DRN-3367482

The complaint

Mr M submitted a number of complaints to Abbey Financial Service (N.I.) Ltd ('AFS').

- In 2018 he and his wife jointly alleged that they had been given unsuitable advice by AFS in 2016, through its Director Niall McGeown ('NMG'), to invest in the *Helix Fund*. ['C1']

- In 2019 he complained again and alleged that NMG, as an AFS Director, had misrepresented his role and regulatory responsibilities in the course of the Helix fund investment and in the course of investment and investment management recommendations and arrangements for his Self-Invested Personal Pension ('SIPP'). He also complained about a conflict of interest between AFS and the Discretionary Fund Manager he says AFS recommended to him; about an investment made in the SIPP and losses incurred in that investment; and about communications between him and AFS.
['C2']

Both complaints were referred to this service.

What happened

On 14 March 2019 I issued a Jurisdiction Decision ('JD1') on C1 and I concluded that this service does not have jurisdiction to address its merits.

C2 was split into two cases ('C2a' and 'C2b'). C2a covered the SIPP related complaint and C2b focused on the misrepresentation allegation with regards to the Helix Fund investment. C2b is the present case. AFS said – and it continues to say – that all matters related to the Helix Fund investment are outside this service's jurisdiction because JD1 said so. On 25 January 2022 I issued another Jurisdiction Decision ('JD2') on C2b and I concluded that we have jurisdiction to address its merits. I referred to C1 as 'complaint 1', and my main findings included the following:

"*I consider it reasonably clear from what I quoted in the previous section (quoted from the 2019 JD) that both complaint 1 and the findings in the JD issued for complaint 1 were limited to the allegation of unsuitable investment advice (for the Helix fund investment) only. The complaint from Mr M and his wife was precise and clear in this respect (but for the misrepresentation issue they added late to their claim), my findings on their eligibility as complainants was the same (and those findings were expressly made only in the context of the complaint about advice) and my findings on whether (or not) there was a regulated activity in their complaint addressed only the regulated activity of advising on investments.*

The present complaint alleges that NMG, as an AFS Director, misrepresented his role and regulatory responsibilities (including authorities) in the course of Mr M's Helix fund investment … the 2019 JD made it clear that this allegation had been raised at the time but subsequent to the complaint about advice; that the allegation had not been presented to AFS as it had to be; and that for these reasons the JD made no findings on the allegation. It follows that the present complaint and allegation was/is new and was not a part of complaint

1 as treated in the 2019 JD. It also follows that there are no grounds to support AFS' argument that all matters related to the Helix fund were concluded in the JD and cannot be revisited. The JD explicitly said the opposite, it said the matter of our jurisdiction for the misrepresentation issue(s) had not been addressed."

"*As I said in the 2019 FD, a complainant must be eligible in order to pursue the relevant complaint through this service, and the regulator's rules for eligibility to complain are also as I stated in the 2019 JD (and as quoted above). I retain and restate the 2019 JD's finding that Mr M was a consumer for the Helix fund investment …*"

"*My findings on whether (or not) Mr M had a regulated relationship with AFS – which is the second limb of the regulator's test for eligibility to complain – differs from those I reached in the 2019 JD, because the context of the complaint is now different. His allegation is now about misrepresentations by NMG/AFS in the course of his investment in the Helix fund, so the relevant scope goes beyond the previous matter of alleged advice. It now features the arrangements leading to his investment – or, in other words, the scope features what happened in the course of his investment in the fund. Such arrangements could, in theory, have included advice, but the matter of alleged advice has already been concluded so the relevant scope is limited to the matter of arrangements only. For this reason, I consider it worthwhile to address this aspect of the test for eligibility within my treatment of the regulated activity requirement in the next sub-section.*"

"*In his formal response to the Helix fund related complaint, NMG, responding to the complaint on behalf of AFS, said as follows to Mr M (and his wife) –*

"We had spoken early May 2016 about Helix and I had left you the providers pack plus emailed you further literature on the 10th May 2016. This investment was for high net worth individuals or sophisticated investors only. You qualified under both as you had assets in access [sic] of £250,000 and had managed your own Sipp for a number of years. After studying all the literature you decided to invest £150,000 and then changed your mind and upped it to £250,000, you transferred the funds from your Bank directly to Helix. This was an unregulated investment with no advice given. Due diligence had been completed on the product, a copy of the Insurance policy was also obtained. You had access to all information including full terms and conditions, you knew where the money was invested."

In his statement to this service, emailed on 11 February 2019, NMG said –

"I had completed due diligence on the product by attending a number of seminars and travelling to Panama to see the operation first hand. I had obtained a copy of the insurance policy which covered 95% of the capital in the event of things going wrong and was arranged by Howden Insurance Brokers, a very reputable Company who also arrange Abbey Financial Services professional indemnity insurance.
Quite simply if the product did not have this insurance policy I would not have introduced it to [Mr M]. The presence of the insurance policy was central to everything."

In the 2019 JD I also noted as follows –

"NMG appears to have continued to play a role in relation to the Helix fund even after the investment was made. Email evidence shows this and his statement within the complaint concedes the same. However, I do not consider that his role, as broadly depicted in the correspondence, amounted to an advisory one.

Following the investment, there appears to have been a period in which NMG was an intermediary for [Mr M] in terms of conveying queries to the fund and feeding back the fund's responses to [Mr M]. In some emails [Mr M] asks NMG for his "advice" on specific

matters and in response NMG appears to have done no more than put the matters to the fund, obtain their responses and then feedback their responses to [Mr M]. It might even be perceived that he appears to have consciously avoided saying anything akin to advice. In some cases he responded to similar queries from [Mr M] by doing no more than giving updates on the state of affairs relevant to the query(ies) and to the fund – but, again, no appearance of advice."

Overall, I am satisfied that the quotes above and the relevant contents within them serve as evidence to conclude that NMG's conduct, which was not distinguished as personal conduct (and was therefore reasonably perceived by Mr M as conduct on behalf of AFS), amounted to arrangements made by an introducer; that his conduct extended to what appears to have been substantial due diligence for the investment that Mr M made (inclusive of the product information and product provider's pack he presented to Mr M, foreign travel related due diligence for the investment and even due diligence on the insurance policy related to the investment); that his introduction of the investment to Mr M followed from this due diligence; and that he continued to play an intermediary role between Mr M and the fund even after the investment was made. I conclude that the regulated activity of arranging deals in investments features in the present complaint, and I do not consider that NMG would have provided such a notable service/role (as depicted above) in the arrangements leading to Mr M's Helix fund investment – and then continued to provide an intermediary service to him even after the investment – if Mr M was not a customer of AFS (given the absence of evidence that he was a personal customer of NMG). As such, there is a regulated activity of arranging deals in investments within Mr M's present complaint and he was a consumer and customer of AFS for that activity, so he is an eligible complainant (for the present complaint)."

Our investigator looked into the merits of C2b and concluded that it should be upheld. She mainly said:

- Her view stands in conjunction with JD2.

- There is no evidence that NMG made effort to clarify that his involvement in the Helix Fund investment was in a personal capacity; there is no evidence that AFS made this clear to him; there is evidence that he had been a client of AFS since 2010 and that it was advising him on other investments at the time of the Helix Fund investment; there is evidence (related to those investments) in which NMG was referred to as his adviser; NMG and AFS gave him the impression that the Helix Fund investment was being arranged by AFS; and whilst they did not advise him on the investment it is clear he believed that they were advising him on it.

- The regulator's Principles for businesses (at Principles 2, 3, 6 and 7) and Conduct of Business Source Book ('COBS', at COBS 2.1.1 R) required AFS to conduct its business with due care, skill and diligence, to organise and control its affairs responsibly and effectively, to pay due regard to its clients' best interests, to communicate with them in a manner that is clear, fair and not misleading, and to act honestly, fairly and professionally in doing so. These requirements were breached by AFS (and NMG) in terms of the misrepresentation of its service to Mr M in the course of his Helix Fund investment. They ought to have ensured that he knew he was not dealing with a regulated adviser of the firm (NMG), but they did not do so.

- The Helix Fund worked by issuing "… *tranches of Euro Medium Term Notes (EMTNs) - debt securities - with each tranche having a specified duration and being redeemable on maturity. Each tranche provided fixed coupons … Helix used investor money to purchase promissory notes issued by Privilege Wealth under the terms and*

conditions of a loan and ongoing finance agreement. Privilege Wealth conducted lending activities in the USA and the investor money paid by Helix to it were to be used by Privilege Wealth to provide short term loans and revolving lines of credit in the USA".

- Around the time of the Helix Fund investment AFS was advising Mr M on his SIPP and in that context it was aware of his profile – he was around three years from retirement, he had a balanced attitude to risk, limited investment experience and he was not a sophisticated investor. He also had a particular and relevant factor in his personal circumstances that was known at the time. AFS (and NMG) were therefore in a good position to know that the introduction, to him, of the unregulated and high-risk Helix Fund was inappropriate, given his level of knowledge and experience in investments. This finding is not about unsuitability, instead it is about AFS failing to uphold Mr M's best interests and it committed that failure by introducing this inappropriate fund to him.

- Mr M was assured by and relied upon NMG's introduction of the Helix Fund and on NMG's due diligence behind the introduction, he also considered NMG to be his adviser. It is unlikely he would have invested in the fund but for these factors, so the misrepresentation of service to him, by AFS/NMG, led to this inappropriate investment from which he made a loss and AFS is responsible for that loss. Mr M should be compensated for that and should receive £500 for the trouble and upset the matter has caused him.

AFS strongly disagreed with this outcome. It said evidence, shared with this service, includes three suitability letters to Mr M from another AFS adviser (not NMG) and investment documentation on other matters that listed another AFS adviser (not NMG) as his adviser, so these show clear effort on its part to distinguish between its service to him at the time and NMG's personal engagement with him; this service has, thus far, failed to challenge him on this point and the documentation the investigator mentioned (citing NMG as adviser) was produced in error; Mr M ran his own multi-million pound (annual turnover) business, he set up his successful SIPP by his own initiative and, as part of his application for the Helix Fund, he submitted a letter in which he confirmed over 20 years' of experience in the stock market, so he was an experienced and sophisticated investor and this service has been unable to show otherwise; the Helix Fund introduction was therefore appropriate for him, especially because NMG's due diligence confirmed the existence of insurance, within the fund, against capital shortfall (without which he would not have introduced the fund to Mr M); and it later transpired, after the investment, that this insurance was not present when the fund failed, but AFS cannot be held responsible for that as it was present at the point of introduction.

AFS also argued that, following the findings in JD1, there is no basis for this service to make any findings on merits about NMG portraying himself as an adviser in the case, because JD1 already concluded that there was no advice from him to Mr M.

In response, the investigator repeated her view that AFS was obliged to communicate with Mr M in a way that was clear, fair and not misleading, so it was obliged to clarify any room for confusion about its role and that of NMG's in the Helix Fund, but it did not do that. She also noted that the fact Mr M ran his own business did not make him a sophisticated investor and that he had only two shareholdings in his SIPP over the course of around six years, so whilst he was not a novice investor he also was not very experienced or sophisticated.

The case was then referred to me.

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.

I do not address the matter of suitability in this complaint, and I do not believe the investigator did that – in fact, she made it explicitly clear that her findings were unrelated to unsuitability. I uphold Mr M's complaint and I share the investigator's view that he should be compensated for financial loss and that he should receive £500 for the trouble and upset he has caused.

AFS is correct in saying that JD1 concluded the complaint in C1 about alleged unsuitability of the Helix Fund for Mr M (and for his wife, who joined him in C1). However, JD2 made it clear to the parties that the matters of alleged misrepresentation and the introduction of, and arrangements for, the Helix Fund investment were not covered by JD1, were actions covered by the regulated activity or arranging deals in investments and are presently within this service's jurisdiction – for the reasons set out in JD2 (and quoted above).

My approach to the complaint is defined by the findings in JD2, and the investigator expressly took the same approach (as I summarised above). This means the issues to determine are whether (or not) AFS, with NMG conducting himself as its director and on its behalf, introduced and arranged Mr M's Helix Fund investment in a manner that misrepresented its role; whether (or not) the introduction (and, by implication, the arrangement that followed) was appropriate for Mr M; and, if there was misrepresentation and if the introduction (and arrangement) was inappropriate, whether (or not) Mr M would have proceeded to invest in the Helix Fund regardless. This also means I will not be treating any arguments or evidence about "advice". Advice is not an issue in the present complaint.

Overall, on balance, and as I explain below, it is my conclusion that misrepresentation of NMG's/AFS' role alongside the inappropriate introduction (and arrangement) of the Helix Fund led to Mr M's investment in it, and he would not have invested in it otherwise.

It is not disputed that NMG introduced the Helix Fund to Mr M. If AFS disputes, separately, that he also arranged Mr M's invested in it, I consider that the evidence directly from NMG's statements, as I have quoted above (from JD2), stands as a reliable basis to conclude that he arranged the investment subsequent to introducing it. Whilst AFS continues to dispute our jurisdiction for the complaint, I have not seen any information from it that defeats these findings (about introduction and arrangement of the investment) or the other findings in JD2 – including the finding that NMG was conducting himself as an AFS director and on behalf of AFS, so AFS is the correct respondent to, and is responsible for, the complaint.

Evidence from AFS and NMG shows that the service to Mr M was misrepresented. He was a client of AFS and it is not disputed that around the time of the Helix Fund investment he was in receipt of investment advice from AFS on other matters. His assertion is that he considered the service for the Helix Fund investment to be no different and to be part of the overall service he was receiving. JD1 did not uphold this assertion with specific regard to the notion of advice. However, on balance, I do not consider it was unreasonable for him to believe the fund had been introduced to him and was being arranged for him as a client of AFS and as part of its overall service to him. It has since transpired that AFS did/does not wish to be responsible for the Helix Fund, but he did not know this at the time and this is an important point in considering what he would have done had this been made clear to him – which I address later.

AFS says there was a distinction between its service to Mr M and NMG's service to him, so he would have known that the Helix Fund matter was outside its service. Its argument and

the evidence it has referred to appear to be rooted in the allegation about unsuitable advice, which I am not addressing. In terms of introducing the investment and arranging it for him, suitability letters would not have been required for either, so the three suitability letters AFS has referred to do not carry the relevance or weight it believes they do. The investigator was/is correct in highlighting AFS' regulatory duty to communicate with its clients clearly, fairly and in a manner that is not misleading. Mr M was AFS' relatively longstanding client, it was engaged in assisting him with other investment matters, NMG introduced and arranged the Helix Fund investment for him around the same time and NMG was a director of AFS. These circumstances lent themselves to Mr M concluding, reasonably, that he was receiving all services as a client of AFS and if that was not the case, there was a duty upon AFS to make that unequivocally clear – but it did not do that.

Regulation requires that the promotion/introduction of investment products and/or services by a firm to its clients must be appropriate for the client. Assessment of *appropriateness* is the process by which firms must assess whether (or not) a client has enough knowledge and experience to understand the product or service, and the risks associated with it. A firm could be entitled to assume this where the client is a professional client, but Mr M was not classified as a professional client.

Furthermore, with regards to the promotion of *non-mainstream pooled investments*, COBS 4.12 (in 2016 and to date) restricted such promotion to a specific list of non-retail client types. A non-mainstream pooled investment included an Unregulated Collective Investment Scheme ('UCIS'). The Helix Fund – the *Helix Securitisation Fund* – was as described by the investigator (as quoted above). Available information about it suggests that it was an offshore UCIS, so its promotion would have been covered by the restrictions in COBS 4.12 at the time Mr M was introduced to it.

I have not seen evidence that Mr M matched any of the non-retail client types to whom such an investment could be promoted. He was a retail client. The list includes certified high net worth and sophisticated investors and self-certified sophisticated investors, but there is no evidence of any such certifications – or assessments for such certifications – specifically for the Helix Fund investment in Mr M's case.

The Helix Fund ought not to have been promoted to Mr M. I have not seen evidence that it was anything like any investment he had previously experienced. To the contrary, it appears to have been notably remote or alien to his pre-existing investment experience. I do not consider that his stock market and limited SIPP investment experience put him in a position to have the knowledge and experience to understand the fund and its associated risks. The fund was distinctly complex, as is evident from the different layers of offshore debt arrangements within its overall operation. Information about the fund supports this conclusion, and its complexity and layers of operation added to the risks associated with it.

Overall, on balance and for all the reasons above, Mr M did not have the knowledge and experience to meaningfully understand the Helix Fund or its risks, its promotion to him was inappropriate and he was not a non-retail client type to whom it could have been promoted. It follows from these conclusions that the arrangement of his investment in the fund was also inappropriate and should not have happened.

The sum of the above findings is that AFS is responsible for misrepresenting its service to Mr M, a service in which the Helix Fund was inappropriately promoted to and arranged for him. I have considered whether (or not) these actions were the cause of his investment and I have concluded, on balance, that they were.

There appears to be no evidence of an awareness of, or plan to invest in, the Helix Fund on Mr M's part prior to NMG introducing it to him. NMG shared with Mr M his due diligence on

the fund as part of the information he (Mr M) considered in his decision-making process. NMG had also given him the Investment Memorandum for the fund and a brochure for the underlying Privilege Wealth entity. It was not the type of investment he was familiar with so it is more likely (than not) that, at least, he relied on NMG's assurance about his due diligence on it.

I also consider that Mr M relied on his perception of safety in the introduction and arrangement happening as parts of AFS' overall service to him (as its client). I consider that he would have been given cause for concern and/or suspicion by the notion of AFS having no responsibility for either. It is unlikely to have made sense to him for AFS to be advising him on other matters but, without explanation, to be seeking to avoid any form of responsibility for the Helix Fund. Hence my finding that he probably had the understanding – which was not corrected by AFS or NMG – that the introduction and arrangement of the fund was part of AFS' service to him.

Overall and on balance, I am satisfied that Mr M would not have invested in the Helix Fund but for NMG's/AFS' misrepresentation of its service to him, but for its inappropriate promotion of the fund to him and but for its inappropriate arrangement of the investment for him. In other words, like the investigator concluded, AFS is responsible for the loss he incurred from his investment in the fund. As such, he is entitled to redress. I also endorse the £500 trouble and upset award recommended by the investigator and I have ordered the same below.

Putting things right

fair compensation

In deciding what is fair my aim is to put Mr M as close as I can to the position he would probably now be in if he had not invested in the Helix Fund. I consider that he would have invested differently, but because it is not possible to say *precisely* what he would have done differently I am satisfied that the benchmark comparison exercise that I have set out and ordered below – based on his profile at the time – becomes appropriate.

what must AFS do?

To compensate Mr M fairly, AFS must:

- Compare the performance of his 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. Pay interest as set out below.

- Pay him £500 for the trouble and upset caused to him by his experience in the matter, and especially by being misled into the investment.

- Provide him with the details of the calculations in a clear and simple format.

Income tax may be payable on any interest awarded.

investment	status	benchmark	from ("start date")	to ("end date")	additional interest

The Helix Fund	Illiquid	FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index)	Date of investment	Date of settlement	Not applicable

actual value

This means the actual amount payable from the investment at the end date. If at the end date the investment is illiquid the *actual value* should be assumed to be zero. This is provided Mr M agrees to AFS taking ownership of the investment, if it wishes to. If that is not possible then it may request an undertaking from Mr M that he repays to AFS 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 payment out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if AFS totals all those payments and deducts that figure at the end instead of deducting them 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.

In addition, the investigator stated, in her view (and to AFS), what I have quoted below in relation to compensation for wrapper fees. If the circumstances relevant to achieving fair and complete redress for Mr M make it relevant and/or applicable, I endorse it. Otherwise, it need not be applied.

"*The wrapper only exists because of illiquid investments. In order for the wrapper to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by you taking over the investment, or this is something that* [Mr M] *can discuss with the wrapper 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 you are unable to purchase the investment, to provide certainty to all parties I think it's fair that you pay [Mr M] *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 wrapper to be closed.*"

why is this remedy suitable?

I have decided on this method of compensation because:

- Mr M's circumstances at the time of the Helix Fund investment appears to have been such that he was prepared to take some risk for the chance of the return he sought.

- The FTSE UK Private Investors Income Total Return Index is a mix of diversified

indices representing different asset classes, mainly UK equities and government bonds, and it would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that the use of this benchmark would reasonably put him into a position that broadly reflects the sort of return he could have had from an alternative and appropriate investment (that also matched his circumstances).

compensation limit

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000 or £355,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

My final decision

For the reasons given above, I uphold Mr M's complaint. I order Abbey Financial Service (N.I.) Ltd to pay him compensation as set out above and to provide him with a calculation of that compensation in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 20 April 2022.

Roy Kuku
Ombudsman