summary of complaint

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

background to complaint

This complaint relates to events in 2010. The allegation is that Mr P was advised by an adviser I will call Mr H on behalf of Positive Solutions.

Mr P says Mr H was acting for Positive Solutions and it's responsible for the advice Mr H gave. Mr P says that was advice to transfer two of his existing pensions to a new SIPP in order to invest in a Harlequin Property investment. Positive Solutions says Mr H was not acting for it and it's not responsible.

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

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

- It considers my provisional conclusions on jurisdiction are wrong as a matter of law. And the conclusions I drew from the case law dealing with principals and agents are wrong.
- My provisional decision *"fundamentally misses"* that Mr H advised Mr P "*without Positive Solutions knowledge or authority, as he was operating on behalf of another company, Tailor Made, which had nothing to do with Positive Solutions. Further Positive Solutions gave no representation to Mr P in respect of either the pension transfer advice or the investment into Harlequin."*
- The provisional conclusion appears to wrongly ask whether Positive Solutions gave Mr H authority to transact a general class of acts and assuming that Positive Solutions did so, it has granted apparent authority. This is not the correct question. The correct question is whether there is ostensible authority in relation to this transaction. And in any event Positive Solutions had not given Mr H authority to advise on pension transfers of this type or the Harlequin investment.
- None of the alleged representations were relevant representations in the circumstances.
- As no relevant representations were made the issue of reliance is irrelevant.
- Mr P cannot credibly say he relied on Positive Solutions as there are no documents linking it to the advice – unlike previous occasions when he was advised by Positive Solutions.
- The evidence is that Mr P relied on Mr H because of his longstanding relationship with him. This is similar to the Anderson v Sense case where the claimants failed to prove reliance.
- Mr P has said he was aware at the time of signing that Tailor Made was listed as an agent. This was in the context of having received nothing on Positive Solutions headed note paper relating to the advice.

- In the circumstances it is unfair and irrational to concluded that Mr P understood that Positive Solutions was providing the advice and that he relied on this.
- A note from Mr H provided to Positive Solutions at the time Mr P first complained shows Mr H was not acting for Positive Solutions.
- It is not the case that there is a broad test of justice as a matter of law.
- The case of *Cox v Ministry of Justice* is not relevant to this complaint.
- It is clear Mr H was advising in the context of a recognisably independent business (Tailor Made).
- Mr H may have been giving investment advice and he may have filled in forms, but these were activities which Positive Solutions prohibited, and which were fraudulent.
- The analysis of the position, if Cox does not apply, is wrong. In a commercial agency case vicarious liability adds nothing to the concept of actual and apparent authority which are the governing principles.
- In any event the complaint the complaint is not suitable for determination by the Financial Ombudsman Service and is more appropriately dealt with by the court. It is impossible to make fair findings on the issue of reliance without cross examination and disclosure.
- Without prejudice to the above points, Positive Solutions does not agree Mr P was risk adverse or with the redress proposed in the provisional decision.

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

Having considered Positive Solutions' response to my provisional decision, I set out below some points by way of supplementing and explaining certain aspects of the provisional decision.

apparent authority

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

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

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

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

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

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

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

who was Mr H acting for?

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

In support of this point Positive Solutions provided a copy of a note from Mr H that was provided to it when Mr P first complained to Positive Solutions. Positive Solutions had previously referred to the points made by Mr H and I referred to them in my provisional decision.

Positive Solutions also says Mr P's admits he was aware Tailor Made was listed as agent and that it is irrational to conclude that Mr H was acting for Positive Solutions rather than Tailor Made given the absence of any letters or communications on Positive Solutions headed note paper.

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

While Mr H told Positive Solutions that he did not give advice, and only acted as an introducer for Tailor Made, there is no evidence that demonstrates this, little to support it and much that tends to contradict it. I discussed the evidence in my provisional decision and made the finding that - contrary to Mr H's version of events – Mr H did advise Mr P to transfer his pensions to a SIPP to invest in Harlequin.

As set out in my provisional decision there is evidence of many steps taken by Mr H apparently as an adviser of Positive Solutions.

There is no documentary evidence showing Mr H apparently acting on behalf of Tailor Made. The only reference to Tailor Made in the documents is on the Harlequin Property reservation form. It does show Tailor Made was an agent. It does not "clearly" show Mr H acted for Tailor Made. And the "Lazy Money" slides (which were personalised to Mr H) said that "you aim to purchase an Overseas Commercial property off-plan in the Caribbean using the unique discounts available to certain member of Positive Solutions". Harlequin is expressly referred to. Nothing is said about acting for Harlequin, or anyone else. There is no mention of Tailor Made.

Mr P does not say anywhere in his accounts or events or in any documents I have seen that he was aware that Tailor Made was an agent for Harlequin and that Mr H was acting for Tailor Made rather than Positive Solutions or in any other capacity.

Positive Solutions representations as to the authority of Mr H:

The points made by Positive Solutions are largely framed by its view that representations must be specific rather than general. I do not agree with that view. Other points are arguments based on conclusions I did not draw.

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

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

> *"Mr and Mrs Martin … have to establish a representation made by LAS, which was intended to be acted on and which was in fact acted on by them, that Mr Sherman was authorised by LAS to give them financial advice concerning a remortgage of The Brambles.*
>
> *In my judgment the business card which Mr Sherman proffered at the outset of the meeting on 9 May 1991 was the clearest representation that he was authorised by LAS to give such financial advice. It may well be the case that, as Mr Burrell submitted, the unqualified use of the expression "Financial Adviser" on the business card would not have led a reasonable person to believe that Mr Sherman was authorised to give financial advice on matters wholly unconnected with the sale of insurance, but that is nothing to the point. It plainly did represent, in my judgment, that Mr Sherman was authorised to give advice in relation to the sale of insurance, including advice concerning associated or ancillary transactions: in other words, to give "investment advice" in the sense in which that term is used in the 1986 Act… . In particular, it represented that Mr Sherman was authorised by LAS to advise on the package of transactions which, in the event, he recommended.*"

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

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

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

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

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

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

reliance

Positive Solutions says there was no representation so reliance is irrelevant. I disagree. It goes on to say that was no reliance. I also disagree for the reasons set out in my provisional decision.

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 that my comment should be read as relating to the carrying on the controlled function in this case, ie to the circumstances of this complaint and Mr P's losses from the advice he complains about not all possible losses in any possible circumstances.

fraud

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

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

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

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

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

vicarious liability

I remain satisfied that Positive Solutions is vicariously liable for the acts Mr P complains about, for the reasons I gave in my provisional decision – though on re-reading my

provisional decision I see a point I was trying to make was 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 P's ability to obtain compensation would depend on whether the Positive Solutions Partner he dealt with was an employee of Positive Solutions.*

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

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

Positive Solutions has referred to paragraph 15 of Lord Reed's judgment in *Cox*. It says "*Lord Reed specifically stated that nothing in his judgment applied to the law of principal and agent (paragraph 15). So properly understood, the law is that Cox is not relevant to the present circumstances*."

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

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

> *"15. Vicarious liability in tort is imposed upon a person in respect of the act or omission of another individual, because of his relationship with that individual, and the connection between that relationship and the act or omission in question. Leaving aside other areas of the law where vicarious liability can operate, such as partnership and agency (with which this judgment is not concerned), the relationship is classically one of employment, and the connection is that the employee committed the act or omission in the course of his employment: that is to say, within the field of activities assigned to him, as Lord Cullen put it in Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co 1925 SC 796 , 802, or, adapting the words of Diplock LJ in*

> *Ilkiw v Samuels [1963] 1 WLR 991 , 1004, in the course of his job, considered broadly. That aspect of vicarious liability is fully considered by Lord Toulson JSC in Mohamud v Wm Morrison Supermarkets plc [2016] AC 677.*
>
> *16. It has however long been recognised that a relationship can give rise to vicarious liability even in the absence of a contract of employment…"*

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

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

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

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

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

statutory responsibility under section 150 FSMA

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

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

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

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

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

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

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

> *"Although the overall relationship between a home collected credit provider (the principal firm) and a person providing the services…(the individual) will need to be taken into account, meeting the following criteria is likely to mean that the individual is carrying on the business of the principal firm (as its agent) and not his own, meaning that the individual does not require authorisation or to be exempt:*
>
> *(1) the principal firm appoints the individual as an agent;*
>
> *(2) the individual only works for one principal firm;*
>
> *(3) the principal firm has a permission from the FCA for every activity the individual is carrying on for which the principal firm would need permission if it was carrying on the activity itself;*
>
> *(4) the contract sets out effective measures for the principal firm to control the individual;…*

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

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

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

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

- I'm satisfied Mr H caused Mr P to believe he was representing Positive Solutions through his words and conduct such as the registration as the servicing adviser for the existing pensions, the application for the SIPP and the presentation slides – all refer to Positive Solutions.

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

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

suitability for determination by an ombudsman

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

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

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

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

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

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

oral hearing

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

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

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

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

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

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

merits

I have considered all the evidence and arguments in order to decided what is fair and reasonable in all the circumstances of the complaint.

I did not make the finding that Mr P was risk averse. I said that Mr P said he was relatively risk averse. I did make the finding that the Harlequin investment too high risk for Mr P and Positive Solutions has not really disputed that. In any event it remains my view for the reasons given in my provisional decision.

It also remains my view that with suitable advice Mr P would not have moved his pensions. The fact that he had an interest in doing something with his pension does not mean it is what he would have done with suitable advice. While each case is different many investors, when suitably advised, tend to take less investment risk as retirement approaches not more. And moving investments around inevitably involves costs which may not be easily recovered over a shorter term.

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

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

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

fair compensation

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

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

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

To compensate Mr P fairly, Positive Solutions must:

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

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

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

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

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure. Credit should not be given in the calculation for the value in the pension attributable to the third pension transferred into the SIPP later.
3. And then pay an amount into Mr P's SIPP so that the transfer values are increased by the amount calculated in (2). This payment should take account of any available tax relief and the effect of charges.

If it's unable to pay the total amount into Mr P's SIPP, Positive Solutions should pay the compensation as a cash sum to Mr P. But had it been possible to pay into the SIPP, it would have provided a taxable income. So the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

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

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

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

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

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

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

If, after five years, Positive Solutions wants to keep the SIPP open, and to maintain an undertaking for any future payments under the investment, it must agree to pay any further

future SIPP fees. If Positive Solutions fails to pay the SIPP fees, Mr P should then have the option of trying to cancel the investment to allow the SIPP to be closed.

5. Pay Mr P £500 for the trouble and upset caused.

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

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

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

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

my final decision

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

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 25 March 2020.

Philip Roberts
ombudsman

anonymised version of provisional decision

summary of complaint

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

background to complaint

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

Mr P says he had been dealing with Mr H from about 2001. Mr H had been with other firms before joining Positive Solutions in late 2004. Mr P had dealt with Mr H at Positive Solutions from 2005. (He also says Positive Solutions wrote to him when Mr H retired in 2012 to tell him the name of the new Positive Solutions adviser who would be looking after his financial needs.)

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

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

Mr H was a Partner of Positive Solutions – a registered individual who was an agent of Positive Solutions. He used the "trading style" [or trading name] which was approved by Positive Solutions and registered as trading style for Positive Solutions with the FSA between 2005 and 2012.

Mr P had dealings with Mr H acting as a Partner of Positive Solutions and there is no dispute about those earlier dealings. The dispute is about events in 2010. There were further dealings then. Mr P says Mr H was acting for Positive Solutions and it's responsible for the advice Mr H gave. Mr P says that was advice to transfer two of his existing pensions to a new SIPP in order to invest in a Harlequin Property investment. Positive Solutions says Mr H was not acting for it and it's not responsible.

Later in 2012 Mr P became the client of a different IFA firm. After that new IFA had been appointed Mr P transferred a further pension (with a transfer value of about £23,000) into the SIPP and paid a fee of £1,000 out of the SIPP to that IFA.

my provisional findings - jurisdiction

I've considered all the evidence and arguments in order to decide whether the Financial Ombudsman Service can consider Mr P'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 P complains done in the carrying on of a regulated activity?

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

the regulatory background

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

regulated activities

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

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

the general prohibition

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

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

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

the approved persons regime

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

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

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

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

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

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

breach of statutory duty

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

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

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

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

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

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

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

what is the complaint?

In March 2012 Mr P wrote to Positive Solutions. His letter included:

> *"For several years prior to 2012 I was a customer of your service and in particular was advised by [Mr H]…*
>
> *In 2010, I was advised by [Mr H] to transfer 2 deferred pensions from Scottish Life and Aviva into a SIPP that was primarily linked to the purchase of a Harlequin Dominican Republic property (Two Rivers). The SIPP trustees are Guardian…*
>
> *As a result of recent adverse media interest and serious investor concerns concerning the viability of this investment – linked to recent warning to IFA's from the FSA (concerning advice provided to clients in respect of this type of investment), I decided to re-appraise this worrying situation and look back at the reason why the investment advice I originally received now looks unfortunately so misplaced and non-transparent…*
>
> *…I feel that I have been let down and on reflection, believe that true due diligence could not have been carried out by those concerned, which in turn would have foreseen some of the fundamental problems now affecting this investment and could have contributed to a more unenthusiastic/realistic/pragmatic view of the Harlequin model…"*

In March 2013 solicitors acting for Mr P wrote to Positive Solutions. The letter included:

> *"Mr [P] has grave concerns regarding the advice provided to him by Mr [H] when he [was] with your company. The advice in question relates to his pension and subsequent investment in the Harlequin Property Fund. We consider this advice to be negligent and to have caused Mr P considerable losses."*

The letter also included:

> *"We are also writing to Tailormade SIPP Limited and Tailormade Investment Limited who we understand acted as agent in connection with the investment."*

A few months later Mr P changed lawyers and the new lawyers wrote to Positive Solutions in April 2013. Their letter included:

> *"Basis of Claim*
> *Our client was advised by you to transfer various pensions to a SIPP with Guardian…Your consultant was fully aware that our client was considering investing in Harlequin Property once the pension transfer was complete. Indeed, the whole process was driven toward that outcome. There is reference to the SIPP being invested into Caribbean property. The reference to monies being invested into "overseas property" relates to Harlequin.*

Suitability

1. *There is no assessment of the suitability of the Harlequin property for our client.*
2. *There is no assessment of the risks of the Harlequin investment.*
3. *If the advice were suitable (which we believe it is not), the fund is over exposed to this type of investment in any event.*
4. *The benefits of the ceding scheme have not been replaced."*

In July 2013 the solicitors submitted a complaint to the Financial Ombudsman Service. The complaint form includes a box for a summary of the complaint. The *words "Please see complaint letter"* were added in that box.

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

were the acts Mr P complains 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 P received – not because it says he did not receive advice at all. But I include this point, for completeness.

Mr P has described the pensions he transferred away from as deferred occupational pensions. The rights under the trusts of an occupational pension scheme were not at that time investments under FSMA 2000, though personal pensions were. However advising a consumer to transfer or switch their rights in a pension – whether an occupational pension or a personal pension – to a SIPP is a regulated activity since it involves the setting up of a personal pension (the SIPP) and the transferring of rights into it. And advice on investing funds within a SIPP is also a regulated activity.

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

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

- advise on the SIPP as it was not an approved product
- advise on Harlequin as it was not an approved product
- advise on the sale of existing pension investments as he was only authorised to introduce new applications for new approved investments.

Positive Solutions has also said:

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

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

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

Mr P has said:

> *"In early 2010 we had a visit from [Mr H] and due to the relationship that we had built up over the years had a very amicable conversation, where he informed us that he was considering leaving financial services to build his own English language teaching business. At that time (I believe due to funding set up costs) he wasn't sure when that would actually happen but regardless I would still be looked after by "Positive Solutions" when the time came.*
>
> *He then proceeded to discuss with me alternatives to my then existing "Positive Solutions" investments and to bring up the subject of Harlequin Property and the investment opportunities that were being made available. I listened to what was being said but initially showed considerable reluctance to what was being recommended. However [Mr H] persisted and told me that due to his personal investigations and attendance at various Harlequin seminars he had carried out his own assessment of the situation and was convinced that the Harlequin model was a means whereby a respectable return could be made by those who decided to invest.*
>
> *Over the next month I queried and raised many questions regarding the investment, (this is on record) but [Mr H] proceeded to become more insistent that the investment was genuine and a not to be missed opportunity. I was bombarded with emails and presented with literature advocating that the first in would benefit considerably from early involvement. I was then also told that by transferring pension monies into a SIPP, this in effect would pay initial deposits with subsequent payments being met by expected returns from the investments.*
>
> *[Mr H] was very good and only because he was answering the questions I was raising in a relatively articulate and knowledgeable manner along with the years of trust and loyalty my wife and self had built up with him I gave the go ahead to proceed with the transfer of pensions and subsequent investment via the arranged SIPP. He also confirmed to me as part of his presentation that many other clients of his (and I assume "Positive Solutions") had accepted his advice prior to me making my own decision.*
>
> *By the end of 2011 as the Harlequin problems started to become more apparent, [Mr H] became de-registered as an IFA and he left "Positive Solutions" to pursue his own language business concerns – funding set up costs had obviously been found…"*

Mr P has also said:

> *"Our IFA ([Mr H]) had given us no previous cause to doubt his knowledge and expertise in investment matters. By virtue of the fact that retirement was quickly creeping up on me, I believed that I had to try and supplement my eventual modest retirement income as best as possible. However, I had always been risk adverse in my financial dealings and in no way would I have considered such a risky investment as Harlequin had we not had considerable (possibly naïve) trust in our longstanding IFA (and the perceived sound advice that was always expected from him). He could not extol the virtues of Harlequin's business model enough and insisted that it was an opportunity not to miss. "*

Mr P has also provided a copy of a presentation by Mr H titled Retirement Planning - The Lazy Money Approach. One of the slides says:

> *"How does it work?*

You aim to purchase an Overseas Commercial Property off-plan in the Caribbean using the unique discounts available to certain members of Positive Solutions.

Use £45000 of your pension funds to provide a 30% deposit"

Another slide said:

Stage 2
Arrange to transfer your existing Personal Pensions to a SIPP that allows you to invest in Overseas commercial property. This will be through a specialist provider. There are not many but I will arrange this.

And the next slide said:

Stage 3
When the funds are transferred to the SIPP you will receive the contracts from Harlequin and you pay the 30% deposit from your pension fund - ie the full £45000…

Mr P has said he did not receive a terms of business agreement from Mr H on behalf of Positive Solutions in relation to the disputed advice. He has also said he had not heard of Overseas Property Angels when asked by our adjudicator. And he said the only time he heard of Tailor Made was when he saw the name on one of the forms he signed. The property reservation form was signed by Marcus James/Tailor Made and a Harlequin Representative… Mr P says he just thought Mr H had arranged the investment with them.

Looking at the arguments put forward, it is not disputed that:

1. A SIPP was set up for Mr P with Guardian in June 2010.
2. Mr P had pension arrangements with Scottish Life and with Aviva and those pensions were transferred to the SIPP in July 2010. The combined value transferred in was around £59,000.
3. A payment was made out of the SIPP in August 2010 of £54,000 in respect of an investment with Harlequin called Two Rivers in the Dominican Republic.

I will refer to each of these points in more detail below.

With regard to point numbered 1 above:

- The slides quoted above show Mr H recommended the use of a SIPP for the investment and that he would select or arrange a specialist SIPP provider.
- Mr P has provided notes (on un-headed note paper) which he has explained are questions from him to Mr H on which Mr H has inserted his replies to the questions asked. The document is headed "Harlequin Property Investments Comments and Questions". The documents begins as follows with Mr H's comments in capital letters:

"Comment
1. My existing deferred pensions would be transferred to a SIPP
Questions:
a. Are existing pension fund providers retained within the SIPP (i.e. Aviva & Scottish Life)?
NONE OF THE MAJOR INSURANCE COMPANIES ACCEPT OVERSEAS COMMERCIAL PROPERTY SO YOU HAVE TO TRANSFER TO A SPECIALIST SIPP PROVIDER. THERE ARE AROUND 10 OR SO WHO WILL DO THIS. I USE GUARDIAN

FROM BLACKBURN"

- Guardian explained to our adjudicator that the authorised IFA who established the SIPP was Mr H at Positive Solutions. And that it did not receive any instructions to pay out from the SIPP in respect of commission or fees when it was set up. So no fees were paid by it to Positive Solutions or anyone else.
- Guardian also provided a letter dated 10 June 2010 from Mr H on Positive Solutions note paper in which he sent the SIPP application form and supporting documents to Guardian.
- The SIPP application form was completed with the firm name Positive Solutions with Mr H as the contact. His Positive Solutions address and email address were given.
- There was also a box on the form headed "Introducer". [The] … the trading style registered for Positive Solutions used by Mr H was entered. Mr H was recorded as the contact and the words "as above" for his contact address.
- As part of the application process an "Identity Verification Certificate" was completed for Mr P. It was signed by Mr H giving his firm name as Positive Solutions and he quoted its FSA number. The form was also stamped by Mr H using a Positive Solutions stamp.
- On 4 August 2010 Guardian wrote to Mr P to thank him for his application received from his financial adviser Positive Solutions.

With regard to point numbered 2:

- It is clear from the slides referred to above that the strategy was to transfer Mr P's pensions to the SIPP.
- Mr P has provided a copy of a signed "transfer of servicing" request forms relating to the Scottish Life pension from April 2010. The form said Mr P wanted *"the responsibility for the future servicing of the …plans transferred to the following company: [Mr H] at Positive Solutions."* The form asked the product provider to notify Positive Solutions when the transfer had been completed and provide an up to date valuation report for its records.
- Mr P has provided a copy of an unsigned version of the same form relating to Aviva.
- The letter from Positive Solutions to Guardian enclosing the application form and other documents included information obtained from Scottish Life and Aviva.

With regard to point numbered 3:

- Mr P says whilst visiting him in early 2010 to discuss his financial position, Mr H *"Strongly advised me to consider investing in the Harlequin Property Fund via a SIPP that he could arrange."*
- The presentation contained in the slides referred to above are clear in encouraging Mr P to use his pensions to invest in Harlequin – and that the investment had the benefit of discounts available to "certain members of Positive Solutions".
- Mr P has provided copies of emails from Mr H from his Positive Solutions email address on which he discusses the Harlequin investment. He has also provided documents on which he asked various questions about the investment and, he says, answers were given by Mr H.
- These emails start in April 2010 when Mr H provided details of the Harlequin investment following an earlier meeting. There is an email from Mr H when he provided some last-minute information about tax in the Dominican Republic before he sent the Harlequin investment application. And there is an email in August confirming the funds have been transferred from the pension to Harlequin. These were all from

Mr H referring to himself as an IFA with Positive Solutions. There is no reference to Tailor Made or Overseas Property Angels in those emails.

- The SIPP application form included a box numbered 16 and headed "Intended Activity of SIPP and timeframe for investment (brief description)". The following words were written in that box: *"To purchase a property – overseas commercial in conjunction with Harlequin."*

It is my view that there is clear evidence to support Mr P's claim that Mr H advised him to transfer his existing pensions to a SIPP to invest in the Harlequin investment. This was all one matter that Mr H recommended and then arranged.

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

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

what was the adviser authorised to do by Positive Solutions?

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

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

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

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

actual authority

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

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

Contracts is defined as:

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

And Institution is defined as:

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

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

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

Paragraph 2.4:

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

Paragraph 3.1:

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

Paragraph 4.3:

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

Paragraph 10.1:

> This clause required the Registered 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.

The terms of business document that the agent is required to give to the client includes the following:

> *"what this document contains and what it means to you*
>
> *I am an IFA partner of Positive Solutions. What this means to my clients is that they have the dual benefits of local, knowledgeable advice, backed by one of the largest IFA organisations in the UK. This means I can tailor my advice and offer products and services in a more effective and efficient manner for all concerned. The common aim of all associated with Positive Solutions is to help clients understand, protect, and increase their assets. This document will outline the service I am able to offer you.*
> …
>
> *terms of business*
>
> *WE ARE BOUND BY THE RULES OF THE FSA…*
> *When we have arranged any contract or contracts for which you have given us instructions, we will not give you any further advice unless you request it, although we will be glad to advise you at any time of you ask us to do so…*
>
> *WE OFFER INDEPENDENT FINANCIAL ADVICE, though unlikely occasions can arise when we, or one of our other customers, will have some form of interest in the business which we are transacting for you. If this happens, or we become aware that our interest or those of one of our other customers conflict with your interest, we will inform you in writing and obtain your consent before we carry out your instructions….*
>
> *partnership code*
>
> *Partnership Code: positivesolutions purpose is "To help our clients, Understand, Protect and Increase their Assets".*
>
> *Because of our shared values, we call our IFAs partners, and this also refers to staff and directors. As a Private Client the service you can expect from me is summarised below.*
>
> *As a positivesolutions Partner I will:*
> *1. Give impartial, independent financial advice.*
> *2. Act on your behalf at all times, not on behalf of any other product or service provider. I am your adviser and must always put you first.*
> *3. Be honest and transparent in my dealings with you.*
> *4. Supply you with written Terms of Business before engaging in any advice for you.*
> *5. Provide for you, in writing, a report or letter explaining the reasons for my recommendations.*
> *6. Be qualified as an experienced financial planner, which means I have passed (as a minimum) the Chartered Insurance Institute's full Financial Planning Certificate examination..."*

The terms of business document included a "key facts about our investment and pension service" document. It included:

> *"1. The Financial Services Authority (FSA)*
> *The FSA is the independent watchdog that regulates financial services. It requires us to give you this document. Use this information to decide if our services are right for you.*
>
> *2. Whose products do we offer?*
> - *We offer products from the whole market.* [This option was ticked]
> - *We offer products from a limited number of companies.*

- *We only offer products from a single group of companies.*

3. Which service will we provide you with?

- *We will advise you and make a recommendation for you after we have assessed your needs.* [This option was ticked]
- *You will not receive advice or a recommendation from us. We ask some questions to narrow down the selection of products that we will provide details on. You will need to make your own choice about how to proceed.*
- *We will provide basic advice on a limited range of stakeholder products and in order to do this we ask some questions about your income, savings and other circumstances but we will not*
    - *conduct a full assessment of your needs;*
    - *offer advice on whether a non-stakeholder product may be more suitable.…*"

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

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

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

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

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

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

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

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

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

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
- 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 H did potentially include advice on the merits of selling existing investments and transferring out of occupational pensions 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:

- set up a SIPP (with a non-approved provider)
- and transfer pensions to it in order to invest in a non-approved investment
- where no commission or fee was passed on to Positive Solutions

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

There is also the point that Positive Solutions instructions to its agents via its Compliance Manual and Pension Handbook said that certain qualifications were required to give transfer pensions advice. Positive Solutions says Mr H did not have the required qualifications.

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

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

apparent authority

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

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

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

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

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

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

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

In *Martin v Britannia Life Ltd* [1999]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 P) if the third party relied on that representation.

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

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

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

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

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

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

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

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

I also need to decide whether Mr P relied on any representation Positive Solutions made. Having considered Parker J's comments in *Martin*, if Mr P proceeded throughout on the footing that in giving advice Mr H was acting in every respect as the agent of Positive

Solutions with authority from Positive Solutions so to act, then this suggests I should conclude that Mr P relied on Positive Solutions' representation.

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

Mr P and Mr H had a client/adviser relationship going back a number of years and predating Mr H's relationship with Positive Solutions. As I understand it Mr H recommended some or all of Mr P's investments and they met from time to time to review things. This is common practice notwithstanding the fact that Positive Solutions (like many other IFAs) make it clear they are not obliged to give ongoing advice.

As I understand it is not in dispute that Mr H did give investment advice on behalf of Positive Solutions before the events complained about in 2010.

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

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

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

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

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

Positive Solutions authorised Mr H to give investment advice on its behalf. Positive Solutions arranged for Mr H to appear on the FSA register in respect of Positive Solutions. And Mr H was approved to carry on the controlled function CF30 at the time of the disputed advice.

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 H with Positive Solutions business stationery and the transfer of servicing request form so Mr H could advise on the existing pensions.

It was in Positive Solutions' interest for the general public, including Mr P to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that

Positive Solutions intended Mr P to act on its representation that Mr H was its financial adviser.

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

did Mr P rely on Positive Solutions representation?

Mr P has said he understood Mr H to be acting as Positive Solutions adviser when he gave that advice. Mr H has said that he made it clear that he was not acting as a Positive Solutions adviser when he gave the advice. However Mr H's point is not supported by the evidence.

Mr H advised Mr P to set up a SIPP and to transfer existing pension rights to it. Mr H also advised on the merits of buying the Harlequin investment using those pension rights within the SIPP.

Mr P signed transfer of servicing request forms addressed to Scottish Life and Aviva authorising to transfer the servicing of those policies to Mr H at Positive Solutions at Positive Solutions head office address. Those firms were asked to notify Positive Solutions when that had been done. This information was on the form Mr P signed.

The "Lazy Money" presentation shows Mr H said he would arrange for a specialist SIPP.

The Guardian SIPP application was completed by or with Mr H who referred to himself as acting for Positive Solutions of the application. And the application was sent to Guardian, including the application to transfer the existing pensions, to Guardian by Mr H using Positive Solutions note paper.

The emails from Mr H show he recommended the Harlequin investment. And the "Lazy Money" presentation shows Mr H told Mr P the scheme included discounts available to Positive Solutions advisers.

It is the case Mr H did not give Mr P a Positive Solutions terms of business agreement when giving the advice. Or confirm the advice in a recommendation report making it clear the advice was from Positive Solutions. It is however my view that the absence of these documents does not clearly establish the capacity in which the advice was given.

There is the issue of Tailormade and the first solicitors saying Mr P intended to complain about them also. Mr P has however said the following to the adjudicator in this case (in an email dated 2 June 2014):

> *"With regard to "Positive Solutions" response to my original claim (via [the first solicitors]), I confirm the following: [Mr H] never explained anything about the involvement of "Tailormade" and a company called "Overseas Property Angels" - both of whom I had absolutely no knowledge of at that moment in time. As far as I was concerned PH's advice came under the "Positive Solutions" umbrella and I was given absolutely no indication that my understanding was wrong. "*

The adjudicator also noted the following from a phone conversation with Mr P the same day:

> *"He never heard of overseas property angel. The only time he heard of tailormade was that he saw the name on one of the forms. asked him whether he has any SIPP documents and he said know [sic]. Asked him who advised him on the SIPP and he said [Mr H] advised him on the SIPP."*

Later the adjudicator wrote on 8 August 2014:

> *"I note the Harlequin Property reservation form signed by [Mr P] identified the agency that would have received the commission for the Harlequin Property investment was tailor-made and not Positive Solutions."*

I have not however seen that reservation form and cannot currently find it in our records.

Mr P has recently said:

> *"With regards to Tailor Made, the only visible link to them was the original Harlequin Property Reservation Form which was signed by their agent Marcus James from Tailor Made and the Harlequin Representative [name given] – it is assumed [Mr H] had arranged this with them accordingly."*

I cannot see that there is evidence that Mr H represented the he was acting for himself or anyone other than Positive Solutions in relation to the investment in Harlequin. The involvement of third parties in transaction does not really establish that Mr H was acting for those third parties rather than acting independently of them for Positive Solutions in accordance with as Positive Solutions normal terms of business.

I cannot see that there is evidence that Mr P knew or should reasonably have known that Mr H was not acting for Positive Solutions – in accordance with its general representation that Mr H had its authority to act for it as it financial adviser - in every respect in relation to the setting up of the SIPP, the pension transfer and the investment in Harlequin.

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

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

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

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

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

vicarious liability

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

what is vicarious liability?

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

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

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

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

- Stage two is to ask whether the wrongdoing itself was sufficiently connected to the wrongdoer's duties on behalf of the principal for it to be just for the principal to be held liable (*Mohamud v 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* the Court of Appeal explicitly declined to decide whether the test in *Cox* applied to Positive Solutions' relationship with another of its registered individuals.

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

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

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

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

the 'stage one test'

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

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

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

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

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

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

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

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

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

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

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

the 'stage two test'

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

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

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

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

- If Positive Solutions is not vicariously liable here, then Mr P'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 P had no way of knowing Mr H's employment status. (I am aware that Mr H's agency contract said he had to make his status as a registered individual clear – but even if he had done that, the term 'Registered Individual' did not imply anything about his employment status.)

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

- Positive Solutions received no benefit from the acts Mr P complains about, and in particular it did not receive any commission. But as Lord Toulson explained in

Mohamud, vicarious liability can apply even where an employee has abused his position in a way that cannot possibly have been of benefit to his employer – such as carrying out a private fraud or assaulting a customer. In *Frederick*, 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 an adviser named Mr Warren. I have not seen the whole of Mr Warren's agency contract with Positive Solutions, but from the sections quoted in the judgment the terms in his contract appear to be identical to the terms in Mr H's contract.

However, the facts in *Frederick* are so different to the facts here that I do not consider that the same outcome is inevitable in this complaint. 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 P had personal dealings with Mr H, Positive Solutions' registered individual. He met with Mr H who provided him with advice. Mr H carried out business activities of a type that had been 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 P makes no allegation of fraud. He only complains about the suitability of the advice for him. His allegation is one of negligence and/or breach of statutory duty. He does not say Mr H was dishonest. There is therefore no need for me to consider whether Positive Solutions would have been vicariously liable for Mr H's dishonest acts.

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

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

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

Even if those specific tests are not applied, I still consider that it would be appropriate for a court to consider whether Positive Solutions is vicariously liable for the actions of Mr H. The earlier cases, including *Armagas* and the *Christian Brothers* case [2012] UKSC

56, make clear that justice is the court's overriding concern in such matters. Where the claimant and the defendant are both innocent parties, the court will consider whether the circumstances under which the wrongdoer committed his wrong were such as to make it just for the defendant to bear the loss.

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

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

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

statutory responsibility under section 150 of FSMA

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

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

summary of my provisional findings on jurisdiction

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

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

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

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

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

my provisional findings on merits

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

Mr P was advised to transfer his pensions to invest in a SIPP. That necessarily involves considering the suitability of the SIPP and the suitability of the known replacement investment.

Mr P has said he was relatively risk averse and that the Harlequin investment involved too much risk for him.

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

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

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

I agree with that view. The investment in Harlequin was relatively high risk and there is no evidence that the investment was suitable for Mr P. In my view investing in an unregulated off-plan property investment scheme overseas involved a high degree of risk which was not suitable for Mr P. He should not have been advised to transfer his pensions to a SIPP in order to invest in Harlequin.

There is no evidence to suggest Mr P would have transferred his pensions to invest in Harlequin if Positive Solutions had advised him that it was unsuitable for him to transfer his pensions to a SIPP and then invest those pension funds in Harlequin. It is therefore my present view that if he had been given suitable advice Mr P would have left his pensions as they were with the existing pension providers.

If Mr P had been given suitable advice by Positive Solutions he would not have suffered the losses he has suffered in his pension. Nor would he have incurred fees in relation to the SIPP. I say this notwithstanding the fact that Mr P transferred a third pension to the SIPP in 2012 after he first started to complain to Positive Solution in 2012 and started to draw benefits from the SIPP not long after that. By that time Mr P had the SIPP and the illiquid Harlequin investment so he was stuck where he was. The use of the then existing SIPP was not an indication that a SIPP would have been taken out in any event. Even with three pensions transferred into it, the SIPP had only received about £80,000 which is lower than the usual level of investment for a SIPP.

Nor would Mr P have suffered the considerable trouble and upset he has no doubt suffered as a result of suffering the significant damage his pension provision has suffered at around the time when he was starting to think about retiring and had no real prospect of making good large investment losses.

how to put things right

On the assumption that Mr P would not yet have taken benefits from his existing pensions if he had not transferred them and that they were defined contributions schemes, in my view Positive Solutions should put things right as follows:

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

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

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

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

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

If it's unable to pay the total amount into Mr P's SIPP, Positive Solutions should pay the compensation as a cash sum to Mr P. But had it been possible to pay into the SIPP, it would have provided a taxable income. So the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

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

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

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

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

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

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

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

5. Pay Mr P £500 for the trouble and upset caused.

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

If Mr P thinks my assumptions about not taking benefits or the type of pension scheme are not correct he should let the investigator know and provide details of what he says he would have done instead, when and why and provide any evidence he has in support and these points will be considered further.

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