

The complaint

Mr H invested in a Bond issued by an unregulated business in an Individual Savings Account (“ISA”) with Hilbert Investment Solutions Ltd (“Hilbert”). The money invested in the Bond was not repaid to Mr H at maturity in 2022. Mr H holds Hilbert responsible for his losses as he says he only made the investment because it was backed by Hilbert, a regulated business.

What happened

In March 2019 Mr H contacted Astute Capital plc in relation to a Bond investment it was offering. Mr H had seen it advertised, he thinks in a newspaper.

Mr H asked Astute Capital to confirm its Financial Conduct Authority (“FCA”) number as he said it did not appear to be on the FCA register.

Astute Capital said it was:

“...just the vehicle through which you invest, we do not offer advice and we do not hold the funds”.

Astute Capital went on to say its ISA Manager and the Security Trustee are both regulated and authorised firms. The ISA Manager was Hilbert Investment Solutions (“Hilbert”).

Mr H also contacted Hilbert before he invested. By email in reply dated 15 March 2019, Hilbert said:

“We confirm that Astute Capital PLC does not hold client money or assets and is not ISA Manager. However, we, Hilbert, act as a custodian for Astute, who issues bonds direct to us. This enables retail customers to be able to access Astute’s bonds through our platform either within a tax efficient wrapper such as an ISA, or outside of such a wrapper if they prefer.

To keep the experience as simple as possible, customers are able to complete their application and fund their investment from Astute’s website. As all of the relevant information about the bond is available and easy to access from their website it made more sense to keep the application process in the same place.

For your reference, Hilbert... is authorised and regulated by the [FCA]...All funds are held within a dedicated Client Money [sic] before they are invested. Once invested we hold a register of the number of bonds purchased and allocated to each client....”

Mr H was still concerned. He replied:

“Many thanks

This still does not clarify are they... OK to invest with...”

Hilbert replied on 15 March 2019:

"...I understand your concerns.

We confirm that Astute Capital is a legitimate business and the bonds are legitimate. However, as I'm sure you can appreciate, capital is at risk so we need to be careful about how we word responses to ensure we do not provide financial advice.

The bonds are listed on the Irish Stock Exchange and if you invested they would be held in our name on your behalf. If you have any further questions about the bonds you should direct that at Astute Capital PLC."

Mr H decided to invest £20,000 in Astute Capital Bonds.

Astute Capital offered more than one Bond investment. Mr H applied for a three-year income Bond with an interest rate of 7.5% per year to mature in 2022.

On 26 March 2019 Astute Capital provided written confirmation of his investment.

On 29 March 2019 Mr H emailed Hilbert to query this, saying he had received a contract note but:

"still nothing noted where the funds are invested."

Hilbert replied on the same day, as follows:

"I think there's some confusion surrounding Astute's role in the process. Astute does not hold any client monies at any point in the investment process.

The card payment facility you used debits the funds to Our Client Money account. The funds remain held in a Client Money account, owned by Hilbert ..., until the bonds are purchased from Astute. The contract note is confirmation of client Monies leaving Hilbert's Client Money account and Bond units entering Hilbert's Client Assets holding.

To be clear, Hilbert held your funds before it was invested in a segregated Money account. Hilbert then used these funds to purchase your bonds in line with your original online instruction. When the bonds were settled they were transferred to our Client assets holding."

Hilbert terminated its relationship with Astute Capital in August 2019 but it continued to administer the investments made in ISA accounts with it before then.

In 2022 Astute Capital published a notice to say it was unable to pay interest or bond maturities. It put forward a proposal under which bond holdings would be converted to shares with the shares to be listed on a recognised stock exchange in order to retain ISA status.

On 14 May 2024 Hilbert contacted investors in Mr H's position to say that HMRC had decided that the investment was no longer ISA eligible due to prolonged delay in listing the shares on a recognised stock exchange. Hilbert said it would reregister the shares in the investors' names.

Two days later Mr H contacted the Financial Ombudsman Service. He said he had been trying to obtain repayment of his money and that Astute Capital was not responding to his requests. He said he would not have bought the Bond if it had not been backed by Hilbert. He said he wanted his £20,000 investment repaid. We forwarded Mr H's communication to Hilbert. It issued a 'final response' letter in answer to Mr H's concerns on 24 June 2024. Hilbert did not uphold Mr H's complaint. It made a number of points including:

- Hilbert entered into a business relationship with Astute Capital in late 2018 to act purely as "ISA manager administrator" for Astute Capital clients who invested in a series of Bonds issued by Astute Capital.
- That relationship ended in August 2019 but Hilbert continued to act as ISA Manager on the existing ISAs.
- As the shares are not listed on a recognised stock exchange they can no longer be held in the ISA.
- Hilbert had not informed Mr H that the investments would be safe.
- As Mr H invested directly with Astute Capital he should direct his complaint to it.

Mr H referred his complaint back to the Financial Ombudsman Service. He said it was his understanding that Hilbert is under a duty of care and should for example ensure any business it deals with is reputable and ensure that a customer is treated fairly. Mr H says Hilbert gave credibility to the investment and is responsible for the losses he has suffered. Hilbert says it acted solely as ISA Manager and custodian. It did not advise Mr H and his complaint is about the performance of the investment which is not a matter it is responsible for. The complaint should be directed to Astute Capital.

As I understand it, Astute Capital has ceased operations and a liquidator was appointed in late 2024 and the money invested in its Bonds is in effect lost.

On 29 October 2025 I issued a provisional decision in this complaint. I explained why I thought the complaint should be upheld, and how Hilbert should put things right. My provisional decision included the following:

"What I have decided - and why:

I've considered all the evidence and arguments in order to decide what is fair and reasonable in all the circumstances.

I am required to decide what is fair and reasonable in all the circumstances of the case taking into account relevant law and regulations, regulators' rules, guidance and standards, and codes of practice, and where appropriate what I consider to have been good industry practice at the relevant time.

Did Hilbert give advice or exercise discretion?

Hilbert did not give Mr H advice to invest in the Astute Capital Bond or make the investment on a discretionary basis. Mr H does not allege that it did. Hilbert was not therefore under an obligation to ensure the investment was suitable for Mr H.

Was Hilbert subject to any other rules if it didn't give advice or exercise discretion?

A regulated firm's responsibilities are not limited only to situations where it gives advice or makes investments acting on its discretion.

As well as rules relating to suitability of advice (when given) the regulator also has rules relating to appropriateness that apply to some situations when advice is not given. I have considered whether those rules apply in Mr H's case.

It is important to keep in mind that Mr H applied for the Astute Capital Bonds in March 2019 and apply the rules applicable at that time.

The rules relating to appropriateness are in COBS10 and 10A.

COBS 10:

COBS 10 applies to non-readily realisable securities. And a non-readily realisable security is defined as a security which is not a readily realisable security.

The definition of a readily realisable security included a security admitted to official listing on an exchange in an EEA State.

The Astute Capital Bond was listed on the Irish Stock exchange. And Ireland is an EEA state.

This means the investment (when made) was a readily realisable security and COBS 10 was not applicable.

COBS 10A:

COBS10A applies when firms provide "*investment services*" in the course of "*MiFID or equivalent third country business*".

COBS 10A does not apply when the firm makes a personal recommendation or carries out portfolio management.

Hilbert did not make a personal recommendation to Mr H or carry out portfolio management for Mr H so COBS10A may be applicable if Hilbert did carry out investment services in the course of MiFID or equivalent third country business.

What does investments services mean?

Investment services was a defined term in the FCA rule and at the time of Mr H's application its definition included:

“any of the following involving the provision of a service in relation to a *financial instrument*:

...

(b) execution of orders on behalf of *clients*;

The definition of financial instrument included "*transferrable securities*". And *transferrable securities* had a definition that included bonds which are "negotiable on the capital market".

So the execution of orders on behalf of clients in respect of bonds that are negotiable on the capital markets is an "*investment service*".

What is the execution of orders on behalf of clients?

This is defined in MiFID as:

“execution of orders on behalf of clients’ means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients and includes the conclusion of agreements to sell financial instruments issued by an investment firm or a credit institution at the moment of their issuance;”

And the FCA provided the following guidance on this service at PERG13.3 at the time of Mr H’s investment:

“Executing orders

Q15. When might we be executing orders on behalf of clients (A2, article 4.1(5) and recital 45)?

When you are acting to conclude agreements to buy or sell one or more MiFID financial instruments on behalf of clients. You will be providing this investment service if you participate in the execution of an order on behalf of a client, as opposed simply to arranging the relevant deal. In our view, you can execute orders on behalf of clients either when dealing in investments as agent (by entering into an agreement in the name of your client or in your own name, but on behalf of your client) or, in some cases, by dealing in investments as principal (for example by back-to-back or riskless principal trading)...

Was the Astute Capital Bond a transferrable security?

I have not seen the terms and conditions of the Bond taken out by Mr H in 2019 but there is no dispute that at the time Mr H entered into the investment it was a bond listed on the Irish Stock exchange.

Since the Astute Capital Bond was listed it was, in principle at least, tradeable or negotiable on the capital markets.

The Astute Capital Bond was therefore a *transferable security*.

Was Hilbert providing a service in relation to the execution of orders on behalf of clients?

Hilbert has argued that it was acting solely in the capacity of ISA Manager and custodian and that the service it provided did not amount to providing an investment service in the course of MiFID business. It says it did not provide a service in relation to the execution of orders. It says:

“All subscription monies were received by Astute in its capacity as Issuer. Following issuance, the bonds were transferred into Hilbert’s custody and held on behalf of Astute.”

In my view this short description of events glosses over material details in the process that led to Mr H investing in the Astute Capital Bond.

The process is not described in any of the promotional documents provided by Hilbert as they relate to an earlier period when Ryker Securities, not Hilbert, was the ISA Manager.

Hilbert has however provided a copy of a service level agreement relating to the “provision of safe custody and administration and associated nominee and other services” between it and Astute Capital. I note a number of points from that agreement (in which Hilbert was generally referred to as the Custodian and Astute Capital was generally referred to as the Issuer) including:

- The Custodian was to open two client money accounts: a capital account for the receipt of client money subscriptions and transfers and an income account for receipt and distribution of coupons (interest payments) to clients.
- The Custodian was to provide details of the Capital bank account to the Issuer (Astute Capital) for inclusion on the application forms made both online and on paper.
- The Custodian was to establish terms of business with debit card payment providers for online applications.
- The Custodian was to establish terms of business with an electronic identity checking service to be completed for each application.
- *“Execution of trade*

Custodian and Issuer to agree defined process. Astute to provide payment and Avenir details. Custodian to document the process of placing orders for each tranche and provide this to the Issuer. Custodian and Issuer agreement [sic] total investment amount for each tranche prior to trade. The trade will be executed on the below timescales:

Product	Frequency of trading	Cut off date for subscriptions	Trade date
<i>1 year</i>	<i>Monthly</i>	<i>Cleared funds on the 17th</i>	<i>18th</i>
<i>3 year Income</i>	<i>Weekly</i>	<i>Friday</i>	<i>Monday</i>
<i>3 year Growth</i>	<i>Weekly</i> <i>Monthly [sic]</i>	<i>Friday</i>	<i>Monday</i>
<i>5 year</i>	<i>Monthly</i>	<i>Cleared funds on the 17th</i>	<i>18th”</i>

- *“Online Applications*

Real time via Issuer’s website.

Issuer’s website connects to Debit card payment provider and completes the application. Alternatively, the client chooses to transfer funds to Custodian’s client money account before the cut-off date and completes the application.

Custodian complete an automated [Anti-Money Laundering] check online...”

- *“Paper applications*

Paper applications will be sent to the Issuer together with cheques...

If an investor completes a paper application, then the Issuer will be totally responsible for uploading account onto the online platform...

Original application and cheque to be posted to the Custodian...

Custodian to process paper Application Forms and validate the Investor's data...

Cheques to be banked within 24 working hours...

- In the section headed *"Investing into Security"* there is a table which includes the following:

"Issuer and Custodian to agree:-

...

<i>Execution of trade</i>	<i>Custodian to carry out"</i>
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Hilbert has also provided a document headed *"ISA Manager, Administrator and Custodian Terms and Conditions"* which it says are the terms and conditions of the agreement between it and Mr H. That document includes the following:

- *"We open an Account in your name once we have received an Application which is in a form acceptable to us and your Payment has cleared. All Applications are subject to anti money laundering and other regulatory checks as appropriate and determined by us from time to time. You will be classified as a Retail Client in accordance with the FCA's Conduct of Business rules unless we specify otherwise in correspondence with you..."*
- *"Purchases and sales effected by us on your instructions will be done in compliance with applicable FCA rules in accordance with our Order Execution Policy...*
When we execute an order on your behalf we will be acting as your agent and not as principal unless agreed otherwise."
- *"All investments purchased by us on your behalf along with those of other investors who have an Account will be registered ... in the name of our nominee... However you will beneficially own the investment."*

I also note that the way Hilbert answered Mr H's queries before he invested and immediately afterwards seems consistent with the terms and conditions document and with the service level agreement document.

In the circumstances, it is my view that in broad terms the application process included the following steps:

- Mr H applied for an Astute Capital Bond via Astute Capital's website. And as part of that application he also:
 - provided personal details to allow anti-money laundering checks to be made
 - opened an ISA account with Hilbert
 - became a retail client of Hilbert
 - paid money to subscribe for the Bonds to Hilbert
 - instructed Hilbert to buy the Bonds on his behalf to be held within his ISA with Hilbert.
- and Hilbert:
 - arranged for anti-money laundering checks to be carried out

- opened an ISA account for Mr H
- accepted into its client money account Mr H's funds to be invested
- received Mr H's instructions, in his capacity as a retail client, to buy Astute Capital Bonds on his behalf for his ISA
- placed the order to buy the bonds as agent for Mr H, with the bonds ordered in its name to be held for Mr H
- paid over funds for the purchase price for the Bonds from its client money account
- received the Bonds it had placed an order for in exchange for the funds it had paid over,
- held the Bonds in its name as agent for Mr H in its nominee arrangement.

And in the circumstances I am therefore satisfied that Hilbert was acting to conclude the agreement to buy or sell the Astute Capital Bonds on behalf of its client Mr H. It was providing that service as it was participating in the execution of an order as agent on behalf of its client Mr H.

Was Hilbert providing investment services in the course of “MIFID or equivalent third country business”?

MiFID or equivalent third country business includes within its scope *MiFID business* which is defined as:

“investment services and activities and, where relevant, ancillary services carried on by a MiFID investment firm.”

Investment services and activities has a definition that includes:

“any of the services and activities listed in Part 3 of Schedule 2 of the Regulated Activities Order, relating to any of the instruments listed in Part 1 of the Schedule to that Order.”

Transferable securities are listed within Part 1 of Schedule 1, and I have said above that Astute Capital Bonds were a transferrable security.

And execution of orders on behalf of clients is an activity listed in Part 3 of Schedule 1. And I have said above that Hilbert was providing the service of execution of orders on behalf of clients.

MiFID investment firm includes:

“an investment firm with its head office in the UK (or if it has a registered office, that office).”

And *investment firm* is defined as:

“Any person whose regular occupation or business is the provision of one or more investment services to third parties...”

The definition of *person* includes a company. And I note that Hilbert's registered office is in the UK.

As Hilbert is a company whose regular business is the performance of one or more investment services to third parties and has its registered office in the UK, it is an MiFID investment firm. And it was providing the *investment services* which are the subject of Mr H's complaint.

Is COBS 10A applicable in this case?

For all the reasons given above it is my view that COBS10A was applicable when Mr H made his Astute Capital Bonds investment in his ISA with Hilbert.

What were the relevant requirements of COBS10A?

In broad terms COBS 10A requires a firm to obtain information from its client and carry out an assessment of whether the product or service is appropriate for the client. There is however an exception to that requirement, and I will consider the exception next.

The exception to the requirement to carry out an appropriateness assessment:

Under COBS 10.A.4.1R a firm is not required to assess appropriateness if the service only consists of the execution of orders related to bonds admitted to trading on a regulated market, except those that:

“embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved.”

Did the Astute Capital Bond incorporate a structure which makes it difficult for the client to understand the risk involved?

In November 2019 – after Mr H's investment – the FCA made what it called a “Temporary intervention on the marketing of mini-bonds to retail clients”. (The regulator referred to this intervention as a “TPI” and it referred to speculative illiquid securities as “SIS”.)

The FCA said the following:

“We are introducing temporary product intervention measures for 12 months from 1 January 2020 to address risks of consumer harm from the promotion of speculative mini-bonds to retail investors. It reflects our concerns with the widespread marketing of these products, particularly online, despite being high risk and difficult for most retail investors to understand.”

I note, and do not overlook, that the temporary interventions and comments made by the regulator related to unlisted bonds and that the bonds in Mr H's case were listed. In June 2020 the FCA issued a consultation paper entitled “*High-risk investments: Marketing speculative illiquid securities (including speculative mini bonds) to retail investors*” (CP20/8). That paper included:

“2.2 We consider SISs are high risk and opaque where an issuer uses some or all of the funds raised to on-lend to third parties, or to buy or acquire investments, or to buy or fund the construction of property. The risks associated with SISs are often similar to unauthorised collective investment schemes (UCIS), which are subject to similar restrictions to the TPI as are other types of NMPIs. We consider that the complexity and risks of SIS mean that their promotion should be

limited to a very niche retail market, where investors can understand the risks and bear the potential losses.” [original emphasis, NMPIs means non-mainstream pooled investments.]

And

“3.11 The key features of the SISs we have seen include:

- *the promise of high annual returns, often presented as ‘fixed’, often starting at 6-8% - well above the rate offered by traditional cash-savings products ...*
- *exposure to high-risk, speculative assets that are difficult for an investor to value or verify, and which present a mismatch to the implied ‘security’ of returns and capital repayment*
- *an unauthorised issuer, or an issuer that is authorised but where the issuing of securities is unregulated, which usually means there is no FSCS protection*
- *complex legal structure to a product, or between a promotor and issuer*
- *high upfront or embedded costs and charges*
- *lack of effective secondary market*
- *often misleading financial promotions that*
 - *focus on attractive headline returns*
 - *imply capital protection or other features (diversification, asset-backed) as reducing risk, which may not be effective protections in practice*
 - *do not disclose costs and charges to the investor or embed them in the arranging or structure of the product, with fees of 20% or more of funds raised in some cases (undermining the likelihood of being able to deliver advertised rates of return)*
 - *use the ‘approving’ role of an FCA-authorised firm, or the fact the issuer or distributor is authorised for certain activities, to imply regulatory protection or FCA endorsement of a product*
 - *advertise that the investment is eligible to be held in a tax-incentivised ‘wrapper’ (eg an IF ISA or SIPP) when it does not meet the qualifying criteria*
 - *use the role of HMRC in overseeing tax wrappers (eg IF ISA or SIPPs) to imply oversight or endorsement by the Government*

3.12 the risks associated with SISs are often similar to UCIS which are subject to similar restrictions to the TPI, as are other types of NMPIs. The likelihood of investors receiving interest and capital repayment often depends on an issuer achieving pooled returns from lending to, or investing in, other third parties or property, usually involving a high degree of speculation and risk. Significant costs and charges or third-party payments deducted from the amounts raised by an issuer also make the feasibility of achieving promised returns even more challenging. We do not think most retail investors can easily understand or assess such risk”. [original emphasis]

In December 2020 the FCA issued a policy statement called “*High-risk investments: Marketing speculative illiquid securities (including speculative mini-bonds) to retail investors*” (PS20/15). It included:

“1.13 Since the introduction of the TPI, we have seen evidence that some UK-based issuers of speculative mini-bonds have gained admission to listing for bonds which are not regularly traded and are promoting them to UK retail investors. These listed bonds are not in scope of the TPI but are similarly high-risk and complex, and we believe they are not suitable for most retail investors.”

I do note that all the above were published after Mr H made his investment in 2019 but the comments made are still valid for investments made in early 2019 if the investments have the same or similar characteristics to those described above. Hilbert has provided a promotional leaflet from Astute Capital from 2018 relating to the Astute Capital Bond. At that time the ISA Manager was a different firm, but the description of Astute Capital’s business model will have been materially the same in 2019 when Mr H invested.

Astute Capital said:

“Astute Capital is an established UK Plc finance company headquartered in London. We specialise in providing asset backed funding to UK property and SME markets. Our mission is to help build more homes and grow stronger businesses whilst achieving strong returns for our bondholder.”

We invest your funds by lending them to carefully selected property developers in the UK. All funds are directly secured against real assets, this is called security. Our lending policy ensures the security always far outweighs the loan amounts.

...Our business model gives customers direct access to returns from asset-backed lending opportunities usually only available to Banks, Institutional and Corporate investors or via higher risk investment structures such as loan notes, non-listed bonds or Peer-to-Peer lending platforms.

Our Strategy is to ensure all funds are ultimately secured directly against real assets such as UK property. This ensures our bondholders ultimately have security over the assets in the name of the security trustee, NCM fund services. In the event of a default, NCM have legal authority to take control of the assets in order to repay the loan.

Astute Capital Bonds are recognised as standard assets and meet HMRC’s criteria to be held within an ISA. This allows eligible customers to invest up to £20,000 per annum and pay zero tax on their earnings...”

The leaflet also said:

“NCM fund services act as the appointed security trustee for Astute Capital Bondholders... All funds are ultimately secured against UK assets by way of legal charge in the name of NCM fund services. In the event of default, the trustee takes possession over the assets in order to try to repay the bond holder.”

...our Independent Credit Committee has over 50 years experience in asset-backed lending within the SME and property markets.

The committee will be working to ensure all the money invested into the Astute Bond will be used to generate the best return and that the right security is taken to give customers genuine peace of mind.”

The following was included in a ‘frequently asked questions’ section:

“How is risk mitigated?”

Once a loan has passed the Astute Capital criteria, a legal charge is secured against the underlying asset. This charge is assigned to a Security Trustee (Authorised and Regulated by the Financial Conduct Authority) on behalf of Bondholders (investors) and in the event of a default of any interest payments by Astute Capital, the Security Trustee has the right to take control of the underlying assets to recoup capital and interest payments.”

“What are the key differences between a listed Bond and a non-listed Bond?”

Non listed bonds are similar to loan notes, privately issued by companies and not recognised as a security on the financial market and therefore do not get issued with ISIN numbers and cannot be traded. They are illiquid and are not recognised as standard assets by the FCA. Therefore, they cannot be purchased with a traditional ISA account and must be done so using an Innovative Finance ISA.

Listed Bonds are listed on a recognised stock exchange, are issued with an ISIN (International Securities Identification Number) and recognised by the FCA as standard assets. Listed bonds can be traded, however trading is subject to availability in the market and it is likely clients selling prior to maturity will be offered a lower amount than their original investment.”

I also note the following point was made in the ‘Risks to consider’ section of the brochure:

“The Secondary Market

Bonds may have no established trading market when issued, and one may never develop. If a market does develop, it may not be liquid. Investors may not be able to sell their Bonds easily or at prices that will provide them with a yield comparable to similar investments that have a developed secondary market. If an investor chooses to sell prior to maturity of the Bonds, the investor may receive an amount less than the amount due to be paid upon maturity.”

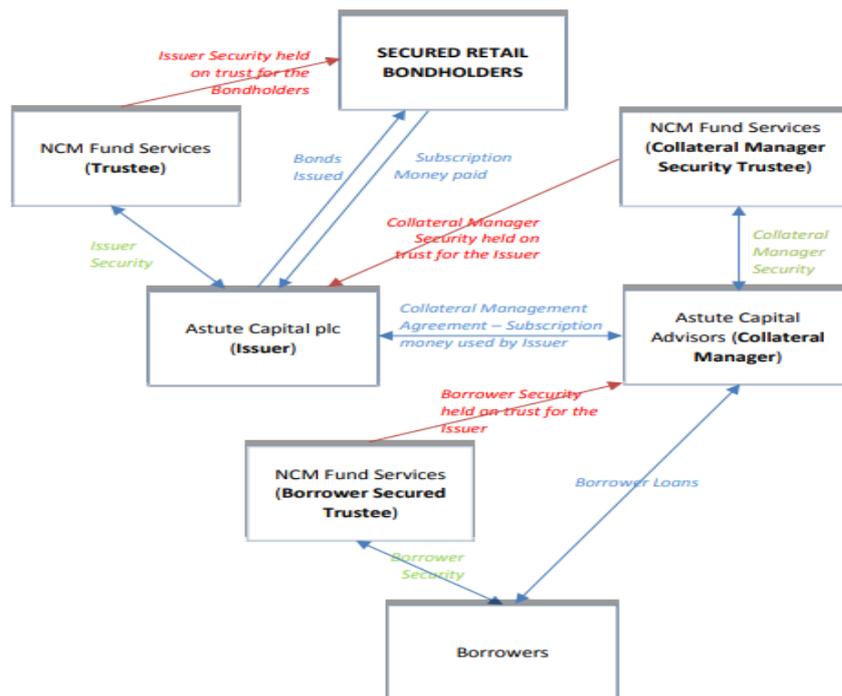
No information is given in the leaflet about the charges, costs or expenses in relation to the bond.

As well as the documents provided by the parties, I have found a document headed “Final Terms date 11 January 2019 Astute Capital PLC...” which appears to set out a breakdown of the final terms of the Astute Capital Bonds. The document can be found at:

https://ise-prodnr-eu-west-1-data-integration.s3-eu-west-1.amazonaws.com/legacy/Final+Terms_ac5c2cec-431f-4395-9f95-6c4476976526.PDF

Next to the heading “structure” the document has the following text and diagram:

“For each Series issued under the Programme, the Issuer will issue Bonds to the Bondholders in one or more Tranches. The proceeds from each issue will be used by the Collateral Manager under the Collateral Management Agreement to advance the Borrower Loans to Borrowers in accordance with the Borrower Loan Agreements.”



I note that the total estimated net proceeds of the Bond offer and the estimated total expenses of the offer was not given in the document – it was said those details would be given in another document I have not found.

One figure was however given. An indication of the overall amount of the underwriting commission and placing commission was said to be 10% of the “Aggregate Nominal Amount”. This was a cost relating to the Bond issue which is over and above all the various expenses involved in running the arrangement such as the Security Trustee’s fees, and the Collateral Manager’s Fees and Astute Capital’s costs all embedded in the arrangement and having some form of impact on the arrangement’s ability to pay the promised return.

It can be seen from all the above that:

- The Astute Capital Bond was raising money to lend on to third party property developers.
- The Bond was listed but it was unlikely there would be a secondary market for the Bonds – the investment was illiquid.
- The structure of the investment was involved.

- The risks involved in the underlying investments were unclear.
- The costs involved in the arrangement and the effect that would have on the arrangement's ability to pay the return to investors was unclear.

In my view the investment was similar to the investments referred to in the publications from the FCA, and it is my view that like those investments the Astute Capital Bond had a structure which makes it difficult for the client to understand the risk involved.

It is therefore my view that the exception to COBS 10.A.4.1R does not apply to the Astute Capital Bond.

Obligations under COBS 10A – an appropriateness assessment:

Under COBS10A.2.1R a firm must ask their client to provide information regarding that client's knowledge and experience in the investment field relevant to the specific type of product or service offered to enable the firm to assess whether the service or product envisaged is appropriate for the client.

Under COBS 10A.2.3 R a firm is required to determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded when assessing whether an investment service is appropriate for a client.

Under COBS10A.3.1R if a firm considers, on the basis of information received to enable it to assess appropriateness, that the product or service is not appropriate for the client, the firm must warn the client. The warning may be provided in a standardised format.

Under COBS 10A.3.2R If the client does not provide the information to enable the *firm* to assess appropriateness, or if the client provides insufficient information regarding their knowledge and experience, the firm must warn the *client* that the firm is not in a position to determine whether the service or product envisaged is appropriate for the client. This warning may be provided in a standardised format.

Under COBS 10A.3.3G If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the *firm* to consider whether to do so having regard to the circumstances.

Did Hilbert carry out an appropriateness assessment?

In this case Hilbert did not request relevant information from Mr H. It did not assess whether the service it was providing was appropriate for him. It did not warn him that it was not in a position to assess whether the service it was providing in relation to the execution of an order to buy Astute Capital Bonds on behalf of Mr H was appropriate for him.

What should have happened?

Under COBS 10A.2.1R and COBS 10A.2.4R Hilbert should have requested from its client, Mr H, information regarding his knowledge and experience in the investment field relevant to the Astute Capital Bond investment including information on:

- (a) the types of service, transaction and financial instrument with which the client is familiar;

(b) the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out;

(c) the level of education, and profession or relevant former profession of the client or potential client.

We asked Mr H to provide information relevant to the above. He said:

- *"I am actually [occupation given] (or was at the time) so as you can appreciate my attitude towards risk is very risk averse. My area of expertise was Commercial [type of service given] (SME) and High Net Worth.*
- *I do have other ISA's and have participated in them for a number of years mainly via Banks, Building Societies and other recognised financial institutions such as Shroders and Hargreaves Lansdown. Hence when I saw the advertisement in the Times newspaper I believe showing very good rates, I dug a little deeper into which financial institution backed this and as my previous correspondence shows, I was led to believe this was Hilbert Investment Solutions Limited, a recognised body and an authorised entity via the FCA, so I had little hesitation that this would be sound.*
- *My appetite towards risk, as mentioned above, comes from my former role as [occupation given], I am and always will be very risk averse and cautious.*
- *No I have not invested in this type of Bond previously (thankfully)."*

I have no reason to think that the above is inaccurate in any respect or that it is materially different to the information Mr H would have provided to Hilbert in 2019 if it had requested it.

Further it is my view that if Hilbert had gathered and considered this information it reasonably would have concluded that the Astute Capital Bond was not appropriate for Mr H. It was a relatively high-risk investment and it is not clear that Mr H had the knowledge and experience in the investment field relevant to the Astute Capital Bond to understand the risks involved in the investment.

It is therefore my view that if Hilbert had reasonably carried out an appropriateness assessment, it would have warned Mr H that its service of executing his order to buy the Astute Capital Bond was not appropriate for him.

And it is also my view that if Mr H had been given such a warning he would not have gone ahead with the investment. His emails from the time show he was proceeding with caution in unfamiliar territory and in my view he would have readily turned back if told by Hilbert, an FCA regulated firm, that (in effect) the investment in the Astute Capital Bond was not appropriate for him.

It is my view that but for the errors on the part of Hilbert in failing to carry out an appropriateness assessment Mr H would not have invested in the Astute Capital Bond. Mr H has said that the investment has caused him financial loss and has caused him worry and upset in losing his money. He says this money was part of his overall retirement planning - he was trying to build up a "nest egg" for retirement - and he is no longer working."

Mr H agreed with my provisional decision. Hilbert did not. It made a number of points in response including the following:

- Hilbert was not under an obligation to conduct an appropriateness assessment

because the exemption in COBS 10A4.1 applies.

- Even if Hilbert had carried out an appropriateness assessment, it is likely Mr H would have invested in the Astute Capital Bond in any event.

In support of these two main points Hilbert made a number of points including:

- COBS 10.4.1(a)R provides that a firm that is within the scope of COBS10A is exempt from performing an appropriateness test if:
 - The investment service provided by the firm consists solely of the execution or reception and transmission of client orders (with or without ancillary services which includes safekeeping and administration of financial instruments for the account of clients, including custodianship and related service such as cash/collateral management), and
 - Relate to non-complex investments
- The service Hilbert provided consisted solely of the execution of orders with ancillary services related to bonds that qualify as non-complex instruments.
- COBS 10A.4.1(2)R sets out criteria for an instrument to be considered a non-complex investment. Bonds qualify if traded on a regulated market and do not embed a derivative or incorporate a structure that makes it difficult for the client to understand the risk involved.
- The Astute Capital Bond qualified as a non-complex investment as it was listed on a regulated market, did not embed a derivative and did not incorporate a structure that made it difficult for investors to understand the risk involved.
- The European Securities and Markets Authority (“ESMA”) published guidelines on complex debt instruments and structured deposits in 2016 (“the ESMA Guidelines”) which specifically related to the requirements introduced under MiFID II to conduct an appropriateness test.
- Hilbert has carried out an analysis of each criteria set out in the Guidelines and explained why each one is not applicable to the Astute Capital Bond.
- Hilbert acknowledges that the FCA published papers in June and December 2020 which indicated it considered mini bonds to be complex and high risk investments but it is important to assess the bonds in accordance with the available information and good industry practice at the time. The relevant guidance at the time of Mr H’s investment was the ESMA Guidelines. The FCA publications should not be applied retrospectively.
- The provisional decision states that the risks involved in the underlying investments were unclear and this was a factor in the assessment that the Astute Capital Bond was not a non-complex investment. But the risk of capital loss is not a consideration in the ESMA guidelines nor is it a key factor listed by the FCA in its publication in June 2020.
- In any event the risk of capital loss was clear from the Astute Capital brochure which clearly stated that in the event that the issuer becomes insolvent the investor may lose some or all of their investment including the interest payments due. And the investor was required to declare they understood this as part of the application.
- Had it carried out an appropriateness assessment it is likely Hilbert would have concluded the product was appropriate for Mr H given his professional experience which includes holding controlled functions at regulated firms and directorships of property companies.

- Alternatively in the unlikely event that Hilbert had concluded that the product was not appropriate for Mr H and it had given him an additional warning to that effect it is likely Mr H would have decided to invest anyway. This is because he had already decided to apply for the investment and there were clear risk warnings in the product documentation.
- Mr H's recent evidence should be viewed with caution as his points are made with the benefit of hindsight and motivated by Mr H's purpose in seeking redress from Hilbert.
- Mr H's point that he only selected the investment was backed by Hilbert as a regulated firm should not be accepted. It is clear Hilbert did not give advice and only held a purely administrative role. So the point that Hilbert backed the investment is not correct or supported by the contemporaneous evidence.

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 I said in my provisional decision, I am required to decide what is fair and reasonable in all the circumstances of the case taking into account relevant law and regulations, regulators' rules, guidance and standards, and codes of practice, and where appropriate what I consider to have been good industry practice at the relevant time.

I have considered all the points made. I do not however comment on all of them. I will concentrate on what I consider to be the main issues.

In my provisional decision I set out, at some length, why I consider COBS10A is applicable in this case because Hilbert had argued it is not applicable. It now accepts that COBS10A is applicable, but that the exception within the rule at COBS 10A4.1R applies meaning there was no requirement to carry out an appropriateness assessment. As a secondary point, Hilbert says that even if there was a requirement to carry out such an assessment Mr H would have invested in any event because either Hilbert would have assessed the investment as appropriate for Mr H or he would not have heeded any warning that Bond was not appropriate.

COBS10A4.1R – was the investment non-complex?

For the avoidance of doubt, my view remains as set out in my provisional decision, that Hilbert was providing an investment service in the course of MiFID or equivalent third country business. In particular, Hilbert was providing a service in relation to the execution of orders on behalf of clients. And I note that Hilbert now appears to accept that it was doing so.

It is not clear that Hilbert thought about COBS 10A4.1R at the time of Mr H's investment given that it has previously argued that it was not carrying on an activity that made it subject to the rule. But its consideration ought to have involved stepping back and thinking about the Astute Capital Bond in the round from the point of view of likely investors and not just, for example, only considering whether the investment exactly matched any of the examples given in the ESMA Guidelines.

Had it done so, Hilbert would have noted the same general points I noted in my provisional decision, as follows:

- The Astute Capital Bond was raising money to lend on to third party property developers.
- The Bond was listed but it was unlikely there would be a secondary market for the Bonds – the investment was illiquid.
- The structure of the investment was involved.
- The risks involved in the underlying investments were unclear.
- The costs involved in the arrangement and the effect that would have on the arrangement's ability to pay the return to investors was unclear.

In my view based on factors such as these Hilbert should reasonably have concluded the bond incorporated a structure which makes it difficult for the client to understand the risk involved. These points are just the types of reasonable points that should be noticed and considered and they do not rely on the FCA's publications in 2020 which I was not, and am not, seeking to apply retrospectively.

If a product, or type of product, is described by the regulator as, say, complex that does not mean the product is complex only from the point when the FCA described it as such. In the absence of it creating a new rule, the regulator is giving a view about an existing situation. So the regulator describing similar investments as complex in 2020 does not mean those products were not complex in 2019. Nor does it mean that I am bound to say the same or similar products were complex in 2019. But it does provide a useful cross reference to test whether my view seems reasonable.

Hilbert disagrees that the bond was non-complex based mainly on the point that the bond is not of the same type as any of the examples of complex debt instruments given in the ESMA Guidelines. However the list of examples in the ESMA Guidelines is not exhaustive. It is therefore possible for a bond to incorporate a structure which makes it difficult for the client to understand the risk involved if it is similar rather than identical to one or more of the examples. And in my view the Astute Capital Bond is a type of security, or at least similar to the type of security, given in examples 13(a) and (i).

ESMA Guidelines example 13(a) says:

“debt instruments, the return of which is dependent on the performance of a defined asset pool. The category includes instruments the return or performance of which depends on the receivable either fixed or revolving generated by the assets in the underlying pool.”

An example of such assets given by the ESMA for this type of security is “asset backed securities”.

On this example of a complex security Hilbert says:

“In accordance with the terms, the bonds are asset backed and secured by a pool of loans (“Borrower Loans”) originated by the Collateral Manager, which are themselves secured against UK real estate assets.”

Hilbert goes on to say:

*“Despite being backed by a pool of loans, the bondholders receive a fixed coupon and principal repayment at maturity. Their return does **not** directly vary based on the performance of the asset pool; instead, the risk is the asset pool may not generate*

sufficient funds to meet payments and may lead to default, which is a credit risk rather than a structural complexity.” [original emphasis]

In my view Hilbert has misunderstood the ESMA’s example. It does not say the return must directly vary based on the performance of the asset pool, it refers to the performance depending on the performance of the defined asset pool. And in this case the return, while fixed, does depend on the performance of the defined asset pool.

ESMA Guidelines example 13(i) says:

“Debt instruments with complex guarantee mechanisms. This category includes debt instruments guaranteed by a third party and structured in a way that makes it complex to assess accurately how the guarantee mechanism affects the risk exposure of the investment.”

The two examples given by the EMSA of such instruments are:

- *“Debt instruments with a guarantee mechanism where the trigger for the guarantee depends upon one or several conditions in addition to default of the issuer;*
- *Debt instruments with a guarantee mechanism where the level of guarantee or the actual trigger of the guarantee are subject to limitations.”*

I accept that Astute Capital Bonds do not have the features referred to in the two examples quoted by the ESMA as relevant to paragraph 13(i). But I do not consider the two examples of type 13(i) investments quoted by the ESMA to be exhaustive. (And in any event an instrument can be complex without precisely matching any of the examples because the examples in paragraph 13 are not exhaustive.)

Hilbert says:

“The security structure is relatively straightforward: if the Collateral Manager defaults, the Security Trustee can enforce and recover assets for bondholders.”

And it goes on to quote the following in support of its position:

“Security: Legal charge over commercial property/debenture over entire undertaking of the Borrower to be held by the Borrower Security Trustee.”

“The Collateral Manager Security Trustee will hold the benefit of Collateral Manager Security on trust for the Issuer (and ultimately the Bondholders)... In the event that the Collateral Manager is in breach ... the Collateral Manager Security Trustee [may] enforce the Collateral Manager Security in favour of the Issuer (and ultimately the Bondholders).”

I disagree that the security is “*relatively straightforward*”. The arrangement, from the point of view of the Bondholder/investor is complex. It involves a structure which takes pages to explain, even in outline form, in the formal bond documents such as the one I provided a link to above and base prospectus. The diagram I copied into my provisional decision and included above shows the complex structure incorporated into the bond. In my view the Astute Capital Bond incorporates a structure that makes it complex to assess accurately how the guarantee mechanism affects the risk exposure of the investment.

Hilbert has argued that the risk of capital loss was made clear to the investor but again Hilbert is misunderstanding the requirement of the rule. The test is not whether the potential

investor is aware that the potential worst-case scenario is complete loss. An investor will usually know that is the case but will want to assess how likely that is and in this case the investment included a security structure that was supposed to make that worst case scenario less likely. In the case of the Astute Capital Bond the complex security structure makes it difficult for the client to understand the risk involved.

In all the circumstances it remains my view that the exception to the general rule in DISP 10A4.1R does not apply in this case.

What would have happened if Hilbert had applied COBS10A?

As set out in my provisional decision, under COBS10A 2.1R a firm must ask the client to provide information regarding that client's knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded to enable the firm to assess whether the service or product is appropriate for the client.

Hilbert did not do this. (Nor did it clearly inform Mr H that it was not required to assess the appropriateness of the service provided and that Mr H would not have the benefit of the protection of the rules on assessing appropriateness – a point which is different to informing the client that it would not be giving advice.)

If Hilbert had carried out the assessment as required, it would have found that while Mr H was a director of a regulated business, it was not a financial advice firm and he had relatively little investment experience and did not appear to have a good understanding of the product or of the risk involved. This does seem to have been his first non-mainstream investment, or at least his first in an unregulated entity. I say this bearing in mind what Mr H has said recently when asked about his investment experience but also from the picture built up from emails exchange with Hilbert in the run up to, and shortly after, the investment. It remains my view that Hilbert should reasonably have decided that Mr H lacked the necessary experience and knowledge to understand the risks involved in the Astute Capital Bond investment.

Hilbert should therefore have provided a warning to Mr H that the investment was not appropriate for him. And my view remains that the contemporaneous evidence shows Mr H was proceeding with caution in unfamiliar territory and it is my view that Mr H would have heeded the warning and he would not have invested in the Astute Capital Bond.

Putting things right

My aim is to try to put Mr H into the position he would have been in had he not invested in the Astute Capital Bond. Mr H was a relatively cautious investor hoping to build up a nest egg for his retirement and he was in his early 50s at the time of the investment. He was willing to invest in the Astute Capital Bond. Although it was difficult to understand the risk involved in that investment Mr H was aware that the investment was not guaranteed and that his money was at risk.

Therefore while it is difficult to say what Mr H would have done with his money if he had not invested in the Astute Capital Bond, I think he would have invested his money at some risk to try to achieve some growth. Overall, I am satisfied that what I have set out below is a fair and reasonable broad measure of Mr H's loss, given his circumstances and objectives when he invested.

What should Hilbert do?

To compensate Mr H fairly, Hilbert must:

- Compare the performance of Mr H'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.
- Hilbert should also add any interest set out below to the compensation payable.
- Pay Mr H £250 for the distress and inconvenience caused by the loss of his investment.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Astute Capital Bonds	unclear	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 my final decision	8% simple per year from final decision to settlement if not settled within 28 days of Hilbert being notified of Mr H's acceptance of my decision

Actual value:

This means the actual amount payable from the investment at the end date. I understand that the Astute Capital Bonds have been converted to shares and that they may have no value.

If the shares still exist Hilbert should buy them (if possible) and the sum paid is to be accounted for in the actual value part of the calculation.

If Hilbert is unable to buy the shares, or if there are any difficulties in buying them, it should give the shares a nil value for the purposes of calculating compensation.

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, Hilbert 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 ISA should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Hilbert totals all those payments and deducts that figure at the end to determine the fair

value instead of deducting periodically.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Mr H wanted some level of growth and was prepared to take some risk but he was also fairly cautious.
- 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 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 H'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 H into that position. It does not mean that Mr H 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 H could have obtained from investments suited to his objective and risk attitude.

Interest:

Hilbert should pay the above compensation to Mr H within twenty-eight days of the date on which we notify it of Mr H's acceptance of this final decision. If it does not it is to pay interest on the compensation at the rate of 8% simple interest per year from the date of this decision to the date of payment of the compensation.

The interest may be taxable. If Hilbert deducts tax it should provide Mr H with a tax deduction certificate to show the details of the tax deducted.

My final decision

For the reasons given in my provisional decision and above, I uphold Mr H's complaint against Hilbert Investment Solutions Ltd and I direct it to pay fair compensation to Mr H, plus interest as appropriate, as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 6 February 2026.

Philip Roberts
Ombudsman