

## The complaint

The estate of Mr S (“the estate”) complains about the arrangement of investments in property developments, “C” and “R”. The estate’s complaint has been brought on its 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 investments 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 Mr S.
- It was sold to Mr S 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.

## What happened

### 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.com/properties](http://www.brickowner.com/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 of 99 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, relating to the C investment, which set out some specifics about the particular investment Mr S was making. I have not seen any such document relating to R.

### **Mr S’s dealings with Brickowner**

Mr S made a number of investments with Brickowner

The first three investments Mr S made were each made in 2017. The investment amounts were £9,708, £53,395 and £28,155. The estate has told us that each either returned Mr S’s capital or returned his capital with a profit, in late 2019 or 2020. No complaint has been made about these investments.

The complaint relates to the following four investments made by Mr S:

- £24,271 on 14 March 2018 into R
- £24,271 on 17 March 2018 into R
- £24,271 on 2 May 2018 into C
- £24,560 on 6 May 2018 into C

Mr S sadly passed away in 2020. The complaint has, accordingly, been brought by his estate.

In March 2018 the home page of Brickowner’s website displayed three “*featured properties*”, including R. R was described as a residential development, with a one year investment term, and a predicted investment return of 32.66%. Other than the target amount of funding, there were no further details given here.

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

On both occasions the website also 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.”*

A large “*join here to invest*” button was displayed on the home page. It appears this led to 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).

I have not seen the web page which displayed details of C or R 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 appendix to 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 [Special Purpose Vehicle] means your investment is ring-fenced to provide additional security”*

I have not seen any details of R, but it appears to have had a similar structure to C, albeit the property involved was a town centre office block in Devon. The updates issued on R suggest it, like C, used a high level of borrowing.

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 the estate ultimately suffered a complete loss of Mr S’s investment.

I have also seen updates which were issued on R by Brickowner or Brickowner Investments Limited from 2020. These were initially largely positive – saying there was an issue with the developer but the development was still on track to deliver the anticipated return to investors. However, the later updates set out a deteriorating position, explaining that a loss was anticipated, with the final update, issued in late 2023, setting out that “*losses could exceed 90% of the capital invested.*” I understand the investment ultimately failed (although I note Gallium says £9,034 was redeemed from the investment in 2022). These updates make several references to the investment being a SPV (Special Purpose Vehicle).

### **Gallium’s response to the estate’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 Financial Conduct Authority (FCA) registered AIFM (I assume this is intended to refer to Alternative Investment Fund Manager) called Brickowner Investments Ltd.
- Mr S was the father of a senior member of staff at Brickowner.
- The investor documents held by Brickowner show that Mr S self-classified himself as a restricted investor during the application process, which evidences he 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.
- Mr S could not proceed with the application until he confirmed he 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:

- Investors through Brickowner have to classify as either High Net-Worth Investors or Self-Certified Sophisticated Investors. There was a brief period of time, during the early stages of the investment products life, were everyday (restricted) investors were able to sign up to invest. These investors were required to meet the relevant criteria applicable under the FCA Conduct of Business (COBS) rules and needed to sign a completed restricted investor statement.
- 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.
- Mr S clearly understood the investor journey as he was able to supply a restricted investor statement, the disclaimers were presented in a clear and easily readable format, and he confirmed his understanding of all the risks applicable to an investment with Brickowner during the application process. Mr S was clearly aware of the risks of the investment.
- It had now located screenshots showing the Brickowner website and entire application process that was in effect in 2018 and when Mr S applied to invest in Brickowner (copies of these screenshots were provided).
- These screenshots show Mr S would have been required to confirm that the following:
  - That he understood the value of property is not guaranteed to increase.
  - That he understood that he may not be able to sell and withdraw his investment.
  - That he read the risk warnings and understood the risks associated with an investment in Brickowner.
- Mr S 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 Mr S invested a significant sum of money, he would have understood the gravity of the risk warnings and potential ramifications if things were to go wrong. There is no evidence to show he did not understand the risk warnings.
- 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 Mr S’s choice to make and proceed with the investments.
- 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.
- Brickowner undertake an extra questionnaire for investors that fund their accounts with large sums. It was unable to source the questionnaire Mr S completed in 2018, but is able to provide the results from the questionnaire completed by Mr S in March 2019 (this was attached).

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 investments in C and R appeared to be non-readily realisable securities, as defined in the 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.
- She had focused on the requirement to conduct an appropriateness test. The rules required Brickowner 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*”.
- Brickowner did not ask Mr S questions about his knowledge and experience.
- Had such questions been asked, Brickowner should have concluded that R and C were not appropriate investments for Mr S. The rules therefore required a warning to be given to Mr S.
- Had a warning been given, she thought it unlikely Mr S would have said he wanted to proceed with the investment. And Brickowner, on behalf of Gallium, should have concluded it was not in Mr S’s best interests to allow him to proceed, in any event.
- She therefore thought it was fair to ask Gallium to compensate the estate for the loss

suffered through the investments.

### **Gallium's response to the view**

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

- The view omits the fact that Mr S, the complainant, was the father of a senior member of staff at Brickowner at the time when Mr S made the investments. This explains why someone like Mr S would invest in such a product. There are thousands of alternative investment products he could have chosen to invest into, and he primarily invested in mainstream products, yet he sought to make an investment in an unlisted asset, because of his son.
- The view says Mr S had no experience of realising profit or loss from property investments at the time. But whether or not an investment realises either a profit or loss, or is realised at all, is not the criteria applicable to investor classifications. The criteria for a sophisticated investor required that an individual must have made two or more investments in unlisted companies. This part of the criteria was also not relevant to a High Net Worth Investor – which Mr S self-classified as.
- The view says Mr S had no experience in these types of assets and investments, yet he made three similar investments prior to making the investments subject to complaint.
- Mr S self-categorised as a High Net Worth Investor. Mr S did meet the definition of a High Net Worth Investor at the time, and choose to proceed with the investment on his own accord. There was no information available at the time to show, nor did the investor make any indication, that the investment was not suitable for them.

### **Further information provided by Mr S's estate**

I recently asked the representative for some more detail about Mr S's circumstances and investment objectives at the time of the investments, and how the investments in C and R came about. The representative put these questions to the executor of Mr S's estate – his wife, Mrs S. The representative told us, in summary:

- Mr and Mrs S sold their family home in 2013. The proceeds of the sale of the family home were specifically preserved by Mr S in order to support him and Mrs S during their retirement. It was a portion of these funds that were used to make the investments into C and R.
- Mr S was the father of a senior member of staff at Brickowner, and they made Mr S aware of the Brickowner website. Mr S made his own investment decisions and decided to invest based on a combination of marketing emails he received from Brickowner and the contents of the Brickowner website. Mrs S can recall talking through certain webpages with Mr S and that Mr S thought that the investments seemed attractive and safe.
- Mrs S says Mr S felt that property investment in general was less risky and these property investments seemed attractive and secure. They had sold the family home, so it made sense to invest in property. When Mr S's son moved to Brickowner Mr S looked at the website and thought the investments looked interesting - at that time you could view anything without logging in and it seemed attractive.

- The majority of Mr and Mrs S's investments were focussed on planning for their retirement, this included cash ISAs, building society accounts, and conservative savings products. Mr S liked the idea of investing in property as they needed to buy a retirement home when they retired.
- Mr S's earned income, together with his pension income, would have been £100,000-£110,000 at the time of the investments. It is therefore now accepted that Mr S would most likely have met the criteria to be classified as a High Net Worth Investor (within the meaning of COBS 4.12.6R).
- The family home sold for £612,000. Following the sale of the family home, Mr and Mrs S lived in rented accommodation due to the fact that Mr S regularly had to travel for work.
- £200,000 of the proceeds of sale were used to purchase a flat. This property was held in Mrs S's name. The remaining proceeds were held predominantly as cash and put in various savings accounts and ISAs etc with banks or building societies.
- Mr S's assets when he died were around £415,000 in bank and building society accounts plus around another £100,000 in ISA or pension funds.

### **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 Mr S had made investments which were a Non-Mainstream Pooled Investment (NMPI) and rules therefore applied to their promotion. I said, in my view, those rules had not been followed and, if they had, the investments would not have been promoted to Mr S. And it was fair to ask Gallium to compensate Mr S for the loss he had suffered.

### **Responses to my provisional decision**

Mr S's representative said the estate accepted the provisional decision, and had nothing further to add.

Gallium did not accept my decision. The key points it made in its response were, in summary:

- Mr S classified as a restricted investor when completing his application form, but later, realising this was incorrect, reclassified as a High Net Worth Investor ("HNWI").
- Mr S invested in a number of non-Brickowner projects, prior to the investments in C and R, which evidences that he was a sophisticated investor. It believes all of these projects were not marketed for retail investors. This clearly shows Mr S was happy undertaking investments in high risk assets, and was not concerned about his exposure.
- Mr S was very familiar with property investment projects, he even personally visited other development sites.
- Mr S was very knowledgeable when it came to investing, tax, and finances. In an email to Brickowner, Mr S expresses concerns over his tax liabilities, after topping up his investment in C.

- Mr S confirmed he was a HNWI and possessed the relevant statement prior to undertaking the investments that are the subject of this complaint.
- Mr S's son had a good relationship with Mr S and was providing financial advice to his parents.
- Mr S's son was the person at Brickowner dealing with R. So, he would have relayed any news about the investment to Mr S.
- Mr S was a sophisticated investor with hundreds of thousands invested in unlisted, unregulated, and non-mainstream assets and securities, who clearly possessed significant knowledge and experience, given that he was personally liaising with financial intermediaries, visiting development sites, and reviewing ways as to how he can reduce his tax liabilities. Therefore Mr S knew and fully understood the risks involved with the investment.

### **What I've decided – and why**

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

I am 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.

### **The investment in C and R**

To establish the relevant regulators' rules, guidance and standards, I need to determine the nature of the investments Mr S made.

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

At the time of the investments, the FCA Glossary included 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 FCA’s definition of a non-readily realisable security.

However, the available evidence suggests the investment was a NMPI; and that it does not therefore meet the definition of non-readily realisable security on that basis.

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 SPV and goes on to say Mr S would be “*investing through a SPV*”. So, it appears that investment involved Mr S receiving securities (i.e. shares) issued by a SPV – described in the Appendix as the “*independent investment company set up for this investment*”. The updates on R confirm that investment was a SPV. So, it appears that, too, involved Mr S receiving securities (i.e. shares) issued by a SPV.

The alternative seems to be that Mr S was buying specific share class of Brickowner Investments Limited and Brickowner Investments Limited, in turn, held all the shares in the C or R SPV, for the benefit of holders of the particular share class Mr S had invested in. In these circumstances, I think Brickowner Investments Limited would have been 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 investments were made in Brickowner Investments Limited, rather than directly into the individual property (i.e. C or R) 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. This structure would therefore also have involved Mr S receiving securities (i.e. shares) issued by a SPV. In either event, as the SPV does not come within any of the provisions of the definition of an excluded security, the investments meet the definition of a NMPI.

If that analysis is not correct - i.e. Brickowner Investments Limited was operating in this way but not an SPV - the alternative is C and R were an Alternative Investment Fund (AIF) or Brickowner Investments Limited was an AIF and therefore, in the circumstances, an Unregulated Collective Investment Scheme (UCIS); and the investment meets the definition of a NMPI on that basis instead.

This conclusion is supported by a number of pieces of evidence.

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.”*

Which infers Brickowner Investments Limited is an AIFM (Alternative Investment Fund Manager).

The wording on the Brickowner website at the time also included the following, which is consistent on the subject of the nature of Brickowner Investments Limited:

*“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.”*

And the wording shown on an archived later version of Brickowner’s website is consistent with this:

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

Gallium’s final response letter (and later submissions to us) also appear 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”.*

I am therefore satisfied the investment Mr S made met the definition of NMPI at either (a) or (c) and therefore ought to have been treated as such throughout.

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 investments in C and R to Mr S, and arranged his investments in them. And I am satisfied that Brickowner did promote the investments in C and R to Mr S and arranged his investments in them. It is also not disputed that Mr S was a retail client; and I am satisfied he was.

As the investments were NMPI promotion of them to retail clients was effectively banned at the time of Mr S’s investments. There were rules setting out exemptions to this; and those rules would therefore 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 4.12.4R 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 they were a UCIS or some other form of NMPI, the investments could only be promoted to Mr S 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, or a person (or persons) legally empowered to make investment decisions on behalf of such individual..*

*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:

- Gallium has made inconsistent submissions about the investor categorisation relied on by Brickowner, on behalf of Gallium, when promoting the investments; saying in some submissions it was Restricted Investor and in others it was High Net Worth Investor (and its latest submissions, following my provisional decision, do not clarify

this point).

- Restricted Investor was not a relevant exemption and therefore not a basis on which C or R could have been promoted to Mr S. It seems likely Mr S could have met the definition of a High Net Worth Investor; and he might have declared himself to be one, had he been asked to do so.
- There were, however, further restrictions on the promotion of NMPI to retail clients, like Mr S, which required a preliminary assessment of Mr S's profile and objectives, and consideration of whether it was likely to be suitable for him.
- 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 investments were suitable for Mr S.
- 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 investments to Mr S because the required steps had not been completed.
- Alternatively, Brickowner 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 Mr S, because it was not likely to be suitable for him.
- It is therefore fair and reasonable to require Gallium to compensate Mr S's estate for the loss suffered through the investments in C and R.

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 Mr S before he made the investments in C and R.

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 Mr S’s case, Gallium has said in some submissions that he 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*”.

In other submissions, Gallium says Mr S selected “*High net worth Investor*”. The screen print Gallium has submitted in relation this shows a similar – but not identical – statement to that set out in the rules quoted above. At its conclusion it says:

*“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.”.*

Consumers were then asked to tick a box which said “*I hereby sign the above statement to declare that as of today’s date I am a high net worth individual as described above.*”

Gallium has not provided copies of any forms completed by Mr S.

Pausing there, I note Gallium has provided a copy of an email from Mr S to Brickowner dated 6 March 2018 in its response to my provisional decision. It says this is evidence Mr S reclassified as a High Net Worth Investor, having realised the “restricted investor” declaration was incorrect. I am not persuaded by this. If the email chain is read in its entirety it is clear it is a request, made through Mr S’s son, for a High Net Worth Investor declaration

to support an application to provide a bridging loan through a different business. In other words, it does not relate to Brickowner investments. It is not therefore evidence of Mr S having classified himself in a certain way or having completed forms in relation to the investments in C and R.

Following these statements (whichever is selected) 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 to six months after Mr S applied for his investments. I also note that an archive record of the homepage of Brickowner’s website from around the time the estate invested appears to differ from the screen prints Gallium has provided. I am not therefore certain that the screenshots provided precisely reflect the applications Mr S would have completed.

As mentioned above, Gallium has also provided a copy of a flowchart, which sets out an investment application process. This appears to significantly post-date Mr S’s application, and is not therefore evidence of what he would have been at the time of making the investments in C and R.

However, it is not disputed that some form of application process was followed by Mr S on Brickowner’s website and I think it is reasonable to assume, in the absence of any further evidence, that the process Mr S 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 Mr S followed.

In its submissions Gallium has referred to a questionnaire completed by Mr S in 2019. This is not, however, a relevant consideration here, as I am looking at whether the investment ought to have been promoted to Mr S at the outset. In any event, the form only contains a few basic details.

## **The process and the requirements of the relevant rules**

### ***Categorisation***

As I have set out, Gallium has made inconsistent submissions on this point, and has not provided any evidence to show what category Mr S declared himself to belong to (on the latest submissions Gallium has made on this point I refer back to my comments in the previous section).

Classifying Mr S as a Restricted Investor was not one of the types of exemptions set out in the table at COBS 4.12.4R (5). So, if Mr S declared himself to be a *everyday investor*, Brickowner, on behalf of Gallium, could not have used that categorisation as a basis to promote the investments in C and R to Mr S.

However, the available evidence suggests Mr S was high net worth (as defined at 4.12.6 R), as his income and assets were consistent with what was required under the definition. So, Mr S could have declared himself to be a High Net Worth Investor, which would have offered a basis to promote the investments in C and R to Mr S. Although, as mentioned, it is not clear whether Mr S did actually declare himself to be a High Net Worth Investor.

Given the uncertainties on this point, and that the rules required an assessment of suitability in addition to the categorisation, in any event, I am going to focus on that suitability assessment.

### ***Suitability***

In addition to putting Mr S into one of the relevant investment categories, 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 or R was likely to be suitable for Mr S, based on a preliminary assessment of his profile and objectives, before making any promotion of the investment. The guidance in COBS, at COBS 4.12.5G (2), set out further detail on this, as follows:

*“(c) The requirement for a preliminary assessment of suitability does not extend to a full suitability assessment, unless advice is being offered in relation to the nonmainstream pooled investment being promoted, in which case the requirements in COBS 9 or 9A apply (as applicable). However, it requires that the firm takes reasonable steps to acquaint itself with the client's profile and objectives in order to ascertain whether the non-mainstream pooled investment under contemplation is likely to be suitable for that client. The firm should not promote the non-mainstream pooled investment to the client if it does not consider it likely to be suitable for that client following such preliminary assessment”*

I think it is important here to emphasise the investments Mr S made were not a straightforward product. Mr S was not simply buying a share of a property. He 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 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 in question would go up in value.

The high gearing alone made the investments high risk ones. 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 point, given the “Appendix” document for C sets out estimates of costs without apparently any independent verification (and there is no evidence of this detail having been provided at all in relation to R). Furthermore, 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 for C (again, there is no evidence of this detail having been provided at all in relation to R).

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

I say this to illustrate that 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 Mr S were the five “yes or no” questions quoted. These questions, in my view, did not provide sufficient information to allow Brickowner, on behalf of Gallium, to make any meaningful assessment of whether an investment in C or R was suitable for Mr S. They did not amount to “*reasonable steps to acquaint itself with the client's profile and objectives*”.

The questions asked, in my view, did no more than test whether Mr S had a basic knowledge of investing. They simply asked if Mr S 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 or R was likely to be suitable for Mr S. No questions are asked about his personal and financial circumstances; nor his investment objectives. So, Brickowner simply could not make any assessment of the suitability of the investment for Mr S on the basis of the questions, as they obtained none of the information it needed to make such an assessment.

I note that, in its response to my provisional decision, Gallium has described Mr S's son as Mr S's financial advisor. And it has provided copies of emails between Mr S and his son where investments other than Brickowner are discussed, as well as matters relating to Mr S's (and his wider family's) finances generally.

Insofar as this point (i.e. whether Brickowner undertook a preliminary assessment of Mr S's profile and objectives) is concerned (I consider this evidence further below), I am not persuaded the further evidence shows Brickowner, on behalf of Gallium, took reasonable steps to acquaint itself with Mr S's profile and objectives.

The further evidence, in summary, is as follows:

- A 9 March 2018 email from Mr S to his son's Brickowner email address explaining Mr S "had a look at your site yesterday".
- A 19 March 2018 email sent to Mr S by his son, from his Brickowner email address, setting out details of the Brickowner investments held by Mr S at that time (not including the recently made investments in R).
- A 26 March 2018 "finances spreadsheet" sent to Mr S by his son, from his Brickowner email address, which contains a list of Mr S's investments.
- A 6 May 2018 email from Mr S to his son's Brickowner email address, asking a question about tax:

*I think the fact you have 30K under investment for me is probably not tax efficient as I am paying a lower tax rate than you in UK, plus it's an added complication. I think it would probably be best if you transfer this money back to me and I reinvest .....*

As mentioned above, there is also a 6 March 2018 email exchange between Mr S and his son relating to a High Net Worth Investor declaration, to support an application to provide a bridging loan through a different business.

The first point to make in relation to this is that, although Mr S's son's Brickowner email address is used, much of this correspondence, although it discusses finances, seems to be personal in nature. So, I am not persuaded these emails are evidence of Brickowner making a preliminary assessment of suitability.

Setting that aside, even if this does amount to efforts by Brickowner to acquaint itself with Mr S's profile and objectives, rather than personal correspondence between Mr S and his son, it fails to amount to reasonable steps to do so as, although it does show limited information about Mr S's financial circumstances (i.e. profile) was known, it does not show reasonable steps were taken to assess Mr S's objectives. Rather, it seems to show that Mr S's son was putting forward suggestions to Mr S for investment on an informal basis, and engaging in general discussion about the family finances, but provides no evidence of any discussion of Mr S's objectives (there are no references to risk or Mr S's long term goals, for example). Or, it follows, any evidence of Mr S's objectives being considered against the profile of the investments in C and R.

So, I remain of the view that Brickowner, on behalf of Gallium, did not undertake a preliminary assessment of suitability (or that it at least did not sufficiently undertake such an assessment) in relation to the promotion of C and R.

### **What should Brickowner, on behalf of Gallium have done?**

As no (or an insufficient) preliminary assessment of suitability had been carried out, Brickowner, on behalf of Gallium, should have concluded that it could not promote C or R to Mr S. So, matters should have concluded there. Or it could, alternatively, have proceeded to make the assessment.

Had Brickowner, on behalf of Gallium, followed the applicable rules - had a preliminary assessment of Mr S's profile and objectives been carried out - this would have revealed an investment in C or R was *not* likely to be suitable for Mr S. Rather, it would have revealed there was no basis to conclude high risk specialised investments like C and R were suitable for Mr S.

I acknowledge Mr S had made three previous Brickowner investments, and the further evidence Gallium has provided, summarised above, shows Mr S had made around £30,000 of investments (albeit, it seems, in his son's name) on some peer to peer/lending platforms, and had provided at least one bridging loan to a property development (which does not appear to have been connected to Brickowner). But I have not seen any evidence to show Mr S made these investments on the understanding they were high risk (where they might have reasonably been considered as such). Or any evidence otherwise to suggest Mr S was willing to take a high level of risk in relation to the investments in C and R.

So, overall, I am not persuaded that a preliminary assessment would have shown Mr S was willing to take a high level of risk, in relation to the investments in C and R.

I also remain of the view Mr S had limited investment experience. He had, as mentioned, made previous investments with Brickowner, and some peer to peer/lending investments. But all of these appear to have been relatively recent to the investments in C and R and seem to have been made on the suggestion of his son. And none appear to have suffered a loss (at the time of the investments in C and R, at least). So, I do not think these investments are evidence of Mr S having significant experience or being a sophisticated investor.

Mr S's investments otherwise all appear to have been lower risk.

I also remain of the view that the previous Brickowner investments offered further reasons why investments in C and R were not likely to be suitable for Mr S. I say this because all three investments were extant at the time of Mr S's investments in C and R. They were therefore evidence Mr S already had significant exposure to investments of this type; and further reason to conclude that investments in C and R were not likely to be suitable.

Going beyond this, Mr S was approaching retirement, and the money he was investing in C and R was from sale of his family home, was to be used (in part) to buy a retirement home, and to support him and Mrs S during retirement. This is further evidence Mr S did not have the tolerance or capacity for a high level of risk, or of the investments being otherwise consistent with his objectives.

So, overall, I remain of the view that any reasonable preliminary assessment of suitability would have given Brickowner, on behalf of Gallium, 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 investments would not have been promoted to Mr S either because Brickowner, on behalf of Gallium, ought to have recognised the rules had not been followed or, if it had taken steps to follow the rules, it would have been aware the investments were not likely to be suitable for Mr S. The investments in C and R would not therefore have been made, had Gallium followed the rules.

### **Risk warnings and relationship with staff at Brickowner**

Gallium has referred to Mr S 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 investments to Mr S, 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 therefore have been consistent with its regulatory obligations.

Gallium has also referred to the connection between Mr S and a senior member of staff at Brickowner; as mentioned, the member of staff was Mr S's son. I do not think this personal relationship meant, in the circumstances, it would have been fair and reasonable for Brickowner to have proceeded to promote the investment to Mr S; as there was no basis under the rules for it to do so. The personal relationship between Mr S and a member of Brickowner's staff did not exempt Brickowner, acting on behalf of Gallium, from the rules relating to the promotion of the investments. There was also no means by which Mr S would have been able to proceed insistently – Brickowner could simply not promote the investments to Mr S, as the rules did not allow it to do so.

On the subject of risk warnings, the available evidence gives further evidence of why it was not fair and reasonable for Brickowner, on behalf of Gallium, to promote the investment to Mr S.

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 Mr S'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 Mr S at the time; or made available to him. 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 Financial Services Compensation Scheme (FSCS) protection may not apply. And the Restricted Investor and High Net Worth statements say, 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 Mr S – do not provide such an explanation either.

These general warnings also need to be viewed in context of what was said about the risk associated with the Brickowner investments specifically. In relation to this, I note that the 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 investments, in any event; and it follows that I uphold the estate’s complaint.

I will now turn to consider fair compensation.

### **Putting things right**

#### **Fair compensation**

In assessing what would be fair compensation, I consider that my aim should be to put Mr S’s estate as close to the position it would probably now be in if Mr S had not made the investments in C and R.

For the reasons I have set out, I am satisfied that the investments should not have been promoted to Mr S by Brickowner, on behalf of Gallium. They should not therefore have proceeded; and the estate would not have suffered the loss it has.

I think Mr S would have invested differently. It is not possible to say *precisely* what he would have done, but I think it likely he would have retained the money in lower or no risk investments, which is consistent with the investments he made otherwise. I am therefore satisfied that what I have set out below is fair and reasonable given the Mr S’s circumstances and objectives when he invested.

#### **What should Gallium do?**

To compensate the estate fairly, Gallium must:

- Compare the performance of Mr S’s investments with that of the benchmark shown below and pay the difference between the fair value and the actual value of the investments. 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.
- Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
C and R	Liquidated	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: 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 the estate's acceptance)

### **Actual value**

This means the actual amount paid from the investments at the end date.

### **Fair value**

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

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

Any withdrawal from 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.

### **Why is this remedy suitable?**

I have chosen this method of compensation because:

- I think Mr S wanted some growth with a small risk to his 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 his capital.
- The FTSE UK Private Investors Income **Total Return** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr S's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr S into that position. It does not mean that Mr

S would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr S could have obtained from investments suited to his objective and risk attitude.

### **My final decision**

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £195,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £195,000, I may recommend that Gallium Fund Solutions Limited pays the balance.

**Determination and award:** I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Gallium Fund Solutions Limited should pay the amount produced by that calculation up to the maximum of £195,000 (including distress or inconvenience but excluding costs) plus any interest on that amount as set out above.

**Recommendation:** If the amount produced by the calculation of fair compensation exceeds £195,000, I recommend that Gallium Fund Solutions Limited pays Mr S's estate the balance plus any interest on the balance as set out above.

The recommendation is not part of my determination or award. Gallium Fund Solutions Limited doesn't have to do what I recommend. It is unlikely that Mr S's estate could accept a final decision and go to court to ask for the balance and the estate may want to get independent legal advice before deciding whether to accept my decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr S to accept or reject my decision before 14 November 2025.

John Pattinson  
**Ombudsman**