DRN-3818301

The complaint

Mr K complains he was mis-sold an investment bond (held in an ISA wrapper) by Basset Gold Limited ("BG Ltd") an appointed representative of Gallium Fund Solutions Limited ("Gallium"). He says he has lost all of his money as a result of poor performance of the investment. Mr K also says that he was misled into thinking the investment was safe.

What happened

The B&G Plc Bond

In September 2017, Mr K invested in a Basset & Gold Plc ("B&G plc") three-year compounding high-yield FISA bond. Sales of this bond were dealt with by BG Ltd", a separate business from B&G Plc, the issuer of the bond. BG Ltd arranged applications for investments in the bond, through a website it operated - bassetgold.co.uk. And it was responsible for advertising/marketing the bond. Potential investors were also able to call BG Ltd, to discuss the bond.

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'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 relevant 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 K's investment. But both were appointed representatives of 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 bond in its own right – it was responsible for approving BG Ltd's marketing and promotional material relating to the bond. 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 issued by BG Ltd.

Mr K's investment in the bond

Mr K visited bassetgold.co.uk in August 2017, after he searched online to find a product which would provide him a good interest. He says he then made contact with BG Ltd and was given a dedicated relationship manager.

Mr K completed the online application form on bassetgold.co.uk and then sent back a paper application form to transfer his existing ISA. In total he applied to invest £16,560 in the bond. The bond Mr K invested in offered an interest rate 6.12% per year, payable monthly, with the invested capital to be returned after 3 years.

There is limited evidence available from the time. BG Ltd's administrators have provided a copy of a spreadsheet showing what was recorded on BG Ltd's system. That says Mr K completed a "Everyday investor" certification on 21 August 2017. The certificate for the investment shows the application date as 1 September 2017 and the copy of the completed ISA transfer form shows this was signed by Mr K on 4 September 2017. From the evidence available, it appears likely Mr K first completed an online application then, when it became apparent, he was transferring money from an existing ISA, he was asked by BG Ltd to complete a paper transfer form, to facilitate this

When Mr K referred his complaint to us we asked for copies of any call recordings BG Ltd held But we have not been provided with relevant recordings of any conversations Mr K had with BG Ltd before or during the bond application.

Mr K says he wanted an investment that would provide good interest and was assured by BG Ltd's website and he had discussions with the relationship manager that the bond was suitable for this purpose. He says both he had his wife invested their life savings into two separate bonds at around the same time in 2017.

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. Following action by the FCA, the lender went into administration in March 2020 - and B&G Plc went into administration shortly afterwards. As a result, Mr K 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 K underwent.

Certification

Mr K 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 K to select from "*EVERYDAY INVESTOR*", "*SELF CERTIFIED SOPHISTICATED INVESTOR*", "*ADVISED INVESTOR*" or "HIGH NET WORTH INVESTOR".

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

The appropriateness test

Having completed the certification, Mr K 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 K 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 K 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. Mr K has told us he does not ever remember receiving the Invitation Document.

The paper ISA application form

I have also seen the paper ISA transfer application form Mr K completed. This is signed and dated 4 September and so, from the available evidence, appears to have been completed after the online application. The form required Mr K to give his personal details, details of his existing ISA, bank details etc. It also included a section called "Understanding the IF ISA", which asked (with the options and Mrs K's answers following):

- How much knowledge do you have of investing? (none, some, expert) – "some"
- Do you understand that you may note be able to access your capital before the repayment date (yes, no) – "yes"
- Do you understand your capital is at risk? (yes, no) – "yes"
- Do you understand that investments in peer to peer loans are not protected by the Financial Service Compensation Scheme? (yes, no) – "yes"
- Are you investing more than 10% of your total wealth? (yes, no) – "no""

Gallium's response to Mr K's complaint

In April 2020, Mr K raised a complaint with Gallium and requested his money returned.

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

- The issuing 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 is not clear what documents or information Mr K 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 K referred his complaint to us, Gallium sent us submissions. In those submissions it said, in summary:

- As part of the application process, every prospective investor declared that they understood 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", and that they "have made investments in similar products in the last 30 months and/or [are] familiar with this type of investment".

- Investors were also 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.

- 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:

- The risks to investors were also clearly explained.

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

- 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.

- The Invitation Documents accurately record that Gallium is authorised and regulated in the UK by the FCA and that Gallium approved the document – but does not state that the investment itself, or any Basset & Gold entity, is regulated.
- Our investigator's view

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

- He 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.

- The application process – both in terms of the certification of Mr K as a "restricted investor" and the assessment of the appropriateness of the bond 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 K wouldn't have decided to invest or BG Ltd should have concluded that it shouldn't allow Mr K to invest. For these reasons, both cumulatively and individually, it was fair to uphold the complaint and for Gallium to compensate Mr K for the loss he has suffered.

Gallium's response to the view

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

summary: On the scope of Mr K's complaint:

- Mr K 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 K's complaint did not do that. It thought the case ought to have been dismissed on this basis.

On the certification process:

- Regardless of label, Mr K was required to confirm that he met the requirements of a restricted investor and confirmed that he did. If Mr K misrepresented that he fulfilled those criteria, it is a well-established legal position that he should be stopped from now seeking to take a position contrary to that representation. It would not be fair or reasonable to expect Gallium to anticipate that investors would incorrectly claim to satisfy the requirements of the declaration.

- It is not fair or reasonable to conclude that the use of the word “everyday” contributed to Mr K giving an incorrect declaration, by causing him to pay insufficient attention to the terms of the declaration.

- Mr K needed to click on a button to move to the next page. It is not credible to conclude that Mr K would wholly regard the terms of declarations required, in light of the clear markings that the declaration was important and needed to be properly considered.

- Mr K ought to be held to the declaration he made that he satisfied the requirements of a restricted investor.

- There is no reason to believe that including the remaining wording of the restricted investor declaration would have led Mr K to act differently.

On the appropriateness test:

- It disagrees that it failed to take sufficient steps to assess the appropriateness of the bond for Mrs K. The investigator’s view misconstrues the requirements of the applicable FCA rules at the time of investment and wrongly concludes that those requirements were not met.

- The fundamental question when assessing appropriateness is whether the client is able to understand the risks involved in relation to the product (COBS 10.2.1R).

- COBS 10.2.1R notwithstanding, depending on the circumstances, a business may conclude that knowledge alone is sufficient for the client to understand the risks involved in the product. Equally, a firm may infer knowledge from experience (COBS 10.2.6G).

- Depending on the nature of the client and product complexity and risks, it may be appropriate for the business to seek information on the types of investment with which the client is familiar, their history of similar investments, and their level of education and profession. But there is no requirement to seek all of that information in every case: it is required only to the extent it is relevant to assessing whether the client was able to understand the risks of the product (COBS 10.2.2R).

- The FCA has provided guidance on its expectations around appropriateness since Mr K 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.

- It understands that 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.

- In any event, Gallium did in fact carry out adequate testing of investors' relevant knowledge and experience. Gallium required prospective investors to pass the appropriateness test by correctly answering 100% of the questions asked. In completing the appropriateness test, information was obtained about an investor's knowledge and experience of the key characteristics of the bonds.

- Mr K also certified that he was an "everyday" investor, confirming "I have made investments in similar products in the last 30 months and/or I am familiar with this type of investment."

- Further, all investors also expressly confirmed that the bonds "may expose me to a significant risk of losing all of the money or other property invested" and they had read and understood the Invitation Document including the terms and conditions of the bonds and associated risks. The Invitation Document provided investors with full details of the nature of the investment and its risks.

- Taken together, 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, per COBS 10.2.1(2)R.

- The fact Mr K was able to invest demonstrates that he answered the appropriateness test correctly and gave the confirmations. Gallium was entitled to conclude that he had answered each question honestly and conscientiously, and in so doing had demonstrated he understood the investment opportunity.

- COBS 10.2.4R provides that "[a] firm is entitled to rely on the information provided by a client unless it is aware that the information is manifestly out of date, inaccurate or incomplete". Gallium had no such awareness.

- If Mr K misrepresented his knowledge and experience, in accordance with well-established legal principles explained above, he should be estopped from taking a position contrary to his own representation. If investors were willing to give false information in response to the appropriateness fest and the confirmations, there is no basis to suppose they would have given accurate information had further questions been asked.

On whether Mr K would have proceeded with the investment in any event:

- Mr K was notified in clear terms in January 2019 that there was a concentration risk arising from the high proportion of funds being lent to one entity, carrying out one type of lending. The risks this entailed were explained in clear terms to him and he was given the opportunity to seek to redeem his bonds but took no steps to do so.

- This provides evidence of how Mr K would have acted if presented with that material when deciding whether to invest. In any event, it demonstrates that Mr K 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, or even to explore the possibility. His loss is therefore caused by the decision not to exit the investment when that risk was made clear to him in 2019. Whilst Gallium does not accept that the promotional material was not fair, clear and not misleading; this demonstrates clearly that he would have continued to invest regardless.

- The investigator's view says Mr K wasn't prepared to take any risk with loss of capital. The available evidence does not support these conclusions.

- Mr K expressly acknowledged on numerous occasions that by proceeding with the investment he was at risk of losing the capital invested. Mr K cannot now be permitted to suggest that he would not have put his capital at risk, when he confirmed on numerous occasions that he understood and acknowledged that his capital was at risk.

- Nor can the Decision rationally conclude either that there is nothing in the evidence to suggest that Mr K wanted to take any risk with his money. Not only is there evidence to demonstrate that Mr K specifically acknowledged the risk to his money, but there is also an absence of any evidence to suggest that Mr K was not prepared to take that risk.

- The 6.12% interest rate evidences Mr K knew the investment was not risk free – the Bank of England Base Rate was below 1%, so it's not realistic to suggest he did not appreciate or accept the risk.

What I've decided – and why

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

As a preliminary point, I note there is some dispute from Gallium about what we should

be looking at when considering Mr K's complaint. Gallium says our investigator made findings on matters significantly beyond the scope of the complaint Mr K made. It also says complainants must establish a proper basis for a complaint about Gallium to be upheld and Mr K'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 complaint form Mr K completed when making a referral to us mainly refers to his investment loss. Mr K complaint concerns what he considers to be a

misinformation when the bond was sold to him by BG Ltd. He refers, primarily, to phone conversations he had with a representative of BG Ltd before applying to invest in the bonds, and to an advert he saw online before he spoke to BG Ltd. In short, his complaint is about events which led to him investing in the bond. In my view the points the investigator considered are within the scope of Mr K's complaint and are, in any event, points which it is appropriate for me to consider inquisitorially, given the nature of Mr K's complaint.

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

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 bond was a security or contractually based investment specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"). At the time Mr K made his investment, 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 K to invest in the bond, and had the direct effect of bringing about the transaction.

So I am satisfied Mr K's complaint – insofar as it relates to the bond application process - 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.

In this case I think the focus is on the acts or omissions of BG Ltd, as it was BG Ltd which was responsible for the sale of the bond. So, in the circumstances – keeping in mind what I say above about our jurisdiction being inquisitorial - I think it is appropriate to consider all the acts or omissions which relate to the sale of the bond. Although I only need to make findings on these to the extent it is necessary to reach a decision on what is fair and reasonable in the circumstances of this case.

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 K invested. B&G Plc's issuing of the bond and what B&G Plc did with the money once Mr K invested did not involve regulated activities.

The merits of Mr K's complaint

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

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 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.

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:*
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
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 her 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 her 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 him."

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 again note Gallium has 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 again had regard to the policy statement, and to Gallium's recollections of the two question and answer sessions.

I've 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

My decision, in summary is:

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

For these reasons – individually and cumulatively – my decision is that Mr K's complaint should be upheld. I am satisfied Mr K 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 K for his loss.

I have again set things out in more detail below.

The online application process

Having reviewed the available evidence, I think it is most likely that Mr K did initially complete an online application. While he does appear to have had some telephone contact with BG Ltd, from what I've seen I think he would have still been required to apply online first. So, I've examined the online application process to help me reach my decision.

There were a number of regulatory obligations which applied to the sale of the B&G Plc bond. 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. 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 again important to emphasise the bond Mr K invested in was not a straightforward product. Risk factors associated with the bond 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 – ratings agencies – carry out 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 bond was 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 document and it contains a lot of complex technical information which may not be readily understood by the average investor.

So the bond was complex, risky and specialist and this is why the bond 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 K, to be certified as being in one of four categories of investor in order to receive promotional communications relating to the bond. In this case, Mr K 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 am 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 K 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'."

But 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 considered the impact of these departures from the requirements of 4.7.10R.

As set out in the background above, Mr K 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 am 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 K 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 find this put undue emphasis on the "everyday investor" option and led consumers like Mr K 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 K 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. But I’m not persuaded. 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 think an “*everyday investor*” – particularly when described as a category to which “*anyone*” can belong - is an option Mr K 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 K 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.

Mr K did not qualify as a restricted investor. Mr K’s has told us he was investing his life savings at the time. He had no previous investment experience and he had only ever invested in cash based ISAs (one of which was being transferred into this investment). I also think it unlikely he was aware of the bond had significant risk associated with it and he had not made investments in similar products in the last 30 months. I am satisfied there is sufficient evidence to make a finding Mr K was unlikely to be aware of the significant risk associated with the bond.

I note Gallium’s view is that Mr K 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.

I acknowledge that the statement, confirmation and declaration did largely mirror what is set out in 4.7.10R and so Mr K did state, confirm and declare something which was not accurate. However, I am of the view it is unlikely Mr K knowingly gave a false statement. The money invested was significant to him – it was half his entire savings - and he had limited liquid assets otherwise. So, I think it unlikely that he had regard to the full detail of the statement, confirmation and declaration and chose to proceed having understood them in full. 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 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 am 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 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 he signed. The situation is quite different here, where Mr K is investing half of his entire and has no investment experience. Mr K’s

complaint is about what he generally describes as a “mis- sale”. And Mr K 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, in my view, Mr K was misled into giving them.

I think it is unlikely Mr K 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. I think, in the circumstances, the correct term would have made Mr K pause for thought. As mentioned, he had no investment experience and was investing a sum which was significant to his. I do not think in such circumstances he would have proceeded had he been told he was a “restricted” investor. As mentioned above, I think “restricted” has a very different meaning to “everyday”. The latter would have provided comfort to Mr K whereas the former would have made his 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 am satisfied if BG Ltd, acting on behalf of Gallium, had acted fairly and reasonably to meet Gallium’s regulatory obligations Mr K 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 K’s complaint on this basis alone. I have however, for completeness, gone on to consider the appropriateness test.

I note the paper ISA application form contained two further questions which are arguably relevant to a restricted investor classification:

- Are you investing more than 10% of your total wealth? (Mr K answered “no”)
- Do you understand your capital is at risk? (Mr K answered “yes”)

Gallium say this supports the arguments it has made around the confirmations and certifications provided Mr K – particularly the answer to confirm whether he was investing more than 10% of his total worth, and the warning given in section 8 in relation to the risk of investing more than that percentage. However, Mr K was only asked to complete the form after he’d completed the full online application process. So he would not have got to this point had he not certified himself to be a restricted (“everyday”) investor (and passed the appropriateness test, which I consider below). For the reasons I set out above and below I do not think Mr K could or should have got beyond the online application stage.

In any event, these questions were not posed for the purpose of classification, it appears (or at least not described as such). And I think the inaccurate answers Mr K gave were a product of him being misled during the “everyday” certification and being reassured during his interactions with BG Ltd. As with the online application, I think it unlikely Mr K knowingly gave a false statement.

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 K 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 K 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 find BG Ltd failed to ask for an appropriate amount of information about Mr K'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 K knew if the bonds were transferable, if the return was fixed, if their capital was secure, if the bonds could be converted to shares and the meaning of diversification. Nothing was asked about Mr K's experience. And if Mr K got a question wrong, he would be told his answer was wrong and prompted to reconsider it.

Even if Mr K 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.

I am of the view this falls a long way short of adequately testing whether Mr K had the knowledge to understand the risk associated with the bonds – particularly in circumstances where the multiple-choice options were limited to two and Mr K 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 K 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 K's application. I again acknowledge BG Ltd asked Mr K 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 K's experience, and additional information about his knowledge. However, I am of the view, even accounting for the declaration, an appropriate level of information was not asked for. I am also of the view, 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 note the paper ISA application form contained four questions about knowledge and Experience and Mr K gave the following answers:

- How much knowledge do you have of investing? (none, some, expert) – "some"
- Do you understand that you may note be able to access your capital before the repayment date (yes, no) – "yes"
- Do you understand your capital is at risk? (yes, no) – "yes"
- Do you understand that investments in peer to peer loans are not protected by the Financial Service Compensation Scheme? (yes, no) – "yes"

But this was completed after the appropriateness test was completed and I have seen no evidence to show this information was considered by BG Ltd or acquired for the purposes of an appropriateness test. It does not, in any event, meet the standards set out in 10.2.2R in my view.

I'm persuaded 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 K 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.

In its previous submissions Gallium referred 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 him to understand the risks involved in a product or service.*

I am of the view these were not such circumstances – not least because BG Ltd did not ask for an appropriate amount of information about Mr K'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. It does not however specify what guidance from the FCA it received, and I have seen no evidence to show any guidance provided to Gallium implied that it did not have to ask about Mr K's experience *at all.*

I have read the policy statement. I'm satisfied 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 K'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 K 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 K 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 K did not have the necessary experience and knowledge to understand the risks involved with the bond.

Mr K did not have *any* investment experience and I have seen no evidence to show he had anything other than a very basic knowledge of investments. As noted above, he has told us he had no investment experience and only invested her money in cash ISAs.

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.

Gallium says if Mr K answered one or more questions incorrectly that means he received the warning that the bonds may not be appropriate and elected to proceed anyway. But, if a warning was given, it was not given in a way which met COBS 10.3.1 R. 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 K 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 K wished to proceed, despite the warning.

I am of the view a warning which told Mr K clearly an investment in the bond was *not* appropriate for him would likely have put Mr K off proceeding further. That is a clear, emphatic statement which would have left Mr K 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 – and separately from any acceptance of a warning by Mr K - had BG Ltd given itself the opportunity to consider in the circumstances whether to go ahead with the transaction if Mr K wished to proceed, having asked for appropriate information about Mr K's knowledge *and* experience, it would have been fair and reasonable for BG Ltd to conclude it should not allow Mr K to proceed. Had Mr K 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 K 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 K wanted to, despite a warning (which, as noted, was not in any event given in the required terms or required way).

All in all, I am 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 K fairly or acting in his best interests. If it had acted fairly and reasonably to meet the relevant regulatory obligations when assessing appropriateness, Mr K would not have got beyond this stage. And I think it would be fair and reasonable to uphold Mr K's complaint on this basis alone. Even if I am wrong to say Mr K 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 K would 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

Gallium has again referred to the explanation of risks set out in the Invitation Document. However, I am of the view things need to be considered in the order in which Mr K would have been privy to them. Mr K could only have been privy to the Invitation Document after having completed the certification and appropriateness test. And, as I set out above, I do not think Mr K should have reached this point.
I acknowledge that it is possible Mr K may have seen the Invitation Document (although he doesn't recall doing so), as he was incorrectly certified as a restricted investor as a result of being misled by BG Ltd and the bond was 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 unlikely Mr K looked 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 am of the view Gallium cannot reasonably rely on the Invitation Document to say Mr K had an understanding of the bond and proceeded on that basis.

I think it is also important to say that an objective of the appropriateness test was to protect consumers such as Mr K 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 do not need to consider anything else (i.e. other than the application stages set out) Mr K 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 K 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 K?

I have considered all the points Gallium has made. However, for the reasons given, I am satisfied that if BG Ltd, on behalf of Gallium, had acted fairly and reasonably to meet its regulatory obligations Mr K could not – or would not - have proceeded to invest in the bond.

Mr K could not have satisfied the first or second conditions in COBS 4.7.7R in order to receive promotional communications relating to the bond. And even if I am wrong about the first condition Mr K 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 K to proceed.

So Mr K 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 K for the loss he has suffered as a result of making the investment.

Gallium says Mr K expressly acknowledged on numerous occasions that by proceeding with the investment he was at risk of losing the capital invested, and this is evidence Mr K would have proceeded to invest in the bond regardless of what it did. It adds that the high return offered reflected the fact capital was at risk and it is unrealistic to think that Mr K was not aware of this and prepared to take a risk with his capital.

Gallium has also referred again to the January 2019 update email. It says the wording of this notice was approved by the FCA as being appropriate wording to inform investors of the risk and it is, therefore, unreasonable to find that this notice was not adequate, or that it gave investors insufficient warning.

I do not think it would be fair to say Mr K should not be compensated on this basis. Firstly, he should not have been able to proceed, had Gallium acted fairly and reasonably to meet its regulatory obligations. Secondly, for the reasons I have given, I am not in any event persuaded Mr K did proceed with a full understanding of the risks associated with the bond.

As noted above, I am not persuaded Mr K looked at the full detail of the acknowledgements he gave, and I think he was reassured by the “everyday” investors description associated with them. And, given what Mr K has said about his understanding of the bond, and his lack of investment experience, I am not persuaded he understood from the relatively high return on offer that the investment involved significant risk.

Turning to the 2019 email, what I am considering here is the impact of the warning in the specific circumstances of Mr K complaint and what impact it actually had. I do think the wording of this email was largely reassuring and it is fair to consider that it had very little impact (Gallium says that only one of 1,700 investors who received this email took any action). I have not seen any further evidence on the FCA’s approval of this communication but, even if it was approved as an adequate general warning, I need to consider it in the context of the facts of this individual complaint. And I do not think it follows from any approval by the FCA that it would not be fair to ask Gallium to pay compensation in circumstances such as those in this complaint.

As mentioned, I am not persuaded Mr K 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. And I think this is sufficient reason for me to find it would not be fair to say the January 2019 update means Mr K should not be compensated for the loss he suffered.

Therefore, I am satisfied it is fair to ask Gallium to compensate Mr K.

In conclusion

Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it is fair and reasonable to uphold the complaint. I am satisfied, for all the reasons given, that Mr K would not have invested in the bond 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 K for the loss he has suffered.

Putting things right

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

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

What should Gallium do?

To compensate Mr K fairly, Gallium must:

- Compare the performance of Mr K's investment with that of the benchmark shown below and pay the difference between the fair value and the actual value of the investment. If the actual value is greater than the fair value, no compensation is payable.

- Gallium should also pay interest as set out below.

- It is also clear that Mr K has been caused some distress and inconvenience by the loss of his investment. Given his circumstances of investing his life savings, this is money Mr K cannot afford to lose, nor is it money he is able to replace. I do not believe Mr K foresaw such a drastic loss and I recognise the considerable worry he will have felt when B&G Plc failed. He has also told us he is wasn't in good health at the time. I consider a payment of £350 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
B&G Plc 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 K 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 K 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 K 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 K's circumstances and objectives. It does not mean that Mr K 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 the 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 K to accept or reject my decision before 23 February 2023.
Daniel Little
Ombudsman