summary of complaint

Mr and Mrs M's complaint is that they were advised by an adviser with Positive Solutions Financial Solutions (Financial Services) Ltd to surrender existing investments to invest in two replacement high risk unsuitable investments with Stirling Mortimer. Those investments have since failed and Mr and Mrs M have lost the money they invested.

Mr and Mrs M also complain that they incurred encashment fees and tax charges when they surrendered existing investments to make the Stirling Mortimer investments and that the adviser did not warn them about that.

background to complaint

This complaint relates to events in 2008 and 2009. Put very briefly Mr and Mrs M say they were advised by an adviser I will call Mr C, when acting for Positive Solutions, to:

- make withdrawals from existing Skandia Bonds
- and invest in
    - a Stirling Mortimer Cape Verde fund
    - a bond with Prudential
    - a Stirling Mortimer Coratina fund.

Mr and Mrs M say they incurred withdrawal and tax charges on the withdrawals that Mr C did not tell them about. The Stirling Mortimer funds were qualified investor funds listed in the Chanel Islands – this meant they should only have been marketed to certain types of investors and not to all investors. Both funds invested in right to sell contacts, one in Cape Verde the other in Mexico.

The Stirling Mortimer funds later became illiquid and lost most or all of their value. Mr and Mrs M say they were unsuitable for them and should not have been recommended.

Positive Solutions say Mr C was not acting for it when he gave the advice and that it is not responsible.

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

Mrs M agreed with my provisional decision. Positive Solutions did not. It made a number of points, including:

- I should not issue a final decision in this case as Positive Solutions is challenging a similar decision in a different case. This case should be delayed until that judicial review challenge has been concluded.
- The points made in that other case apply to this complaint.
- The provisional decision makes errors of law and errors as to how the law applies to the facts.
- The ombudsman service ought to have declined to determine the complaint because it is required to come to correct conclusions on difficult questions of law in a developing area of law. These issues are central to the determination of the complaint. The ombudsman service should have left the matter to the Court to decide.
- Alternatively, if the ombudsman service does have jurisdiction it could not fairly determine this complaint without an oral hearing. This is because the central issue of reliance cannot be determined without taking such a course.
- The decision wrongly treats the case of *Cox* and the cases leading up to it as applicable to principal and agent.

- In *Cox* itself Lord Reed made it clear that was not so.
- And the courts have recently expressed that view in *Winter v Hockley Mint* [2019] 1 WLR 1617 (at paragraph 63) and *Anderson v Sense* (at paragraph 324).
- Even if Cox is applicable the only rational conclusion was that Mr C was acting on his own and separate to Positive Solutions
    - Commission in respect of the investment was not paid to Positive Solutions.
    - No records of the investment transaction were generated or supplied to Positive Solutions.
    - The investment transaction was unknown to Positive Solutions and there is no reason why it should have known about it.
    - Mr C had his own business called [name given].

my findings

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

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

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

should this decision be further delayed?

Positive Solutions 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 Positive Solutions argues that I have made the same mistakes of law as it alleges in the other 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.

Positive Solutions representations in response to my view were largely in the form of repeating representation made in another case without really addressing the specific factual details of Mr and Mrs M's complaint. Positive Solutions was however 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

Positive Solutions 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.

Although it has not specifically argued the point in this complaint, Positive Solutions says the question is not whether it gave Mr C authority to transact a general class of acts. The question is whether Positive Solutions gave Mr C authority in relation to this transaction.

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

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

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

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

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

Positive Solutions did not specifically mention the Stirling Mortimer investments in its representations, but that is not determinative. Neither is the point that Mr C did not have actual authority to give the advice he gave. Mr C had Positive Solutions' apparent authority to act on its behalf in advising Mr and Mrs M to surrender existing investments to reinvest in the Stirling Mortimer investments, because he had Positive Solutions' more general apparent authority to act on its behalf in giving them that kind of investment advice.

Positive Solutions representations as to the authority of Mr C:

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

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

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

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

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

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

reliance

Positive Solutions has not expressly disputed my finding on reliance. And my view is unchanged. This was a straightforward matter of clients dealing with their existing Positive Solutions adviser because he was a Positive Solutions adviser - the Positive Solutions adviser who had previously recommended the Skandia investments and was now recommending changes he justified in light of changing circumstances. There is no evidence to show that Mr and Mrs M knew or should have known that Mr C was acting in any capacity other than a Positive Solutions adviser. Mr and Mrs M proceeded on the basis that Mr C was acting in every respect as the agent of Positive Solutions with authority from Positive Solutions so to act.

just that Positive Solutions should bear the loss

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

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

vicarious liability

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

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

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

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

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

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

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

Positive Solutions 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 Positive Solutions is vicariously liable for the deceit of its agent. The complaint is - and the finding made against Positive Solutions for which it is liable is - that the advice was negligent and/or unsuitable and in breach of statutory duty.

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

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

I accept that Mr C gave some advice to Mr and Mrs M without Positive Solutions' knowledge or 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.

If Mr C'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, Positive Solutions would still be responsible for the acts complained of by reason of apparent authority and statutory responsibility.

statutory responsibility under section 150 FSMA

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

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

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

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

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

- So the relevant question under section 150 FSMA is which party's business (i.e. Positive Solutions' or Mr C'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 C and Positive Solutions:

- Positive Solutions had appointed Mr C as an agent.
- The FCA register suggests Mr C wasn't an approved person or appointed representative for any other firm at the relevant time.
- Positive Solutions had permission for the activities carried on by Mr C that needed permission.
- The agreement between Positive Solutions and Mr C set out a number of measures for Positive Solutions to control Mr C.
- Clause 2.4 of the agreement between Positive Solutions and Mr C 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 C caused Mr and Mrs M to believe he was representing Positive Solutions through his words and conduct as discussed in my provisional decision.

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

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

suitability for determination by an ombudsman

When Mr and Mrs M referred their complaint to the ombudsman service, our rules said (at DISP 3.3.4R):

"*The Ombudsman may dismiss a complaint without considering its merits if [she] considers that: …*

(10) it would be more suitable for the subject matter of the complaint to be dealt with by a court, arbitration or another complaints scheme."

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

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

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

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

oral hearing

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

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

Positive Solutions hasn't requested a hearing as such in this complaint but 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:

- Although Mr M has died this is a joint complaint and Mrs M was present at the advice meetings and made notes at them. However, the events complained of happened over ten years ago and memories inevitably fade. I'm satisfied I can reach a fair outcome using all the available evidence and I'm not persuaded hearing oral evidence would assist me.

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

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

merits

I've considered all the 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 my provisional decision.

In 2008 Mr and Mr M both had bonds with Skandia. They were recorded as having a medium or slightly lower than medium attitude to risk. Some if not all of the funds in the Skandia bonds were invested in a Cautious Managed Fund. All of the surrendered units were invested in that fund.

The Stirling Mortimer funds seem to have been recommended on the basis they were lower risk investments as they were not correlated to the stock market and had some contractual guarantees. The investments were not however low risk. They were higher risk specialist funds. They invested in one asset type in developing economies. They were in effect investing in properties that had not yet been built.

The funds were Channel Island Qualified Investor funds meaning they should only have been promoted to relevant experienced or expert investors. Mr and Mrs M were not such investors. The Stirling Mortimer funds were not suitable for Mr and Mrs M and should not have been recommended to them.

The money that was invested in Stirling Mortimer should instead have stayed in the Skandia bonds in the funds which seem consistent with Mr and Mrs M's attitude to risk. If that had happened Mr and Mrs M would not have suffered the withdrawal charges and tax charges incurred in respect of those charges.

As for the Prudential investment, this was recommended to replace, in part, an existing investment. The Skandia investment had not been held for long and should have been viewed as at least a medium term investment (just as the Prudential investment was). There needs to be a good reason to surrender units from the first investment in order to invest in the second because of the inevitable charges that would be involved. Mr C did not analyse those charges in his recommendation reports or warn about the charges that would be involved.

I remain of the view that the Prudential investment advice was suitable in the circumstances either. (Having said that it is possible that this advice may not have caused Mr and Mrs M loss if the Prudential investment performed sufficiently well compared to the Skandia investment to cover the additional expenses incurred.)

how to put things right

The purpose of redress is to try to put Mr and Mrs M's investment back into the position they would have been but for the unsuitable advice from Positive Solutions.

To compensate Mr and Mrs M fairly, Positive Solutions must:

- Compare the Mr and Mrs M's investments in the two Stirling Mortimer funds and the Prudential fund with Skandia Bonds in which those funds were originally invested and pay the difference between the *fair value* and the *actual value* of the investments. The comparison should be on the basis of the realisable values of the investments ie the amount that would be received on encashment after the deduction of all applicable charges. If the actual value is greater than the fair value no compensation is payable.

- Pay compensation equal to the tax charges incurred by Mr M in respect of the chargeable events of partial surrender if evidence can be provided to show the charges and when they were paid.

- Pay Mrs M £300 for the distress and inconvenience it the unsuitable advice has caused her. And pay £300 to the executors of Mr M's estate for the distress and inconvenience the unsuitable advice caused to Mr M.

- Pay interest as set out below.

- Provide details of its calculations to Mrs M and the executors of Mr M in a clear simple format.

Calculating the present value of the Skandia investments should have the effect of cancelling out the early encashment charges for the purposes of the calculation any loss.

I think it is unlikely that Mr and Mrs M's Stirling Mortimer investments have any value at the date of my decision. I therefore think it's fair for Positive Solutions to assume that the actual value of the Stirling Mortimer investments is zero. This is provided Mrs M and the executors of the estate of Mr M agree to Positive Solitons taking ownership of the investment if it wishes to.

If it is not possible for Positive Solutions to take ownership of Mr and Mrs M's Stirling Mortimer investments then, subject to the comments I make below about maximum awards, it may request an undertaking from Mrs M and the executors of Mr M that they repay to Positive Solutions any amount they may receive from the investments in the future. Positive Solutions will need to meet the costs of drawing up the undertaking.

Fair value (referred to above) is what the realisable value would have been at the date of this decision if the money had remained invested with Skandia. Any withdrawal, income or other payment out of the investment should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on.

If there are a large number of regular payments, to keep calculations simpler, Positive Solutions may total all those payments and deduct that figure at the end instead of deducting periodically.

If any of the investments, such as Mr M's Prudential investment, have been closed, the value(s) when closed and the date(s) of closure(s) will need to be used in the calculations instead of the present notional value. And if there is a loss so calculated, interest should be added to that loss from the time the investment was closed to the date of this decision. That interest shall be at the rate of 8% simple interest per year.

Simple interest at the rate of 8% per year is also to be added to the refund of the tax charges paid by Mr M from the time they were paid to the date of this decision.

And interest is to be paid on all of the fair redress due under this decision (including interest calculated to the date of this decision and the compensation for distress and inconvenience) at the rate of 8% simple interest per year from the date of this decision to the date of payment of the fair compensation if that fair compensation is not paid with 28 days of Positive Solutions being notified of the acceptance of this decision.

my final decision

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

determination and award: For the reasons given in my provisional decision and above I uphold Mr and Mrs M's complaint against Positive Solutions (Financial Services) Ltd. I consider that fair compensation should be calculated as set out above. My decision is that Positive Solutions (Financial Services) Ltd should pay Mr and Mrs M the amount produced by that calculation – up to a maximum of £150,000 (including distress and/or inconvenience) plus any interest as set out above.

If Positive Solutions (Financial Services) Ltd dos not pay the full fair compensation, then any investment currently illiquid should be retained by/for Mr and Mrs M. This is until any future benefit that they may receive from the investment together with the compensation paid by Positive Solutions (Financial Services) Ltd (excluding any interest) equates to the full fair compensation as set out above.

Positive Solution (Financial Services) Ltd may request an undertaking from or on behalf of Mr and Mrs M that once the full fair compensation has been received by/for them, they will transfer (to the extent possible) the benefit of the investment to Positive Solutions(Financial Services) Ltd and will pay any amount Mr and Mrs M may receive from the investment thereafter

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Positive Solutions (Financial Services) Ltd pays Mr and Mrs M the balance plus interest on the balance as set out above.

This recommendation is not part of my determination or award. It does not bind Positive Solutions (Financial Services) Ltd. It is unlikely that Mrs M and the executors of Mr M can accept my decision and go to court for the balance. Mrs M and the executors of Mrs M may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M and the executors of the estate of Mr M to accept or reject my decision before 3 April 2020.

Philip Roberts
ombudsman

anonymised version of provisional decision

The rules about complaining to the ombudsman set out when we can – and can't – look into complaints. Unfortunately the application of those rules in relation to complaints made against certain types of advisers who represent financial firms is not straightforward. There have been a number of court cases dealing with some of the issues recently and we are now in a position to set out what all this means for Mr and Mrs M's complaint.

Uncertainty about these matters has led to very considerable delay in this complaint and I am very sorry that we have not been able to deal with things more quickly.

I've now considered the relevant information about Mr and Mrs M's complaint. Based on what I've seen so far I think we can consider their complaint. I have also formed the provisional view that the complaint should be upheld.

I'll look at any more comments and evidence that I get by 15 December 2019. But unless the information changes my mind, my decision is likely to be along the following lines.

summary of complaint

Mr and Mrs M's complaint is that they were advised by an adviser with Positive Solutions Financial Solutions (Financial Solutions) Ltd to surrender existing investments to invest in two replacement high risk unsuitable investments with Stirling Mortimer. Those investments have since failed and Mr and Mrs M have lost the money they invested.

Mr and Mrs M also complain that they incurred encashment fees and tax charges when they surrendered existing investments to make the Stirling Mortimer investments and that the adviser did not warn them about that.

background to complaint

This complaint relates to events in 2008 and 2009. Put very briefly Mr and Mrs M say they were advised by an adviser I will call Mr C, when acting for Positive Solutions, to

- make withdrawals from existing Skandia Bonds
- and invest in
    - a Stirling Mortimer Cape Verde fund
    - a bond with Prudential
    - a Stirling Mortimer Coratina fund.

Mr and Mrs M say they incurred withdrawal and tax charges on the withdrawals that Mr C did not tell them about. The Stirling Mortimer funds were qualified investor funds listed in the Chanel Islands – this meant they should only have been marketed to certain types of investors and not to all investors. Both funds invested in right to sell contacts, one in Cape Verde the other in Mexico.

The Stirling Mortimer funds later became illiquid and lost most or all of their value. Mr and Mrs M say they were unsuitable for them and should not have been recommended.

Positive Solutions say Mr C was not acting for it when he gave the advice and that it is not responsible.

This complaint has been considered by an adjudicator and by one of my fellow ombudsmen.

The adjudicator thought that the Mr C was not acting for Positive Solutions but was acting for Capital Consultancy Network when he recommended the two Stirling Mortimer investments. He also thought it was likely Mr C was acting for a separate business when he recommended that Mr and Mrs M surrender existing investments. He therefore thought we could not consider the complaint against Positive Solutions.

Mr and Mrs M and their representative disagreed. They said it's clear Mr C advised them to make partial surrenders from their Skandia Bond and invest in the Prudential Bond and the other investments in Stirling Mortimer were all part of the same transactions. They were not aware of the separate business and thought Mr C was acting for Positive Solutions throughout. And in any event that other business was not a separate entity – it is just Mr C. They say they did not receive a suitability letter for the Stirling Mortimer investments. They only received information memoranda relating to the investments.

Mr and Mrs M's representative also made the point that he was aware that Positive Solutions had settled almost identical complaints about almost identical advice by Mr C to other clients. And he said that Positive Solutions was the registered agent for the two investments that were encashed to invest in Stirling Mortimer.

One of my fellow ombudsmen considered the complaint and he analysed the case on the basis Mr C was an appointed representative of Positive Solutions. And he said we could consider part of the complaint – the advice to surrender and invest the Cape Verde investment in 2008. And the advice to withdraw £40,000 from the Skandia bond in 2009. But he did not think there was enough evidence to show that Positive Solutions was responsible for the further £20,000 withdrawal and investment in Coratina in 2009.

Neither Positive Solutions or Mr and Mrs M agreed.

Positive Solutions pointed out that Mr C was its agent not an appointed representative. And so the law relating to appointed representatives is not applicable. It said Mr C had acted in breach of his agency agreement in several respects meaning he was acting beyond the scope of the authority he had from Positive Solutions. This meant he was not acting for it and Mr and Mrs M were not its client.

Mr and Mrs M were pleased that the ombudsman had come to a different view to the adjudicator. On the final point they argued that the notes of the various meetings made by Mrs M do show that all the advice was all linked and that includes the advice to surrender from the Skandia bonds to invest in the Coratina fund.

Since then there has been a reorganisation within the Financial Ombudsman Service and the role of the original ombudsman who considered this complaint has changed. This complaint has therefore been reallocated to me and I have considered it afresh.

The factual background:

The complaint relates to events in 2008 and 2009. By that time Mr and Mrs M were existing clients of Positive Solutions. Their adviser was Mr C who was a "registered individual" or self-employed agent of Positive Solutions.

Mr C was registered on the FSA register as CF22 Investment Adviser from 2005 to 2007 and CF30 Customer from 2007 to 2010.

In 2007 Mr and Mrs M set up two Skandia Bonds on the advice of Mr C. They invested £118,000 each. The investments were made through Positive Solutions and it was paid commission by Skandia. As I understand it there is no complaint about that advice.
Mr C, for Positive Solutions, was the servicing agent for the Skandia investments.

Mr and Mrs M had funds managed separately by their bank in cautious managed funds.

2007-2008, was the time of the financial crisis. The run on Northern Rock was in mid- September 2007. Lehman Brothers went bust a year later.

the 2008 advice

There was a further meeting between Mr and Mrs M and Mr C in October 2008. Mr and Mrs M say they were advised to surrender part of their Skandia bonds to invest in the Stirling Mortimer Cape Verde investment fund.

Mr and Mrs M say they incurred early encashment penalties and tax liabilities. They say Mr C did not warn them about either.

Positive Solutions has provided a copy of some of its records. A record for the 2008 advice says:

> *"Investment Review*
> *27/10/2008*
> *Investment Review Following the recent down turn in the world stock markets – the clients needed to review the current status of their investments. Some 70K is managed by [Mr and Mrs M's bank]. The clients are looking to invest in the short term for growth (to be passed to the next Generation) and are looking to make an investment over the next two to three years, they would also like some guarantees in light of the current market losses they would wish to have some protection. During my research I looked at a number of Structured products but most were geared to Stock market rises and were for too longer [sic] term. The Stirling Mortimer property fund offers the term, growth potential and guarantees coupled with low initial charges and running costs. It was agreed to invest on a joint basis £57,000 into the SM Property Fund No 7 Cape Verde II.*

This does seem to be a record showing Mr C purporting to act as a Positive Solutions adviser giving Mr and Mrs M advice to invest in the Stirling Mortimer Cape Verde fund as alleged by Mr and Mrs M. And this note is broadly consistent with the record Mrs M made which includes:

> *"Cape Verde. Overseas. Off W. coast of Africa for holiday properties.*
>
> *They have a "Right to purchase clause". You can negotiate reduction of 15 %.*
> *"Off Plan".*
>
> *"Right to Sell" gives you 15 %. Underwritten by Royal Bank of Scotland! "Off Plan" you can negotiate discounts – once built – you can't.*
>
> *It's an ex Portuguese colony. Listed in Channel Islands Stock Exchange. It is a close ended invest comp is a fixed time – running for 2 yrs. Rt is Phase II – Phase I sold and made return of 47%. The phase has been extended to get finance in."*

Things do not however end here. There is a further note in Positive Solutions records. It says:

> *"Investment Review – reconsideration.*
> *08/11/2008*
> *Following feedback from PS Compliance dept. and further consideration the clients decided not to proceed with the Stirling mortimer [sic] application via PS and to retain the money for the time being until the markets had settled a little. It was agreed to review again in the new year around Easter time."*

Mrs M does not have any corresponding note for a meeting or update in November 2008.

Mr and Mrs M say they accepted Mr C's advice and withdrew funds from the Skandia investment and incurred withdrawal charges of £2,285 and Mr M incurred a higher rate tax charge of £3,668.72. They say Mr C did not warn them about these charges.

On 7 November 2008 Skandia wrote to Mr and Mrs M to confirm that they had each withdrawn £28,500 from their Skandia Bonds. That means the withdrawal request must have been made a few days before the note dated 8 November above. The withdrawal was made from the [name given] Cautious Managed Fund. Those letters from Skandia were copied to Positive Solutions.

Mr and Mrs M say they had no knowledge of the change recorded in the note of 8 November 2008. As far as they were concerned the application for the Cape Verde investment just proceeded as advised at the meeting in October and they assumed the business was placed through Positive Solutions.

The application was on 10 November 2011. The application was to invest £57,000 in the fund on a joint basis.

On the application form, after the part where Mr and Mrs M signed there is section for the details of the financial adviser to be entered. That part of the form was left blank.

The Cape Verde Fund was a qualified investor fund listed in the Channel Islands. It was set up to invest in right to purchase contracts in off plan property developments in Cape Verde. This involves buying the right to buy at completion a property at a fixed price which is usually at a discount to the expected value at completion.

Positive Solutions says the application for the Stirling Mortimer Cape Verde Investment was made through [name given]. This was a separate trading name used by Mr C which it says is separate to and nothing to do with Positive Solutions.

Positive Solutions says it did not authorise Mr C to advise on the Stirling Mortimer Cape Verde investment (Global Property Fund No 7 Cape Verde II). It says Mr C was not acting for it in relation to that investment. It says it is not responsible for any advice Mr C gave to invest in the Stirling Mortimer fund or for the losses suffered in relation to that investment.

Positive Solutions also says it has a pre-approval process in respect of surrenders and re-investment and it has no record of Mr C seeking approval for the advice to surrender part of the Skandia Bond to re-invest in Stirling Mortimer.

It also says it had no record of Mr C trading style or business of [name given] and that it was not a registered trading style of Positive Solutions.

the 2009 advice

In 2009 there was further advice. There were three transactions. Mr and Mr M surrendered more units in the Skandia Bond held in the Cautious Managed Fund. They each withdrew £30,000. So a total of £60,000 was withdrawn. And they both applied to withdraw £30,000 in one lump sum not in two withdrawals each that totalled £30,000.

Mr and Mrs M invested £20,000 each in investment Bonds with Prudential and a second Stirling Mortimer investment fund called Coratina. They invested £20,000 jointly in that fund. So there was a total of £60,000 invested.

These arrangements were discussed in early 2009. In February 2009 there was a meeting between Mr C and Mr and Mrs M. According to the record dated 24 February 2009 made by Mr C the Prudential investment was discussed. The following point is included in the note:

> *"The clients wished this investment to run alongside their Skandia Life portfolio and the Share/UT/Oiec portfolio run by [Mr and Mrs M's bank] both to remain unchanged as for the Risk profiles."*

Mrs M made handwritten notes of her meeting with Mr C. Her note of the meeting of 24 February 2009 included:

> *"…Skandia Life has lost 11% in a year. [Mr C] has been looking at a lot of companies…[Mr C] would like structured products. Skandia Life has none in their portfolio. Some will only let you invest till age 75 the Pru will let you go on to 79…*
>
> *Transfer fees – costs will be picked up by the Pru – [Mr C] will ensure.*
>
> *£20,000 from each fund moved into the Pru."*

Mrs M's notes dated 23 March 2009 include:

> *"More news on the Mexican front*
> *£30,000 out of each fund = £60,000 sitting in the bank*
> *[Mr C] has checked on the Prudential – fund is international…*
>
> *'Cortina' fund is quite encouraging – maybe*
>
> *[Mr C] wants us to put £40,000 with Pru*
> *+ joint = £20,000 Cortina for 2 years*
> *i.e. Mexico"*

On 24 March 2009 Skandia wrote to thank Mr and Mrs M for their "recent request to surrender £30,000…" So the surrender request was sent a few days before that - seemingly at around the time the meeting with Mr C on 24 February 2009.

And I have seen a copy of the application form signed by Mr M and it is dated 24 February 2009 on which he asks to withdraw £30,000.

On 31 March 2009 Mr C provided recommendation letters recording his recommendations to Mr and Mrs M that they each invest in Prudential investment bonds. It records that £20,000 each was to be invested. The letters do not mention the source of the money to be invested. The letter does not say that the recommendation was to invest money that was to be withdrawn from Skandia.

As I understand it Positive Solutions does not dispute that Mr C gave the Prudential investment bond advice as a Positive Solutions Partner.

On 23 March 2009 Mr and Mrs M applied to invest in the Stirling Mortimer Coratina Fund. On the application form, after the part where Mr and Mrs M signed, there section for the financial adviser was completed. The details given were Mr C and his firm's name was recorded as [Mr C's trading name]. I note that the email address given was Mr C's Positive Solutions email address.

I also note that it was not unusual for registered individuals of Positive Solutions to use trading names. I am aware of other cases where those trading names are registered as trading styles of Positive Solutions with the FSA. Mr C's trading name was not so registered or approved by Positive Solutions it says. I have no reason to doubt that but I have seen [Mr C's trading name] note paper from a different complaint on which it said
[Mr C's trading name] is a trading style of Positive Solutions. I also note that the address, email address and phone numbers were the same as Mr C's Positive Solutions address email address and phone numbers.

The Coratina Fund is a Qualified investor fund that intended to invest in Right To Purchase contacts in Mexico. This involved investing in the right to buy residential properties off plan and an early stage of construction with the option to buy when complete. The fund was listed in the Channel Islands.

complaints about one service or more

Mr and Mrs M had separate Skandia Bonds and made separate Prudential investments. They made two joint investments in the Stirling Mortimer funds. In my view the complaint is really about the advice they received together in relation to funds they regarded as their joint family assets.

I also think that the events of late 2008 and early 2009 blend together into the ongoing service of servicing the Skandia Bonds investment and providing ongoing reviews and financial advice.

Mr and Mrs M made one single complaint about the combined events of late 2008 and early 2009 and in my view this is appropriate and reflects the way all parties assess the nature of this dispute.

my provisional findings - jurisdiction

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

the basis for deciding jurisdiction:

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

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

the compulsory jurisdiction

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

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

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

1. Were the acts about which Mr and Mrs M complain done in the carrying on of a regulated activity?

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

the regulatory background

I have taken into account the 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, Positive Solutions was an 'authorised person' (also referred to as a 'firm' in regulator's rules). That means it could carry out regulated activities without being in breach of the general prohibition.

Mr C was neither an authorised person nor exempt from authorisation. [Mr C's trading name] not a separate legal entity – it was just a trading name he used. That means that if Mr C 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."*

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

Positive Solutions arranged for Mr C to be was registered on the FSA register as CF22 Investment Adviser (trainee) from 2005 to 2007 and CF30 Customer from 2007 to 2010.

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

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 and Mrs M complain 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 and Mrs M were private persons under section 150(1) of FSMA and private customers under COB 5.3.5R. Broadly, those terms covered all natural persons – subject to some exceptions. I am satisfied that no exceptions applied to Mr and Mrs M – they were not a firm, and they were not carrying out any regulated activities by way of business. They were simply ordinary consumers.

That means that if Mr and Mrs M suffered a loss as a result of a rule breached by Positive Solutions, they would have a right of action against Positive Solutions for breach of statutory duty. They would have no such right against Mr C, because he was not a 'firm'.

what is the complaint?

The complaint is that Mr and Mrs M were given unsuitable advice to surrender funds in their Skandia Bonds causing them expense and unsuitable advice to reinvest in two Stirling Mortimer funds.

were the acts Mr and Mrs M complain about done in the carrying on of a regulated activity?

I understand that Positive Solutions does not deny that a regulated activity took place. It objects to my consideration of this complaint because it says it was not responsible for any advice Mr and Mrs M received – not because it says they did not receive advice at all.

Advice to a person in their capacity as an investor on the merits of selling or buying a particular investment is a regulated activity under Article 53 RAO. So advice to sell units in the Skandia investment was regulated investment advice. And so was advice to invest in the Stirling Mortimer funds.

was Positive Solutions responsible for the acts Mr and Mrs M complain about?

In my view there is evidence to show that Mr C did give the 2008 advice as alleged. He advised Mr and Mrs M to surrender some or their Skandia investment because of concerns about performance and the economic situation generally. He recommended the invest some of their money in Stirling Mortimer instead.

He clearly did this as a Positive Solutions adviser since he recorded it on its system and Positive Solutions compliance department gave him feedback on the advice. In effect the compliance department told him that advice was not acceptable to Positive Solutions. It is not recorded why. It may be Positive Solutions did not have an agency agreement with Stirling Mortimer. Or perhaps because it did not think the investments were suitable.

What then happens is Mr C continued with the investment recommendation. The surrendered still went ahead – probably at the same time Mr C was being told by the compliance department not to do what he was doing. And the investment application went ahead. And yet Mr C made a note on Positive Solutions system to say Mr and Mrs M were not going to proceed.

It seems clear Mr C was trying to mislead Positive Solutions in the records he was keeping.

There is no evidence that Mr C told Mr and Mrs M that the advice he had given them on behalf of Positive Solutions had not been approved by Positive Solutions after all. There is no evidence that he explained that he would instead give that advice and arrange the investment in a separate capacity.

It is my view that the first 2008 advice was given by Mr C when he was holding himself out as a Positive Solutions adviser and that Mr and Mrs M understood he was acting on that basis.

The events of 2008 show that Mr C's record keeping was not reliable. It is my view that in 2009 Mr C did give the advice to surrender £60,000 from the Skandia bonds and the advice to invest £20,000 each in Prudential Bonds and £20,000 in Stirling Mortimer Coratina fund. Mr C did not record all that advice in Positive Solution records most likely because by then he knew it would not be approved by Positive Solutions.

Again Mr C was misleading Positive Solutions. And again there is no evidence to show (if it were the cases) that Mr C explained that part of his advice was given in one capacity (the investment in the Prudential) and part in another (the surrender advice and the investment in Stirling Mortimer, neither of which were approved by Positive Solutions).

It is my view that the 2009 advice was given by Mr C when he was holding himself out as a Positive Solutions adviser and that Mr and Mrs M understood he was acting on that basis.

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

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

what was the adviser authorised to do by Positive Solutions?

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

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

The law recognises different forms of agency.

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

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

actual authority

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

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

Contracts is defined as:

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

And Institution is defined as:

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

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

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

Paragraph 2.4:

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

Paragraph 3.1:

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

Paragraph 4.3:

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

Paragraph 10.1:

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

Paragraph 10.4:

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

Paragraph 10.7:

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

Paragraph 14.:

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

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

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

The Positive Solutions Compliance Manual recorded that Positive Solutions 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 C was appointed to advise on investments on behalf of Positive Solution and not just to introduce applications for new policies.

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

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

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

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

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

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

When Positive Solutions agrees to give investment advice (which it gives through its registered individuals) it cannot know at the outset what advice it will give. First Positive Solutions (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 Positive Solutions (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 Positive Solutions.
2. Sell an existing investment and buy a new plan approved by Positive Solutions 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 Positive Solutions because it is not in the client's interest to sell and to buy.
4. Do not buy a particular approved Positive Solutions 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 Positive Solutions (given through the registered individual) and, as I have said, Positive Solutions, 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 Positive Solutions has not approved.

If a Positive Solutions registered individual was *only* authorised by Positive Solutions 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 Positive Solutions 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 express or implied authority from all the processes set out in Positive Solutions own requirements on its registered individuals as result of the FSA conduct of business rules it is subject to.

In saying all that, I do not say that the appointment of the registered individual is unconditional. I only say at this point that the authority goes wider than *only* introducing applications for new approved contracts. 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 Positive Solutions authority to Mr C 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 some of the provisions of the agency agreement referred to above. It seems the agent is likely to have breached those terms in this case.

Further, it is difficult to see that giving advice to invest in a fund after being told not to give that advice was acting in the interests of the principal, Positive Solutions.

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 apparent (or ostensible) authority to consider.

apparent authority

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

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

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

> *representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority...*"

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

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

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

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

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

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

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

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

> *in the "status disclosure" which contains any representation that MFSS or its financial advisers could operate or advise in connection with a deposit scheme that MFSS was running.*"

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

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

must the third party rely on the representation?

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

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

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

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

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

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

- Positive Solutions made a representation to Mr and Mrs M that Mr C had Positive Solutions' authority to act on its behalf in carrying out the activities he now complains about, and
- Mr and Mrs M relied on that representation in entering into the transactions they now complain about.

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

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

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

In this case Mr C advised Mr and Mrs M on the merits of selling units in their existing investments. Mr C also advised on investing in new investments with Prudential and Stirling Mortimer.

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

Mr and Mrs M have said they understood Mr C to be acting as Positive Solutions adviser when he gave that advice. I accept that is the case.

did Positive Solutions represent to Mr and Mrs M that Mr C had the relevant authority?

Mr and Mrs M had an existing client/adviser relationship by the time of the 2008 and 2009 advice.

As I understand it, it's not in dispute that Mr C did give investment advice on behalf of Positive Solutions before the events complained about in 2008 and 2009.

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

- advise on the setting up of investment such as the Stirling Mortimer investments
- advise on the surrender of existing investment in order to make such new investments.

These activities were provided for in Positive Solutions 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 would not have been visible to Mr and Mrs M. So for example he would not know that an adviser should only recommend approved investments, should obtain clearance from Positive Solutions before giving certain types of advice and should present the advice in certain ways.

Positive Solutions placed Mr C in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr and Mrs M complain about.

Positive Solutions authorised Mr C to give investment advice on its behalf.

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

Positive Solutions 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.

Positive Solutions provided Mr C with Positive business stationery and its computer systems for things like its "know your client" questionnaire/records.

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

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

did Mr and Mrs M rely on Positive Solutions representation?

Mr and Mrs M have said they understood Mr C to be acting as Positive Solutions adviser when he gave that advice.

It is my view that there is evidence that Mr C misled Positive Solutions. I see no reason why he would have been more open with Mr and Mrs M. I think it more likely he would have been similarly prepared to mislead them.

This seems to be a straightforward matter of a client dealing with their existing Positive Solutions adviser because he was a Positive Solutions adviser - the Positive Solutions adviser who had previously recommended the Skandia investments and was now recommending changes he justified in light of changing circumstances.

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

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

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

The courts have taken into account whether it is just to require a principal to bear a loss caused by the wrongdoing of his agent. I have considered whether it is just to hold Positive Solutions responsible for any detriment Mr and Mrs M has suffered as result of the advice they received from Mr C. I think there is evidence that he misled Positive Solutions and proceeded to do something he had been told not to do. Nevertheless I think it is just to hold Positive Solutions responsible for the consequences of its putting Mr C in the position where Mr and Mrs M could suffer loss as a result of his actions. In particular, I note:

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

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

vicarious liability

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

what is vicarious liability?

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

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

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

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

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

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

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

I am not aware of any case law concerning the exact set of circumstances that Mr and Mrs M complain 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 and Mrs M referred this matter to a court instead of to the ombudsman service, I consider that the court is likely to have chosen to apply the approach suggested by Lord Reed. I will therefore do the same.

the 'stage one test'

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

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

I am satisfied that in giving investment advice to Mr and Mrs M to surrender units in the Skandia investments to reinvest in alternative investments Mr C was carrying on activities as an integral part of the business activities carried on by Positive Solutions. I say that because:

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

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

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

- Mr C was a Positive Solutions Partners. Positive Solutions had given him permission to carry out the controlled functions "*Investment Adviser (Trainee)*", then "*Investment Adviser*" and "*CF 30 Customer"* on behalf of Positive Solutions. Positive Solutions had therefore engaged Mr C to carry out activities that were an integral part of its business.

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

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

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

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

the 'stage two test'

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

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

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

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

- If Positive Solutions is not vicariously liable here, then Mr and Mrs M's ability to obtain compensation would depend on whether the Positive Solutions Partner he dealt with was an employee of Positive Solutions. In *Cox*, the court suggested it would have been unreasonable and unfair for the claimant's ability to receive compensation for the injury she suffered while working in a prison kitchen to depend on whether the worker who injured her was an employee or a prisoner. I consider that argument has even more relevance here – at least Mrs Cox is likely to have either known or had the ability to find out who was an employee and who was a prisoner. But Mr and Mrs M had no way of knowing Mr C's employment status. (I am aware that Mr C'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 Positive Solutions will not be responsible if Mr C acts outside his authority. But the contract also says that *any* act or omission of the registered individual will be treated as an act of Positive Solutions. In my view, those two terms conflict. I do not consider it would be fair for Positive Solutions to be entitled to rely on one but ignore the other.

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

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

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

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

- Mr Warren submitted "*dishonest and fraudulent*" mortgage applications for loans on behalf of the claimants. Mr and Mrs M make no allegation of fraud. They only complain about the suitability of the advice for them. Their allegation is one of negligence and/or breach of statutory duty. They do not say as such that Mr C was dishonest – even if it has come to light that he seems to have acted in a way to mislead Positive Solutions. There is therefore no need for me to consider whether Positive Solutions would have been vicariously liable for any dishonest acts by Mr C.

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

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 C, Positive Solutions, and the specific acts Mr C complains about. The applicability of those tests to agency relationships is unclear, as is their applicability to some or all of the reliance-based torts, possibly including negligent mis-statement.

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

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

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

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

statutory responsibility under section 150 of FSMA

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

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

summary of my provisional findings on jurisdiction

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

- Positive Solutions represented to Mr and Mrs M that Mr C had Positive Solutions' authority both to advise on the surrender of units in the Skandia investment bonds and the re-investment in the Stirling Mortimer funds.

- In addition – or in the alternative – Positive Solutions is vicariously liable for the acts Mr and Mrs M complain about.

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

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

In 2008 Mr and Mr M both had bonds with Skandia. They were recorded as having a medium or slightly lower than medium attitude to risk. Some if not all of the fund in the Skandia bonds were invested in the Gartmore Cautious Managed Fund. All of the surrendered units were invested in that fund.

The Stirling Mortimer funds seem to have been recommended on the basis they were lower risk investments as they were not correlated to the stock market and had some contractual guarantees. The investments were not however low risk. They were higher risk specialist funds. They invested in one asset type in developing economies. They were in effect investing in properties that had not yet been built.

The funds were Channel Island qualified Investor funds meaning they should only have been promoted to relevant experienced or expert investors. Mr and Mrs M were not such investors

The Stirling Mortimer funds were not suitable for Mr and Mrs M and should not have been recommended to them.

The money that was invested in Stirling Mortimer should instead have stayed in the Skandia bonds in the funds which seem consistent with Mr and Mrs M's attitude to risk. If that had happened Mr and Mrs M would not have suffered the withdrawal charges and tax charges incurred in respect of those charges.

As for the Prudential investment, this was recommended to replace, in part, an existing investment. The Skandia investment had not been held for long and should have been viewed as at least a medium term investment (just as the Prudential investment was). There needs to be a good reason to surrender units from the first investment in order to invest in the second because of the inevitable charges that would be involved. Mr C did not analyse those charges in his recommendation reports or warn about the charges that would be involved.

I cannot presently see that the Prudential investment advice was suitable in the circumstances either. (Having said that it is possible that this advice may not have caused Mr and Mrs M loss if the Prudential investment perfumed sufficiently well compared to the Skandia investment to cover the additional expenses incurred.)

how to put things right

The purpose of redress is to try to put Mr and Mrs M's investment back into the position they would have been but for the unsuitable advice from Positive Solutions.

Positive Solutions should therefore find out from Skandia what Mr and Mr M's investments would now be worth if the 2008 and 2009 withdrawal and reinvestments had not been made. Calculating the present value would have the effect of cancelling out the early encashment charges for the purposes of the calculation any loss. If the Skandia and/or Prudential investment(s) have been closed, the value(s) when closed will need to be used in the calculations instead of the present notional value.

In addition to the tax charges incurred by Mr M in respect of the chargeable events of partial surrender should be added to the above if evidence can be provided to show the charges and when they were paid.

I also think that Mrs M has been caused considerable trouble and upset by the unsuitable advice she received and the losses she had suffered. I consider that Positive Solutions £300 in this respect.

The compensation should be paid within 28 days of Positive Solutions being notified of acceptance of my final decision. If it is not interest at 8% simple interest per year is to be paid on the compensation.

my provisional decision

For the reasons given above, my provisional decision is that we can consider this complaint, the complaint should be upheld and Positive solutions should pay fair compensation as set out above.

Philip Roberts
ombudsman