, legal, documentation, application development, trading, marketing, sales or any other business role. He held a senior position in IT services with a major bank, which involved technology operational roles.
- His role wouldn't have provided him with an understanding of risk beyond that of an ordinary investor. Prior to meeting with the financial adviser, his decisions had been based on articles in the financial media. His need for financial advice arose as a result of share options coming to fruition and nearly doubling his wealth.
- He had no knowledge of the investments recommended by the adviser prior to the latter introducing him to them.
- He'd only ever had one financial adviser, who'd moved from a previous firm to S4. Mr O had also complained about advice given to him whilst the adviser was at that previous firm, but had been told that he'd need to complain to that firm.
- When he first met with the adviser in early 2004, his objectives were agreed and have broadly remained consistent since. They were to plan for retirement at age 50, have an actively managed portfolio, invest in a broad range of assets, plan income and investments in a tax efficient manner and fund his children through school and higher education.
- The total value of his and his wife's investments when he met the adviser was approximately £633,000 - this included ISAs, shares (from employment), unit trusts and commercial property. They had a mortgage of £488,000 and two film partnership deals created by the adviser meant that he had additional liabilities of approximately £245,000. Including their holiday home, they had equity in their residences of approximately £760,000.
- He didn't choose investments himself - he followed the recommendations of his adviser.
- The investment strategy and objectives were defined in S4's response to his complaint in December 2013 - they were to spread investments across the main asset classes *"with a view to reducing volatility and risk within your portfolio. From the firm's records it was agreed you would follow a Balanced Asset Allocation to target a real return of 4% growth over the term of the plan".*
- S4 recommended every investment as being suitable for a balanced risk profile. He was aware that all investments carried a degree of risk, but he expected S4 to make appropriate recommendations based upon the clearly established investment criteria.
- There was only one occasion - in August 2010 - when S4 made it clear that the recommendation being made carried a higher than balanced risk rating. This description made him consider the investment in a very different light - and he only entered into the investment on the basis that the entire portfolio was deemed appropriate for a balanced risk profile.
- S4 determined a target asset allocation for him, which was set out in the annual reviews. This was split 20%/20%/30%/30% between Absolute Return funds, Fixed Interest, Equity and Property respectively up until January 2008, at which point Fixed Interest and Property investments were to be reduced to 15% and 25% respectively to allow for a 10% investment in "Private Equity & Finance".
- S4 were concerned at the beginning that he was overexposed to high risk assets - with high levels of investment in direct equity holdings and other equity funds. At the time, this was virtually all that he held, and he had little or no knowledge of other asset classes. S4 determined the asset allocation which would be suitable for a balanced risk portfolio. But he had no knowledge of the asset classes in which S4 was recommending 70% of the portfolio be invested - these being fixed income, absolute return funds and commercial property (aside from that recommended by the adviser in 2004 whilst they were client/adviser at the previous firm).
- Although it was the adjudicator's view that he would have become familiar with the paperwork design and workings of such schemes through the investments since 2004, he queried as to what this would have told him. It gave him no insight into the suitability of such investments for a balanced risk portfolio.

- S4 were the experts and he followed their advice, and nothing went wrong with them until many years later - after he'd stopped working. As far as he was concerned, S4 was creating a balanced risk portfolio, and if he'd had any concerns, he wouldn't have retired.
- He wasn't a party to the "balanced/aggressive" risk profile in the Investment Risk Profile Assessment which had been submitted to the adjudicator by S4. He'd not seen the document before and had no recollection of it being completed. Throughout the suitability reports, reference was only ever made to a balanced portfolio.
- The document was dated 31 August 2004, but as also confirmed by S4, he didn't become their client until September 2004 - so it was completed before this.
- If there was any foundation in the content of the document prepared in August 2004, then it would be expected that this would be repeated in suitability reports thereafter. But there wasn't a single mention of anything other than a balanced risk profile until August 2010.
- In the November 2008 annual review questionnaire, his top three priorities were school/university fees, financial independence and inheritance tax planning. He ticked the "aggressive" box, but underneath this wrote *"No current earned income".* He'd ticked the "aggressive" box as S4 had introduced a *"reasonable overseas exposure"* as per their definition of "aggressive". He wanted to ensure that S4 hadn't changed his risk profile without discussion or agreement, and it confirmed that this was the asset it was using for the determination of his balanced portfolio.
- This was reaffirmed in the review document of June 2009, which said that his *"attitude to risk could realistically be described* as *Balanced".*
- In the annual review questionnaire of May 2010, his top three priorities were to repay his mortgage, cover tax liabilities and generate adequate retirement income - with future events to plan for being school/university fees and a house extension costed at approximately £275,000.
- In that document, he ticked "balanced/aggressive", but the annual review document of September 2010 reaffirmed the "balanced" risk profile. He wouldn't have changed this, as at this point he had no income and had increased his mortgage. He considered that his exposure to commercial property was too great and so wished to reduce this and increase his holding in equities.
- In September 2009, S4 confirmed that it considered him to be a balanced risk investor.
- His objectives from the start of his relationship with the adviser wouldn't have allowed him to take undue risks, upon which he was dependent to achieve his aim of early retirement from a stressful IT role.
- There was no mention in any suitability reports of his risk rating being anything other than balanced and he believed that S4 was making recommendations in accordance with that.
- He sent the email from January 2011 - cited by the adjudicator in his findings - as he wanted to increase his exposure to equities. This had nothing to do with any of the investments complained of.
- In the annual review dated September 2010, S4 set out that, by that time, he had a 34% exposure to property, which exceeded the 25% target - and he only had 25% invested in equities against a target of 30%. Although S4 said that it would correct this, it had failed to do so some months later.

Specifically relating to the further investment into the Invicta Partnership in 2010, Mr O made the following points:

- This was a new investment - not a restructure.
- S4 provided no information other than one email, which said that S4 had been offered a proposal to defer the entire tax liability profile from the Invicta film partnership.
- The proposal was to buy a new film and use the losses to offset income from the same trade. There was also a possible "additional equity kicker" which S4 said could potentially double Mr O's money on the additional contribution.
- The total cost to Mr O would be £12,750 - S4 said that, whilst it was a further tax deferral, it should "push out" the potential liabilities for another 21 years, and that there could be further planning which would cater for the "bullet payment" later on.
- S4 said that, at worst, this would increase the taxable income beyond the current 50% tax band, give Mr O the "value erosion benefits" of inflation and might provide additional returns on top of that.
- The issues with the Invicta investment began after this recommendation. Although S4 had portrayed the investment as carrying no risk, it failed, no income was paid and additional costs had been incurred.
- As part of Mr O's assets and objectives, the investment had proven to be inappropriate.

Mr O made the following concluding remarks about his relationship with S4:

- He'd been saving toward his own and then wider family objectives since he started work at 18. He'd considered himself to have a balanced attitude to risk and couldn't afford to be exposed to anything other than that.
- But the advice he'd received had been disastrous. At the beginning, he'd been advised to invest approximately £290,000 in film partnerships, which created liabilities of around £500,000 - leaving him

with an overall negative asset value. This was designed to improve his retirement income, but the position would deteriorate due to the enquiries which were ongoing into this type of scheme.
- He'd been advised to invest around £360,000 in commercial property, of which he'd lost in the region of £330,000.
- A further £187,000 was then invested in film schemes, of which around £150,000 had been lost.
- Although some investments had made money, further non-mainstream schemes made significant losses, to the extent that the value of his SIPP and other investments had almost halved over 13 years.
- He still had a mortgage of approximately £540,000, which his investments had been designed to repay.
- The only investments he'd made of his own design were in ISAs and some shares, which had been severely depleted to cover the losses incurred on the other investments.
- Mr O queried as to what, from the overall portfolio of investments S4 created, had been suitable for a balanced risk portfolio. Although he'd finished working at 50 as planned, things had deteriorated financially since. His view was that S4 had recommended investments without any regard for his objectives, overall financial position and risk profile. But he in turn had generated fees for S4 of well over £100,000.
- In most instances where S4 had quoted the overall value of his assets, it had done so incorrectly, for example including liabilities as assets and omitting certain liabilities altogether.
- Nothing had performed as S4 had outlined in the suitability reports. Virtually no positive returns or income had been generated.
- S4 had halved his pension investments of over £300,000 over the period of advising him, and he was unable to draw on his pension income due to the inclusion of the recommended investments.
- S4's advice had been totally misleading - it defined a balanced portfolio and portrayed every investment as being suitable for a balanced risk profile. He had no knowledge of the investments until they were presented to him by the adviser - and he believed that certain investments had been recommended to generate fees and money for reinvestment.
- His life and retirement plans had been ruined - financially and emotionally.
- If he'd wanted to reduce his tax liability, he could have moved to countries with lower tax regimes with his employer. S4 introduced the tax efficient aspects of investing, but if this hadn't been consistent with a balanced risk portfolio, it should have made this very clear.
- All the evidence indicated that S4 was investing for a balanced risk portfolio and risk profile. He had no knowledge that would have assisted him in assessing the recommendations.

As agreement hadn't been reached, the adjudicator confirmed that the matter would be referred to an ombudsman for review.

S4's representative commented on the adjudicator's assessment, and Mr O's response, in the following terms:

- It agreed with the conclusions reached - it said the adjudicator had accurately identified Mr O as someone for whom this, and other, investments were suitable, given his investment experience, HNW investor status and attitude to risk. And that he took an active role in choosing his investments.
- S4 had correctly treated Mr O as someone who had the knowledge and financial sophistication to be able to understand the relevant documents, as well as the level of risk associated with the investments. That level of knowledge and sophistication was clear from his communications, both contemporaneous and current.
- Although it didn't alter the experience Mr O had with investments, it submitted a screenshot of Mr O's "LinkedIn" page, which it said contradicted Mr O's description of his employment role. The page described him as having a senior position in derivative operations. The same page also referred to Mr O's role since 2008 as involving a *"range of consulting, interim management. start up and investment opportunities".*
- The suitability documents signed by Mr O also demonstrated that he'd held roles with other organisations in which he'd been involved in venture capital and consultancy work. This contradicted Mr O's assertion that he had never held a business role and worked only in IT operational areas.
- The portfolio valuations provided by S4 were as accurate as possible - they reflected the assets of which S4 was aware and for which S4 was able to obtain a valuation.

Mr O also provided a further submission for the attention of the deciding ombudsman:

- He queried the adjudicator's reliance on the risk profiling assessment completed in August 2004, in which Mr O's risk profile was recorded as balanced/aggressive. If this were true, S4 would have stated this in every suitability report - but it didn't. On the contrary, every reference was to a balanced portfolio.
- The first "statement of high net worth individual" wasn't signed and given to S4. It was given to a firm of solicitors for a very specific purpose and not to be applied to any subsequent investments by S4.
- He reiterated that he'd only been employed in technical roles. He'd never been responsible for derivatives and future modelling, or been employed in a business role. This was borne out by the suitability reports.
- He was confused as to some of the wording used by the adjudicator relating to ongoing and in-depth investigations being undertaken by HMRC into various schemes - of which the adjudicator had said he'd likely be aware. And the adjudicator appeared to be referencing separate investments within the same findings.
- In its letter of December 2013 responding to the complaint, S4 said, in a section entitled "Investment Strategy & Objectives":

  "According to the firm's records you were engaged with S4 as a *holistic financial planning client. following* a *long term financial plan to meet your specific investment objectives ... The financial plan and model you were following was underpinned by an asset a/location, which spread your investments across the main investment asset classes* ***with a view to reducing volatility and risk within your portfolio. From the firm's records it was agreed you would follow a Balanced Asset Allocation to target a real return of 4% growth over the term of the plan."*** *(Mr* O·s *emphasis)*

- S4 recommended every investment as being suitable for a balanced risk profile.
- He was aware that every investment carried a degree of risk, but the level of risk he was prepared to take was clearly defined against a known background and financial position. And S4 should have made appropriate recommendations against the clearly established criteria.
- Only on one occasion did S4 make it clear that what they were recommending represented a higher than balanced risk rating - in August 2010. And even then, he only agreed to the investment on the basis that the entire portfolio was deemed appropriate for a balanced risk profile. This was confirmed within the accompanying suitability report.
- It wasn't tenable that S4, or this service, could conclude that his attitude to risk was anything other than balanced.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I'm required by the Financial Services and Markets Act 2000 (FSMA) and DISP to determine the complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the complaint.

When considering what's fair and reasonable, I need to take into account relevant: law and regulations; regulators' rules, guidance, standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.
Did S4 advise Mr O *to invest further into the Invicta film partnership?*

I've noted S4's comment that it gave no advice to Mr O to invest further into the Invicta scheme in 2010. But as with the ombudsman who decided whether it would be appropriate to consider this complaint as a separate piece of investment advice, I've also taken into account the wording of the email which S4 sent to Mr O on 6 October 2010, in which it said that it needed to talk to Mr O about the further investment.

No suitability report may have been produced, and I accept that it may have been a direct offering from Invicta to the existing partners, but this doesn't necessarily mean that S4 didn't verbally advise Mr O to take up the offer and invest further funds.

And given the content of the email, and what I consider to be the probability that S4 did then talk to Mr O about the further investment opportunity, I think it's more likely than not that it advised Mr O to invest the additional sum.

In support of this, I've noted that, in other situations where Mr O was offered an opportunity to bolster an initial investment which had been originally recommended by S4, for example further funds into an existing property partnership in July of the same year, S4 recommended that he did so.

But even if I'm wrong on that, I think it's arguable that Mr O would in any case have been acting upon the information and recommendation provided to him about the original Invicta recommendation when deciding whether to invest further.

This doesn't impact on my view that the further investment should be dealt with separately from that made in 2005 - this was after all more than five years after the initial investment and that type of gap alone would suggest that this wasn't part of a long term investment plan devised in 2005. The available evidence doesn't support the position that this further investment was envisaged or mentioned to Mr O in 2005.

So, on balance, my view is that this course of action was recommended to Mr O - at least verbally - in 2010. And even if S4 is able to persuade me that it didn't make that recommendation, I think it's reasonable to conclude that, when making the further investment, Mr O was acting - albeit on a separate and distinct basis - upon information provided to him by S4 about the scheme in 2005.

The applicable rules. regulations and requirements

The following isn't a comprehensive list of the rules and regulations which applied to a firm when giving advice, but provides useful context for my assessment of S4's actions here.

COBS 2.1.1R required a business to *"act honestly, fairly and professionally in accordance with the best interests of its client'.* And in order to ensure this was the case, and in line with the requirements COBS 9.2.2R, S4 needed to gather the necessary information for it to be confident that its advice met Mr O's objectives.

It also needed to ensure that Mr O had the necessary experience and knowledge to understand the risks he was taking. Broadly speaking, that section sets out the requirement for a regulated advisory business to undertake a "fact find" process.
Once the fact finding was complete, COBS 9.4.7R required a business to *"explain why the firm has concluded that the recommended transaction is suitable for the client"* - in other words, it needed to provide its client with a suitability report outlining its advice and the reasons for it.

This didn't happen in this instance. As I've noted above, S4 has said that this was because advice wasn't given. But I've also concluded above that it's probable that Mr O *was* advised, at least verbally, by S4 to invest further.

As such, I therefore consider in the following sections whether S4 adhered to its regulatory obligations and gave Mr O suitable advice.

UCIS promotion

This investment was an unregulated collective investment scheme (UCIS). Section 238 of the Financial Services and Markets Act 2000 (FSMA) prohibited the promotion of UCIS to the general public, unless an investor fell within certain exempted categories. One of these is, and as set out in the FSMA (Financial Promotion) Order 2005, the categorisation of the investor as a high net worth individual.

Mr O signed a "Statement of Certified High Net Worth for Individuals" on 26 May 2010. And from the detail contained within the financial valuation produced in September 2010, this is consistent with Mr O's circumstances at the time. I'm therefore satisfied that Mr O was correctly categorised as a high net worth individual and so was eligible to receive UCIS promotions. I also think that, on balance, Mr O was capable of understanding that document when he signed it.

Mr O's *understanding of the investment and the associated risks*

What I need to determine next is whether Mr O was provided with sufficient information to be able to understand the investment.

I've thought very carefully about the submissions made by both S4 and Mr O relating to his level of investment experience, business acumen, employment history and levels of participation in directing investments - and to what extent this would have furnished him with an understanding of the investment proposal here.

Having done so, my view is that Mr O could fairly and reasonably be described as an intelligent, capable individual, who would have had the capacity to understand what was being proposed. And if he didn't, I think he would have queried the nature of the investment with the adviser.

The additional investment amount of £12,750 into the Invicta film partnership, whilst a relatively small percentage of Mr O's overall portfolio, was not an insubstantial sum. And I think it fair to conclude that Mr O would have wanted to satisfy himself that he understood the proposal before entering into the arrangement.

The suitability report issued in 2005 for the original Invicta investment set out its details. This included highlighting the risks of the investment, which were many and varied, and constituted six bulleted paragraphs within the section entitled "Specific Risks Attached to the Investment". Another risk- that HMRC may challenge the scheme - merited its own specific "Taxation Risk" section.
I don't think it could therefore be reasonably claimed that S4 sought to underplay, or otherwise failed to disclose, the risks of the individual investment. Moreover, alongside my conclusion that Mr O would have been able to understand the workings of the investment itself, my view is that he would have been able to understand these risks.

The agreed risk rating for the portfolio

Much has been made of Mr O's level of sophistication or the experience he would have picked up through other investments or employment roles he held.

But it doesn't naturally follow that he was keen to invest in predominantly high risk products. Nor would it absolve a regulated firm of financial advisers from the responsibilities - as outlined above - of assessing his circumstances, objectives and appetite for risk (rather than awareness of risk and capacity for loss) and providing suitable advice.

Furthermore, although Mr O may have had awareness of a range of investments, perhaps including derivatives, if he had the levels of investment knowledge attributed to him, I would question as to why he needed the services of a financial adviser at all - services which by his own reckoning had generated many tens of thousands of pounds in fees and so would have reduced the value of his portfolio accordingly.

The fact is that he was nevertheless seeking the advice of a professional firm, which he was justified in believing had greater knowledge still. And irrespective of the provision of risk warnings, or an awareness of those risks, he was entitled to expect, and to receive, suitable advice.

A key theme of Mr O's submissions has been that S4 always portrayed the investments as being suitable for a balanced risk profile. But I've thought carefully about whether this would reasonably have been his impression of certain individual higher risk investments within the overall portfolio. It's also worth noting that, in the review report produced in September 2010, Mr O had confirmed that he held a "balanced/aggressive" risk profile.

My view is that it's highly unlikely that Mr O, appreciating the risks involved, would have believed *all* of his individual investments to carry a balanced risk rating. And this is a view endorsed not only by his own comments relating to property investments being designed to balance the more volatile aspects of his portfolio, but also by his acceptance of higher risk investments as being a part of an *overall* balanced, or by this time, balanced/aggressive risk portfolio.

So my conclusion here is that, irrespective of whether Mr O would reasonably have viewed some of the individual investments as having a balanced/aggressive risk profile, Mr O was entitled to believe that S4 was creating an overall balanced/aggressive risk portfolio for him.

But I also think that, in the creation of a balanced/aggressive portfolio, in which there are no set rules relating to asset allocation, factors such as risk awareness and specific aims or agreed percentages of asset allocation can come into play. I'll discuss this further in the next section.

Was the recommended investment suitable for the agreed risk profile of the overall portfolio?

As I've said above, irrespective of Mr O's investment experience or his ability to understand and willingness to accept the risks of the specific investment, he was nevertheless entitled to receive suitable advice.
I'd firstly comment on S4's assertion that Mr O wasn't a passive recipient of investment advice, but was actively involved in directing investments. I've only seen one documented instance of this, however - the email of January 2011. Within that email, Mr O asked when switches could be done on the funds he held. Mr O said that they should *"virtually dump all bonds etc and go aggressive growth".*

There's email evidence within the business' files that Mr O was at various time seeking explanations and reassurances relating to his investments, but the available evidence doesn't support the position that, before 2011, he was actively directing investments.

So I'm satisfied that, but for one documented instance, Mr O was very much reacting to the recommendations and "opportunities" that were put to him by S4.

Although Mr O's risk profile was by this time described as being balanced/aggressive, prior to that Mr O was routinely described as holding a "balanced" risk portfolio. Mr O refers to this often, but with good reason - throughout the suitability report for this (and other) cases, S4 referred to the portfolio as being balanced.

There are other indications which also corroborate a prior "balanced" risk rating for Mr O, along with previous investment experience of only more mainstream types of investment. For example, the "life plan" produced in March 2004 (when Mr O was a client of the previous firm) detailed his asset split as being 46.5% in cash and fixed interest, and 53.5% in a range of global equities, including direct share holdings. It was also noted at the time that only around 4.2% of the portfolio was invested in managed funds. The overall investment fund was valued at approximately £927,000 at that time. Pension plans between Mr and Mrs O also accounted for a further £218,000.

Within the non-pension arrangements, there was no investment in property, hedge funds or "structured" products. And so whilst it wasn't perhaps as diversified as a typical portfolio, it nevertheless had the balancing features of higher and lower risk assets.

Mr O was then introduced to tax mitigation schemes and other non-mainstream investments. This process began whilst Mr O was a client of the previous firm, but notably receiving recommendations from the same adviser who then became a part of S4.

S4 has said that such tax planning schemes shouldn't really be considered to form part of an overall investment portfolio - and in some instances they're designed to create a loss so that the tax rebates can be accessed.

This was certainly not a mainstream investment and, I'd agree, had a specific purpose - to mitigate the tax which Mr O would be paying over the coming financial years. Mr O has said that this was S4's idea, and that he didn't need to claim tax rebates. But he was nevertheless prepared to invest further funds in the Invicta scheme, having originally done so in 2005, with what I consider likely to have been a good understanding of what this entailed.

I think it's arguable that a scheme whose primary purpose was to provide tax rebates wouldn't fit comfortably within an overall investment portfolio - which in my view would reasonably be described as a strategy to provide growth on capital, and so create wealth. Schemes which

mitigate tax by way of reliefs obtained through a sale and leaseback arrangement such as this could perhaps be said to be wealth "protection" or "maintenance".

As such, I think there's some merit in S4's argument here that it shouldn't be included in the consideration of the investment portfolio and the overall aim of a balanced/aggressive risk profile. I note that, in its response to Mr O's complaint, it said the Invicta investment was suitable both within the portfolio, and in isolation.

But I also think that argument is somewhat self-defeating - far from providing the safety of a scheme which, by being considered in isolation removes it from the overall balanced/aggressive risk objective for the portfolio, it imperils S4's position. If it wasn't designed to be included in the overall investment portfolio, and I consider it in isolation outside of that portfolio, I can't ignore the fact that S4 nevertheless still originally described it in 2005 as being suited to Mr O's balanced risk profile.

And this cannot fairly or reasonably be said to be the case. S4 went to some lengths to specify the many risks associated with this type of scheme, some of which might result in eventual liabilities outweighing the initial capital invested. In so doing, it comprehensively undermined its own description of the scheme itself being suited to a balanced risk profile.

So as a stand-alone arrangement, which was originally described in 2005 as being suited to a balanced risk profile, I might be inclined to uphold the complaint on the basis that this risk rating was misrepresentative of the actual risks associated with it.

My view is that this type of investment represented a higher than balanced risk, and given its non-mainstream specialist nature, also arguably higher than the balanced/aggressive risk profile attributed to Mr O in September 2010. Only by inclusion in an overall portfolio - and my view is that Mr O was reasonably entitled to believe that the recommended investment formed part of an overall balanced/aggressive risk "life planning" strategy - do I think that this could be said to constitute a suitable recommendation for a balanced/aggressive risk profile. And that would very much depend on the wider asset split of the overall portfolio (which I assess in more detail below).

As a reminder at this point, Mr O has also said that he wouldn't have objected to high risk schemes forming part of the overall portfolio, so long as they were small in percentage terms and balanced out by other lower risk investments.

And I agree that that type of format is likely to constitute a recognisable and suitable makeup of a typical balanced/aggressive risk portfolio - one which has a diverse mix of assets and so different types of exposure to investment risk.

A "typical" balanced/aggressive portfolio might be expected to contain a lower percentage of investment in less risky investments, and a higher concentration in more speculative assets. But as I've said above, there are no hard and fast rules in terms of what constitutes a balanced/aggressive portfolio. The actual make-up will be quite subjective and rely heavily on a range of factors, which, in this instance, would reasonably have provided greater latitude in increasing the weighting in some of the higher risk investments.

One of the key aspects in that regard is Mr O's acceptance of the specific risks posed (and detailed by S4) - and I note that in a letter of complaint to the provider of property partnerships relating to the issue of undisclosed risks in separate complaints, Mr O said *"although the existence of the loans is not an issue or concern for* me... ". I acknowledge that this relates to investments in commercial property schemes, but I do also think it's relevant to Mr O's acceptance of the particular risk represented by loans and gearing in certain types of investment, including this one.

I've therefore carefully considered Mr (and Mrs) O's overall portfolio in October 2010. And the portfolio valuation in September 2010 should be reliable as an indication of the types of asset held at that later point.

This tells me that, of the overall portfolio (valued at £2.13m excluding directly held property), the further investment in Invicta would have represented around 0.6%. As at September 2010, Mr and Mrs O's portfolio was recorded as follows:

Absolute Return	£182,879	7.1%
Asia Pacific/Japan Equity	£26,374	1.0%
Cash	£44,951	1.7%
European Equity	£42,220	1.6%
Fixed Interest	£68,551	2.7%
Global Equity	£2,043	0.1%
Rest of World Equity	£11,184	0.4%
Property	£348,009	13.5%
Specialist Equity	£42,000	1.6%
UK Equity	£91,282	3.5%
US Equity	£39,942	1.5%
Asset Allocation Funds	£187,607	7.3%
Private Equity & Finance	£100,000	3.9%
Tax Based Property - EZTs	£27,003	1.0%
Tax Based Equity - VCT & EIS	£108,133	4.2%
Direct Equity Holdings	£387,651	15.0%
Non-Managed Cash & Bonds	£401,109	15.5%
Non-Managed Funds	£18,804	0.7%
(Main residence)	(£450,000)	(17.4%)

Within my assessment of the overall portfolio, I've included the pension assets. I think this a reasonable approach, because this was a "life plan" for Mr O and his family, and the objective of early retirement was a very prominent feature of his financial planning.

If I remove the pension assets, leaving a net portfolio of £1.75m at the time, the additional commitment to rises to just over 0.7% of the portfolio.

By that point, the ratio between the main asset classes (including pension funds) was as follows:

Absolute Return	11%
Cash/Fixed Interest/Bonds	25%
Equities	33%
Property	20%
Private Equity/Finance/VCTs	11%

In my view, the portfolio resembled a typical "balanced" portfolio - and was certainly not too high risk to be inconsistent with a "balanced/aggressive" portfolio. It had 25% invested in lower risk assets, 20% invested in various property assets and the remainder in a mixture of absolute return funds, equities and private equity.

And I'd reiterate my view on the potential of a balanced/aggressive portfolio to take various guises, influenced by a range of factors specific to the individual and their circumstances Mr O was aware of the specific risks of the scheme, along with the tax advantages, and he accepted the principle of higher risk ventures being balanced out by other lower risk investments in the creation of a balanced/aggressive portfolio.

Therefore, I don't think I can fairly and reasonably conclude that the additional investment of 0.6% invested in the Invicta film partnership, even with the higher risks posed by this type of scheme, was in this particular instance unsuitable within a balanced/aggressive risk portfolio for Mr O.

summary

I think S4 fairly disclosed the specific key risks associated with the investment. S4 set these out in the suitability report when Mr O originally invested in 2005 and they were also outlined in the investment prospectus. So I don't think there was misrepresentation here.

But irrespective of Mr O's awareness of the risks, or his experience with investments, a fair and reasonable analysis leads me to conclude that he was nevertheless expecting, and entitled, to receive suitable advice from a skilled financial professional.

S4's original assertion in 2005 that this investment in isolation could be described as having a balanced risk profile belied the reality of the situation. As I've said above, given the various high risks involved, I don't think this is a credible description of this type of scheme.

But I'm nevertheless satisfied that Mr O was aware, and was justified in believing, that the scheme was designed to form part of an overall "balanced" portfolio at that time, and part of a "balanced/aggressive" portfolio by 2010. And having considered the overall asset split of the portfolio at the time, along with specific factors which would inform the creation of a balanced/aggressive risk portfolio for Mr O, I'm satisfied that, on balance, the investment could reasonably be described as suitable.

my provisional decision

For the reasons given above, I'm currently minded to not uphold the complaint.

Philip Miller
ombudsman