DRN-3866880

Complaint

Mr and Mrs Y complain about investments they made in three bonds issued by Basset & Gold Plc ("B&G plc"). In short, they say the bonds were mis-sold to them. They say they were misled about the level of regulatory and Financial Services Compensation Scheme (FSCS) protection associated with the bonds. And they say they were also misled about how the money they invested in the bonds would be used. They say most of the misleading information was given to them during phone conversations with a representative of Basset Gold Limited ("BG Ltd") but also in the Investor Terms and Conditions for the bonds and an online advert, which described the bonds as "pensioner bonds".

Background

The B&G Plc Bond

Mr and Mrs Y invested in a B&G Plc Fixed Monthly Income IFISA Bond (3 years) and Fixed Monthly Income Bond (5 years). Sales of the bonds were dealt with by BG Ltd, a separate business from B&G Plc, the issuer of the bonds. BG Ltd arranged applications for investments in the bond. And it was responsible for advertising/marketing the bond. Potential investors were also able to call BG Ltd, to discuss the bond.

The bonds were non-readily realisable and therefore there were rules restricting who they could be promoted to and on how to test whether the investment was appropriate for the potential investor. BG Ltd's online application process took steps to meet the obligations created by these rules. I have set out details of the application process below and will set out, and consider, the 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 and Mrs Y's investment. But both were appointed representatives of Gallium Fund Solutions Limited ("Gallium"), which was an FCA authorised business.

B&G Plc and BG Ltd were appointed representatives of Gallium from 17 February 2017 to 28 February 2018. As such, Gallium is responsible for a complaint about either business which is about the acts and omissions which took place during this time, for which Gallium accepted responsibility.

Gallium also played a role in relation to the 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 (such as Google and Facebook adverts) issued by BG Ltd.

Gallium has, at times, been represented by its legal representative. For simplicity, I will refer to Gallium throughout and any such reference should be taken to mean Gallium or its legal representative.

Mr and Mrs Y's investments in the bonds

The complaint concerns two £20,000 investments Mr and Mrs Y made in a 3 Year Fixed Monthly Income IFISA Bond and a £50,000 investment they made in a 5 Year Fixed Monthly Income Bond. The certificates issued for these bonds were dated 15 June 2017 and 16 June 2017 respectively.

I understand Mr and Mrs Y had previously made a £50,000 investment in a bond a few months earlier, but this is not part of their complaint as they surrendered this bond after one year and received a return on their invested capital.

Mr and Mrs Y say, before making the investments subject to complaint, Mr Y I spoke to a "*sales agent*" at BG Ltd after seeing an advert on social media. They say Mr Y questioned the agent at length, as they were nervous about scams. They say the agent told Mr Y B&G Plc invested in peer to peer loans and SME companies. They say Mr Y was also told B&G Plc/BG Ltd was regulated by the FCA and protected by the FSCS in the event of B&G Plc being unable to repay their investment, and this was also stated in the Investor Terms and Conditions.

Mr and Mrs Y say Mr Y checked and found out that B&G were indeed an appointed representative of Gallium and they were happy to invest thinking their money was being looked after in a responsible manner and duly regulated. And they never received or indeed had heard of the Invitation Document Gallium refers to.

Mr and Mrs Y were both retired at the time of investment and their total income of around £1700 per month came from pensions. They say they were having to dip into savings each month to pay bills and all of the money they invested in the bonds was from a recent inheritance, and their investment objective was to get extra income to supplement their pensions.

Mr and Mrs Y say their existing investments were £100,000 in Premium Bonds, £130,000 in fixed deposits and £15,000 in shares ISAs (which they say were invested in bonds) and two ISAs with National Savings and Insurance of £20,000 each – so around £285,000 in total.

The certificates for the three bond investments Mr and Mrs Y made were issued to them by BG Ltd on 17 July 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, called Uncle Buck. Following action by the FCA, Uncle Buck went into administration in March 2020 - and B&G Plc went into administration shortly afterwards. As a result, Mr and Mrs Y have not had their invested capital returned to them (although they did receive the interest payments on the bond up until B&G Plc went into administration).

The application process

I have not seen any contemporaneous evidence relating to Mr and Mrs Y's application(s). Gallium says applications could only be made online, by following the process on BG Ltd's website. However, it has not provided us with any detail about Mr and Mrs Y's application other than a spreadsheet recording information held on BG Ltd's system as follows:

High Net Worth Investor	*2017-06-25 14:03:52*
Completed Investor Questionnaire	*2017-06-25 14:03:40*
B&G T&C Confirmed	*2017-06-25 14:01:39*
KYC Completed	*2017-06-25 14:03:05*

When Mr and Mrs Y referred their complaint to us we asked for copies of any call recordings BG Ltd held, but we have not been provided with recordings of any conversations Mr and Mrs Y had with BG Ltd before or during the bond applications.

Mr and Mrs Y say they don't think that there was any application procedure – they just sent cheques to BG Ltd. They also say they were not asked what type of investor they were when they first made their investments – but they were asked about this around 12 months later. And at that time they said they were high net worth investors, but were in this category only because of the inheritance they had received (which, as mentioned, was the source of the money they invested in the bonds).

I have seen screen prints of each stage of the application process for those who made applications online, using BG Ltd's website.

Certification

Potential investors 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 and Mrs Y to select from "*EVERYDAY INVESTOR*", "*SELF CERTIFIED SOPHISTICATED INVESTOR*", "*ADVISED INVESTOR*" or "HIGH NET WORTH INVESTOR".

Mr and Mrs Y say that, at some point, they said they were high net worth investors. On the online application "HIGH NET WORTH INVESTOR" was described as follows:

"What Is A High Net Worth Investor?

If you have earned more than £100,000 a year consistently for the past 12 months or have net assets of more than £250,000, this category may be applicable to you.

Having selected this profile, potential investors were then asked to make a statement and declaration as follows:

High Net Worth Investor Statement

I make this statement so that I can receive promotional communications which are exempt from the restriction on promotion of non-readily realisable securities and investments because at least one of the following applies to me:

I had, throughout the immediately preceding financial year, an annual income to the value of £100,000 or more;

I held, throughout the immediately preceding financial year, net assets to the value of £250,000 or more.

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 benefit (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.

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."

At the bottom of the page it said:

"By clicking NEXT you acknowledge, understand, and agree with the investor declaration."

The appropriateness test

If they completed the certification, potential investors 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."

As mentioned, I have seen no evidence Mr and Mrs Y completed this process, so do not know if they answered the questions correctly – and, if so, whether they answered any questions incorrectly initially and changed their answers, having seen this message.

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

Gallium's response to Mr and Mrs Y's complaint

Gallium did not uphold Mr and Mrs Y's complaint. It said, in summary:

- Gallium is not able to pay compensation in respect of B&G plc's failure to repay the Bonds. This is because issuing the Bonds and the 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.

- The Invitation Document stated that B&G plc was an unlisted company, the bonds were unlisted and that investing in an unlisted company carries substantial risk. The Invitation Document also stated that neither B&G plc nor Gallium were providing investment advice.

- The Invitation Document said B&G plc was committing its funds to investment in peer-to-peer (P2P) and marketplace lending markets which contain certain risks described in the Invitation Document. It is satisfied that the arrangements with the pay day lender Uncle Buck fall within the categories of lending activity stated in the Invitation Document. Uncle Buck was involved in FCA-regulated online lending to borrowers in the high cost short-term credit sector.

- It understands that B&G plc intended to diversify its lending activities to include lending to other borrowers and that the statements to that effect in the Invitation Document were accurate at the time they were made.

- It is not clear what documents or information Mr and Mrs Y 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 and Mrs Y referred their complaint to us, Gallium sent us submissions. In those submissions it said, in summary:

- All sales of the bond were completed on an execution only basis. No advice was given, by Gallium or BG Ltd to potential investors. The Invitation Document set out that Gallium was not providing any advice.

- Further, the Invitation Document made clear to potential investors that no one from BG Ltd was authorised to give advice or information outside of that contained in the Invitation Document.

- The Invitation Document gave extensive information and warnings about the bonds and the risks of investing. Having confirmed that they read and understood that

information as part of agreeing to invest, Mr and Mrs Y cannot fairly be said to have been mis-sold their investment by Gallium.

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

Our investigator's view

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

- It appears Mr and Mrs Y were certified as High Net Worth Investors. But there is no evidence B&G Ltd asked any further questions or obtained any evidence to check Mr and Mrs Y were indeed high net worth investors.

- However, Mr Y has explained that they selected this category as they had recently received some inheritance. He has also said they held existing investments totalling approximately £245,000.

- Taking this into account, even though B&G Ltd asked no further questions, it seems Mr and Mrs Y may have met the requirements of the first condition to be an 'eligible investor' for the bonds, as high net worth investors.

- However, the appropriateness assessment didn't fairly meet the requirements under COBS 10. The outcome of the questions asked would not have enabled B&G Ltd to come to a safe conclusion on whether the investment was appropriate for Mr and Mrs Y.

- Had a fair and reasonable appropriateness assessment been carried out in line with the rules, it's likely this would've concluded the investment was inappropriate for Mr and Mrs Y due to a lack of knowledge and experience in the relevant investment field and appreciation of the risks involved.

- She also thought the promotional material for the Bonds was misleading.

- She did not think Mr and Mrs Y would have proceeded to invest in the bonds, had an adequate appropriateness test been carried out, and the promotional material not been misleading.

Gallium's response to the view

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

- Mr and Mrs Y had not explained why they thought the bonds had been mis-sold. It appreciated our inquisitorial remit, but it felt we had gone significantly beyond the scope of the complaint made. It thought the case ought to have been dismissed as Mr and Mrs Y had not established a proper basis for a complaint.

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

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

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

- The FCA has provided guidance on its expectations around appropriateness since Mr and Mrs Y made their investments, 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.

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

- Mr and Mrs Y confirmed they had invested in similar products within the last 30 months, that they were familiar with the type of investment, and had accepted other confirmations along the lines that bond might expose them to significant risk of losing all their money.

- Mr and Mrs Y also confirmed they had read and understood the Invitation Document, inclusive of the risk warnings on pages 27 – 31 of that document.

- If Mr and Mrs Y got any of the appropriateness questions wrong, they would have been presented with a warning. If they then changed an answer to the correct one, they would have been considered as correcting their knowledge.

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

- Mr and Mrs Y had already invested in a Basset & Gold bond in April 2017. When Mr

and Mrs Y invested in the bonds in June 2017 they did in fact have prior experience of investing in the same type of product. That fact would have been known to Gallium. COBS 10.2.5G permits a firm to use information already in its possession when assessing appropriateness.

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

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

- The view suggests Mr and Mrs Y decided to invest because of "extra-layers of security, in particular, FCA authorisation, potential recourse to the FSCS…". The view does not suggest that the promotional material on these points was anything other than fair, clear, and not misleading. For the avoidance of doubt, the Invitation Document provided the correct information on these issues, which was presented in a way which was fair, clear and not misleading.

- Though our investigator said Mr and Mrs Y wanted to achieve a reasonable return without taking any risk, the evidence does not support this. Mr and Mrs Y expressly acknowledged on numerous occasions that by proceeding with the investment they were at risk of losing the capital invested.

- The view also indicates that Mr and Mrs Y had investments in other products where their capital was at risk. It says Mr and Mrs Y hold £15,000 in shares. It is therefore incorrect to conclude that Mr and Mrs Y would not have invested in a product which put their capital at risk.

- The 6.12% and 7.46% interest rates evidences Mr and Mrs Y knew the investment was not risk free – the Bank of England Base Rate was only 0.25% so it's not realistic to suggest they did not appreciate or accept the risk. Our investigator had misunderstood the risk-reward nature of securities markets and if every investor who had acknowledged their capital was at risk were to become entitled to capital protection this would bring about the end of retail participation in investment markets.

My provisional decision

I recently issued a provisional decision on this complaint. I concluded Mr and Mrs Y's complaint should be upheld.

Gallium asked for an extension of time to respond to the provisional decision, but did not respond by the extended deadline. Mr and Mrs Y responded to say they accepted the provisional decision.

As I have not received any further submissions from either party, and have not been persuaded to depart from my provisional findings, I have repeated my provisional findings below – and have not therefore included any further detail of them in this background summary.

My findings

As a preliminary point, I note there is some dispute from Gallium about what we should be looking at when considering Mr and Mrs Y's complaint. Gallium says our investigator made findings on matters significantly beyond the scope of the complaint Mr and Mrs Y made. It also says complainants must establish a proper basis for a complaint about Gallium to be upheld and Mr and Mrs Y'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.

Mr and Mrs Y's complaint concerns what they consider to be a mis-sale of the bonds by BG Ltd. They refer, primarily, to phone conversations they had with a representative of BG Ltd before applying to invest in the bonds. And they refer to an advert they saw before they spoke to BG Ltd and to a document given to them before they applied - the Investor Terms and Conditions. In short, their complaint is about events which led to them investing in the bond. In my view the points the investigator considered are within the scope of Mr and Mrs Y's complaint and are, in any event, points which it is appropriate for me to consider inquisitorially, given the nature of Mr and Mrs Y's complaint.

For completeness, I have first considered all the available evidence and arguments to decide whether we can consider Mrs M'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 and Mrs Y made their 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 and Mrs Y to invest in the bond, and had the direct effect of bringing about the transaction.

So I am satisfied Mr and Mrs Y's complaint 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.

The merits of Mr and Mrs Y'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 relates to. 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

At the time, COBS 4.7.7R said:

(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.

On High Net Worth Investors COBS 4.12.6R said:

A certified high net worth 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 (as per 4.7.9R (2) (a) any references to "*non-mainstream pooled investments*" must be replaced with references to "*non-readily realisable securities*" in this case):

"*HIGH NET WORTH INVESTOR STATEMENT*

I make this statement so that I can receive promotional communications which are exempt from the restriction on promotion of non-mainstream pooled investments. The exemption relates to certified high net worth investors and I declare that I qualify as such because at least one of the following applies to me:

I had, throughout the financial year immediately preceding the date below, an annual income to the value of £100,000 or more. Annual income for these purposes does not include money withdrawn from my pension savings (except where the withdrawals are used directly for income in retirement).

I held, throughout the financial year immediately preceding the date below, net assets to the value of £250,000 or more. 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; or

(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-mainstream pooled investments.

Signature:

Date:"

And the guidance at COBS 4.12.9G said:

(1) A firm which wishes to rely on any of the certified high net worth investor exemptions (see Part I of the Schedule to the Promotion of Collective Investment Schemes Order, Part I of Schedule 5 to the Financial Promotions Order and COBS 4.12.6 R) should have regard to its duties under the Principles and the client's best interests rule. In particular, the firm should take reasonable steps to ascertain that the retail client does, in fact, meet the income and net assets criteria set out in the relevant statement for certified high net worth investors.

(2) In addition, the firm should consider whether the promotion of the non-mainstream pooled investment is in the interests of the retail client and whether it is fair to make the promotion to that client on the basis that the client is a certified high net worth investor, having regard to the generally complex nature of non-mainstream pooled investments. A retail client who meets the criteria for a certified high net worth investor but not for a certified sophisticated investor may be unable to properly understand and evaluate the risks of the non-mainstream pooled investment in question.

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"

COBS 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 she provides insufficient information regarding her 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 her.

COBS 10.3.3G

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

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

Having taken careful account of these relevant considerations, to decide what is fair and reasonable in the circumstances, and given careful consideration to all Gallium has said, I have concluded Mr and Mrs Y's complaint should be upheld.

My decision, in summary:

- I think it is more likely than not Mr and Mrs Y did complete at least one online application process.
- However, Mr and Mrs Y did not meet the income and net assets criteria set out in the relevant statements for certified high net worth investors and, had Gallium undertaken the classification properly and taken reasonable steps to check Mr and Mrs Y met the criteria, it ought to have known this.
- Mr and Mrs Y could not have fallen under any of the alternative categories either.
- 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 bonds were not an appropriate investment for Mr and Mrs Y. In the circumstances Mr

and Mrs Y would either not have proceeded or, acting fairly and reasonably, BG Ltd should have concluded it should not promote the bond to Mr and Mrs Y.

- I am satisfied Mr and Mrs Y 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 and Mrs Y for their loss.

The promotion of the bonds to Mr and Mrs Y

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

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

In the market for corporate bonds listed on the main exchanges, institutions – 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 bonds were not listed on a recognised exchange, and so could not be readily sold (in fact it seems to have been a condition of the investment that it could not be transferred). And, as Gallium has pointed out, the Invitation Document which set out the details of the bond was over 40 pages long. I have read the document and it contains a lot of complex technical information which may not be readily understood by the average investor.

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

Mr and Mrs Y's applications

In this case there is limited contemporaneous evidence of Mr and Mrs Y's applications. Neither Gallium's response to the complaint nor the information provided to us by the administrators of BG Ltd have any detail of applications beyond what is recorded on a spreadsheet, set out above, which only appears to refer to one application.

It is Mr Y's recollection that he and Mrs Y were categorised a High Net Worth Investors – albeit after they had invested. That recollection is partly consistent with the information which has been provided to us, which suggests Mr and Mrs Y were each categorised as High Net Worth Investors on 25 June 2017, around ten days after the investments were made (based on the dates shown on the bond certificates). I say partly consistent because Mr and Mrs Y's recollection is of a much longer gap (12 months).

Mr and Mrs Y also say they don't think that there was any application procedure – they just sent cheques to BG Ltd.

While I appreciate Mr Y's recollection differs I think it more likely than not Mr and Mrs Y did complete at least one online application process on BG Ltd's website. That would be consistent with Gallium's general explanation of how investments were made and what we have seen in practice in the large number of complaints we have seen about Gallium and these bonds. So I have considered the complaint on that basis.

The evidence does suggest the online application process(es) might have been done retrospectively i.e. after the investment had been made. But I do not think this, in itself, is material to the outcome of this complaint, even though it is not consistent with what the rules require, as if Mr and Mrs Y did (by assessments and processes which met the requirements of the relevant rules) meet the two conditions set out in COBS 4.7.7R I do not think the short delay impacts this.

Certification

The first condition set out in COBS 4.7.7R required a retail client, such as Mr and Mrs Y, to be certified as being in one of four categories of investor in order to receive promotional communications relating to the bond.

The wording used by BG Ltd for the High Net Worth Investor category mirrors the wording set out at 4.12.6R and therefore rightly asks about *individual* circumstances. However, as I have no evidence of what was done at the time I do not know if both Mr and Mrs Y were asked individually to make the High Net Worth certification and therefore each gave a statement and declaration. Or whether they gave the statement and declaration jointly, or made joint and individual statements and declarations. But, in any event, the rules required assessment of their individual positions. And this is something which should have been understood by BG Ltd and it, in turn, should have ensured it was understood by Mr and Mrs Y. It should also have informed the reasonable checks BG Ltd should have made to ensure Mr and Mrs Y each met the definition of High Net Worth Investor.

Had Gallium correctly explained the position – and ensured Mr and Mrs Y understood it – I think it would have been apparent neither Mr nor Mrs Y could meet the High Net Worth Investor definition as the total of their qualifying assets was around £285,000 and their incomes were significantly less than £100,000. The inheritance they had received was not large enough to change this position and had not in any event been held for all of the previous financial year – it was a recent inheritance.

In these circumstances I think it unlikely Mr and Mrs Y would have given the statement and declaration as they would have realised they could not meet the High Net Worth Investor definition.

In the (in my view) unlikely event Mr and Mrs Y still gave the statement and declaration with a full understanding of the position (i.e. that they each had to individually meet the definition of High Net Worth Investor) Gallium should still have carried out reasonable checks to ensure they did meet the definition. And such checks would have quickly revealed they did

not. Even a cursory check would have revealed they did not each have net assets to the value of £250,000 or more or income in excess of £100,000 throughout the previous financial year.

So there should have been no basis on which Mr and Mrs Y could proceed as High Net Worth Investors.

I note there was additional wording (to the High Net Worth statement set out at 4.12.6R) in the statement and declaration, as follows:

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."

If Mr and Mrs Y completed the online application process it is reasonable to assume they clicked "next" to *acknowledge, understand, and agree with the investor declaration*. But I do not think this offers a basis on which things could have proceeded – this additional wording does nothing to satisfy the High Net Worth Investor definition.

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 in my view the case law Gallium has referred to is quite different to the facts of this case. The Bank of Leumi v Wachner case, for example, relates to circumstances where Ms Wachner was clearly a wealthy, sophisticated investor with lots of experience of previous similar investments - and in that situation the court decided that it was fair for the business to rely on the professional client declaration made and that it was likely Ms Wachner did understand the papers she signed. The situation is quite different here, where Mr and Mrs Y have limited investment experience and were investing in what they appear to have understood was a "pensioner bond", to supplement thier pension income.

In my view - notwithstanding what I say about neither Mr nor Mrs Y meeting the definition of High Net Worth Investor - Gallium should also have considered whether the promotion of the bonds was in the interests Mr and Mrs Y and whether it is fair to make the promotion to them on the basis they were certified high net worth investors. That would have been a fair and reasonable step to take, consistent with the regulatory guidance at COBS 4.12.9 G (2). And had such a step been taken the only reasonable conclusion that could have been reached would be that it was *not* fair or in the interests Mr and Mrs Y to make the promotion based on them being certified high net worth investors. Such a step, if taken reasonably, would have revealed Mr and Mrs Y may have been unable to properly understand and evaluate the risks of the bonds.

This is a further basis on which things should not have proceeded based on Mr and Mrs Y being certified high net worth investors.

I think it unlikely Mr and Mrs Y would have described either of themselves as a "self-certified sophisticated investor", "advised investor" or "restricted investor" as it would have been clear from the descriptions of those categories (if given in a way which reflected how they are set out in the FCA rules) that they 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 and Mrs Y 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 and Mrs Y's complaint on this basis alone. I have however, for completeness, gone on to consider the appropriateness test.

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 and Mrs Y to provide information regarding their 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 and Mrs Y did have the necessary experience and knowledge in order to understand the risks involved (the second limb of the rule). As with the High Net Worth Investor category considered above this is an *individual* test and so should have been applied to Mr and Mrs Y individually.

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"

In my view BG Ltd failed to ask for an appropriate amount of information about Mr and Mrs Y'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)*". Under this section BG Ltd asked five questions which tested knowledge. These questions asked whether Mr or Mrs Y 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 or Mrs Y's experience. And if Mr or Mrs Y got a question wrong, they would be told their answer was wrong and prompted to reconsider it.

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

Gallium says if Mr or Mrs Y answered all these questions correctly that demonstrates that they did understand the investment. I do not agree. This falls a long way short of adequately testing whether Mr or Mrs Y 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 or Mrs Y were 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 or Mrs Y simply understood money could be lost – but whether they were able to understand how likely that might be and what factors might lead to it happening.

Nor do I think it was reasonable to rely on the statement and declaration given during the previous stage of Mr and Mrs Y's application. I acknowledge BG Ltd asked Mr and Mrs Y 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"*. But, even accounting for the declaration, an appropriate level of information was not asked for.

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 or Mrs Y had the necessary experience and knowledge in order to understand the risks involved with investment in the bond. But it was not in a position to make such an assessment, based on the information it obtained.

Gallium has 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.*

In my view these were not such circumstances – not least because BG Ltd did not ask for an appropriate amount of information about Mr or Mrs Y'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. But I have seen no evidence to show any guidance provided to Gallium implied that it did not have to ask about Mr and Mrs Y's experience *at all.*

I have read the policy statement. And in my view 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 – as Gallium did not ask for sufficient information about Mr and Mrs Y's knowledge, it was not in a position to assess whether their knowledge alone was sufficient.

Gallium also suggests the FCA has provided guidance on its expectations around appropriateness since Mr and Mrs Y made their investments 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 or Mrs Y been asked for appropriate information about their knowledge *and* experience - the only reasonable conclusion BG Ltd could have reached, having assessed this, was that neither Mr or Mrs Y had the necessary experience and knowledge to understand the risks involved with the bonds.

Mr and Mrs Y did not have *any* experience of investments like the bonds and I have seen no evidence to show they had anything other than a limited knowledge of investments.

Gallium says the fact Mr and Mrs Y had already invested in a bond a few months earlier meant they did in fact have prior experience of investing in the same type of product and COBS 10.2.5G permitted it to use information already in its possession when assessing appropriateness. I have however seen no evidence to show Gallium did use information already in its possession (the online application process makes no provision for this) and, in any event, having held another bond for a few months prior to investing in the bonds subject to complaint cannot reasonably be considered meaningful experience, insofar as it would enable them to understand the risks involved.

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.

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 or Mrs Y 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 or Mrs Y wished to proceed, despite the warning.

A warning which told Mr or Mrs Y clearly an investment in the bonds was *not* appropriate for them would likely have put them off proceeding further. That is a clear, emphatic statement which would have left them in no doubt the bonds were not an appropriate investment for them. And they both 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 and Mrs Y - had BG Ltd given itself the opportunity to consider in the circumstances whether to go ahead with the transaction if Mr and Mrs Y wished to proceed, having asked for appropriate information about Mr and Mrs Y's knowledge *and* experience, it would have been fair and reasonable for BG Ltd to conclude it should not allow Mr and Mrs Y to proceed. Had Mr and Mrs Y been asked for appropriate information about their knowledge *and* experience this would have shown they may not have the capacity to fully understand the risk associated with the bond. As mentioned, I have seen no evidence to show Mr and Mrs Y 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 and Mrs Y 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 remain satisfied BG Ltd, acting on behalf of Gallium, did not act fairly and reasonably when assessing appropriateness. By assessing appropriateness in the way it did it was not treating Mr and Mrs Y fairly or acting in their best interests. If it had acted fairly and reasonably to meet the relevant regulatory obligations when assessing appropriateness, Mr and Mrs Y would not have got beyond this stage. And I think it would be fair and reasonable to uphold Mr and Mrs Y's complaint on this basis alone. Even if I am wrong to say Mr and Mrs Y would not have said they were each High Net Worth Investor and given the statement and declaration relating to this (or that reasonable checks by BG Ltd would have revealed they were not High Net Worth Investors) if BG Ltd, on behalf of Gallium, had acted differently Mr and Mrs Y 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 remain of the view things need to be considered in the order in which Mr and Mrs Y would have been privy to them. Mr and Mrs Y 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 and Mrs Y should have reached this point.

I acknowledge that Mr and Mrs Y may have seen the Invitation Document, although they do not recall seeing it, as they were (incorrectly) assessed as being eligible to receive it. However, considering the available evidence, I think it unlikely Mr and Mrs Y looked at the Invitation Document in any detail if they did see it and did not have the capacity to fully understand it even if they did look at it in detail.

I think it is also important to say that an objective of the appropriateness test was to protect consumers such as Mr and Mrs Y 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.

So in my view Gallium cannot reasonably rely on the Invitation Document to say Mr and Mrs Y had an understanding of the bond and proceeded on that basis.

The website and any other marketing material

For similar reasons to those given above, I remain of the view I do not need to consider anything else (i.e. other than the application stages set out) Mr and Mrs Y 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 and Mrs Y 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.

I have noted the point Mr and Mrs Y have made about the Terms and Conditions and their view these misled them as to the level of regulatory protection available to investors in the bond. However, I do not think it is necessary to consider this either, for the same reason.

Is it fair to ask Gallium to compensate Mr and Mrs Y?

I am satisfied that if BG Ltd, on behalf of Gallium, had acted fairly and reasonably to meet its regulatory obligations Mr and Mrs Y could not – or would not - have proceeded to invest in the bonds.

Mr and Mrs Y 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 and Mrs Y 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 they had said they 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 them to proceed.

So Mr and Mrs Y 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 and Mrs Y for the loss they have suffered as a result of making the investment.

Gallium says Mr and Mrs Y expressly acknowledged on numerous occasions that by proceeding with the investment they were at risk of losing the capital invested, and this is evidence Mr and Mrs Y 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 and Mrs Y were not aware of this and prepared to take a risk with their capital. Gallium also refers to Mr and Mrs Y holding investments in shares as evidence they were willing to take risk.

I do not think it would be fair to say Mr and Mrs Y should not be compensated on this basis. Firstly, they should not have been able to proceed, had Gallium acted fairly and reasonably to meet its regulatory obligations. Going beyond that, I understand what Mr and Mrs Y described as “shares” ISAs were in fact invested in bonds. And, in any event, if they were willing to take risks with that sum of money (£15,000) it does not follow they were willing to take those risks with a much larger sum, which was being invested to increase their income. There is no evidence they were willing to accept significant risk in order to achieve this – in fact they say they were concerned about risk when discussing the bonds with BG Ltd.

Given what Mr and Mrs Y have said about their understanding of the bonds, and their limited investment experience, I am persuaded by their testimony they relied on assurances from BG Ltd’s representative that the investment did not involve significant risk. In these circumstances, I am not persuaded they understood from the relatively high return on offer – or otherwise – that the investment involved significant risk.

Gallium has also referred to the January 2019 update email.

I 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). And I do not think it would be fair to ask Gallium to pay no, or less, compensation in circumstances such as those in this complaint. I am not persuaded Mr and Mrs Y had the capacity to fully understand the risks associated with the bonds – and they were 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.

I am therefore satisfied it is fair to ask Gallium to compensate Mr and Mrs Y.

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 and Mrs Y would not have invested in the bonds had BG Ltd, on behalf of Gallium, acted fairly and reasonably to meet its regulatory obligations. And I think it is fair to ask Gallium to compensate Mr and Mrs Y for the loss they have suffered.

Fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr and Mrs Y in as close to the position they would probably now be in if they had not invested in the bonds.

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

What should Gallium do?

To compensate Mr and Mrs Y fairly, Gallium must:

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

- Gallium should also pay interest as set out below.

- It is also clear that Mr and Mrs Y have been caused some distress and inconvenience by the loss of their investment. Given their circumstances, this is money Mr and Mrs Y cannot afford to lose, nor is it money they are able to replace. I do not believe Mr and Mrs Y foresaw such a drastic loss and I recognise the considerable worry they will have felt when B&G Plc failed. I consider a payment of £500 is fair compensation for the upset caused.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From (“start date”)	To (“end date”)	Additional interest
B&G Plc bond x 3	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 and Mrs Y agree 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 and Mrs Y that they repay to Gallium any amount they 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 and Mrs Y wanted to achieve a reasonable return without any significant risk to their capital.

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

For the reasons given, I uphold the complaint. Gallium Fund Solutions should calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs Y and Mr Y to accept or reject my decision before 17 January 2023.

John Pattinson
Ombudsman