complaint

Mr C complains a Miss S wrongly advised him to move his pension from an occupational scheme to a self-invested personal pension (SIPP) to invest £40,500 in Harlequin property. Miss S was a registered individual of Positive Solutions (Financial Services) Ltd so Mr C believes it's responsible.

background

Mr C says a friend and neighbour who'd invested in Harlequin suggested he did too and introduced him to someone who worked at an unregulated business. He says that person suggested he invest in Harlequin using a SIPP but told him he should get IFA advice if he was interested.

Mr C was put in touch with Miss S and the SIPP was set up. £67,876.80 was transferred into it from Mr C's previous pension – an occupational pension scheme – on 5 January 2010. And £40,500 was paid to Harlequin on 12 January 2010. Unfortunately the property was never built.

Mr C complained to Positive Solutions but Positive Solutions didn't uphold his complaint. He therefore came to this service.

I issued a provisional decision on 7 November 2019. A copy of that is attached and forms part of this decision. In summary, I said I was planning to decide Miss S did provide advice Positive Solutions is responsible for and the complaint should be upheld against it.

Mr C's representative said he agrees with my provisional decision. Positive Solutions doesn't. I've read and considered its response in full. In summary it said:

- My provisional conclusions on jurisdiction are wrong as a matter of law and some of my considerations aren't relevant.
- Miss S didn't give Mr C any advice.
- It had no knowledge of Miss S's actions and she acted without its authority.
- It didn't make any representations to Mr C that would have given Miss S apparent authority. The "*alleged representations*" I set out in my provisional decision didn't meet the necessary criteria.
- Because it didn't make any representations of authority, there isn't any need to consider its intention or whether Mr C relied on the representations. But Mr C didn't rely on the role of Positive Solutions in any event. He clearly only wanted an introduction to the SIPP operator.
- "*It is not the case that there is a broad test of "justice" as a matter of law*". But in any event, none of the points I've made to explain why I believe it's fair to hold Positive Solutions responsible are rational in the circumstances.
- In relation to my provisional finding that Positive Solutions is vicariously liable for Miss S's dealings with Mr C, the case of *Cox v Ministry of Justice* isn't relevant in the circumstances here. And even if it were, the second part of the test set out in that

case (that "*the commission of the wrongful act* [must be] *a risk created by the* [principal] *by assigning those activities to the individual in question*") wasn't met because Miss S's position with it wasn't analogous to that of an employee.

- In the circumstances here, section 150 the Financial Services and Markets Act 2000 (FSMA) doesn't give a route to liability.

- The issue of jurisdiction should be decided before the merits of the complaint are addressed.

- Mr C would still have made the investments even if Miss S had acted differently. He was committed to Harlequin and would have found a way to make the investments so would have incurred the same losses.

- My proposed compensation isn't appropriate.

- The complaint would be more appropriately dealt with by the court as "*it's impossible to make fair findings on the issue of reliance without cross examination and disclosure*".

my findings

I've reconsidered all the available evidence and arguments and I've considered the responses to my provisional decision. Having done so, I've reached the same conclusions as in my provisional decision:

- Miss S advised Mr C in relation to the SIPP and made arrangements in relation to the SIPP and the Harlequin investment. Mr C's complaint is therefore about acts or omissions in relation to regulated activities.

- Positive Solutions made representations to Mr C that Miss S had the necessary authority. And Mr C relied on those representations. Positive Solutions therefore gave her apparent authority.

- Positive Solutions is also vicariously liable for Miss S's actions here. Miss S was an "approved person" for it under the regulatory regime for the purpose of performing customer-facing functions as part of Positive Solutions' carrying on its regulated business. The permitted functions included advising on, and arranging, investments and setting up SIPPs for its customers as well as advising on pension transfers. She was performing those functions as an integral part of Positive Solutions' business activities and there was a sufficient connection for vicarious liability to arise.

- Section 150 FSMA is an alternative route by which Positive Solutions is responsible for the acts complained of.

- This service therefore has jurisdiction to consider Mr C's complaint against Positive Solutions.

- The advice Miss S gave Mr C wasn't suitable and amounted to a negligent misstatement.

- Had Miss S given suitable advice, Mr C wouldn't have transferred his pension and made the Harlequin investment in question here.

- Mr C suffered a loss as a result of transferring his pension and making the Harlequin investment, so the fair and reasonable outcome is for Positive Solutions to compensate him for that loss.

My reasons for reaching those conclusions remain as set out in my provisional findings of 7 November 2019 – which I've attached – supplemented by the additional points I've made below addressing Positive Solutions' response.

apparent or ostensible authority

Positive Solutions agreed with the two questions I'd asked here, namely:

- Did it represent to Mr C that Miss S had its authority to act on its behalf in terms of the activities he's complaining about?

- Did Mr C rely on that representation when he entered into the transactions he's now complaining about?

But it says I factored in irrelevant considerations when addressing those two questions. It referred to my statement that "*it would be enough if Positive Solutions had placed Miss S in a position which would objectively be viewed as carrying its authority*". It said:

> *This appears…to be asking whether Positive Solutions appeared to have given Miss S authority to transact a general class of acts. That is not the correct question. The question is whether there was apparent authority in relation to the transaction relevant to the Complaint.*

I've thought about this carefully. I agree the correct question is whether there was apparent authority in relation to the acts carried out here. But I'm still satisfied it's relevant whether Positive Solutions placed Miss S in a position which would objectively be viewed as carrying its authority to do the type of acts she did here.

There's nothing I've seen in the case law that says in order for apparent authority to exist, the principal has to have represented that an agent has its authority to carry out a specific act. Instead, I'm satisfied the case law supports giving weight to representations from a principal that an agent has its authority to carry out a more general class of acts when assessing whether apparent authority has been given.

For example, in the section of *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* [1964] 2 Q.B. 480 I quoted in my provisional decision, Diplock L.J. specifically said:

> *An "apparent" or "ostensible" authority, on the other hand, 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*** [my emphasis]…
>
> *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 the 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*** [my emphasis].

In the section of *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B.549 I quoted in my provisional decision, Lord Denning M.R. said:

> *Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with* ***ostensible authority to do all such things as fall within the usual scope of that office*** [my emphasis]*. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director*.

And in the section of *Armagas Ltd v Mundogas S.A.* [1986] A.C. 717 I quoted in my provisional decision, Lord Keith of Kinkel 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.*

I've carefully reconsidered what this all means in the circumstances of this case. Taking everything into account, I'm still satisfied that for the reasons set out in my provisional decision and below, Positive Solutions did represent to Mr C that Miss S had the necessary authority. It acted in a number of ways which together amounted to permitting Miss S to act in the conduct of its business with customers such as Mr C. Miss S gave Mr C pension transfer advice and made arrangements to transfer his pension and make an investment and when she did so, she claimed to act on behalf of Positive Solutions. Those activities were exactly the types of investment services that would be expected of Miss S, an IFA who had been assigned customer facing responsibilities. In all the circumstances, I believe Positive Solutions held her out to Mr C as having its authority to give the advice and make the arrangements that she did.

the alleged representations

Positive Solutions has raised a number of issues with my provisional finding that it represented to Mr C that Miss S had the necessary authority. Several factors contributed to that finding. I address below the issues Positive Solutions has raised about these:

- It says I've relied in part on the fact Miss S held herself out as representing Positive Solutions when in fact the representations need to have been made by Positive Solutions. I don't agree this is what I've done, and I'm satisfied the acts and statements I've relied on were made by Positive Solutions and amounted to a representation by it – in the form of holding out Miss S as having the necessary authority – when they are viewed in the round. I do think it's relevant that Miss S's own conduct was consistent with that representation (she also held herself out as acting on Positive Solutions' behalf). But this is because if she had told Mr C she was acting in some different capacity, he couldn't reasonably have relied on Positive Solutions' representation.

- It says the fact Miss S appeared on the Financial Services Authority (FSA) register doesn't amount to a representation by it. And it certainly doesn't amount to a representation to Mr C. If it did, it'd be liable for anything done by a person registered in connection with it. It drew a comparison with status disclosures, saying that status disclosures are required on stationery but in the case of *Anderson v Sense Network*, it was concluded these status disclosures can't be representations.

  I don't agree with this analysis of *Anderson v Sense Network* [2018] EWHC 2834 (Comm). I'm satisfied Jacobs J simply made a fact-specific finding in the circumstances of that case. In the section I quoted in my provisional decision, he said:

  > *In the present case, there is nothing in the "status disclosure" which contains any representation that MFSS* [the agent] *or its financial advisers could operate or advise in connection with a deposit scheme that MFSS was running.*

  Given running or advising on deposit schemes isn't what would be expected of an IFA, I don't find this conclusion surprising. I also note that in the case of *Martin v Britannia Life* [1999] EWHC 852 (Ch), Parker J said:

  > *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* [the principal] *to give such financial advice…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 particular, it represented that Mr Sherman was authorised by LAS to advise on the package of transactions which, in the event, he recommended.*

  I therefore don't think the comparison with status disclosures leads to the conclusion Positive Solutions has drawn, as I'm satisfied status disclosures in business stationery can be representations that create apparent authority.

  In this case, Positive Solutions applied for and obtained the FSA's published approval for Miss S to perform certain controlled functions for it. Those functions related to Positive Solutions carrying on its regulated business. The controlled functions were known as "Customer Function CF30" and they included advising its customers about pension transfers and investments and arranging their investment transactions. In my view, obtaining the FSA's approval for these arrangements contributed to Positive Solutions' holding out of Miss S to the world in general, including Mr C, that it authorised Miss S to undertake the types of advice and arrangements in issue here.

  I don't agree my conclusion here means Positive Solutions would be liable for anything Miss S did – only actions of a kind that would usually be within the authority of a person placed in Miss S's position would be covered. But this includes the types of advice and arrangements here.

- Positive Solutions says neither the fact Miss S was required to provide Positive Solutions' terms of business to her clients, nor the fact she was given a

Positive Solutions email address have any bearing on her authority here. I've thought about what Positive Solutions has said but I'm still satisfied both these things add to the overall picture of it representing to the outside world that Miss S had its authority to act as an IFA.

It also says the fact Miss S did the kind of things you'd expect of an IFA (allegedly giving pension transfer advice and making arrangements to transfer Mr C's pension and invest in Harlequin) isn't relevant to whether she had apparent authority for the specific acts complained about. But as I've set out, Positive Solutions was and is authorised to conduct pension transfers and I'm satisfied that it was within the usual authority of its IFAs to do the same. So by holding out Miss S to the outside world – including Mr C – as its IFA, it represented that she had that authority.

As I've set out above, I don't agree my conclusions here mean Positive Solutions would be liable for anything Miss S did – only for acts or omissions involving the kind of transactions it'd represented she had the authority to carry out.

- It says the fact Miss S used Positive Solutions' name and FSA details to set up the SIPP isn't relevant because to the extent it was a representation, it was a representation from Miss S to the SIPP operator – not from Positive Solutions to Mr C. As I set out in my provisional decision, Miss S filled in the forms using Positive Solutions' name and FSA details. Positive Solutions had put her in the position to do this and I don't agree that this is an irrelevant point. I also don't agree it was only a representation to the SIPP operator – Mr C saw all the SIPP paperwork.

- It's raised several issues about me relying on the payment of commission as a representation. One of these is that it says it received the commission after the alleged advice so it can't be the basis for apparent or ostensible authority. I've thought about this carefully and in the circumstances here, although I think Positive Solutions' acceptance of commission is consistent with Miss S having Positive Solutions' authority, I accept that because of the timing, it didn't amount to a representation that Mr C relied on when he entered into the transactions.

But even without giving weight to its acceptance of commission, for the reasons set out in my provisional decision and above, I'm satisfied Positive Solutions did represent to Mr C that Miss S had the relevant authority.

Mr C's reliance on the alleged representations

Positive Solutions has repeated its belief that Miss S simply introduced Mr C to the SIPP operator and didn't give him any pension transfer advice. It has reiterated that there was no formal advice process. And it says it's clear Miss S's position and her role with Positive Solutions weren't of importance to Mr C as he simply wanted to tick the box of getting an introduction to the SIPP operator.

For the reasons set out in my provisional decision, I don't agree Miss S simply introduced Mr C to the SIPP operator. I'm still satisfied it's most likely she gave him advice. Mr C had been told he'd need to get advice from an IFA in order to set up a SIPP to invest in Harlequin. And although it doesn't seem a formal advice process was followed, I don't think that would necessarily have rung any alarm bells for Mr C. I'm satisfied he thought he was getting regulated advice. And Miss S was only able to give regulated advice on Positive Solutions' behalf.

the fairness of holding Positive Solutions responsible

Positive Solutions says that in considering in my provisional decision whether it's fair to hold it responsible, I'd misdirected myself on the law. I don't agree. Under the heading "*did Positive Solutions give Miss S apparent or ostensible authority?*" I set out the relevant case law and applied that to the facts here – concluding that Positive Solutions had represented that Miss S had authority to carry out the acts complained about on its behalf and that Mr C reasonably relied on those representations. This means that it gave Miss S apparent or ostensible authority. When I considered whether it was fair to hold Positive Solutions responsible, that was under a separate heading after I'd already concluded apparent or ostensible authority had been given. I note that the courts also often consider whether a particular outcome they've reached is just and doing so can be helpful to the parties or others who are interested in the decision.

Positive Solutions also has issues with my finding on this point and the things I considered. As I explained in my provisional decision, it may be that none of my considerations on their own are determinative as to the justice of the case. But I'm still satisfied that applying the test for ostensible authority leads to an outcome that I think is fair.

vicarious liability

Positive Solutions says the test set out in *Cox v Ministry of Justice* [2016] UKSC 10 isn't the correct test here. I don't agree. As I set out in my provisional decision, Lord Reed in that case said:

> *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'm still satisfied – for the reasons I set out in my provisional decision – that Miss S's relationship with Positive Solutions and what happened here meets these criteria. It would seem to me to be a strange conclusion that despite this, Positive Solutions couldn't be vicariously liable simply because it had a principal and agent relationship with Miss S. This is particularly so as many employees are given authority, as agents, to carry out business on their employer's behalf. Indeed, *Bowstead & Reynolds on Agency* at 1-004 said:

> *As to status, an agent's status will usually be that of employee or independent contractor (but sometimes a gratuitous actor), and agency is not a separate category.*

And with that in mind, it doesn't seem the intention can have been that the test in *Cox v Ministry of Justice* doesn't apply whenever there's an agency relationship. I don't agree with Positive Solutions' interpretation of what was said in *Cox v Ministry of Justice*. It's referred to a specific section. I've quoted the whole paragraph and emphasised in bold the section referred to:

> *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 & Motor Co…or, adapting the words of Diplock LJ in Ilkiw v Samuels…in the course of his job, considered broadly. That aspect of vicarious liability is fully considered by Lord Toulson in the case of Mohamud.*

I also note that the next paragraph starts:

> *It has however long been recognised that a relationship can give rise to vicarious liability even in the absence of a contract of employment.*

Positive Solutions says:

> *Lord Reed specifically stated that nothing in his judgment applied to the law of principal and agent…So, properly understood, the law is that Cox is not relevant to the present circumstances.*

Reading the part Positive Solutions has referred to in the context of what else was said, I'm satisfied Lord Reed was simply saying:

- there are cases where "*the relationship is classically one of employment*" and vicarious liability applies – which the *Cox v Ministry of Justice* case considered; *and*

- there are cases "*such as partnership and agency*" where vicarious liability can apply – which the *Cox v Ministry of Justice* case didn't consider.

I'm not persuaded he was saying a principal can't be vicariously liable for an agent under *Cox v Ministry of Justice*, even though their relationship meets the criteria set out in that case and in *Mohamud* v *WM Morrison Supermarkets plc* [2016] UKSC 11.

I've already pointed out that agency is not necessarily a "status" in its own right. And I don't think the relationship between Positive Solutions and Miss S can be defined by its agency aspect. They had a specific legal relationship under FSMA and the FSA rules – that of an authorised firm and person approved to carry on customer-facing controlled functions (advising on and arranging investments) in relation to the firm's regulated business. That's a specific and very close relationship and one that is as consistent with being an employee as an agent or independent contractor.

In my provisional decision I recognised the two-stage *Cox v Ministry of Justice* and *Mohamud v VM Morrison Supermarkets plc* test doesn't apply where deceit was involved. I'm not aware of any case law that says it doesn't apply simply because there was a principal and agent relationship involved. And for the reasons I've explained, I wouldn't expect the courts to arrive at that conclusion.

Positive Solutions says that even if I had applied the correct test:

> *it is not accepted that the conditions of the test are met in any event…Nor would it be fair just and reasonable to impose vicarious liability in this case. Positive Solutions*

> *made clear to Miss S the scope of her authority and undertook reasonable monitoring of her activities.*

For the reasons set out in my provisional decision, I don't agree. I'm satisfied I applied the relevant test and that the conditions of that test were met.

statutory responsibility under section 150 FSMA

Positive Solutions says that:

> *in circumstances where Miss S was acting entirely outside the scope of her authority, and where there is no actual or apparent authority or vicarious liability, it is denied that s.150 FSMA provides the Complainant with a route to liability. In addition, of course, our position remains that Miss S did not provide any advice to the Complainant*

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 wouldn't 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 Miss S'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 Miss S and Positive Solutions:

  - Positive Solutions had appointed Miss S as an agent.
  - The FCA register suggests Miss S 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 Miss S that needed permission.
  - The agreement between Positive Solutions and Miss S set out a number of measures for Positive Solutions to control Miss S.
  - Clause 2.4 of the agreement between Positive Solutions and Miss S 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 Miss S told Mr C she was representing Positive Solutions as its agent.

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

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

merits

I note Positive Solutions' comments about the need to decide jurisdiction before considering the merits of the complaint. Like my provisional decision, this decision addresses both jurisdiction and merits issues. To confirm, I considered jurisdiction separately and only considered merits once I was satisfied the complaint was in this service's jurisdiction.

As I explained in my provisional decision, I don't feel it's appropriate in the circumstances here to restrict my decision to jurisdiction. In deciding this I've considered the age of the case; the fact that deciding jurisdiction here essentially involves deciding responsibility for the acts complained about; and the fact I'm satisfied there's enough evidence and arguments available to allow me to fairly and reasonably decide the merits of the complaint.

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I'm still satisfied for the reasons I set out in my provisional decision that the advice Miss S gave Mr C wasn't suitable and amounted to a negligent misstatement. And I'm still satisfied that if she had given Mr C suitable advice, he wouldn't have made the Harlequin investment in question here.

proposed compensation

Positive Solutions has raised a number of issues with my proposed compensation which I've addressed below:

- It says it requires evidence that Mr C lost the whole of the investment and received no returns from it. My conclusion that Mr C 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 C has received any returns or will receive a return. Nonetheless, my proposed compensation allows Positive Solutions to ask Mr C for an undertaking to give it the net amount of any payment he may receive from the Harlequin investment. So if I'm wrong to have valued the investment at zero, this will enable Positive Solutions to recover any remaining value.

The calculation Positive Solutions is required to carry out will consider any returns received from the investment historically so Mr C should confirm whether there were any if Positive Solutions asks him. In the circumstances I think it would be disproportionate to ask Mr C about any returns before making a final decision.

- It says the calculation of compensation shouldn't run from the date of the investment to the date of this decision because this penalises it for the length of time the complaint has been with this service. I agree the complaint has been with this service far longer than we'd have liked and I apologise for that. But Mr C's losses cover that whole period and I don't think he should be disadvantaged because of the length of the time the complaint has been with our service. In the circumstances, fair compensation should put Mr C back in the position he would have been in, but for the unsuitable advice Positive Solutions is responsible for. In my view, Positive Solutions should have upheld the complaint when it was first made and so I'm satisfied it's fair for it to be held responsible for Mr C's whole loss.

- It says an interest rate of 8% simple a year is unreasonably high and doesn't reflect market conditions. But I've only required interest to be paid if Positive Solutions doesn't pay the compensation within 90 days of being informed that Mr C has accepted my decision. If it pays the compensation within this timeframe it won't have to pay the interest. In these circumstances I'm satisfied it's fair for me to specify that interest will accrue at a rate of 8% simple a year.

- It says an award for the trouble and upset Mr C has been caused isn't appropriate in the circumstances here because "*Positive Solutions is also a victim of Miss S's activities*". But even if Positive Solutions didn't know Miss S had advised Mr C, for the reasons I've given, I'm satisfied it's responsible for her advice. And in these circumstances, I'm satisfied it's fair for it to compensate Mr C for the consequences of that advice – one of which is the trouble and upset he's been caused by it.

suitability for the ombudsman service

When this service received Mr C's complaint, the rule that covered grounds for dismissal (DISP 3.3.4R) said:

> *The Ombudsman may dismiss a complaint without considering its merits if he 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*

Positive Solutions says:

> *We suggest that the number, complexity and importance of the issues of law you have considered mean that (now the Provisional Decision has been issued) it can be clearly seen that the Complaint is more appropriately dealt with by the Court.*
>
> *Further, and separately, we suggest that it is impossible to make fair findings on the issue of reliance without cross examination and disclosure. These matters again suggest that the dispute should be referred to the Court.*

I've carefully considered what it's said but I don't agree. This service regularly considers complaints that involve deciding whether a business is responsible for the acts complained about. I accept that deciding this in this case involves complex issues and that it's a developing area of law. But I'm not persuaded this means the subject matter of the complaint is more suitable for a court.

I'm also satisfied a fair decision can be made without cross examination and disclosure. Miss S and Mr C have both given their clear recollections of what happened and there's nothing that makes me think relevant evidence hasn't been disclosed. In the circumstances here, I don't think the court's ability to cross examine and order disclosure would add anything.

Taking everything into account, I'm satisfied it isn't more suitable for this complaint to be handled by a court. I therefore haven't dismissed it.

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 but I'm aware it has on other similar complaints. I've therefore thought about this carefully and 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 more than 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 has set out its position clearly in writing.

- The Court of Appeal has adopted a very flexible approach to what's fair in this context (*Heather Moor & Edgecomb Ltd*).

fair compensation

I'm satisfied that a fair outcome would be for Positive Solutions to put Mr C, 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 pension 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 C 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.

the specified steps

Positive Solutions should:

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

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

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

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

- If payment into a pension isn't possible or has protection or allowance implications, it should be paid directly to Mr C as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. 25% of the loss would have been tax-free and 75% would have been taxed according to his likely income tax rate in retirement so the notional deduction should reflect this.

- Pay Mr C five years' worth of SIPP fees. Had Miss S given suitable advice I don't think there would be a SIPP. It's not fair that Mr C continue 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 C back into 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 all parties, I think it's fair that Positive Solutions pays Mr C 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 this, Positive Solutions may ask Mr C to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin investment in that five-year period, as well as any other payment he may receive from any party as a result of the investment. If Positive Solutions limits compensation to £150,000, the

undertaking will only apply to the extent any payment received is more than what was effectively written off by Positive Solutions limiting the compensation. That undertaking should allow for the effect of any tax and charges on the amount he may receive. Positive Solutions will need to meet any costs in drawing up this undertaking. If it asks Mr C 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 Harlequin investment, it must agree to pay any further future SIPP fees. If Positive Solutions fails to pay the SIPP fees, Mr C should then have the option of trying to cancel the Harlequin investment to allow the SIPP to be closed.

- Pay Mr C £300 compensation for the stress and worry he's suffered thinking he'd lost a significant proportion of his pension provision.

If everything had happened as it should have, I'm satisfied that in the circumstances here, Mr C would have lost the £1,000 he paid as a deposit for the Harlequin property in question here. Positive Solutions can therefore deduct £1,000 from the compensation it pays to Mr C.

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

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

Mr C'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 C 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 C'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.

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 above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 24 March 2020.

Laura Parker
ombudsman

COPY OF PROVISIONAL DECISION ISSUED ON 7 NOVEMBER 2019

complaint

Mr C complains a Miss S wrongly advised him to move his pension to a self-invested personal pension (SIPP) to invest £40,500 in Harlequin property. Miss S is a registered individual of Positive Solutions (Financial Services) Limited so Mr C believes it's responsible.

background

the factual background

Mr C says a friend and neighbour who'd invested in Harlequin suggested he did too. His friend introduced him to someone who worked at an unregulated business and suggested he talk to him about investing.

Mr C has told us:

> [The person he'd been introduced to] *SUGGESTED IT WAS A GOOD POSSIBLE PENSION INVESTMENT AS LONG AS IT COULD BE DONE VIA A SIPP & THAT I SHOULD OBTAIN IFA ADVICE IF I WAS INTERESTED….*
>
> *I CONTACTED ERICA SAMPLE OF POSITIVE SOLUTIONS WHO AGREED TO ARRANGE THE TRANSFER OF MY PENSION POT…*
>
> *I CONTACTED ERICA SAMPLE WHO ADVISED IT WAS POSSIBLE TO SET UP A SIPP TO ENABLE INVESTMENT IN HARLEQUIN…*
>
> *ERICA SAMPLE THEN HELPED MANAGE THE PROCESS OF SETTING UP THE SIPP*

This was the first time Mr C had any dealings with Miss S. It seems she presented herself as being an adviser for Positive Solutions. It's not clear whether she gave him any status disclosure documents setting out the exact nature of her relationship with Positive Solutions.

Positive Solutions says Miss S was approached at a networking event and asked to introduce Mr C to the SIPP operator. It says she was told everything was already in place – including the documentation – but Mr C couldn't approach the SIPP operator himself as it didn't accept direct applications from clients.

A letter from Harlequin to Mr C dated 2 September 2009 shows that Mr C had sent a reservation form and a £1,000 reservation fee to Harlequin for the Harlequin property in question here.

In October 2009 Mr C invested £60,000 in two other Harlequin properties. He's told us the money for those properties came from selling shares and increasing his mortgage.

It's not clear exactly when Miss S became involved, but the first piece of documentation I've seen that names Miss S is the SIPP application form which was signed on 2 November 2009:

- It named Miss S in the financial/professional adviser section where she was listed as being an IFA with Positive Solutions and Positive Solutions' details – including its address and Financial Services Authority (FSA) number – were included.

- In response to the question "*Have you received advice from your adviser in respect of this transaction?*" the yes box had been ticked (although I note the no box had also been ticked and had then been crossed out).

- In answer to the question "*Is the adviser to receive remuneration by deduction from the fund?*" the yes box had been ticked. It then said Miss S would receive an "*Initial payment*" – rather than a "*Renewal*" payment – of 3% of the fund. The bank details given for this payment seem to be the details of Positive Solutions' main commission account. An "*INTRODUCER FEE CALCULATOR*" calculated the commission to be £2,036.30.

I've also been provided with a different application form for the SIPP account dated 8 December 2009 in which Miss S has signed an IFA confirmation. And various other forms, documents and emails name Miss S as the IFA. For example, internal emails within the SIPP operator dated 7 December 2009 and 21 December 2009; the SIPP operator's "*NEW BUSINESS PROCEDURE CHECKLIST*"; and the "*INTRODUCER FEE CALCULATOR*". The SIPP account was opened on 11 December 2009.

A Harlequin purchase form was signed on 14 December 2009. And the contract dated 10 August 2009 was signed on 21 December 2009 by Mr C and on 15 January 2010 by Harlequin.

£67,876.80 was transferred into the SIPP from Mr C's previous pension – an occupational pension scheme – on 5 January 2010. There's a handwritten note from Miss S on the same day saying "*Please find enclosed Harlequin contracts, hotel room application & telegraphic transfer form for* [Mr C]". And £40,500 was paid to Harlequin on 12 January 2010 following a chaser from Miss S. This was a first payment for the property and other payments were to become due later as building progressed. The SIPP administrator then refunded the £1,000 reservation fee Mr C had paid with a cheque that was paid from the SIPP account.

An email was sent by Miss S from a Positive Solutions email address to the SIPP provider on 16 February 2010 which said:

> *I know you said payment was to be made last week, I was just wondering as* [Positive Solutions] *haven't allocated it to me yet, if you would mind forwarding me a commission statement if possible to help allocation*.

The SIPP provider confirmed this had been paid to Positive Solutions on 10 February 2010.

The property was never built. Mr C complained to Positive Solutions but Positive Solutions didn't uphold his complaint. In summary, it said Miss S had simply introduced Mr C to the SIPP provider and didn't provide any advice in relation to either the SIPP or Harlequin. Mr C therefore came to this service. He also arranged for £20,000 to be transferred out of the SIPP to a new provider.

An adjudicator was satisfied this service could consider the complaint against Positive Solutions. And that it should be upheld. He was satisfied Miss S had advised Mr C and had done so in her role as a registered individual of Positive Solutions. He said she should have assessed the suitability of the pension transfer and investment in Harlequin and advised against it in the circumstances. He was satisfied if suitable advice had been given, Mr C would have left his pension where it was.

Positive Solutions didn't agree. I've read and considered its response in its entirety. In summary it said:

- Miss S didn't advise Mr C. The fact it doesn't have a business file supports this. As does the fact she was only paid an introducer fee.

- The fact Miss S used a Positive Solutions email address doesn't mean it's liable.

- Miss S hadn't acted in line with the terms of the agreement it had with her.

- Mr C already held two Harlequin investments so understood them and their risks. He was friends with the Harlequin broker.

- Mr C had already reserved the property in question and paid the reservation fee before he met Miss S.

- Miss S was only involved because Mr C couldn't deal directly with the SIPP operator. He would have done so if he could. He wasn't looking for help and advice from Miss S.

- Mr C had lots of experience in financial matters and wasn't a typical retail client.

the regulatory background

regulated activities

Section 22(1) of the Financial Services and Markets Act 2000 (FSMA) says:

> *An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –*
>
> *(a) relates to an investment of a specified kind…*

Regulated activities are specified in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO), and include:

- Advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO).

- Making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

A collective investment scheme is a security or relevant investment (article 81 RAO). As are stakeholder pension schemes (article 82 RAO).

the general prohibition and the approved persons regime

Section 19 FSMA says:

> *(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –*
>
> *(a) an authorised person; or*
>
> *(b) an exempt person.*
>
> *(2) The prohibition is referred to in this Act as the general prohibition.*

Positive Solutions is – and was at the time of the events here – an authorised person. So it could carry out regulated activities without being in breach of the general prohibition.

Miss S wasn't an authorised person. And she wasn't exempt from authorisation. So if she'd carried out a regulated activity on her own behalf, she'd have been in breach of the general prohibition.

But she held a controlled function with Positive Solutions that allowed her to carry out regulated activities. So in her capacity as a registered individual of Positive Solutions she was able to carry out regulated activities.

Section 59(1) FSMA required Positive Solutions to take reasonable care to make sure Miss S didn't carry out a controlled function unless she was acting in accordance with an approval given by the FSA.

breach of statutory duty

At the relevant time, section 150(1) 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.*

One such rule in place at the time was in the Conduct of Business Sourcebook (COBS) section of the FSA's Handbook. COBS 9.2.1R(1) said:

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

I'm satisfied Mr C was a private person under section 150(1) FSMA. So if he suffered a loss as a result of Positive Solutions breaching a rule, he'd have a right of action against it for breach of statutory duty. Miss S wasn't a firm, so he'd have no such right against Miss S.

my provisional findings on jurisdiction

This service isn't able to look at all complaints. We operate under a set of rules and guidance that tell us what we can and can't look at. These are published as part of the Financial Conduction Authority's (FCA) Handbook – in a section called "*Dispute Resolution: complaints*" (the DISP Rules).

I've considered all the information provided by both parties to decide whether this complaint is one we can consider against Positive Solutions. I'm currently planning to decide it is. I've explained my thinking below.

the compulsory jurisdiction

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

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

Positive Solutions is clearly a "*firm*" under our rules. So to decide whether it's responsible here, there are two issues I need to consider:

- Were the acts about which Mr C complains done in the carrying on of a regulated activity – or ancillary to a regulated activity?

- Did the principal firm, Positive Solutions, accept responsibility for those acts?

were the acts Mr C complains about done in the carrying on of a regulated activity – or ancillary to a regulated activity?

I'm satisfied the Harlequin property Mr C invested in was a security or a relevant investment. As was the SIPP that was set up. Mr C says Miss S advised him. Positive Solutions says no advice was given and Miss S only introduced Mr C to the SIPP operator.

I accept Miss S may not have given Mr C advice to invest in Harlequin property. But taking everything into account, I'm satisfied she did advise him to transfer his pension to a SIPP in order to invest in it.

I accept Positive Solutions doesn't have a business file for the pension transfer and investment and says it has no record of it. It says there would be a file if Miss S had given advice. I assume it means she would have produced things like a suitability report. But although suitability reports are one of the indicators that advice was given, the absence of one doesn't mean advice wasn't given.

In the circumstances here, there are a number of other things that satisfy me it's most likely advice was given:

- Mr C's recollections of his conversation with Miss S suggest to me that she gave him advice.

- The box on the SIPP application form is ticked to say advice was given.

  As noted above, the "no" option had been ticked but then crossed out. Miss S says she questioned the fact the answer had been changed at the time but was told the question needed to be answered yes for the SIPP operator's internal compliance.

  I've thought carefully about this. I accept it's possible that Miss S agreed for a form to be submitted that didn't reflect what'd actually happened. But I don't think this is most likely. If Miss S hadn't given advice, I would have expected her to say this – even if it meant the SIPP couldn't be set up without further steps being taken. The fact she didn't suggests to me that it's most likely she did stray into advising Mr C.

- Although Positive Solutions has said Miss S was only paid an introducer fee, the only mention of the fee being an introducer fee is the fact the calculator that was used for it was an introducer fee calculator. Although the SIPP application form offers two options – "*Initial payment*" and "*Renewal*" payment – it doesn't make any reference to introducer and/or adviser fees. Instead it simply asks "*Is the adviser to receive remuneration by deduction from the fund?*" after asking whether advice had been given. So in fact, the application form suggests the fee was for advice having been given.

- Miss S was named on a number of the forms as Mr C's IFA.

- Miss S was involved in chasing up the pension transfer for the Harlequin investment to be made. There were many emails between her and the SIPP operator. Although I note Positive Solutions' comments that this was led by Mr C, these don't seem to be the actions of someone who'd simply made an introduction to a SIPP operator. They suggest to me that she was far more involved than that.

Positive Solutions says Mr C's neighbour/friend and the person he was then referred to were the ones who advised him. It says by the time Mr C was referred to Miss S he'd already made up his mind and wasn't looking for any advice. I've thought about this carefully. But even if Mr C had already been advised by other people, that doesn't mean Miss S didn't also give advice.

I'm also satisfied Miss S carried out the regulated activity of making arrangements for someone to buy or sell or subscribe for a security or relevant investment. It's clear to me from the correspondence I've been provided with that she was involved in arranging the pension transfer and Harlequin investment. For example, on the day the £40,500 payment to Harlequin was made, the SIPP operator sent an email to her saying:

> *we will await instruction from Harlequin to pay the next instalment and I would ask that you consider how future payments will be made.*

And as set out above, there were many emails from Miss S chasing up the transfer to make sure the Harlequin investment could be made.

did Positive Solutions accept responsibility for those acts?

Mr C didn't deal with any employees of Positive Solutions – although Miss S was an agent of Positive Solutions, she wasn't its employee. But Positive Solutions might still be responsible, even if none of its employees were involved.

This could be through having given actual authority; having given apparent or ostensible authority; being vicariously liable; and/or having statutory responsibility.

did Positive Solutions give Miss S actual authority?

Positive Solutions has provided a copy of the agreement it says was in place between it and Miss S. The agreement was quite restrictive and significantly limited the activities Miss S was authorised to undertake.

Clause 2.1 said:

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

And clause 2.4 said:

> *…the Company shall not be bound by acts of the Registered Individual which exceed the authority granted under the provision of this Agreement*

Positive Solutions says it never approved Harlequin investments or transfers to the SIPP operator involved here. It says it had no terms of business in place with either Harlequin or the SIPP operator. And it's provided an extract of approved agencies which doesn't include either Harlequin or the SIPP operator.

On the other hand, I've seen the SIPP application form and emails which suggest the SIPP operator paid commission to Positive Solutions that Miss S was then allocated. And this suggests to me that Miss S did have Positive Solutions' actual authority.

However, it's not clear to me whether Miss S had the required qualifications to give pension transfer advice. And in any event, I've gone on to explain that I think Positive Solutions gave Miss S apparent/ostensible authority and is vicariously liable for her actions. So for the purposes of this decision, I've proceeded on the basis Positive Solutions didn't give Miss S actual authority.

did Positive Solutions give Miss S apparent or ostensible authority?

Although Miss S's actions weren't authorised in her agreement with Positive Solutions, it could also have given what's called apparent or ostensible authority.

<u>the relevant case law</u>

It was described in *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd*:

> *An "apparent" or "ostensible" authority, on the other hand, 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.*
>
> *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 the 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.*

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

In *Hely-Hutchinson v Brayhead Ltd*, one of the judges said:

> *Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding-out". Thus, if he orders goods worth £1,000 and signs himself "Managing Director for and on behalf of the company", the company is bound to the other party who does not know of the £500 limitation.*

And in *Martin and another v Britannia Life Limited* the judge quoted Article 74 in *Bowstead and Reynolds on Agency* 16th edition to explain apparent or ostensible authority:

> *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.*

This was endorsed in the case of *Anderson v Sense Network*, where the judge said:

> *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.*

And in *Armagas Ltd v Mundogas S.A.* one of the judges 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.*

In *Sino Channel Asia Ltd v Dana Shipping and Trading (Singapore) Ptd Ltd* the judge said:

> *the foundation of ostensible authority is the representation of the principal and "it is generally trite law that an employee/agent cannot purport to create his own ostensible authority". However, though a communication is made directly (or immediately) by the agent, it may be inferred that the representation is that of the principal, arising from his conduct…*
>
> *As explained by Lord Pearson in the Hely-Hutchinson case…"That may be shown by inference from the conduct of the board of directors [the principal] in the particular case by, for instance, placing the agent in a position where he can hold himself out as their agent and acquiescing in his activities, so that it can be said they have in effect caused the representation to be made. They are responsible for it and, in the contemplation of law, they are to be taken to have made the representation to the outside contractor"…*
>
> *As expressed by the High Court of Australia, in Pacific Carriers Ltd v BNP Paribas…"The holding out might result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation"…*
>
> *In Gurtner v Beaton…Neill LJ observed…"The development of the doctrine has been based in part upon the principle that where the court has to decide which of two innocent parties is to suffer from the wrongdoing of a third party the court will incline towards placing the burden upon the party who was responsible for putting the wrongdoer in the position in which he could commit the wrong".*

Here, I'd therefore need to decide that Positive Solutions made representations to Mr C that Miss S had the necessary authority. It isn't enough for Miss S to have said she was acting on behalf of Positive Solutions. But it would be enough if Positive Solutions had placed Miss S in a position which would objectively be viewed as carrying its authority.

I'd also need to decide that Mr C reasonably relied on those representations. In the case of *Anderson v Sense Network*, the judge said:

> *a relevant ingredient of a case based on apparent authority is reliance on the faith of the representation alleged…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.*

The case law is clear that whether representations were relied upon very much depends on the facts of the case.

did Positive Solutions represent to Mr C that Miss S had its authority to act on its behalf in terms of the activities he's complaining about?

Taking everything into account, I'm satisfied that in the circumstances here, Positive Solutions did represent to Mr C that Miss S had the necessary authority. I say this because I'm satisfied Miss S was holding herself out as acting on behalf of Positive Solutions and:

- Miss S's name appeared on the FSA/FCA's register in connection with Positive Solutions between 24 September 2003 and 28 May 2019. The register shows that between 1 November 2007 and 28 May 2019 she was approved by the FSA (and later the FCA) to carry out the controlled function "CF30 Customer" on behalf of Positive Solutions. This meant she could advise on, and arrange, investments and set up SIPPs for Positive Solutions customers. And she could advise on pension transfers if she held the correct qualifications.

  None of these activities would be unexpected for an IFA firm. They are all the type of activity that IFAs are usually authorised to do. The transfer of occupational pensions is a specialist activity that some IFA firms aren't allowed to do. But Positive Solutions was – and still is – authorised to do this. Positive Solutions was representing to the outside world that Miss S was an IFA for it.

- The agreement between Miss S and Positive Solutions required Miss S to provide Positive Solutions' "Terms of Business" to each of her clients. Miss S was also given a Positive Solutions email address which she used when communicating with Mr C and the other businesses involved. So again, Positive Solutions was representing to the outside world that Miss S was an IFA for it.

- Miss S then gave Mr C pension transfer advice and made arrangements to transfer his pension and make an investment. This is exactly what would be expected from an IFA. And it's something Positive Solutions did in principle allow its registered individuals to do. Positive Solutions had therefore put Miss S in a position where it would have appeared that she had its actual authority.

  I accept Positive Solutions required its registered individuals to act in line with the agreement they'd entered. And it seems Miss S didn't here. And it's not clear whether she had the necessary qualifications to advise on pension transfers. But the outside world – and Mr C in particular – wouldn't have known what the requirements of the agreement were and what qualifications were required to advise on pension transfers. So I'm satisfied in the circumstances here that this doesn't affect the representations Positive Solutions had made.

- Positive Solutions' name and FSA details were used to set up the SIPP. I accept Miss S filled in those forms – not Positive Solutions. But Positive Solutions had put her in the position to do this. And anyone checking the FSA register would have seen that Miss S was approved to carry out the controlled function "CF30 Customer" on behalf of Positive Solutions.

- It seems Positive Solutions received commission relating to Mr C's SIPP. I haven't seen anything that suggests it questioned this or tried to clarify the position. This omission suggests to me that it knew Miss S was holding herself out as acting on its behalf – both to other businesses and Mr C. And that it didn't have an issue with this.

I'm also satisfied that Positive Solutions intended to represent to Mr C that Miss S had the necessary authority. Providing financial advice was a key part of its business. And I can't see that its business could have succeeded but for the outside world treating its registered individuals – like Miss S – as having the necessary authority to give advice and make arrangements on its behalf.

did Mr C rely on that representation when he entered into the transactions he's now complaining about?

The question then is whether Mr C relied on those representations. And if he did, whether this was reasonable. In the circumstances here, I'm satisfied the answer to both of those questions is yes:

- The initial unregulated business Mr C spoke to told he'd need to get advice from an IFA in order to be able to set up a SIPP to invest in Harlequin. Mr C was then introduced to Miss S for that advice. It was therefore reasonable for him to believe he was getting financial advice from someone that was regulated to give such advice. Miss S wasn't regulated to give investment advice on her own behalf. The FSA register was clear that she was only allowed to give it on Positive Solutions' behalf.

- Mr C didn't have a previous relationship with Miss S in any other capacity. He only knew her when she was a registered individual for Positive Solutions.

- I think it's unlikely Mr C would have followed Miss S's advice if he'd known she didn't have regulatory authority to act.

I'm therefore satisfied that Positive Solutions represented that Miss S had authority to carry out the acts complained about on its behalf. And that Mr C reasonably relied on those representations.

is it fair to hold Positive Solutions responsible?

I note that in the case law, particularly *Sino Channel Asia Ltd v Dana Shipping and Trading (Singapore) Ptd Ltd*, the courts have considered – in addition to the two-stage test – whether it's just to hold the principal responsible for losses caused by the wrongdoing of its agent. I've therefore considered this in the circumstances here. I can't ignore the facts that:

- Positive Solutions was in a position where it could monitor what Miss S was doing.

- It seems Positive Solutions received commission relating to Mr C's SIPP so it knew Miss S had been involved in some way in him transferring his pension to a SIPP. But it chose to not look into this further.

- Positive Solutions didn't tell Mr C that there were any limits on the actual authority it'd given to Miss S. I accept it wasn't required to. But I'm satisfied the fact it didn't is relevant.

- The SIPP operator required a regulated adviser to give advice. Miss S allowed a box to be ticked that said she'd done this. And in doing so, she identified herself as acting for Positive Solutions. The SIPP wouldn't have been set up but for the involvement of Positive Solutions.

- Miss S was a financial adviser and she was giving financial advice and arranging a pension transfer and investment. This was the normal business of Positive Solutions.

Whilst it may be that none of these things on their own are determinative, taken together, I'm satisfied it's fair to hold Positive Solutions responsible.

is Positive Solutions vicariously liable for Miss S's actions?

One of the judges in *Jetivia SA and another v Bilta Limited* and others explained:

> *Vicarious liability does not involve any attribution of wrongdoing to the principal. It is merely a rule of law under which a principal may be held strictly liable for the wrongdoing of someone else. This is one reason why the law has been able to impose it as broadly as it has. It extends far more widely than responsibility under the law of agency: to all acts done within the course of the agent's employment, however humble and remote he may be from the decision-making process, and even if his acts are unknown to the principal, unauthorised by him and adverse to his interest or contrary to his express instructions (Lloyd v Grace Smith & Co [1912] AC 716), indeed even if they are criminal (Lister v Hesley Hall Ltd [2002] 1 AC 215).*

An obvious example of a relationship that can give rise to v[ic]arious liability is the employer/employee relationship. But this isn't the only relationship capable of giving rise to vicarious liability.

The law of vicarious liability has been evolving over recent years. Unless deceit is involved, there's generally now a two-stage test for establishing vicarious liability:

- Stage one is to ask whether there's a sufficient relationship between the wrongdoer and the principal.

- 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.

I've therefore considered those two stages in the circumstances here. Taking everything into account, I'm satisfied Positive Solutions is vicariously liable for the reasons I've explained below. But even if that two-stage test isn't applicable because of the nature of the relationship between Miss S and Positive Solutions, I'm satisfied it's still appropriate to consider whether Positive Solutions is vicariously liable. And in the circumstances here, I'm satisfied it's fair to say it is. I say this because the approved person regime was one of the ways FSMA and the FSA made provisions to protect consumers. Miss S was a Positive Solutions approved person. And I'm satisfied that when she carried out the regulated activities of advising on and arranging investments, these were activities of Positive Solutions.

stage one

In *Cox v Ministry of Justice*, one of the judges said:

> *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'm satisfied that in giving advice and making arrangements here, Miss S was carrying on activities as an integral part of the business activities of Positive Solutions:

- I'm satisfied she was holding herself out as acting on behalf of Positive Solutions – not on behalf of a recognisably independent business of her own.

- Positive Solutions was an authorised firm. It was able to carry out regulated activities (including giving investment advice) without being in breach of the general prohibition. And by virtue of her relationship with it, Miss S was able to give investment advice on behalf of Positive Solutions without being in breach of the general prohibition.

- Positive Solutions had given her permission to carry out the controlled function "CF 30 Customer" on its behalf. Giving pension transfer advice and making arrangements for pension transfers and investments seems to have been a key part of Positive Solutions' business model. So it'd engaged her to carry out activities that were an integral part of its business.

I'm also satisfied that in giving Miss S the permissions it did, Positive Solutions created the risk that she'd make errors or act negligently.

stage two

Taking everything into account, I'm satisfied the acts complained about were sufficiently connected to Miss S's duties on behalf of Positive Solutions for it to be just for Positive Solutions to be held liable:

- I've already concluded that Miss S gave Mr C pension transfer advice and made arrangements for a pension transfer and investment. Positive Solutions was a firm that provided these services to its customers. So I'm satisfied Miss S's activities were closely connected to the business activities of Positive Solutions.

- If Positive Solutions isn't vicariously liable, Mr C's ability to claim compensation would depend on whether Miss S was an employee of Positive Solutions. In *Cox v Ministry of Justice*, the court suggested it'd be unfair if Mrs Cox's ability to claim compensation depended on whether it was an employee or a prisoner who'd injured her. I think that's particularly relevant here where Mr C had no way of knowing whether Miss S was or wasn't an employee of Positive Solutions – unlike Mrs C who could have found out the status of the person who'd injured her.

- It seems the SIPP operator wouldn't have allowed the SIPP to be set up without a regulated adviser having given advice – in this case, Miss S on behalf of Positive Solutions.

- As set out above, the agreement between Miss S and Positive Solutions says "*the Company shall not be bound by acts of the Registered Individual which exceed the authority granted under the provision of this Agreement*". But I note it also says "*Any act or omission of the Registered Individual shall be treated as an act or omission of the Company*". There's therefore a contradiction here. And I don't think it'd be fair and reasonable to simply decide that contradiction in Positive Solutions' favour.

- Positive Solutions says it didn't receive any money as a result of Miss S's actions here. But as set out above, I've seen emails suggesting commission was paid to it that Miss S was then allocated. It's not clear whether Positive Solutions kept any of that commission. But even if it didn't, the court in *Mohamud v WM Morrison Supermarkets plc* was clear that vicarious liability can apply even where no commission was received.

I recognise my findings on this point are different to those in *Frederick v Positive Solutions* where Positive Solutions was found not to be vicariously liable. But I'm satisfied the facts are very different. In that case the registered individual (Mr Warren) had submitted dishonest and fraudulent mortgage applications and it was found that:

> *the only conclusion that one can form is that this is a case, using the old fashioned phraseology, where Mr. Warren was off on a frolic of his own. It is true that the risk of him carrying out the fraud was, in the "but for" sense, created by him having been appointed the defendant's agent and having been given access to the portal but that is only one small part of the overall test which one has to look at. It cannot properly be said, in my judgment, having regard to Lord Reed's analysis of the test, that Mr. Warren was, in perpetrating this particular fraud in this particular way, in any sense carrying on those activities as an integral part of the business activities of the defendant and for its benefit. This is not a legitimate transaction which had been brought to the defendant and which the defendant had allocated to Mr. Warren to undertake and which Mr. Warren had undertaken in a fraudulent way. This is a case where Mr. Warren (with or without Mr Qureshi) had designed the fraud himself…*
>
> *Mr. Warren so clearly departed from the scope of his agency that his principal should not be liable for his wrongful acts. He was moonlighting in a very real sense. There is no connection between this transaction and the business of the defendant. The acts relied on cannot properly be said to have been intended to be in any sense for their benefit or carried out in the course of the agency of Mr. Warren while he was under the direction of the defendant. It was something which he did off his own back for his own purposes*

The same clearly doesn't apply here as there are no allegations of fraud. There are also other significant differences. For example:

- Mr C met Miss S and received advice from her. Whereas the claimants in *Frederick* never met with Mr Warren and had been encouraged to invest by someone who wasn't a registered individual of Positive Solutions.

- Mr C says his losses directly flow from the advice Miss S gave him on behalf of Positive Solutions. Whereas the losses the claimants suffered in *Frederick* didn't flow from the re-mortgaging done on behalf of Positive Solutions. Instead, they happened when the claimants handed the money over to Mr Warren.

statutory responsibility under section 150 FSMA

As explained above, I'm satisfied that when Miss S advised Mr C and arranged his pension transfer and investment, she was acting on behalf of Positive Solutions. This means Positive Solutions is subject to the COBS suitability rules in respect of Miss S's advice. If the advice wasn't suitable, then (subject to the recognised defences), Positive Solutions is responsible in damages to Mr C under the statutory cause of action provided by section 150 FSMA. So I'm satisfied that section 150 FSMA provides an alternative route by which Positive Solutions is responsible for the acts complained of.

my provisional findings on merits

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

the advice Miss S gave

As set out above, I'm satisfied that Miss S advised Mr C on transferring his pension to a SIPP. It's not clear to me whether Miss S's advice extended to the Harlequin investment. But even if it didn't, I'm satisfied it should have.

In 2013 the FSA issued an alert in relation to "*Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP*". Amongst other things, this said:

> *It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some of which may be in Unregulated Collective Investment Schemes). Examples of these unregulated investments are…overseas property developments…*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs…), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating.*
>
> *For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable.*

I acknowledge that this alert was issued after the events here. But I'm satisfied it was simply a reminder of existing obligations and therefore is relevant.

Miss S knew (or should have known) various things that were cause for concern here:

- Unregulated third parties had been involved.
- Mr C was looking to move his whole pension provision.
- The charges on the SIPP were likely to be higher than Mr C's existing pension so its performance needed to be much better for Mr C to not lose out.
- The SIPP was just a wrapper so its suitability was linked to the investments that were going to be made within it. And Mr C was planning to invest in Harlequin property.

In the circumstances here, I'm satisfied that acting in Mr C's best interests would have taken account of all of these things. And would have involved understanding the Harlequin investment he was planning to make. Suitable advice needed to take account of both the pension transfer and the proposed investment.

what suitable advice would have been

I've therefore gone on to think about what suitable advice would have been, based on what I know about Mr C's circumstances at the time:

- An annual income of between £75,000 and £100,000.
- Holding no other pensions other than the one involved here – although his wife had a small pension.
- Holding shares in his employer worth approximately £220,000.
- Having approximately £20,000 of savings.
- Already having exposure to Harlequin property.
- Having a planned retirement age of 55 (with a plan to reduce his workload instead if retirement wasn't possible at that point).

In relation to occupational pension transfers, COBS 19.1.6G set out at the relevant time that:

> *When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should, start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests.*

Taking everything into account, I don't think there was any justification for the transfer in this case.

Mr C's attitude to risk wasn't assessed at the time of the advice. Despite having already invested in Harlequin and having shares in his employer, I haven't seen anything that would indicate he was an experienced investor or that he could afford to take significant risk with his pension provision. Instead, the opposite appears to have been true – he appears to have had limited investment experience and didn't have any other pensions. And despite the large number of shares he held in his employer, these were all in one business.

Harlequin was unregulated, high risk and speculative. It had no track record and there was a possibility the project would fail and his investment would be lost. Miss S knew (or should have known) this. She also knew he already had exposure to Harlequin. Positive Solutions says because Miss S knew Mr C already had exposure to Harlequin property, she assumed he already understood the risks involved. I don't think this was a reasonable assumption.

I therefore think Miss S should have concluded the pension transfer to the SIPP wasn't suitable and should have told Mr C this in the strongest possible terms. This would have involved explaining that the Harlequin investment was high risk and could involve Mr C losing most of his pension.

what would Mr C have done if suitable advice had been given?

Positive Solutions says Mr C had already decided to transfer his pension and invest in Harlequin at the point he was introduced to Miss S. Its pointed to the fact a reservation fee had been paid; the paperwork had been progressed; and two other properties had been purchased by the time Miss S became involved. It's also commented on the close relationship between Mr C and the person who introduced him to Harlequin. And it's highlighted Mr C's financial experience and said in light of this he should be considered an experienced investor.

I've carefully considered all of these things. It's possible that even if Miss S had given Mr C suitable advice, he would have chosen to ignore that advice. But in the circumstances here, I don't think he would have:

- I accept third parties may also have advised Mr C and have some responsibility for what happened. But they weren't regulated to give this type of advice – which is why he was referred to Miss S. Although he may have had a close relationship to at least one of those third parties and gone to Miss S thinking he was certain what he was going to do, I think it's unlikely he would have ignored advice from a regulated adviser – particularly if the reasoning had been clearly explained.

- The adjudicator asked Mr C about his financial experience. Although he's had senior positions in financial services organisations, it seems his key responsibilities have been things such as change management. In my opinion, the roles he's had don't have any bearing on what he would have done had he been given suitable advice. I haven't seen anything that persuades me he had a level of knowledge and understanding that meant he would have chosen to ignore the advice of a regulated adviser.

- I don't think things had gone so far that Mr C wouldn't have turned back. Although he would have lost the £1,000 he'd paid as a reservation fee for the property in question here, the next payment was for £40,500 (with £1,000 of that to be refunded). This was an entirely different level of commitment and I think Mr C would've been prepared to lose the £1,000 he'd already paid to avoid the risk of losing the other £39,500. Particularly as he already had exposure to Harlequin property.

So, in the circumstances here, I'm satisfied that if Miss S had given suitable advice, Mr C wouldn't have transferred his pension to the SIPP or made the Harlequin investment in question.

fair compensation

My current conclusion is that a fair outcome would be for Positive Solutions to put Mr C, 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 pension 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 C 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.

the specified steps

Positive Solutions should:

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

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

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

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

- If payment into a pension isn't possible or has protection or allowance implications, it should be paid directly to Mr C as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. 25% of the loss should be tax-free and 75% should be taxed according to his likely income tax rate in retirement.

- Pay Mr C five years' worth of SIPP fees. Had Miss S given suitable advice I don't think there would be a SIPP. It's not fair that Mr C continue 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 C back into 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 all parties, I think it's fair that Positive Solutions pays Mr C 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 this, Positive Solutions may ask Mr C to provide an undertaking to give it the net amount of any payment he may receive from the Harlequin investment in that five-year period, as well as any other payment he may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount he may receive. Positive Solutions will need to meet any costs in drawing up this undertaking. If it asks Mr C 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 Harlequin investment, it must agree to pay any

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

- Pay Mr C £300 compensation for the stress and worry he's suffered thinking he'd lost a significant proportion of his pension provision.

If everything had happened as it should have, I'm satisfied that in the circumstances here, Mr C would have lost the £1,000 he paid as a deposit for the Harlequin property in question here. Positive Solutions can therefore deduct £1,000 from the compensation it pays to Mr C.

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

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

Mr C'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 C 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 provisional decision

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

recommendation: if the financial effect of the award exceeds £150,000, I'm planning to recommend that Positive Solutions (Financial Services) Limited still carry out in full the steps I've specified above.

Laura Parker
ombudsman