complaint

Mr N's complaint is that a representative of Positive Solutions (Financial Services) Limited (now Quilter Financial Planning Solutions Limited) gave him unsuitable advice to invest within his self-invested personal pension (SIPP). This complaint is about advice to invest pension fund money in a Data Centre Fund in 2007.

background

At the time of the disputed advice Mr C was an adviser with Positive Solutions. Soon after Mr N first complained Positive Solutions became part of Intrinsic Group and Intrinsic responded to the complaint. Later Positive Solutions became Quilter Financial Planning Solutions Limited. For convenience I will mostly refer to the firm as Positive Solutions as that is what it was called at the time of the events the complaint is about.

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

Mr N works in finance. He had been dealing with Mr C for a number of years and was on friendly terms with him. As I understand it, Mr C advised Mr N on a pension with Scottish Equitable in 2000 - before he joined Positive Solutions. Mr C had his own firm called Jones Plunkett Asset Management and later Regent Wealth. He represented a number of other firms or networks and then Positive Solutions from 2004 to 2011.

Mr C was a Partner of Positive Solutions – a registered individual who was an agent of Positive Solutions. He used the "trading style" of Regent Wealth Management and/or Regent Wealth Management Consultants which was approved by Positive Solutions and registered as trading style for Positive Solutions with the FSA between 2004 and 2011.

Mr N had dealings with Mr C acting as a Partner of Positive Solutions and as I understand it there is no (or no longer) dispute about those earlier dealings. For example Mr C seems to have arranged for Mr N to take out another personal pension with Scottish Equitable in the summer of 2005.

Also in 2005 Mr N invested in some Carbon Capital investment schemes Mr C recommended to him. (Mr N has complained about that advice and that was dealt with in a different complaint.)

In 2006 Mr N and Mr C discussed a possible investment in a property fund investing in Poland offered by Curzon Capital. Mr C says Mr N went to Poland on an expenses paid trip to check up on the fund and in the end decided not to invest. Mr N says it was more of a social trip aimed at advisers rather than investors and that he did not have a detailed understanding of the fund as Mr C has since suggested. He says Mr C invited him to try to get him to encourage some of his colleagues to invest in the fund.

Mr N did sign a document in March 2006 from Curzon Capital headed Notice of Treatment as an Intermediate Customer relating to the Poland fund. Mr N also signed two documents from Regent Wealth Management Consultants at the same time: a statement for self-

certified sophisticated investor and a statement for certified high net worth individual. Both of those documents had a footer that said:

> *"Regent Wealth Management Consultants are a trading style of Positive Solutions (Financial Services) Ltd. Positive Solutions (Limited)* [sic] *is authorised and regulated by the Financial Services Authority."*

In 2007 Mr C gathered information about Mr N's personal pensions with Scottish Equitable. So Mr C could do that Mr N signed an authority headed "Authority to transfer records, servicing and agency". That authorised his pension provider to send information to Mr C and any renewal commission to Positive Solutions. The letter included a declaration that Mr N was aware that Mr C of Regent Wealth Management Consultants is an independent financial adviser and a member of Positive Solutions Limited.

That authority was faxed to Scottish Equitable on business stationery that said it was from Regent Wealth Management Consultants, had the Positive Solutions logo and said Positive Solutions (Financial Services) Limited is authorised and regulated by the FSA and Regent Wealth Management is a trading style of Positive Solutions (Financial Services) Limited.

Mr C, using Regent Wealth Management Consultants note paper, sent various papers to the SIPP provider James Hay on 27 November 2007, including:

- An application for the self-invested personal pension. It gave the advisers details as "Regent Wealth Management" and quoted Positive Solutions' FSA number.
- A request to transfer an existing Scottish Equitable pension to James Hay.
- An application for the PFB Data Centre Fund investment with the instruction to invest £40,000 in that fund.

On 7 December 2007 Mr N emailed Mr C at Regent Wealth Management Consultants. Mr N said:

> *"Please could you in future tell me of costs involved when changing my pension, setting up this Sipp costs £290 plus £455 annual administration fee. What am I paying £455 for?"*

Mr C replied the same day:

> *"the James Hay SIPP is a far superior product that the bog standard pension plan. You cannot self invest through a standard pension plan hence the requirement of a SIPP. You (we all) pay at least 1% annual management charge (reduces with the size of the fund) for our standard pension plans plus a fund charge (normally.5% dependent upon the underlying fund)."*

In December 2007 Aegon/Scottish Equitable transferred just over £40,000 to James Hay.

James Hay invested £40,000 in shares in the Data Centre Fund in February 2008 on Mr N's behalf as instructed.

Mr N has not complained about the setting up of the SIPP. His complaint is about the advice to invest in the Data Centre Fund.

Later in September 2008, Mr N says he was advised to invest £20,000 in the City Life PCC Ltd Romania property fund.

This complaint relates only to the first investment. Mr N says he was concerned about the advice to invest such a large proportion of his available funds but was persuaded to invest by Mr C. Mr N says he was rushed and pressurised to invest into something that was totally unsuitable for his pension. Mr N seeks compensation for the loss he has suffered on this investment. Mr N says when the fund was closed he suffered a loss of about 70%

Mr N made other complaints at the same time. Positive Solutions said the complaint about a Carbon Credit investment taken out in 2004 had been made too late. It upheld a complaint about a later investment made in 2009 that had been marketed as a low risk but Positive Solutions said it should have been considered a high risk. Positive Solutions did not uphold this complaint or the complaint about the Romania Fund. It made a number of points including:

- Mr N had known Mr C for over 15 years by the time of the investment.
- Mr C says discussion over the years had mostly been informal often over drinks. During those informal discussions Mr C would introduce various investment opportunities to Mr N who would make up his own mind about things.
- Mr N had previously invested in single company shares and start-up ventures. He was comfortable with investments where his capital was at risk.
- Mr N has always been interested in property-based investment and has some buy to let properties.
- Mr N had gone on an expenses paid trip to Poland to consider a different investment in 2006 and decided not to go ahead with it.
- Mr N worked in finance with a high salary. He signed a self-certified sophisticated investor and a high net worth investor declaration in 2006.
- Mr N was accordingly classified as an intermediate customer. He was aware of the non-regulated nature of the investments and that he would not have access to the Financial Ombudsman Service.
- In 2005 in respect of a different investment Mr N's attitude to risk was recorded as adventurous and speculative.
- In Positives Solutions' view Mr N's attitude to risk had not changed by 2008.

Positive Solutions also said:

> *"We also consider that it is unreasonable to accept that you did not receive any documentation from* [Mr C] *and/or the product providers. You are undoubtedly a sophisticated investor who undertakes his own research and ultimately makes your own investment decisions. It is therefore reasonable to believe that you would not have invested each respective tranche of money without being provided with any supporting documentation. Had you not been provided with relevant documentation, then we are sure you would have immediately raised the issue at that particular time.*
>
> *Having considered all the information on file, we are therefore unable to uphold this part of your complaint."*

Mr N therefore referred his complaint to the Financial Ombudsman Service. One of our adjudicators considered the complaint. He thought Mr N had been advised to invest in the Data Centre Fund and that the advice was unsuitable.

Positive Solutions did not agree with the adjudicator. It said that under section 39 Financial Services and Markets Act 2000 the principal of an appointed representative is only responsible for things done in carrying on the business for which it has accepted responsibility. And Mr C was not authorised to provide advice of the type complained of in

this complaint. Mr C was acting outside his authority, and so Positive Solutions is not responsible.

We asked Positive Solutions to expand on its point. Positive Solutions then corrected itself explaining that Mr C was not an appointed representative – rather he was an agent of Positive Solutions. Apart from that, the point remained that Positive Solutions says it did not authorise Mr C to give the advice complained about in this complaint. In particular Mr C was appointed as a *Registered Individual* for the purpose only of introducing applications by Clients for new Contracts for submission to Institutions specified and approved by Positive Solutions.

The investment in this complaint was not a Contract with an Institution approved by Positive Solutions.

The investment was not placed through Positive Solution's agency and it was paid no commission in respect of the investment. Mr C was required to remit all monies that he receives for doing business on behalf of Positive Solutions and he did not do so in respect of the Data Centre Fund investment.

Also Positive Solutions says Mr C was classified as an intermediate customer and so cannot complain to the ombudsman service in any event.

The complaint was referred to me and I issued a provisional decision on 29 December 2020. I explained why I thought we could consider Mr N's complaint and why I thought it should be upheld and how Quilter Financial Planning Solutions should put things right. I asked the parties to let me have any comments the wished to make by 29 January 2021.

Mr N confirmed receipt of the provisional decision. He agreed with it.

Quilter Financial Planning Solutions also confirmed receiving the provisional decision. On 29 January 2021 it said it had not finalised its response to the provisional decision and said it would reply to the provisional decision that week. The investigator agreed an extension of time for Quilter to respond to 5 February 2021. We have not heard further from Quilter.

my findings - jurisdiction

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

the basis for deciding jurisdiction:

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

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

the compulsory jurisdiction

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

As DISP 2.3.3G explains,

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

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

1. Were the acts about Mr N complains about done in the carrying on of a regulated activity?

2. Was the principal firm, Positive Solutions, responsible for those acts?

the regulatory background

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

regulated activities

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

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

the general prohibition

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

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

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

the approved persons regime

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

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

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

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

Positive Solutions arranged for Mr C to be approved by the FSA to perform the controlled functions "*CF 22 Investment Adviser (Trainee)*" (28 September 2004 to 7 March 2005), "*CF 21 Investment Adviser*" (7 March 2005 to 31 October 2007) and *"CF30 Customer"* (from 1 November 2007 to 23 May 2011) in relation to regulated activities carried on by Positive Solutions. (CF30 is the function of advising on investments.)

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

intermediate customers

It was the case that consumers who were classified as intermediate customers could not complain to the Financial Ombudsman Service. Without going into detail, intermediate customers were customers who were considered sufficiently expert or knowledgeable to have such a classification and who agreed to be so classified and were given written warning (in a prescribed form) that they would lose the right to complain to the Financial Ombudsman Service. In return the investor could get access to certain specialist investment and perhaps lower charges.

Agreeing to be classified as a sophisticated investor and/or a high net worth investor is not the same as being an intermediate client or automatically qualify the client as an intermediate customer

In 2007 the intermediate customer concept was replaced by a category called elective professional clients. This was broadly similar but had a more prescribed criteria and assessment process. These changes were made when the Conduct of Business (COB) section of the regulators handbook was replaced by the Conduct of Business Sourcebook (COBS). And the rules applying to the ombudsman service were also changed.

Initially an elective professional client could not complain to the ombudsman service as a result of DISP 2.7.9.

However in 2015 the rules were changed again and since July 2015 DISP 2.7.9A says that DISP 2.7.9 does not apply to a complainant who is a consumer in relation to the activity to which the complaint relates.

And a consumer is defined as an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession.

In this case Mr N did work in finance but the complaint relates to advice on the investment in his own pension. So he was an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession.

And Mr N referred his complaint to the Ombudsman Service after that rule change.

Accordingly even if Mr N was properly categorised as an intermediate customer or an elective professional client in 2007/2008 (and I have seen no evidence that he was) he would not be prevented from complaining to the ombudsman service for this reason in any event.

breach of statutory duty

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

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

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

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

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

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

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

what is the complaint?

Mr N wrote to Positive Solution on 9 July 2014 and re-sent his letter on 14 July 2014. He made more than one complaint in his letter. In relation to this matter he said:

> *"I am writing to complain about the advice given by* [Mr C] *and the above investments [which included the Data Centre Fund]. I was advised by* [Mr C] *to invest my SIPP funds …into the above investments, which I have now been told are worth nothing or I cannot get the funds back or transferred because it is closed.*
>
> *At no point during the conversations did* [Mr C] *state that these funds would reduce to nothing in value or that I wouldn't be able to access or get them back when required. I requested many times the information from* [Mr C] *and was told at the time that they were safe*

> *investments and have a number of emails from him stating this fact. I have never received any documentation since or letters detailing either the investment made and when, what the facts of the investments were or are or what fees were earned by the adviser.*
>
> *At the time I stated to* [Mr C] *that these funds could not be risked as they form the bulk of my pension investments … I actually stated that my attitude to risk on these funds was cautious, and not in any way high risk which is what I have been subsequently [told] they are.*
>
> *Please let me know what you require to investigate my complaint and put me back in a position I was prior to the advice given by* [Mr C]*."*

When he referred his complaint to the Financial Ombudsman Service in Mr N said:

> *"I had £66,000 to invest in a SIPP. I was advised to put £40,000, which was a big % of my pot, into the data fund, as I was advised I had no exposure in this area. I stated my hesitance regarding the size and how to grade the risk as I had no knowledge of the product. This is my pension pot and I was firm with* [Mr C] *that I couldn't have it put at risk. Despite this I was assured this was the right investment for my pension. It was only recently when I received advice from another financial adviser that I was told this was a 'closed fund' I had no idea what that meant and was never told this by* [Mr C]. *I would never invest in such a scheme if known. I have now been advised I am unlikely to get any money back from this investment."*

Mr N is therefore complaining about investment advice he says he was given by Mr C to invest in the Data Centre Fund within his SIPP.

were the acts Mr N complains about done in the carrying on of a regulated activity?

Mr C has said Mr N signed a notice of treatment as an intermediate client in relation to Curzon Capital and a Poland property fund that Mr N considered and decided not to invest in after checking out the fund himself via an expenses paid trip to Poland. Mr C says the Romania fund is essentially the same as the Poland fund just focused on Romania rather than Poland.

Initially at least Positive Solutions argued in part that Mr C did not give advice. This was based on Mr C's testimony. Positive Solutions' position is that Mr C essentially said Mr N is a sophisticated investor, he (Mr C) gave information to Mr N and Mr N made up his own mind about whether or not to invest.

I do not consider that the evidence backs up this view of things. An exchange of emails on 3 December 2007 indicates the nature of the discussions/dealings between Mr C and Mr N.

Mr C said:

> *"…With regard to the Data Centre fund, I was under the impression that you wanted to get involved (hence setting up a SIPP)? The last time we had a meaningful conversation about the fund I thought we had agreed that you would invest the paid up Scottish Equitable fund into the DC fund and maintain equity exposure via the live SE pension?*
>
> *Obviously we should get together to iron matters out as I have allocated you circa £40k from my firms allocation (it is not a problem if you do not want it as I have other investors who will greedily take it up!) and to be quite frank I would not want you to miss out on the opportunity (ie Poland Buy to Let fund up 40%).*
>
> *From a comfort point of view, quite a few of our investors are Carbon and Poland investors as well as commercial property professionals (if you can make it to our party this Saturday you*

could have a chat with a few of them). The commercial property guys see the data centre sector as hot even though commercial property has been coming off just lately. The hotness is quite simply to do with demand massively out pacing supply for these specialist types of properties. If you have any IT savvy buddies you may want to have a chat with them?

I am aware of a few reports on the sector from two of the leading commercial agents in the UK which concur with hotness of the sector.

This fund is an ideal investment for a pension due to the medium to long term nature of the underlying assets.

You know I am not heavy handed when it comes to matters [Mr N's first name] but I do require an answer quite soon as the first closing date was last week and the next will be in December, the reason I need your answer is that if you do not want to get in then well and good because have started the process but if you do not want to then I am going to be up against it from a timescale point of view regards allowing another investor to tale up your allocation.

Cheers for now."

Mr N replied by email the same day:

"… I'll finish reading the docs tonight, prob will be fine to go ahead, I'm just slightly hesitant to put such a large proportion of my pension into one scheme. It's hard to grade the risk as it's a new fund…."

And Mr C replied again the same day:

"…I think you are making the right decision re the fund although I do appreciate your concern, they are valid, you do not really have any exposure to this type of fund as it is quite specialist. The fund managers know their onions and have 10 successful commercial funds previously. Quite a lot of experienced players have invested."

In my view the above exchange shows a clear recommendation that Mr N invest in the Data Centre Fund. The email is also putting pressure to confirm his decision to invest. It is evidence that Mr N did give advice on the merits of investing in that fund.

The investment involved buying shares in the fund. And advising someone on the merits of buying such an investment is a regulated activity. (And so too is arranging the deal that has been recommended.)

It is also the case that Mr N was advised to use the funds - or rights – in his pension to invest in the Data Centre Fund. And the rights under a pension scheme are also an investment. And advising on buying an investment in a pension is advice on selling and buying rights under the pension scheme.

Further it is clear that the transfer out of Mr N's existing pension was made in order to transfer into a SIPP to make this type of investment if not this precise investment. Certainly Mr C appears in his email to have linked the two things and, as mentioned above, the application to James Hay was made a few days before that email and it includes an instruction to invest in the Data Centre Fund.

Further the email on 7 December 2007 I quoted above shows Mr C recommended the SIPP and why. And in the circumstances, it does therefore seem more likely than not that Mr C

also advised Mr N to transfer his pension from Sottish Equitable to the SIPP notwithstanding the lack of documentary evidence recording such advice.

I note that Mr C submitted the application to James Hay with accompanying documents on the headed note paper of Regent Wealth Management Consultants at an address in London. The Positive Solutions logo is in the bottom right hand corner of that note paper and the footer says Regent Wealth Management Consultants is a trading style of Positive Solutions (Financial Services) Ltd.

On the application form Mr C gave the address for Regent Wealth Management Consultants in Hertfordshire. He also quoted Positive Solutions' FSA number. When James Hay double checked this with him, he confirmed the correct address was the Hertfordshire address.

Shortly after that James Hay realised that its process for dealing with business from Positive Solutions agents was to write to Positive Solutions at Newcastle and for it to pass things on to its agents. James Hay therefore updated its records and wrote to Mr C at Positive Solutions in Newcastle (adding the Regent Wealth Management Consultants name immediately underneath Positive Solutions name in the address on the letter) to confirm the SIPP had been set up.

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

The finding that Mr C gave the disputed advice is not the end of the matter. Positive Solutions' position is that Mr C was its agent but that he was not authorised to advise on the investment as it is not an approved product

Positive Solutions' point is that if Mr C did give advice he was not doing so in his capacity as a registered individual (or agent) of Positive Solutions.

what was the adviser authorised to do by Positive Solutions?

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

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

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

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

actual authority

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

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

Contracts is defined as:

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

And Institution is defined as:

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

Taken in isolation paragraph 2.1 seems to say the agent is only appointed to introduce applications for new contracts for Positive Solutions approved products. I think it is arguable that the authority under the contract did go wider than just introducing new contracts and covers advising on a client's existing investments as part of that process.

And as I understand it James Hay SIPP was on Positive Solutions list of approved Institutions. This is consistent with James Hay having a process for dealing with business from Positive Solutions. So advising on the investing of the rights within that pension may in principle have been authorised even if the investment bought within the pension was not.

However I do not need to go into detail on that point because an agent is required to act in the interests of the principal. And it's difficult to see that giving advice to invest in a non-approved investment (the Data Centre Fund), where no commission or fee was passed on to Positive Solutions, was acting in the interests of the principal, Positive Solutions.

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

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

apparent authority

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

For this type of authority there has to be a representation by the principal by words or conduct that the agent has the relevant authority being considered. And the third party seeking to establish that apparent or ostensible authority has to reasonably relay on that representation.

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

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

> "*Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the*

> *same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.*"

Because of what I say below about reliance I will not deal with this point in detail. In my view Positive Solutions held itself out as whole of market investment adviser. And it held Mr C out as at adviser on its behalf. He was registered as an approved person. He was permitted by Positive Solutions to hold himself out as an adviser acting on its behalf.

The act complained of is investment advice in 2007. The advice was to invest pension funds held in a James Hay SIPP in the Pinder Fry & Benjamin Data Centre Fund. This advice in relation to rights in personal pension which is usually within the authority of a whole of market independent financial adviser.

The Fund itself was a closed ended investment company incorporated in Guernsey that invested in data centres. It was a specialised fund, but it was an investment of a type usually within the authority of a whole of market independent financial adviser notwithstanding the point that Positive Solutions only permitted its agents to recommended investments it has an agency arrangement with.

In principle I consider that Positive Solutions did represent to Mr N that Mr C had authority to give advice of the type Mr C gave.

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 N) if the third party relied on that representation.

In the case of *Anderson v Sense Network* [2018] EWHC 2834 Comm, in the High Court, 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 the *Anderson* case, Jacobs J placed weight on the fact the majority of the claimants had never heard of the defendant, Sense Network, and that those who had heard of it made their decision to invest in the relevant scheme before they saw the stationery which they later said contained the representation on which they relied.

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

In Mr N's case we sent him a questionnaire that included the following questions and Mr N's answers were as follows:

Q: How and when did you first become aware of the PFB Data Centre and Romania Geared property funds?

A: "[Mr C] *Advised me to invest in both*
Data Fund: Dec 2007
Romania: Sep 2008
I was never told the mechanics or risk involved. I would not have invested if known."

Q: "Did anyone advise you to invest your pension fund in the above investments? If so, who was it and who did he/she say they were working for?"

A: "[Mr C]. *Under his own company Regent Wealth Management Consultants"*

Q: "When and how did you first become a client of Positive Solutions? Please provide as much detail as possible."

A: "Not known.
I was a client of [Mr C] *since 1997 approx.*
I was unaware he was under the banner of Positive Solutions.
He never mentioned them."

did Mr N rely on Positive Solutions representation?

Given the comments made by Mr N quoted above I cannot say that Mr N was aware of and relied on any representation of authority Positive Solutions may have made. This seems to be the case notwithstanding the fact that Mr N signed documents and received emails that referred to the relationship between Regent Wealth Management Consultants and Positive Solutions.

It is not therefore possible to say that Positive Solutions is responsible for the advice by Mr C to Mr N to invest in the Data Centre Fund on the basis of apparent or ostensible authority.

vicarious liability

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

what is vicarious liability?

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

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

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

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

- 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.

the stage one test

in *Barclays Bank plc v Various Claimants [2020] UKSC 13* Lady Hale said that, when faced with a case where vicariously liability may be imposed:

> "*The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips* [in Various Claimants and Catholic Child Welfare Society and Others [2012] UKSC 56 ('the Christian Brothers case')] *may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in Christian Brothers, Cox and Armes, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents.*"

was Mr C carrying on his own independent business?

As mentioned above Mr N had been dealing with Mr C for a number of years. Mr N thought he was dealing with Mr C at his own firm and he says he did not know about Positive Solutions. Does that mean Mr C was carrying on his own independent business in relation to the events this complaint is about?

Mr C seems to have had a company from 2006 onwards called Regent Wealth Limited. It was directly regulated by the FSA/FCA from 2010. And it uses a trading name "Regent Wealth Management".

This would seem to be Mr C's independent business. However I have seen no evidence this business was involved in any of the events this complaint is about.

Mr C was not employed by Positive Solutions. He was an independent contractor. So Mr C was carrying on his own business. But at the relevant time that business was the business of being a financial adviser for Positive Solutions for whom he gave advice as an approved person.

For example I note the two emails I quoted above dated 3 December 2007 are from an email address that ends @regentwmc.com. They include the words "Web: RegentWMC.com" and the words Regent Wealth Management Consultants after Mr C's name. The footer of the email includes:

> *"Regent Wealth Management Consultants are a trading style for Positive Solutions (Financial Services) Ltd. Positive Solutions (Limited) is authorised and regulated by the Financial Services Authority."*

Mr C was registered as CF21 investment adviser from 7 March 2005 to 31 October 2007, and a CF30 Customer approved person from 1 November 2007 to 2011 on the FSA's register in relation to Positive Solutions.

Mr C's business Regent Wealth Limited was not authorised to give regulated investment advice at the time. Mr C could only lawfully give investment advice at the time of the events in this complaint as an agent of Positive Solutions.

Positive Solutions registered Mr C's business name as a trading style for Positive Solutions from 2004 to 2011.

I note that, according the FCA register now, the registered trading style was Regent Wealth Management rather than Regent Wealth Management Consultants. But is seems Mr C used the names inter-changeably, with one as a shorter version of the other rather than as two separate businesses. So for example on the James Hay SIPP application in November 2007 the financial adviser's details are recorded as "Regent Wealth Management" and the FSA authorisation number given is Positive Solutions' number. And on the application form for the Data Centre Fund investment the introducing adviser details are given as Regent Wealth Management Consultants with, again, the Positive Solutions' FSA number given. And both forms were sent to James Hay with a covering letter of Regent Wealth Management Consultants notepaper.

It is clear that Mr C's relevant business for this complaint was his trade or professional practice as a financial adviser using the name Regent Wealth Management Consultants sometimes shortened to Regent Wealth Management. It seems that it was the shortened version that was registered as a trading style with the regulator by Positive Solutions while Mr C was using business stationery including his email footer that said the longer name was a trading style of Positive Solutions. Be that as it may, in the period from 2005 to 2011 Mr C was giving financial advice as a financial adviser with Positive Solutions registered as an approved person at the FSA in connection with Positive Solutions. And in relation to the disputed advice in this complaint Mr C was not carrying on his own independent business.

part and parcel of Positive Solutions business? a relationship akin to employment?

Positive Solutions' business model was that it gave financial advice itself, through its Registered Individuals – people like Mr C.

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 Registered Individuals gave investment advice on behalf of Positive Solutions, carrying out Positive Solutions' business activities, those Registered Individuals were not in breach of the general prohibition either.

Mr C was a Positive Solutions Registered Individual. Positive Solutions had given him permission to carry out the controlled function "Investment Adviser", then "Customer" on behalf of Positive Solutions. Positive Solutions had therefore engaged Mr C to carry out activities that were an integral part of its business.

I note that the FCA has issued guidance as to when it considers a person to be carrying on a business in their own right, set out in PERG 2.3.5 to 2.3.11. Although the guidance was published some time after the events Mr N's complaint is about, the relevant parts of the legislation (in respect of permissions to give regulated financial advice) have not changed substantively. I have considered 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".*

For the avoidance of doubt I do not say I am obliged to follow that guidance. Or that I am obliged to consider that guidance in the same way as I am obliged to consider guidance from the regulator when determining what is fair and reasonable in all the circumstances of a complaint that is within my jurisdiction. And as I have already said that is not the basis upon which I am determining the issue of jurisdiction. Rather I have noted the guidance is consistent with my own conclusions about the nature of Mr C's relationship with Positive Solutions.

Positive Solutions clearly intended Mr C to fall outside the general prohibition when acting on Positive Solutions' behalf in giving investment advice. The only way in which Mr C could have fallen outside the general prohibition at the time was on the basis that he was carrying on Positive Solutions' business rather than his own. In my view, the guidance therefore supports my view that Mr C's relationships with Positive Solutions were very similar to employment relationships.

That guidance fits very well with how the Supreme Court's framed the question, and in particular the distinction between "*whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant".* In this present case I am satisfied the relationship between Mr C and Positive Solutions was that he was carrying on Positive Solutions' business, as opposed to business on his own account, and I am also satisfied that in doing so the relationship was akin to employment.

In my view Mr C's activities were part and parcel of Positive Solutions' business. The controlled function of giving regulated investment advice was an activity assigned to Mr C by Positive Solutions as part of Positive Solutions' own business and for Positive Solutions' benefit

In these circumstances, I consider that a relationship existed between Mr C and Positive Solutions such that Positive Solutions may be held vicariously liable for Mr C's actions. But even if this was one of the "doubtful cases" that Lady Hale referred to, I consider that the five incidents Lord Phillips identified would still point towards the relationship being one to which vicarious liability could apply. I note:

- Positive Solutions is considerably more likely to have the means to compensate Mr C. Positive Solutions can be expected to have insured against that liability, and may even have been required to hold professional indemnity insurance as a condition of its authorisation by the Financial Services Authority.

- Positive Solutions had assigned to Mr C the activity of giving investment advice. The act Mr N complains of – the giving of *unsuitable* investment advice – was therefore carried out as a result of activity Mr C undertook on Positive Solutions' behalf.

- Mr C's activity was very much part of Positive Solutions' business activities. Positive Solutions' whole purpose was to give independent financial advice.

- In assigning to Mr C the activity of giving investment advice on its behalf, Positive Solutions created the obvious risk that he would do so negligently.

- Mr C was to a very large degree under the control of Positive Solutions. The FSA's rules required Positive Solutions to properly supervise all of its approved persons, including Mr C. In addition, the Registered Individual Agreement between Mr C and Positive Solutions gave Positive Solutions extensive rights to control his conduct. The contract made clear that any act or omission of the Registered Individual "*shall be treated as an act or omission of [Positive Solutions]*" and explained that meant "*it is therefore imperative that the Registered Individual adhere to the strict rules laid down by the FSA and the Company's Procedure manuals*".

However, the fact that the relationships in question are capable of giving rise to vicarious liability does not mean that Positive Solutions is automatically liable for everything Mr C did. To decide whether Positive Solutions is liable in the circumstances of this complaint, I must also consider whether the act complained of is sufficiently connected to Mr C's duties on behalf of Positive Solutions – the stage two test.

the stage two test

Here I must answer two questions:

- What was the field of activities Positive Solutions had assigned to Mr C?

- Was the act complained of so closely connected with the acts Mr C was authorised to do such that, for the purposes of Positive Solutions' liability to Mr N, that act may fairly and properly be regarded as having been done by Mr C while acting in the ordinary course of his duties for Positive Solutions?

the field of activities

In *Group Seven Ltd v Notable Services [2019] EWCA Civ 614* the Court of Appeal considered the scope of the field of activities assigned to the wrongdoer in that case. It said:

> "*we agree… that when deciding what a wrongdoer's field of activities is it is relevant, in general terms, to consider that person's contract of employment and any directives about the way in which he should carry out his functions which form part of the terms and conditions. However, this is only the beginning of the enquiry and cannot be determinative or prescriptive. If it were, the scope of vicarious liability would be narrow indeed and the majority of the central cases in this area of the law would have been decided differently. The question must be addressed broadly. As Lord Nicholls explained in the* Dubai Aluminium *case at [22] quoted by Lord Toulson in* Mohamud *at [41], "agents may exceed the bounds of their authority or even defy express instructions" and as a result, "the law has given the concept of 'ordinary course of employment' an extended scope. …*
>
> *Secondly, we agree … that the usual authority of someone in the role of the wrongdoer is of some relevance when reaching a conclusion about the nature of a job and the field of activities entrusted to him or her. However, it is not the complete answer any more than the precise terms of his contract of employment can be. Moreover, usual authority must not displace the approach described by Lord Toulson in Mohamud. The question must be addressed broadly in the light of all of the circumstances of the case. It is important not to seek to import a yardstick of authority into that broad enquiry. As Lord Nicholls stated in the Dubai Aluminium case at para [23], albeit in the context of actual authority, "authority is not the touchstone."*

> *Thirdly, we also agree that the nature of the job and whether there is sufficient connection between it and the wrongdoing must be considered from an objective standpoint, viewed in the light of all the circumstances. To put it another way, the question should be addressed from the perspective of the reasonable observer with knowledge of the relevant context. It seems to us that that is inherent in Lord Toulson's criticism and analysis of the Australian case of Deatons Pty Ltd v Flew (1949) 79 CLR 370 at [29] of his judgment in Mohamud*."

The above passage shows contractual terms can be relevant, at least at the beginning of an enquiry, as to the field of a wrongdoer's activities; and similarly the usual authority of the wrongdoer; but that the nature of the agent's job and of the connection between it and wrongdoing is a wider enquiry, which depends on all the circumstances viewed objectively. I note that *Group Seven* was decided before the recent *Barclays* and *Morrisons cases* in the Supreme Court, but I consider that I should similarly approach the question of the scope of the field of activities assigned to Mr C in a broad, non-technical way.

Here, Mr C was contracted to give investment advice on behalf of Positive Solutions. He appeared on the FSA's Register as an approved person able to give such advice on Positive Solutions' behalf. For the purposes of the application of the stage two test to Mr N's complaint I consider that the field of activities assigned to Mr C by Positive Solutions should be described as the giving of investment advice.

In considering the 'close connection' part of the test, bearing in mind the wide range of factors that have been considered relevant in the decided cases concerning liability for misadvice/misstatements such as *Group Seven Ltd v Notable Services [2019] EWCA Civ 614* and *Kooragang v Richardson & Wrench [1982] AC 462,* I consider that there are factors in this case pointing both toward holding Positive Solutions vicariously liable for the actions of its agents. I note:

- This complaint is about the investment advice Mr C gave to Mr N.

- The advice given was not authorised by Positive Solutions, but it was of a type that is part of the usual authority of an IFA.

- Mr C was purporting to act on behalf of Positive Solutions, using business stationery and email and the business name he was operating under was a trading style of Positive Solutions – even if Mr N did not notice this was the case.

- Mr N had a long and friendly relationship with Mr C which endured as Mr N changed the firms he represented from time to time. Although this was a personal relationship the fact remains Mr C did not at the time have personal authority to give regulated investment advice. He could only do so on behalf of Positive Solutions at the relevant time.

- I see no way in which Mr N, or a reasonable consumer in his position, could have known that the investment advice they received from Positive Solutions' investment advisers was not in fact authorised by Positive Solutions. Even if he had consulted the Financial Services Authority's Register, he would not have seen any limits on the scope of Mr C's authority to give investment advice. Positive Solutions treated the contracts between itself and its Registered Individuals as confidential matters, so Mr N would not have been aware of the contents of those agreements.

- So far as I am aware, Mr C had one principal – Positive Solutions. Positive Solutions was the only principal a reasonable consumer in the position of Mr N would have seen if they had looked up Mr C on the FSA's Register. This is not a case like *Kooragang*, where the agent/employee had dual, conflicting, employments. Instead, it is a case where the only way Mr C could have lawfully given advice at all was by acting on behalf of Positive Solutions. If he had given advice on his own behalf, or on behalf of another third party, he would have been in breach of the general prohibition.

- Positive Solutions says it did not receive any commission for the investment, and I accept its evidence on that point. That means Mr C benefitted financially from the advice he gave and Positive Solutions did not. If Positive Solutions had benefitted financially, that would have been a factor pointing towards its being vicariously liable. But the absence of a benefit does not point the other way. In *Kooragang*, the Privy Council made clear that a principal may be vicariously liable even if an agent/employee committed a wrong solely for his own benefit.

- The Supreme Court considered the position of a wrongdoer's motive in *Morrisons*. It made clear that the wrongdoer's motive is a relevant consideration. There is nothing here to suggest that Mr C had any intention to harm either Positive Solutions, or Mr N. It seems most likely that Mr C thought the investment was suitable for his long-term client and he recommended it to him for their mutual benefit ie Mr N would get a suitable and hopefully successful investment and Mr C would be remunerated for that investment advice and his happy client would return for more investment advice in the future.

- Any commission Mr C received did not follow the route contractually agreed between Positive Solutions and its agents. Any commission should have been paid to Positive Solutions direct, and then passed on (at least in part) to Mr C. Alternatively, if it had been paid to Mr C direct, he should have declared it to Positive Solutions. This would not have been known to a reasonable consumer in Mr N's position.

I consider that the field of activities Positive Solutions had assigned to Mr C was that he should give investment advice to Positive Solutions' customers. Mr C gave investment advice to Mr N. I am satisfied that the investment advice complained of was indeed so closely connected with the acts Mr C was authorised to do such that, for the purposes of Positive Solutions' liability to Mr N, that advice may fairly and properly be regarded as having been done by Mr C while acting in the ordinary course of his duties for Positive Solutions.

I am therefore satisfied that Positive Solutions is vicariously liable for the investment advice Mr C gave to Mr N to invest in the Data Fund investment in his SIPP.

statutory responsibility under s150 (now s138D) of FSMA

I consider that the guidance the FCA set out in PERG 2.3.5 to 2.3.11 (in respect of when the FCA considers a person to be carrying on a business in their own right) is also of note – on the same basis as I discussed above – in relation to the issue of whether Positive Solutions had statutory responsibility under section 150 of FSMA for the actions of Mr C. Again, I appreciate the guidance in PERG was published some years after the advice complained of here, but the relevant parts of the legislation had not changed substantively.

In my view, the FCA's guidance suggests that the question of a firm's responsibility for agents who were not appointed representatives should be analysed according to whether the agent was carrying on the firm's business. The guidance directly concerns the question of whether the agent is in breach of the general prohibition for carrying on its own business instead of the firm's, but I think it is just as relevant to the question of whether the agent's acts and omissions count as acts and omissions of the firm under section150 of FSMA. The general prohibition applies to persons who carry on regulated activities by way of business and section 150 applies to persons who breach regulatory rules whilst carrying on those activities. In both cases, the question needs to be answered which party's business is carried on. If the agent was carrying on the firm's business, then the agent won't be in breach of the general prohibition, but the firm will nevertheless be liable under section 150 for its agent's breaches of rules such as the COBS suitability rules.

For the reasons I've given above, I am satisfied that when Mr C gave the advice complained of, he was acting in his capacity as Positive Solutions' approved person for the purpose of carrying on Positive Solutions' regulated business. He was not carrying on an independent business of his own. So, if the advice was not suitable, then (subject to the recognised defences) Positive Solutions is responsible in damages to Mr N under the statutory cause of action provided by section 150 of FSMA. I therefore consider that section 150, now section 138D of FSMA provides an alternative route by which Positive Solutions is responsible for the acts complained of.

summary of my findings on jurisdiction

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

- Positive Solutions represented to Mr N that Mr C had Positive Solutions' authority to advise on the investment in the Data Centre Fund within the SIPP but Mr N did not rely on that representation. Apparent authority does not therefore operate, and Positive Solutions is not responsible on this basis.

- Positive Solutions is however vicariously liable for the acts Mr N complains about.

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

I am therefore satisfied that Positive Solutions is responsible for the acts Mr N complains about.

my findings on merits

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

Mr N says the advice to invest in the Data Centre Fund was unsuitable – that it was too high risk as he wanted a lower risk investment for his pension.

Positive Solutions' position – in broad terms – is that Mr N is a sophisticated investor who understood what he was doing and would not have invested in the Data Centre Fund if it was too high risk for him.

Mr N did sign a document dated 2 March 2006 from Curzon Capital headed Notice of Treatment as an Intermediate Customer relating to a different fund. This suggests that he was willing to be classified as an experienced and knowledgeable investor. As did his signing of Regent Wealth Management Consultants' form headed statement of self-certified sophisticated investor.

However Mr N has said he put a great deal of trust in Mr C and signed whatever Mr C asked him to sign. And this does seem to be confirmed by points such as Mr N not noticing the relationship between Regent Wealth Management Consultants and Positive Solutions. And by his asking questions about the SIPP after he had taken it out.

The evidence does tend to show Mr N was naïve rather than sophisticated in relation to his dealings with Mr C.

Mr N was no doubt successful at his own job in finance, but it had nothing to do with pensions or retail investment funds. He consulted a financial adviser about those matters – Mr C an adviser with Positive Solutions at the time. And that means the onus was on Mr C to act professionally and give suitable advice.

However, it's clear to me that Mr C adopted a very informal approach in relation to Mr N.

An investment should meet the client's investment objectives. The client should be in a financial position to bear the risks of the investment. And the client should be able to understand the risks involved. It is not however clear that Mr C gathered and recorded sufficient information to have a reasonable basis for considering the investment was suitable bearing in mind all those points.

Nor did Mr C provide a suitability report setting out the reasons for his recommendation.

Positive Solutions has referred to a recommendation letter written in 2005 in relation to the Carbon Capital investments. It says it included:

> *"Having discussed your attitude to investment risk, I would describe you as being adventurous and speculative in that you are comfortable investing in volatile funds and appreciate the risk versus reward concept.*
>
> *You understand that this investment in the Carbon Trading Partnerships is potentially of a high risk nature. We agreed that this investment is one where:*
>
> *"Investors are prepared to accept significant risk to their capital in return for the prospect of possible high returns in the long term. Investors understand and accept that in certain circumstances the funds invested may lose their entire value and there is a possibility (however small) of losing capital in excess of that invested"".*

Positive Solutions also says Mr N's job and attitude to risk had not changed between then and the disputed advice in 2007.

However, I note Mr N agreed to invest in the EEA Life Settlement fund in 2009. Positive Solutions has said this was marketed as low risk and so presumably Mr N was advised to invest in it on that basis. This shows Mr N's attitude to risk was not necessarily stuck in one position for all investments for all time – and that's normal.

At the time of the advice in this case Mr N was in his thirties and planned to retire at 55. He had a well-paid job in finance and had at least some understanding of investment risk. This is shown by his comment in one of the emails of 3 December 2007 when he said, *"It's hard to grade the risk as it's a new fund…."*

Mr N says he had two buy-to-let properties worth about £40,000 both of which were mortgaged. He also had some ISAs, premium bonds and money on deposit. He had bought some shares in the dot com boom and he had also invested in £10,000 in friend's start up business. I note that Mr N chose not to invest in the Poland Fund Mr C had promoted to him.

Mr N would therefore seem to have been a person with some understanding of risk who was financially secure enough to take some risk and a willingness to do so when he thought it right.

Mr N has said his attitude to risk in relation to his pension was low. There is no contemporaneous evidence that confirms that point. And he has said the same about investment and savings products and I am not sure his investment track record and decisions from around that time is necessarily consistent with that attitude to risk.

Generally relatively sophisticated investors will invest at different risk ratings for different things and generally investors are likely to take less risk with investments earmarked for specific purposes. So as I understand it, the EEA fund was taken out for school fees. The Carbon Credit investments were not for such a purpose so far as I am aware, so a higher risk rating is understandable. And generally (though not invariably) investors are more likely to take less risk with their pension investments even if they are 20 years or more from retirement.

The Data Centre Fund was a specialist fund that was being newly launched and intended to invest in data centres. The Fund was not, say, a large diversified property fund. It was investing in one specific part of the property sector. And it was classified as a non-readily realisable investment meaning it was likely to become illiquid if it encountered any problems. The investment would generally be considered a higher risk investment.

It is not clear that any of the risks were explained to Mr N or that he was given the opportunity to make a properly informed decision. Mr C acted like a salesman rather than an adviser and put pressure on Mr N to invest in the fund – for example referring to limited availability and the 40% growth of the fund Mr N had chosen not to invest in and his not wanting Mr N to miss out on the opportunity. Mr C also quickly brushed aside Mr N's reasonable reservations about being unable to assess the risks of the fund and the size of the investment as a proportion of his pension fund.

I think a reasonable adviser acting reasonably would not have advised Mr N to invest pension funds in the Data Centre Fund. It was at too high a level of risk for most pension investors. I consider a reasonable independent adviser acting reasonably would have advised Mr N to invest in broadly medium risk investments for his pension fund and not take undue risk by investing a large proportion of his pension fund in a new specialist closed ended investment fund.

It is also my view that Mr N would have accepted such advice.

It my view that Mr N was given unsuitable advice. It is also my view that it is fair and reasonable that Positive Solutions should pay Mr N compensation for any loss that unsuitable advice has caused Mr C.

It is also my view that Mr N will have suffered worry and upset as a result of his unsuitable investment in the Data Centre Fund. And that it is fair and reasonable that Positive Solutions should pay Mr N compensation for that worry and upset.

how to put things right

My aim is to return Mr N as close as possible to the position he'd probably now be in if he'd been given suitable advice by Mr C. With suitable advice, I think his pension funds would have remained in the James Hay SIPP. Beyond that, I don't think it's possible to say precisely what he would have done, but I'm satisfied that what I've set out below is fair and reasonable given his circumstances and objectives when he invested.

what should Positive Solutions do?

To compensate Mr N fairly, Positive Solutions should compare the performance of the portion of Mr N's James Hay SIPP that was invested in the Data Centre Fund with that of the benchmark shown. If the *fair value* is greater than the *actual value*, there's a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable. Positive Solutions should also add interest as set out below.

If there's a loss, Positive Solutions should pay into Mr N's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Positive Solutions is unable to pay the compensation into Mr N's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr N's actual or expected marginal rate of tax at his selected retirement age. For example, if Mr N is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr N would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

Positive Solutions should also pay Mr N £500 for the worry and upset the unsuitable Data Centre investment has caused him.

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

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Data Centre	Fund now closed	FTSE UK Private	date of investment	date of my decision	8% simple per year from

Fund		Investors Income Total Return Index			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 appropriate proportion of the SIPP at the end date.

fair value

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

Any withdrawal, income or other distribution out of the SIPP 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's a large number of regular payments, to keep calculations simpler, I'll accept if NDL totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I've chosen this method of compensation because:

- In my view Mr N wanted capital growth within his SIPP and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it's called an income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr N's circumstances and risk attitude.

my final decision

My final decision is that we can consider Mr N's complaint against Quilter Financial Planning Solutions Limited (formerly known as Positive Solutions (Financial Planning) Ltd) and that I uphold the complaint. Quilter Financial Planning Solutions Limited should pay Mr N fair compensation as set out above within 28 days of being notified of Mr N's acceptance of this

decision. If it does not pay within 28 days Quilter Financial Planning Solutions Limited must also pay 8% simple interest per year on the fair compensation from the date of this decision to the date of payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 18 April 2021.

Philip Roberts
ombudsman