complaint

Mr and Mrs B complain that in April 2007, a Mr Paul Clark wrongly advised them to invest £300,000 in the Stirling Mortimer Global Property Fund PCC Limited – Majestic Village No 3 Fund ('*the fund*'). They further complain that in late 2006 and early 2007, Mr Clark wrongly advised them to cash in their existing investments to raise money to purchase shares in the fund.

Mr and Mrs B believe that Positive Solutions (Financial Services) Ltd is responsible for Mr Clark's advice.

background

Mr and Mrs B say that in late 2006, they were considering their retirement plans. Mr Clark advised them to cash in their existing investments and reinvest the proceeds in the fund, for a short term boost to their retirement pot. They believed the fund would mature after two years, and was guaranteed to return 6% per year.

The fund experienced significant difficulties. Mr and Mrs B did not receive the 6% per year they expected, nor was their capital returned to them after two years. Mr and Mrs B still do not know when – or if – any part of their capital will be returned to them.

Mr and Mrs B complained to Positive Solutions in early 2013, just less than six years after they received the advice they complain about. They asked Positive Solutions to put them in the position they would have been in if they hadn't invested in the fund.

Positive Solutions objected to our consideration of the complaint, because it said it was not responsible for Mr Clark's advice.

I issued a provisional decision on this complaint on 13 September 2019. Briefly, I said I was satisfied that Positive Solutions was responsible for the acts Mr and Mrs B complain about. I explained why I thought the fair and reasonable outcome to this complaint was for Positive Solutions to pay compensation to Mr and Mrs B.

Mr and Mrs B accepted my provisional decision, but Positive Solutions did not. Its representative provided detailed comments in support of its position. In summary, its representative said:

- It considers that my provisional conclusions on jurisdiction are wrong as a matter of law. It further considers that the conclusions I drew from the case law dealing with principals and agents are incorrect.

- My provisional decision "*fundamentally misses that Mr Clark advised [Mr and Mrs B] without Positive Solutions' knowledge or authority, as he was operating on behalf of his own and distinct business which had nothing to do with Positive Solutions. Further, Positive Solutions gave no representations to [Mr and Mrs B] in respect of either the surrender advice or the investment into Stirling Mortimer*".

- None of the "*alleged representations by Positive Solutions as to the authority of Mr Clark*" were in fact representations of the necessary sort.

- Since there is no rational basis for finding that Positive Solutions made any representations at all, there is no need for me to consider Positive Solutions' intentions in making representations. Similarly, there is no need for me to consider whether Mr and Mrs B relied on those representations. But on the facts, Mr and Mrs B "*cannot credibly assert that they relied on Positive Solutions*".

- As a matter of law, *"it is not the case that there is a broad test of 'justice'"*. In addition, my provisional decision wrongly said that the complaint did not involve fraud. In fact, the complaint does involve fraud by Mr Clark.

- The case of *Cox v Ministry of Justice* [2016] UKSC 10 is not relevant to the present circumstances. Even if it was, "*it is perfectly clear that Mr Clark was advising about Stirling Mortimer in the context of a recognisably independent business (Clark Rees)*".

- In any event, the complaint is not suitable for determination by the Financial Ombudsman Service, and is more appropriately dealt with by the court. It is impossible to make fair findings on the issue of reliance without cross examination and disclosure.

- Nothwithstanding the above, Positive Solutions believes that the redress I proposed in my provisional decision is not appropriate.

my findings

I have reconsidered all the evidence and arguments both parties have provided on this complaint. Having done so, I have reached the same conclusions as I did in my provisional decision of 13 September 2019. Those conclusions were:

- Mr and Mrs B's complaint is about an act or omission in relation to the carrying on of the regulated activity of giving investment advice.

- Positive Solutions represented to Mr and Mrs B that Mr Clark had Positive Solutions' authority to conduct business of the same type as the business he did in fact conduct, Mr and Mrs B relied on those representations, and apparent authority therefore operated such as to give rise to Positive Solutions' responsibility for the acts Mr and Mrs B complain about.

- In addition, Positive Solutions is vicariously liable for the investment advice Mr Clark gave to Mr and Mrs B. Although he was not an employee of Positive Solutions, he was an approved person with responsibility for carrying on Positive Solutions' business of advising its customers and arranging their transactions. As such he carried on activities as an integral part of Positive Solution's business activities and had a sufficient relationship to Positive Solutions for vicarious liability to arise. His advice to Mr and Mrs B was so closely connected to Positive Solutions' business activities as to make it just to hold Positive Solutions liable for it.

- Positive Solutions is also liable to Mr and Mrs B under section 150 of the Financial Services and Markets Act 2000.

- Mr and Mrs B's complaint therefore falls within the jurisdiction of the Financial Ombudsman Service.

- Mr Clark's advice was unsuitable for Mr and Mrs B.
- Mr and Mrs B acted on that advice and suffered a loss as a result of the unsuitable advice.
- The fair and reasonable outcome to this complaint is for Positive Solutions to compensate Mr and Mrs B for that loss.

My reasons for reaching those conclusions are those which I set out in my provisional decision of 13 September 2019 supplemented by the additional points which I make below. That provisional decision is attached to, and forms part of, this final decision.

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

- Compare the performance of Mr and Mrs B's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

  Positive Solutions should also pay interest as set out below.

- Pay Mr and Mrs B £2,000 for the distress and inconvenience they suffered.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Stirling Mortimer Global Property Fund PCC Limited – Majestic Village No 3 Fund	still exists – but illiquid	average rate from fixed rate bonds	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

The terms "actual value", "fair value", and "average rate from fixed rate bonds" have the meaning explained in the attached provisional decision.

Having considered Positive Solution's response to my provisional decision, I set out below certain points by way of supplementing and explaining certain aspects of the provisional decision. I will use headings that are similar to the ones used in Positive Solutions' response.

apparent authority

Positive Solutions suggests that I have asked the wrong questions in respect of Mr Clark's apparent authority here.

It agrees that I should ask, on the facts of this individual case:

- Did Positive Solutions make a representation to Mr and Mrs B that Mr Clark had Positive Solutions' authority to act on its behalf in carrying out the activities they now complain about? And

- Did Mr and Mrs B rely on that representation in entering into the transactions they now complain about?

However, Positive Solution's representative goes on to say "*the decision appears incorrectly to ask whether whether Positive Solutions placed Mr Clark in a position which would objectively carry authority to 'enter into transactions such as the Stirling Mortimer investment'. This appears to be asking whether Positive Solutions gave Mr Clark authority to transact a general class of acts, and assuming that if Positive Solutions did so, it has granted ostensible authority. This is not the correct question. The question is whether there was ostensible authority in relation to this transaction*."

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

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

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

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

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

Positive Solutions did not specifically mention Stirling Mortimer in its representations, but that is not determinative. Mr Clark had Positive Solutions' apparent authority to act on its behalf in recommending that Mr and Mrs B invest £300,000 in Stirling Mortimer, because he had Positive Solutions' more general apparent authority to act on its behalf in giving them that kind of investment advice.

who was Mr Clark acting for?

Positive Solutions' position has been, and remains in its recent submissions, to the effect that Mr Clark advised Mr and Mrs B "*on behalf of his own distinct business which had nothing to do with Positive Solutions*". In my provisional decision, I considered whether the facts are consistent with that characterisation. I concluded that Mr Clark acted throughout on behalf of Positive Solutions and not on behalf of a distinct business of his own. This was a relevant question for at least two reasons:

- Firstly, part of the test for vicarious liability in *Cox* is whether the harm was done by an individual who carries on activities as an integral part of the business activities carried on by a defendant for its benefit "*rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or by a third party*". As I explained in my provisional decision, I do not find this to be a case where the relevant advice was attributable to the conduct of a recognisably independent business. The explanation for that finding, as I state in the provisional decision, is in the section "*who was Mr Clark acting for?*".

- Secondly, if Mr Clark's activities had been attributable to a distinct business which was nothing to do with Positive Solutions, it could have no liability or responsibility for those activities under s. 150 FSMA. That section applies only where an authorised person (here, Positive Solutions) breaches a regulatory rule applicable to its carrying on of one or more regulated activities in the United Kingdom. If the relevant regulated activity were carried on by a distinct third party which has nothing to do with the authorised person, it is most unlikely to have been carried on by the authorised person in breach of any rule, and the section would probably not be engaged.

Positive Solutions' representative says that it follows from my finding that Mr Clark lacked actual authority from Positive Solutions to advise Mr and Mrs B to invest in the fund that Mr Clark "*cannot have been acting for Positive Solutions*". But I don't think that his lack of actual authority (which isn't the only route to Positive Solutions' responsibility here) means that Mr Clark's advice and actions can be characterised as belonging to a distinct business, namely Clark Rees LLP, as opposed to Positive Solutions, as Positive Solutions has contended.

Positive Solutions' representations as to the authority of Mr Clark

I acknowledge that Positive Solutions believes strongly that it did not make any relevant representations to Mr and Mrs B. I disagree, for the reasons given in my provisional decision.

Positive Solutions has made several specific objections to my provisional findings on its representations. I have considered each of those objections in turn:

- With respect to the status disclosure on stationery, I do not agree that Jacobs J found in *Anderson v Sense* that a status disclosure could never be a representation of anything. Instead, I consider that his finding was that on the particular facts of that case, the status disclosure "*was not a representation of any kind* ***to the effect that*** *[the agent] was running the [Ponzi] scheme with the authority of Sense or as the agent of the Defendant*" (emphasis mine). Financial advisers are not usually authorised to run schemes like the Ponzi scheme there in question, so I am not surprised by his finding.

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

"Mr and Mrs Martin … have to establish a representation made by LAS, which was intended to be acted on and which was in fact acted on by them, that Mr Sherman was authorised by LAS to give them financial advice concerning a remortgage of The Brambles.

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

Jacobs J in *Anderson v Sense* applied *Martin* and endorsed the above approach. He said "*As* Martin *shows, [ostensible authority] requires a representation that there was authority to give advice of the type that was given*."

I do not suggest that the status disclosure in this case should have the effect of making Positive Solutions liable for any communication of whatever type made on the notepaper bearing the status disclosure. But I think the status disclosure is relevant to whether Positive Solutions is liable for the investment advice given in this particular case. Positive Solutions had given Mr Clark permission to tell third parties like Mr and Mrs B that Clark Rees LLP was a "*trading style*" of Positive Solutions. That meant that Positive Solutions described itself to customers as "Clark Rees LLP". And it had given Mr Clark permission to describe himself as "*Paul Clark, Independent Financial Adviser*" on notepaper bearing Positive Solutions' branding. I don't think Mr Clark was doing anything that a reasonable person would think was unusual for a financial adviser. He was not running a Ponzi scheme, or appropriating Mr and Mrs B's money for himself – he was simply recommending the surrender of some investments in favour of the purchase of another. I think that Positive Solutions represented he had its authority to give that kind of advice.

Equally, obtaining approval from the Regulator for Mr Clark to advise Positive Solutions' customers about investments was in my view, part of the conduct by which Positive Solutions held him out to the world in general as authorised to do that. Again, this was not a holding out that everything he might do was authorised. But, to the extent that he gave advice to Positive Solutions' customers, such as Mr and Mrs B, about the contents of their investment portfolios, this was the type of business he was held out as carrying on for it.

- I entirely accept that Mr and Mrs B cannot have relied on any correspondence they did not see – and in particular that they cannot have relied on the 2006 email

exchange between Mr Hudson (of Positive Solutions) and Mr Clark. I think that correspondence is consistent with Positive Solutions placing Mr Clark in a position that would generally be regarded as having Positive Solutions' authority to recommend investments, but I do not say that the correspondence is itself a representation to Mr and Mrs B.

- In my provisional decision, I commented on the manner in which Mr Clark gave his advice about Stirling Mortimer under the heading "*Positive Solutions' representations*". I made those comments because Positive Solutions had previously submitted to me that Mr and Mrs B cannot possibly have regarded that advice as ordinary Positive Solutions business being carried out in the usual way – and I wanted to explain why I disagreed with Positive Solutions on that point. I accept that my comments on that point relate to reliance rather than representation.

- If Positive Solutions had not obtained FSA approval for Mr Clark and Mr Rees to arrange transactions in investments on behalf of Positive Solutions' customers, they would probably have been in no position to perform that service for Mr and Mrs B, by arranging their investment in the fund. I remain satisfied that Positive Solutions put Mr Clark (and Mr Rees) in a position where they could tell product providers they were Positive Solutions' representatives and enable investment transactions to go ahead. Mr Clark and/or Mr Rees did exactly that when completing the Stirling Mortimer application form in this case. I consider that issue is relevant to whether Positive Solutions placed Mr Clark in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr and Mrs B complain about.

- Positive Solutions gave Mr and Mrs B access to its website portal. In my provisional decision, I explained that this is not a strong point in isolation. But I consider that it does amount to a representation by Positive Solutions that Mr Clark had its authority to act on its behalf as a financial adviser. Mr Clark had previously given Mr and Mrs B investment advice whilst acting on behalf of Positive Solutions, and the investments he recommended as a result were shown on Positive Solutions' portal. I consider that those facts amount to a representation that Mr Clark did have Positive Solutions' authority to give investment advice of the kind in question. It is argued by Positive Solutions' representatives that giving Mr and Mrs B access to the portal cannot be taken to be a representation that Mr Clark was authorised to advise about Stirling Mortimer. I disagree, I think it was a representation of general type that Positive Solutions permitted him to advise about their portfolio of investments. The relevant sales and purchase were part of a course of dealing of that type.

  Positive Solutions' representative says that Mr Clark advised clients no longer to use the Positive Solutions portal. However, I've been provided with no evidence that Mr and Mrs B received any such advice. Positive Solutions did provide me with copies of two letters dated 25 June 2006 and 31 October 2006, and it initially suggested those letters were sent to Mr and Mrs B – but it has since accepted that was not the case. The letters were in fact sent to two of Mr Clark's other customers. Positive Solutions would like me to take the letters into account anyway, because it says they are "*very important evidence of how [Clark Rees] was interacting with and representing advice to their clients*". So I have looked at those letters:

  - The 25 June 2006 letter was clearly written in response to specific queries raised by Mr Clark's other client, so I think it unlikely Mr and Mrs B would

have received the same information. In any event, the letter did not tell the other customers not to use Positive Solutions portal, as has been suggested to me, but only that valuations on the portal had not been updated because "Clark Rees Ltd" was going to transfer away from Positive Solutions to be regulated directly (a change which didn't take place until 25 November 2007) and once Clark Rees had become registered it would update clients.

- The 31 October 2006 letter (whose letterhead describes Clark Rees LLP as a trading name of Positive Solutions) is about a specific third-party platform's requirements when Stirling Mortimer investments were held within an ISA on that platform. Mr and Mrs B were not using ISAs, so again I think it unlikely they would have received that information.

In the circumstances, I don't find these letters to other clients of assistance in deciding the issues between Positive Solutions and Mr and Mrs B.

- Positive Solutions says that it is "*impossible to see*" how the fact that it authorised Mr Clark to advise Mr and Mrs B about their investment in 2005 is relevant to his later advice in connection with the fund. As I said in my provisional decision, I think Mr and Mrs B would reasonably have concluded from Positive Solutions' conduct in 2005 that it had given Mr Clark its authority to act on its behalf in recommending that they acquire the Sterling bond (which indeed it had done). I do not find it surprising that Mr and Mrs B thought that in 2006, Mr Clark still had Positive Solutions' authority to act on its behalf in recommending that they surrender that same Sterling bond. I accept that a 2005 representation does not necessarily imply that the situation is the same in 2006 or 2007, but I remain satisfied that Positive Solutions' 2005 conduct is relevant here. Positive Solutions could have told Mr and Mrs B that there were restrictions on the advice Mr Clark was able to give with respect to the Sterling bond, but it did not.

  Positive Solutions' failure to communicate restrictions on Mr Clark's authority to give investment advice on its behalf is not in itself a representation. I mentioned it to make the point that if Positive Solutions had been clearer about the limits of the actual authority it gave to its agents, it would have been far more difficult for Mr and Mrs B to have reasonably concluded that Mr Clark had Positive Solutions' actual authority to give the advice he did.

- I remain satisfied that Positive Solution's conduct in requiring Mr Clark to tell Positive Solutions' clients, including Mr and Mrs B, that he was a Positive Solutions financial adviser is relevant here. In the circumstances of this case, I see nothing unfair or unreasonable in finding that Positive Solutions is responsible for the investment advice Mr Clark gave to Mr and Mrs B, whilst I nonetheless do accept that he acted outside his actual authority in giving that advice.

- I note that Positive Solutions does not understand why I mentioned Mr and Mrs B's belief that Mr Clark had to set up a "*company*" in order to be a Positive Solutions' Independent Financial Adviser. The relevance of this point is that I don't think Mr and Mrs B's belief that Mr Clark was acting for Clark Rees LLP is incompatible with a belief that Positive Solutions was taking responsibility for his advice. As I have said, I consider that Positive Solutions caused Mr Clark to represent to Mr and Mrs B that Positive Solutions used the trading name "*Clark Rees LLP*". Positive Solutions'

> conduct might have been a mistake or an accident, but I see no reason why Mr and Mrs B should be disadvantaged as a result.

reliance

Positive Solutions' position is that Mr and Mrs B cannot credibly assert that they relied on Positive Solutions. I disagree, for the reasons given in my provisional decision.

is it just for Positive Solutions to bear the loss?

Positive Solutions' representative said that the section in my provisional decision asking whether it was just for Positive Solutions to be required to bear losses caused by Mr Clark:

> "*proceeds on a blatent misdirection of law. It is not the case that there is a broad test of 'justice' as a matter of law. If it were so, the result of any particular case would be entirely at the discretion of the decision maker (which is, we observe, the vice of the decision taken as a whole) and parties' rights would be entirely unpredictable. This is directly contrary to the principles of the common law. It is also not supported by the authorities. A good example of this is per Lord Keith in Armagas where he asked whether the circumstances are such as to make it just for the principal to bear the loss, but he went on specifically to define the circumstances which would make it just to reach that conclusion…Lord Keith was not saying that the test was one of general 'justice'.*"

This misunderstands why I expressed in my provisional decision my view that my finding of apparent authority coincided with the justice of the case.

In my provisional decision immediately above the heading "Positive Solutions' representations", I set out in summary why I consider that Mr Clark had apparent authority to act on behalf of Positive Solutions when he advised Mr and Mrs B to invest in the fund. In doing so, I applied the specific criteria drawn from the authorities.

That summary, and the discussion of the authorities leading up to it, make clear that the test for apparent authority does not include a general consideration of the justice of the case, and that I reached my provisional conclusion on each of the criteria for a finding of apparent authority before discussing that question.

However, Positive Solutions seems to me to believe that holding it responsible for Mr Clark's advice in relation to the fund is unjust to it. I disagree. So in fairness to Positive Solutions it seems to me to be appropriate to explain why I disagree. And I believe doing this can be helpful for another reason: if I had felt that the conclusion I was drawing was *unjust*, that would have given me pause for thought as to whether the conclusion could be correct.

I note that in the reported cases judges do much the same, so I don't believe that including such a discussion in my provisional decision is untoward.

Positive Solution's contention that Mr Clark committed a fraud

One of the arguments advanced by Positive Solutions' representative in response to my provisional decision is that Mr Clark committed fraud.

I said in my provisional decision that I was satisfied that neither Mr Clark nor Mr Rees had acted fraudulently, but I did not fully explain why I had reached that conclusion (largely because, at that stage, Positive Solutions had not said that it believed Mr Clark's conduct had been fraudulent). I expand on the fraud issue below:

- I regard an allegation of fraud as a serious allegation. I should find fraud if, on the balance of probabilities, that is more likely than not to be the explanation for any conduct of Mr Clark. But, in the same way as the courts, I approach such questions from the starting point that the more serious the allegation of misconduct, the stronger is the evidence required to establish on the balance of probabilities that the misconduct occurred: see *Re H (Minors, Sexual Abuse Standard of Proof)* 1996] AC 563, at 586, where Lord Nicholls said:

  "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence….. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation."

- On balance, I don't think Mr Clark's (or Mr Rees') conduct in respect of the sophisticated investor certificate was dishonest – and therefore it cannot have been fraudulent. The certificate says:

  "We, CERI REES (POSITIVE SOLUTIONS), being an authorised person for the purposes of the Financial Services and Markets Act 2000 confirm that [MR AND MRS B] is *sufficiently knowledgeable to understand the risks associated with the investments described in the above certificate [that is, investments like Stirling Mortimer]*"

  (The capitalised part of that quote is handwritten, and the rest is pre-printed.)

  Positive Solutions has said Mr Clark knew the certificate was false, but it has not specified the falsehood. I think there are three possibilities: that Mr Clark (or Mr Rees) was acting on behalf of Positive Solutions; that Mr and B had sufficient knowledge to understand the risks of the investment; or that Mr Rees was himself an authorised person. In any event, I don't think the signing of the certificate was dishonest:

  - The completion of the sophisticated investor certificate was not in itself a regulated activity. I can't see that Positive Solutions ever told Mr Clark or Mr Rees that they were not permitted to certify an investor as sophisticated whilst acting on Positive Solutions' behalf, and I see nothing dishonest in their doing so.

  - I am satisfied that Mr and Mrs B did not have sufficient knowledge to be able to understand the risks associated with the Stirling Mortimer investment. But I don't know whether or not Mr Rees knew that. He might have honestly believed that the level of knowledge required to understand the investment

was fairly low – and in that case, I consider that he was wrong but not dishonest.

Alternatively, he might have signed the certificate because it was part of the application pack, without sufficiently considering Mr and Mrs B's level of knowledge. I think that is a very likely explanation, but it does not imply dishonesty.

- Mr Rees was not himself an authorised person under FSMA, but the way he completed the form is ambiguous as to whether he understood that Positive Solutions was authorised (which was true) or that he himself was an authorised person (which was untrue). So I don't know which he intended. If Mr Rees intended the latter meaning, I think the most likely explanation for that is that he didn't understand his own regulatory status as an approved person. Given the complexity of the arrangements, I don't find that surprising. I think the way Mr Rees completed the form is far more likely to be a result of confusion between his status as an FSA "approved person" and Positive Solutions' status as an FSA "authorised person" than of dishonesty.

- If Mr Clark knew he wasn't permitted to recommend Stirling Mortimer products on behalf of Positive Solutions and yet purported to do so, that might amount to fraud. However, it is not clear to me that Mr Clark did in fact know that he wasn't permitted to recommend Stirling Mortimer products whilst acting on behalf of Positive Solutions. I think Mr Clark's October 2006 email exchange with Mr Hudson of Positive Solutions is likely to have led him to believe that he was permitted to promote Stirling Mortimer products on behalf of Positive Solutions so long as he referred those promotions to Positive Solutions' compliance department.

  In other words, I think Positive Solutions' conduct would have led Mr Clark to believe that he could promote Stirling Mortimer products if and only if he carried out certain steps. He did not carry out those steps. But I am not persuaded that his failure to do so was a result of dishonesty. I think his failure is more likely to be a result of laziness, or forgetfulness, or disorganisation, or some similar reason. I don't think he would have thought Positive Solutions was guaranteed to refuse him permission to promote Stirling Mortimer – if that had been Positive Solutions' position, presumably it would have said so during the October 2006 exchange.

- Positive Solutions might be alleging fraud on the basis that Mr Clark channelled commission from the Stirling Mortimer investment away from Positive Solutions, and arranged for it to be paid to Clark Rees LLP instead.

  The contracts Mr Clark and Mr Rees had with Positive Solutions said they had to pay all commission over to Positive Solutions, and then Positive Solutions would pay them the amounts they were entitled to. But Positive Solutions hasn't said much about how the finances worked in practice and it may well be that Mr Rees or Mr Clark thought there were good practical and/or legal reasons for the commission to go to Clark Rees. I'm not convinced on the limited material that has been provided to me that either of them was dishonest.

- I don't think Mr Clark's (or Mr Rees') conduct in recommending and arranging the Stirling Mortimer investment was solely with the aim of making a personal gain. Certainly the provision of financial advice was likely to benefit Mr Clark through the

payment of commission – but at the time, it was very common for advisers to receive commission when they gave advice.

This is not a case in which an adviser appropriated a customer's money for himself, nor is it a case in which the adviser recommended that the customer invest in a fund managed by or controlled by the adviser himself. Instead, this is simply a case in which a financial adviser recommended that a customer surrender existing products and then reinvest into another investment. That is a very common activity for financial advisers. As I've said, I don't think Mr Clark's advice was suitable for Mr and Mrs B – but unsuitable does not necessarily imply fraud.

vicarious liability

I remain satisfied that Positive Solutions is vicariously liable for the acts Mr and Mrs B complain about, for the reasons I gave in my provisional decision.

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

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

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

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

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

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

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

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

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

I accept that Mr Clark advised Mr and Mrs B without Positive Solutions' knowledge or authority. But I do not agree that he was "*was operating on behalf of his own and distinct business which had nothing to do with Positive Solutions*". I note:

- In my provisional decision, I explained why I did not think it would be reasonable to have expected members of the public like Mr and Mrs B to have realised that Clark Rees LLP was independent of Positive Solutions. Clark Rees LLP was not a *recognisably* independent business.

- In particular, Positive Solutions had given Mr Clark permission to use the words "*Clark Rees LLP*" as a "*trading style*" of Positive Solutions. I accept that Positive Solutions says it gave that permission by mistake, but nevertheless it was given. Mr and Mrs B therefore received correspondence on Clark Rees LLP notepaper in respect of transactions carried out on behalf of Positive Solutions (such as the 2005 AIG fund switch).

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

I agree that the FSMA does not, and was not intended to, provide a remedy to every consumer who has lost out as a result of wrongful advice. But for the reasons I gave in my

provisional decision, I am satisfied that s150 of FSMA does provide a remedy to certain consumers who have lost out as a result of the actions of an authorised firm – and I consider that it does apply here.

Finally, I note Positive Solutions' representative's comment that "*this case substantially resembles Frederick in that there was no semblance of an advice process, and in particular no reasons why letter or fact find process*".

I accept that there are similarities between this case and *Frederick*, particularly in that the term of the agency contract in *Frederick* appear to be identical to the terms of Mr Clark's and Mr Rees' agency contracts. But as I explained in my provisional decision, there are also very considerable differences. A key one is that there was no advice process in *Frederick*, but here I am satisfied that Mr Clark did give Mr and Mrs B investment advice. That advice was not documented, but in light of Mr and Mrs B's recollections I am satisfied that it was given. In addition, I think it is inherently implausible that consumers in Mr and Mrs B's position would approach an independent financial adviser and then choose to invest in one of Stirling Mortimer's funds without first taking advice.

suitability for determination by an ombudsman

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

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

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

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

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

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

oral hearing

Our rules also 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, [she] will determine the complaint. If not, [she] will invite the parties to take part in a hearing.*"

Positive Solutions' representative considers that "*it is impossible to make fair findings on the issue of reliance without cross examination and disclosure…Although … this matter should be referred to a Court, at the very least the FOS should hold an oral hearing in order to more fully address the question of [Mr and Mrs B's] reliance, before making a final determination on jurisdiction*".

The representative went on to say "*before finding in favour of [Mr and Mrs B] that there were representations and reliance thereon [Mr and Mrs B] must be expected to give oral evidence on the issue, and be cross examined about it, because to make a finding otherwise in their favour on these issues is simply impossible and irrational*".

I have carefully considered Positive Solutions' comments. However, in the specific circumstances of this complaint, I am satisfied that I can fairly determine the matter without convening a hearing. In particular, I note:

- The events complained of happened more than ten years ago, and memories inevitably fade. Whilst I am sure Mr and Mrs B are doing their best to assist me, I think it highly unlikely that they can remember exactly why they chose to take particular actions so long ago – and I think it is inevitable that their recollections will be coloured by subsequent events. I consider that I can reach a fair outcome by considering all the available evidence and using the circumstances to infer Mr and Mrs B's reasons for taking the actions they did.

- In such circumstances, even the courts (whose procedure is far more formal, elaborate and reliant on hearing oral testimony than that of the Financial Ombudsman Service) have recognised that oral evidence can be of limited value (see *Gestmin SGPS S.A. v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm))*.

- Positive Solutions' representative clearly believes that I have misunderstood the law, but it has also set out its position clearly in writing. I do not believe that fairness requires me to offer the representative the opportunity to tell me in person why they believe I am wrong.

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

confidentiality

Positive Solutions' representative has also referred to DISP 3.5.9(2), which says:

> "*The Ombudsman may: accept information in confidence (so that only an edited version, summary or description is disclosed to the other party) where [she] considers it appropriate.*"

The effect of that rule is that – *where I consider it appropriate to do so* – I may take account of evidence without providing the whole of that evidence to both parties.

Here, I have noted Positive Solutions' belief that my final decision should not refer to or include information that it provided to me in confidence. I have assumed that it is referring to Mr Clark's and Mr Rees' contracts with Positive Solutions. But as a matter of natural justice, I consider it important that Mr and Mrs B have had the opportunity to comment on the evidence I relied on to reach my decision. I have relied on the contracts, and so I consider it appropriate that I quote the relevant sections of those contracts within my decision.

merits

I remain satisfied that the Mr Clark's advice was not suitable for Mr and Mrs B for the reasons I gave in my provisional decision of 13 September 2019.

However, Positive Solutions does have a number of concerns about the redress I proposed in that provisional decision.

"*We make the following submissions regarding the proposed redress:*

1. *You have concluded that [Mr and Mrs B] were low risk investors, despite the fact that they handed over a cheque for £300,000 based on oral advice alone.*

2. *You have assumed that [Mr and Mrs B] have lost the entirety of their investment. We require evidence of this.*

3. *We require evidence of whether they received any returns at all.*

4. *The suggestion of using an average rate from fixed rate bonds to calculate redress is unfair and inappropriate. You have concluded that [Mr and Mrs B] had a low risk appetite and it is therefore inappropriate to suggest a rate which provides such high interest returns. Cautious investors would never expect to receive such high percentage returns.*

5. *The period for the calculation of redress unreasonably and unfairly runs from the date of the investment to the date of the Ombudsman's decision despite the FOS's serious and lengthy delays (of years) in dealing with this matter.*

6. *An interest rate of 8% is unreasonably high and does not reflect current, or even recent, market conditions.*

7. *The award for distress and inconvenience is inappropriate in this case. This is a matter where Positive Solutions is also a victim of Mr Clark's activities. Mr Clark advised [Mr and Mrs B] without Positive Solutions' knowledge or authority as he was operating on behalf of his own and distinct business which had nothing to do with Positive Solutions*."

Mr and Mrs B have accepted that their conduct was "*naïve*". I agree. Their actions exposed them to considerable risk. But that does not automatically mean that they should have been advised to take such risks. On balance, I think it is more likely than not that if they had been given suitable advice they would have taken it.

As I explained in my provisional decision, I do not know how much risk Mr and Mrs B wanted to take. But in view of their circumstances, I think their *capacity* for risk was low and this should have been appreciated by a competent financial adviser exercising reasonable skill

and care and complying with COB 5.3.5R. Regardless of their attitude to risk, they should not have been advised to take more than a small amount of risk.

My conclusion that Mr and Mrs B have lost the whole of their investment is based in part on my conversation with the fund's liquidator last summer. He told me that there was not enough money in the fund to cover his fees, let alone to give returns to investors. I consider that very strong evidence that Mr and Mrs B have lost the whole of their investment.

I also note that Mr and Mrs B are happy to assign the whole of their investment in the fund to Positive Solutions in exchange for the "*full fair compensation*" as set out in my provisional decision. If I am wrong to value Mr and Mrs B's interest in the investment at zero, then the assignment will enable Positive Solutions to recover any remaining value.

I agree that it is fair for Positive Solutions to seek evidence as to whether Mr and Mrs B received any returns at all. As I said in my provisional decision, any income or other payment out of the investment should be deducted from the *fair value* calculation at the point it was actually paid.

I see nothing unfair or inappropriate about using the average rate for fixed rate bonds to calculate redress. The particular rate I chose is published by the Bank of England, and reflects the average rate that banks and building societies are advertising for fixed rate deposit accounts with a fixed term of 12 to 17 months. It's a weighted average, meaning that the biggest banks' rates have more influence. I am not saying that I think Mr and Mrs B would in fact have put their £300,000 into a fixed interest deposit account. Instead, I am saying that I think that rate fairly reflects the sort of return they would have got with little to no risk to their money.

Over the relevant period, the average rate for fixed rate bonds ranged from around 5.5% in April 2007 to around 1.0% today – with a high of 6.2% in October 2007 and a low of 0.6% in January 2017. I do not agree that that rate is higher than Mr and Mrs B could reasonably have expected to receive if they had been given suitable advice.

In addition, I see nothing unfair or inappropriate about calculating redress from the date of the investment to the date of my final decision. Mr and Mrs B's losses cover the whole of that period, and I therefore consider that it is right for Mr and Mrs B to receive compensation for the whole of that period.

I acknowledge that it has taken me much longer than I would have liked to issue this final decision. I apologise to both parties for that. But I see no reason why Mr and Mrs B should be disadvantaged as a result. I consider that Positive Solutions should have upheld Mr and Mrs B's complaint at the outset, and so I am satisfied that it is fair for Positive Solutions to be held responsible for the whole of Mr and Mrs B's loss despite my delays.

I accept that Mr and Mrs B are unlikely to receive returns of 8% per year simple if they invest elsewhere. But in this particular case, I am only ordering Positive Solutions to add interest at that rate if it does not pay compensation within 28 days of being notified of Mr and Mrs B's acceptance of this final decision. If Positive Solutions pays promptly, it will not have to pay interest at 8% simple. If it fails to pay promptly, then I consider that it is fair for me to specify that interest will accrue at a rate of 8% per year simple.

Finally, I accept that Positive Solutions did not know that Mr Clark had advised Mr and Mrs B to invest in the fund. But for the reasons I've given, I'm satisfied that Positive Solutions is

responsible for Mr Clark's advice. I consider that it is fair and reasonable for me to order Positive Solutions to compensate Mr and Mrs B for the consequences of that advice – and those consequences include the distress and inconvenience they have suffered.

my final decision

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

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

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

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

Positive Solutions (Financial Services) Ltd should provide details of its calculation to Mr and Mrs B in a clear, simple format.

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

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

Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs B either to accept or reject my decision before 6 January 2020.

Laura Colman
ombudsman

Copy of provisional decision issued on 13 September 2019

complaint

Mr and Mrs B complain that in April 2007, a Mr Paul Clark wrongly advised them to invest £300,000 in the Stirling Mortimer Global Property Fund PCC Limited – Majestic Village No 3 Fund ("*the fund*"). They further complain that in late 2006 and early 2007, Mr Clark wrongly advised them to cash in their existing investments to raise money to purchase shares in the fund.

Mr and Mrs B believe that Positive Solutions (Financial Services) Limited is responsible for Mr Clark's advice.

background

Mr and Mrs B say that in late 2006, they were considering their retirement plans. Mr Clark advised them to cash in their existing investments and reinvest the proceeds in the fund, for a short term boost to their retirement pot. They believed the fund would mature after two years, and was guaranteed to return 6% per year.

The fund experienced significant difficulties. Mr and Mrs B did not receive the 6% per year they expected, nor was their capital returned to them after two years. Mr and Mrs B still do not know when – or if – any part of their capital will be returned to them.

Mr and Mrs B complained to Positive Solutions in early 2013, just less than six years after they received the advice they complain about. They asked Positive Solutions to put them in the position they would have been in if they hadn't invested in the fund.

Positive Solutions objected to our consideration of the complaint, because it said it was not responsible for Mr Clark's advice.

I issued a provisional jurisdiction decision on this complaint in November 2018. In that provisional jurisdiction decision, I explained that I thought Positive Solutions was responsible for the matters Mr and Mrs B complain about because Mr Clark had apparent authority to carry out the acts complained of on behalf of Positive Solutions. Mr and Mrs B accepted my first provisional decision, but Positive Solutions did not.

Mr and Mrs B said:

- They believe they have provided ample factual evidence to show they were being advised by Mr Clark in his capacity as a representative of Positive Solutions. Their investment portfolio was serviced by Positive Solutions from 2003 until July 2007. Positive Solutions provided them with a personal account on its website on which to view their investment status, Positive Solutions was fully aware of the liquidation of their portfolio, and the investment they complain about was made by a Positive Solutions representative using Positive Solutions' name and Financial Services Authority (FSA) number.

- If there was any "*mismanagement of the activities and processes used by [Mr Clark]*", then Mr and Mrs B believe that to be an internal disciplinary matter between Positive Solutions and its representatives. Mr and Mrs B say they could not possibly have been aware of any such "*mismanagement*" unless Positive Solutions informed them of it – and Positive Solutions did no such thing.

Positive Solutions also provided detailed comments in support of its position. In summary, it said:

- It did not itself make any representations to Mr and Mrs B that Mr Clark had its authority to act on its behalf in respect of the matters Mr and Mrs B complain about. It considers that any

representations made by Mr Clark are not relevant to the issue of whether Positive Solutions itself made representations to Mr and Mrs B.

- Mr and Mrs B cannot have placed any reliance on representations from Positive Solutions that Mr Clark had Positive Solutions' authority to carry out the acts they complain about, because Positive Solutions made no such representations.

- The fact Mr Clark was one of its agents, and appeared on the FSA Register with respect to Positive Solutions, is not relevant to the issue of whether Mr Clark appeared to have Positive Solutions' authority to carry out the acts Mr and Mrs B complain of.

- Mr Clark did not use Positive Solutions' stationery for the purpose of carrying out the acts Mr and Mrs B complain about – and in any event the stationery issue is not relevant to apparent authority.

- Mr and Mrs B received oral advice from Mr Clark personally, and they acted on that oral advice. Mr Clark was not acting for Positive Solutions when he gave that advice.

- Mr and Mrs B understood they were dealing with Clark Rees LLP, and were happy to do so. They must have known they were not dealing with a network, because they did not receive a suitability letter on the network's headed paper.

I have taken both parties' comments into account in reaching the revised provisional findings that I set out below. I have also given further consideration to the law, particularly in the areas of apparent authority, vicarious liability, and statutory duties under the Financial Services and Markets Act 2000 (FSMA). Having done so, my overall conclusions on jurisdiction are unchanged, but my reasoning is not identical to the reasoning I set out in my first provisional decision.

my provisional findings on jurisdiction

Firstly, I have considered whether Mr and Mrs B's complaint falls within the jurisdiction of the Financial Ombudsman Service. I am satisfied that it does.

Briefly, my provisional findings on jurisdiction are:

- Mr and Mrs B's complaint is about an act or omission in relation to the carrying on of the regulated activity of giving investment advice.

- Positive Solutions represented to Mr and Mrs B that Mr Clark had Positive Solutions' authority to conduct business of the same type as the business he did in fact conduct, Mr and Mrs B relied on those representations, and apparent authority therefore operated such as to give rise to Positive Solutions' responsibility for the acts Mr and Mrs B complain about.

- In addition, Positive Solutions is vicariously liable for the investment advice Mr Clark gave to Mr and Mrs B.

- Positive Solutions is also liable to Mr and Mrs B under section 150 of FSMA.

- Mr and Mrs B's complaint therefore falls within the jurisdiction of the Financial Ombudsman Service.

I go on to explain how I reached those findings.

the factual background

The facts here are essentially undisputed (other than some points relating to Mr and Mrs B's use of Positive Solutions' website portal, which I discuss below). Neither party is in a position to challenge

much of the other's factual evidence. For example, Mr and Mrs B cannot usefully add anything to Positive Solutions' description of its contractual relationship with Mr Clark, and Positive Solutions cannot usefully add anything to Mr and Mrs B's recollections of Mr Clark's comments to them.

Where the parties have given me evidence from within their own knowledge, I have no concerns about that evidence. I am satisfied that they are both doing their best to help me understand this complex matter.

Information about Positive Solutions' interactions with Mr and Mrs B is clearly relevant here. I also intend to rely on evidence showing the parties' interactions with Mr Clark (the financial adviser), Mr Rees, (Mr Clark's associate), Clark Rees LLP (Mr Clark and Mr Rees' limited liability partnership), Stirling Mortimer (the product provider for the fund Mr and Mrs B complain about), Heritage (the fund's administrator), and with Sterling, AIG and Skandia (other product providers).

In my first provisional jurisdiction decision on this complaint, I set out my findings as to the factual background. I think it is helpful for me to set out those facts again. I do so in largely identical terms to my first provisional decision, but there are two substantive differences:

- I now accept that the Cardiff office Mr Clark worked from was not Positive Solutions' Cardiff office. Since I issued my first provisional jurisdiction decision, Positive Solutions has provided me with the address of its actual Cardiff office, which differs from the address used by Mr Clark. Mr and Mrs B say that whilst they assumed that the office in which they met Mr Clark was a Positive Solutions' office, there was "*never a name on the door*". They also accept Positive Solutions' evidence on this issue.

- Both parties have provided me with further evidence about a Sterling investment bond Mr Clark sold to Mr and Mrs B in early 2005. I have incorporated that further evidence into my findings.

Subject to anything further that I receive from either party, I am provisionally satisfied of the following:

Mr Clark's relationship with Mr and Mrs B before 2003

Mr Clark first advised Mr and Mrs B in 1998. At the time, Mr and Mrs B believed Mr Clark to be working for a different firm of financial advisers (not associated with Positive Solutions).

Over the period 1998 to 2003, Mr Clark gave advice to Mr and Mrs B in his capacity as a financial adviser of that other firm. Mr and Mrs B accepted his advice. They make no complaint about the advice Mr Clark gave during this period.

Mr Clark's 2003 move to Positive Solutions

In 2003, Mr Clark moved from the other firm to Positive Solutions. One of his associates, a Mr Rees, also moved to Positive Solutions at around the same time.

Mr Clark and Mr Rees entered into (separate) agency agreements with Positive Solutions. Positive Solutions has provided me with copies. At clause 2.1, those agreements said:

> "*The Company [Positive Solutions (Financial Services) Ltd] hereby appoints the Registered Individual as its Registered Individual for the purpose only of introducing Applications by Clients for new Contracts for submission to the Institutions specified by the Registered Individual and approved by the Company [Approved Institutions].*"

At clause 4.5, they said:

> "*The Registered Individual must at all times describe itself as a Registered Individual and must not hold itself out as an employee of the Company. All correspondence, business cards or other similar literature must clearly state that the Registered Individual is a Registered Individual of the Company*."

And at clause 10.7

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

The agency agreements also said the term "*Registered Individual*" had "*the meaning ascribed to Investment Adviser function, Investment Adviser (Trainee) Function or Pension Transfer Specialist Function by the FSA and in the Financial Services and Markets Act 2000*". At the time, the FSA defined each of those functions as a "*controlled function*" – or in other words as "*a function, relating to the carrying on of a regulated activity by a firm, which is specified under section 56 of the [Financial Services and Markets] Act (Approval for particular arrangements) in the table of controlled functions [set out in SUP 10.4.5R in the FSA Handbook]*".

(I note here that the term "Registered Individual" is not defined in FSMA. I am aware that other authorised firms use the same term for different purposes, often to denote an employee of an appointed representative. Throughout this decision, where I use the term "Registered Individual" I do so with the meaning specified in Positive Solutions' agency agreements.)

The contract between Mr Clark and Positive Solutions included a provision for Mr Clark to indemnify Positive Solutions in circumstances where Mr Clark acted outside of his authority, and for Mr Clark to pay over to Positive Solutions any monies (including commissions) that he received from financial institutions. A further provision said that Positive Solutions would not be bound by any acts of Mr Clark which exceeded the authority granted to him under the contract. Mr Rees' contract contained identical provisions.

Mr and Mrs B's move to Positive Solutions

Mr and Mrs B say they were aware of Mr Clark's move to Positive Solutions, and they wanted him to continue to be their financial adviser. They told us they believed Mr Clark had to set up a "*company*" in order to be a Positive Solutions Independent Financial Adviser.

Mr and Mrs B completed various documents in 2003 to enable the servicing of their existing investments to be transferred to Positive Solutions. I don't have all of those documents, but I do have confirmations from some of the product providers that the documents were received. For example, Skandia wrote to Mr and Mrs B on 21 October 2003 to "*confirm that I have changed your financial adviser to Positive Solutions (FS) Ltd (P Clark)…Any future commission…will now be paid to your new adviser*".

Mr and Mrs B completed further documents in 2004. I've seen copies of their Positive Solutions "*Transfer of Servicing Request*" forms for Scottish Amicable, Allied Dunbar, Scottish Widows and Clerical Medical. Mr and Mrs B signed all of those forms on 11 August 2004. They all show Positive Solutions' logo, and carry identical wording:

> "*I/we write to inform you that I/we would like the responsibility for the future servicing of the above plans to be transferred to the following company: Paul Clark, Independent Financial Adviser at Positive Solutions (Fin.Serv.) Ltd) [at Positive Solutions' Newcastle head office address]. Can you please notify Positive Solutions when the transfer has been completed and provide an up to date valuation report for their records.*"

Positive Solutions' Terms of Business

At the time, firms providing investment advice were required to tell their retail customers whether that advice covered the whole of the market ("independent advice"), or whether the advice was restricted to one or a limited number of product providers. The rules in this respect did not change significantly between 2003 (when Mr and Mrs B first became clients of Positive Solutions) and 2007 (when they invested in the fund complained about).

Positive Solutions provided independent advice. It told its customers that it was independent by providing them with its Terms of Business, which included the following:

> "**REGULATOR'S STATEMENT**
>
> *Those who advise on life assurance, pensions or unit trust products are either: Independent Advisers or Representatives of one company. Your adviser is independent and will act on your behalf in advising you on life assurance, pensions or unit trust products. Because your adviser is independent he or she can advise you on the products of different companies.*"

The Terms of Business also included Positive Solutions' "*partnership code*", which explained that its purpose was to "*help our clients understand, protect and increase their assets*". The Terms of Business also say that Positive Solutions' "*partners*" will "g*ive impartial, independent financial advice*".

Mr and Mrs B do not recall receiving Positive Solutions' Terms of Business, and Positive Solutions has no record of having provided that document to Mr and Mrs B. But I think the Terms of Business are still relevant, in that they show what Positive Solutions was telling the general public about what it expected its financial advisers, including Mr Clark and Mr Rees, to do.

the December 2004 screenshot / the website portal

I think Mr and Mrs B's alleged use of Positive Solutions' website portal is the only area where the parties disagree about the facts of this complaint.

Mr and Mrs B told us that "*part of the attraction of dealing with Positive Solutions was their online tracking of our investments – we were given username/password access to our account on their website. So, details of our investment portfolio were held on Positive Solution's own system.*"

Mr and Mrs B provided me with a screenshot which they say shows their investments on Positive Solutions' website portal as at December 2004. Mr and Mrs B's recollection is that they logged into the portal themselves, from their home computer, in order to produce the screenshot.

Positive Solutions' evidence is that Mr and Mrs B did not log into its system themselves. It provided me with two screenshots which it says show that, as at June 2014, Mr and Mrs B's Positive Solutions' accounts each had "*0 logins*".

I don't think any of the screenshots provided are, in themselves, strong evidence. The screenshot Mr and Mrs B provided could have come from Mr Clark rather than from their own computer. Positive Solutions' screenshots only show that there were zero logins from Mr and Mrs B's accounts since it started tracking those logins. Positive Solutions has not told me the date on which that login tracker started.

In the circumstances, I rely on the screenshot evidence only as far as to say: Positive Solutions had a website portal; Mr and Mrs B knew that; Mr and Mrs B had accounts on Positive Solutions' portal; and Mr and Mrs B *believed* that it was open to them to log on to the portal and view their investments. Whether or not Mr and Mrs B actually logged into the portal themselves, I am satisfied that they knew they could.

Mr Clark's January 2005 Sterling recommendation

In January 2005, Mr and Mrs B invested in a Sterling bond. They say they did so in reliance on a recommendation from Mr Clark, who was acting in his capacity as a Positive Solutions financial adviser.

Unlike the later Stirling Mortimer investment, Positive Solutions has substantial records in respect of Mr and Mrs B's 2005 Sterling investment. In particular, it has copies of:

- The fact find Mr Clark completed before recommending Mr and Mrs B invest in the Sterling bond. Mr Clark noted "*clients have received an inheritance from [Mrs B's mother]…clients wish to invest £115,000 for growth over a minimum term of five years*".

- The "*identity verification certificate*" Mr Clark completed for Mr B. This form has a Positive Solutions logo on it. It appears to have been completed by Mr Clark in his capacity as an "*independent financial adviser*" of "*Positive Solutions (Financial Services) Ltd*", and notes that Mr Clark made a home visit to Mr B in early January 2005.

- Positive Solutions' own "*New Business Submission Sheet*", detailing the commission it received in respect of Mr and Mrs B's new Sterling bond.

- Mr Clark's 4 January 2005 letter to Mr and Mrs B confirming their investment in the Sterling bond, and inviting them to view their "*personal private client web-site*" at "*http://www.pclark.co.uk*".

- Mr Clark's documented reasons for recommending the Sterling investment (enclosed with his 4 January 2005 letter).

- The application form for Mr and Mrs B's Sterling investment. That application names Mr Clark as Mr and Mrs B's adviser, and records Positive Solutions as the "*Adviser Firm*".

I note that Mr and Mrs B disagree with Positive Solutions as to whether their investment in the Sterling bond has any relevance to Positive Solutions' liability for their later Stirling Mortimer investment. But I understand everyone agrees that Mr Clark was acting on behalf of Positive Solutions when he recommended the Sterling investment to Mr and Mrs B. They also agree that Mr and Mrs B accepted Mr Clark's recommendation in respect of the Sterling bond, and that the bond duly went into force.

incorporation of Clark Rees LLP

In March 2005, Mr Clark and Mr Rees set up the limited liability partnership, Clark Rees LLP. They were both members of the partnership, and remained so until December 2009.

I have seen no evidence to suggest that there has ever been any contractual relationship of any kind between Clark Rees LLP and Positive Solutions (Financial Services) Ltd. In particular, Clark Rees LLP has never been an agent, appointed representative, or Registered Individual of Positive Solutions. Positive Solutions certainly had contractual relationships with Mr Clark and Mr Rees individually, but it did not have contractual relationships with their limited liability partnership.

the 2005 'trading style' correspondence

Nicky Calder of Positive Solutions wrote to Mr Rees in June 2005 to confirm that "*Clark Rees LLP*" had been registered as a "*trading style*" of Positive Solutions. Mr and Mrs B were not aware of that email at the time.

Positive Solutions later explained that the email had been sent in error, because it does not usually allow the use of trading names including the terms "LLP" or "ltd".

September 2005 AIG fund switch

Mr and Mrs B have recently provided me with a letter dated 28 September 2005, on Clark Rees LLP notepaper, which said:

> "*Please find enclosed a Fund Switch Form for your AIG Investment Bond. I would be grateful if you could both sign it and return it to me in the pre paid envelope provided.*"

Mr and Mrs B provided this letter as another example of a document with the footer "*Clark Rees LLP is a trading style of Positive Solutions (Financial Services) Ltd*".

Sterling's 2006 and 2007 correspondence

Sterling wrote to Mr and Mrs B in January 2006 and January 2007 to give them an annual statement for their investment bond. Sterling's letters said "*a copy of this statement has been sent to your Financial Adviser, Positive Solutions (Financial Services) Limited. If you are reviewing your investment objectives we would recommend that you discuss them with your Financial Adviser*".

I consider these letters show that Sterling acted on the basis that Positive Solutions was Mr and Mrs B's financial adviser in respect of their Sterling bond.

the October 2006 promotion

Doug Hudson, Positive Solutions' "*Assistant Director Compliance*", wrote to Mr Clark and Mr Rees in October 2006 in respect of a promotion Mr Clark had sent to other Positive Solutions Registered Individuals. The promotion was in respect of the Stirling Mortimer Property fund. This was not the fund Mr and Mrs B ultimately invested in, but it was offered by the same product provider – which was not on Positive Solutions' list of approved institutions.

In the promotion, sent by email, Mr Clark described himself as a "*managing partner*", gave his address as "*Clark Rees LLP*", and provided Clark Rees LLP's company number. Mr Hudson said:

> "*I have had a complaint lodged by one of our partners[*] who received the attached email from you. He feels that this does not fall into the category of business which PS would want to be associated with.*
>
> *I am more concerned that you are advertising your services to PS partners using an email which does not meet our standards and in which you are advertising yourself as an [LLP]. Further there is no mention that you are a trading style of PS. I have had an exchange of emails with Ceri Rees before this went out and he was instructed that you must not portray yourself in this way. He agreed that it would not happen again, but clearly has ignored this. In addition I am not happy that your advert, for that is what it is has not been passed by PS to confirm that it complies with our requirements.*
>
> *Clearly you are both in breach of our procedures and I will record this as such.*
>
> *I need confirmation from you both that in future all advertising will be sent [to Positive Solutions] for approval, that you will cease to refer to yourself as a limited liability partnership AND you will ensure that all future emails and letters will show fully that Clark Rees is a trading style of Positive Solutions in line with FSA rules*".

(*I understand Mr Hudson and Positive Solutions use the term "*partners*" to mean the Registered Individuals of Positive Solutions. I do not believe Mr Hudson was referring to "partners" in the sense of members of an ordinary or limited liability partnership.)

In his email, Mr Hudson did not comment on whether Stirling Mortimer was an institution approved by Positive Solutions. He did not say that Positive Solutions had any concerns over being associated

with the type of business done by Stirling Mortimer – only that one of Positive Solutions' other Registered Individuals had such a concern.

There is no suggestion in Mr Hudson's email that Mr Hudson believed Mr Clark was acting on behalf of Clark Rees LLP in promoting the Stirling Mortimer investment. On the contrary, it is clear that Mr Hudson thought Mr Clark was acting on behalf of Positive Solutions – and indeed had breached Positive Solutions' procedures in doing so.

Mr Hudson's objection to Mr Clark's use of the name "Clark Rees LLP" was specifically about the inclusion of the letters "LLP" – and not about the use of the words "Clark Rees". Mr Hudson insisted that Mr Clark's future letters and emails referred to the fact Clark Rees was a trading style of Positive Solutions.

A very similar promotion appears to have been sent through the post. Positive Solutions provided me with a letter dated 10 October 2006, from Clark Rees LLP's Head of Operations to a third party (Positive Solutions redacted the recipient's name, but I understand it was not Mr or Mrs B). That letter also promoted the Stirling Mortimer Property Fund. I do not know when that letter first came into Positive Solutions' possession, nor do I know whether it took any action on receipt of the letter.

Mr and Mrs B's 2006/2007 surrenders and reinvestment

On 24 August 2006 Mr Clark wrote to Mr B on Clark Rees LLP headed paper, with a footer explaining "*Clark Rees LLP is a trading style of Positive Solutions (Financial Services) Ltd*". The letter promoted "*the prestigious Stirling Mortimer Property Fund*". That fund was also the subject of Mr Clark's October 2006 promotion, but was not the fund Mr and Mrs B ultimately invested in.

Mr and Mrs B subsequently met with Mr Clark. I do not know the date of that meeting, but Mr and Mrs B's recollection is that it was in October 2006. Mr Clark recommended that Mr and Mrs B cash in some of their existing investments, with the aim of reinvesting elsewhere. Mr and Mrs B accepted that recommendation, though there was some delay before the advice was implemented. I do not know the cause of the delay.

Mr Clark then wrote to various product providers using Positive Solutions' headed paper, enclosing Mr and Mrs B's surrender instructions. An example is Mr Clark's 8 February 2007 letter to Sterling (which I understand instructed the surrender of the bond Mr Clark had recommended two years earlier). The product providers followed Mr Clark's instructions, and at least some of them wrote to Positive Solutions at its head office address in Newcastle to confirm the surrenders. Skandia wrote directly to Mrs B, confirming it had received her instructions and naming her financial adviser as "*Positive Sols (FS) Ltd (P Clark)*".

In April 2007 Mr and Mrs B had a single meeting with Mr Clark. He recommended that they invest £300,000 in the fund. Mr and Mrs B do not recall Mr Clark providing them with a suitability letter, nor do they recall receiving any other document in which he set out the reasons why he had recommended they invest in the fund.

Mr and Mrs B accepted Mr Clark's recommendation to invest in the Stirling Mortimer fund. I don't know the precise date on which they accepted the recommendation, but it must have been on or before 11 April 2007 – the date on which Mr and Mrs B signed an application form for their investment in the fund. The application form had a section "*For Professional Adviser's Use Only*", in which Mr Rees of "*Positive Solutions*" was named as their financial adviser. This section of the form also included Positive Solutions' FSA number.

I understand that Stirling Mortimer would not have permitted UK based investors like Mr and Mrs B to invest in the fund unless it was satisfied they were eligible, or "*qualified*", to receive promotions about it. Stirling Mortimer appears to have proceeded on the basis that the fund was a "*qualified investor scheme*" (in the sense used in the FSA Handbook). At the time, such a scheme could only be lawfully promoted within the UK to investors who fell within one of the relevant exemptions. Here, it appears

Stirling Mortimer was satisfied of Mr and Mrs B's eligibility because Mr Rees completed a "*Sophisticated Investor's Certificate*" in respect of Mr and Mrs B. In doing so, Mr Rees identified himself as working for Positive Solutions.

Heritage (the fund administrator) told us that it paid commission for Mr and Mrs B's investment in the fund to "*Mr Ceri Rees, Clark Rees, Positive Solutions*".

I don't know what, if anything, happened in respect of any commission paid out by other product providers in respect of Mr and Mrs B's existing policies. I do know that Sterling deducted an early surrender charge of around £12,500 because Mr and Mrs B had surrendered their bond within five years of taking it out, but I don't know whether any of the initial commission was clawed back.

Mr Clark's resignation from Positive Solutions

On 2 July 2007 Mr Clark wrote to Positive Solutions to say he had decided to resign from Positive Solutions. Mr Rees wrote to Positive Solutions on the same date and in near-identical terms.

I understand that all parties to this complaint accept that from 2 July 2007 onwards, nothing Mr Clark did was done on behalf of Positive Solutions.

the fund update

Mr and Mrs B provided me with an undated "*Stirling Mortimer Fund Update*". That update is printed on paper marked with "Clark Rees" (without the limited liability descriptor) in the upper right hand corner. The update refers to "*our*" recommendation that Mr and Mrs B invest in the fund, but does not specify who is meant by the word "*our*".

Mr and Mrs B do not recall when they received this update. But from context, I consider that it must have been in either 2009 or 2010 – after Mr Clark had resigned from Positive Solutions.

the FSA Register

Throughout the relevant period, Positive Solutions was registered with the FSA as having permission under Part IV of FSMA to carry on certain regulated activities, including those of advising on investments and arranging transactions in investments. As such, Positive Solutions was an 'authorised person' under FSMA.

Mr Clark and Mr Rees both appeared on the FSA Register with respect to Positive Solutions. Mr Clark's name appeared between June 2003 and October 2007, and Mr Rees' name appeared between February 2003 and October 2007. They were approved by the FSA to carry out the controlled function "*Investment Adviser (Trainee)*" and then "*Investment Adviser*" on behalf of Positive Solutions. Mr Clark and Mr Rees therefore both had the status of 'approved persons' for the purposes of performing specific functions for Positive Solutions. But neither of them were themselves an 'authorised person' under FSMA.

(The FSA's register also shows that "*Clark Rees LLP*" was registered as a "*trading name*" of Positive Solutions between 17 July 2007 and 5 November 2008, but this was after the events Mr and Mrs B complain of.)

Mr and Mrs B are now aware of the contents of the FSA Register, but I do not believe they were aware of the Register in 2006 or 2007.

the stationery

I've seen letters from Mr Clark on two different sets of notepaper.

I understand Positive Solutions provided Mr Clark with notepaper bearing Positive Solutions' name and logo. It has a footer with Positive Solutions' registered address and company number. It displays Mr Clark's Cardiff address more prominently, at the top right of the page, and describes Mr Clark as an "*Independent Financial Adviser*". Positive Solutions provided Mr Rees with similar notepaper.

The other notepaper bears the name and address (but not company number) of Clark Rees LLP. It includes the footer "*Clark Rees LLP is a trading style of Positive Solutions (Financial Services) Ltd who are authorised and regulated by the Financial Services Authority*". This notepaper did not include a position for Mr Clark, but he described himself as a "senior partner" in his signature block. I accept Positive Solutions' evidence that it did not provide or approve this notepaper.

I have seen a third notepaper, for Clark Rees LLP, but I have not seen any letters from Mr Clark to Mr and Mrs B on that paper (the single letter I have seen is the October 2006 promotion mentioned above, which was not addressed to Mr and Mrs B, and which was from somebody identifying herself as Clark Rees LLP's head of operations). That notepaper includes Clark Rees LLP's name and logo, its registered address, and its company registration number and VAT number. It does not mention Positive Solutions.

I am not aware of any correspondence or stationery in which Mr Clark described himself as a Registered Individual of Positive Solutions. I understand that Positive Solutions' business cards, compliments slips and other stationery described its Registered Individuals as an "*Independent Financial Adviser*" rather than as a Registered Individual.

the compulsory jurisdiction

Having set out the factual background, I go on to decide whether the complaint Mr and Mrs B have asked us to look at falls within the jurisdiction of the Financial Ombudsman Service.

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

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

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

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

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

the regulatory background

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

regulated activities

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

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

the general prohibition

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

This is known as the "general prohibition".

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

Mr Clark and Mr Rees were neither authorised persons nor exempt from authorisation. That means that if Mr Clark (or Mr Rees) had carried out a regulated activity on his own behalf by way of business, he would have been in breach of the general prohibition. Similarly, if Mr Clark had carried out a regulated activity on behalf of Clark Rees LLP, both he and Clark Rees LLP would have been in breach of the general prohibition.

If Mr Clark had been an appointed representative of Positive Solutions, the position would have been different. He would then have been exempt from authorisation, and so he could have lawfully carried on regulated activities by way of business on his own behalf (to the extent that Positive Solutions had accepted responsibility for the regulated activities he carried out).

the approved persons regime

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

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

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

Positive Solutions was an authorised person. The act of advising on investments was a controlled function. I consider that Mr Clark's (and Mr Rees') Registered Individual contracts with Positive Solutions amounted to an arrangement entered into by Positive Solutions in relation to the carrying on *by Positive Solutions* of a regulated activity.

Positive Solutions was required to take reasonable care to ensure that neither Mr Clark nor Mr Rees gave investment advice unless they were acting in accordance with an approval given by the FSA. Positive Solutions therefore arranged for both Mr Clark and Mr Rees to be approved by the FSA to perform the controlled functions "*Investment Adviser (Trainee)*" and then "*Investment Adviser*" in relation to regulated activities carried on by Positive Solutions.

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

breach of statutory duty

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

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

(The provisions of section 150(1) of FSMA are now substantially contained in section 138D of FSMA.)

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

One such rule in place at the time of the events Mr and Mrs B complain about was COB 5.3.5R, which said:

> "*A firm must take reasonable steps to ensure that, if in the course of designated investment business:*
> *(a) it makes any personal recommendation to a private customer to:*
> *(i) buy, sell, subscribe for or underwrite a designated investment (or to exercise any right conferred by such an investment to do so); …*
> *the advice on investments or transaction is suitable for the client.*"

The FSA Glossary explained that "*designated investment business*" included arranging deals in investments and advising on investments. Those terms had the meaning set out in the RAO.

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

That means that if Mr and Mrs B suffered a loss as a result of a rule breached by Positive Solutions, they would have a right of action against Positive Solutions for breach of statutory duty. They would have no such right against Mr Clark or Mr Rees, because neither Mr Clark nor Mr Rees were 'firms'.

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

I understand that Positive Solutions does not deny that a regulated activity took place. It objects to my consideration of this complaint because it says it was not responsible for the advice Mr and Mrs B received – not because it says they did not receive advice at all. But I include this point, both for completeness and because I think there might be some confusion about the extent of the regulated activity that took place.

The fund Mr and Mrs B invested in is a security or relevant investment under article 53 of the RAO. The products Mr and Mrs B surrendered in order to raise money to purchase the fund were also securities or relevant investments. Mr and Mrs B say they were advised on both buying shares in the fund and on selling their existing products. I am satisfied that they were so advised. I also note that the application form for their investment in the fund names an adviser. A regulated activity – advising on investments – therefore took place.

I am satisfied that Mr Clark's advice was given by way of business. Again, I don't think there's a dispute about that but I mention it for completeness. I note that Stirling Mortimer paid commission in respect of Mr and Mrs B's investment in the fund.

The regulated activity of arranging deals in investments also took place, both in relation to the purchase of Mr and Mrs B's shares in the fund and in relation to the sale of their existing investments.

Mr and Mrs B's complaint is primarily about Mr Clark's advice, but the advice they complain about could not have been implemented unless somebody arranged deals in investments. I think it is therefore relevant for me to consider the circumstances surrounding the arrangement of those deals.

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

Mr and Mrs B did not deal with any employees of Positive Solutions – although Mr Clark and Mr Rees were both agents of Positive Solutions, they were not Positive Solutions' employees. But Positive Solutions might still be responsible for the advice even if none of its employees were involved.

I have first considered the issue of actual authority. Positive Solutions accepts that if it had given Mr Clark actual authority to recommend that Mr and Mrs B surrender their existing investments and then reinvest in the Stirling Mortimer fund, it would then be responsible for that advice. But Positive Solutions says it did not give Mr Clark actual authority to carry out those activities.

Briefly, Positive Solutions says:

- It had not agreed terms of business with Stirling Mortimer (or its administrators Heritage), and it would not have given permission for any of its Registered Individuals to recommend any fund without terms of business in place.

- It had not given Mr Clark or Mr Rees permission to recommend any Stirling Mortimer fund.

- It did not give Mr Clark permission to recommend that Mr and Mrs B surrender any of their existing investments.

- It did not receive any commission in respect of Mr and Mrs B's Stirling Mortimer investment.

Mr and Mrs B have not provided me with any evidence as to whether Mr Clark had Positive Solutions' actual authority to make the recommendations he did. That is not surprising. It would be very unusual for consumers in Mr and Mrs B's position to have detailed knowledge of the contractual relationship between their adviser and his principal.

Provisionally – and subject to any further evidence or arguments I might receive – I am prepared to accept Positive Solutions' evidence that it did not give any of its
Registered Individuals permission to recommend Stirling Mortimer products. It is impossible for Positive Solutions to prove that it did not give permission, but taking the evidence as a whole I think that is unlikely.

Similarly, I think it unlikely that Mr Clark followed Positive Solutions' procedures in respect of the surrender of their previous investments, and I think it unlikely that Positive Solutions received commission. I have no reason to suspect Positive Solutions of failing to disclose documents that it has in its possession. I consider that if Mr Clark had followed Positive Solutions' procedures, Positive Solutions would have a record of the surrender advice – and it says it has no such record.

In the overall circumstances, I am not persuaded that Mr Clark had Positive Solutions' actual authority to carry out the acts Mr and Mrs B complain about. However, I am satisfied that apparent authority operated such as to give rise to Positive Solutions' responsibility for the actions of Mr Clark in this complaint. I am also satisfied that Positive Solutions is vicariously liable for Mr Clark's actions, and that section 150 of FSMA provides a further route to liability. I will explain why below.

relevant case law

I have considered the leading authorities on the common law of agency, particularly those focusing on apparent authority (sometimes called "ostensible authority) and the issues of representation and reliance. I have also taken into account case law on the issue of vicarious liability.

The case law I have considered includes:

- *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* [1964] 2 QB 480
- *Hely-Hutchinson v Brayhead Limited* [1968] 1 QB 549
- *Armagas Ltd v Mundogas SA ('The Ocean Frost')* [1985] UKHL 11
- *Gurtner v Beaton* [1993] 2 Lloyd's Rep 369
- *Martin v Britannia Life Ltd* [1999] 12 WLUK 726
- *Pacific Carriers Limited v BNP Paribas* [2004] 218 CLR 451
- *So v HSBC* [2009] EWCA Civ 296
- *Various Claimants and Catholic Child Welfare Society and Others* [2012] UKSC 56 ('*the Christian Brothers case'*)
- *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23
- *Cox v Ministry of Justice* [2016] UKSC 10
- *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11
- *Sino Channel Asia v Dana Shipping & Trading PTE Singapore & Another* [2017] EWCA Civ 1703
- *Frederick v Positive Solutions (Financial Services) Ltd* [2018] EWCA Civ 431
- *Anderson v Sense Network Ltd* [2018] EWHC 2834 (Comm); [2019] EWCA Civ 1395.
- *James Scott Winter v Hockley Mint Ltd* [2018] EWCA Civ 2480.

what is apparent authority?

In an agency relationship, a principal may limit the actual authority of his agent. But if the agent acts outside of that actual authority, the case law shows that a principal may still be liable to third parties for the agent's acts if those acts were within the agent's "apparent authority".

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

> "*An "apparent" or "ostensible" authority, 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..*"

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

In *Hely-Hutchinson v Brayhead Limited* [1968] 1 QB 549, Lord Denning said (at 583)

> "*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.*" (original emphasis)

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

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

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

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

In *Martin*, Parker J quoted the relevant principle as stated in Article 74 in Bowstead and Reynolds on Agency 16th edition:

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

In the more recent case of *Anderson*, Jacobs J endorsed Parker J's approach:

> "*As far as apparent authority is concerned, it is clear from the decision in* Martin *(in particular paragraph 5.3.3) that, in order to establish apparent authority, it is necessary for the claimants to establish a representation made by Sense [the alleged principal], which was intended to be acted on and which was in fact acted on by the claimants, that MFSS [the alleged agent] was authorised by Sense to give advice in connection with the scheme…*
>
> *I also agree with Sense that there is nothing in the "status" disclosure – i.e. the compulsory wording relating to the status of MFSS and Sense appearing at the foot of the stationery and elsewhere – which can be read as containing any relevant representation as to MFSS's authority to do what they were doing in this case: i.e. running the scheme and advising in relation to it. The "status" disclosure did no more than identify the regulatory status of MFSS and Sense and the relationship between them. I did not consider that the Claimants had provided any persuasive reason as to how the statements on which they relied relating to "status disclosure" could lead to the conclusion that MFSS was authorised to provide advice on the scheme that was being promoted. In my view, a case of ostensible authority requires much more than an assertion that Sense conferred a "badge of respectability" on MFSS. As*

> Martin *shows, it requires a representation that there was authority to give advice of the type that was given…the relevant question is whether the firm has 'knowingly or even unwittingly led a customer to believe that an appointed representative or other agent is authorised to conduct business on its behalf of a type that he is not in fact authorised to conduct'. …*
>
> *Nor is there any analogy with the facts or conclusions in* Martin*. That case was not concerned with any representation alleged to arise from "status" disclosure. In* Martin*, the representation by the principal that the agent was a financial adviser acting for an insurance company was regarded as a sufficient representation that the adviser could advise on matters (the mortgage in that case) which were ancillary to insurance products. In the present case, there is nothing in the "status disclosure" which contains any representation that MFSS or its financial advisers could operate or advise in connection with a deposit scheme that MFSS was running.*"

The representation may be general in character. In *Armagas*, Lord Keith said (at 777):

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

The representation must come from the principal. That does not mean that the conduct of the agent is irrelevant to the representation – but the principal's conduct must be the source of the representation.

In *Sino*, Gross LJ 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*."

He then referred to *Hely-Hutchinson,* in which Lord Pearson said (at 593):

> "*It is, therefore, necessary in order to make a case of ostensible authority to show in some way that such communication which is made directly by the agent is made ultimately by the [principal]. That may be shown by inference from the conduct of 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.*"

Gross LJ also referred to an Australian judgement, *Pacific Carriers*, which said (at 38):

> "*The holding out might result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation*".

In reaching his conclusion in *Sino*, Gross LJ referred to *Gurtner*, at p379, where Neill LJ said:

> "*The development of the doctrine [of apparent authority] 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.*"

must the third party rely on the representation?

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

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

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

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

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

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

- Positive Solutions made a representation to Mr and Mrs B that Mr Clark had Positive Solutions' authority to act on its behalf in carrying out the activities they now complain about, and

- Mr and Mrs B relied on that representation in entering into the transactions they now complain about.

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

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

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

Positive Solutions' position is that when Mr Clark advised Mr and Mrs B to invest in the fund, he was acting on behalf of Clark Rees LLP and not on behalf of Positive Solutions.

I have only seen two pieces of documentary evidence that suggest Mr Clark might have been acting on behalf of Clark Rees LLP when he advised Mr and Mrs B to invest in the fund:

- The fund update, which was printed on paper marked "Clark Rees". The update referred to "*our*" recommendation that Mr and Mrs B invest in the fund.

- Mr Clark's 24 August 2006 letter to Mr B, on Clark Rees LLP's letterhead, promoting "*the prestigious Stirling Mortimer Property Fund*". (The fund Mr and Mrs B ultimately invested in was a different Stirling Mortimer fund.)

I put very little weight on the fund update as indicative of the capacity in which Mr Clark gave advice. Although undated, it appears the update was produced some time after the advice was given. In addition, I think that by the time of the update Mr Clark is likely to have realised that Mr and Mrs B had suffered significant loss as a result of his advice – and so I treat any comments he made at that time with considerable caution.

Although the August 2006 promotion letter was on Clark Rees LLP headed paper, given the unusual circumstances here I don't think that that is sufficient for me to conclude that Mr Clark was acting on behalf of Clark Rees LLP. I note:

- In June 2005, Nicky Calder of Positive Solutions confirmed to Mr Rees that "*Clark Rees LLP*" had been registered as a "*trading style*" of Positive Solutions. I acknowledge that Positive Solutions now says that permission was given in error, because it does not usually allow 'trading style names' that end with "LLP" or "ltd".

- In October 2006, Doug Hudson of Positive Solutions reminded Mr Clark that Mr Clark's communications must "*show fully that Clark Rees [without the limited liability descriptor] is a trading style of Positive Solutions*". Mr Hudson's email implies that at some point between June 2005 and October 2006 Positive Solutions had rescinded its permission to Mr Rees that he may say "*Clark Rees LLP*" was a trading style of Positive Solutions. But I do not know when that permission was rescinded – and in particular I have seen nothing to show that permission was rescinded before Mr Clark's letter to Mr and Mrs B on 24 August 2006.

- Mr and Mrs B told us they believed Mr Clark had to "*set up his own company*" in order to act as a Positive Solutions Independent Financial adviser. I think they were confused about the status of Clark Rees LLP – but I also think Positive Solutions' actions contributed to that confusion. In the circumstances, I don't think Mr and Mrs B's comments about Mr Clark's "company" amount to evidence of a belief on their part that he was not acting on behalf of Positive Solutions.

The picture is unclear, but on balance I consider it more likely than not that Mr Clark was acting on behalf of Positive Solutions (rather than as a member of Clark Rees LLP) throughout his dealings with Mr and Mrs B in 2006 and 2007. I say that because:

- Mr and Mrs B's complaint is about the surrender of their existing investments as well as the recommendation they invest in Stirling Mortimer. In writing to other parties in respect of the surrender of Mr and Mrs B's existing investments, Mr Clark identified himself with reference to Positive Solutions, not Clark Rees LLP. For example, Mr Clark wrote to Sterling on 8 February 2007 to enclose Mr and Mrs B's "*completed encashment letter*" for their Sterling Investment Bond. Mr Clark's letter was on Positive Solutions' notepaper, and identified him as an independent financial adviser with Positive Solutions.

- Whether or not Mr Clark had Positive Solutions' authority to use its notepaper to write to the product providers, his behaviour suggests that when he did so he was acting on behalf of Positive Solutions rather than in his capacity as a member of Clark Rees LLP.

- The documents produced by third parties (AIG and Skandia) in relation to Mr and Mrs B's previous investments name Mr and Mrs B's adviser as "*Positive Solutions (Fin.Serv.) Ltd – Paul Clark*" and "*Positive Sols (FS) Ltd (P Clark)*". They do not identify Mr Clark with

reference to Clark Rees LLP. Whilst this is not determinative, the established position was that Mr Clark acted on behalf of Positive Solutions in giving his advice.

- If Mr Clark had been acting for anybody other than Positive Solutions, whether for himself or for a third party like Clark Rees LLP, then he would have been in breach of the general prohibition. It is of course possible that Mr Clark was breaking the law, but on balance I think it more likely that he was acting on behalf of Positive Solutions – and doing exactly what he told Mr and Mrs B, Sterling, and the other product providers that he was doing.

I accept Positive Solutions' evidence that it did not receive commission in respect of Mr Clark's advice that Mr and Mrs B invest in the Stirling Mortimer fund. Heritage told us that it believed the commission was paid into an account in the name of Clark Rees LLP, and nobody has suggested Heritage was wrong about that. In my experience, the receipt of commission is very often an indicator of responsibility for advice. But it is not determinative of the capacity in which a financial adviser gives investment advice.

I have also considered the involvement of Mr Rees. At the time, Mr Rees was both a Registered Individual of Positive Solutions and a partner (together with Mr Clark) in Clark Rees LLP.

The application form for Mr and Mrs B's new Stirling Mortimer investment suggests that at least some of the arrangement was done by Mr Rees, rather than by Mr Clark. That suggests a degree of co-operation between Mr Clark and Mr Rees in the sales process, which does support Positive Solutions' contention that Clark Rees LLP was involved in the sale of Mr and Mrs B's investment in the fund.

However, on the Stirling Mortimer application form, Mr Rees identified himself by reference to Positive Solutions and not by reference to Clark Rees LLP. It is not clear whether Mr and Mrs B saw the whole of the application form for their Stirling Mortimer investment. (Positive Solutions says it is aware of other cases in which Mr Clark or Mr Rees added details to forms after they were signed by the applicants; Mr and Mrs B say they believe they did see the whole form). But regardless of whether Mr and Mrs B saw this part of the form, I consider that it shows Mr Rees was identifying himself to Stirling Mortimer as a person acting on behalf of Positive Solutions.

It appears that Stirling Mortimer would not have allowed the investment to go ahead at all unless it was satisfied that Mr and Mrs B were investors to whom qualified investment schemes could lawfully be promoted. Stirling Mortimer was satisfied in this case that Mr and Mrs B were eligible to receive the promotion because it believed that an authorised person had signed the sophisticated investor's certificate. Mr Rees was not himself an authorised person, so I consider it highly likely that Stirling Mortimer believed Mr Rees signed the certificate on behalf of Positive Solutions (which was an authorised person).

Overall, I am not satisfied that any of the acts Mr and Mrs B complain of were carried out by or on behalf of Clark Rees LLP. My conclusion is that all of the acts they complain about were carried out by Mr Clark or Mr Rees on behalf of Positive Solutions.

did Positive Solutions represent to Mr and Mrs B that Mr Clark had the relevant authority?

This matter is not straightforward. Much of the factual evidence is conflicting. There is no single piece of evidence that I can point to and say that because of that particular piece of evidence, Positive Solutions is or is not responsible for the acts Mr and Mrs B complain of.

On the one hand, Mr Clark's actions appear to have been entirely outside the actual authority Positive Solutions gave him; Positive Solutions received no commission or other benefit for the advice; Mr and Mrs B's relationship with Mr Clark long predated either of their relationships with Positive Solutions; and there is some evidence suggesting that Mr Clark might have been (unlawfully) giving advice on behalf of Clark Rees LLP rather than on behalf of Positive Solutions.

On the other hand, Mr and Mrs B's say their investment portfolio was serviced by Positive Solutions from 2003 until July 2007; Positive Solutions provided them with a personal investment account on its website from which to view their investment status; Positive Solutions was fully aware of the liquidation of their portfolio; and the reinvestment they complain about was made by one of Positive Solutions' representatives using Positive Solutions' investment name and FSA licence. Mr and Mrs B "*do not see how anyone can argue that we would have understood differently to the fact that we were customers of Positive Solutions*" in relation to the acts they complain about.

But the question I need to decide here is not just "*did Mr and Mrs B believe that Positive Solutions was responsible for the advice they received?*", or even "*did Mr and Mrs B* reasonably *believe that Positive Solutions was responsible for the advice they received?*". Mr and Mrs B's belief is relevant to the issue of whether they relied on any representation from Positive Solutions, but it is far from the whole story.

Having considered all the facts in this case I am persuaded on balance that I have jurisdiction to consider the complaint against Positive Solutions on the basis that Mr Clark was acting as its agent when he advised Mr and Mrs B to invest in Stirling Mortimer by reason of apparent authority.

Briefly, I am provisionally satisfied that:

- Positive Solutions represented to Mr and Mrs B that Mr Clark had its authority to act on its behalf as a financial adviser, and placed him in the position which in the outside world is generally regarded as having authority to carry out the acts Mr and Mrs B now complain about.

- The surrender and reinvestment advice that Mr and Mrs B complain about were activities which in the outside world are generally regarded as being activities which financial advisers have authority to carry out.

- Positive Solutions intended Mr and Mrs B to act on its representations.

- Mr and Mrs B reasonably relied on Positive Solutions' representations that Mr Clark had Positive Solutions' authority to act on its behalf in recommending that they surrender their existing investments and reinvest in the Stirling Mortimer fund.

I give more details of those findings below.

Positive Solutions' representations

I understand that Positive Solutions disputes the relevance of anything that happened before Mr Clark gave his surrender and reinvestment advice in late 2006 / early 2007. However, having carefully considered the legal principles on apparent authority I conclude that evidence showing whether Positive Solutions placed Mr Clark in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question is relevant to my determination of whether Positive Solutions made representations to Mr and Mrs B. I also consider that evidence as to transactions carried out by Mr Clark and later honoured by Positive Solutions is relevant. I'm therefore satisfied that it is right for me to examine the whole of Mr and Mrs B's relationship with Positive Solutions, as well as the whole of the circumstances of Mr Clark's position.

In reaching my conclusion that Positive Solutions represented to Mr and Mrs B that Mr Clark had its authority to act on his behalf as a financial adviser, I note:

- Positive Solutions placed Mr Clark in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr and Mrs B complain about. In particular:

- Positive Solutions successfully applied to the FSA for both Mr Clark and Mr Rees' names to appear on the FSA Register with respect to Positive Solutions. Mr Clark's name appeared between June 2003 and October 2007, and Mr Rees' name appeared between February 2003 and October 2007. They were approved to carry out the controlled function "*Investment Adviser (Trainee)*" and then "*Investment Adviser*" on behalf of Positive Solutions. Without that approval, they could not lawfully have carried out any regulated activities at all (to do so would have been in breach of the general prohibition). Positive Solutions therefore represented to the world that Mr Clark had its authority to act on its behalf as an investment adviser. I consider that *Armagas* suggests this point is relevant to establishing whether or not Positive Solutions is fixed with liability by reason of apparent authority, but it is not determinative.

  I consider that the giving of investment advice on products such as the Stirling Mortimer fund falls squarely within the class of activities that financial advisers are usually authorised to do. Positive Solutions' partnership code noted that one of the key activities of its IFA partners was to "*give impartial, independent financial advice*". Mr Clark was one of its IFA partners, and I therefore consider that Positive Solutions represented to the world that Mr Clark would give such advice.

- The October 2006 correspondence between Mr Clark and Mr Hudson shows that Positive Solutions had actual knowledge that Mr Clark was promoting a different Stirling Mortimer fund (that is, another fund from an institution that was not on Positive Solutions' approved list). Mr Hudson's email was expressly more concerned with the manner in which Mr Clark described himself than it was with the advertised fund or institution. I see nothing in Mr Hudson's email to suggest that Mr Hudson – a senior member of Positive Solutions' compliance team – thought that promoting the fund was not the sort of activity he would expect from a financial adviser in Mr Clark's position. I consider that is consistent with the argument that Positive Solutions placed Mr Clark in a position that would generally be regarded as having the authority to recommend investments, whether or not those investments were on any internal Positive Solutions' list of approved products or institutions.

- I acknowledge that Positive Solutions says that the manner in which Mr Clark gave his advice to Mr and Mrs B cannot possibly be regarded as ordinary Positive Solutions business being carried out in the usual way. It says that because Mr Clark gave Mr and Mrs B oral advice only – he did not produce a suitability letter, or give them terms of business, or do any of the other things that financial advisers would normally be expected to do. I entirely accept that the manner in which Mr Clark gave his advice had shortcomings. But as the case law shows, an agent's shortcomings do not necessarily prevent a principal from being fixed with liability for the agent's actions by reason of apparent authority.

  In recommending that Mr and Mrs B surrender their existing policies – including the Sterling policy Mr Clark had sold to them whilst acting as Positive Solutions' agent – I consider that Mr Clark was carrying out a type of activity that Positive Solutions allowed him to do. Positive Solutions did give its Registered Individuals actual authority to recommend the surrender of existing investments if the Registered Individuals carried out certain steps. Mr Clark failed to carry out those steps with respect to Mr and Mrs B's existing investments. So, although the *manner* in which Mr Clark gave the surrender advice was not authorised by Positive Solutions, the *activity* of giving surrender advice was something that Positive Solutions authorised its Registered Individuals to do. But from Mr and Mrs B's perspective – and from the perspective of the rest of the outside world, including the existing policy providers – the steps Positive Solutions required Mr Clark to carry out would have been invisible.

In other words, Mr Clark was giving surrender advice in his capacity as an independent financial adviser of Positive Solutions. Surrender advice is something that the outside world would usually expect an independent financial adviser would have authority to give to his principal's customers. Positive Solutions placed Mr Clark in a position such that it appeared to Mr and Mrs B, as customers of Positive Solutions, that Positive Solutions had given Mr Clark actual authority to recommend surrenders.

Mr Clark's advice that Mr and Mrs B should reinvest in a different fund is also exactly the sort of activity that financial advisers usually undertake. Again, the manner in which Mr Clark carried out the activity differed from the procedures Positive Solutions required him to follow. Stirling Mortimer was not on Positive Solutions' list of approved institutions – and so Positive Solutions did not give Mr Clark actual authority to recommend Stirling Mortimer's products unless Stirling Mortimer was first added to that list. However, Mr Clark's failure to choose an institution "*approved by*" Positive Solutions would have been invisible to Mr and Mrs B. They did not know – and could not have known – precisely what the arrangements were between Mr Clark and Positive Solutions. They could not have known which institutions were on Positive Solutions' list, and so again I consider that Positive Solutions had placed Mr Clark in a position such that it appeared to Mr and Mrs B that Positive Solutions had given Mr Clark actual authority to recommend Stirling Mortimer products.

I don't know whether Mr and Mrs B noticed in 2006 or 2007 that Mr Clark had not produced a fact find or suitability letter. After this length of time – and all the subsequent events – there seems little point in my asking them for their comments on that issue. But in any event, I don't think Mr Clark's failure to produce documents did anything to suggest to them that Positive Solutions was not taking responsibility for his advice.

- The application form for Mr and Mrs B's Stirling Mortimer investment names Positive Solutions as Mr and Mrs B's investment adviser, and quotes Positive Solutions' FSA number. I accept that this form was completed by Mr Clark and/or Mr Rees, and not by Positive Solutions. But I consider that in appointing Mr Clark and Mr Rees as Registered Individuals, Positive Solutions put them in the position in which they could tell product providers like Stirling Mortimer that they were indeed Positive Solutions' financial advisers. If Stirling Mortimer had checked the FSA Register, it would have seen that Mr Clark and Mr Rees did indeed appear as approved by the FSA to carry out the controlled function of investment advice on behalf of Positive Solutions.

I do not suggest that Positive Solutions should be held liable for all of Mr Clark's acts or omissions. But I do consider that it may be responsible for acts or omissions involving the kind of transactions that Positive Solutions had represented that he had the authority to carry out.

The circumstances of this complaint are different to the circumstances in *Anderson*. In *Anderson*, the regulatory position was different because the agent was an appointed representative of the principal firm. That appointed representative was operating a Ponzi scheme – accepting deposits from participants in the scheme, and then using those deposits to make payments to other investors. Investment advisers are not usually authorised to accept deposits on behalf of their principals (and they are certainly not authorised to operate Ponzi schemes). But Mr Clark did not do either of those things. Instead, Mr Clark gave investment advice to Mr and Mrs B to surrender their existing investments and reinvest elsewhere. That is exactly the sort of thing that investment advisers are usually authorised to do.

Accepting deposits was not within the usual activity of Sense Network (the principal in the *Anderson* case), and nor was operating a Ponzi scheme. In contrast, the activity of giving

regulated investment advice is very much the usual activity of Positive Solutions (Financial Services) Ltd – as even its name suggests.

In my view, another key difference between the circumstances in *Anderson* and the circumstances here is that several of the lead claimants in *Anderson* accepted that they had never heard of the defendant, Sense Network. Of those who did allege that they had relied on a representation that Sense Network was taking responsibility for the advice, none alleged that Sense Network had previously taken responsibility for an activity of the same type as the one they complained of. But in Mr and Mrs B's case, they had not only heard of Positive Solutions, they had been its clients for several years. Mr and Mrs B had previously received regulated investment advice from Mr Clark in his capacity as a financial adviser of Positive Solutions (the 2005 Sterling advice). Their complaint is about further investment advice – and indeed some of the advice they complain about is the advice to surrender the Sterling bond.

In addition, in *Anderson* Jacobs J made the point that – unlike in *Martin* – none of the lead claimants were given advice to surrender regulated investments with a view to investing in the scheme. In my view, the facts of Mr and Mrs B's case are much closer to the facts in *Martin*. As in *Martin*, Mr Clark advised Mr and Mrs B to surrender existing regulated investments in order to reinvest in a new investment product. This complaint and *Martin* are both about the regulated activity of advising on investments; they are not about the activity of accepting deposits.

- In addition to appointing Mr Clark as its agent, I consider that Positive Solutions' own conduct represented to Mr and Mrs B that Mr Clark had its authority to carry out the acts they complain about. In particular:

    - Positive Solutions gave Mr and Mrs B access to its website portal, listing their investments. As I've said, it's unclear whether they accessed the portal directly or through Mr Clark (though I note they say they accessed the portal themselves). But in any event I'm satisfied they knew that they could access Positive Solutions' portal directly. As at December 2004, the portal showed Positive Solutions' logo together with the value of investments recommended by Mr Clark. In isolation this is not a strong point, but I consider it does show that Positive Solutions represented to Mr and Mrs B that Mr Clark was Positive Solutions' agent in respect of their investments.

    - In 2005 Mr Clark gave Mr and Mrs B investment advice in his capacity as a Positive Solutions financial adviser, and recommended that they invest in a Sterling bond. At the time, Positive Solutions accepted responsibility for Mr Clark's actions (though Positive Solutions does not accept that Mr Clark acted on its behalf when he later recommended that Mr and Mrs B surrender that same investment bond).

      I consider Mr and Mrs B would reasonably have concluded from Positive Solutions' conduct in 2005 that it had given Mr Clark authority to act on its behalf as an investment adviser. I appreciate that a 2005 representation does not necessarily imply that the situation is the same in 2006 or 2007, but I still consider that Positive Solutions' 2005 conduct is relevant to my consideration of the facts of this case. Taken as a whole, I consider there is a course of dealing in which Positive Solutions took responsibility for the actions of Mr Clark in respect of Mr and Mrs B's investments.

- I also consider that some of Positive Solutions' omissions amount to a representation by conduct that Mr Clark did have the authority to give the investment advice that Mr and Mrs B now complain about. In particular:

    - Positive Solutions knew that other organisations believed Mr Clark to be acting on behalf of Positive Solutions in respect of giving financial advice on Mr and Mrs B's existing policies. For example, AIG wrote to Positive Solutions' head office in

Newcastle on 3 October 2003 to say that "*Positive Solutions (Fin.Serv.) Ltd – P Clark is the servicing agent and financial adviser for [Mr and Mrs B's AIG] policy*". That letter was copied to Mr and Mrs B.

I consider that the term "*financial adviser*" in respect of a specific policy is usually understood to mean that the adviser named is expected to give financial advice in respect of that policy. So, the adviser might recommend fund switches, or indeed the full surrender of the policy. Positive Solutions now says that Mr Clark did not in fact have its authority to recommend the full surrender of Mr and Mrs B's policies unless he first followed a specific procedure. But it did not tell Mr and Mrs B that. Instead, Positive Solutions allowed Mr and Mrs B to believe that Mr Clark was acting on behalf of Positive Solutions as their financial adviser in respect of their AIG policy, without communicating to Mr and Mrs B any restrictions on the authority given to him.

Positive Solutions therefore allowed Mr Clark's (and/or AIG's) representation that Mr Clark was acting on behalf of Positive Solutions as a financial adviser in respect of their AIG policy to be perpetuated.

I am not saying that I think Positive Solutions was required to tell Mr and Mrs B about the restrictions on the authority it gave Mr Clark, nor am I saying that I believe Positive Solutions' failure to communicate the scope of Mr Clark's authority somehow caused Mr and Mrs B to suffer the losses they did. I merely make the point that if Positive Solutions had been clearer about the limits of the actual authority it gave to its agents, it would have been far more difficult for Mr and Mrs B to have reasonably concluded that Mr Clark had Positive Solutions' actual authority to give the advice he did.

- Similarly, whilst Positive Solutions accepted responsibility for Mr Clark's advice that they invest in the Sterling bond in 2005, it did not tell them that it had placed any restrictions on the scope of his advice. So, when Mr Clark later recommended that Mr and Mrs B surrender that same investment bond, I consider that it was reasonable for them to believe that Positive Solutions was still taking responsibility for investment advice in respect of the bond.

- In early 2007, Positive Solutions received letters from third party product providers (including Zurich and Skandia) which clearly showed that the third parties were acting on the basis that Mr Clark "*of Positive Solutions*" was Mr and Mrs B's financial adviser. Mr and Mrs B knew about those letters, because they were copied in to some of them. I therefore consider that Positive Solutions knew that it was being referred to as Mr and Mrs B's financial adviser in respect of those surrenders, but it does not appear to have contacted Mr and Mrs B or Mr Clark to clarify the position.

- In my view, Positive Solutions' conduct was the source of various representations by Mr Clark that he had Positive Solutions' authority to carry out the acts Mr and Mrs B complain about. In particular:

  - Mr and Mrs B told us "*we understood Paul Clark was advising us in his capacity as an Independent Financial Adviser at Positive Solutions*". That understanding is not surprising – Positive Solutions' Terms of Business made clear that Mr Clark's role was indeed to act as a financial adviser. I accept that Mr and Mrs B say they didn't see Positive Solutions' Terms of Business, but I note that the contract between Mr Clark and Positive Solutions required him to provide those Terms of Business to his clients. So, in telling Mr and Mrs B that he was a Positive Solutions' financial adviser, I consider that Mr Clark was acting on Positive Solutions' instructions – and therefore Positive Solutions was the source of Mr Clark's representation that he was an independent financial adviser of Positive Solutions.

- Mr and Mrs B completed Positive Solutions' "*Transfer of Servicing Request*" forms in 2004 (and presumably also in 2003). I consider those forms are likely to have been given to Mr and Mrs B by Mr Clark. But Positive Solutions would have provided the forms to Mr Clark, presumably with the intention that he used them in precisely the way he did use them.

  I consider that in providing the Positive Solutions' branded transfer forms to Mr Clark, Positive Solutions caused Mr Clark to make a representation to Mr and Mrs B that Positive Solutions authorised him to act on its behalf as a financial adviser.

- Mr and Mrs B say they believed Mr Clark had to set up a "*company*" in order to be a Positive Solutions Independent Financial Adviser.

  I consider their belief was reasonable. I understand that at the time, the majority – and possibly all – of Positive Solutions' Registered Individuals gave their advice under a trading name of Positive Solutions.

  Again, I accept that that representation was given by Mr Clark, and not directly by Positive Solutions itself. But Positive Solutions gave Mr Clark permission to use the trading name "*Clark Rees LLP*" in respect of the business he did on its behalf. I therefore infer from Positive Solutions' conduct that Positive Solutions caused Mr Clark to represent to Mr and Mrs B that Positive Solutions took responsibility for business conducted under the trading name "*Clark Rees LLP*".

  I do not think that this representation alone would be sufficient to fix Positive Solutions with responsibility for all the actions of Clark Rees LLP. But again, it does form part of the factual background.

  I note that Positive Solutions says it give permission for the name "*Clark Rees LLP*" to be used by mistake. But I see no reason why Mr and Mrs B should be disadvantaged by that mistake.

- Positive Solutions provided Mr Clark with stationery bearing its own branding. The letterhead included Positive Solutions' logo, registered address and company number. It also included the words "*Paul Clark, Independent Financial Adviser*" and the address of the Cardiff office that Mr Clark worked from. (I understand from responses to my first provisional decision that although Positive Solutions did have a Cardiff office, Mr Clark did not work from that building.)

  Mr Clark used Positive Solutions' stationery to write to Sterling in February 2007 to request that Mr and Mrs B's Sterling investment be surrendered. I think it likely that Mr Clark also used Positive Solutions' stationery to write to the other product providers, including Skandia. He therefore represented to Sterling and to Skandia that he was acting on behalf of Positive Solutions in requesting the surrender of Mr and Mrs B's investments. Positive Solutions provided Mr Clark with the stationery he used to so hold himself out.

  It is not clear whether Mr or Mrs B saw Mr Clark's letters to the product providers, but I know Mrs B did see Skandia's response. That response was addressed directly to her, confirmed that Skandia had acted on her instructions, and named "*Positive Sols (FS) Ltd (P Clark)*" as her financial adviser.

  The stationery issue is not determinative. In itself, the stationery may have done little more than provide a "*badge of respectability*" for Mr Clark and Mr Rees. But, taken together with all of Positive Solutions' other representations, I consider that the stationery is a relevant factor to be taken into account in assessing how Mr Clark's relationship with the outside world would appear to Mr and Mrs B.

Positive Solutions' intention that Mr and Mrs B should act on its representations

I consider that it was clearly in Positive Solutions' interest for the general public, including Mr and Mrs B, to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that Positive Solutions intended Mr and Mrs B to act on its representation that Mr Clark was its financial adviser – as indeed they did in respect of Mr Clark's January 2005 recommendation for the Sterling bond.

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

I accept that not all of Positive Solutions' representations were made with the intention that consumers like Mr and Mrs B would rely on them. For example, Positive Solutions' agreement that Mr Clark could use the trading name "Clark Rees LLP" for his Positive Solutions work appears to have been given by mistake – so it is very hard for me to make a finding as to what Positive Solutions intended by that permission. However, as Jacobs J noted in *Anderson*, if a principal unwittingly led a customer to believe that an agent was authorised to conduct business on its behalf of a type that the agent was not in fact authorised to conduct, the principal may still be fixed with liability for the act by reason of apparent authority.

did Mr and Mrs B rely on Positive Solutions' representation?

I am satisfied that Mr and Mrs B proceeded on the footing that when Mr Clark gave surrender and reinvestment advice to them in 2006 and 2007 he was acting in every respect as the agent of Positive Solutions with authority from Positive Solutions to so act. I am also satisfied that Mr and Mrs B acted reasonably in doing so.

In saying that, I note:

- Mr and Mrs B's evidence is that "*as husband and wife investors caught in the middle of this, it was our understanding that from 2003 until we signed another set of Authorising letters in October 2007 … we were being advised by representatives of Positive* Solutions". They say that as a result of the documents they received from 2003 onwards, "*we understood Paul Clark was advising us in his capacity as an Independent Financial Adviser at Positive Solutions*". They also drew my attention to the fact that in 2006 "*all correspondence from Clark Rees including [the mailshot promoting a Stirling Mortimer investment] contained the words at the bottom 'Clark Rees LLP is a trading style of Positive Solutions (Financial Services) Ltd who are authorised and regulated by the Financial Services Authority*". I consider their evidence to be plausible and persuasive, and I accept it.

- Mr and Mrs B had dealt with Mr Clark, in his capacity as a financial adviser for Positive Solutions, for some years. Unlike some of the claimants in *Anderson*, this is not a case in which Mr and Mrs B had never heard of the principal firm. Instead, Mr and Mrs B had received correspondence over a period of several years, from several different entities (Mr Clark and product providers) representing that Mr Clark was one of Positive Solutions' financial advisers. That representation was true; he was indeed one of Positive Solutions' advisers.

- Mr and Mrs B had previously purchased a Sterling investment on Mr Clark's advice. Positive Solutions took responsibility for that advice. In following Mr Clark's advice in respect of the surrenders and Sterling Mortimer reinvestment, Mr and Mrs B's behaviour was consistent with their previous behaviour.

- I think it highly unlikely that Mr and Mrs B would have chosen to follow Mr Clark's surrender and reinvestment advice if they had realised that he was acting outside of his actual authority. As Mr and Mrs B have pointed out, if Mr Clark was not acting on behalf of Positive Solutions (or another authorised firm) then he could not have lawfully given any investment advice by way of business. In the circumstances, I do not believe that Mr and Mrs B would have followed Mr Clark's advice if Positive Solutions had not put him in the position to act as investment adviser.

I am therefore satisfied that Mr and Mrs B reasonably relied on Positive Solutions' representations that Mr Clark had its authority to give the advice he did in respect of both the surrenders and the reinvestment.

I've noted Positive Solutions' comment that:

> "*the evidence in this case is that Mr and Mrs [B] understood they were dealing with Clark Rees LLP and they were happy to do so. If not, we do not consider that Mr and Mrs [B] would have been happy to write a cheque for £300,000 in the same meeting that oral advice only had been given. Any person understanding that they were dealing with a financial adviser authorised by network would expect a suitability and advice letter to be given on the principal's headed paper setting out the rationale for the investment in great detail. Being asked to provide a cheque for £300,000 to invest in a foreign property scheme without any written advice should have set some very serious alarm bells ringing*".

I have explained above why I am satisfied that Mr Clark was not acting for Clark Rees LLP when he advised Mr and Mrs B.

In my view, Mrs and Mrs B's conduct in giving a cheque to Mr Clark in these circumstances shows only that they trusted Mr Clark – it does not say anything about who they believed he was acting for.

I do not agree with Positive Solutions that "*any person*" who believed they were dealing with a network-authorised financial adviser would expect to receive a suitability letter on the principal's headed paper. Certainly any person familiar with the FSA's rules on the Conduct of Business would have had that expectation. But I've seen nothing to suggest that Mr and Mrs B did have any familiarity with the FSA's rules.

Mr and Mrs B had many years of investment experience. I know they received suitability letters in the past for at least some of their previous investments, and indeed Positive Solutions provided me with a copy of Mr Clark's suitability letter in respect of their 2005 Sterling bond. But I don't think receipt of previous suitability letters is enough to show that Mr and Mrs B should have realised that a suitability letter was required here.

Mr and Mrs B told us that although they cannot recall Mr Clark providing them with a suitability letter, he did tell them that the fund was "*within a few days of being closed to applicants*". My view is that Mr Clark's comments would have put Mr and Mrs B under some amount of time pressure. I believe that the Stirling Mortimer fund Mr Clark first promoted to Mr and Mrs B had indeed closed to new applicants by the time they made their investment. Even if Mr and Mrs B had noticed the lack of a suitability letter, I consider they are likely to have viewed the (apparent) imminent closure of the fund as a reasonable explanation for that lack.

In addition, Mr and Mrs B's recent investment experience had all been in reliance on advice from Mr Clark. Their evidence is that, whilst they did not realise this at the time, Mr Clark did not always comply with regulatory requirements in giving previous advice (for example, they say he did not provide Terms of Business or any other disclosure documentation before giving his 2005 advice about the Sterling bond). In the circumstances, I do not think it would be reasonable for me to conclude that Mr and Mrs B's contact with Mr Clark would have given them a thorough understanding of the rules that financial advisers were required to follow.

Overall, I don't think the lack of a suitability letter shows that Mr and Mrs B were not relying on Positive Solutions' representations that Mr Clark was acting as Positive Solutions' agent in giving his surrender and reinvestment advice. I consider that a reasonable person in their position – without specific knowledge of the relevant financial services regulations – would have reasonably believed that a person held out by Positive Solutions as an "*independent financial adviser*" of Positive Solutions would have had Positive Solutions' actual authority to give investment advice on both surrenders and reinvestments.

I've also considered whether any of Mr and Mrs B's comments or actions suggest that they did not rely on Positive Solutions' representations that Mr Clark had its authority to act on its behalf as a financial adviser. In particular, I note that they told us:

> "*As you know, Clark Rees were disbanded and fined by the FSA so our claim to them could not be resolved. We then started correspondence with Positive Solutions.*"

That comment suggests that Positive Solutions was not Mr and Mrs B's first thought when things went wrong. Instead, they approached Mr Clark and "*Clark Rees*". That does suggest these matters were more associated with Clark Rees LLP than with Positive Solutions in Mr and Mrs B's minds. That is not relevant to the issue of who Mr Clark was in fact acting for, but I think it is relevant to the issue of reliance.

However, I don't think Mr and Mrs B's initial decision to approach Clark Rees LLP rather than Positive Solutions is determinative of the reliance issue. As I've discussed in respect of the August 2006 promotion letter on Clark Rees LLP notepaper, the trading style issue – which Positive Solutions was responsible for – means I don't think a belief that Mr Clark was acting for Clark Rees LLP is incompatible with a belief that Mr Clark was acting for Positive Solutions.

I also note that investors very often complain directly to the adviser who carried out the act they are complaining about. That does not necessarily imply that they expect that individual to personally pay them compensation; often it means only that the investor thinks the adviser is best placed to direct their complaint to the relevant department within the organisation complained about. In the circumstances, I put very little weight on Mr and Mrs B's initial decision to address their complaint to Clark Rees LLP as indicative of whether Mr and Mrs B relied on Positive Solutions' representations that Mr Clark had its authority to act on its behalf as a financial adviser.

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

I note that in the case law, in particular *Sino*, the courts have taken into account whether it is just to require a principal to bear a loss caused by the wrongdoing of his agent. I have considered whether it is just to hold Positive Solutions responsible for the detriment Mr and Mrs B have suffered. Here, I think it is just to hold Positive Solutions responsible for the consequences of its putting Mr Clark in the position where Mr and Mrs B could suffer loss as a result of his actions. In particular, I note:

- Positive Solutions was in a position to monitor Mr Clark's behaviour (and indeed did so monitor him).

- The October 2006 email correspondence between Mr Clark and Mr Hudson shows that Positive Solutions had actual knowledge that Mr Clark was promoting an investment similar to the one he ultimately recommended to Mr and Mrs B. Positive Solutions did take some steps to prevent a reoccurrence of that promotion – it told Mr Clark that future promotions needed to be approved – but I am not aware that it took any steps to limit damage that might have already been done, or to remind Mr Clark of the scope of his authority as a Registered Individual of Positive Solutions. If Positive Solutions did take any such steps, they were insufficient in respect of the promotion Mr Clark sent to Mr and Mrs B in August 2006.

  Mr Clark's October 2006 promotion was not investment advice; it was merely a promotion (or "*advert*"). However, the promotion explicitly invited investors to a seminar with Mr Clark to

learn more about the investment promoted. If Mr Hudson had considered the matter, I think it would have been obvious to him that Mr Clark's intention was that the recipients of the promotion (or their clients) would ultimately invest in a Stirling Mortimer fund. As a minimum, Mr Clark therefore intended the promotion to lead to arranging deals in investments provided by an institution that was not on Positive Solution's list of approved institutions. Mr Clark may also have intended the promotion to lead to advising on Stirling Mortimer investments.

At the time, Mr Clark only appeared on the FSA Register with respect to Positive Solutions. Mr Hudson would have therefore known that the only way Mr Clark could lawfully carry out regulated activities was as an agent of Positive Solutions. Positive Solutions had not given Mr Clark permission to carry out any regulated activities with respect to any Stirling Mortimer funds. I therefore consider that the October 2006 email exchange represented an opportunity for Positive Solutions to carry out further investigation into exactly what Mr Clark was doing – and to warn him that he did not have its authority to recommend that its clients invest in products from institutions that were not on its approved list. It is impossible to know whether further enquiries or warnings on Positive Solutions' part would have prevented Mr and Mrs B from suffering the loss in the way that they did. But I still think this point is relevant to my consideration of whether it is just in the circumstances to require Positive Solutions to bear a loss caused by Mr Clark's actions.

The October 2006 email exchange also shows that Mr Clark told third parties that he wanted to introduce them to a specific fund "*as an appointed distributor for Stirling Mortimer*". I don't know exactly what it meant to be an appointed distributor for Stirling Mortimer; I haven't seen the contract. I also don't know whether Mr Clark meant that he personally was an appointed distributor, or whether he meant the distributor was Clark Rees LLP. But I'm not aware that Positive Solutions knew those things either, or that it took any steps to find them out. In my experience, distributors of funds usually do have at least some involvement in arranging deals in investments in those funds. Given the regulatory position, in that Mr Clark could only lawfully carry out regulated activities in his capacity as an agent of Positive Solutions, I consider that Positive Solutions could have done more to investigate exactly what Mr Clark was doing.

I appreciate that it is possible that any advising or arranging Mr Clark carried out following the promotion might have fallen within an exemption to the rules on regulated activities, particularly as the promotion was marked as being to "*professional intermediaries only*". But – on the basis of the information available to me now – I don't think Positive Solutions could have been confident that any such exemptions would have applied.

- I consider that Positive Solutions had another opportunity to intervene, when it received notifications from other product providers that Mr and Mrs B had surrendered their existing investments. I accept that investors often surrender products without receiving advice, and so the surrenders did not (in and of themselves) say that Mr Clark had been giving surrender advice without first obtaining authorisation from Positive Solutions. But in context – with investors coming up to retirement surrendering a policy sold to them only two years earlier, and with the involvement of an adviser that Positive Solutions knew had previously issued unauthorised promotions – I consider that Positive Solutions could have displayed more curiosity about Mr Clark's interactions with Mr and Mrs B.

  To be clear, I am not saying that I think Positive Solutions had any kind of regulatory or legal obligation to check whether Mr and Mrs B had been advised to surrender their existing policies. I am simply saying that, in considering whether Positive Solutions is responsible for Mr Clark's acts, its apparent lack of curiosity is a relevant factor – albeit one that I put only a small amount of weight on.

- As I've discussed above, Positive Solutions did not tell Mr and Mrs B that there were any limits on the actual authority it had given to Mr Clark. I do not say that it was required to communicate those limits to Mr and Mrs B, but I do consider its failure to do so to be a

relevant factor in my consideration of whether it is just for Positive Solutions to be required to bear the loss caused by Mr Clark's actions.

- It appears Stirling Mortimer would not have permitted Mr and Mrs B to invest in the fund at all unless they fell within one of the categories of people to whom qualified investor schemes could lawfully be promoted in the UK. Qualified investor schemes could be promoted to "certified sophisticated investors" – but only if an authorised person confirmed that the investor was sufficiently knowledgeable to understand the risks associated with the investment. The application form for the fund included a "sophisticated investor's certificate". Mr Rees signed that certificate, and in doing so identified himself as acting for Positive Solutions (an authorised person).

  I acknowledge that the fact the investment could not have gone ahead in the way it did "but for" the involvement of Positive Solutions (acting through Mr Rees) in signing the sophisticated investors certificate is not determinative. The reason the investment went ahead at all is that Mr Clark recommended it to Mr and Mrs B, and it is likely Mr and Mrs B saw the certificate as merely an administrative step. But I still consider that Mr Rees' completion of the certificate is relevant to whether it is just for Positive Solutions to be required to bear any losses suffered by Mr and Mrs B as a result of the wrongdoing they allege on the part of Mr Clark and Mr Rees.

- With hindsight, Mr and Mrs B accept that their own conduct – in giving Mr Clark a cheque for £300,000 without first receiving written advice – was "*naïve*". I agree. I consider that is a relevant factor for me to take into account in deciding whether it is just for Positive Solutions to take responsibility for their loss, but it is one that I put very little weight on. As I've said, I don't think Mr and Mrs B knew enough about the FSA's COB rules – or the financial services industry more generally – to have realised that the way in which Mr Clark gave his advice was unusual.

- I note that this complaint does not involve any allegations of fraud. It simply involves financial advisers giving financial advice and arranging deals in investments – and in doing so they were carrying on the normal business activities of Positive Solutions.

Overall, I consider that it is just for Positive Solutions to be required to bear the losses caused by any wrongdoing done by Mr Clark or Mr Rees whilst carrying on the controlled functions assigned to them by Positive Solutions.

vicarious liability

Since issuing my first provisional decision, I have reconsidered the law in the area of vicarious liability. Having done so, I think it is also appropriate for me to consider whether Positive Solutions is vicariously liable for the actions of Mr Clark and Mr Rees – independently of whether apparent authority also operated such as to fix Positive Solutions with liability for the actions of its agents.

what is vicarious liability?

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

As Lord Sumption said in *Bilta*:

> "*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 [2001] UKHL 22).*"

Not all relationships are capable of giving rise to vicarious liability. The classic example of a relationship which can give rise to vicarious liability is the employment relationship, and neither Mr Clark nor Mr Rees were employees of Positive Solutions. However, the employment relationship is not the only relationship capable of giving rise to vicarious liability.

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

- Stage one is to ask whether there is a sufficient relationship between the wrongdoer and the principal (*Cox*).

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

There is some uncertainty in the law as to how widely the test in *Cox* should be applied. I acknowledge Positive Solutions' belief (expressed in 2016) that "*issues of vicarious liability have nothing to do with principals and agents*". But I note that in *Frederick* (decided in 2018) the Court of Appeal explicitly declined to decide whether the test in *Cox* applied to Positive Solutions' relationship with another of its Registered Individuals.

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

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

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

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

the 'stage one test'

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

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

> *party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.*"

Positive Solutions has chosen not to answer all of my questions about its relationship with Mr Clark. In particular, it did not answer my questions about the equipment it provided to its Registered Individuals or about the arrangements for locums. If Positive Solutions wishes to provide further information on these points (or indeed on any others) I will of course consider it. But on the basis of the limited information I have, I am satisfied that in giving investment advice to Mr and Mrs B, and in completing the Stirling Mortimer application form, Mr Clark and Mr Rees were carrying on activities as an integral part of the business activities carried on by Positive Solutions. I say that because:

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

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

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

- Mr Clark and Mr Rees were both Positive Solutions Partners. Positive Solutions had given them permission to carry out the controlled function "*Investment Adviser (Trainee)*" and then "*Investment Adviser*" on behalf of Positive Solutions. Positive Solutions had therefore engaged Mr Clark and Mr Rees to carry out activities that were an integral part of its business.

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

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

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

I am also satisfied that Mr Clark and Mr Rees' activities were not entirely attributable to the conduct of a recognisably independent business of their own or of Clark Rees LLP's. As I explained above, in the section "*who was Mr Clark acting for?*", I am satisfied that Mr Clark was acting on behalf of Positive Solutions when he advised Mr and Mrs B. Mr Clark did operate another business through Clark Rees LLP (in respect of accountancy services), but the activities Mr and Mrs B complain about concern the giving of regulated investment advice and the arrangement of deals in investments – and those activities fall entirely within Positive Solutions' business. I am therefore satisfied that the activities complained about were entirely attributable to Positive Solutions. This is not a complaint where, for example, the activities complained about include the running of a property investment scheme, or any other activity outside the business activities of Positive Solutions.

As I've explained, I am satisfied that Clark Rees LLP was not involved in the acts Mr and Mrs B complain about. But even if I am wrong about that, it would be difficult for me to make the finding that Clark Rees LLP was *recognisably* independent from Positive Solutions. The confusion or 'mistake' over Positive Solutions permitting Mr Clark and Mr Rees to tell the public that Clark Rees LLP was a trading name of Positive Solutions means that I do not think it would be reasonable to have expected members of the public like Mr and Mrs B to recognise that Clark Rees LLP was independent of Positive Solutions.

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

My conclusions on vicarious liability may have been different if Mr Clark and Mr Rees had been appointed representatives of Positive Solutions. I note that in *Anderson*, David Richards LJ said:

> "*In my judgment, there is no substance in the appeal on vicarious liability. The judge [at first instance] made clear findings that Midas [the agent] was carrying on its own business and it is not open to the appellants to go behind those findings. Sense [the principal] also carried on its own business which comprised providing the regulatory umbrella for independent financial services firms. When Midas and its advisors provided financial advice, they were doing so as part of Midas' own recognisably independent business. In no sense could it be said that they were carrying out activities assigned to them by Sense as part of Sense's business and for Sense's benefit*."

Here, Positive Solutions' business (in respect of Mr Clark and Mr Rees) was not to provide the regulatory umbrella for independent financial services firms. Instead, Positive Solutions was itself the independent financial services firm. Positive Solutions had arranged for Mr Clark and Mr Rees to be approved by the FSA to perform various controlled functions in relation to regulated activities carried on by Positive Solutions. Those controlled functions – which included the giving of regulated investment advice – were activities assigned to Mr Clark and Mr Rees by Positive Solutions as part of Positive Solutions' business and for Positive Solutions' benefit.

the 'stage two test'

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

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

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

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

- If Positive Solutions is not vicariously liable here, then Mr and Mrs B's ability to obtain compensation would depend on whether the Positive Solutions Partner they dealt with was an employee of Positive Solutions. In *Cox*, the court suggested it would have been unreasonable

and unfair for Mrs Cox's ability to receive compensation for the injury she suffered to depend on whether the worker who injured her was an employee or a prisoner. I consider that argument has even more relevance here – at least Mrs Cox is likely to have either known or had the ability to find out who was an employee and who was a prisoner. But as Mr and Mrs B have themselves pointed out, they had no way of knowing Mr Clark and Mr Rees' employment status. (I am aware that Mr Clark's agency contract said he had to make his status as a Registered Individual clear – but even if he had done that, the term 'Registered Individual' did not imply anything about his employment status).

- It does not appear that Stirling Mortimer would have allowed the investment in the fund to go ahead unless it was satisfied that Mr and Mrs B fell into one of the categories of people to whom qualified investor funds could be lawfully promoted. In this particular case, Positive Solutions (through its agent Mr Rees) certified Mr and Mrs B as 'sophisticated investors'. But for that certification, the investment would not have gone ahead. In isolation, that is not determinative – but I consider that the point is relevant to whether it is just to hold Positive Solutions responsible for the acts complained about.

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

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

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

However, the facts in *Frederick* are so different to the facts here that I do not believe that case assists me in determining whether Positive Solutions is vicariously liable for the acts Mr and Mrs B complain about. In particular, I note:

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

- Mr Warren submitted "*dishonest and fraudulent*" mortgage applications for loans on behalf of the claimants. Mr and Mrs B make no allegation of fraud. They simply complain about "*the mis-selling of an investment … which has subsequently failed to deliver on its promises*". I consider that their allegations are of negligence and negligent mis-statement. They say that Mr Clark was incompetent in respect of the investment advice he gave to them, but they do not say that he was dishonest. There is therefore no need for me to consider whether Positive Solutions would have been vicariously liable for Mr Clark's dishonest acts.

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

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

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

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

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

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

If this were a case of fraud, the tests in *Mohamud* and *Cox* would not apply and vicarious liability would depend on whether the fraudulent statements were made with the actual or apparent authority of the principal, the test for vicarious liability in deceit laid down by the House of Lords in *Armagas*, which still applies (see *Hockley Mint*). But this is not a case of fraud. In *So*, The Court of Appeal rejected the argument that negligent statements are treated in the same way as fraudulent ones and also need to be made with the principal's actual or apparent authority.

I therefore consider that Positive Solutions is vicariously liable for the acts Mr and Mrs B complain about regardless of whether Mr Clark and Mr Rees carried out those acts with apparent authority on behalf of Positive Solutions. However, as I have said I consider that Mr Clark and Mr Rees did in fact act with Positive Solutions' apparent authority when they carried out the acts complained of. As a result, even if *So v HSBC* is wrongly decided or no longer applies, that would not change my view that Positive Solutions is vicariously liable in this complaint.

statutory responsibility under section 150 of FSMA

For the reasons I've give above, I am satisfied that when Mr Clark gave the advice complained of, and when Mr Clark and Mr Rees arranged the associated deals in investments, they were both acting in their capacity as Positive Solutions' approved persons for the purpose of carrying on Positive Solutions' regulated business. They were not carrying on a business of their own.

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

summary of my provisional findings on jurisdiction

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

- Positive Solutions represented to Mr and Mrs B that Mr Clark had Positive Solutions' authority both to advise on surrenders and to advise on reinvestment in the Stirling Mortimer fund, Mr and Mrs B relied on Positive Solutions' representations, and apparent authority therefore operated such as to give rise to Positive Solutions' responsibility for the acts Mr and B complain about.

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

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

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

my provisional findings on merits

Having provisionally concluded that Mr and Mrs B's complaint does fall within my jurisdiction, I have gone on to reach provisional conclusions on the merits of their complaint. In doing so, I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of the case.

Briefly, my provisional findings on merits are:

- Mr Clark's advice was unsuitable for Mr and Mrs B.
- Mr and Mrs B acted on that advice and suffered a loss as a result of the unsuitable advice.
- The fair and reasonable outcome to this complaint is for Positive Solutions to compensate Mr and Mrs B for that loss.

Based on the evidence I've seen so far, I think fair compensation is likely to exceed £150,000 (our financial limit in this case). Subject to any further evidence or arguments I might receive, I intend to order Positive Solutions to pay Mr and Mrs B £150,000 (plus interest), and make a non-binding recommendation that it both reimburse the rest of their losses and pay them compensation for the distress and inconvenience they suffered.

I go on to explain how I reached those conclusions.

was Mr Clark's advice suitable for Mr and Mrs B?

I consider that Mr Clark's advice was clearly unsuitable for Mr and Mrs B.

Mr Clark recommended that Mr and Mrs B surrender the vast majority of their existing investments, and rely for their financial security on an investment in a single fund. From a diversification perspective alone, I consider that advice to be unsuitable.

It is not clear precisely what objectives Mr and Mrs B had for their money – I don't know what level of return they were looking for, nor do I know how much risk they wanted to take. But in light of their circumstances, I think their capacity to accept risk was low. They were intending to retire shortly, and could not easily replace lost capital without significant changes to their lifestyle (in effect, by going back to work). So I consider Mr Clark should not have recommended anything that exposed Mr and Mrs B to more than a small amount of risk.

I understand the fund invested in right to purchase contracts for a Spanish development, with the intention of reselling those contracts once construction was completed. I consider that the risks associated with such a fund were significantly higher than Mr and Mrs B were in a position to take.

I note that Positive Solutions has not sought to argue that Mr Clark's advice was suitable for Mr and Mrs B. If Positive Solutions does wish to put forward an argument that Mr Clark's advice was suitable, I will of course consider its comments. But in the absence of further evidence or arguments, my final decision will be that Mr Clark's advice was not suitable.

I make no findings as to whether Mr Clark 'churned' Mr and Mrs B's existing investments. Churning occurs when a financial adviser inappropriately recommends that an investor surrender a suitable existing investment and replace it with another product that is either unsuitable or essentially the same as the original one. But here, I do not have enough information to make findings as to whether the investments Mr and Mrs B surrendered were suitable for them.

have Mr and Mrs B suffered a loss as a result of Mr Clark's advice?

Again, in the circumstances I think it is clear that Mr and Mrs B have suffered a loss as a result of Mr Clark's advice. The fund they invested in experienced significant difficulties. Mr and Mrs B did not receive the 6% per year they expected, nor was their capital returned to them after two years.

I can't be certain whether Mr and Mrs B will eventually receive the return of any part of their investment. However, the fund's liquidator told me in July last year that he had not received sufficient fee income to be able to produce accounts for the fund. He also told me that the lawyer acting for the fund had not been in touch with him for some time. Overall, his view was that it was extremely unlikely that any money would be recovered for the fund's investors.

On balance, my opinion is that Mr and Mrs B have probably lost the whole of their investment in the fund. If they had been given suitable advice, it is likely they would have either retained their existing investments, or (if those investments were themselves unsuitable), been advised to purchase low risk alternatives. I don't know what investment return they would have received in either of those cases, but I think a total loss exceptionally unlikely. I am therefore satisfied that Mr Clark's unsuitable advice did cause Mr and Mrs B to suffer a financial loss.

I have not considered whether Mr and Mrs B made any additional losses as a result of being inappropriately advised to surrender existing investments, because I have made no findings as to churning.

fair compensation

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

I think Mr and Mrs B would have invested differently. It is not possible to say *precisely* what they would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr and

Mrs B's circumstances and objectives when they invested.

what should Positive Solutions do?

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

- Compare the performance of Mr and Mrs B's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

  Positive Solutions should also pay interest as set out below.

- Pay Mr and Mrs B £2,000 for the distress and inconvenience they suffered.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Stirling Mortimer Global Property Fund PCC Limited – Majestic Village No 3 Fund	still exists – but illiquid	average rate from fixed rate bonds	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

This means the actual amount payable from the investment at the end date (that is, on the date of my final decision).

I can't be sure today what the value of Mr and Mrs B's investment in the fund will be on the date of my final decision. In view of the liquidator's comments (mentioned above), I think it unlikely that Mr and Mrs B's investment in the fund will have any value at all on the date of my final decision. I can't be certain of that, but for the purposes of the compensation calculation I think it is fair for Positive Solutions to assume that the *actual value* of the investment on the end date is zero. This is provided Mr and Mrs B agree to Positive Solutions taking ownership of the investment, if it wishes to.

If it is not possible for Positive Solutions to take ownership of Mr and Mrs B's investment in the fund, then it may request an undertaking from Mr and Mrs B that they repay to Positive Solutions any amount they may receive from the investment in future.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Positive Solutions should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any withdrawal, income or other payment out of the investment should be deducted from the *fair*

value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on.

If there are a large number of regular payments, to keep calculations simpler, I will accept if Positive Solutions totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mr and Mrs B wanted to achieve a reasonable return without risking any of their capital.
- The average rate for the fixed rate bonds would be a fair measure given Mr and Mrs B's circumstances and objectives. It does not mean that Mr and Mrs B would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital.
- I consider that Mr and Mrs B suffered distress when they discovered that they had lost a significant proportion of their retirement savings. Mr B says he has also had to go back to work – some years after he retired – to replace that lost money. I consider that he has suffered significant inconvenience as a result.

my provisional decision

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

determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My provisional decision is that Positive Solutions (Financial Services) Limited should pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

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

Positive Solutions (Financial Services) Limited may request an undertaking from Mr and Mrs B that either they repay to Positive Solutions (Financial Services) Limited any amount Mr and Mrs B may receive from the investment thereafter or if possible, transfer the investment at that point.

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

Laura Colman
ombudsman