DRN-3203252

The complaint

Mr E complains to Gallium Fund Solutions Limited about two bonds issued by Basset & Gold Plc (B&G plc) which he invested into in 2017. He says the bonds were mis-sold to him, and that he was misled into thinking they were safe and regulated.

What happened

The B&G Plc Bond

Mr E made two investments into B&G Plc bonds – £15,000 into a three year fixed monthly income bond and £5,000 into a five year compounding high-yield bond. Sales of the bonds were dealt with by Basset Gold Limited ("BG Ltd"), a separate business from B&G Plc, the issuer of the bonds. BG Ltd arranged applications for investments in the bonds, through a website it operated – bassetgold.co.uk. And it was responsible for advertising/marketing the bonds. Potential investors were also able to call BG Ltd, to discuss the bonds.

The bonds were non-readily realisable and therefore there were rules restricting who they could be promoted to and on how to test whether the investment was appropriate for the potential investor. BG Ltd's online application process took steps to meet the obligations created by these rules. I have set out details of the application process below and will set out, and consider, the rules in my findings.

Neither B&G Plc nor BG Ltd was authorised by the Financial Conduct Authority (FCA) in its own right at the time of Mr E's investment. But both were appointed representatives of Gallium Fund Solutions Limited (Gallium), which was an FCA authorised business. B&G Plc and BG Ltd were appointed representatives of Gallium from 17 February 2017 to 28 February 2018. As such, Gallium is responsible for a complaint about either business which is about the acts and omissions which took place during this time, for which Gallium accepted responsibility.

Gallium also played a role in relation to the bonds in its own right – it was responsible for approving BG Ltd's marketing and promotional material relating to the bonds. Gallium has confirmed that the promotional material included the Invitation Document (which was the formal financial promotion document for the purposes of Section 21 of the Financial Services and Markets Act 2000), bassetgold.co.uk, and online advertising material (such as Google and Facebook adverts) issued by BG Ltd.

Gallium has a legal representative, but for simplicity I will refer only to Gallium throughout my decision and any such reference should be taken to mean Gallium or its legal representative.

Mr E's investments in the bond

Mr E doesn't recall how he first came to hear about the B&G plc bonds, but does remember speaking with BG Ltd about the opportunity over the phone. He says he remembers asking for more information about the products on offer and that within this, he saw Gallium was regulated by the FCA which gave him peace of mind.

When Mr E referred his complaint to us, we asked for copies of any call recordings BG Ltd held. We were provided with some, but they were service and enquiry calls – importantly, none were pertinent to the sales of the investments, so the recordings have not been material in my consideration of this complaint.

Mr E completed the first online application form on bassetgold.co.uk in July 2017 ahead of his investment in August. He applied to invest £15,000 in a bond which paid monthly interest at a rate of 6.22% per year, with the invested capital to be returned after three years.

Mr E completed the second online application form on bassetgold.co.uk in November 2017. He applied to invest £5,000 in a bond which offered a compounding interest rate of 9.01% per year, with the invested capital to be returned after five years.

Mr E says that at the time of investing, he was retired and on a low income. He had some savings, but wanted to do as well as he could with them in order to supplement his income. He said his investment experience was mainly in putting money into bonds with banks and building societies which he would have for a few years before finding another product upon maturity. That's what happened here too, Mr E was reinvesting money from maturing bonds.

Mr E recalls feeling B&G Plc interest rates were attractive, but not totally silly or too good to be true – his objective simply was to get a better return than on the high street and that he wasn't reckless in tasking risks with his savings.

On 8 January 2019, B&G Finance Limited (which by that point had taken on the role of BG Ltd), sent an email to all investors then holding B&G Plc bonds. That email included the following:

"To date the vast majority of lending has been to an FCA regulated lender that currently holds approximately 36,000 consumer loans. We are happy with the way that investment is performing, and the underlying spread of loans across tens of thousands of borrowers provides strong levels of predictability and resilience."

"As Basset & Gold Plc is currently predominantly invested in a single lender, it is our responsibility to ensure that you are aware of the associated risk, known as "Concentration Risk". It might help to explain this risk if you think of the goose that laid the golden egg. It was a great asset, but it only took one goose to die for the asset to dry up. Basset & Gold's investment team has performed due diligence on more than 40 opportunities over the past year. Its investment philosophy has been to accept the risk of holding one good asset, rather than diluting quality in order to improve diversification. We hope that this will translate into improved diversification over time, but as an investor you should be aware that Basset & Gold will only proceed with an investment when they are happy with it, even if that prolongs the Concentration Risk."

This refers to the fact that nearly all the money invested in B&G Plc bonds had been lent to one short term and pay day lender, called Uncle Buck. Following action by the FCA, Uncle Buck went into administration in March 2020 - and B&G Plc went into administration shortly afterwards. As a result, Mr E has not had his invested capital returned to him.

The online application process

I have seen screen prints of each stage of the online application process. These show the application journey that Mr E underwent.

Certification

Mr E would first have arrived at a page titled "*APPLY NOW TO BECOME AN INVESTOR*" which asks the consumer to provide some basic details. The next page is titled "*PLEASE SELECT THE MOST ACCURATE INVESTOR PROFILE FROM THE LIST BELOW*" and in this case asked Mr E to select from "*EVERYDAY INVESTOR*", "*SELF CERTIFIED SOPHISTICATED INVESTOR*", "*ADVISED INVESTOR*" or "HIGH NET WORTH INVESTOR".

Mr E selected "*EVERYDAY INVESTOR*", which was described as follows:

"What Is An Everyday Investor?

Anyone can become an Everyday Investor. You just need to agree to not make more than 10% of your investments (including savings, stocks, ISAs, bonds and property excluding your primary residence) in investments that cannot easily be sold (i.e. illiquid). This is why the FCA refers to these investors as 'Restricted Investors'."

Having selected this profile, Mr E was then asked to make a statement, confirmation and declaration as follows:

"Everyday Investor Statement

I make this statement so that I can receive promotional communications relating to non-readily realisable securities and investments as a restricted investor.
I declare that I qualify as a restricted investor because both of the following apply:
In the preceding twelve months, I have not invested more than 10% of my net assets in non-readily realisable securities.
I undertake that in the following twelve months, I will not invest more than 10% of my net assets in non-readily realisable securities.
Net assets for these purposes do not include:
(a) the property which is my primary residence or any money raised through a loan secured on that property;
(b) any rights of mine under a qualifying contract of insurance;
(c) any benefits (in the form of pensions or otherwise) which are payable on the termination of my service or on my death or retirement and to which I am (or my dependents are), or may be, entitled.

Investment Duration

I confirm that I am aware that the minimum duration of the current bonds on offer are as follows:
Cash Bond: 30 business days.
3 Year Monthly Income Bond: 3 years.
5 Year Monthly Income Bond: 5 years.
Compounding High-Yield Bond: 5 years.
Pensioner Bonds: 1 year extendable up to 5 years.

Declaration

I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested.
I am aware that it is open to me to seek advice from an authorised person who specialises in advising on non-readily realisable securities.

I have made investments in similar products in the last 30 months and/or I am familiar with this type of investment. I am not planning on borrowing, remortgaging or liquidating assets to invest into a Non-readily Realisable Security. I am not investing via a SIPP/SSAS created specifically for investment in a Non-readily Realisable Security. I will retain access to sufficient liquid resources following investment. I am aware the Bond is intended to be an income producing product and not a product that provides capital growth.
I agree to Basset & Gold Plc and Gallium Fund Solutions Limited keeping a record of this declaration and providing them to the FCA in event of an investigation."

Mr E was required to click "*Next*" to make the required statement, confirmation and declaration.

The appropriateness test

Having completed the certification, Mr E would then have arrived at a page titled "*JUST A FEW MORE QUESTIONS (REQUIRED BY LAW)"* which included the following multiple choice questions and answers, and a concluding confirmation:

"These questions are designed to check that this type of investment is appropriate for you. Please read each question carefully and select the answer that you believe is correct.

1) *AFTER YOU INVEST IN THIS OFFER CAN YOU TRANSFER YOUR BASSET & GOLD BONDS?*
    - *The bonds are not transferable except in the case of the IFISA Bonds*
    - *Yes I can transfer them as a listed share*
2) *THE EXPECTED RETURN FROM BASSET AND GOLD BONDS?*
    - *is the fixed interest rate per annum paid over the term (plus my Money back at the end).*
    - *is dependent on movements in the financial bond and equity markets.*
3) *IS YOUR CAPITAL SECURE?*
    - *No, my capital is at risk and I might not get back all that I invested.*
    - *Yes, my capital is secure and I have no risk of losing.*
4) *CAN THE BASSET & GOLD BONDS BE CONVERTED TO BASSET & GOLD SHARES?*
    - *Yes*
    - *No*
5) *DIVERSIFICATION IS A COMMON WAY TO HELP MANAGE RISK WHEN INVESTING; WHAT DOES THIS MEAN?*
    - *That you should invest all of your money into a single bond.*
    - *That you should invest your money in a range of different bonds as well as other less risky investments.*

I confirm that I have read, understood and agree to Basset Gold Ltd's terms and conditions of service and confirm that I would like to become a client of Basset Gold Ltd and receive financial promotions from time to time."

If any question was answered incorrectly the website displayed the following message (at the point of the particular question being answered incorrectly):

You have selected an incorrect answer. If this was an error please correct your answer, however please consider that if you are unfamiliar with the features of this investment then it might not be suitable for you.

Mr E completed the full process, so clearly answered the questions correctly – but it is not known if he answered any questions incorrectly initially and changed his answers, having seen this message.

Answering the questions correctly allowed Mr E to move the to the final stages, which involved selecting an ISA or bond, selecting which of the products he wanted to invest in, and how much he wanted to invest. After completing these final stages consumers were able to click on a box to open the Invitation Document for the bond. However, it was not mandatory to do this – consumers were able to proceed without opening the Invitation Document.

Gallium's response to Mr E's complaint

Gallium did not uphold Mr E's complaint. It said, in summary:

- It is not able to pay compensation in respect of B&G plc's failure to repay the bond as issuing the bonds and the subsequent performance of B&G plc's business and lending activities were not regulated activities which Gallium assumed any responsibility for. Gallium hadn't provided investment advice, and this had been made clear within the Invitation Document.

- The Invitation Document made clear that Gallium had issued and approved the marketing and promotional materials while the bonds had been issued by B&G Plc. It was also clear B&G Plc was an appointed representative and that Gallium had no ongoing role with it, nor was Gallium responsible for the implementation or viability of the investment proposition.

- The Invitation Document also said investors may be entitled to compensation under the Financial Services Compensation Scheme (FSCS) in certain limited circumstances if Gallium or BG Ltd was unable to meet its obligation to them. It was also clear that the FSCS would not cover investment performance.

- It is not clear what documents or information Mr E had regard to when deciding to invest. However, it notes that the various financial promotions at the time, including the B&G plc website and the Invitation Document, contained appropriate risk warnings for potential investors including that an individual may be exposed to a significant risk of losing all of the money invested.

After Mr E referred his complaint to us, Gallium sent us submissions. In those submissions it said, in part:

- The issue of the bonds, and subsequent performance of B&G plc's business and lending activities were not regulated activities and were not matters for which Gallium assumed any responsibility.

- It was stated in the Invitation Documents that Gallium had no ongoing role within Basset & Gold and that it was not responsible for the implementation of the plans, objectives or intentions or the viability of the investment.

- Investors were asked questions about their experience and understanding of the investment opportunity, to ensure that applicants could only invest if they had sufficient understanding, experience and financial means, such that the bonds were an appropriate investment for them.

- Potential investors were required to confirm that they had read and understood the Invitation Document as part of applying to invest. The risks to investors were also clearly explained.

- The Invitation Document explained that no person had been authorised to give information or make representations not contained within the document – so Mr E ought to have been aware statements made by the representative were not on behalf of Gallium.

- The Invitation Documents clearly specified on multiple occasions that investors' capital was at risk, and gave detail on the risks of investing in bonds generally, and Basset & Gold bonds in particular.

I have considered the submissions in full. I have also seen a copy of what Gallium described as its "position statement", which sets out general information on the background to complaints about B&G Plc bonds, and have considered this when reaching my decision.

Our investigator's view

One of our investigators considered Mr E's complaint and concluded it should be upheld. She said, in summary:

- She was satisfied the complaint is about a regulated activity and that Gallium, as the principal of BG Ltd, was responsible for the acts or omissions the complaint relates to. So the complaint is one we can consider.

- She was not satisfied that Mr E was provided with clear, fair and not mis-leading information about the bond.

- The application process – both in terms of the certification of Mr E as a "restricted investor" and the assessment of the appropriateness of the bonds for him – was mis-leading and didn't gather sufficient information to comply with the FCA's rules.

- Overall, BG Ltd, on Gallium's behalf, didn't comply with its regulatory obligations. Had it done so Mr E wouldn't have decided to invest or BG Ltd should have concluded that it shouldn't allow Mr E to invest. For these reasons, both cumulatively and individually, it was fair to uphold the complaint and for Gallium to compensate Mr E for the losses he has suffered.

Gallium's response to the view

Gallium did not accept the investigator's view. It said, in summary:

- Mr E hadn't detailed why he thought the bond had been mis-sold – though it appreciated our inquisitorial remit, it felt we had gone significantly beyond the scope of the complaint made. Complainants must establish a proper basis for a complaint about Gallium to be upheld and Mr E's complaint did not do that. It thought the case ought to have been dismissed on this basis.

- It is important to recognise when appropriateness testing or suitability testing is required. As businesses structure their approach based on this, any incorrect application can wholly undermine their business model. There is significant cost to designing and implementing the approach. Our investigator had not applied the requirements correctly.

- COBS 10.2.6G allowed BG Ltd to have relied on knowledge when assessing whether Mr E understood the risks in relation to the product.

- COBS 10.2.2R says it may be appropriate to ask about similar investment experience but there is no requirement to do that in each case. And the regulator provided guidance to the crowdfunding industry allowing firms to satisfy themselves of what information was pertinent to their investment process – this meant the regulator did not insist on questions about education or prior investment experience had to be included. This was confirmed in the regulator's 2014 policy statement (PS 14/4) too.

- The bonds were not complex products – it involved lending money to B&G Plc, at a fixed rate of return which was contingent on B&G Plc generating sufficient revenue from its lending activities to meet its obligations to investors.

- The FCA has provided guidance on its expectations around appropriateness since Mr E made his investment, and the regulatory environment has changed. At the time of the investment, however, the FCA had publicly articulated different expectations. We must apply regulatory expectations as they existed at the relevant time and not seek to apply the different standards that exist today in a retrospective manner.

- In 2014 there had been discussions between the FCA and crowdfunding industry as to what the FCA expected businesses to do to ensure investments were appropriate for investors. The guidance took the form of two question and answer sessions with the FCA's Head of Investment Policy and UK Crowdfunding Association ("UKCFA"). These sessions addressed, in particular, the question of whether investor experience and education needed to form part of an appropriateness assessment. Gallium had regard to this guidance when considering BG Ltd's appropriateness testing.

- Guidance provided by the FCA in those industry meetings clarified that firms were able to satisfy themselves of what information was pertinent to their investment process. Importantly, in appropriate circumstances, the FCA would not insist on an appropriateness test containing questions about education or prior investment experience.

- BG Ltd's appropriateness test (this refers to the "*JUST A FEW MORE QUESTIONS (REQUIRED BY LAW)"* set out above) was adequate – information was obtained about an investor's knowledge and experience of the key characteristics of the bonds.

- Mr E confirmed he had invested in similar products within the last 30 months, that he was familiar with the type of investment, and he had accepted other confirmations along the lines that bonds might expose him to significant risk of losing all his money. Mr E also confirmed he had read and understood the Invitation Document, inclusive of the risk warnings on pages 27 – 31 of that document.

- BG Ltd was entitled to rely on the answers Mr E gave. It would not be fair or reasonable to expect Mr E to have given misleading answers. Had he done so, there is no basis to suppose he would have given accurate information had further questions been asked.

- By the time Mr E made his second bond investment, he had experience of the product and that was known to Gallium. COBS 10.2.5G permits a firm to use information already in its possession when assessing appropriateness. In accordance with COBS 10.2.6G, Gallium would therefore have been entitled to infer that Mr E had knowledge based on this prior experience.

- Ultimately, BG Ltd was entitled to conclude Mr E had sufficient knowledge and experience of the same or similar products to understand the risks involved such that the investment was appropriate for him. The investigator had disregarded the confirmations and appropriateness test responses given – and had reached a wholly irrational and unsupported conclusion.

- The available evidence demonstrated that being notified of any lack of diversification of B&G Plc's lending activities would not have deterred Mr E from investing, as it did not cause his to disinvest when he became aware of it following the January 2019 update email.

- In any event, it demonstrates that Mr E became aware of the concentration risk in 2019, had the option to seek to exit his investment in the bonds, and chose not to do so. His loss is not therefore caused by having failed to understand the level of concentration risk posed by the bonds at the time of purchase; it is caused by his decision not to exit his investment when that risk was made clear to him in 2019.

- Though our investigator said Mr E wanted a low risk investment, the redress proposed said he didn't want to risk *any* of his capital. This is inconsistent with the warnings Mr E saw when applying for the bond – every page of the process contained a risk warning, he accepted that he may be exposed to a significant risk of losing all his money, the appropriateness test confirmed understanding that capital was at risk and the Invitation Document outlined the risks. So it cannot now be suggested Mr E didn't want to risk any of his money.

- The 6.22% and 9.01% interest rates evidence Mr E knew the investments were not risk free – the Bank of England Base Rate was only 0.25% so it's not realistic to

suggest he did not appreciate or accept the risk. Mr E also said "*I tried to maximise my income … without being reckless*" – nothing in this statement suggests he was not prepared to risk his capital. Rather, the statement suggests that he appreciated and was prepared to put his capital at risk, so long as the risk was acceptable to him. Additionally, our investigator had misunderstood the risk-reward nature of securities markets and if every investor who had acknowledged their capital was at risk were to become entitled to capital protection this would bring about the end of retail participation in investment markets.

Gallium also said it did not agree with the investigator's finding the Invitation Document did not meet the regulatory standard of clear, fair and not misleading.

After receiving this response our investigator shared some information from the file with Gallium. This included some of Mr E's submissions to our service and some call recordings. But as Gallium did not agree to change its position, Mr E's complaint was passed to me to consider.

My provisional decision

I recently issued a provisional decision. In summary, I concluded Mr E's complaint should be upheld because:

- The bond was non-readily realisable and therefore there were rules restricting who it could be promoted to and on how to test whether the investment was appropriate for the potential investor.

- BG Ltd, on behalf of Gallium, did not follow the rules relating to this. Had it done so, it would have concluded Mr E did not fall into a category of investor to whom the bond could be promoted and, furthermore, that the bond was not an appropriate investment for him.

- Had the rules been followed in either respect, I was satisfied Mr E would not have made the investment. It was therefore in my view fair to ask Gallium to compensate Mr E for his loss.

As I revisit (and, where appropriate, repeat) my provisional findings below I will not include any more than this brief summary here.

Gallium did not respond to my provisional decision. Mr E did – he was positive about the outcome but didn't add any further substantive comment.

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.

For completeness, I have first reconsidered all the available evidence and arguments to decide whether we can consider Mr E's complaint.

I note there had been some dispute from Gallium about what we should be looking at when considering Mr E's complaint. Gallium says our investigator made findings on matters significantly beyond the scope of the complaint Mr E has made. It also says complainants

must establish a proper basis for a complaint about Gallium to be upheld and Mr E's complaint did not do that.

The Financial Ombudsman Service is an informal dispute resolution forum. A complaint made to us need not be, and rarely is, made out with the clarity of formal legal pleadings. As recognised by the High Court in R (Williams) v Financial Ombudsman Service [2008] EWHC 2142, our service deals with complaints, not causes of action. Our jurisdiction is inquisitorial, not adversarial.

I acknowledge the details of the complaint we provided to Gallium after Mr E's referral to us simply mentioned that he was seeking the repayment of his bonds. But the referral to us was of a more detailed complaint already made to Gallium, which it had considered and responded to. So Gallium has been privy to the full detail of Mr E's complaint and has considered that detail. It is (and was at the time of the referral to us) therefore aware Mr E's complaint concerns what Mr E considers to be a mis-sale of the bond and the provision of misleading information by BG Ltd.

Rule 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*".

And 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)*".

The bonds were a security or contractually based investment specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"). At the time Mr E made his investments, the RAO said regulated activities include arranging deals in investments. Acts such as obtaining and assisting in the completion of an application form and sending it off, with the client's payment, to the investment issuer would come within the scope of Article 25(1), when the arrangements have the direct effect of bringing about the transaction. So I am satisfied the online application process falls within the scope of Article 25(1). These all involved making arrangements for Mr E to invest in the bonds, and had the direct effect of bringing about the transactions.

So I remain satisfied Mr E's complaint – insofar as it relates to the bond application processes – is about regulated activities. I am also satisfied this part of the complaint is about acts for which Gallium accepted responsibility. They are therefore acts of Gallium and can be considered in a complaint against it.

I am not able to consider B&G Plc's issuing of the bond or what B&G Plc did with the money once Mr E invested given this did not involve regulated activities.

So I remain of the view that in this case the focus is on the acts or omissions of BG Ltd, as it was BG Ltd which was responsible for the sales of the bonds.

The merits of Mr E's complaint

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

I have first reconsidered what the relevant considerations are in this case. Having done so, I remain of the view that these are as set out in my provisional decision. So I have repeated below what I said in my provisional decision.

Relevant considerations

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint. In doing so, I have considered relevant law and regulations; regulators rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

In my view the key consideration as to what is fair and reasonable in this case is whether Gallium met its regulatory obligations when BG Ltd, acting on its behalf, carried out the acts the complaint is about. I consider the following regulatory obligations to be of particular relevance here.

The Principles for Businesses

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 Principles 6 and 7 are relevant here. They provide:

> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.*
>
> *Principle 7 - Communications with clients - A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 4 – Communicating with clients, including financial promotions

Principle 7 overlaps with COBS 4.2 - Fair, clear and not misleading communications, which I also consider to be relevant here:

COBS 4.2.1R:

(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

As mentioned, the bond was non-readily realisable and therefore there were rules restricting who it could be promoted to and how to test whether the investment was appropriate for the potential investor. These rules were set out in COBS 4.7 and COBS 10. I have set out below what I consider to be the relevant rules, in the form they existed at the time.

COBS 4.7 - Direct offer financial promotions

COBS 4.7.7R:

(1) Unless permitted by COBS 4.7.8 R, a firm must not communicate or approve a direct-offer financial promotion relating to a non-readily realisable security to or for communication to a retail client without the conditions in (2) and (3) being satisfied.

(2) The first condition is that the retail client recipient of the direct-offer financial promotion is one of the following:

> *(a) certified as a 'high net worth investor' in accordance with COBS 4.7.9 R;*
> *(b) certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R;*
> *(c) self-certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R;*
> *(d) certified as a 'restricted investor' in accordance with COBS 4.7.10 R.*

(3) The second condition is that firm itself or the person who will arrange or deal in relation to the non-readily realisable security will comply with the rules on appropriateness (see COBS 10) or equivalent requirements for any application or order that the person is aware, or ought reasonably to be aware, is in response to the direct offer financial promotion.

COBS 4.7.10R

A certified restricted investor is an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

"RESTRICTED INVESTOR STATEMENT *I make this statement so that I can receive promotional communications relating to non-readily realisable securities as a restricted investor. I declare that I qualify as a restricted investor because:*	
(a)	*in the twelve months preceding the date below, I have not invested more than 10% of my net assets in non-readily realisable securities; and*
(b)	*I undertake that in the twelve months following the date below, I will not invest more than 10% of my net assets in non-readily realisable securities.*
Net assets for these purposes do not include:	
(a)	*the property which is my primary residence or any money raised through a loan secured on that property;*
(b)	*any rights of mine under a qualifying contract of insurance; or*
(c)	*any benefits (in the form of pensions or otherwise) which are payable on the termination of my service or on my death or retirement and to which I am (or my dependants are), or may be entitled; or*
(d)	*any withdrawals from my pension savings (except where the withdrawals are used directly for income in retirement).*
I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on non-readily realisable securities. *Signature:* *Date:"*	

COBS 10 – Appropriateness (for non-advised services)

At the time COBS 10.1.2 R said:

"This chapter applies to a firm which arranges or deals in relation to a non-readily realisable security, derivative or a warrant with or for a retail client and the firm is aware, or ought reasonably to be aware, that the application or order is in response to a direct offer financial promotion."

COBS 10.2.1R:

"(1) When providing a service to which this chapter applies, a firm must ask the client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the firm to assess whether the service or product envisaged is appropriate for the client.

(2) When assessing appropriateness, a firm:

> *(a) must determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded;"*

COBS 10.2.2 R:

"The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

> *(1) the types of service, transaction and designated investment with which the client is familiar;*
> *(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;*
> *(3) the level of education, profession or relevant former profession of the client"*

10.2.6G – Knowledge and experience:

"Depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for his to understand the risks involved in a product or service. Where reasonable, a firm may infer knowledge from experience."

COBS 10.3 Warning the client

COBS 10.3.1R

(1) If a firm considers, on the basis of the information received to enable it to assess appropriateness, that the product or service is not appropriate to the client, the firm must warn the client.

COBS 10.3.2R

(1) If the client elects not to provide the information to enable the firm to assess appropriateness, or if he provides insufficient information regarding his knowledge and

experience, the firm must warn the client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for his.

COBS 10.3.3G

If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances.

I note Gallium has also referred to the FCA's policy statement PS14/4, and to question and answer sessions with the FCA's Head of Investment Policy and UKCFA. I have had regard to the policy statement, and to Gallium's recollections of the two question and answer sessions.

Having taken careful account of these relevant considerations, to decide what is fair and reasonable in the circumstances, and given careful consideration to all Gallium has said, I have not been persuaded to depart from my provisional conclusions and remain of the view that Mr E's complaint should be upheld. So I have largely repeated below what I said in my provisional decision. My decision, in summary, is as follows:

- BG Ltd, acting on Gallium's behalf, misled Mr E into certifying himself as belonging in a category to which he did not belong (a "restricted investor") by changing the term used in the rules to "*everyday investor*" and describing the category as being one "*anyone*" could fall into. This was not treating Mr E fairly or acting in his best interests. Had BG Ltd followed the rules and not misled Mr E, it is unlikely he would have certified himself as being a restricted investor.

- The appropriateness test carried out by BG Ltd, on behalf of Gallium, did not meet the requirements of the rules. And, had it done so, it would have been apparent the bond was not an appropriate investment for Mr E. In the circumstances Mr E would either not have proceeded or, acting fairly and reasonably, BG Ltd should have concluded it should not promote the bond to Mr E.

For these reasons – individually and cumulatively – my decision remains that Mr E's complaint should be upheld. I am also satisfied Mr E would either not have proceeded to make the investments or would not have been able to proceed, had Gallium acted fairly and reasonably to meet its regulatory obligations. And so I remain satisfied it is fair to ask Gallium to compensate Mr E for his loss.

I have again set things out in more detail below.

The online application process

There were a number of regulatory obligations which applied to the sale of the B&G Plc bonds. The bonds were non-readily realisable and therefore there were rules restricting who they could be promoted to and on how to test whether the investment was appropriate for the potential investor. These are the two conditions set out in COBS 4.7.7R which must be satisfied before a business such as BG Ltd (here acting on Gallium's behalf) could communicate or approve a direct-offer financial promotion relating to a non-readily realisable security such as the bonds issued by B&G Plc.

The online application took steps toward meeting the rules which set out how a busines must satisfy the two conditions, which I have set out above. I will consider the steps taken by BG Ltd, on behalf of Gallium, in relation to each in turn.

At the outset I think it is important to emphasise the bonds Mr E invested in were not straightforward products. Risk factors associated with the bonds included the track record of B&G Plc, the detail of its due diligence on the businesses it would be lending to, the criteria B&G Plc applied to its lending and the conditions on which the loan was made. The credit history of the business the loan was made to would also need to be considered, its capacity to repay, and its capital position. Furthermore, as the business B&G Plc was lending to was itself lending, the lending criteria it applied, the default rate and the success of its past lending would need to be considered. All of these points (and this is not an exhaustive list) would need to be considered in order to understand the investment.

In the market for corporate bonds listed on the main exchanges, institutions – credit reference agencies – carry out credit analysis work to assess the risk associated with a bond and express a view (a "rating"), and investment managers often carry out further credit analysis before deciding to invest in a bond. Here there were no such aids to a consumer's understanding of the product. There was also a liquidity risk. The bonds were not listed on a recognised exchange, and so could not be readily sold (in fact it seems to have been a condition of the investment that it could not be transferred). And, as Gallium has pointed out, the Invitation Document which set out the details of the bond was over 40 pages long. I have read the documents and they contain a lot of complex technical information which may not be readily understood by the average investor.

So the bonds were complex, risky and specialist and this is why they fell into a category of investment on which the FCA puts restrictions as to who it could be promoted. And an obvious risk of consumer detriment arises if the rules relating to this are not properly applied. The importance of Gallium fully meeting its regulatory obligations here was therefore high. Its responsibility was significant. And the steps it took to meet its regulatory obligations need to be considered with that in mind.

Certification

The first condition set out in COBS 4.7.7R required a retail client, such as Mr E, to be certified as being in one of four categories of investor in order to receive promotional communications relating to the bonds. In this case, Mr E was certified as a "restricted investor". The detail of this category and the process by which an investor can certify themselves as belonging to it is set out in COBS 4.7.10R, which I have quoted above.

I remain of the view the certification stage of the application stage on BG Ltd's website did not meet the requirements of COBS 4.7.10R in a number of ways.

Firstly, BG Ltd did not use the correct term – "restricted investor" – it instead used the term "*everyday investor*".

Secondly, the statement, confirmation and declaration Mr E was asked to make included some of the wording set out in 4.7.10R – but not all of it. And additions had been made. The title of the statement also departed from the wording set out in 4.7.10R – it was described as a "*Everyday Investor Statement*".

Finally, BG Ltd provided its own definition of a restricted (or, as it put it, "*everyday*") investor, as follows:

"Anyone can become an Everyday Investor. You just need to agree to not make more than 10% of your investments (including savings, stocks, ISAs, bonds and property excluding

your primary residence) in investments that cannot easily be sold (i.e. illiquid). This is why the FCA refers to these investors as 'Restricted Investors'."

The requirements set out in 4.7.10R are much further reaching than "*You just need to agree to not make more than 10% of your investments (including savings, stocks, ISAs, bonds and property excluding your primary residence) in investments that cannot easily be sold".* 4.7.10R requires the prospective investor to agree to *all* of the following:

- In the twelve months preceding the certification date, not to have invested more than 10% of their net assets in non-readily realisable securities.

- To undertake that in the twelve months following the certification date, they will not invest more than 10% of my net assets in non-readily realisable securities.

- To accept that the investments may expose them to a significant risk of losing all of the money invested.

- To be aware that it is open to them to seek advice from an authorised person who specialises in advising on non-readily realisable securities.

I have reconsidered the impact of these departures from the requirements of 4.7.10R.

As set out in the background above, Mr E was offered the option of four "investor profiles", after he had completed the first stages of his application. The options, other than "everyday investor" were "self certified sophisticated investor", "advised investor" or "high net worth investor".

I remain of the view, the change of the term "restricted investor" to "*everyday investor*" and BG Ltd's definition of this being a category to which "*anyone*" could belong, by simply agreeing to not make more than 10% of their investments in investments that cannot easily be sold, had the effect of making the restricted investor category appear to be one into which investors like Mr E would naturally fall.

"Restricted" is, by its common and ordinary meaning, something which is limited in amount or range. Synonyms include words like *limited, constricted* and *controlled.* And what is set out in 4.7.10R is consistent with this. "Everyday" is, by its common and ordinary meaning, something which is ordinary, typical or usual and is inconsistent with what is set out in 4.7.10R. The change of the term was also likely to alter how it was perceived. This is compounded by BG Ltd's definition of a restricted investor as being a category to which "*anyone"* can belong. Clearly not "*anyone*" can belong to a restricted category.

I remain of the view that this put undue emphasis on the "everyday investor" option, and led consumers like Mr E to selecting this option when they may not have done so otherwise. I do not think it was fair or reasonable for BG Ltd to act in this way. It was not treating Mr E fairly or acting in his best interests. BG Ltd ought to have known that changing the term created a risk of consumers perceiving a "restricted investor" to be something different to what it was, and certifying themselves incorrectly as a result, and risked consumers skipping through this as a formality.

I note Gallium says It would not be fair or reasonable to expect it to anticipate that investors would incorrectly claim to satisfy the requirements of a restricted investor. I do not agree. If you change the description of a category from "restricted" to an "*everyday*" one to which "*anyone*" can belong an obvious risk is that prospective investors who do not belong in the category mistake the category as being one to which they do belong. Indeed, it is difficult to see why BG Ltd departed from 4.7.10R and changed the term and definition other than to get investors to certify themselves as being eligible to receive a promotion of the bond when they might not otherwise have done so. In my view this appears to have been done to contrive this outcome in a bid to access more investors.

I remain of the view an "*everyday investor*" – particularly when described as a category to which "*anyone*" can belong – is an option Mr E would immediately have understood or could resonate with as that term is a reasonable description of an investor with his characteristics – someone without significant investment experience or assets who was looking to invest a modest amount to provide an income to supplement their pension. In my view Mr E would have been attracted to this profile based on his understanding and perception of the word "*everyday*" and the description of it as a category to which "*anyone*" can belong.

It is possible Mr E could have qualified as a restricted investor as his recollections are that his £20,000 investment may have been around 10% of his assets. But that aside, I think it unlikely he was aware of the bonds had significant risk associated with them given his investment experience, and he had not made investments in similar products in the last 30 months.

I acknowledge that the statement, confirmation and declaration did largely mirror what is set out in 4.7.10R and so Mr E did state, confirm and declare something which was not accurate. And I note Gallium's view is that Mr E nonetheless gave the statement, confirmation and declaration, that it is not credible to say he would have completely disregarded the detail of these, and that it was reasonable for it to rely on them. However, I remain of the view it is unlikely Mr E knowingly gave a false statement. The money invested was important to him and he wasn't looking to take a considerable risk with it. So I think it unlikely he had regard to the full detail of the statement, confirmation and declaration and chose to proceed having understood them in full. Instead, I think it instead likely that he did not consider the detail of what he was being asked to agree to as he understood it to be an "*everyday*" i.e. ordinary, typical or usual category, to which "*anyone*" could belong. And, as mentioned above, I think BG Ltd should have been aware this was a possible consequence of it changing the wording required by the FCA's rules.

I again note Gallium's reference to case law relating to circumstances where someone is seeking to take a position contrary to an earlier representation. The law is a relevant consideration which I need to take into account. But I remain of the view the case law Gallium has referred to is quite different to the facts of this case. The Bank of Leumi v Wachner case, for example, relates to circumstances where Ms Wachner was clearly a wealthy, sophisticated investor with lots of experience of previous similar investments and in that situation the court decided that it was fair for the business to rely on the professional client declaration made and that it was likely Ms Wachner did understand the papers she signed. The situation is quite different here – Mr E's complaint is about what he generally describes as a "mis- sale" and he is not making a legal claim – my role here is to decide what is fair and reasonable in the circumstances, on the basis I have set out. I do not think it would be fair and reasonable to say the statement, confirmation and declaration should be relied on in circumstances where Mr E was misled into giving them.

I think it is unlikely Mr E would have made the statement confirmation and declaration at all had the correct "restricted investor" term been used and had the website not presented the restricted investor category as being an "*everyday*" one into which "*anyone*" could fall. As mentioned above, I think "restricted" has a very different meaning to "everyday". The latter would have provided comfort to Mr E whereas the former would have made him pause for thought and realise that was a category to which he did not belong. I also think it unlikely he would have described himself as a "self-certified sophisticated investor", "advised investor" or "high net worth investor" as it would have been clear from the descriptions of those categories that he did not fit into them either.

So I remain satisfied if BG Ltd, acting on behalf of Gallium, had acted fairly and reasonably to meet Gallium's regulatory obligations Mr E would not have got beyond this stage. The first condition set out in COBS 4.7.7R could not be met and things could not have proceeded

beyond this. And I think it would be fair and reasonable to uphold Mr E's complaint on this basis alone. I have however, for completeness, gone on to consider the appropriateness tests.

Appropriateness

The second condition set out in COBS 4.7.7R required BG Ltd to comply with the rules on appropriateness, set out in COBS 10 and quoted in the relevant considerations section above.

The rules at the time (COBS 10.2.1R) required BG Ltd, acting on behalf of Gallium, to ask Mr E to provide information regarding his knowledge *and* experience – and for this information to be relevant to the product offered (the first limb of the rule). The rules required that information to then be assessed, to determine whether Mr E did have the necessary experience and knowledge in order to understand the risks involved (the second limb of the rule).

As set out above, COBS 10.2.2 R required BG Ltd, acting on behalf of Gallium, when considering what information to ask for, to consider the nature of the service provided, the type of product (including its complexity and risks) and for it to include, to the extent appropriate to the nature of the client:

> *(1) the types of service, transaction and designated investment with which the client is familiar;*
> *(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;*
> *(3) the level of education, profession or relevant former profession of the client"*

I remain of the view BG Ltd failed to ask for an appropriate amount of information about Mr E's knowledge and experience, as required by COBS 10.2.1R and COBS 10.2.2 R.

BG Ltd did not refer to an appropriateness test on the website – it instead referred to "*just a few more questions (required by law)*". I think this, in itself, is a further example of BG Ltd downplaying the significance of the regulatory requirements and attempting to make them appear as a formality, as it did under the certification section.

Under the "*few more questions*" section BG Ltd asked five questions which tested knowledge. These questions asked whether Mr E knew if the bonds were transferable, if the return was fixed, if his capital was secure, if the bonds could be converted to shares and the meaning of diversification. Nothing was asked about Mr E's experience. And if Mr E got a question wrong, he would be told his answer was wrong and prompted to reconsider it.

Even if Mr E did know the correct answer to all five questions without prompting this only showed he understood the bonds were not transferrable, the return was fixed, capital was at risk, whether the bonds could be converted into shares and was able to select a correct answer from two options as to what the definition of diversification was.

This falls a long way short of adequately testing whether Mr E had the knowledge to understand the risk associated with the bonds – particularly in circumstances were the multiple-choice options were limited to two and Mr E was allowed repeated efforts to get them right. The risks, as I set out earlier, were complex and multifactorial. It was not, for example, a question of whether Mr E simply understood money could be lost – but whether he was able to understand how likely that might be and what factors might lead to it happening.

Gallium has referred to it being reasonable to rely on the statement, confirmation and declaration given during the restricted or "everyday" investors stage of Mr E's application. I acknowledge BG Ltd asked Mr E to declare, at the previous stage "*I am familiar with this type of investment."* and "*I have made investments in similar products in the last 30 months"*. And it says this means it did have some information about Mr E's experience, and additional information about his knowledge. However, even accounting for the declaration, an appropriate level of information was not asked for. I think, for the reasons I have set out in the previous section, the statement, confirmation and declaration could not reasonably be relied on in the circumstances in which it was obtained.

I remain of the view that as the first limb of COBS 10.2.1R was not met, BG Ltd was unable to carry out the assessment required under the second limb. BG Ltd should have been confident, from the information it asked for, that it was able to assess if Mr E had the necessary experience and knowledge in order to understand the risks involved with investment in the bond. But it was not in a position to make such an assessment, based on the information it obtained.

Gallium refers to 10.2.6G which says there may be circumstances in which *a firm may be satisfied that the client's knowledge alone is sufficient for his to understand the risks involved in a product or service.*

I remain of the view these were not such circumstances – not least because BG Ltd did not ask for an appropriate amount of information about Mr E's knowledge. The guidance in any event does not supplant the rules and in my view it is clearly meant to apply where the client has been asked about both knowledge *and* experience, as the rules require, and the information obtained shows knowledge is high and experience is low. It does not say a business can ask only about knowledge when conducting an appropriateness test.

Gallium has referred to industry conferences with the FCA and to the FCA's policy statement PS14/04. This relates to the regulation of firms operating online crowdfunding platforms or conducting other similar activities. I have read the policy statement but my view is that it simply confirms the rules on appropriateness apply and must be followed. I note, for example, the statement confirms, at 4.24, that firms are required to assess whether the client has the necessary experience and knowledge to understand the risk involved. In relation to the crowdfunding coming under its regulation the FCA's proposal (which was adopted), summarised at 4.6, was:

"where no advice was provided, that all firms (MiFID and non-MiFID) must check that clients have the knowledge and experience needed to understand the risks involved before being invited to respond to an offer"

The policy statement does not therefore change my view that BG Ltd, acting on behalf of Gallium, did not meet its regulatory obligations. And I have seen no evidence to show the FCA gave guidance to Gallium otherwise which would have led it to conclude its appropriateness test was adequate.

In any event – and notwithstanding what I say above about COBS 10.2.1R and 10.2.6G – it remains the case that as Gallium did not ask for sufficient information about Mr E's knowledge, it was not in a position to assess whether his knowledge alone was sufficient.

Gallium also suggests the FCA has provided guidance on its expectations around appropriateness since Mr E made his investment in 2017, and the regulatory environment has changed since then. To be clear, my findings are based on the rules that existed at the time.

Had the process been consistent with what the rules required – had Mr E been asked for appropriate information about his knowledge and experience – the only reasonable conclusion BG Ltd could have reached, having assessed this, was that Mr E did not have the necessary experience and knowledge to understand the risks involved with the bond.

If BG Ltd assessed that the bond was not appropriate, COBS 10.3.1 R said a warning must be given and the guidance at COBS 10.3.3G said a business could consider whether in the circumstances to go ahead with the transaction if the client wished to proceed, despite the warning.

This envisages the test being completed, and a result determined, before the warning was given. As BG Ltd designed the test the only warning was in response to incorrect answers and simply said "*if you are unfamiliar with the features of this investment then it might not be suitable for you".* In my view this does not meet what is required by COBS 10.3.1R, which is a warning that the product is *not* appropriate. And, by allowing Mr E the opportunity to effectively silence the warning through selecting a different answer, the impact of it was reduced in any event.

The process also did not give BG Ltd the opportunity to consider whether in the circumstances to go ahead with the transaction if Mr E wished to proceed, despite the warning.

I remain of the view a warning which told Mr E clearly an investment in the bond was *not* appropriate for him would likely have put Mr E off proceeding further. That is a clear, emphatic statement which would have left Mr E in no doubt the bond was not an appropriate investment for him. And he ought to have been privy to such a warning, had an appropriateness test consistent with the requirements of the rules been conducted.

Furthermore, had BG Ltd given itself the opportunity to consider in the circumstances whether to go ahead with the transaction if Mr E wished to proceed, having asked for appropriate information about Mr E's knowledge *and* experience, it would have been fair and reasonable for BG Ltd to conclude it should not allow Mr E to proceed. Had Mr E been asked for appropriate information about his knowledge *and* experience this would have shown he may not have the capacity to fully understand the risk associated with the bond. As mentioned, I have seen no evidence to show Mr E had anything other than a very basic knowledge of investments. In these circumstances, it would not have been fair and reasonable for BG Ltd to conclude it should proceed if Mr E wanted to, despite a warning (which, as noted, was not in any event given in the required terms or way).

All in all, I remain satisfied BG Ltd, acting on behalf of Gallium, did not act fairly and reasonably when assessing appropriateness. By assessing appropriateness in the way it did it was not treating Mr E fairly or acting in his best interests. If it had acted fairly and reasonably to meet the relevant regulatory obligations when assessing appropriateness, Mr E would not have got beyond this stage. And I think it would be fair and reasonable to uphold Mr E's complaint on this basis alone. Even if I am wrong to say Mr E would not have said he was a "restricted investor" and given the statement, confirmation and declaration relating to this had BG Ltd, on behalf of Gallium, acted differently (and for the reasons I have set out, I still do not consider that to be the case) Mr E would still not have got beyond this second stage. The second condition set out in COBS 4.7.7R could not be met and things could not have proceeded beyond this.

Invitation Document

I note what Gallium says about the need to look at all of the information that was available to Mr E about the bond – particularly the Invitation Document. However, I remain of the view that things need to be considered in the order in which Mr E would have been privy to them and Mr E should only have been privy to the Invitation Document after having completed the certification and appropriateness test. As I set out above, I do not think Mr E should have reached this point.

I acknowledge that it appears Mr E had seen the Invitation Document, but shouldn't have as he was incorrectly certified as a restricted investor as a result of being misled by BG Ltd and as the bonds were incorrectly assessed as being appropriate for him due to BG Ltd failing to meet its regulatory obligations in relation to this. However, considering the available evidence, I think it likely Mr E did not look at the Invitation Document in any detail and that he did not have the capacity to fully understand it even if he did look at it in detail.

So I remain of the view Gallium cannot reasonably rely on the Invitation Document to say Mr E had an understanding of the bond and proceeded on that basis.

As I set out in my provisional decision, I think it is also important to say that an objective of the appropriateness test was to protect consumers such as Mr E from receiving communications about investments which were not appropriate for them. One obvious reason for this being that such consumers may not be able to fully understand these communications. So it would not be fair and reasonable to say, where the test has not been applied as set out in the rules and an incorrect conclusion reached on appropriateness as a result, that any knowledge subsequently acquired from the Invitation Document can be used in an effort to retrospectively satisfy the test.

The website and any other marketing material

For similar reasons to those given above, I remain of the view that I do not need to consider anything else (i.e. other than the application stages set out) Mr E may have been privy to before making the investment. I say this because nothing else that could have been conceivably shown on the website or elsewhere changes the position that Mr E would not – and could not – have satisfied the first or second conditions in COBS 4.7.7R and therefore could not receive promotional communications relating to the bond.

Is it fair to ask Gallium to compensate Mr E?

I have considered all the points Gallium has made. However, for the reasons given, I remain satisfied that if BG Ltd, on behalf of Gallium, had acted fairly and reasonably to meet its regulatory obligations Mr E could not – or would not – have proceeded to invest in the bonds. He would not – and could not – have satisfied the first or second conditions in COBS 4.7.7R in order to receive promotional communications relating to the bonds. And even if I am wrong about the first condition Mr E could not have passed an appropriateness test which met the requirements of the rules and so could not have met the second condition, in any event. And even if he had said he wanted to proceed following a warning (and such a warning had been given in a way which was consistent with the rules) I do not think, as I set out above, that it would have been fair and reasonable for BG Ltd to conclude it should allow Mr E to proceed.

So Mr E should not have been able to proceed, had Gallium acted fairly and reasonably to meet its regulatory obligations. The starting point is therefore that it is fair to ask Gallium to compensate Mr E for the loss he has suffered as a result of making the investments.

Gallium has pointed out that the January 2019 update email did not lead to Mr E taking any action, and that his loss is caused by his decision not to exit his investment when the risks were made clear to him in 2019. But I do not think it would be fair in the circumstances to say Mr E is responsible for the loss he has suffered due to him not reacting to this update. As mentioned, I am not persuaded he had the capacity to fully understand the risks associated with the bond – and he was in this position because BG Ltd, acting on behalf of Gallium, did not act fairly and reasonably to meet its regulatory obligations at the outset.

In any event, I still think the wording of this email was largely reassuring and did not prompt investors overall to take any action (I note Gallium says that only one of 1,700 investors who received this email took any action). Given the specific facts here, it is not unreasonable to think that Mr E would have been reassured by this communication – to the extent he understood it – and didn't take any action in response to it. I therefore remain satisfied it is fair to ask Gallium to compensate Mr E.

In conclusion

Taking all of the above into consideration – individually and cumulatively – I remain of the view that in the circumstances it is fair and reasonable for uphold the complaint. I am satisfied, for all the reasons given, that Mr E would not have invested in the bonds had BG Ltd, on behalf of Gallium, acted fairly and reasonably to meet its regulatory obligations. And I think it is fair to ask Gallium to compensate Mr E for the losses he has suffered.

Putting things right

Fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr E as close to the position he would probably now be in if he had not invested in the bond.

I think Mr E 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 E's circumstances and objectives when he invested.

What should Gallium do?

To compensate Mr E fairly, Gallium must:

- Compare the performance of Mr E's investments 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.
- Gallium should also pay interest as set out below.
- It is also clear that Mr E has been caused some distress and inconvenience by the loss of his investment. Given his circumstances, this is money Mr E cannot afford to lose, nor is it money he is able to replace. I do not believe Mr E foresaw such a drastic loss and I recognise the considerable worry he will have felt when B&G Plc failed. I consider a payment of £500 is fair compensation for the upset caused.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From (“start date”)	To (“end date”)	Additional interest
Three year fixed monthly income bond	Still exists but illiquid	Average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)
Five year compounding high-yield bond	Still exists but illiquid	Average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

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

If at the end date the investment 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 E agrees to Gallium taking ownership of the investment, if it wishes to. If it is not possible for Gallium to take ownership, then it may request an undertaking from Mr E that he repays to Gallium any amount he may receive from the investment in future.

Fair value

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

Any withdrawal, income or other distributions paid out of the investments should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I’ll accept if Gallium totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically. If any distributions or income were automatically paid out into a portfolio and left uninvested, they must be deducted at the end to determine the fair value, and not periodically.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Mr E wanted to achieve a reasonable return without any significant risk to his capital.

- The average rate for the fixed rate bonds would be a fair measure given Mr E's circumstances and objectives. It does not mean that Mr E 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.

My final decision

I uphold Mr E's complaint. My decision is that Gallium Fund Solutions Ltd should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 14 March 2023.

Aimee Stanton
Ombudsman