DRN-3408784

## The complaint

Mr W's complained that advice he received to invest into an unregulated Scion Film Opportunities LLP ('Scion') holding was unsuitable. Mr W says this advice was provided by a representative of Quilter Financial Planning Solutions Limited ('Quilter').

## What happened

At the relevant date, Quilter was known as Positive Solutions (Financial Services) Ltd ('Positive Solutions') and so, for ease of reference, I'll simply refer to Positive Solutions throughout this decision.

Mr P of Regent Wealth Management ('Regent') was a Registered Individual ('RI') of Positive Solutions. I'll explain more about the term RI later in the decision, but for now it's sufficient to say that Mr P was an agent of Positive Solutions and authorised to give advice on its behalf. Mr P ceased to be an RI of Positive Solutions altogether in 2011.

As I understand it, both parties accept that Mr P carried out a Fact Find with Mr W on 10 October 2008. That Fact Find wasn't completed as a part of the advice I'm reviewing in this complaint. But it was noted, amongst other things, in the Fact Find that Mr W:

- Was 62 years old.
- Had an income of £65,000.
- Had a little over £250,000 in a pension plan with Skandia.
- Had an overall risk profile of 'medium'.

Mr W says he invested in a Scion holding in February 2009, on the advice of Mr P. And that, as a moderate risk investor, the Scion investment was unsuitable for him.

We've seen no suitability report or recommendation letter for the advice. But we've been provided with some documentation from the period of the transactions complained about.

A Scion Film Opportunities LLP *'frequently asked questions'* document, dated 24 December 2008, explains a bit about the Scion investment. It says, amongst other things, that:

- Individuals would be subscribing for a share in a UK limited liability partnership.
- The Partnership would trade in film industry activities and would finance films.
- Each investment would be for £27,000, investors would contribute £9,000 of their own money and the remaining £18,000 would, subject to approval, be funded by a full recourse loan.
- Each investor would need to commit for a seven-year period; the loan term would be no less than seven years and the capital would be repayable by 31 March 2016.
- The loans would be secured against the investor's interest in the Partnership. And the Partnership would also grant security over its own assets to the lender.
- The indicative annual rate of return on the cash payment, before interest and tax, was projected to be 14% a year.
- At the end of year seven, it was hoped that members would receive sufficient profits

to repay the loan and enjoy an above market return on the money they'd invested.
- Members would be personally liable to repay the loan if the Partnership assets didn't generate sufficient income to do so.
- In accordance with UK Generally Accepted Accounting Practice, at the end of any accounting period, trading stock or work in progress held on the balance sheet should be written down to the lower of its cost and its net realisable value.
- Given the nature of the Partnership's activities, future income might be uncertain, and this might result in the Partnership having to write down assets. This was particularly likely in the Partnership's first accounting period, when most of its capital was committed and before significant income might've been secured.
- The tax implications of subscribing to the Partnership were fairly uncontentious, and were incidental to the commercial objectives, so external tax Counsel hadn't been sought. But legal, accounting and tax advice had been taken from external advisers.
- The Partnership was an unregulated collective investment scheme ('UCIS') and could only be marketed by individuals authorised under the Financial Services and Markets Act ('FSMA') 2000.

A *'Method of Cash Payment'* form for the Scion investment was completed for Mr W. This records that he'd be investing £9,000. The form has been signed by Mr P on 19 January 2009 on behalf of Regent as the introducer and Positive Solutions' Financial Services Authority ('FSA') number 184591 is given in the form. By signing the form, the introducer's confirmed, amongst other things, that the issuing of the Information Memorandum and other promotions to Mr W had been made without contravention of sections 21, 238 and 240 of FSMA 2000.

Also on 4 February 2009, Mr W signed and Mr P witnessed, a subscription deed for the Scion investment. It's explained, amongst other things, in the deed that:

- The subscriber (Mr W) had read, understood and agreed to the matters set out in the Information Memorandum for Scion Film Opportunities dated 9 January 2009.
- The subscriber is experienced in business matters and recognises that the Partnership's a speculative venture and has no history of operations or earnings.
- Membership of the Partnership might result in total capital loss and/or in the subscriber incurring additional liability.
- There was no established market for interests in the Partnership.
- It may be difficult to sell an interest in the Partnership, or to obtain reliable information about the value of the interest.
- The Partnership wasn't authorised under FSMA 2000 and ordinary members wouldn't be able to claim under the Financial Services Compensation Scheme ('FSCS') if the Partnership defaulted.

And, on the same date, Mr P signed an *'Introducing Adviser's Certificate'* form for the Scion investment on behalf of Regent to confirm that, amongst other things, the identity of the subscriber had been verified. Positive Solutions' FSA number's also given in this form.

A Scion '*Loan Agreement'* has also been signed by Mr W on 4 February 2009, the agreement contains details about the loan and confirms it's for £18,000.

There's also a Scion '*Borrower Information'* form. This records that Mr W's a co-director, that his total income is £70,000 and that he's got about £650,000 of 'prime assets' (including property). The approximate total amount of his 'other assets' was £250,000. Again, this form was signed by Mr W on 4 February 2009.

Mr W says that, aside from the signature which he acknowledges is his, the rest of the Scion

'*Borrower Information'* form was completed by Mr P. Mr W doesn't know if he signed the form before or after values were added but he's highlighted that the figures aren't quite accurate. Mr W's explained that in February 2009 he and his wife jointly owned their home, which had a mortgage on it. Mr W says that they sold their home for £630,000 in 2016 and that its value in 2009 was around £500,000. Apart from this, Mr W says that the other assets he owned when the Scion investment was made in February 2009 were as follows:

- About £5,000 in cash deposits.
- A 26% share in his own company, this share was worth around £24,000.
- About £6,000 in stocks and shares.
- Around £250,000 in pension plans.

On 26 March 2013, a few years after he'd made the Scion investment, HM Revenue & Customs ('HMRC') wrote to Mr W. HMRC believed there'd been an error in Mr W's tax return for the year ending 5 April 2009. It explained that, during that year, Mr W had included a sideways loss relief claim as a partner of Scion Film Opportunities LLP. But, as he was a non-active partner in the Partnership, HMRC was concerned Mr W might not have been entitled to sideways loss relief. And the assessment it was sending was to enable Mr W to make good the underpayment of tax that resulted from his sideways loss relief claim.

HMRC's assessment of the sum Mr W needed to pay was £9,538. A breakdown clarified how HMRC had arrived at this sum. Mr W's 2009 loss relief claim had been for £23,845, and 40% income tax on £23,845 was £9,538.

Mr W then paid the £9,538 to HMRC on 23 April 2013.

Scion Financial Partners Limited wrote to Mr W on 18 December 2014 and explained that:

- It was the Financial Conduct Authority ('FCA') authorised operator of the Partnership.
- The Partnership was an UCIS.
- It was intending to wind up the Partnership.
- HMRC enquiries into the Partnership had been closed and Mr W would receive a separate letter confirming how this should be reflected in his personal tax returns.
- SIF UK Limited (the lender for member's loans) had agreed not to make any claims under member's personal loans against members personally.
- With the winding up, after the liquidator's fees and expenses were met, it was anticipated that members should each receive about £2,140.

Mr W's told us that:

- During the HMRC investigation he'd requested a copy of his original Scion application. He didn't recall having seen the application in detail before this. He'd been asked to sign pages by Mr P, with the document essentially being completed and submitted by Mr P.
- The Scion investment was recommended by Mr P on the basis that he'd only have to make an initial payment of £9,000 and he could claim this back on his next tax return as an allowable expense. It *"was essentially a cost neutral investment but with the potential to provide very good returns."*
- The investment was made around 4 February 2009.
- His initial investment was £9,000 and the £18,000 was viewed as a loan, as the commitment had to total a minimum of £27,000.
- Mr P said that the Scion proposal was different to other similar tax avoidance schemes as it was investing in film production directly.
- HMRC, after a number of years, took a different view and he ended up having to pay

more than £9,000 back to HMRC.
- Apart from two UCISs in his pension fund that were the subject of a previous complaint we considered involving the same parties, he's not previously invested in any other UCISs.

In response to Mr W's complaint Positive Solutions has said, amongst other things, that:

- It doesn't have any record of Positive Solutions giving Mr W advice on the Scion investment.
- It didn't authorise Mr P in relation to this investment, it didn't process this business and it didn't receive any commission.
- Until he left in early 2011, Mr P was authorised to act as an Independent Financial Adviser ('IFA') with Positive Solutions.
- Mr P was contracted to Positive Solutions as a self-employed IFA on a 'contract for services' basis and he was free to enter into contracts and agencies outside of his contract with Positive Solutions.
- Mr P says that he informed Mr W that Positive Solutions didn't offer advice on unregulated investments.
- It has no records of any agreement to provide an ongoing service to Mr W, and it's asked us to consider the Terms of Business Mr P provided to Mr W.

More than one investigator was involved with reviewing Mr W's complaint. Most recently, an investigator reviewing the complaint said the complaint should be upheld. That investigator found that Positive Solutions was responsible for unsuitable advice Mr W had received to invest in the Scion holding, and that Positive Solutions should redress Mr W for this.

Positive Solutions didn't agree with the investigator and said that Mr P knew the limitations of his authority and went outside that authority in presenting the Scion investment to Mr W. Further, that Mr P's actions were unknown to it, and clearly weren't sanctioned under Mr P's agreement with it.

As agreement on this complaint couldn't be reached it was passed to me to review and I issued a provisional decision on 24 February 2022. In summary, I said that the complaint was one we could consider, that Positive Solutions was responsible for the complaint and that the complaint should be upheld.

I asked both parties to make any further submissions they'd like me to consider before I issued my final decision. In response to my provisional decision Positive Solutions has said, amongst other things, that:

- The adviser acted outside his permissions in respect of the investments offered.
- It hadn't seen copies of some of the documents referred to in the decision and asked for copies of these.
- It doesn't agree with the decision and doesn't believe it's liable for the advice.
- In the comments I'd made about the fact that I didn't think Mr W was a sophisticated investor, and I didn't think it was *most likely* he'd have signed something to say that he was, I appeared to be preferring the verbal testimony of Mr W to that of Mr P.

Mr W had nothing further to add in response to the provisional decision.

Positive Solutions was provided, amongst other things, with a copy of any material information we'd received about the Scion investment and the correspondence we'd seen from HM Revenue & Customs to Mr W. Following on from this, Positive Solutions made some further comments for my consideration, including that:

- It doesn't appear that Mr W actually took a loan out, it was just a mechanic of the product and his outlay was therefore only his initial investment of £9,000.
- It's also unclear what Mr W's losses are.

Following on from this I wrote to both parties to clarify the redress wording I'd set out in my provisional decision.

I've considered the further submissions both parties have made, and reviewed all the available evidence and arguments again. Having done so, my findings remain those I arrived at in my provisional decision. For completeness I've set out my findings on this complaint in full below.

**What I've decided – and why**

**jurisdiction**

I've considered all the available evidence and arguments in order to decide whether we can consider this complaint.

As a preliminary point, I should explain that although Mr W set out his concerns to us in one letter, and Positive Solutions issued one response, the expression of dissatisfaction referred to this service by Mr W comprised more than one complaint. And, in this decision, I'm only looking into Mr W's complaint about the advice and arrangements to invest in the Scion holding.

There are two jurisdiction principal issues that need to be addressed, has the complaint been brought in time and is Positive Solutions responsible for the acts complained about?

Has the complaint been brought in time?

Positive Solutions has previously submitted that some of the issues Mr W's complained to us about, across the complaints he's made, haven't been made in time. It's not clear whether Positive Solutions are arguing that this complaint is time barred. So, for completeness, I've considered whether this complaint about the Scion investment was brought in time.

The Dispute Resolution ('DISP') chapter of the FCA's Handbook sets out the rules and guidance we use to decide whether we can look at a complaint. It explains that there are time limits for making complaints, DISP 2.8.2R says:

> *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;*

*unless:*

> *(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2R or DISP 2.8.7R was as a result of exceptional circumstances*

The event being complained about is the advice and arrangement to invest into the Scion holding.

As I understand it, Positive Solutions first received the complaint in February 2015, and this followed on from us receiving Mr W's complaint in December 2014.

There's no suitability report or recommendation letter for the advice. So, I've got to consider the wider context to establish when it's *most likely* to have happened.

From the evidence I think it's *most likely* that any advice process concluded shortly before the application form for the Scion holding was signed by Mr W and Mr P in February 2009. And I'm also satisfied that Mr P was integral to the arrangements to complete the Scion investment; Mr P was recorded as the introducer on the application form, Mr P also verified Mr W's identity for the transaction and Mr W says that he just signed the application form and that Mr P completed the other sections.

February 2009 was within six years of us receiving Mr W's complaint in December 2014. So, I'm satisfied Mr W's complaint was raised within six years of the event complained about.

Therefore, my finding is that this complaint isn't time barred.

Is Positive Solutions responsible for the acts complained about?

DISP 2.3.1R says we can:

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

The guidance at DISP 2.3.3G says:

> *"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, I need to be satisfied that Mr W's complaint relates to regulated activities and, if so, that Positive Solutions accepted responsibility for those acts.

Positive Solutions hasn't got any record of advice being given on the holding. Mr W contends that Mr P advised on and arranged this investment. Positive Solutions seems to disagree, and it certainly says it didn't authorise Mr P to give the disputed advice or arrange this investment.

There's no written record of the advice that Mr W says Mr P gave on the Scion investment. But Mr P's details were noted in the investment application documents, and Regent was recorded as the introducer. Mr W says that Mr P recommended the Scion investment, and that Mr P completed and submitted the application forms he'd been asked to sign.

And we also know that a few months before the Scion investment was made that Mr P was

advising Mr W on pension provisions he had, including on unregulated investments.

The Scion investment was a UCIS. Advising on the merits of investing in UCISs is a regulated activity our service has jurisdiction to look at. Arranging such investments is also a regulated activity. On balance, and having carefully considered all of the available evidence, I think it's more likely than not that Mr P advised on, and made arrangements for, the Scion investment. So, Mr W's complaint relates to regulated activities.

As such, the next issue to address is whether Mr P was acting as an agent of Positive Solutions and whether his acts or omissions are in respect of activities for which Positive Solutions accepted responsibility.

Mr P wasn't an employee of Positive Solutions, he was its agent and he had an agency agreement with it to be one of its RIs. This meant that Positive Solutions authorised Mr P to carry out certain regulated acts on its behalf.

The agency agreement was non-exclusive, it didn't prevent Mr P acting independently or for another firm at the same time. But I don't think that's what happened here. I'm satisfied that in giving the advice and making the arrangements this complaint concerns that Mr P was acting as an agent of Positive Solutions. I say that because:

- Mr P's details with Positive Solutions' authorisation number appears on the Scion investment application forms.
- As an agent of Positive Solutions, Mr P had been advising Mr W about his pension arrangements a few months earlier in October 2008.

So, I now need to go on to decide whether the advice and arrangements given and made by Mr P are acts for which Positive Solutions accepted responsibility. If not, then we won't have jurisdiction to consider this complaint against Positive Solutions.

Did Positive Solutions accept responsibility for the advice?

The law recognises more than one type of agency. Agency is where one party (the principal here Positive Solutions) allows another party (the agent – here Mr P) to act on its behalf in such a way that affects its legal relationship with third parties. An agent may have actual authority, where the principal has expressly or impliedly given its assent to the agent that it may act on its behalf. Or the agent may have apparent authority, where the principal has made a representation to a third party that the agent has authority to act on its behalf and the third party has relied on this representation.

There's an express agreement between Positive Solutions and Mr P. The agreement sets out that Mr P must account to Positive Solutions for all business and only advise on investments that it had pre-approved. There's also a general point in agency of this type that the agent is required to act in the principal's best interests.

As I understand it, the Scion holding wasn't an approved investment, and Mr P doesn't appear to have notified Positive Solutions about what he was doing. So, it doesn't appear as if Mr P was acting in accordance with the actual authority he'd been given. And I can't conclude that Positive Solutions accepted responsibility for acts complained about by Mr W by way of actual authority.

That's not however the end of the matter, because there's also agency based on apparent or ostensible authority. It arises when the principal represents to third parties through words or conduct that the agent has authority to act on its behalf and the third party reasonably relies upon that representation. The essence of apparent authority isn't concerned with what was

actually agreed between the parties (for example by way of the agency agreement), but rather, how the relationship between those parties *appeared* to third parties. In this complaint, I'm concerned with how the relationship appeared to Mr W.

The case law makes it clear that whether a claimant has relied on a representation is dependent on the circumstances of the individual case. So here, I must consider whether, on the facts of this individual case:

- Positive Solutions made a representation to Mr W that Mr P had Positive Solutions' authority to act on its behalf in carrying out the activities he now complains about; and
- Mr W reasonably relied on that representation in entering into the transactions he now complains about.

I need to decide whether Positive Solutions placed Mr P in a position which would objectively generally be regarded as carrying its authority to enter into transactions. Put another way, did Positive Solutions knowingly – or even unwittingly – lead Mr W to believe that Mr P was authorised to conduct business on its behalf of a type (namely, advising and arranging investments) that he wasn't in fact authorised to conduct? If I find that it did, I also need to decide whether Mr W reasonably relied on any representation Positive Solutions made.

Did Positive Solutions represent to Mr W that Mr P had the relevant authority?

I think Positive Solutions placed Mr P in a position which would objectively generally be regarded as having authority to carry out the acts Mr W complains about. I say this for the following reasons.

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

Positive Solutions authorised Mr P to give investment advice on its behalf and Mr P was held out by it as authorised to give investment advice on its behalf. Positive Solutions arranged for Mr P to appear on the regulator's register in respect of Positive Solutions. And Mr P was approved to carry on the controlled function CF30 at the time of the disputed advice.

Positive Solutions accepts Mr W was given its Terms of Business by Mr P. This showed that Mr P could advise on and arrange investments for Positive Solutions' customers. None of these activities would be unexpected for an IFA firm. They're all the type of activity that IFAs are usually authorised to do.

Any restrictions on the authority to give advice, such as using only certain investments wouldn't have been visible to Mr W. So, for example, he wouldn't know that an adviser should only recommend approved investments, should obtain clearance from Positive Solutions before giving certain types of advice and should present the advice in certain ways.

It was in Positive Solutions' interest for the general public, including Mr W, to understand that it was taking responsibility for the advice given by its financial advisers. I'm satisfied that Positive Solutions intended Mr W to act on its representation that Mr P was its financial adviser. I say this because, the provision of financial advice was a key part of Positive Solutions' business. It said in its terms of business that its "*Partners*" would give "*impartial, independent financial advice*". I don't see how Positive Solutions could've carried out its business activities at all if the general public hadn't treated registered individuals like Mr P as

having authority to give investment advice on behalf of Positive Solutions.

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

So I think that all of these points taken together mean that Positive Solutions did represent to Mr W that Mr P was authorised to give the advice he gave to Mr W and make the arrangements he did.

Did Mr W reasonably rely on Positive Solutions' representation?

Positive Solutions has said that Mr P recollects telling Mr W that Positive Solutions didn't offer advice on unregulated investments. But, on balance, I don't think Mr P's recollections about this are consistent with evidence we've seen in this complaint. And they're also not consistent with the evidence we saw in a previous complaint involving the same parties in which two UCIS investments were made in Mr W's pension fund. In that complaint, we were satisfied that Mr P gave advice on unregulated investments as a Positive Solutions adviser.

As I've explained above, I think the forms completed as part of the application for Scion make it clear that Mr P was purporting to act as an agent of Positive Solutions in these matters.

Mr W's also said he understood Mr P to be acting as a Positive Solutions' adviser when he gave the advice and made the arrangements that this complaint concerns. And I haven't seen any evidence to show that Mr W knew or should reasonably have known that Mr P was acting in any capacity other than a Positive Solutions adviser.

In my view, the evidence does indicate that Mr W proceeded on the basis that Mr P was acting in every respect as the agent of Positive Solutions with authority from Positive Solutions so to act. In other words, Mr W reasonably relied on Positive Solutions' representation that Mr P was authorised to give the investment advice he gave to Mr W.

It's therefore my finding that Positive Solutions is responsible for the advice Mr W complains about and that we can consider his complaint.

**merits**

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

The parties to this complaint have provided submissions to support their position and I'm grateful to them for doing so. I've considered these submissions in their entirety. However, I trust that they won't take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. The purpose of this decision isn't to address every point raised in detail, but to set out my findings and reasons for reaching them.

In considering what's fair and reasonable in all the circumstances of this complaint, I've taken into account relevant law and regulations; regulator's rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

Where the evidence is incomplete, inconclusive, or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is *most likely* to have happened in the light of the available evidence and the wider circumstances.

The Scion investment appears to have been an UCIS. And, as such, was subject to the scheme promotion restriction (s.238 FSMA). Adviser firms had a choice between two different sets of exemptions from the s.238 restrictions under the Promotion of Collective Investment Schemes (Exemptions) Order 2001 SI 1060 (as amended) and under FSA rules exempting the promotion of UCIS under certain circumstances. Relevant exemptions included:

- Certified high net worth individuals.
- Certified sophisticated investors.
- Self-certified sophisticated investors

I've seen no evidence that Mr W was someone who was certified as a high net worth individual or a sophisticated investor.

With regards to the third category, self-certified sophisticated investors, Positive Solutions has previously said that Mr P recollects Mr W completing and signing certificates to confirm he was a self-certified sophisticated investor. But Mr W didn't agree with Mr P's recollection about this, and we've seen no evidence of the certificates Mr P's mentioned. Mr W's said that *"There is again no documentation to support…the certificates referred to, to entertaining the notion that any of us could possibly consider ourselves, or be allowed to consider ourselves as sophisticated investors, self-certified or otherwise."*

On balance, and having carefully reviewed all of the evidence, I don't think it's *most likely* that Mr W was a sophisticated investor. And I also don't think it's *most likely* Mr W would've signed something to say that he was.

To be clear, as I've mentioned previously, I don't think Mr P's recollections that he told Mr W that Positive Solutions didn't offer advice on unregulated investments is consistent with the evidence we've seen in this complaint. They're also not consistent with the evidence we saw in a previous complaint involving the same parties in which two UCIS investments were made in Mr W's pension fund. In that complaint, we were satisfied that Mr P gave advice on unregulated investments as a Positive Solutions adviser. And, in my opinion, that lack of consistency does make Mr P's recollections, and from the same general period, about Mr W having completed and signed certificates to confirm he was a self-certified sophisticated investor less credible.

I've also carefully considered any other exemptions that might have applied.

At the time, there was also an exemption in COBS 4.12.1R that potentially applied if a consumer held other similar UCIS investments. This service concluded in a previous complaint involving the same parties that UCIS investments Mr P arranged to be held in Mr W's pension plan weren't suitable for Mr W. These were the only previous UCIS investments Mr W had made. I don't think those other UCISs were substantially similar to the Scion investment, but even if they were it wouldn't be fair or reasonable for a firm to seek to rely on a COBS 4.12.1R Category 1 person exemption when a consumer's only previous participation in UCISs was the result of unsuitable recommendations for which that firm was responsible.

All that said, the Scion holding could still have been promoted to Mr W by Mr P under another exemption if Mr P had assessed the Scion investment as being suitable for Mr W.

I'm satisfied that Mr W was a financially unsophisticated retail client and as I mentioned above, based on all of the evidence I've seen, I think it's *most likely* that he received and acted upon advice from Mr P to invest in the Scion holding. So, I've gone on to carefully consider whether advice to invest in the Scion holding was suitable for Mr W.

In advising Mr W, Mr P ought to have made a recommendation that was consistent with Mr W's circumstances, objectives, attitude to investment risk and capacity for loss. And Mr P ought to have explained in writing the reasons he thought the Scion investment was appropriate for Mr W, including an explanation of the risks associated with the advice, but this doesn't appear to have happened.

As I understand it, the Scion holding was a specialist investment intending to trade in film industry activities and film financing. The investment documentation says that the Partnership was a speculative venture, with no history of operations or earnings and that membership of the Partnership could result in the loss of the capital invested and that investors might incur additional liability. I think this investment would generally be considered a higher risk investment.

This was an unusual holding, operating in a very specific way. And it might reasonably be described as a sophisticated and/or complex investment; and could suffer significant losses, the nature of which would be difficult to predict or estimate at the outset. I consider the holding exposed investors to significant risks such as illiquidity and risks inherent in unregulated investments. The investment wasn't subject to regulation in the same way as regulated funds. And investors potentially didn't have recourse to the FSCS or this service.

These factors were, or should've been, apparent to Mr P at the time and should've been taken carefully into account in assessing the suitability of this investment for Mr W.

Mr W says the Scion investment wasn't suitable for his moderate risk profile. Mr W's overall risk profile was recorded as being 'medium' in an October 2008 Fact Find, this was a few months before the Scion investment was made. The Fact Find was compiled when advice was being given on Mr W's pension monies, whereas the Scion investment was made with monies from outside of Mr W's pension arrangements.

Mr W's financial position in February 2009 was relevant to the level of risk he could afford to take and his capacity for loss. I've not seen a Fact Find from the relevant period in which Mr W's total assets and liabilities were fully recorded. But, as mentioned in the 'Background' section above, Mr W has since provided us with details of his financial position at that time.

Mr W says Mr P told him that he'd be able to claim the £9,000 investment back in his next tax return, so he'd understood that the Scion investment was 'cost neutral'. And that, on top of this, the investment would also have the potential to provide very good returns. Mr W then made a sideways loss relief claim linked to the Scion holding in his 2008-2009 tax return.

So, on balance, I think it's *most likely* that Mr W relied on what Mr P said and that this led Mr W to believe the risk of suffering an overall loss on the £9,000 invested was low, as monies would be claimed back in his tax return and the investment would also have the potential to provide good returns. And that Mr W then agreed to proceed with the investment on this basis.

From the evidence I've seen, I'm satisfied that the risks associated with the Scion investment were significant. Further, Mr W's exposure to loss wasn't limited to the £9,000 he was investing, he also had to take out an £18,000 loan as part of the Scion investment and Mr W was personally liable to repay this loan if the Partnership assets didn't generate sufficient income to do so.

In my view, the Scion investment was non-standard, higher risk and specialist. I take the view Mr P ought to have been aware of the fact that such a holding was unlikely to be suitable for Mr W. It's important for advisers to take these matters into account when

assessing the suitability of the products for an individual investor. And for potential investors to understand that such investments presented a significant risk to the monies being invested. From what I've seen, the risks involved in investing in this holding weren't adequately explained to Mr W by Mr P. And, in my view, the Scion investment wasn't a suitable investment for an individual in Mr W's circumstances, with his risk profile and with his capacity for loss.

So, I think that the advice Mr W received from Mr P to invest in the Scion holding was unsuitable. And I think that Mr W should be compensated for any losses he's suffered as a result of this.

In addition to the financial loss that Mr W has suffered as a result of the unsuitable advice he received, I think that the loss of these monies has caused Mr W some distress, and I think that it's fair for Positive Solutions to compensate him for this as well.

**Putting things right**

My aim is to return Mr W to the position he'd now be in if suitable advice had been given. I think if suitable advice had been given that Mr W's monies would've been invested in a manner that was appropriate for Mr W allowing for his circumstances, attitude to risk and investment objectives.

I've no way of determining definitively into what holdings, and in what proportions, the monies in question would've been invested had suitable advice been given. So, I think it's fair and reasonable to ask Positive Solutions to perform a notional redress calculation, and using a benchmark with the qualities of investments of the type Mr W would likely have made.

I think it's fair and reasonable for Positive Solutions to redress Mr W for all losses which have been caused by monies being unsuitably invested in the Scion holding.

To be fair, any redress calculation needs to allow for any monies that were returned to Mr W from the Scion investment, such as any monies that were returned to investors when the Partnership was wound up. Scion Financial Partners Limited's letter of 18 December 2014 suggests that the sum to be returned might be around £2,140 each. And Mr W will be expected to assist Positive Solutions in obtaining such information as it might need to complete the redress calculation set out below. For example, by providing it with evidence of the date and amount of any payment he received when the Partnership was wound up.

So, in summary, I think Mr W would've invested differently and it's not possible to say *precisely* what he would've done. But I'm satisfied that what I've set out below is fair and reasonable given Mr W's circumstances and objectives when he invested.

With regards to the sum Mr W had to pay to HMRC in April 2013; from the content of the assessment that HMRC sent to Mr W, the £9,538 Mr W paid to HMRC appears to solely consist of the underpayment of tax that resulted from Mr W's earlier sideways loss relief claim. So, to be clear, as I understand it from HMRC's 26 March 2013 letter, the £9,538 Mr W had to pay to HMRC was just the additional tax he ought to have paid during the tax year ending 5 April 2009. And I'm satisfied that Mr W has suffered no additional loss by way of paying a sum to HMRC in 2013 that ought to have been paid to HMRC previously.

As Mr W paid the full sum HMRC requested back in 2013 then, as I understand it, the issues between Mr W and HMRC about the sideways loss relief claim are now resolved. However, for completeness, I want to highlight to the parties that were this to change in the future, and were HMRC to request some further payment from Mr W, it's very unlikely that Mr W would

be able to refer a subsequent complaint to us about this. I appreciate that the likelihood of this happening over eight years after Mr W made the requested payment to HMRC is remote, but it's still important that we're open and clear with the parties about the likelihood of us being able to look at any related complaint in the future.

**What should Quilter do?**

**To compensate Mr W fairly, Quilter must do all of the following:**

1. Calculate what the £9,000 Mr W personally invested in the Scion holding would be worth, as at the date of this decision, had it achieved a return from the date of investment equivalent to:

    - For half the investment the FTSE UK Private Investors Income Total Return Index.
    - For the other half of the investment the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

    As part of this notional calculation, Quilter must make an allowance for the following notional withdrawals:

    - Any monies that were returned to Mr W from the Scion investment, including monies that were returned to investors when the Partnership was wound up.

2. Interest at the rate of 8% simple per year should be added to the final sum calculated in step 1. from the date of this decision to the date of settlement if compensation isn't paid within 28 days of the business being notified of acceptance of this decision.

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

3. Pay Mr W directly £250 for the distress and inconvenience he's been caused.

    Mr W's been caused some distress by the events this complaint relates to, and the loss of a significant portion of the monies invested into the Scion holding. I think that a payment of £250 is fair to compensate him for that upset.

4. Quilter should also provide Mr W with a copy of its calculation, showing its calculation of the compensation due in a simple and easy to follow format.

Finally, Quilter may require, if it wishes, an assignment from Mr W of any claim he may have against third parties in relation to his Scion investment. If Quilter chooses to take an assignment of rights, it must be effected before payment of compensation is made. Quilter would need to meet any costs in drawing up the assignment.

**Why is this remedy suitable?**

I've chosen this method of compensation because:

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- 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.

- I consider that Mr W's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives with the monies this complaint concerns. So, the 50/50 combination would reasonably put Mr W into that position. It doesn't mean that Mr W would've invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr W could've obtained from investments suited to his objectives and risk attitude.

- The additional interest is for being deprived of the use of any compensation that isn't paid within 28 days of the business being notified of acceptance of the decision.

**My final decision**

For the reasons set out above it is my decision that we can consider Mr W's complaint against Quilter Financial Planning Solutions Limited.

It is also my decision that the complaint is upheld and that Quilter Financial Planning Solutions Limited must pay fair compensation to Mr W as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 28 April 2022.

Alex Mann
**Ombudsman**