complaint

Mr P has complained about advice he says he received from a Positive Solutions (Financial Services) Limited (PSL) financial adviser to switch his existing pension provision into a SIPP and then invest in Harlequin overseas property investments. He says this advice was unsuitable for him. Mr P says that the investments are high risk and he has a, *"very low acceptance of risk"*. Furthermore, the pension fund that was switched to the SIPP represented almost all of his invested wealth and he had no other investments of any kind.

background

I issued a provisional decision on 8 January 2020. A copy is attached and forms part of this final decision. In the decision I explained why I believed this complaint would fall within my jurisdiction. I also set out why I believed the complaint should be upheld.

Mr P's representative made no further submissions.

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

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

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

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

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

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

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

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

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

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

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

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

my findings

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

Having done so I have reached the same conclusions as set out in my provisional decision of 8 January 2020 and would refer the parties to it. In brief, in that provisional decision I set out my findings that:

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

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

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

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

- PSL is also liable to Mr P under section 150 of the Financial Services and Markets Act 2000.

- Mr P's complaint therefore falls within my jurisdiction.

- Mr H's advice was unsuitable for Mr P.

- Mr P acted on the advice and suffered loss as a result of it.

- It is fair and reasonable for PSL to compensate Mr P for that loss.

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

apparent authority

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

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

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

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

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

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

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

PSL did not specifically mention the Harlequin investments in its representations, but that is not determinative. Neither is the point that Mr H did not have actual authority to give the advice he gave. Mr H had PSL's apparent authority to act on its behalf in advising Mr P to switch/surrender existing investments (in this case a pension) so that an investment could be made in Harlequin, because he had PSL's more general apparent authority to act on its behalf in giving him that kind of investment advice.

PSL's representations as to the authority of Mr C

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

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

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

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

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

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

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

reliance

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

should PSL bear the loss caused by the pension switch and investments in Harlequin?

My assessment as to whether PSL should bear this loss was not intended to be read as part of the test for apparent authority. It is a point the courts consider as a check that they have

reached the right conclusion. I regard the test for apparent authority as being satisfied on the facts in this complaint. The reference to the justice of the case was by way of such a cross check and was included as the courts often include such an explanation and to be helpful to the parties.

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

vicarious liability

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

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

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

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

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

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

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

> *"15. Vicarious liability in tort is imposed upon a person in respect of the act or omission of another individual, because of his relationship with that individual, and the connection between that relationship and the act or omission in question. Leaving aside other areas of the law where vicarious liability can operate, such as partnership and agency (with which this judgment is not concerned), the relationship is classically one of employment, and the connection is that the employee committed the act or omission in the course of his employment: that is to say, within the field of activities assigned to him, as Lord Cullen put it in Central*

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

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

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

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

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

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

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

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

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

statutory responsibility under section 150 FSMA

Taking everything into account, I remain satisfied that section 150 FSMA provides an alternative route by which PSL is responsible. This is a statutory responsibility, and I'm not

persuaded that (if I'm wrong about apparent authority) the absence of actual or apparent authority would mean that responsibility wouldn't arise under section 150 FSMA:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

suitability of this complaint for determination by an ombudsman

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

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

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

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

oral hearing

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

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

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

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

- Mr P was present at the advice meetings and he has been clear about what occurred. Furthermore there is a considerable amount of evidence (set out in the attached provisional decision) about the involvement and actions of Mr H in the pension switch and investments - which effectively corroborate what Mr P has said. Whilst the events complained of happened some time ago and memories inevitably fade I'm satisfied, given the evidence, that I can reach a fair outcome using all the available evidence and I'm not persuaded hearing oral evidence would assist me.

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

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

my findings as to the merits of the complaint

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

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

how to put things right

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

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

I think with suitable advice Mr P would have kept his existing pension. But it's unlikely to be possible for PSL to reinstate Mr P into his previous pension scheme.

There are also a number of possibilities and unknown factors in making an award. While I understand Harlequin will allow PSL to take over the investment from Mr P, the involvement of third parties – the SIPP provider and Harlequin Property – means much of this is beyond this service or the business's control.

All the variables are unknown and each may have an impact on the extent of any award this service may make. The facts suggest it's unlikely that the property(ies) will be completed and unlikely that the contract and any future payments would be enforceable – but I can't be certain of that.

While it's complicated to put Mr P back in the position he would have been in if suitable advice had been given, I think it's fair that Mr P is compensated now. I don't think we should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

In summary, PSL should:

1. Obtain the notional transfer value of Mr P's previous pension plan, as at the date of my final decision, if it not been transferred to the SIPP.

2. Obtain the transfer value, as date of my final decision, of Mr P's SIPP, including any outstanding charges.

3. And then pay the amount of (1 – 2) into Mr P's SIPP so that the transfer value is increased by the amount calculated. This payment should take account of any available tax relief and the effect of charges.

In addition, PSL should:

4. Pay any future fees owed by Mr P to the SIPP, for the next five years.

5. Pay Mr P £300 for the trouble and upset caused.

I have set out each point in further detail below.

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

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

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

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

2. *Obtain the transfer value as at the date of my final decision of Mr P's SIPP, including any outstanding charges.*

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

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

If it's not possible to pay the compensation into the SIPP, PSL should pay it as a cash sum to him. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr P's marginal rate of tax in retirement.

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

Had PSL given suitable advice I don't think there would be a SIPP. It's not fair that Mr P continues to pay the annual SIPP fees if it can't be closed.

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

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

In return for the compensation set out above, PSL may ask Mr P to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin property

investment in that five year period, as well as any other payment he may receive from any party as a result of the investment.

That undertaking should allow for the effect of any tax and charges on the amount he may receive. PSL will need to meet any costs in drawing up this undertaking. If it asks Mr P to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, after five years, PSL wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Harlequin property investment, it must agree to pay any further future SIPP fees. If PSL fails to pay the SIPP fees, Mr P should then have the option of trying to cancel the Harlequin property contracts to enable the SIPP to be closed.

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

5. *Pay Mr P £300 for the trouble and upset caused.*

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

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

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

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £150,000, plus any interest and/or costs/interest on costs that I consider appropriate. If I think that fair compensation is more than £150,000 limit, I may recommend that the business pays the balance.

Decision and award: I consider that fair compensation should be calculated as set out above. My decision is that PSL should pay Mr P the amount produced by that calculation - up to a maximum of £150,000, plus any interest.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that PSL pays Mr P the balance.

This recommendation is not part of my determination or award. PSL doesn't have to do what I recommend. It's unlikely that Mr P can accept my decision and go to court to

ask for the balance. Mr P may want to get independent legal advice before deciding whether to accepting my final decision – should my decision remain the same as the provisional decision.

my final decision

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

My decision is that I uphold the complaint and order Positive Solutions (Financial Services) Limited to calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 13 April 2020.

David Bird
ombudsman

Copy provisional decision

complaint

Mr P has complained about advice he says he received from a PSL (Financial Services) Limited (PSL) financial adviser to switch his existing pension provision into a SIPP and then invest in Harlequin overseas property investments. He says this advice was unsuitable for him. Mr P says that the investments are high risk and he has a, *"very low acceptance of risk"*. Furthermore the pension fund that was switched to the SIPP represented almost all of his invested wealth and he had no other investments of any kind.

background

In January 2010 a SIPP application for Mr P was submitted to Guardian Pension Consultants (GPC) by Mr H. Mr H was a representative of PSL. Accompanying the SIPP application were three Harlequin purchase contracts to be held within the SIPP.

The pension switch took place in February 2010. Mr P has said that it was Mr H who advised him to switch his pension into the SIPP and invest in Harlequin. And he says that the documentation shows that when arranging the switch and investment Mr H was acting for Houghton Newton Investment Services (HNIS), a trading style of PSL.

I understand the Harlequin investments have failed and have no value.

Mr P complained via his representative to PSL about the advice he had been given. His representative said that the advice had been unsuitable and inappropriate for Mr P's circumstances.

PSL did not uphold the complaint. It said, in summary, that it had no record of having provided advice to Mr P, and had HNIS/Mr H provided advice on the pension switch and Harlequin investments, it would not be responsible for it. As no advice had been provided by PSL, Mr P was not an eligible complainant and a referral to the ombudsman service would be outside of this service's jurisdiction.

The complaint was referred to this service at which point PSL reiterated that it did not think the ombudsman service had jurisdiction. An adjudicator at this service considered the issue and concluded that the case did not fall within our jurisdiction. In summary he said:

- The regulated activity of arranging was undertaken by Mr H whilst acting as a representative of PSL.
- However, in order to be in jurisdiction the act must also be an activity for which PSL accepted responsibility. The registered individual agreement between Mr H and PSL meant that, assuming Mr H undertook the act, PSL was not responsible for it.

As a result the complaint was not one that this service could consider.

Mr P's representative did not agree and made further submissions. It said, in summary:

- The letterhead shows that as a trading style of PSL, HNIS was a *part of* PSL.
- PSL promote its advisers as 'partners' on its website. As 'partners' PSL are bound to the actions of Mr H, and cannot disown those actions.
- As a result, PSL is responsible for Mr H's actions and it's incorrect to rely solely on the contract.

my provisional findings - jurisdiction

We can't consider all complaints brought to this service. Before we can consider the merits of a complaint, we need to check, by reference to the Financial Conduct Authority's DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at. In this case, PSL says that we don't have the power to look at this complaint, on the basis that it relates to acts PSL aren't responsible for. PSL says it didn't authorise HNIS to provide any advice or services in respect of the GPC SIPP or the Harlequin investment.

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

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

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

- Were the acts about which Mr P complains done in the carrying on of a regulated activity?
- Were those acts the acts of the authorised firm, (PSL)?

the regulatory background

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

regulated activities

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

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

the general prohibition

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

This is known as the 'general prohibition'.

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

Mr H was neither an authorised person nor exempt from authorisation. HNIS was not a separate legal entity – it was just a trading name he used. That means that if Mr H had carried out a regulated activity on his own behalf, whether in his own name or his trading name, by way of business, he would have been in breach of the general prohibition.

the approved persons regime

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

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

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

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

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

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

breach of statutory duty

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

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

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

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

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

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

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

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

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

I am satisfied that HNIS arranged and advised on the pension switch to the SIPP and the Harlequin investment. That is Mr P's recollection, and documents I have seen (set out later in this decision) indicate that HNIS was corresponding on Mr P's behalf with the transferring pension scheme and the new SIPP provider (GPC). The documents also refer to the Harlequin investments subsequently being set up. The fact that there does not appear to be any 'recommendations report' or 'fact finding' being carried out does not mean that HNIS did not provide advice to Mr P or arrange the switch and subsequent investments. The evidence strongly indicates it did.

The SIPP and Mr P's existing pension were a security or a relevant investment. The Harlequin investments exhibit the qualities of a collective investment scheme, most probably unregulated collective investment schemes. But even if they were not, regulated activities took place in relation to the pension schemes, at least. I therefore need to consider whether those activities were the acts of PSL.

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

When considering if the acts complained about are those of PSL I have taken note of the following documents:

- A letter dated 27 January 2009 from HNIS to Abbey Life, requesting details of Mr P's pension.

- A letter dated 10 August 2009 from Mr H of HNIS to Abbey Life requesting details of Mr P's pension. The letter uses PSL headed paper and records that HNIS is a trading style of PSL. The letter also encloses a, *"Transfer of Servicing Request"* form which directs Abbey Life to make Mr H of PSL responsible for any servicing and directs any income or fees in respect of the pension to be paid to it.

- A letter from Abbey Life dated 17 August 2009 to Mr H of PSL supplying pension information.

- A letter dated 27 August 2009 from HNIS to Abbey Life. This asks for information about Mr P's pension and states that he is considering transferring. It asks for the documentation to arrange that. The letter uses PSL headed paper and records that HNIS is a trading style of PSL.

- A letter dated 23 December 2009 from Abbey Life to Mr H of PSL supplying a pension transfer value and transfer documents.

- A GPC Harlequin property questionnaire dated 6 January 2010 for Mr P. The *"Adviser Name"* section carries a 'Peter H, PSL' stamp.

- A verification of identity form for Mr P dated 25 January 2010. Identity is verified by Mr H and, under *"Details of Introducing Firm"*, *"PSL"* is recorded.

- A letter dated 28 April 2010 from Mr H of HNIS to GPC enclosing a GPC SIPP application and other documents including, *"3 x Harlequin Contracts for SIPP Purchase"*. The letter uses PSL headed paper and records that HNIS is a trading style of PSL.

- A GPC SIPP application form for Mr P. This records the *"Financial Adviser"* for the SIPP as *"PSL"* and the form carries a 'stamp' indicating Mr H of PSL is the financial adviser. The email address is (Mr H)@thinkpositive.co,uk. It also records that the financial adviser is to receive an ongoing fee in respect of the SIPP. The, *"Intended Activity"* recorded is, *"Acquisition of overseas commercial property via Harlequin".*

- A letter dated 28 April 2010 from Mr H of HNIS to GPC. The letter said it enclosed, *"3 SIPP contracts for signature by Guardian and onward transmission to Harlequin".* The letter uses PSL headed paper and records that HNIS is a trading style pf PSL.

- A GPC Harlequin property questionnaire dated 28 April 2010 for Mr P. The contact details on the form were Mr H, email (Mr H)@thinkpositive.co,uk.

- A letter dated 10 May 2010 from GPC to Mr H of PSL enclosing a Harlequin property receipt.

- A letter dated 25 May 2010 from GPC to Mr H of PSL. This enclosed a completed SIPP contract for Mr P.

Mr P says that he had known Mr H for a number of years before he advised him to switch his Abbey Life pension to the SIPP and invest in Harlequin property investments in 2009/2010 – the switch and investments occurring in 2010. Approximately £100,000 was switched from Mr P's Abbey Life pension to the GPC SIPP. Mr P says that the reason for the pension switch was so that investments could be made in Harlequin.

It is clear from the documentation that Mr H was involved in the pension switch and subsequent investments in Harlequin. He obtained the information about Mr P's existing pension, submitted the documents so that the switch could be made and SIPP set up and also submitted the documents so that the investments could be made. The documents indicate he was the financial adviser involved. Given the evidence I am persuaded that Mr P's version of events is more likely correct in that Mr H advised him to make the switch and make the investments.

In 2009 and 2010 Mr H was a *"registered individual"* or self-employed agent of PSL. His business, HNIS, was a trading style of PSL and recorded on the FCA Financial Database as such. Mr H is recorded on the FCA Register as CF30 Customer, representing PSL from 2007 to 2011. He is not recorded as being authorised by or representing another business when the switch and investments took place.

Mr P has said that at all times throughout the application and investment process, Mr H held himself out to be a part of PSL.

Mr P has said that:

"When this investment was first made, a deciding factor was that it was being handled by PSL, and the size and reputation of the company, especially with the size of the investment, was the key factor in entering into it. If this had not been the case, I would not have proceeded".

All the correspondence and documents I have seen indicate or record that Mr H was acting as a PSL adviser in respect of the pension switch to the SIPP and Harlequin investments. The application documents for the SIPP record that and his letters to Abbey Life and GPC are as representing PSL. Mr H instructed Abbey Life to designate that he, as a PSL adviser, take over the servicing of Mr P's pension and receive income or fees in relation to it.

When giving advice of this nature or arranging for a pension switch and investments to take place, there would normally be some form of fact finding documentation completed by the adviser, setting out the customer's circumstances, needs and objectives. And there would normally be a document setting out why the advice or recommendation had been given. I have not seen such documents in this case and Mr P says he was not supplied with any such documents.

Having said that, I am persuaded, as discussed, that Mr H gave Mr P advice that he should switch his pension and make the investments. And, given the documentation I have discussed, I am persuaded that he held himself out as an adviser of PSL when he did so. I have not seen any evidence that Mr H was representing another business.

However PSL says it does not accept responsibility for Mr H's/HNIS's actions here because the SIPP provider was not a business that HNIS was permitted to recommend under its representative agreement with PSL. Any actions HNIS took in respect of that would fall outside its agreement. It also says that Harlequin was similarly not permitted under its agreement. It has said that it cannot trace any commission payment made to it in respect of the SIPP and has no record of Mr P. It says that the SIPP application was made without its knowledge and Mr H acted outside of his contract with PSL.

what did PSL authorise Mr H to do?

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

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

The law recognises different forms of agency.

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

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

actual authority

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

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

'Contracts' is defined as:

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

And 'Institution' is defined as:

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

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

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

Paragraph 2.4:

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

Paragraph 3.1:

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

Paragraph 4.3:

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

Paragraph 10.1:

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

Paragraph 10.4:

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

Paragraph 10.7:

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

Paragraph 14.:

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

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

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

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

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

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

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

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

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

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

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

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

that, suitable investment advice from PSL (given through its registered individual) might, depending on the circumstances discovered, be:

1. Invest money that is not currently invested in a new plan approved by PSL.
2. Sell an existing investment and buy a new plan approved by PSL because it is in the client's best interest to sell and to buy.
3. Do not sell an existing investment to buy a new plan approved by PSL because it is not in the client's interest to sell and to buy.
4. Do not buy a particular approved PSL investment the client is interested in because it is not suitable for the client (because it is too high risk or not currently affordable for example) and so not in the client's best interest to buy.

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

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

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

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

In saying all that, I do not say that the appointment of the registered individual is unconditional. I only say at this point that the authority goes wider than *only* introducing applications for new approved contracts. In my view the registered individual's authority does include giving advice on the merits of selling existing investments in some circumstances.

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

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

An agent is required to act in the interests of the principal. This principle is reflected in, for example, paragraphs 4.3 and 10.7 of the agency agreement quoted above. It seems the agent is likely to have breached those terms in this case.

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

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

apparent authority

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

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

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

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

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

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

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

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

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

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

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

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

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

must the third party rely on the representation?

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

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

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

respect as the agent of [the alleged principal] with authority from [the alleged principal] so to act'."

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

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

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

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

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

Having considered the law in this area, including Lord Keith's comments in *Armagas*, so far as representations are concerned I need to decide whether PSL placed Mr H in a position which would objectively generally be regarded as carrying its authority to enter into transactions such as the pension switch and investments in Harlequin. Put another way, did PSL knowingly – or even unwittingly – lead Mr P to believe that Mr H was authorised to conduct business on its behalf of a type (namely, carrying out the pension switch and arranging the investments) that he was not in fact authorised to conduct?

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

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

Mr P has explained that Mr H was introduced to him by another financial adviser a few years before the advice in question was given. He says he was introduced to him as an adviser representing PSL.

As I have discussed I am persuaded that Mr H did give advice to switch Mr P's pension and provide investment advice on behalf of PSL before the events complained about in 2009/2010.

It is not clear that Mr P received a terms of business agreement in respect of the disputed advice. Nevertheless it is my view that in principle an agent of PSL was authorised to:

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

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

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

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

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

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

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

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

did Mr P rely on PSL's representation?

Mr P has said clearly that he understood Mr H to be acting as a PSL adviser when he gave the advice about the pension switch and Harlequin investments. As discussed, in my view it is highly likely that Mr H did represent to Mr P that he was giving advice and providing his services as an adviser of PSL. I have not seen any evidence that would indicate he was representing any other party or entity.

This seems to be a straightforward matter of a client dealing with their existing PSL adviser because he was a PSL adviser.

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

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

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

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

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

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

vicarious liability

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

what is vicarious liability?

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

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

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

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

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

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

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

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

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

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

the 'stage one test'

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

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

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

- At the time, PSL's stated purpose was "*To help our clients, Understand, Protect and Increase their Assets*" (Terms of Business). I consider that the provision of, and subsequent implementation of, investment advice is an integral part of fulfilling that purpose.

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

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

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

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

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

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

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

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

the 'stage two test'

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

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

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

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

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

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

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

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

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

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

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

- Mr Warren was only able to submit the mortgage applications in the way he did because he was an agent of PSL. But the claimants in *Frederick* did not say they had "*suffer[ed] any loss*

> *through the actual re-mortgaging or their receipt of monies from [the lender]*". Instead, they suffered losses only when they handed the money over to Mr Warren (or to the company of which Mr Warren and Mr Qureshi were directors). In contrast, Mr P says he suffered losses as a direct result of the advice given to him by Mr H, in his capacity as a PSL financial adviser, to switch his pension and invest in Harlequin.

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

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

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

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

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

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

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

statutory responsibility under section 150 of FSMA

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

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

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

- PSL represented to Mr P that Mr H had PSL's authority both to advise on the pension switch and the investments in Harlequin.

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

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

I am therefore satisfied that PSL is responsible for the acts Mr P complains about. Even if I am wrong about one or two of the above three conclusions, I still consider that the third means that Mr P's complaint about PSL falls within my jurisdiction.

my provisional findings on merits

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

Mr P owned a hotel and restaurant business when the switch took place. He has confirmed that for the last five years he has earned around £10,000 a year. He has confirmed that he does not have any other investments.

So Mr P didn't have any investments of an 'aggressive' or high risk nature. In fact it seems he had no experience of risk based investments at all.

The Harlequin investments were 'off plan' unregulated speculative overseas property investments. They were likely Unregulated Collective Investment Schemes (UCIS). They were high risk and the investor faced the real possibility of losing all their money. Because they were unregulated Mr P did not benefit from the protection afforded by the Financial Services Compensation Scheme.

Mr P's circumstances do not indicate that he was prepared to lose, or could afford to lose, all his money in his pension scheme. They also do not indicate that he was suited to the risks these investments presented.

Mr P's investment experience was very limited and does not suggest that he was an experienced investor who could appreciate all the risks of what he was doing or would not be reliant on PSL to give him suitable advice and consider his best interests. I have not seen that PSL gave Mr P's any material guidance about the risks of the Harlequin investments, such as I have discussed.

My understanding is that the value of Mr P's pension funds was about £100,000**.** The material issue is that the majority of that money was designated for investing in Harlequin. That put most of his pension savings at risk of total loss (which is what is likely to have happened).

As discussed Mr H knew that Mr P was intending to invest his pension funds in Harlequin overseas property. He seemingly obtained very little detail about Mr P or his financial situation.

In my view Mr H and PSL did not meet their requirements under COBS 9 to take reasonable steps to ensure suitability or obtain enough information so as to advise Mr P appropriately. As previously discussed, that would include taking into account what investments the switch was facilitating. It could not in my view have assessed whether these investments and the overall arrangement of SIPP and investment was suitable for Mr P given the lack of information it had. It should not have agreed to carry out the arrangement of the SIPP in this situation.

If it had carried out appropriate fact finding and assessment of Mr P's situation and the Harlequin investments then it would have known these investments were not suitable for him. I have not seen that it was explained to Mr P that Harlequin was unregulated (and what that meant in terms of

regulatory protections), or explain all the risks of unregulated off plan overseas property investments and that Mr P could lose all his money. This was particularly important because Mr P was investing the majority of his pension benefits.

Clearly, the evidence indicates that Mr P's was not the more sophisticated and professional type of investor for which UCIS would be suitable; the risks of the investment are far higher than were suitable for him and they were of a nature that was not appropriate for him.

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

how to put things right

should PSL pay compensation?

I'm aware that a party involved with Harlequin Property had been charged with fraud offences. A court might therefore conclude that Mr P's loss didn't flow directly from PSL's unsuitable advice. And on this basis, a court might not require PSL to compensate Mr P – notwithstanding the clearly unsuitable advice.

But in assessing fair compensation, I'm not limited to the position a court might take.

It may be there has been a break in the "*chain of causation*". That might mean it wouldn't be fair to say that all of the losses suffered flowed from the unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice even if fraud later takes place. But the position is different where the consumer wouldn't have been in the investment in the first place without the unsuitable advice. In that situation, it may be fair to assess compensation on our usual basis – aiming to put the consumers in the position they would have been in if they'd been given suitable advice.

In this particular case, I conclude that it would be fair and reasonable to make an award, given the specific circumstances. This is notwithstanding arguments about a break in the "*chain of causation*" and the "*remoteness*" of the loss from the (poor) advice given. I am satisfied that Mr P would not have made the Harlequin property investments had it not been for the failings of PSL's appointed representative. If the adviser had given Mr P suitable advice, the Harlequin property investment would not have been made. And I consider that the advice given by the adviser completely disregarded Mr P's interests. As a direct result of PSL's representative's failure to give suitable advice, Mr P's invested the majority of his pension into a specialised, unregulated investment with a limited track record.

So I think that it's fair and reasonable to hold PSL responsible for the whole of the loss suffered by Mr P. I am not asking PSL to account for loss that goes *beyond* the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr P's right to compensation from PSL for the full amount of his loss.

calculating compensation

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

I think with suitable advice Mr P would have kept his existing pension. But it's unlikely to be possible for PSL to reinstate Mr P into his previous pension scheme.

There are also a number of possibilities and unknown factors in making an award. While I understand Harlequin will allow PSL to take over the investment from Mr P, the involvement of third parties – the

SIPP provider and Harlequin Property – means much of this is beyond this service or the business's control.

All the variables are unknown and each may have an impact on the extent of any award this service may make. The facts suggest it's unlikely that the property(ies) will be completed and unlikely that the contract and any future payments would be enforceable – but I can't be certain of that.

While it's complicated to put Mr P back in the position he would have been in if suitable advice had been given, I think it's fair that Mr P is compensated now. I don't think we should wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

In summary, PSL should:

6. Obtain the notional transfer value of Mr P's previous pension plan, as at date of my final decision, if it not been transferred to the SIPP.

7. Obtain the transfer value, as date of my final decision, of Mr P's SIPP, including any outstanding charges.

8. And then pay the amount of (1 – 2) into Mr P's SIPP so that the transfer value is increased by the amount calculated. This payment should take account of any available tax relief and the effect of charges.

In addition, PSL should:

9. Pay any future fees owed by Mr P to the SIPP, for the next five years.

10. Pay Mr P £300 for the trouble and upset caused.

I have set out each point in further detail below.

2. Obtain the notional transfer value of Mr P's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of my final decision.

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

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

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

6. *Obtain the transfer value as at the date of my final decision of Mr P's SIPP, including any outstanding charges.*

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

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

If it's not possible to pay the compensation into the SIPP, PSL should pay it as a cash sum to him. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr P's marginal rate of tax in retirement.

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

Had PSL given suitable advice I don't think there would be a SIPP. It's not fair that Mr P continues to pay the annual SIPP fees if it can't be closed.

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

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

In return for the compensation set out above, PSL may ask Mr P to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin property investment in that five year period, as well as any other payment he may receive from any party as a result of the investment.

That undertaking should allow for the effect of any tax and charges on the amount he may receive. PSL will need to meet any costs in drawing up this undertaking. If it asks Mr P to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, after five years, PSL wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Harlequin property investment, it must agree to pay any further future SIPP fees. If PSL fails to pay the SIPP fees, Mr P should then have the option of trying to cancel the Harlequin property contracts to enable the SIPP to be closed.

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

9. Pay Mr P £300 for the trouble and upset caused.

The compensation resulting from the loss assessment must where possible be paid to Mr P within 90 days of the date PSL receives notification of his acceptance of my final decision (should it remain the same as this provisional decision). Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes PSL to pay Mr P this compensation.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £150,000, plus any interest and/or costs/interest on costs that I consider appropriate. If I think that fair compensation is more than £150,000 limit, I may recommend that the business pays the balance.

Provisional Decision and award: I consider that fair compensation should be calculated as set out above. My provisional decision is that PSL should pay Mr P the amount produced by that calculation - up to a maximum of £150,000.

Provisional Recommendation: If the amount produced by the calculation of fair compensation exceeds 150,000, I recommend that PSL pays Mr P the balance.

This recommendation is not part of my determination or award. PSL doesn't have to do what I recommend. It's unlikely that Mr P can accept my decision and go to court to ask for the balance. Mr P may want to get independent legal advice before deciding whether to accepting my final decision – should my decision remain the same as the provisional decision.

my provisional decision

I believe this complaint would fall within my jurisdiction.

I also believe the complaint should be upheld and I intend to order that PSL calculate and pay compensation as detailed above.

David Bird
ombudsman