complaint

Mr T complains about the advice he was given by a financial adviser - Mr R - in 2009. He says this advice was to switch his personal pension into a SIPP and then invest in the shares of an unlisted company. That company has since gone into liquidation and Mr T believes it was unsuitable to recommend he invest his money in that way. Mr T believes that Mr R was representing Positive Solutions (Financial Services) Limited (PSL) now Quilter Financial Planning Solutions Limited (Quilter), at the time when he gave this advice and it is therefore responsible for that advice.

background

I issued a provisional decision on 13 January 2020. A copy is attached and forms part of this final decision. In the provisional decision I explained why I believed this complaint would fall within my jurisdiction. I also set out why I believed the complaint should be upheld.

There were two typographical errors in the provisional decision that I would like to correct. On page 12 of the provisional decision was the following paragraph:

"I also need to decide whether Mr R relied on any representation PSL made. Having considered Parker J's comments in Martin, if Mr T proceeded throughout on the footing that in giving advice Mr R was acting in every respect as the agent of PSL with authority from PSL so to act, then this suggests I should conclude that Mr T relied on PSL's representation."

This should have read, *"I also need to decide whether **Mr T** relied on any representation PSL made."*

And on page 13, the paragraph:

"PSL placed Mr R in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr R complains about."

Should have read:

*"PSL placed Mr R in a position which would, in the outside world, generally be regarded as having authority to carry out the acts **Mr T** complains about."*

Mr T accepted the provisional decision.

Quilter said that it did not accept my provisional decision. I have read and considered its response in full but, in summary, it said as follows:

- There is a clear mistake in my findings. This is that the adviser was able to advise on investments authorised by the FSA - but it has seen nothing to suggest that the investment here was authorised and regulated by the FSA. The shares were unregulated, unquoted and unlisted and the rules applying to investments within FSMA 2000 do not apply. This means that the investment does not fall within my jurisdiction.

- Mr R did not have PSL's permission at the time to advise on this type of unregulated investment.

- I have not given sufficient weight to a previous decision issued by this service.

- PSL did not hold any agency in respect of the SIPP or the investment and therefore the adviser was acting outside his authority.

- Mr T has never been a client of PSL/Quilter. PSL/Quilter has no record of Mr T and he has not produced any evidence that he understood he was a client of PSL/Quilter. He is not a customer of PSL/Quilter and therefore is not an eligible complainant.

- Mr R advised Mr T without PSL's knowledge at the time and was operating on a *"frolic of his own".* It did not believe it was responsible for this complaint or one the ombudsman service could consider.

- It requested any decision on the case be suspended awaiting the outcome of another similar complaint made to this service.

I noted Quilter's reference to another decision issued by this service. Although Quilter did not set out why it thought this decision was relevant to Mr T's case, I noted that this decision considered the time limits for making a complaint. Therefore I considered that issue and set out my view in a letter of 4 June 2020. I thought the complaint had been made in time. I have not received a response from Quilter to that letter.

my findings

Firstly I would like to apologise to Mr T for the time it has taken to reach this point.

jurisdiction

As discussed in my letter of 4 June 2020, Quilter referred to a decision which considered the time limits in which to make a complaint.

To reiterate, the relevant time limits are:

"DISP 2.8:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(2) more than:

(a) six years after the event complained of; or (if later)
(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received."

In terms of the six year limit, the event complained of is the advice Mr T says he was given to switch his pension to a SIPP to invest in unlisted shares. This occurred in 2009. As Mr T did not complain to Quilter until 2016, this time limit has expired.

So I have considered the three year time limit rules in DISP as set out above. As Mr T complained on 15 January 2016, he would need to have been reasonably aware (or ought to have been) before 15 January 2013 of the cause for complaint to be out of time.

Bearing in mind that Quilter has not set out why it, despite requests, it believes Mr T is out of time to complain, to consider if Mr T had, or ought reasonably to have had an awareness of a cause for complaint before 15 January 2013, I requested the regular pension statements from the SIPP provider. It is the statements before 15 January 2013 that are relevant to the three year rules, for the reasons discussed in my letter of 4 June 2020.

All the pension statements/valuations up to those issued in 2014 record the value of Mr T's investment as the same as originally invested. In other words, the valuation of his investment had not decreased and he had not suffered any losses which might have put him on notice of cause for complaint. It was only in 2014 that the valuation of the holding was reduced. I would also say that I have not seen any other evidence that Mr T was, or should have reasonably been aware, he had cause for complaint before 15 January 2013.

Therefore Mr T has complained in time.

In brief, in my provisional decision I set out my findings that:

- Mr T's complaint is about an act or omission in relation to carrying on regulated activities, which Mr R carried out for Mr T.
- The advice Mr R gave fell within the express (or actual) authority conferred by PSL
- PSL represented to Mr T that Mr R had authority to conduct business of the same type as the business he did conduct. And Mr T relied on those representations. Apparent authority also therefore operated and PSL is responsible for the acts Mr T complains about.
- In addition, PSL is vicariously liable for the investment advice Mr R gave to Mr T.
- Although Mr R was not an employee of PSL, he was an approved person with responsibility for carrying on PSL business of advising its customers and arranging the investments recommended. As such he carried on activities as an integral part of PSL's business and had a sufficiently close relationship to PSL for vicarious liability to arise. Mr T's advice was so closely connected to PSL's business activities that PSL is liable for it.
- PSL is also liable to Mr T under section 150 of the Financial Services and Markets Act 2000.
- So the acts subject to complaint were the acts of the authorised firm, (PSL)
- Mr T's complaint therefore falls within my jurisdiction.
- Mr R's advice was unsuitable for Mr T.
- Mr T acted on the advice and suffered loss as a result of it.

- It is fair and reasonable for PSL to compensate Mr T for that loss.

Quilter has previously said that I should wait to decide this complaint until after its judicial review challenge to a decision on a similar case has been resolved. Those proceedings are now at an end. In any event each case turns on its own particular facts and I am required to consider the particular facts of this case.

I would also note that Quilter has been given sufficient time to make whatever submissions it wanted to make with respect to this complaint and so I am satisfied that it has had a fair opportunity to put its case.

regulated activity

Quilter says that the investment complained of here (Lightstep shares) was unregulated and unlisted and therefore the rules about investments under FSMA 2000 do not apply.

What I said in the provisional decision was that regulated activities took place. The switch of the personal pension to the SIPP was a regulated activity. Rights under a SIPP are specified investments as per article 81 of the Regulated Activities Order 2001 (RAO). A personal pension is also a specified investment. Advice to switch a personal pension to a SIPP is regulated investment advice as per article 53 of the RAO. And the share purchase was intrinsically linked to the pension switch to the SIPP, as discussed in the attached provisional decision.

Shares are a specified investment – Article 76 of the RAO. Advice to buy such a specified investment or arrange the purchase of a specified investment is a regulated activity.

Consequently the activities undertaken by Mr R are regulated activities that fall squarely within my jurisdiction.

actual authority

I discussed in the provisional decision my view that Mr R did have PSL's express authority to arrange the SIPP for Mr T. However, on reflection I believe that Mr R may not have had such authority because he did not abide by PSL's prescribed process in carrying out the regulated activity – such as routing such applications through PSL.

Having said that, as I set out in the provisional decision, this was not the only basis for my conclusion that the acts subject to complaint were the acts of PSL. There were several bases on which I could draw that conclusion.

apparent authority

Quilter has said the question is not whether it gave Mr R authority to transact a general class of acts. The question is whether PSL gave Mr R authority in relation to this transaction.

I agree that the ultimate question is whether there was apparent authority in relation to this transaction. But in addressing that, I believe I should consider whether PSL placed Mr R in a position which would objectively carry PSL's authority for Mr R to conduct business of a *type* he did in fact conduct.

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

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

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

For the reasons I've given in my provisional decision I am satisfied that PSL represented to Mr T that Mr R 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 PSL.

That Mr R may not have had actual authority to give the advice he gave is not determinative. Mr R had PSL's apparent authority to act on its behalf in advising Mr T to switch/surrender existing investments (in this case a pension) so that an investment could be made in Lightstep shares, because he had PSL's more general apparent authority to act on its behalf in giving him that kind of investment advice.

PSL's representations as to the authority of Mr R

The points made by Quilter in other cases are largely framed by its view that representations must be specific rather than general. I do not agree with that view.

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

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

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

PSL has said if this amounts to a representation it would make PSL liable for anything said or done by Mr R relating to anything which might broadly amount to financial advice. PSL has separately said this is, *"an absurd proposition"*. But that is not what I said or implied and

the cases of *Martin v Britannia* and *Anderson v Sense* show how such matters can be applied (and limited) in practice.

I do not say in this case there was a holding out that *everything* Mr R might do was authorised. But, to the extent that he gave advice to PSL's customers such as Mr T about their investments, this was the type of business he was held out as carrying on for it.

It remains my finding that PSL did represent to Mr T through its conduct that Mr R had its apparent authority to act on its behalf in carrying on the activities complained about.

reliance

PSL has not in its response disputed my finding on reliance. And my view is unchanged. This was a straightforward matter of a client dealing with their existing PSL adviser because he was a PSL adviser – Mr T has made comment to that effect. He said he accepted it was a PSL adviser who was recommending changes that he justified. There is no evidence to show that Mr T knew or should have known that Mr R was acting in any capacity other than a PSL adviser. Mr T proceeded on the basis that Mr R was acting in every respect as the agent of PSL with authority from PSL so to act. As I discussed in the attached provisional decision, the SIPP application documentation (for the SIPP) strongly suggests that Mr R was operating as a PSL adviser in respect of the pension switch and he had dealt with Mr T on this basis.

should PSL bear the loss caused by the pension switch and investment in Lightstep shares?

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

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

vicarious liability

Quilter does not agree that it is vicariously liable for the acts Mr T complains about. I considered this matter in my provisional decision and said that the tests laid down by the Supreme Court in *Cox* and *Mohamud* were applicable in this case. Since my provisional decision was issued, vicarious liability has been considered by the Court in *WM Morrisons Supermarkets plc v Various Claimants* [2020], *and Barclays Bank plc v Various Claimants* [2020]. However, I have not reviewed this matter again in light of these new authorities because my decision is that PSL are liable for the acts of Mr R here by virtue of apparent authority.

statutory responsibility under section 150 FSMA

In my provisional decision I set out that section 150 FSMA provided an alternative route by which Quilter is responsible. As with vicarious liability I have not reviewed this issue again as my decision is that PSL are liable for Mr R's acts by virtue of apparent authority.

suitability of this complaint for determination by an ombudsman

When Mr T referred his complaint to the ombudsman service, there wasn't specifically a provision under the DISP Rules (in particular the 'dismissal provisions under DISP 3.3.4A (R)) that allowed an ombudsman to dismiss the complaint on the basis that it would be better dealt with by a court.

In any event I acknowledge that Quilter has said separately that it 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 Quilter 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.

Overall, I am satisfied that I can resolve this complaint justly, fairly, and within my jurisdiction.

my findings as to the merits of the complaint

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

Neither party has made any further submissions on the merits of the complaint or the way I said things should be put right. My view remains as set out in the attached provisional decision.

how to put things right

I set out in the attached provisional decision why it was appropriate and fair for PSL/Quilter to pay compensation in this case. And I also set out how compensation should be calculated. But, to confirm:

I think if this unsuitable advice had not been given then Mr T would have kept his existing pension. But it's unlikely to be possible for Quilter to reinstate Mr T into his previous pension scheme. Bearing that in mind, what is set out below is in my view a fair way of compensating Mr T for the unsuitable advice.

The redress calculation is set out on the basis that, as Mr T says, Lightstep is in liquidation or has been wound up.

In summary, Quilter should:

1.Obtain the notional transfer value of Mr T's previous pension plan, as at the date of my Final Decision, if it had not been transferred to the SIPP.

2. Obtain the transfer value, as at the date of my Final Decision, of Mr T's SIPP, including any outstanding charges and allowing for any sum received from Lightstep.

3. And then pay an amount into Mr T's SIPP so that the transfer value is increased to the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.

In addition, Quilter should:

4.Pay any future fees owed by Mr T to the SIPP, for the next five years (this will only be necessary if Mr T's shares still exist and cannot be encashed).

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

I have set out each point in further detail below.

1. *Obtain the notional transfer value of Mr T's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of my Final Decision.*

Quilter should ask Mr T's former pension provider to calculate the notional transfer value that would have applied as at the date of my Final Decision had he not transferred his pension but instead remained invested.

If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

Quilter should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates.

2. *Obtain the transfer value as at the date of my Final Decision of Mr T's SIPP, including any outstanding charges* and allowing for any sum received from Lightstep.

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure. The figure should include any sum returned from Lightstep or from the sale of Lightstep shares.

This could be complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That may well be the case here.

To calculate the compensation, Quilter should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment(s).

If Quilter is unable to buy the investment(s), it should assume a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Quilter has paid into the SIPP.

In return for this, Quilter may ask Mr T to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. Quilter will need to meet any costs in drawing up the undertaking. If Quilter asks Mr T to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

3. *Pay an amount into Mr T's SIPP so that the transfer value is increased to equal the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.*

If it's not possible to pay the compensation into the SIPP, Quilter should pay it as a cash sum to Mr T. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore, the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr T's marginal rate of tax in retirement. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

4. *Pay any future fees owed to the SIPP for the next five years.*

Had Quilter given suitable advice I don't think there would be a SIPP. It's not fair that Mr T continues to pay the annual SIPP fees if it can't be closed. This might be the case if Lightstep still exists and the shares cannot be sold.

In that situation, ideally, Quilter should take over the shares to allow the SIPP to be closed. This is the fairest way of putting Mr T back in the position he would have been in. But it is possible that the ownership of the shares can't be transferred.

If they can't be transferred, to provide certainty to all parties, I think it's fair that Quilter pays Mr T an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, Quilter may ask Mr T to provide an undertaking to give it the net amount of any payment he may receive from the shares in that five year period, as well as any other payment he may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount he may receive. Quilter will need to meet any costs in drawing up this undertaking. If

it asks Mr T to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, after five years, Quilter wants to keep the SIPP open, and to maintain an undertaking for any future payments under the shares, it must agree to pay any further future SIPP fees.

In addition, Quilter is entitled to take, if it wishes, an assignment from Mr T of any claim Mr T may have against any third parties in relation to this pension switch and share investment. If Quilter chooses to take an assignment of rights, it must be affected before payment of compensation is made. Quilter must first provide a draft of the assignment to Mr T for his consideration and agreement.

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

I believe Mr T has been caused significant upset by the events this complaint relates to, and the apparent loss of pension benefits. I think that a payment of £500 is fair to compensate for that upset.

The compensation resulting from the loss assessment must where possible be paid to Mr T within 28 days of the date PSL receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 28 days, that it takes Quilter to pay Mr T this compensation.

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

my final decision

For the reasons set out in this final decision and the attached provisional decision, this complaint does fall within my jurisdiction.

My decision is that I uphold the complaint and order Quilter Financial Planning Solutions Limited to calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 15 January 2021.

David Bird
ombudsman

copy provisional decision

summary of complaint

Mr T complains about the advice he was given by Mr R in 2009. He says this advice was to switch his personal pension into a SIPP and then invest in the shares of an unlisted company. That company has since gone into liquidation and Mr T believes it was unsuitable to recommend he invest his money in that way. Mr T believes that Mr R was representing Positive Solutions (Financial Services) Limited (PSL) when he gave this advice and it is therefore responsible for that advice.

background

As discussed, in 2009 Mr T switched his pension to a SIPP and then invested in shares in a company called 'Lightstep Ltd'. At the time Mr R traded as Real Wealth Management (RWM).

Mr T complained to PSL that the advice to do this had been unsuitable. PSL said that it had no responsibility for any advice Mr T had been given. It said that Mr R was free to enter into contracts and agencies outside of the contract he held with PSL. It said it had no record of the advice Mr T says he had been given or any record of the switch and investment at all. It therefore said that, in its view, Mr R had not carried out the switch or given advice as a representative of PSL.

Mr T referred his complaint to this service. One of our investigators considered the complaint but did not believe it would fall within our jurisdiction. She said that PSL's terms of its agreement with Mr R stated that any applications had to be submitted through it for approval. As the investigator did not think Mr R did this, PSL was not responsible and the complaint would not fall within our jurisdiction.

Mr T did not agree and so the complaint has been passed to me for review.

my findings

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the Financial Conduct Authority's DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at. In this case, PSL says that we don't have the power to look at this complaint, on the basis that it relates to acts PSL aren't responsible for. PSL says Mr R did not submit the transfer and investment 'business' through it and so it did not authorise those transactions.

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

So there are two points to consider in order to decide whether this complaint is one I can look at:

- Were the acts about which Mr T complains done in the carrying on of a regulated activity?

- Were those acts the acts of the authorised firm, (PSL)?

the regulatory background

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

regulated activities

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

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

the general prohibition

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

This is known as the "general prohibition".

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

Mr R was neither an authorised person nor exempt from authorisation. RWM was not a separate legal entity – it was just a trading name he used. That means that if Mr R had carried out a regulated activity on his own behalf, whether in his own name or his trading name, by way of business, he would have been in breach of the general prohibition.

the approved persons regime

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

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

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

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

PSL arranged for Mr R to be was registered on the FSA register as *'CF30 Customer'* from 2007 to 2011.

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

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 T 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 T was a private person under section 150(1) of FSMA and a private customer under COB 5.3.5R. Broadly, those terms covered all natural persons – subject to some exceptions. I am satisfied that no exceptions applied to Mr T – 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 T suffered a loss as a result of a rule breached by PSL, he would have a right of action against PSL for breach of statutory duty. He would have no such right against Mr R, because he was not a 'firm'.

were the acts complained of done in carrying out a regulated activity?

Regulated activities are specified in Part II of the FSMA 2000 (Regulated Activities) Order 2001 ("'the RAO") and include advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO), and making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

It does not seem to me disputed that Mr R gave advice to Mr T to switch his pension and then invest in the shares. But in any event I am satisfied that the evidence indicates that Mr R arranged and advised on the pension switch to the SIPP and the share investment. That is Mr T's recollection, and the documents I have seen indicate that Mr R was corresponding on Mr T's behalf with the transferring scheme and the new SIPP provider. The documents also refer to the share purchase. The fact that there does not appear to be any recommendations report or 'fact find' being carried out does not mean that Mr R did not provide advice to Mr T or arrange the switch and subsequent investment. The evidence strongly indicates he did.

The SIPP, Mr T's existing pension and the shares were securities or relevant investments. So a regulated activity took place (giving advice on or arranging the switch and investment). I therefore need to consider whether those activities were the acts of PSL

were those acts the acts of the authorised firm, (PSL)?

M R is recorded on the Financial Services Register as representing PSL from November 2007 to March 2012.

When considering if the acts complained about are those of PSL I have taken note of the following documents:

- A Yorsipp SIPP application form dated 6 November 2009. This recorded the transferring scheme as Mr T's personal pension with Clerical Medical. The *"Financial Adviser Details"* on that form record Mr R was acting for *"Positive Solutions*", using a *"thinkpositive"* email address. The application also recorded that an investment was to be made in Lightstep unquoted shares. The *"Confirmation"* on the application was 'signed' by Mr R whose position was recorded as *"Partner".* The *"Introducing Firm"* was stated to be *"Positive Solutions"*, FSA reference number 184591.

- An instruction from Mr T to appoint Professional Financial Services as his financial advisers. This instruction is held by Clerical Medical.

- An email from Mr R dated 9 November 2009 which appears to be to Yorsipp. This says it attaches application and pension transfer documentation for Mr T. It instructs all correspondence be sent to Mr R's personal address. The email is 'signed' Mr R, Partner, 20-4-7 Solutions LLP.

- A letter from Clerical Medical confirming that a payment of about £20,000 was made to Yorsipp on 18 November 2009.

- A letter from Yorsipp to Mr R of *"Real Wealth Management".* This confirmed receipt of Mr T's pension transfer value from Clerical Medical.

- Confirmation from Yorsipp that no fees were paid to Mr R or PSL. It also confirmed that any letters were issued to Mr R at his personal address, not PSL's.

Mr T has said:

"At all times in my discussions with Mr R he made it clear that he was an appointed representative of Positive Solutions and provided me with his business card and initial disclosure document and assured me that I had the backing of a large financial service company in Positive Solutions with any transaction."

Bearing in mind the evidence it is clear that Mr R arranged the switch of Mr T's pension to the SIPP. I also believe it is likely that Mr R advised Mr T to invest in the shares, as Mr T has said. I think it is likely that Mr R did so on the basis he was representing PSL. That is what Mr T has said and it is recorded on the SIPP application that Mr R, representing PSL, was the financial adviser involved. My understanding is that 'Real Wealth Management' was a 'trading style' of PSL.

what did PSL authorise Mr R to do?

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 or actual authority to Mr R.

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 PSL and Mr R 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 PSL approved products.

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

Paragraph 2.4:

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

Paragraph 3.1:

> Required a Registered Individual to be registered with the FSA.

Paragraph 4.3:

> Required the Registered Individual to conduct business on PSL terms of business - which the Registered Individual must supply to every client.

Paragraph 10.1:

> Required the Registered Individual to conduct himself in adherence to the FSA rules.

Paragraph 10.4:

> Prohibited the Registered Individual from procuring persons to enter into agreements otherwise than through PSL agency.

Paragraph 10.7:

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

Paragraph 14.:

> The Registered Individual agreed to indemnify PSL if it incurred any claims or liability in respect of the Registered Individual's acts or omissions.

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

As mentioned above, at the time of the events complained about in this case, as required by paragraph 3.1 of the Agency agreement Mr R was registered on the FSA register. It shows that he was approved to perform the controlled function *"CF30 Customer"* with PSL from November 2007 to March 2012.

The PSL Compliance manual recorded that PSL was authorised to advise on investments (amongst other things).

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

Registered individuals such as Mr R were appointed as, and held out by PSL, as independent financial advisers able to advise on investments as authorised and regulated by the FSA.

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

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

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

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

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

When PSL agrees to give investment advice (which it gives through its registered individuals) it cannot know at the outset what advice it will give. First PSL (through its registered individual) must assess the client's current financial position, objectives, attitude to risk and so on. When it has done that, suitable investment advice from PSL (given through its registered individual) might, depending on the circumstances discovered, be:

1. Invest money that is not currently invested in a new plan approved by PSL.

2. Sell an existing investment and buy a new plan approved by PSL because it is in the client's best interest to sell and to buy.

3. Do not sell an existing investment to buy a new plan approved by PSL because it is not in the client's interest to sell and to buy.

4. Do not buy a particular approved PSL investment the client is interested in because it is not suitable for the client (because it is too high risk or not currently affordable for example) and so not in the client's best interest to buy.

Each one of these possible scenarios involves regulated investment advice by PSL (given through the registered individual) and, as I have said, PSL does not know which of those or other possible scenarios will play out at the start of the advice process. And three of those scenarios involve more than introducing new applications for new plans. And the second and third might involve advising on the merits of selling plans PSL has not approved.

If a PSL registered individual was *only* authorised by PSL to introduce applications for new plans possible scenarios 2, 3 and 4 would seem to involve the registered individual acting unlawfully. So this possible restricted interpretation of the authority given by PSL to its registered individual can't be right.

In my view it must be the case that the registered individual's appointment is wider than only introducing applications for new approved contracts. In my view this is either:

- the meaning of clause 2.1 when read with clause 2.4, and the rest of the agreement, and/or
- it is the actual or implied authority from all the processes set out in PSL own requirements on its registered individuals as result of the FSA conduct of business rules it is subject to.

In saying all that, I do not say that the appointment of the registered individual is unconditional. I only say at this point that the authority goes wider than *only* introducing applications for new approved contracts. In my view the registered individual's authority does include giving advice on the merits of selling existing investments in some circumstances.

So it is my view, in this case, that PSL's authority to Mr R did potentially include advice on the merits of selling existing investments as well as the introduction of applications for new contracts.

did the agent's express authority cover the advice in this case?

As discussed, PSL placed requirements on its registered individual's when conducting investment business. It said:

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

That means that applications must relate to investments PSL had approved. As I understand it PSL has confirmed that Yorsipp – whose SIPP Mr T transferred to - was an approved SIPP provider. In other words that was a SIPP provider that its registered individual's could use. However, the company shares were not an approved investment.

So Mr R did have express authority from PSL to advise on, and arrange, the Yorsipp SIPP. So Mr R's actions in that respect would fall within my jurisdiction.

But I have noted that Lightstep shares were not approved investments or institutions.

In the applicable authority of *Martin v Britannia Life Limited* [1999] the judge took a broad approach. The appointed representative advised on a package of transactions including a mortgage. The judge held that the concept of investment advice will include all financial advice given to a prospective client with a view to or in connection with the purchase, sale or surrender of an investment including advice as to any associated or ancillary transaction.

So in *Martin v Britannia Life* a firm was held to be responsible for advice that extended beyond the products the appointed representative was authorised to advise upon. That was on the basis that there was an activity that was part of the overall transaction that the adviser *was* authorised to advise on.

As discussed, Mr R gave advice as to, and arranged, the Yorsipp SIPP – a plan which he could give advice on, or arrange, under his agreement with PSL. PSL is therefore liable for that advice and the arrangement of the SIPP.

The advice as to the SIPP and the arrangement of it was intrinsically linked to the purchase of the Lightstep shares investment in the sense that the latter could not proceed without the former.

I have referred to *Martin v Britannia Life* [1999] *Limited* and *TenetConnect v Financial Ombudsman Service* [2018]. Such set out that if the non-authorised activity is *"very closely connected to"* or *"inextricably linked to"* the activity which the principal authorised and permitted then the non-authorised activity can be considered to be part of the overall transaction that the principal permitted.

The SIPP was clearly linked to the advice to invest in the shares, they were part of the same 'transaction'. The advice to set up the SIPP was not given on a 'standalone' basis but formed part of a process encompassing both the switch to the SIPP and the investment in the shares. They were part of the same transaction or piece of advice.

It follows that the advice to invest in the shares falls within my jurisdiction as it was a linked transaction of the advice to switch to the SIPP and part of the same piece of advice.

apparent authority

Even if I am wrong that Mr R had express authority to give advice about the SIPP and investment, there is also the matter of apparent (or ostensible) authority.

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

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

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

Although Diplock LJ referred to *"contractors",* the law on apparent authority applies to any third party dealing with the agents of a principal – including a consumer such as Mr T.

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

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

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

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

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

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

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

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

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

> *contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.*"

must the third party rely on the representation?

The principal's representation that its agent has its authority to act on its behalf will only fix the principal with liability to the third party (here Mr T) if the third party relied on that representation.

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

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

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

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

In respect of apparent authority I have considered whether, on the facts of this individual case:

- PSL made a representation to Mr T that Mr R had PSL's authority to act on its behalf in carrying out the activities he now complains about, and

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

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

I also need to decide whether Mr R relied on any representation PSL made. Having considered Parker J's comments in *Martin*, if Mr T proceeded throughout on the footing that in giving advice Mr R was acting in every respect as the agent of PSL with authority from PSL so to act, then this suggests I should conclude that Mr T relied on PSL's representation.

did PSL represent to Mr T that Mr R had the relevant authority?

As I have discussed, I am persuaded that Mr R did give advice to switch Mr T's pension and investment advice on behalf of PSL.

The evidence is that Mr T received a terms of business agreement in respect of the disputed advice. It is my view that in principle an agent of PSL was authorised to:

- advise on the setting up of investment such as the shares

- advise on the switch of the pension to the SIPP.

None of these activities were in themselves novel or exceptional or unexpected for an IFA. These are activities that fall within the class of activities that IFAs are usually authorised to do. Any restrictions on the authority to give such advice (such as set out by PSL) would not have been visible to Mr T. So for example he would not know that an adviser should only recommend approved investments, should obtain clearance from PSL before giving certain types of advice and should present the advice in certain ways.

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

PSL authorised Mr R to give pensions and investment advice on its behalf.

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

PSL held itself out as an independent financial adviser that gave advice and offered products from the whole of the market after assessing a client's needs. No information was provided to clients or potential clients about the agent being authorised in relation to approved products only.

It was in PSL's interest for the general public, including Mr T, to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that PSL intended Mr T to act on its representation that Mr R was its financial adviser.

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

did Mr T rely on PSL's representation?

Mr T has said clearly that he understood Mr R to be acting as PSL's adviser when he gave the advice about the pension switch and share investment. As discussed, in my view it is highly likely that Mr R did represent to Mr T that he was giving advice and providing his services as an adviser of PSL.

There is no persuasive evidence to show that Mr T knew or should have known that Mr R was acting in any capacity other than a PSL adviser.

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

should PSL to be required to bear any losses caused by Mr R?

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 PSL responsible for any detriment Mr T has suffered as result of the advice he received from Mr R. I think it is just to hold PSL responsible for the consequences of its putting Mr R in the position where Mr T could suffer loss as a result of his actions. In particular, I note:

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

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

vicarious liability

It is also appropriate for me to consider whether PSL is vicariously liable for the actions of Mr R – independently of whether apparent authority also operated such as to fix PSL 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 R was not an employee of PSL. However, the employment relationship is not the only relationship capable of giving rise to vicarious liability.

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

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

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

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

If it were the case that vicarious liability could never have anything to do with principals and agents then I consider it likely that the Court of Appeal would have simply said so. But in any event, the relationship between Mr R and PSL was not just an agency relationship. Mr R was registered with the FSA as an 'approved person' able to carry out regulated activities on PSL's 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 T complains about. But that does not prevent me from applying the law as I understand it to be. In *Cox*, Lord Reed said:

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

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

the 'stage one test'

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

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

I am satisfied that giving advice to Mr T to switch his pension and then invest in the shares was carrying on activities as an integral part of the business activities carried on by PSL. I say that because:

- At the time, PSL's stated purpose was "…t*o 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.

- PSL's 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*".

- PSL's 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 PSL, carrying out PSL's business activities, those Partners were not in breach of the general prohibition either.

- Mr R was a PSL Partner. PSL had given him permission to carry out the controlled function of '*CF 30 Customer'* on behalf of PSL. PSL had therefore engaged Mr R 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 T complains about, 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*".

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

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

PSL had arranged for Mr R to be approved by the FSA to perform various controlled functions in relation to regulated activities carried on by PSL. Those controlled functions – which included the giving of regulated investment advice – were activities assigned to Mr R by PSL as part of PSL's business.

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 PSL to be held responsible for the actions Mr T complains about. I note:

- Mr R was giving pension and investment advice, completing paperwork and making arrangements to put that advice into practice. I consider these activities are closely connected to the business activities of PSL, a firm which provided financial advice and arranged investment transactions for its customers.

- If PSL is not vicariously liable here, then Mr T's ability to obtain compensation would depend on whether the PSL Partner he dealt with was an employee of PSL. In *Cox*, the court suggested it would have been unreasonable and unfair for the claimant's ability to receive compensation for the injury she suffered while working in a prison kitchen to depend on whether the worker who injured her was an employee or a prisoner. I consider that argument has even more relevance here – at least Mrs Cox is likely to have either known or had the ability to find out who was an employee and who was a prisoner. But Mr T had no way of knowing Mr R's employment status (I am aware that Mr R's agency contract said he had to make his status as a registered individual clear – but even if he had done that, the term 'Registered Individual' did not imply anything about his employment status).

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

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

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

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

- In *Frederick*, the claimants were approached by a Mr Qureshi – who was not a registered individual of PSL. 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 T had personal dealings with Mr R, PSL's registered individual. He met with Mr R who provided him with advice. Mr R carried out business activities of a type that had been specifically assigned to him by PSL, and which he could only (lawfully) perform on behalf of PSL.

- Mr Warren submitted "*dishonest and fraudulent*" mortgage applications for loans on behalf of the claimants. Mr T has made no such allegation of fraud. He only complains about the suitability of the advice. Their allegation is one of negligence and/or breach of statutory duty. He does not say as such that Mr R was dishonest. There is therefore no need for me to consider whether PSL would have been vicariously liable for any dishonest acts by Mr R.

- Mr Warren was only able to submit the mortgage applications in the way he did because he was an agent of PSL. 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 T says he suffered losses as a direct result of the advice given to him by Mr R, in his capacity as a PSL financial adviser, to switch his pension and invest in Shares 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 R, PSL, and the specific acts Mr T complains about. The applicability of those tests to agency relationships is unclear, as is their applicability to some or all of the reliance-based torts, possibly including negligent mis-statement.

Even if those specific tests are not applied, I still consider that it would be appropriate for a court to consider whether PSL is vicariously liable for the actions of Mr R. The earlier cases, including *Armagas* and the *Christian Brothers* case [2012], 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 PSL to bear any loss caused by negligent investment advice provided by Mr R.

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 R was a PSL approved person. In view of section 59(1) of FSMA, I consider that when Mr R carried out the regulated activity of a pension switch, advising on investments, and arranging deals in investments, those activities were the activities of PSL. PSL is clearly responsible for its own activities.

I see no support in FSMA – or anywhere else – for the belief that PSL's 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 PSL's responsibility depends on whether the approved person's conduct is classified in terms of one type of tort ("reliance-based") or another. I would be surprised if a court were to take the view that such distinctions were relevant to the outcome of this complaint.

I therefore consider that PSL is vicariously liable for the acts Mr T complains about regardless of whether Mr R carried out those acts with apparent authority on behalf of PSL (however, as I have said, I consider that Mr R did in fact act with PSL's apparent authority when they carried out the acts complained of.)

statutory responsibility under section 150 of FSMA

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

That means PSL is subject to the Conduct of Business (COBS) suitability rules in respect of Mr R's advice. If Mr R's advice was not suitable, then (subject to the recognised defences) PSL is responsible in damages to Mr T 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 PSL is responsible for the acts complained of.

In summary and having considered all of the circumstances here, as well as the legal authorities, I am provisionally satisfied that:

- Mr R had express authority to give advice as to, and arrange, the SIPP. The SIPP and the share investment were part of one overall transaction and therefore PSL is responsible for the advice given about that transaction. The complaint would therefore fall within my jurisdiction and I can consider the merits of it.

- In addition – or in the alternative - PSL represented to Mr T that Mr R had PSL's authority both to advise on the pension switch and the investment in the shares.

- In addition – or in the alternative – PSL is vicariously liable for the acts Mr T complains about.

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

I am therefore satisfied that PSL is responsible for the acts Mr T complains about.

my provisional findings on merits

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

Mr T was a company director of a business involved in the installation and maintenance of air-conditioning systems. He says he earned abut £30,000 a year. He has confirmed that the only investment he had at the time the advice was given was the Clerical Medical pension.

So Mr T didn't have any investments of an 'aggressive' or high risk nature. In fact it seems he had no experience of risk based investments at all apart from his pension. He confirms that his only investment since 2009 was a further lump sum into his pension.

My understanding is that the Lightstep shares were unlisted smaller company shares. Investing in them would be high risk and the investor faced the real possibility of losing all their money.

Mr T's circumstances do not indicate that he was prepared to lose all his money in the pension scheme or that he could afford to do so. They also do not indicate that he was suited to the risks this investment presented. The Clerical Medical plan was his only pension and he invested most of the money in the shares.

Mr T's investment experience is and was very limited and does not suggest that he was an experienced investor who could appreciate all the risks of what he was doing or would not be reliant on the adviser to give him suitable advice and consider his best interests. I have not seen that the adviser gave Mr T detailed advice about the shares and in particular the risks of investing in them.

The value of Mr T's pension funds was modest at about £20,000**.** The material issue is that the majority of that money was designated for investing in the shares. That put most of his pension savings at risk of total loss (which is what appears to have happened).

As discussed Mr R knew that Mr T was to invest his pension funds in the Lightstep shares. He seemingly obtained very little detail about Mr T or his financial situation.

Clearly, the evidence indicates that Mr T was not the sophisticated type of investor for which such an investment in unlisted single company shares would be suitable; the risks of the investment are far higher than were suitable for him and they were of a nature that was not appropriate for him. In any event far too much of the pension money was invested in the shares – there was little, if any, diversification.

Bearing all this background in mind, I do not believe there is any persuasive evidence that it was appropriate for Mr T to take the risks of switching and investing in the shares, which put his retirement income and benefits at great risk.

calculating compensation

I think if this unsuitable advice had not been given then Mr T would have kept his existing pension. But it's unlikely to be possible for PSL to reinstate Mr T into his previous pension scheme. Bearing that in mind what is set out below is in my view a fair way of compensating Mr T for the unsuitable advice.

The redress calculation is set out on the basis that, as Mr T says, Lightstep is in liquidation or has been wound up. If this is not the case then the parties should let me know. It would be helpful if Mr T could clarify the current status of his holding.

In summary, PSL should:

1.Obtain the notional transfer value of Mr T's previous pension plan, as at the date of my Final Decision, if it had not been transferred to the SIPP.

2. Obtain the transfer value, as at the date of my Final Decision, of Mr T's SIPP, including any outstanding charges.

3. And then pay an amount into Mr T's SIPP so that the transfer value is increased to the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.

In addition, PSL should:

4.Pay any future fees owed by Mr T to the SIPP, for the next five years (this will only be necessary if Mr T's shares still exist and cannot be encashed).

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

I have set out each point in further detail below.

6. *Obtain the notional transfer value of Mr T's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of my Final Decision.*

PSL should ask Mr T's former pension provider to calculate the notional transfer value that would have applied as at the date of my Final Decision had he not transferred his pension but instead remained invested.

If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

PSL should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates.

7. *Obtain the transfer value as at the date of my Final Decision of Mr T's SIPP, including any outstanding charges.*

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

8. *Pay an amount into Mr T's SIPP so that the transfer value is increased to equal the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.*

If it's not possible to pay the compensation into the SIPP, PSL should pay it as a cash sum to Mr T. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr T's marginal rate of tax in retirement.

9. *Pay any future fees owed to the SIPP for the next five years.*

Had PSL given suitable advice I don't think there would be a SIPP. It's not fair that Mr T continues to pay the annual SIPP fees if it can't be closed. This might be the case if the Lightstep still exist and the shares cannot be sold.

Ideally, PSL should take over the shares to allow the SIPP to be closed. This is the fairest way of putting Mr T back in the position he would have been in. But it is possible that the ownership of the shares can't be transferred.

If they can't be transferred, to provide certainty to all parties, I think it's fair that PSL pays Mr T an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

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

If, after five years, PSL wants to keep the SIPP open, and to maintain an undertaking for any future payments under the shares, it must agree to pay any further future SIPP fees.

In addition, PSL is entitled to take, if it wishes, an assignment from Mr T of any claim Mr T may have against any third parties in relation to this pension switch and share investment. If PSL chooses to take an assignment of rights, it must be affected before payment of compensation is made. PSL must first provide a draft of the assignment to Mr T for his consideration and agreement.

10. Pay Mr T £500 for the trouble and upset caused.

I believe Mr T has been caused significant upset by the events this complaint relates to, and the apparent loss of pension benefits. I think that a payment of £500 is fair to compensate for that upset.

The compensation resulting from the loss assessment must where possible be paid to Mr T within 28 days of the date PSL receives notification of his acceptance of my final decision (should it remain the same as this provisional decision). Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 28 days, that it takes PSL to pay Mr T this compensation.

my provisional decision

For the reasons given in this decision, I do believe Mr T's complaint against PSL would fall within my jurisdiction. I also believe it should be upheld and compensation calculated as set out above.

David Bird
ombudsman