DRN-5790239

The complaint

Miss K complains about the arrangement of an investment in a property development, “C”. Miss K’s complaint has been brought on her behalf by a professional representative. The key points it has made, in summary, are:

- An appointed representative (AR) of Gallium Fund Solutions Limited (”Gallium”) called Brickowner Limited (“Brickowner”) arranged the investment and, when doing so, failed to meet its regulatory obligations.
- The investment was subject to rules restricting who it could be sold to, which meant it could and should not have been sold to Miss K.
- It was sold to Miss K on the basis of an inadequate application process on the AR’s website, which breached those rules.
- This also amounted to a breach of the Principles for Businesses, which set out requirements to act with due care and treat customers fairly.

Background

Brickowner’s business

Brickowner was an AR of Gallium from 11 August 2016 to 17 September 2019.

At the time of the events subject to complaint, Brickowner operated primarily online. Its business was property investments, offered through investment in Brickowner Investments Limited, and its website sought to introduce potential investors to a number of property investments it had available at any given time.

An undated document provided by Gallium entitled “*Brickowner Investments Limited Generic Information Memorandum*” explains the structure of the investments as follows:

“*Each series of shares issued by the Company* [Brickowner Investments Limited] *will relate to a property investment opportunity, including indirect participation in property-related investments, (a Property) that is described in the Properties section of the Brickowner website —www.brickowner.corn/properties. Information that is specific to the specific Share classes and underlying assets is contained on the website and information that applies to all Share classes is contained in this Information Memorandum*

The Company will issue different classes of Shares for £1 each that will be allocated to a specific property investment opportunity. For example, £1 X Shares could be invested into Property Y or invested into Property Fund Z. In this example, X could be any description that distinguishes those shares from other share classes the Company has issued in respect of other Properties, so that investor returns only relate to the specific Property they have identified. Each of the Share classes currently share some common features, which are set out below.

Each £1 X Share is a block of 100 shares, consisting of99 2% Cumulative Redeemable Preference X Shares of 1 pence each (CRPS) and 1 X Ordinary Share of 1 pence in the Company. The £1 X Shares are referred to in this Information Memorandum as shares. The proceeds of issue of the Shares will be limited to investing in the Property and paying associated costs.

Each block of 99 CRPS and 1 X Ordinary Share cannot be split. If an investor wishes to sell their holding on the Brickowner secondary market, each 100-share block (or £1 Share) must be sold together."

As I set out below, it appears there may have been an appendix to this Information Memorandum, which set out some specifics about the particular investment Miss K was making.

Miss K's dealings with Brickowner

Miss K visited Brickowner's website around May 2018. At the time, the website said, in a section on the home page titled "*How it works*":

"*Invest as little as £100 up to as much as you like into properties of your choosing. We aim to provide you with access to exclusive institutional grade property investments which would otherwise be inaccessible to most investors.*

You can build your own property portfolio by investing in a number of different properties on the platform. You can add funds and increase the size of your portfolio whenever you want, should you wish to do so. Its completely your decision as to what you invest in, how much you invest, and when you invest."

The home page also displayed three "*featured properties*", including C. C was described as a residential development, with a one year investment term, and a predicted investment return of 24%. Other than the target amount of funding, there were no further details given here.

A large "*join here to invest*" button was displayed on the home page. Miss K's recollection is that she completed an account opening process on the website (further detail of which I set out below, although its exact make-up at the time is a matter of dispute), after which she was able to see further details of C.

I have not seen the web page which displayed details of C at the time. There is, however, an Information Memorandum "*Appendix to* [C]" (it is not clear whether it is an appendix to the generic Information Memorandum mentioned above or a C-specific Information Memorandum which I have not seen) online, which sets out some details of the investment. Amongst other things, it explains there will be equity investment (i.e. investor contributions) of £582,324 and borrowing of £1,065,924, to fund the development. It provides details of the developer, and some examples of its track record. It also explains:

- "*The freehold for the Bristol Site will be owned by Brickowner investors through an independent investment company set up for this investment (known as a Special Purpose Vehicle).*
- *Investing through an SPV means your investment is ring-fenced to provide additional security*"

Miss K decided to invest in C (again, I explore the process in further detail below), and made an investment of £37,671 on 2 May 2018.

When asked about Miss K's circumstances at the time of the investment, her representative told us the following:

- When she invested in C, Miss K held a bank account; this was a current account only, she did not have a savings account. She held no private pension, but she was a member of a works pension scheme that her previous employer had made contributions into. Aside from her bank account and pension, Miss K held no other investments.

- Miss K is a teacher by profession. At the time of investing, she was not in regular employment and made sporadic income of negligible amounts only from private tutoring lessons.

- At the time of investing, Miss K had sold her home and was travelling prior to moving back to her home country. Accordingly, she held savings of approximately 300,000 Euros in her bank account, which she had earmarked in order to purchase a new home; this was the source of her investment funds.

Gallium has submitted updates which were issued on C by Brickowner or Brickowner Investments Limited from 2019. These decreased in frequency over time, with only two updates given in 2021 and one in 2022. From late 2019 the updates referred to delays being experienced, as a result of flats in the development taking longer than expected to sell, and issues with the lender. And the 10 September 2021 update sets out a new projected return of between -24% and +10%. I have not seen any updates after 8 November 2022, but understand Miss K ultimately suffered a complete loss of her investment. It is not clear how this complete loss came about.

Gallium's response to Miss K's complaint

Gallium said the complaint had been made outside the time limits set out in our rules. It also said:

- All investments made went into specific share classes of a small FCA registered AIFM (I assume this is intended to refer to Alternative Investment Fund Manager) called Brickowner Investments Ltd.

- The investor documents held by Brickowner show that Miss K self-classified herself as a restricted investor during the application process, which evidences she had some knowledge of investments. Self-classification was also a mandatory step for completion in the application process prior to an investment being permitted.

- The series of "*Yes/No*" questions the representative has referred to were in fact an appropriateness assessment.

- Risk warnings were clearly visible on the Brickowner website and referenced in the Information Memorandum.

- Miss K could not proceed with the application until she confirmed she understood the appropriateness questions.

- At the time of Brickowner being an AR of Gallium, it was not subject to the suitability rules, only the appropriateness rules. Brickowner has never provided financial advice.

After the complaint had been referred to us, our investigator wrote to Gallium to explain she thought the complaint had been made within the relevant time limits. Gallium accepted this view, then made some further submissions. Its key points, in summary were:

- It cannot provide a copy of the signed restricted investor statement that was completed by Miss K during the application process, but can provide confirmation from Brickowner that this was obtained, checked, and verified upon sign up, prior to an investment being made.

- It would like to bring to our attention the disclaimers, key risks, and the suitability questionnaire, which all investors are required to complete before being able to view investment opportunities.

- The performance of the investment is not something Gallium can be held responsible for after Brickowner ceased to be its AR.

- Miss K clearly understood the investor journey as she was able to supply a restricted investor statement, the disclaimers were presented in a clear and easily readable format, and she confirmed her understanding of all the risks applicable to an investment with Brickowner during the application process. Miss K was clearly aware of the risks of the investment.

Gallium referred to the suitability questionnaire, disclaimers and key risks as being those shown in a document it had attached, titled “Brickowner Investment Flowchart – Appendix”. This document is dated “*H1 2021*”

Our investigator’s view

Our investigator concluded that the complaint should be upheld. She said, in summary:

- The investment in C was a non-readily realisable security, as defined in the Financial Conduct Authority (FCA) rules. There were therefore rules in place which detailed restrictions on who the investment could be promoted to as well as a requirement to test it was appropriate to the consumer.

- As Gallium arranged for Miss K to invest, it was required to comply with these rules.

- The flowchart Gallium have has provided shows Miss K was presented with investor classifications of “High Net Worth Investor” and “Sophisticated Investor”.

- Having considered Miss K’s circumstances, she was not persuaded Miss K met the requirements for a High Net Worth Investor. Even if she did, Gallium was required to conduct an appropriateness test.

- Gallium, was therefore required by the rules to “*ask the client to provide information regarding his knowledge and experience … to enable the firm to assess whether the service or product envisaged is appropriate for the client*” and “*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*”.

- She was not satisfied Gallium gathered sufficient information from Miss K to assess her understanding and knowledge of the investment.

- She acknowledged risk warnings were given within the investment literature.

However, she did not think these were clear enough for Miss K to understand the level of risk she was taking.

- She acknowledged that Gallium was not responsible for the investment performance; however, it enabled the investment. She was not persuaded that if Miss K had been aware of the level of risk associated with the investment in C that she would have proceeded with the investment; and for this reason she thought it was fair uphold the complaint.

Gallium's response to the view

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

- It had now located screenshots showing the Brickowner website and entire application process that was in effect in 2018 and when Miss K applied to invest in Brickowner (copies of these screenshots were provided).

- These screenshots show Miss K would have been required to confirm that the following:

    - That she understood the value of property is not guaranteed to increase.
    - That she understood that she may not be able to sell her and withdraw her investment.
    - That she read the risk warnings and understood the risks associated with an investment in Brickowner.

- Miss K accepted a restricted investor statement, which contained the following:

  "*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*."

- As Miss K invested a significant sum of money, she would have understood the gravity of the risk warnings and potential ramifications if things were to go wrong.

- It has not been presented with any evidence or rationale to support the claims being made of Miss K being unable to understand the risks. It believes that Miss K was of sound mind and able to understand the material presented to her, even if it was a very basic understanding.

- To be clear, Brickowner provides an execution-only service and will not assess the suitability of the transaction based on information provided to them by the client. Brickowner will not provide advice or a recommendation. It was only and primarily Miss K's choice to make and proceed with the investment.

- It disagrees with the claims that Miss K was intending to use the proceeds of this investment to fund her next house purchase. It is common knowledge that property is a long-term investment. If Miss K was going to use the funds to purchase another home, after having just sold her last home, then she should not have used the funds to invest into an asset with a long lifespan.

- Brickowner is an online automated platform. It is designed to be non-invasive, unpressured, and unforced. This is done through the process being passive, where the investors take charge, and by limiting interaction. The process collates all information that is required from prospective investors.

- In relation to appropriateness, Brickowner undertake an extra questionnaire for investors that fund their accounts with large sums. It is unable to source the questionnaire Miss K completed in 2018, but is able to provide the results from the questionnaire completed by Miss K on 19 March 2019 (this was attached).

Further submissions from Miss K's representative

Miss K's representative also provided further submissions for my consideration. It said, in summary:

- It seems that Gallium now seeks to rely on Miss K self-categorising as a "Restricted Investor", within the meaning of the rules at COBS 4.7.10R of the FCA Handbook.

- The Restricted Investor Statement was incorrect. Miss K invested £37,671 which - in breach of condition (b) in the Restricted Investor Statement - was greater than 10% of her net assets at the time of investment.

- The FCA's rules in place as of May 2018 required Brickowner, on behalf of Gallium to - at the very least - undertake an appropriateness test. When considering what is fair and reasonable in all the circumstances of this complaint, we must, therefore, consider whether the appropriateness test carried out by Brickowner prior to Miss K making the investment into C met the FCA's requirements.

- It is clear that Brickowner's appropriateness test did not meet the requirements of COBS 10.

- Had the process been consistent with what the rules required, Miss K would been asked for appropriate information about their investment knowledge and experience (of which they had none) and the only reasonable conclusion Brickowner could have reached, having assessed this knowledge and experience, was that Miss K did not have the necessary experience and knowledge to understand the risks involved with the investment in C.

- It notes that Gallium has provided a copy of a questionnaire completed by Miss K in March 2019.This is irrelevant to the complaint, the investment in C having been made in May 2018, but it is an example of the completely flawed appropriateness test undertaken. The questions asked of Miss K do not come near to satisfying the FCA requirements for an appropriateness test (as found in COBS 10).

Gallium also made a final set of submissions, which largely reiterated what it had said previously. So, I have not summarised them here – but I have considered them in full.

My provisional decision

I recently issued a provisional decision. As I largely repeat the decision below, I will not include a detailed summary here. In brief, I concluded the investment Miss K made was a Non-Mainstream Pooled Investment (NMPI) and rules therefore applied to its promotion. I said, in my view, those rules had not been followed and, if they had, the investment would not have been promoted to Miss K. And it was fair to ask Gallium to compensate Miss K for the loss she had suffered.

Responses to my provisional decision

Gallium did not accept my decision, but said it had no further response to make.

Miss K's representative said she accepted the provisional decision, and had nothing further to add.

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 neither party has made any substantive response to my provisional decision I have not been persuaded to depart from it. I have therefore largely repeated my provisional decision below, as my final decision.

I am required to make my own independent determination of this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable, I am required to take 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.

With that in mind I will start by setting out what I consider to be the key relevant considerations to deciding what is fair and reasonable in this case.

To establish the relevant regulators' rules, guidance and standards, I need to determine the nature of the investment Miss K made.

In my view, based on the evidence available, and considering the FCA Glossary definitions in place at the time, the investment was not a non-readily realisable security, but a Non-Mainstream Pooled Investment (NMPI).

The FCA Glossary includes the following definitions (I have only quoted the parts which are relevant here:

"*non-readily realisable security*

a security which is not any of the following:

(a) a readily realisable security;"

"(c) a *non-mainstream pooled investment*;"

"***Non-Mainstream Pooled investment***

any of the following investments:

(a) a unit in an unregulated collective investment scheme;"

"*(c) a security issued by a special purpose vehicle, other than an excluded security*;"

The generic Information Memorandum suggests the investment will take the form of shares issued by Brickowner Investments Limited. The shares of Brickowner Investments Limited did not trade on a recognised exchange, and I have not seen any evidence to suggest that there were plans to list the shares. So, they were not a readily realisable security, and therefore meet that part of the definition of a non-readily realisable security.

However, the "*Appendix to* [C]" document, as set out above, says the freehold for the site will be owned by "*Brickowner investors*" (as the header of the document is "Brickowner Investments Limited" I assume "Brickowner" means that business, although it is not defined in the Appendix) through a Special Purpose Vehicle (SPV) and goes on the say Miss K would be "*investing through a SPV*". So, it appears the investment involved Miss K receiving securities (i.e. shares) issued by a SPV – described in the Appendix as the "*independent investment company set up for this investment*".

The alternative is Miss K was buying specific share class of Brickowner Investments Limited and Brickowner Investments Limited, in turn, held all the shares in the C SPV, for the benefit of holders of the particular share class Miss K had invested in. In these circumstances, I think Brickowner Investments Limited would have been a SPV and this structure would therefore also have involved Miss K receiving securities (i.e. shares) issued by a SPV.

The FCA Glossary definition of a SPV is as follows

> "*a body corporate, explicitly established for the purpose of securitising assets, whose sole purpose (either generally or when acting in a particular capacity) is to carry out one or more of the following functions:*
>
> > *(a) issuing designated investments, other than life policies;*
> >
> > *(b) redeeming or terminating or repurchasing (whether with a view to re-issue or to cancellation) an issue (in whole or part) of designated investments, other than life policies;*
> >
> > *(c) entering into transactions or terminating transactions involving designated investments in connection with the issue, redemption, termination or re-purchase of designated investments, other than life policies;*"

So, if the investment was made in Brickowner Investments Limited, rather than directly into the individual property (i.e. C) SPV, Brickowner Investments Limited was the SPV – it issued shares to securitise the property development; and that (alongside securitising other property developments) appears to have been the purpose for which it was established, and its only business i.e. its sole purpose.

If that analysis is not correct - i.e. Brickowner Investments Limited was operating in this way but not an SPV - the alternative is it was an Alternative Investment Fund (AIF) and therefore, in the circumstances, an Unregulated Collective Investment Scheme (UCIS). This appears to be the understanding of Gallium/Brickowner/Brickowner Investments Ltd, albeit it has been communicated inconsistently.

The Generic Information Memorandum says:

"*The Company is registered with the Financial Conduct Authority (FCA) as a small registered self-managed alternative investment fund manager pursuant to article 10(2) of the Alternative Investment Fund Managers Regulations 2013*."

This is not accurate as "*The Company*" is defined in the Generic Information Memorandum as Brickowner Investments Limited, which does not appear on the FCA Register (only Brickowner does, as Gallium's AR). But it infers Brickowner Investments Limited is an AIF.

The wording on the Brickowner website at the time included the following, which is inconsistent with the Generic Information Memorandum on the point of FCA registration, but consistent on the subject of the nature of Brickowner Investments Limited, says:

“*Brickowner Investments Limited is a small registered alternative investment fund manager (Reference number: 775256) and is not authorised and regulated by the Financial Conduct Authority.*”

The wording shown on an archived later version of Brickowner’s website is consistent with this. That says:

“*Funds are invested via a self-managed AIF (Alternative Investment Fund) known as Brickowner Investments Ltd (a limited company)*”

Gallium’s final response letter also appears to acknowledge Brickowner Investments Ltd was an AIF:

“*all investments made went into specific share classes of a small FCA registered AIFM called Brickowner Investments Ltd*”

Although this is not consistent with what was said on Brickowner’s website, as it describes Brickowner Investments Ltd as a AIFM rather than AIF, it appears to be intended as an acknowledgement that the arrangements involved investment into an AIF.

Furthermore, the High Net Worth statement shown in the application process screenshots submitted to us by Gallium describes the promotion as applying to a NMPI. It says “*I make this statement so I can receive promotional communications which are exempt from the restriction on promotion of non-mainstream pooled investments*”.

The “Brickowner Investment Flowchart – Appendix” dated H1 2021 submitted also says, at page 8:

“*NB: we do not accept restricted investors*”

And at page 9

“Appendix 4.1

Controls: Platform users cannot view investments unless appropriateness / preliminary suitability test has been completed and passed.”

It then sets out the details of a “*Preliminary Suitability Assessment Questionnaire*” which consumers are required to complete.

This differs from the application process screenshots submitted to us by Gallium – likely because those screenshots pre-date the flowchart appendix. But it shows that Brickowner’s understanding at this time was that it was promoting NMPI.

In its submissions, Gallium also says the Restricted Investor categorisation was available for a “short period of time” but then withdrawn (although it has not specified the period over which the category was available); which suggests that Brickowner came to the realisation that this category did not apply, as it was promoting NMPI.

Overall, there appears to have been some confusion on Brickowner’s part as to the nature of the investments it offered and therefore which rules applied to their promotion. It may not have fully understood the rules, it applied them inconsistently, and its understanding appears to have evolved over time. But it appears to have ultimately reached the view the investments it was offering were NMPI; and that is consistent with the available evidence.

I am satisfied the investment Miss K made met the definition of NMPI at either (a) or (c) and therefore ought to have been treated as such throughout. It is clear the sole purpose of Brickowner Investments Ltd was to facilitate collective investment in individual property developments, whether that was through issuing shares to securitise those individual property developments or to act as a fund to allow collective investment in the developments.

I will now set out what this means for the relevant considerations in this case.

Relevant considerations

It is not disputed that Brickowner promoted the investment in C to Miss K and arranged her investment in it. And I am satisfied that Brickowner did promote the investment in C to Miss K and arranged her investment in it. It is also not disputed that Miss K was a retail client; and I am satisfied she was.

As the investment was a NMPI, promotion of it to retail clients was effectively banned at the time of Miss K's investment. There were rules setting out exemptions to this; and those rules would have applied here. I have set the relevant rules out below.

COBS 4.12.3R

Section (1) of this rule says:

"*A firm must not communicate or approve an invitation or inducement to participate in, acquire, or underwrite a non-mainstream pooled investment where that invitation or inducement is addressed to or disseminated in such a way that it is likely to be received by a retail client.*"

Section (2) of the rule refers to the statutory restriction on promotion of UCIS in section 238 of the Financial Services and Markets Act (FSMA)

COBS 4.12.3R sets out exemptions to 4.12.3R(1) and the statutory restriction:

"*(1) The restriction in COBS 4.12.3 R does not apply if the promotion falls within an exemption in the table in (5) below.*

(2) A firm may communicate an invitation or inducement to participate in an unregulated collective investment scheme without breaching the restriction on promotion in section 238 of the Act if the promotion falls within an exemption in the table in (5) below."

So, whether it was a UCIS or some other form of NMPI, the investment could only be promoted to Miss K if one of the exemptions applied. From those set out in the table at (5), the only exemptions which could apply here are:

"*2. Certified high net worth investors*

Promotion to:

An individual who meets the requirements set out in COBS 4.12.6 R, including an individual who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another person who is the firm's client.

Promotion of a non-mainstream pooled investment which is:

Any non-mainstream pooled investment the firm considers is likely to be suitable for *that client, based on a preliminary assessment of the client's profile and objectives. [See COBS 4.12.5G (2)]*"

"*9. Self-certified sophisticated investors*

Promotion to:

An individual who meets the requirements set out in COBS 4.12.8 R, including an individual who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another person who is the firm's client.

Promotion of a non-mainstream pooled investment which is:

Any non-mainstream pooled investment the firm considers is likely to be suitable for that client, based on a preliminary assessment of the client's profile and objectives. [See COBS 4.12.5G (2)]"

The relevant guidance at COBS 4.12.5G says:

(2) (a) A firm which wishes to rely on exemptions 2 (certified high net worth investors), 9 (self-certified sophisticated investors) ….. as provided under COBS 4.12.4R (5), should note that these exemptions require a preliminary assessment of suitability before promotion of the non-mainstream pooled investment to clients (in addition to other requirements)."

COBS 4.12.6 R

This sets out the criteria for a High Net Worth investor as follows:

- "*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)."

COBS 4.12.8 R

This sets out the criteria for a self-certified sophisticated investor as follows:

"*I am a self-certified sophisticated investor because at least one of the following applies:*

(a) I am a member of a network or syndicate of business angels and have been so

for at least the last six months prior to the date below;

(b) I have made more than one investment in an unlisted company in the two years prior to the date below;

(c) I am working, or have worked in the two years prior to the date below, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises;

(d) I am currently, or have been in the two years prior to the date below, a director of a company with an annual turnover of at least £1 million."

The Principles for Businesses

I also think 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) are a relevant consideration. And I think Principle 6 is particularly relevant here:

"*Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.*"

Summary of my findings

Having considered all the available evidence and arguments I have concluded the complaint should be upheld. In summary:

- The Restricted Investor categorisation relied on by Brickowner, on behalf of Gallium, was not a relevant exemption and therefore not a basis on which C could have been promoted to Miss K.
- The available evidence suggests Miss K was neither sophisticated nor High Net Worth – and there is no evidence to show she would have declared herself to be either of these things, had the wording set out in the relevant rules been used. So, there was no basis on which the investment could have been promoted to Miss K.
- There were also further restrictions on the promotion of NMPI to retail clients, like Miss K, which required a preliminary assessment of Miss K's profile and objectives, and consideration of whether it was likely to be suitable for her.
- The purpose of those rules was to prevent such investments being offered to those for whom they may not be suitable.
- I have not seen sufficient evidence to show that Brickowner, on Gallium's behalf, took adequate steps to meet the requirements of the applicable rules. It did not take adequate steps to check that the investment was suitable for Miss K.
- I am satisfied that, if Brickowner, on Gallium's behalf, had taken sufficient steps to meet the requirements of the rules, it should have concluded it should not promote the investment to Miss K because the required steps had not been completed. Or it should have ensured that the required steps were completed, which would have meant the investment would not have proceeded, as there was no basis on which it could be promoted to Miss K.
- It is therefore fair and reasonable to require Gallium to compensate Miss K for the

loss she suffered through the investment in C.

I have set my findings out in more detail below.

The application process

Gallium has provided screenshots from Brickowner's website which it says show the application process followed by Miss K before she made the investment in C.

The screenshots show the following set out at the outset of the application:

"***Step 1/3 Understanding Property Investment***
Please choose from the below investor category that best describes you

High net worth Investor

I earn more than £100,000 a year or have net assets over £250,000

Self-certified Sophisticated Investor

I am an experienced investor and understand risk

Everyday Investor

This includes first time, and ordinary investors"

They show consumers were then asked to tick a box under which of the three applied to them; and were then asked to answer five "yes or no" questions, as follows:

"***Investment Returns***

I understand that investment returns can be generated by capital growth, rental income, or both

Property Value

I understand that the value of property is not guaranteed to always increase

Investment Strategy

I understand that spreading my investment over a number of properties helps to reduce risk

Ability to Sell Investment

I understand that if I want to sell my investment, I am not always guaranteed to find a buyer willing to pay the price I want

FAQs and Risk Warning

I have read and understand the FAQs and Risk Warning"

I understand consumers were required to answer "*yes*" to each of these questions before they could proceed; and had multiple opportunities to answer them (although it is not known what message was displayed if a question was answered "no"). Consumers were then asked to press a "*Continue*" button, after which a statement relevant to whichever of the three categories had been selected was displayed.

In Miss K's case, Gallium says she had selected "*everyday or restricted investor*" – although, as set out, the term "restricted" was not in fact used at the outset - and would hence have seen a Restricted Investor statement, which used the wording set out in the rules relating to the promotion of non-readily realisable investments. At the conclusion of this consumers are asked to tick a box which said "*I confirm and sign the above statement*".

Following this the screenshots show consumers were asked to provide their personal details and to add funds to their account.

I note these screenshots appear to date from September 2018 – so, around four months after Miss K applied for her investment. I also note that an archive record of the homepage of Brickowner's website from around the time Miss K invested appears to differ from the screen prints Gallium has provided. Finally, I note that Gallium does not have a copy of the application which was completed by Miss K. I am not therefore certain that the screenshots provided precisely reflect the application Miss K would have completed.

As mentioned above, Gallium has also provided a copy of a flowchart, which sets out an investment application process. However, this does not help clarify the position as it does not appear to reflect Miss K's application journey. It makes no reference to "everyday investor" and instead has three investment classifications – "High Net Worth", "Sophisticated Investor" and "Company Investor". It also appears to post-date Miss K's application. And Miss K's representative says it does not reflect her recollection of the application process.

However, it is not disputed that some form of application process was followed by Miss K and I think it is reasonable to assume, in the absence of any further evidence, that the process Miss K followed did at least look similar to the screenshots Gallium has provided. I have therefore made my decision on the basis that the screenshots do, largely, reflect the process Miss K followed.

In its submissions Gallium has referred to a questionnaire completed by Miss K in 2019. This is not, however, a relevant consideration here, as I am looking at whether the investment ought to have been promoted to Miss K at the outset.

The process and the requirements of the relevant rules

Categorisation

Classifying Miss K as a Restricted Investor was not one of the types of exemptions set out in the table at COBS 4.12.4R (5). So, Brickowner, on behalf of Gallium, could not have used Miss K's "*everyday investor*" categorisation as a basis to promote the investment in C to her. The available evidence also suggests Miss K was not high net worth (as defined at 4.12.6 R) or sophisticated (as defined at 4.12.8R). She did not, in my view, meet the definition of either; and I think it unlikely she would have declared herself as doing so.

Miss K had a low income and the cash she held on deposit was the proceeds of the sale of her home, to be used to purchase another home; and therefore likely amounted to "*property which is my primary residence*" (or at least would have done so in the eyes of Miss K, and therefore led her conclude she should not sit in this category). She also had very limited investment experience and did not meet any aspect of the sophisticated investor definition. So, she could not have been put into one of the relevant categories, and would not have put herself into either category. The process did not therefore allow promotion of NMPI in reliance of any of the relevant exemptions set out in the table at COBS 4.12.4R (5).

Suitability

In addition to categorising Miss K as High Net Worth or Sophisticated, Brickowner, acting on behalf of Gallium was, in order for the relevant exemptions set out in the table at COBS 4.12.4R (5) to apply, also required to consider whether an investment in C was likely to be suitable for Miss K, based on a preliminary assessment of her profile and objectives, before making any promotion of the investment.

I think it is important here to emphasise the investment Miss K made was not a straightforward product. Miss C was not simply buying a share of a property. She was investing money into a SPV or an AIF which, together with significant bank borrowing, was being used to fund the purchase and development of a residential building. There were multiple parties involved – building trades, architects, development managers, the provider of the lending etc. And the risks were multifactorial – it was not simply a question of whether the property would go up in value. The high gearing alone made the investment a high risk one. There was also the focus on a single development, a lack of liquidity, and the risks of delays and rising costs, all of which could be caused or contributed to by multiple parties - which was a key factor, given the "*Appendix*" document sets out estimates of costs without apparently any independent verification. And there was a complex security structure involving a SPV holding the freehold, without a clear explanation of how exactly this worked being provided in the "*Appendix*" document.

The investment was therefore complex, risky and specialist; and this is why it fell into a category of investment on which the FCA puts restrictions as to who it could be promoted. It was highly unlikely to be suitable for the vast majority of retail clients. And an obvious risk of consumer detriment arises if the rules restricting its promotion were not properly applied.

I say this to illustrate the importance of Brickowner, on behalf of Gallium, fully meeting its regulatory obligations here was high. Its responsibility was significant. And the steps it took to meet its regulatory obligations need to be considered with that in mind.

As set out, it appears all that was asked of Miss K were the five "yes or no" questions quoted. These questions, in my view, do not provide sufficient information to allow Brickowner, on behalf of Gallium, to make any meaningful assessment of whether an investment in C was suitable for Miss K.

The questions asked, in my view, did no more than test whether Miss K had a basic knowledge of investing. They simply asked if Miss K understood returns could be generated in different ways and were not guaranteed, that diversification reduces risk, and a sale at the price wanted might not be possible.

The questions did not therefore allow Brickowner, on behalf of Gallium, to consider whether an investment in C was likely to be suitable for Miss K; they did not amount to a preliminary assessment of her profile and objectives. No questions are asked about her personal and financial circumstances; nor her investment objectives. So, Brickowner simply could not make any assessment of the suitability of the investment for Miss K, as it obtained none of the information needed to make such an assessment

What should Brickowner, on behalf of Gallium have done?

Had Brickowner, on behalf of Gallium, followed the applicable rules, it would have been aware that Miss K could not be classified as High Net Worth or sophisticated. As mentioned, Miss K did not meet the definition of either; and I have seen no evidence to show that she would have declared herself as meeting either definition.

So, things should have not got beyond the categorisation stage, had the rules been followed. Brickowner should have identified at this early stage that there was no basis on which a promotion could be made to Miss K, as the rules did not allow it.

Going beyond that, had a preliminary assessment of Miss K's profile and objectives been carried out, this would have revealed an investment in C was *not* likely to be suitable for Miss K. It was clearly unsuitable – she had very limited investment experience; the money was from sale of her home, and to be used to buy a new home. There would have been no evidence Miss K had the tolerance or capacity for a high level of risk, or of the investment being otherwise consistent with her objectives. And it ought to have been clear she was investing too much, in any event, as she was putting more than 10% of her total worth into the investment. So, any reasonable preliminary assessment of suitability would have given Brickowner, on behalf of Gallium, further reason to conclude a promotion could not be made.

All in all, I am satisfied that if Brickowner, acting on behalf of Gallium, had acted fairly and reasonably to meet the relevant regulatory obligations the investment would not have been promoted to Miss K because she would not fall into any of the categories of investor to whom promotion could be made and it was not likely to be suitable for her. No investment would therefore have been made, had Gallium followed the rules.

Risk warnings

Gallium has referred to Miss K having been told of, and understanding, the risks associated with the investment. I do not think that, in the circumstances, it would have been fair and reasonable for Brickowner to have proceeded to promote the investment to Miss K, in reliance on any risk warnings it had given; as there was no basis under the rules for it to do so, and the promotion would not have been consistent with its regulatory obligations. I have however considered this point, for completeness as, in my view, the available evidence on the subject of explanations of risk gives further evidence of why it was not fair and reasonable for Brickowner, on behalf of Gallium, to promote the investment to Miss K.

Gallium has specifically referred to "*Disclaimers*" and "*Key Risks*"; but has also provided screenshots of an application process which does not feature those terms. The document Gallium has submitted which sets out these sections is dated H1 2021 – long after Miss K's application was made, and after Brickowner ceased to be an AR of Gallium. I am not therefore persuaded that the "*Disclaimers*" and "*Key Risks*" Gallium refers to were seen by Miss K at the time; or made available to her. The screenshots refer to "*FAQs and Risk Warning*". But neither the Risk Warning nor FAQs pages appear to have been archived, and Gallium has not submitted copies of them; so, I do not know what they said.

The archived webpages from around the time I have seen do provide a warning that capital is at risk and FSCS protection may not apply. And the restricted investor statement says, as required by the rules, "*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*".

So, it seems some warnings were given. However, they fall a long way short of a full explanation of the risks. And the Information Memorandum documents – if they were seen by Miss K – do not provide such an explanation either.

I also note that home page of Brickowner's website around the time included the following, in relation to the investments it offered:

"*Secure & safe* (in large bold letters)

Government regulated

Brickowner is an Appointed Representative of Gallium Fund Solutions Ltd which is *authorised and regulated by the Financial Conduct Authority (FCA). The FCA is the UK organisation that regulates and supervises the financial services industry in the UK with the intention of protecting consumers.*

Ring fenced investments

Your investments are ring-fenced and separated from the assets and liabilities of Brickowner Limited. Each property investment is made via a UK limited company that is distinct from Brickowner Limited. This means if Brickowner Limited were to fall into financial distress, it would not affect the value of your investment.

Uninvested funds are protected

Funds which are shown in your account on Brickowner which are not invested are held on trust in a segregated account on your behalf. This is a separate bank account which is protected and ring-fenced from Brickowner monies."

So, I am not persuaded that Brickowner, on behalf of Gallium, provided a full explanation of the risks; the available evidence instead suggests inadequate and possibly misleading statements were instead made about risk. However, I make this only as a secondary point. As mentioned, Brickowner, on behalf of Gallium, simply should not have promoted the investment, in any event.

I will now turn to consider fair compensation.

Fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Miss K as close to the position she would probably now be in if she had not made the investment in C.

For the reasons I have set out, I am satisfied that the investment should not have been promoted to Miss K by Brickowner, on behalf of Gallium. And it should not therefore have proceeded; and Miss K would not have suffered the loss she has.

I think Miss K would have invested differently. It is not possible to say *precisely* what she would have done, but I think it likely she would have retained the money on deposit. I am therefore satisfied that what I have set out below is fair and reasonable given Miss K's circumstances and objectives when she invested.

What should Gallium do?

To compensate Miss K fairly, Gallium must:

- Compare the performance of Miss 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 add any interest set out below to the compensation payable.

- Pay Miss K £200 for the upset caused by the complete loss of the investment.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
C	Liquidated	Average rate from fixed rate bonds	Date of investment	Date of decision	8% simple per year from final decision to settlement (if not settled within 28 days of Gallium receiving Miss K's acceptance)

Actual value

This means the actual amount paid from the investment at the end date. I understand that no return was paid.

Fair value

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

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

Why is this remedy suitable?

I have chosen this method of compensation because:

- I understand the investment is now complete. I do not know when it completed but I think it is fair, in the circumstances, to simply run the comparison to the date of the decision, given Miss K did not receive any return from the investment.
- Miss K wanted Capital growth and was not in a position to take risk to her capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to her capital.

My final decision

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

Under the rules of the Financial Ombudsman Service, I’m required to ask Miss K to accept or reject my decision before 30 September 2025.

John Pattinson
Ombudsman