

## The complaint

Mr G complains that Jacob Hopkins McKenzie Limited (JHML) mis-sold him an investment in a property scheme.

## What happened

Mr G met with an advisor of JHML in around July 2018. The advisor sold him £30,000 worth of shares in a property development scheme. Mr G understood his and other investors' money would be used to purchase and develop a plot of land, with a view to it being sold on at a later date. As part of the sales process, Mr G signed a declaration which confirmed he was a "self-certified sophisticated investor" (SCSI).

In 2019, Mr G received a series of updates from JHML citing difficulties with the development. In 2020, he was told the investment had failed, and that he stood to lose everything he invested. Mr G complained to JHML that it should return his money.

In its response, JHML blamed unforeseen circumstances for the investment's demise. It suggested it'd only introduced and sold the investment to Mr G as he'd claimed to be an SCSI. As part of Mr G's complaint was that he wouldn't have qualified as an SCSI, it accused him of acting dishonestly during the application process. Mr G was unhappy with JHML's response, he referred the matter to our service.

Our investigator upheld Mr G's complaint. They were persuaded Mr G was unlikely to have been an SCSI, and JHML had failed to evidence the necessary due diligence to confirm otherwise. They concluded the investment shouldn't have been promoted to Mr G, and recommended JHML should return his money. JHML disagreed with our investigator's findings, so the matter was referred to me.

I made a provisional decision on this complaint. This is what I said:

*"The Principles for Businesses, which are set out in the FCA's Handbook "are a general statement of the fundamental obligations of firms under the regulatory system" (PRIN 1.1.2G). I think Principle 6 (Customers' interests), is particularly relevant here. And this overlaps with the rule in COBS 2.1.1R which requires that "A firm must act honestly, fairly and professionally in accordance with the best interests of its client". I've kept this in mind when considering Mr G's complaint.*

*Having studied the sales paperwork, I'm satisfied the investment JHML sold Mr G would meet the definition of a "non-mainstream pooled investment" (NMPI). I've seen evidence that his £30,000, along with money from other investors, was used to purchase securities issued by the special purpose vehicle JHML established when arranging this scheme. It's not in dispute that JHML introduced, promoted, and made the arrangements through which Mr G became invested in the NMPI.*

*In my view, the investment's status as an NMPI is significant in this case. According to the rules which applied at the time, COBS 4.12.3R says that:*

*“A firm must not communicate or approve an invitation or inducement to participate in, acquire, or underwrite a non-mainstream pooled investment where that invitation or inducement is addressed to or disseminated in such a way that it is likely to be received by a retail client”*

*So when applied to the circumstances of this complaint, JHML wouldn't have been allowed to promote this NMPI to Mr G if it considered him to be a retail client. It could only have done so if Mr G met the criteria of one of the exemptions to the rule I've quoted above. The exemptions to this rule are listed out in COBS 4.12.4R.*

*From the evidence in this case, I can see JHML regarded Mr G as being someone who did meet the criteria of one of these exemptions. It's treated him as an SCSi. COBS 4.12.8R says that an SCSi is, amongst other things, an individual who's signed a specifically worded statement, confirming themselves as such, within 12 months of them receiving the promotion in question.*

*Mr G has signed a statement confirming he's an SCSi. I understand that the circumstances surrounding the signing of this document are contested by both parties. But I won't explore this in my decision, because it does not affect the outcome I'm reaching. The facts are that this document was signed, and JHML has suggested it only sold Mr G the investment because it understood he was an SCSi.*

*SCSis are exempted from the prohibition on promoting NMPIs in COBS 4.12.3R. But there are still restrictions on what types of NMPIs may be promoted to them. When outlining the criteria of an SCSi, COBS 4.12.4R (5) makes it clear that firms may use this exemption to promote:*

*“Any non-mainstream pooled investment the firm considers is likely to be suitable for that client, based on a preliminary assessment of the client's profile and objectives”.*

*The regulator provides guidance on what form this due diligence should take in COBS 4.12.5G. It says:*

*“The requirement for a preliminary assessment of suitability does not extend to a full suitability assessment, unless advice is being offered in relation to the non-mainstream pooled investment being promoted, in which case the requirements in COBS 9 or 9A apply (as applicable). However, it requires that the firm takes reasonable steps to acquaint itself with the client's profile and objectives in order to ascertain whether the non-mainstream pooled investment under contemplation is likely to be suitable for that client. The firm should not promote the non-mainstream pooled investment to the client if it does not consider it likely to be suitable for that client following such preliminary assessment”*

*In this case, the evidence doesn't persuade me that JHML was giving advice to Mr G. But the rule and guidance I've outlined above make it clear that it couldn't have promoted its investment to Mr G without first carrying out a preliminary assessment of whether the investment was likely to be suitable for him.*

*I have been presented with no evidence of JHML undertaking any such assessment. And JHML hasn't ever mentioned conducting one. So on the facts available to me, I think it's likely this assessment did not take place as it should have.*

*By itself, this is a significant failing on JHML's part. But it would only be fair and reasonable of me to conclude Mr G's complaint should succeed, if the evidence persuaded me he*

wouldn't have ended up investing had the preliminary assessment of suitability taken place. I've therefore considered what JHML ought reasonably to have concluded, had it carried out a preliminary assessment of suitability.

As above, a preliminary assessment of suitability would require JHML to "take reasonable steps to acquaint itself with the client's profile and objectives", and weigh this against what it knew about the NMPI it was offering, to decide whether the investment was likely to be suitable. From the evidence gathered in this case I understand that at the time:

- Mr G's annual salary was around £24,000.
- He'd obtained the money by releasing equity from a property he owned.
- The money he invested represented a significant portion of his savings.
- Mr G was looking to grow his deposit by investing, to start a buy to let business

Where the NMPI is concerned, I understand that:

- The investment held a significant concentration risk, in that its success relied on the performance of a specific property development.
- There was a likelihood that, in the event the investment should fail, all of the money invested could be lost.

On these basic facts, I'm satisfied it would be fair and reasonable to conclude that the NMPI was likely to be unsuitable for Mr G. The amount he was seeking to invest represented a significant amount of his savings. And his salary wasn't such that he could easily replenish any losses he sustained when investing. This investment came with the prospect of all of his money being lost, which had the potential to cause real harm to his future plans, mindful of what his objective was. Therefore I cannot see how, treating Mr G fairly and considering his best interests as it would've been required to, JHML could've reasonably concluded its NMPI was likely to be suitable for Mr G based on a preliminary assessment of his profile and objectives.

I'm persuaded that had it carried out this assessment, mindful of the guidance in COBS 4.12.5G, JHML ought reasonably to have decided not to promote this investment to Mr G. This would mean that he would not have invested, and would not have suffered the loss it's clear has distressed him.

JHML has suggested in its submissions that it only promoted this investment to him because he dishonestly identified himself as an SCSi. It's also argued that Mr G never told it how much of his savings he was investing, and that had he done so, it wouldn't have accepted his deposit. But leaving aside the arguments around what was and was not said when the CSI declaration was signed, JHML's argument overlooks its obligations to "acquaint itself with the client's profile and objectives" and conduct a preliminary assessment of the investments suitability for Mr G under COBS 4.12.4R (5). And as I've found that discussions JHML ought to have had with Mr G, ought reasonably to have ended in him not investing, I think it's fair and reasonable that I should direct JHML to compensate him.

### **Putting things right**

Our investigator recommended JHML should refund the £30,000 Mr G invested, and pay him £250 for the distress and inconvenience its actions caused. But I'm not satisfied this goes far enough at addressing Mr G's losses. I'll explain why.

As I understand it, at the time of the sale, Mr G was keen to invest. I've concluded above that JHML ought to have realised that it couldn't fairly or reasonably have sold him the NMPI.

*Instead, mindful of its obligation to consider Mr G's best interests, I'm persuaded it would've been fair for JHML to direct him to obtain advice on investing in a way that was more suitable for his needs. And because it didn't do so, Mr G's missed out on the opportunity to benefit from more suitable advice.*

*Where I identify a firm's made a mistake and it's customer's worse off as a result, my broad aim when redressing complaints is to ensure that customer is returned to the position they would've been in, had the firm's mistake not occurred. That's what I intend to direct JHML to do in Mr G's case.*

*To begin with, JHML should fully refund any fees it charged separately from Mr G's £30,000 deposit, associated with the arrangement of the NMPI. This would include but isn't necessarily limited to advice fees, administrative fees, and legal fees. My intention here is that it should be as if Mr G never paid for any services connected with the NMPI.*

*If Mr G paid any fees as described above, NMPI should calculate and pay 8% simple interest on any amount refunded. This interest should be calculated from the date Mr G first paid the fees, up until the date JHML settles the complaint by making payment to Mr G. If JHML decides that tax is payable on this interest, it should send a tax deduction certificate to Mr G. He may then reclaim the tax from HM Revenue & Customs if appropriate.*

*Next, I've considered that Mr G's unfairly experienced distress as a result of JHML's failures. He's been sold an investment which should not have been promoted to him. And in the years that followed, he's learnt his entire £30,000 had been swallowed up by the failure of the NMPI. His submissions persuade me this has had a big impact on him personally, particularly because he had plans for the money. So I'm satisfied it's fair and reasonable in these circumstances to require JHML to pay him £350 in recognition of this.*

*Finally, I must address the way Mr G's money was invested. And how his circumstances would now be different if JHML had directed him to obtain suitable advice, as I've concluded it should have. I've set out my thoughts on this below.*

### **Fair compensation**

*In assessing what would be fair compensation, I consider that my aim should be to put Mr G as close to the position he would probably now be in if he'd invested elsewhere.*

*I think Mr G would have invested differently. It is not possible to say precisely what he would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr G's circumstances and objectives when he invested.*

### **What should JHML do?**

*To compensate Mr G fairly, JHML must:*

- As above, refund any charges Mr G paid as a consequence of investing in the NMPI. Calculate simple interest at 8%, from the date charges were paid, until the date of settlement, on any amount due back to Mr G with respect to this direction.*
- Compare the performance of Mr G's investment with that of the benchmark shown below and pay the difference between the fair value and the actual value of the investment. If the actual value is greater than the fair value, no compensation is payable.*
- JHML should also add any interest set out below to the compensation payable.*

- Pay Mr G £350 the sum of £350 for the distress he suffered when the investment collapsed.

*Income tax may be payable on any interest awarded.*

<i>Portfolio Name</i>	<i>Status</i>	<i>Benchmark</i>	<i>From ("start date")</i>	<i>To ("end date")</i>	<i>Additional interest</i>
<i>NMPI</i>	<i>Still exists but illiquid</i>	<i>Average rate from fixed rate bonds</i>	<i>Date of investment</i>	<i>Date of my final decision</i>	<i>8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)</i>

### **Actual value**

*This means the actual amount payable from the investment at the end date.*

*If at the end date the portfolio is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the actual value is. In such a case the actual value should be assumed to be zero. This is provided Mr G agrees to JHML taking ownership of the portfolio, if it wishes to. If it is not possible for JHML to take ownership, then it may request an undertaking from Mr G that he repays to JHML any amount he may receive from the portfolio in future.*

### **Fair value**

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

*To arrive at the fair value when using the fixed rate bonds as the benchmark, JHML should use 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.*

*The NMPI only exists because of illiquid assets. In order for the NMPI to be closed and further wrapper fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by JHML taking over the investment, or this is something that Mr G can discuss with the provider directly. But I don't know how long that will take.*

*Third parties are involved and we don't have the power to tell them what to do. If JHML is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Mr G an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the NMPI to be closed.*

### **Why is this remedy suitable?**

*I have chosen this method of compensation because:*

- *Mr G wanted to achieve a reasonable return without taking a significant risk.*
- *The average rate for the fixed rate bonds would be a fair measure given Mr G's circumstances and objectives. It does not mean that Mr G would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital".*

JHML did not respond to my decision.

Mr G appeared to accept my decision but had comments and questions around the redress I'd proposed. Specifically, he said:

- He didn't recall paying any administrative or advisor fees separately from the money he deposited, and he wasn't certain what I'd proposed would address this.

Whilst he appreciated my consideration for the distress he'd suffered, he questioned whether £350 fully addressed the impact these events had on him.

### **What I've decided – and why**

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

As I explained in my provisional decision, I'm satisfied JHML failed to treat Mr G fairly and consider his best interests when it omitted to carry out a preliminary assessment of the suitability of its NMPI. Had it done so, it ought reasonably to have concluded this investment was likely to be unsuitable for Mr G, because of his profile and objectives. Knowing this, and being mindful of its obligations, it shouldn't have sold the investment to Mr G, which would've spared him a considerable loss, and the associated distress and inconvenience he's suffered as a result.

Because of this, I'm satisfied it is both fair and reasonable of me to direct JHML to pay Mr G the settlement I've outlined above, which addresses both his financial loss, and the impact these events have had on him personally.

Mr G has questioned if, mindful that he doesn't recall paying any advisor fees separately, the redress I've proposed fully takes account of the circumstances of his case. But I'm satisfied this would be considered in the methodology I've proposed. For further clarity however, for the purposes of calculating and paying the comparative redress I outlined in my provisional decision, JHML cannot make any deductions for its own fees. As I said, Mr G should be returned to the position he would've been in had he never invested, and this would mean he'd never have paid JHML fees of any kind for its services to him.

Mr G has also questioned my decision to award him the sum of £350 for the distress and inconvenience this matter has caused him. But I'm satisfied this amount feels fair in the circumstances, mindful that the methodology I've outlined above will, once calculated, require JHML to return his entire £30,000 plus interest.

All that remains is for me to make my decision final, which I shall now do.

### **My final decision**

I uphold the complaint. My decision is that Jacob Hopkins McKenzie Limited must pay the

amount calculated as set out above.

Jacob Hopkins McKenzie Limited must provide details of its calculation to Mr G in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 23 March 2023.

Marcus Moore  
**Ombudsman**