

The complaint

Mr R complains about the sale of certain investments to him by an appointed representative of Gallium Fund Solutions Limited. He said these investments were mis-sold and the risks not properly explained, and he has now lost all his money.

What happened

In April, June and November 2017 Mr R invested a total of £56,250 in three, 3 year fixed monthly IFISA bonds with an interest rate of 6.12% p.a. with Basset & Gold Plc (“B&G Plc”). Some of this investment came from transferring his existing ISAs worth around £39,965.

Sales of these 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. And it was responsible for advertising and marketing the bonds. Potential investors were also able to call BG Ltd to discuss the bonds.

B&G Plc and BG Ltd were both appointed representatives of Gallium Fund Solutions Limited. B&G Plc and BG Ltd were appointed representatives of Gallium from 17 February 2017 to 28 February 2018.

Mr R visited BG Ltd’s website in April 2017 as he was looking to invest money currently held in cash ISAs to provide for his child’s education and his retirement. As he was investing in ISAs, he believed they were tax free, low risk and supported by the government. Mr R said that he had no experience in investment and had only ever invested in ISAs – he didn’t have any knowledge about non-readily realisable securities and considered himself risk averse at the time.

Subsequently most of the money invested in these bonds was used to lend to the short term and pay day lender, Uncle Buck. Following action from the FCA, Uncle Buck fell into administration and as it was no longer able to repay the funds lent to it by B&G Plc, the bond was no longer able to provide Mr R with the interest expected nor the original capital invested.

The application process

Mr R applied online and also submitted a paper application to allow the ISA transfer to take place.

I have seen screen prints of each stage of the online application process.

These show the application journey that Mr R underwent. This consisted of two stages, designed to meet the regulatory rules restricting who the bond could be promoted to and on how to test whether the investment was appropriate for the potential investor. The first was certification, where Mr R as categorised as an “everyday investor” by BG Ltd. The second was the appropriateness test.

I have also seen copies of the paper ISA application form. This was completed by Mr R and signed on 13 June 2017.

Gallium's response to Mr R's complaint

Gallium did not uphold Mr R's complaint. It said Mr R had been given sufficient information and risk warnings about the investment. It then made further submissions once Mr R's complaint was referred to us. I have considered the submissions in full. I have also considered what Gallium described as its "position statement", which sets out general information on the background to complaints about B&G Plc bonds.

Our investigator's view and Gallium's response

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

- The application process – both in terms of the certification of Mr R as a "restricted investor" and the assessment of the appropriateness of the bond for him - was misleading and didn't gather sufficient information to comply with the FCA's rules.
- The website and marketing material was misleading.
- Overall, BG Ltd, on Gallium's behalf, didn't comply with its regulatory obligations. Had it done so, Mr R wouldn't have decided to invest or BG Ltd should have concluded that it shouldn't allow Mr R to invest. For these reasons, both cumulatively and individually, it was fair to uphold the complaint and for Gallium to compensate Mr R for the loss he had suffered.

Gallium didn't agree with the investigator's conclusions. In summary it said:

- Our findings went beyond the scope of Mr R's complaint.
- The website and marketing material was not misleading – Mr R was given sufficient information and risk warnings.
- Regardless of the label attached, Mr R was required to confirm that he met the requirements of a restricted investor and confirmed that he did. It is not fair or reasonable to conclude that the use of the word "everyday" contributed to Mr R giving an incorrect declaration, and it was reasonable for it to rely on the declaration.
- The appropriateness test answers and these confirmations were sufficient for Gallium to satisfy itself that prospective investors had sufficient knowledge and experience of the bonds to understand the risks those bonds involved, as per the relevant rules.
- It was reasonable for Gallium to rely on the outcome of this test.
- Mr R made the investment on the understanding it had risk associated with it, and did not chose to surrender it when receiving the email in 2019 which warned of the concentration risk. So he would have proceeded with the investment regardless.

As agreement couldn't be reached, the case was passed to me to decide.

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 am satisfied it is appropriate for me to consider all of the acts carried out by BG Ltd, on behalf of Gallium, in relation to the sale of the bond.

In considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account 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.

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 (Customers' interests) and 7 (Communications with clients) are relevant here.

Principle 7 overlaps with COBS 4.2.1R (1) (*A firm must ensure that a communication or a financial promotion is fair, clear and not misleading*), which I also consider to be relevant here.

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 10.1, 10.2 and 10.3. I have considered the relevant rules in full – and I note the investigator has set them out in some detail in their assessment.

I note Gallium has referred to the FCA's policy statement PS14/4, and the question and answer sessions with the FCA's Head of Investment Policy and UKCFA. I have considered these too.

Having considered all the available evidence and arguments I have reached the same conclusion as the investigator, for the same reasons. In summary:

- BG Ltd, acting on Gallium's behalf, misled Mr R 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 R fairly or acting in his best interests. Had BG Ltd followed the rules and not misled Mr R, 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 R. In the circumstances Mr R would either not have proceeded or, acting fairly and reasonably, BG Ltd should have concluded it should not promote the bond to Mr R.

- I note Mr R completed a paper ISA application form, which contained a few questions about investment knowledge and experience. But I am not persuaded that changes things. Mr R would not have been able to apply for the ISA had he not been certified as a restricted (“everyday”) investor and passed the appropriateness test. And the questions in the form were not posed for the purpose of classification or appropriateness testing (or at least not described as such), in any event.

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

Putting things right

Fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr R as close to the position he would probably now be in if he had not been mis-sold these investments

I take the view that Mr R would have invested differently. It is not possible to say *precisely* what he would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr R’s circumstances and objectives when he invested.

What must Gallium do?

To compensate Mr R fairly, Gallium must:

- Compare the performance of each of Mr R’s investments with that of the benchmark shown below.
- A separate calculation should be carried out for each investment.
- Gallium should also add any interest set out below to the compensation payable.
- Pay to Mr R £350 for the distress caused to him by the loss of his investment; an investment he never should’ve been allowed to invest in.
- Provide the details of the calculation to Mr R in a clear, simple format.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From (“start date”)	To (“end date”)	Additional interest
3 year fixed monthly income IFISA 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

6.12% p.a. (BG22600)					not settled within 28 days of the business receiving the complainant's acceptance.
3 year fixed monthly income IFISA bond 6.12% p.a. (BG23495)	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.
3 year fixed monthly income IFISA bond 6.12% p.a. (BG26175)	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.

For each investment:

Actual value

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

As the investment is illiquid (meaning it could not readily be sold on the open market), the *actual value* should be assumed to be zero. This is provided that Mr R 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 R 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.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Gallium should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

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 decided on this method of compensation because:

- Mr R wanted to achieve a reasonable return and I do not think he wanted to take significant risk.
- The average rate for the fixed rate bonds would be a fair measure given Mr R's circumstances and objectives. It does not mean that Mr R 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.
- The additional interest is for being deprived of the use of any compensation money since the end date.

My final decision

I uphold the complaint. My decision is that Gallium Fund Solutions Limited should pay the amount calculated as set out above.

Gallium Fund Solutions Limited should provide details of its calculation to Mr R in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 18 April 2023.

Alessandro Pulzone
Ombudsman