

Before the Arbiter for Financial Services

Case No. 111/2017

OE ('the Complainant')

vs

**Custom House Global Fund Services
Limited (C43799) as substituted by
TMF International Pensions Limited
(C76483) ('the Service Provider')**

Sitting of the 15 September 2020

The Arbiter,

Having seen **the Complaint** relating to the Melita International Retirement Scheme Trust ('the Retirement Scheme' or 'Scheme'), this being a personal retirement scheme licensed by the Malta Financial Services Authority ('MFSA'),¹ established in the form of a trust and administered by Custom House Global Fund Services Limited where the latter was taken over by TMF International Pensions Limited.²

Custom House Global Fund Services Limited as substituted by TMF International Pensions Limited ('the Service Provider'), is the Trustee and Retirement Scheme Administrator of the Retirement Scheme.³

The Complainant submitted that he has suffered financial loss on his Retirement Scheme through the losses experienced on the underlying investments, namely

¹ <https://www.mfsa.com.mt/financial-services-register/result/?id=206>

² A fol. 220

³ A fol. 69/354

the Exane leveraged structured notes that were allowed by the Service Provider to be invested into. The Complainant also submitted that there were various deficiencies in the processing of the application for membership into the Scheme.

The Complainant explained that in March 2014, an application for him to become a member of the Retirement Scheme was completed through his investment broker, Watson Vaughan & Associates. Following such application, a transfer was made from his UK pensions to the Retirement Scheme.

The Complainant submitted that the Service Provider, as trustee and administrator of the Scheme, failed to act in his best interests and did not comply with applicable procedures in relation to the Retirement Scheme.

The claimed failures of the Service Provider were summarised as involving the following:⁴

- i) The Service Provider not providing any documentation to the Complainant on the membership number or any information in relation to the Retirement Scheme, with the Complainant claiming that the Service Provider instead *'only sent emails to the broker (info@watsonvaughan.com) with no copies sent to the member'*;⁵
- ii) The Service Provider accepting the application for membership and the pension transfer into the Retirement Scheme without obtaining confirmation that the Complainant had received appropriate advice or that a waiver of advice had been completed;
- iii) The Service Provider accepting the application for membership and the pension transfer into the Retirement Scheme without checking to confirm whether the investment advisor, Watson Vaughan & Associates, was qualified to give advice to the Complainant on the pension transfer;
- iv) The Service Provider contacting unrelated third parties who were requested to provide personal information on the Complainant when no authority to contact such third parties had been obtained;

⁴ A fol. 7

⁵ *Ibid.*

- v) The Service Provider sending an application form to purchase an underlying policy, the Personal Portfolio Bond offered by Old Mutual International when such application form, which signalled agreement to the charging structure, had not been signed by the Complainant but only signed by the advisor, Watson Vaughan & Associates;
- vi) The Service Provider allowing investments (which were only available to professional and institutional investors⁶) to be made within the Scheme when such investments were of extremely high risk and outside the risk profile of the Complainant and not reflective of the agreed benchmark.

With respect to the deficiencies in the application process, the Complainant explained *inter alia* that the letter of acceptance as member into the Scheme, which he eventually received, was dated 3 March 2014 but the application form for membership into the Retirement Scheme was not completed and signed until the 14 March 2014.⁷

The Complainant also claimed that Watson Vaughan & Associates did not provide him with any official advice but only verbal information despite that in the application form for membership of the Retirement Scheme, which was countersigned by the investment advisor, it was indicated that the advisor had given the Complainant appropriate financial and tax advice and that the advisor was qualified to give such advice. The Complainant claimed that the official of Watson Vaughan & Associates was not qualified to give advice.

It was also claimed that the application form for membership did not include a section where the Complainant could agree or accept that appropriate advice had been given to him.⁸

The Complainant claimed that the Service Provider should have not accepted the application for membership of the Retirement Scheme and pointed out that it is the trustee's responsibility to ensure that an application lodged via an advisor is submitted by someone who is qualified to give advice.

⁶ A fol. 13

⁷ A fol. 8

⁸ *Ibid.*

With respect to the Scheme's investments, it was submitted that the Complainant had opted for a balance between capital growth and income in his Investment Policy Statement. The Complainant explained that he '*was comfortable with a high-risk tolerance and as such was willing to accept a greater level of volatility in order to achieve greater returns*',⁹ but he had selected the FTSE 100 as benchmark. The Complainant submitted that Watson Vaughan & Assoc. placed investment trades without his knowledge into highly leveraged structured notes.¹⁰

It was also submitted that the investments placed '*were of extremely high risk and were not appropriate as per the completed Investment Policy Statement and were significantly much higher in risk than the FTSE 100 benchmark that was agreed on & recorded*'.¹¹

The Complainant also remarked that the leveraged structured notes that were invested into were only available to experienced or institutional investors. The Complainant submitted that he was not such type of investor and reiterated that the Exane investments within his portfolio were way outside of his risk profile.¹² It was also claimed by the Complainant that the FTSE 100 benchmark should have been used '*for both monitoring the performance and the risk/volatility experienced in achieving the performance*'.¹³

The Complainant submitted that as part of its responsibilities, the Service Provider should have not allowed the investments in the leveraged structured notes. He claimed that if such action had been taken, he would not have ended up suffering the financial losses from such investments.

The Complainant claimed that he suffered losses from the following leveraged structured notes, which were underlying investment instruments within his Retirement Scheme:¹⁴

- i) a loss of GBP7,841 from the investment of GBP13,260 done on 3 September 2014, into the Exane Leverage Bull Certificate Kingfisher;

⁹ A fol. 9

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ A fol. 10

- ii) a loss of GBP10,765 from the investment of GBP25,000 done on 3 September 2014, into the Exane Bonus Tracked De La Rue;
- iii) a loss of GBP4,730 from the investment of GBP10,170 done on 3 September 2014, into the Exane Leverage Bull Certificate Tesco;
- iv) a loss of GBP1,669 from the further investment of GBP8,269 done on 5 September 2014, into the Exane Leverage Bull Certificate Kingfisher;
- v) a loss of GBP5,165 from the further investment of GBP6,648 done on 8 September 2014, into the Exane Leverage Bull Certificate Tesco.

It was also submitted that the indemnity form which indemnified the Service Provider from claim of loss, liability or expenses in respect of certain events was only signed by the Complainant in respect of a different retirement scheme and that accordingly the indemnity form signed by the Complainant is not applicable in respect of the Retirement Scheme.¹⁵

The Complainant submitted that, as trustee, the Service Provider breached its duty of care by allowing an incorrect indemnity form to be completed and by allowing inappropriate and extremely high risk assets outside the accepted risk levels which had caused the significant financial loss.¹⁶

The Complainant explained that he was aware that the Scheme was going to invest in a policy issued by Old Mutual (formerly Royal Skandia), which was going to be used as a holding structure for the underlying investments of the Retirement Scheme.¹⁷

However, he submitted that whilst he was aware of the fees applicable on the Retirement Scheme, given that the application form for membership indicated a formation fee of 0.5% (minimum Eur2,000) and an annual fee of 0.5% (minimum Eur2,000), he was not aware of the fees applicable on the policy issued by Old Mutual as no mention was made of the fees applicable with respect to such policy.

¹⁵ A fol. 10 & 11

¹⁶ A fol. 11

¹⁷ Ibid.

It was claimed that the Complainant was under the impression that the policy fees of Old Mutual were actually included in the charges indicated for the Retirement Scheme and the fees payable of 1.25% p.a. to the professional advisor.¹⁸ The Complainant claimed that he was never informed of the relevant charges that the Service Provider had applied to have in respect of the Old Mutual policy, nor about the applicable charges on the structured notes.¹⁹

The Complainant further submitted that that the copy of the charging structure, which he eventually obtained following his request, was countersigned by the Service Provider after the application for membership of the Retirement Scheme and after the Old Mutual policy was established for the Retirement Scheme.²⁰ The Complainant claimed that he had not signed any agreement to the charging structure applicable in respect of the Old Mutual policy despite that there were different charging structures available. It was further claimed that there was a requirement for the client to accept the specific structure to be used.²¹

The Complainant submitted that another breach by the Service Provider involved the Service Provider contacting, without the Complainant's permission, third parties for proof of his residential address as part of its due diligence and know your client procedures.²² The Complainant argued that if the Service Provider could not verify his address then it should have not accepted the application.²³

The Complainant claimed that the Service Provider has failed in its duty and responsibility towards him as a member of the Scheme due to the indicated shortfalls.²⁴

The Complainant requested compensation of GBP30,170 being the losses incurred on the underlying Exane derivatives leveraged structured notes.²⁵

A refund of the application fee and subsequent fees paid to the Trustee was also requested. The Complainant also asked to be allowed, by the Service Provider,

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *A fol. 12*

²² *Ibid.*

²³ *A fol. 21*

²⁴ *A fol. 13*

²⁵ *A fol. 5 & 13*

to exit the Scheme and transfer his assets to another QROPS without charges and delays.²⁶

In its reply, the Service Provider essentially submitted that:²⁷

As a preliminary matter, the Arbiter's attention was drawn to the complaint filed by the Complainant on the same matter with the Consumer Complaints Unit at the MFSA on the 7 December 2015,²⁸ and the replies already provided by the Service Provider to the MFSA.

The Service Provider presented copies of the correspondence exchanged in this regard and the evidence, it claimed, in support of the objections to the alleged breaches of duty featured in the complaint filed with the Consumer Complaints Unit at MFSA as well as the Office of the Arbiter for Financial Services.²⁹

In summary, the Service Provider submitted that:³⁰

1. Its authority, in pension arrangements similar to the one in discussion, excludes the power to monitor every investment that occurs behind a bond when the investment is made by the life company.
2. The responsibility of the Service Provider to observe investments made by the Scheme which it administers lies only on the necessity for it to ensure that the investment restrictions in the Pension Rules are observed. The restrictions which it needed to monitor under the Special Funds (Regulation) Act were never breached and, therefore, it argued that it was never in breach of its regulatory obligations.
3. The Complaint should have been directed to the outgoing investment advisor of the Complainant because the recommendations in relation to which investments were to be made with the Complainant's pension were made solely by the outgoing investment advisor of the Complainant and not by the Service Provider.

²⁶ *Ibid.*

²⁷ *A fol.* 113 to 115

²⁸ *A fol.* 117

²⁹ *A fol.* 117 to 208

³⁰ *A fol.* 114

4. At no point was the Complainant via his investment advisor complaining about the fees of the Service Provider or the Scheme administered by the Service Provider. His complaint is solely addressed in respect of the charges of the life bond which he had invested in, prior to joining the Scheme.

The Service Provider noted that the fees of the Scheme were explained to the member and were signed off by him when he joined the Scheme as stated by the MFSA in its letter of 26 April 2017.

5. The Service Provider should not be liable to pay any of the losses suffered on Exane Investments because there is no connection whatsoever between the loss and the acts or omissions of the Service Provider.

The Service Provider further submitted that it has clearly highlighted the nature and cause for its rejection of the recommendations made by the Consumer Complaints Unit at the MFSA.³¹

For the said reasons, the Service Provider requested the Arbiter to reject the request of the Complainant and accept its pleas attributing all consequential fees and charges if any to the Complainant.

Having heard the parties and seen all the documents and submissions made,

Considers:

The Merits of the Case

The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.³²

The Product in respect of which the Complaint is being made

The Melita International Retirement Scheme Trust ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta registered with the Malta Financial

³¹ A fol. 196

³² Cap. 555, Art. 19(3)(b)

Services Authority ('MFSA'), as a Retirement Scheme originally under the Special Funds (Regulation) Act, 2002 (Chapter 450 of the Laws of Malta), ('SFA').³³

Article 2 (1) of the SFA defined a 'scheme' as meaning '*a scheme or arrangement which is registered under this Act under which payments are made to beneficiaries for the principal purpose of providing retirement benefits...*', with 'retirement benefit' being in turn defined in the same article as '*pension or other benefits that are payable to a beneficiary after retirement, permanent invalidity or death*'.

The Retirement Scheme was established in 2010 by Custom House Global Fund Services Ltd³⁴ in terms of a trust deed³⁵ and is subject to the Laws of Malta.³⁶

The Trust Deed establishing the Retirement Scheme³⁷ provides *inter alia* that:

'The Scheme is established and maintained solely for the purposes of providing Retirement benefits for Members in the event of their retirement or in certain circumstances for the dependants of Members'.³⁸

The Retirement Scheme is in the form of a Personal Retirement Scheme.³⁹

The Service Provider allowed the Complainant to appoint an investment advisor to advise him on the choice of investments as would be undertaken in a typical scenario of a member-directed scheme.⁴⁰

Provisions from the Retirement Scheme's Trust Deed in relation to investments

The Trust Deed issued in respect of the Retirement Scheme presented during the case, provided the following with respect to the Trustee's Investment Powers:

³³ A fol. 58 & 300

³⁴ A fol. 354

³⁵ A fol. 297

³⁶ A fol. 308

³⁷ A fol. 297

³⁸ A fol. 300

³⁹ <https://www.mfsa.com.mt/financial-services-register/result/?id=206>

⁴⁰ The reference to the member directing his investments was also made in the Service Provider's letter dated 7 April 2017 addressed to the MFSA, wherein the Service Provider stated '*We would also draw your attention again, to Mr OE's email of Wednesday, September 9, 2015 at 1:51PM, in which he clearly states that the Trustees are to make no investment changes without his agreement, indicating that he was 'directing' the investments within his pension pot, after consulting with this advisor and the RSA's role was limited to assessing whether those instructions were in line with the pension rules on investment restrictions*' (A fol. 199).

'14. (a) Investment Policy and Strategy

*The Trustee shall stand possessed of the trust money upon trust for sale and shall have full and unrestricted powers of investment and dealing with trust money and buying or selling investments of whatever nature and wherever situated as the Trustee shall think fit and as if it were entitled absolutely, and, subject to relevant provisions of the SFRA [Special Funds (Regulation) Act], the Trustee shall determine the investment policy and strategy of the Scheme from time to time and shall set general investment objectives PROVIDED THAT the Trustee shall arrange for the scheme assets to be invested in the best interests of Beneficiaries and, in the case of a potential conflict of interest, the Trustee shall ensure that investment activity is carried out in the sole interest of Beneficiaries. The Trustee may obtain such advice and information as it thinks fit to determine the investment policy, strategy and objectives.'*⁴¹

The Trust Deed also provided *inter alia* a list of authorised investments that could be made where article 14(b) of the deed stated *inter alia* the following:

'(b) Authorised Investments

SUBJECT TO PARAGRAPH (a) HEREOF, so much of the moneys forming part of the Scheme from time to time as shall not be required immediately for the payment of Benefits or other amounts authorised by this Deed shall be invested in accordance with the investment policy and strategy of the Scheme as determined in accordance with sub-clause (a) above in any of the following instruments:

(i) *Any investment for the time being authorised by law for the investment of personal Retirement Scheme funds;*

...

(ix) *any other investments which the Trustee considers appropriate, PROVIDED THAT the Trustee shall ensure that the trust assets are*

⁴¹ A fol. 321-322

*properly diversified in such a way as to avoid accumulations of risk of the trust assets as a whole ...'*⁴²

Article 14(d) of the Trust Deed listed the investment criteria which the Trustee was required to have regard to when exercising any powers of investment, as follows:

'In exercising any power of investment, the Trustee shall have regard to the following investment criteria:

- (i) the suitability to the Scheme of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind;*
- (ii) any rules for the time being in force under the SFRA in relation to the investment of personal Retirement Scheme funds;*
- (iii) any directions received in writing from a Member in which the Member indicates his or her preference to one or more of the investments ('the Preferred Investments') contained in a portfolio selected from time to time by the Trustee (or by any Asset Manager appointed by the Trustee in terms of clause 15 below) for the purpose of the Scheme and notified to the Member in writing. The Trustee may take the Member's Preferred Investments into account when exercising its power of investment but such directions shall not be binding upon the Trustee. Where the Trustee decides to invest a Member's Accumulated Account (or part thereof) in a Preferred Investment, the Trustee may require the Member to provide them with such security and indemnity as to any liability arising from the loss of or any depreciation or default upon the Preferred Investment as the Trustee may reasonably require;*
- (iii) the need for diversification of investments of the Scheme; ...*

...

The Trustee shall review the investments of the Scheme and consider whether, having regard to the investment criteria set out herein, they should be varied'.⁴³

⁴² A fol. 322-323

⁴³ A fol. 324

The Legal framework

The Retirement Scheme and the Service Provider are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was eventually repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta). The Retirement Pensions Act ('RPA') was published in August 2011 and came into force on the 1 January 2015.⁴⁴

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by the MFSA under the RPA.

The Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA, given the Service Provider's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.⁴⁵

Indeed, Article 1(2) of the TTA provides that:

'The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A',

with Article 43(6)(c) in turn providing that:

⁴⁴ Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - <https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/>

⁴⁵ The TTA also applies to a party which is acting in the capacity of a Trustee and as a Retirement Scheme Administrator under the RPA, even where such party may not have a specific trustee authorisation under the TTA.

'A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes ...'.

Profile of the Complainant

The Application Form for membership into the Retirement Scheme dated 14/03/2014 and signed by the Complainant indicates that the Complainant was born in 1940 and retired.⁴⁶ The same form indicates the Complainant having a residential address in Thailand.

The Investment Policy Statement issued by Custom House signed by the Complainant and dated 08/01/2014, specifies that the investment objective of the Complainant was to achieve *'Balance between Capital Growth and Income,'*⁴⁷ where *'hedge funds'* were the only asset class of investments that were excluded.

The risk tolerance in the Investment Policy Statement was indicated as *'High'* meaning that the Complainant was *'Very comfortable with risk – willing to accept greater volatility in order to achieve greater returns'*.⁴⁸

The Investment Policy Statement also indicated that the long-term average return targeted by the Complainant was of 8-10% over 5-10 years with no or limited withdrawals expected by the Complainant. The FTSE 100 was indicated as being the *'Appropriate Benchmark'*⁴⁹ in the Investment Policy Statement.

During the proceedings of the case, the Complainant stated *inter alia* that:

'I have invested in the past and I have some knowledge on shares and mutual/managed funds. But I have no idea on how Leveraged Structured products such as the Exane notes work or the risk involved'.⁵⁰

Investment Advisor

⁴⁶ A fol. 63

⁴⁷ A fol. 60

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ A fol. 392

The Application Form for membership into the Scheme signed by the Complainant and dated 14/03/2014 indicates the professional advisor of the Complainant as Anthony Watson of Watson Vaughan, in Thailand.⁵¹ The regulatory status in respect of the professional advisor had been left blank in the said Application Form.⁵²

The Complainant requested the replacement of Watson Vaughan with a new investment advisor, Montpelier Thailand Ltd, shortly after commencement of the Scheme, as per his letter to the Service Provider dated 8 October 2014.⁵³

The Complainant stated *inter alia* that:

*'the pension trustee had no involvement in the appointment of the adviser. However, they did approve the appointment and accepted application forms from the adviser, where some forms just had my signature on and the rest of the forms were blank ...'*⁵⁴

Underlying Investments

The money held in the Complainant's account with the Retirement Scheme was used to acquire the Executive Investment Bond, this being a single life insurance policy issued by Old Mutual International (previously Royal Skandia).⁵⁵ The Service Provider, as Trustee of the Retirement Scheme, applied for the Executive Investment Bond on 22 May 2014,⁵⁶ with the Complainant being indicated as the life assured and beneficiary under the said policy.⁵⁷ The policyholder of the Executive Investment Bond was indicated as '*TMF Custom House Global Fund Services*' as trustee of the Retirement Scheme.⁵⁸

The premium and top-ups transferred into the Executive Investment Bond were in turn used to acquire various investment instruments as detailed in the historic transaction report issued by Old Mutual International.⁵⁹ The Exane investments

⁵¹ A fol. 63 & 64

⁵² A fol. 64

⁵³ A fol. 201 & 398

⁵⁴ A fol. 389

⁵⁵ A fol. 181

⁵⁶ A fol. 276 to 287

⁵⁷ A fol. 279 & 287

⁵⁸ A fol. 39

⁵⁹ A fol. 39 - 43

constituted the initial investments underlying the Executive Investment Bond.⁶⁰ Such investments were made under the investment advice provided to the Complainant by Watson Vaughan & Associates.

The statement issued by Old Mutual International titled '*Historic Cash Account Transactions*'⁶¹ indicate that the five investments complained about⁶² were all bought in September 2014. These were, in fact, the first investments bought under the Executive Investment Bond of Old Mutual International. The said statement indicates that the Executive Investment Bond had a total of GBP249,895.85 of investible assets, from premium and top ups, as at 12 August 2014.⁶³

The statement of transactions shows the following:⁶⁴

- a) The 'EXANE LEVERAGE BULL CERT KINGF' was purchased on 03/09/2014 for the amount of GBP13,260. This investment constituted 5.31%⁶⁵ of the total investible assets at the time;
- b) The 'EXANE BONUS TRACKED DE LA RUE' was purchased on 03/09/2014 for the amount of GBP25,000. This investment constituted 10%⁶⁶ of the total investible assets at the time;
- c) The 'EXANE LEVERAGE BULL CERT TESCO' was purchased on 03/09/2014 for the amount of GBP10,170. This investment constituted 4.07%⁶⁷ of the total investible assets at the time;
- d) The 'EXANE LEVERAGE BULL CERT KINGF' was sold on 05/09/2014 for the amount of GBP5,419;

⁶⁰ A fol. 40-41

⁶¹ A fol. 39-43

⁶² (1) Exane Leverage Bull Cert KingF purchased on 03/09/2014

(2) Exane Bonus Tracked De La Rue purchased on 03/09/2014

(3) Exane Leverage Bull Cert Tesco purchased on 03/09/2014

(4) Exane Leverage Bull Cert KingF purchased on 05/09/2014

(5) Exane Leverage Bull Cert Tesco purchased on 08/09/2014

A fol. 10 & 39-41

⁶³ A fol. 40

⁶⁴ A fol. 40-42

⁶⁵ GBP13,260 of GBP249,895.85

⁶⁶ GBP25,000 of GBP249,895.85

⁶⁷ GBP10,170 of GBP249,895.85

- e) A further investment into the 'EXANE LEVERAGE BULL CERT KINGF' was made on 05/09/2014 for the amount of GBP8,269. This constituted 4%⁶⁸ of the amount available for investment at the time which amount did not however include the value of the other investments held within the portfolio;⁶⁹
- f) The 'EXANE LEVERAGE BULL CERT TESCO' was sold on 08/09/2014 for the amount of GBP5,440;
- g) A further investment into the 'EXANE LEVERAGE BULL CERT TESCO' was made on 08/09/2014 for the amount of GBP6,648. This constituted 3.26%⁷⁰ of the amount available for investment at the time which amount did not include the value of the other investments already held within the portfolio;⁷¹
- h) The 'EXANE BONUS TRACKED DE LA RUE' was sold on 27/11/2014 for the amount of GBP14,235;
- i) The 'EXANE LEVERAGE BULL CERT TESCO' was sold on 28/11/2014 for the amount of GBP1,483;
- j) The 'EXANE LEVERAGE BULL CERT KINGF' was sold on 28/11/2014 for the amount of GBP6,600.

Two of the five Exane investments were thus sold at a considerable loss within just a few days from being bought, just to be again re-invested in an Exane investment bearing the same name. The remaining three Exane investments were also sold or matured at a loss within 3 months from the date of purchase.⁷² The total loss on the Exane investments totalled GBP30,170.

⁶⁸ GBP8,269 of GBP206,759.85

⁶⁹ The percentage of this investment out of the total account value was seemingly less than 4% taking into consideration that the Exane investments had experienced a loss in value.

⁷⁰ GBP6,648 of GBP203,930.85

⁷¹ The percentage of this investment out of the total account value was less than 3.26% taking into consideration that the Exane investments had experienced a loss in value.

⁷² A fol. 10 & 40-41

As from 31 October 2014 onwards various other investment instruments of a different nature were bought and transacted into.⁷³ As indicated above, the Complainant had requested the appointment of a new investment advisor, Montpellier Thailand Ltd, which it seems was also unregulated,⁷⁴ in October 2014.⁷⁵

Other relevant aspects

- (a) As to the question why the notice of admission bore an earlier date of 3 March 2014 than the completed application form for membership into the Retirement Scheme of 14 March 2014, the Service Provider explained that initially, the wrong application form was used given that an application in respect of another scheme called the Calypso International Retirement Scheme was submitted instead. The Complainant and his advisors signed the corrected form on 14 March 2014.⁷⁶
- (b) The Complainant claimed that he was unaware of the investments made by Watson Vaughan & Assoc.

It was stated that the Complainant:

⁷³ The statement of account includes, for example, the following investments that were purchased as underlying investments during the period 31 October 2014 till May 2015:

- INVESCO PERPETUAL UT MGMT LTD IP MONTHLY INC
- ROYAL LONDON UK EQUITY INCOME FUNDRETAIL INC A GBP
- ARTEMIS FUND MANAGERS GLOBAL INCOME R INC GBP
- OLD MUTUAL GLOBAL EQUITY P ACC GBP
- M&G INV MAN OPTIMAL INCOME R DIS GBP
- FIRST STATE GBL LIST INFRA INC £
- FIRST STATE INV ASIA PACIFIC LEADERS A ACC GBP
- INVESCO FD MNGRS PERPETUAL GLOBAL TARGT RTN
- UNICORN UK INC INSTL INC SHS B GBP
- INVESCO MGRSPR HK&CHIN NO TRAILACC GBP
- CAPITA FINL CITY UK EQTY B DIS GBP
- BHP BILLITON PLC USD0.50
- RIO TINTO ORD GBP0.10 EUR

The last two investments out of the above list are equities whilst the remaining investments are collective investment funds (A fol. 174-175).

⁷⁴ A fol. 83 – Communication between Montpellier and the Service Provider wherein the Service Provider quoted the comments of Montpellier “*In regards to Montpellier being regulated, I can confirm that we are not regulated (as per a previous email, there is no regulatory body in Thailand for the offshore industry)*”. A fol. 103 also refers.

⁷⁵ A fol. 201 & 398

⁷⁶ A fol. 368

'was never provided quarterly valuations as TMF were sending them to Watson Vaughan & Assoc. via email. He was not aware of the holdings in his pension until the appointment of Montpelier Thailand and the subsequent review conducted. It was after the review that Mr OE queried the transactions and details of his MIRS policy'.⁷⁷

- (c) The Complainant quoted the Retirement Scheme Particulars which included a statement that the *'Trustee shall retain ultimate discretion and responsibility regarding the investments effected'.⁷⁸*

The Service Provider highlighted that:

'We are of the opinion that such a statement does not mean that the trustee is responsible for losses but that the trustee is responsible to ensure that the recommendations made to the trustee by the member's advisor are indeed in line with the Malta pension rules'.⁷⁹

- (d) The Service Provider claimed that this was not the first time that the Complainant had invested into the Exane investments and provided valuation statements of a portfolio featuring Exane investments.

Two valuations, one dated January 2014 and another one dated March 2014, in respect of a separate investment portfolio that the Complainant had with Royal Skandia, indicate that the Complainant had previous investments in instruments issued by Exane, classified as equities or fixed interest holdings, since at least January 2014.⁸⁰

Accordingly, it was argued by the Service Provider that:

'TMF had no objection to [the Complainant] advisor's recommendation to invest in such products offered by Royal Skandia, particularly since his previous portfolio was made up of such investments, evidence of which was in the Trustees possession'.⁸¹

⁷⁷ A fol. 403

⁷⁸ A fol. 369

⁷⁹ Ibid.

⁸⁰ A fol. 275 & 295

⁸¹ A fol. 405

The Complainant from his part submitted *inter alia* that:

'The valuation statement referred to by the Trustee is a separate, offshore portfolio bond in the name of the client personally and is no way related to the policy mentioned with this complaint against the Trustee. The Exane holdings in the personal policy mentioned by the Trustee were in fact the subject of an official complaint by the client lodged with the product provider Old Mutual'.⁸²

- (e) The Complainant filed a complaint with the Consumer Complaints Office of the MFSA in September 2015.⁸³ The MFSA's recommendations were issued in its letter of 26 April 2017 where it was recommended to the Service Provider to issue a refund of the losses suffered on the Exane investments amounting to GBP30,170 as it was *inter alia* indicated that:

'Despite the member's high-risk appetite, if the Exane Leveraged Structured Notes should have only been sold to institutional investors, then they should never have been offered to Mr OE and it was the Trustees' responsibility to certify the suitability of these underlying investments'.⁸⁴

- (f) The Complainant submitted a formal complaint to the Service Provider through a letter dated 4 November 2014.⁸⁵

In the said letter, the Complainant *inter alia* stated that:

'I had actually instructed Watson Vaughan NOT to place any investment trades and that the Skandia portfolio was to be maintained in Cash. However, trades were placed with Skandia'.⁸⁶

- (g) With reference to the signing off of the dealing instructions with respect to the Exane investments, the Service Provider confirmed that:

⁸² A fol. 23

⁸³ A fol. 125

⁸⁴ A fol. 192

⁸⁵ A fol. 44

⁸⁶ A fol. 45

'the investments were reviewed in the light of the pension rules and were signed off, following a recommendation to go for that product by Mr OE's advisor'.⁸⁷

Overview of underlying investments

No term sheets or other product documentation in respect of the Exane investment instruments were presented during the proceedings of this case. The said investments were described by the Complainant as *'leveraged structured notes'*⁸⁸ which *'were only available to professional and institutional investors'*.⁸⁹ The Service Provider did not contest the nature of such investments in its submissions.

With respect to diversification, the Complainant submitted *inter alia* that:

'there was no diversity of issuer (all issued by Exane Derivatives) and they were all highly leveraged note with the performance based solely on 1 listed stock each (Kingfisher x2 separate notes, Tesco x2 separate notes and 1 note with De La Rue)'.⁹⁰

The Complainant posed the following question *inter alia* to the Service Provider:

'Has the trustee complied with the requirement for diversification (100% of the invested proceeds were invested in leveraged structured notes issued by Exane Derivatives, with the performance being based on the share price movement of 1 stock per note)'.⁹¹

The Service Provider from its part re-iterated its position that there were no prohibitions in the regulatory framework for investing in the type of instruments invested into and that it had fully complied with the applicable regulations.

Indeed, in its final submissions it was stated that:

⁸⁷ A fol. 370

⁸⁸ A fol. 10

⁸⁹ A fol. 13

⁹⁰ A fol. 22

⁹¹ A fol. 369

'TMF also wishes to reiterate that the investment in such products is totally in line with the Pension Rules applicable at the time and also those applicable today'.⁹²

Final Observations and Conclusions

In essence, the Complaint revolves around the claim that the Complainant experienced a loss on his Retirement Scheme due to the Service Provider not having adequately carried out its duties as administrator and trustee of the Scheme in line with the applicable regulations and requirements.

The alleged failures of the Service Provider, as claimed by the Complainant, can basically be categorised under three main aspects:

- i) Failings of an administrative nature where the claimed shortcomings included: the Service Provider contacting, during its on-boarding process, unrelated third parties without the consent of the Complainant; the Service Provider not sending documentation about the initial membership of the Scheme directly to the Complainant but only to the investment advisor; the Service Provider accepting certain incorrect or incomplete information on the application form for membership into the Scheme; the Service Provider accepting the application form for membership without verification that the Complainant had received appropriate investment advice on the Scheme and the pension transfer; the Service Provider sending an application form for the purchase of an underlying policy without such application bearing the Complainant's signature and without ensuring that the Complainant had agreed to the charging structure on the underlying policy; acceptance of a wrongly completed indemnification form in respect of the Service Provider which was filled in respect of a different product.
- ii) Unqualified advisor - The claim that the Service Provider did not ensure that the investment advisor of the Complainant was duly qualified to give advice.
- iii) Inadequate investments – The claim that the Service Provider permitted the Exane investments to be undertaken within the Retirement Scheme

⁹² A fol. 405

which were of extremely high risk and outside the Complainant's risk profile and not in line with the selected benchmark.

One aspect which should be considered first involves the Complainant's consideration that the Service Provider should not have accepted his application for membership of the Retirement Scheme due to the irregularities in the application process.

Whilst some of the alleged failings of an administrative nature are considered to be trivial or of not sufficient material bearing to the matter in hand, there are certain administrative shortcomings which should have not been allowed to occur in the first place.

It was, for example, inadvisable for the Service Provider to have allowed the unregulated investment advisor, Watson Vaughan & Associates, to act as the only recipient for electronic mail with no direct email communication with the Complainant. This went indeed contrary to the Service Provider's own leading method of communication stipulated in its own documentation, where communication was to be with the scheme's member with the professional advisor being in turn only in copy.

The Application Form for Membership of the Retirement Scheme in fact provided that:

'Custom House Global Fund Services (CHGFS) leading method of communication to Applicants and Members is via the specified correspondence email (copying in Professional Advisors)'.⁹³

The *'specified correspondence email'* inserted in the Application Form for Membership in respect of the Complainant was, however, the same email address of Watson Vaughan & Associates.⁹⁴

Rather than enabling or facilitating the provision of information directly to the Complainant with his professional advisor being in copy, as per its leading method of communication, the Service Provider actually allowed a situation

⁹³ A fol. 63

⁹⁴ A fol. 63-64

where the unregulated professional advisor retained control and was the only direct contact over electronic mail.

In order to safeguard the member's interests and ensure adequate transparency, a trustee and retirement scheme administrator of a retirement scheme is reasonably expected to take sufficient and reasonable measures to ensure that a member is able to promptly and adequately receive details of transactions and developments related to his retirement scheme and not relying on outside unregulated third parties, such as the investment advisor in this case, to undertake such communications.

It is nevertheless considered that, in the particular circumstances of the case in question, there are no sufficient convincing grounds on which to determine that the Complainant would have not proceeded with the application for membership of the Retirement Scheme in case the claimed administrative failings had not occurred or had been more appropriately addressed at the time.

In the circumstances of this case, it is considered that the most pertinent matters to the complaint in question are rather the aspects raised relating to Watson Vaughan & Associates which was allowed to act as an investment advisor to the Complainant and the claims regarding the underlying Exane investments that were allowed to be invested into.

The following are considered to be the key considerations in respect of the said aspects:

- a) It is clear that the Service Provider did not provide investment advice to the Complainant in relation to the underlying investments. The role of the investment advisor was the duty of Watson Vaughan & Associates which was appointed by the Complainant.

This would reflect on the extent of responsibility that the financial advisor and the Retirement Scheme Administrator and Trustee had in this case as will be later seen in this decision.

- b) **Although the Service Provider was not the entity which provided the investment advice to invest in the financial instruments which suffered the losses, the Service Provider nevertheless had certain obligations to**

undertake in its role of trustee and scheme administrator of the Retirement Scheme.

The functions and obligations of a trustee and retirement scheme administrator in respect of a retirement plan are important and critical for the proper functioning of such a plan. Such functions and obligations could have a substantial bearing on the operations and activities of the retirement scheme and may affect directly, or indirectly, its performance.

Consideration thus needs to be made as to whether the Service Provider failed in any relevant obligations and duties and, if so, to what extent any such failures are considered to have had a bearing or otherwise on the resulting losses.

c) *The appointment of an unregulated/unqualified advisor:*

Watson Vaughan & Associates was chosen by the Complainant himself⁹⁵ to provide him with investment advice in relation to the selection of the underlying investments and composition of the portfolio within the Retirement Scheme. The Service Provider, from its part, allowed and/or accepted the unregulated investment advisor to provide investment advice to the Complainant within the structure of the Scheme. The appointment of a regulated advisor would have provided, *inter alia*, certain comfort regarding the qualifications to provide advice.

On this point, no evidence has however emerged that the regulatory framework, which applied at the time the Complainant became member of the Scheme, in 2014, did not permit the appointment of an unregulated investment advisor in respect of the Scheme.

However, the appointment of an unregulated entity to act as investment advisor nevertheless meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where a regulated advisor is appointed. A regulated financial advisor is, in comparison to an unregulated one, subject to, for example, fitness and properness

⁹⁵ A fol. 389

assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory authority.

The Service Provider, a regulated entity itself, should have been duly cognisant of this. In the scenario where an unregulated advisor was allowed to provide investment advice to the Complainant, one would reasonably expect the Service Provider, in its role of Retirement Scheme Administrator and Trustee of the Retirement Scheme, to exercise even more caution and greater prudence in its dealings with such an unregulated party.

This is even more so when the activity in question, that is, one involving the recommendations on the choice and ongoing allocation of underlying investments, has a material bearing on the financial performance of the Scheme and thus on the objective of the scheme to provide for retirement benefits. In such a scenario, it is only reasonable to expect the retirement scheme administrator and trustee, as part of its essential and basic obligations and duties in such roles, to have an even higher level of disposition in the probing and querying of the actions of such party in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances.

It is to be noted that the role of the retirement scheme administrator of a personal retirement scheme requires it to act in the best interests of the retirement scheme. Such fundamental principle is ingrained in the Acts itself where Article 19 (2) of the Special Funds (Regulation) Act ('SFA'), which dealt with the duties of the retirement scheme administrator, provided that:

'A retirement scheme administrator shall act in the best interests of the scheme ...' and Article 13 (1) of the Retirement Pensions Act, which replaced the SFA, specifies that:

'The Retirement Scheme Administrator shall act in the best interests of the retirement scheme ...'

Such principle is also reflected in the general conduct of business rules/ standard licence conditions applicable to the Service Provider in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively.

Rule 2.6.2 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to the Service Provider as a Scheme Administrator under the SFA, provided that:

'The Scheme Administrator shall act with due skill, care and diligence – in the best interests of the Beneficiaries ...'

The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, and which applied to MPM as a Scheme Administrator under the RPA, provided that:

'The Service Provider shall act with due skill, care and diligence ...'

The Service Provider was also subject to the duties applicable as a trustee.⁹⁶ Article 21 (1) of the Trusts and Trustees Act which deals with the '*Duties of trustees*', stipulates a crucial aspect, that of the ***bonus paterfamilias***, which applied to the Service Provider.

The said article provides that:

'(1) Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias, act in utmost good faith and avoid any conflict of interest'

Article 21 (2)(a) of the Trusts and Trustees Act, also specifies that:

⁹⁶ Page 1 of the Trust Deed in respect of the Retirement Scheme indeed provides that '*The Trustee has agreed to act as Trustee of the Scheme in accordance with the provisions of this Deed and the provisions of the Trusts and Trustees Act, 1988 (Chapter 331 of the Laws of Malta) and the Special Funds (Regulation) Act, 2002 (Chapter 450 of the Laws of Malta)*'. (A fol. 300).

'Subject to the provisions of this Act, trustees shall carry out and administer the trust according to its terms; and, subject as aforesaid, the trustees shall ensure that the trust property is vested in them or is under their control and shall, so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage ...'.

In its role as Trustee, the Service Provider was accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.

As also outlined by the MFSA, in one of its documents dealing with changes to the pension rules for personal retirement schemes,

'In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries.

*It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations**'.*⁹⁷

The duty of care of the Service Provider was also reflected in Article 17 of the Scheme's Trust Deed which provided that:

*'In exercising any power, carrying out any duty or doing any act in connection with its duties as a trustee or retirement scheme administrator under this Scheme, the Trustee shall exercise such care and skill as is reasonable in the circumstances'.*⁹⁸

Although this Consultation Document was published in 2017, MFSA was basically outlining principles established both in the TTA and the Civil Code which had already been in force prior to 2017.

⁹⁷ Page 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.

⁹⁸ A fol. 330

The above aspects are accordingly deemed important considerations which should have guided the Service Provider in the appointment and dealings with the investment advisor and also form the relevant context and basis under which the other matter raised relating to the portfolio involving the Exane investments is to be considered.

d) *Other relevant aspects – the Oversight function*

The contested Exane investments were made under the instructions of the appointed investment advisor. The investment advisor, Watson Vaughan & Associates, who was accepted by the Service Provider to act in such role, gave instructions as to which underlying investments were to be traded. The said instructions were allowed and accepted by the Service Provider and ultimately executed within the structure of the Retirement Scheme.

In the context of member directed schemes for retail members the oversight function takes even more prominence and needs to be evidently seen to be undertaken in practice with the required skill, care and diligence. Such function is considered to be an important aspect in the context of personal retirement schemes forming part of the safeguards aimed to support and ensure the attainment of the objective of retirement schemes.

The MFSA also regarded the monitoring role of the Retirement Scheme Administrator as an important obligation where it emphasised, in recent years, the oversight role even in the context of regulated investment advisors.

The MFSA explained that it:

'is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk

*profile of the member in relation to his individual member account within the Scheme’.*⁹⁹

The MFSA also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment advisor stating that:

*‘the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments’.*¹⁰⁰

Despite that the quoted statements were made by the MFSA in 2018, it is considered that, as part of the general obligations and duties of the Service Provider towards the Scheme and its members, oversight was reasonably expected to be undertaken by the Service Provider as part of its obligations in the occupied roles in respect of the Scheme. Adequate oversight was important even more so in the circumstance where an unregulated investment advisor was allowed by the Service Provider to provide advice to the member of the Scheme.

With respect to monitoring, the Service Provider itself submitted that:

*‘the responsibility of the RSA in terms of the Rule to observe investments made by a Scheme (and not a Fund) lies only on the necessity for it to ensure that the investment restrictions in the Rules are observed’.*¹⁰¹

The Service Provider also submitted that:

*‘... the Trustees did check that there was diversity and that not all funds were allocated to one investment as per pension rules’.*¹⁰²

⁹⁹ Pgs. 6-7 of the MFSA’s Consultation Document dated 16 November 2018 titled ‘Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act’ (MFSA Ref. 15/2018) <https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/>.

¹⁰⁰ Pg. 9 of the MFSA’s Consultation Document dated 16 November 2018 titled ‘Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act’ (MFSA Ref. 15/2018).

¹⁰¹ A fol. 196

¹⁰² A fol. 405

In addition, it is to be noted that the role of a retirement scheme administrator and trustee does not end or is just solely limited to the compliance of specified rules. The wider aspects of the trustee's and scheme administrator's key role within a personal retirement scheme has to be also kept in context, and the actions of the Service Provider needed to reflect the spirit and principles behind the regulatory framework and in practice promote the purpose for which the retirement scheme has been created.

e) *The permitted portfolio composition and status of Complainant:*

- i. The Exane instruments were the first investments to be undertaken from a total investible premium available of GBP249,895.85.¹⁰³ A total of five investments into the Exane instruments, for the overall amount of GBP63,347,¹⁰⁴ was made over one week from 3 September 2014 to 8 September 2014.¹⁰⁵

The Complainant lost GBP30,170 out of the Exane investments.¹⁰⁶ Such loss equates to 47.63% of the total amount invested in the indicated instruments¹⁰⁷ and comprised 12.07% of the original total investible premium.¹⁰⁸ Out of the total loss of GBP30,170, a loss of GBP12,571¹⁰⁹ occurred within just 2-5 days for two out of the five Exane investments¹¹⁰ with the loss on the remaining Exane investments occurring within just three months of commencement of investment.

Despite the loss of GBP7,841 experienced within just two days on the investment in the Exane Leverage Bull Cert KingFisher purchased on 3

¹⁰³ A fol. 39-40

¹⁰⁴ GBP13,260+25,000+10,170+8,269+6,648 = GBP63,347

¹⁰⁵ A fol. 40

¹⁰⁶ Amount invested of GBP63,347, less amount received from the Exane investments of GBP33,177 (GBP5,419+14,235+5,440+6,600+1,483) = GBP30,170

¹⁰⁷ GBP30,170 of GBP63,347

¹⁰⁸ GBP30,170 of GBP249,895.85 (A fol. 40)

¹⁰⁹ (GBP7,841 + GBP4,730) where the loss of GBP7,841 resulted from the purchase of the Exane Leverage Bull Cert KingF of GBP13,260 on 3 September 2014 and the sale of such instrument for GBP5,419 on 5 September 2014; Loss of GBP4,730 resulted from the purchase of the Exane Leverage Bull Cert Tesco of GBP10,170 on 3 September 2014 and the sale of such instrument for GBP5,440 on 8 September 2014 (A fol. 40).

¹¹⁰ A fol. 40.

September 2014,¹¹¹ where such loss is equivalent to over 59% of the original investment, another investment of GBP8,269 was again done in the Exane Leverage Bull Cert KingFisher on 5 September 2014, the same day of the sale of the first Exane Leverage Bull Cert KingFisher investment. The investment into this product of the 5 September 2014 also ended up with a loss of GBP1,669 or a 20% loss of the original investment.¹¹²

Similarly, despite the loss of GBP4,730 experienced within just five days on the investment in the Exane Leverage Bull Cert Tesco purchased on 3 September 2014,¹¹³ where such loss is equivalent to nearly 47% of the original investment, another investment of GBP6,648 was again done in the Exane Leverage Bull Cert Tesco on 8 September 2014, the same day of the sale of the first Exane Leverage Bull Cert Tesco investment. The investment into this product of the 8 September 2014 also ended up with a loss of GBP5,165 or a nearly 78% loss of the original investment.¹¹⁴

The lack of intervention by the Service Provider stands out in the circumstances. It was only reasonable and proper for the Service Provider, as the retirement scheme administrator and trustee of the Scheme, to query and challenge such transactions, including the rationality of such given also that, at the time, the Exane investments comprised the initial and sole investment transactions undertaken within the whole portfolio. Querying how such transactions promoted the purpose for which the retirement scheme was created and intervening accordingly was only reasonable, prudent and appropriate, something which the Service Provider has not done.

This is even more so in the context where notwithstanding the hefty losses experienced within just a few days on the indicated Exane

¹¹¹ The investment of GBP13,260 in the Exane Leverage Bull Cert KFISC purchased on 3 September 2014 was sold for GBP5,419 on 5 September 2014 (*A fol.* 40).

¹¹² The investment of GBP8,269 in the Exane Leverage Bull Cert KFISC purchased on 5 September 2014 was sold for GBP6,600 on 28 November 2014 (*A fol.* 40-42).

¹¹³ The investment of GBP10,170 in the Exane Leverage Bull Cert Tesco purchased on 3 September 2014 was sold for GBP5,440 on 8 September 2014 (*A fol.* 40).

¹¹⁴ The investment of GBP6,648 in the Exane Leverage Bull Cert Tesco on 8 September 2014 was sold for GBP1,483 on 28 November 2014 (*A fol.* 40-41).

products, a re-investment in the same products, which yielded further losses, was allowed to occur.

The principal scope of a retirement scheme, that of providing for retirement benefits, is a crucial aspect which is highlighted in the primary legislation itself, the Special Funds (Regulation) Act ('SFA')¹¹⁵ as well as the Retirement Pensions Act ('RPA').¹¹⁶

As also specified in the documentation used in respect of the Retirement Scheme:

'The Scheme is established and maintained solely for the purpose of providing Retirement benefits for Members in the event of their retirement or in certain circumstances, for the dependants of Members'.¹¹⁷

Hence, such an important aspect needs to be kept in mind when considering the investments being allowed to be made. The extent of losses in the Exane investments within such a short period of time are indeed reflective of the risks taken into such products and do not reflect the scope for which the scheme was created.

- ii. It has also not emerged nor been demonstrated that the initial investments comprising solely of the Exane *'leveraged structured notes'*, were reasonable in the context of and taking into consideration any other investments that were to be included within the overall portfolio.

¹¹⁵ Article 2(1) of the SFA defined a 'scheme' to mean *'a scheme or arrangement which is registered under this Act under which payments are made to beneficiaries for the principal purpose of providing retirement benefits ...'*

¹¹⁶ Article 2 of the RPA defines a 'personal retirement scheme' as: *'a retirement scheme which is not an occupational retirement scheme and to which contributions are made for the benefit of an individual'*. A 'retirement scheme' is, in turn, defined under Article 2 of the RPA, as *'a scheme or arrangement as defined in article 3'*, where Article 3 (1) of the RPA then stipulates that *'A retirement scheme means a scheme or arrangement with the principal purpose of providing retirement benefits'*. Article 2 of the RPA also defines 'retirement benefit' as meaning: *'benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death'*.

¹¹⁷ A fol. 300

Other investment instruments of a different nature were only affected, as from 31 October 2014, under what seems to be the direction of a different advisor.

As per the Complainant's letter dated 8 October 2014, the Complainant had asked the Service Provider to appoint a different investment advisor and instructed the Service Provider:

'that no further correspondence is to be provided to my previous advisor Watson Vaughan or for you to act on any instructions received from them'.¹¹⁸

Whilst noting the high risk tolerance level of the Complainant,¹¹⁹ it has not emerged how the investments in the structured notes were reasonable and rational within the context of the overall portfolio of investment instruments that was to be structured by Watson Vaughan & Associates and neither reflective of the scope for which the Scheme was created as indicated above.

The Service Provider should have reasonably had some information on the intended overall portfolio allocation in order to adequately be able to duly exercise its role. Such aspect has, however, not emerged during the proceedings of this case.

- iii. With respect to the Exane investments, the Service Provider re-iterated that it has complied with the applicable investment restrictions highlighting *inter alia* that:

'we submit that the responsibility of the RSA [the Service Provider] in terms of the Rule to observe investments made by a Scheme (and not a Fund) lies only on the necessity for it to ensure that the investment restrictions in the Rules are observed. The restrictions under the SFA were never breached and therefore the trustees were not in breach of the regulatory obligations at any time'.¹²⁰

¹¹⁸ A fol. 201

¹¹⁹ Risk tolerance was selected as 'High', 'very comfortable with risk – willing to accept greater volatility in order to achieve greater returns' - A fol. 60

¹²⁰ A fol. 196

The Service Provider had even claimed that it:

'also wishes to reiterate that the investment in such products is totally in line with the Pension Rules applicable at the time and also those applicable today'.¹²¹

It is noted that Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA, which applied to the Service Provider as a Scheme Administrator under the SFA, provided that:

'The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries ...'

The same principle continued to apply under the rules issued under the RPA. Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provides that:

'The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries'

It has not been adequately demonstrated that the Exane investments were indeed reflective of assets '*invested in a prudent manner*' in the specific circumstances considered in this case.

Moreover, the Service Provider's claim that the investments into the Exane products are '*totally in line*' with the Pension rules also applicable today, does not hold ground either.

Whilst it is noted that the Exane investments would have been in compliance with the current Standard Licence Condition 9.5(d)(ii)(aa) of the Pension Rules for Personal Retirement Schemes¹²² issued in

¹²¹ A fol. 405

¹²² Last updated: 28 December 2018

terms of the Retirement Pensions Act, 2011,¹²³ it is nevertheless important to keep in mind and consider other relevant and appropriate aspects which seem to have been overlooked nor given their due importance by the Service Provider as was duly merited.

Indeed, the current Pension Rules also provide *inter alia* for the requirement to ensure that in case of a retail member the chosen investments are of a retail nature as per Standard Licence Condition 9.5(d)(ii)(bb) of the said rules.¹²⁴

Indeed, no evidence has been produced by the Service Provider that the Exane instruments were retail products.

The claim made by the Complainant that the Exane instruments '*were only available to professional and institutional investors*'¹²⁵ was actually not contested by the Service Provider.

Hence, in the circumstances, it is considered that there is no convincing and sufficient basis supporting the Service Provider's claim about compliance with the investment rules.

It has not been demonstrated either that the Complainant was a professional investor. During the proceedings of the case, it has emerged that the Complainant was a retired person, where his investment decisions were based on the provision of advice provided by an investment advisor.

As declared by the Complainant:

'I have invested in the past and I have some knowledge on shares and mutual/managed funds. But I have no idea on how Leveraged

¹²³ The said condition provides the following: '(aa) where structured notes are included in a Member's account, these will be permitted up to a maximum of 30% of the Member's account total value, with no more than 20% of the Member's account to be subject to the same issuer guarantor default risk'.

¹²⁴ The said condition provides the following: '(bb) unless a Member requests to be classified as a professional member, a Member may only invest in investments which can be classified as suitable for a retail member: Provided that the responsibility of the Retirement Scheme Administrator in assessing the investments chosen shall be limited to carrying out due diligence on the proposed investment, following which the Retirement Scheme Administrator is satisfied on reasonable grounds that the investment can be classified as suitable for a retail member'.

¹²⁵ A fol. 13

*Structured products such as the Exane notes work or the risk involved’.*¹²⁶

The fact that the Complainant had other separate and distinct portfolios of investments such as the one indicated by the Service Provider in the portfolio valuation dated 14 March 2014,¹²⁷ which included equity and fixed interest instruments issued by Exane, does not automatically qualify one, nor should be construed as sufficient, to classify the Complainant as a professional investor. No sufficient and convincing information has emerged which points towards the Complainant having that level of expertise, experience and knowledge and of being capable of making his own investments decisions and of understanding the risks involved as would typically be expected out of a professional investor.

Even where the rules under the Special Funds (Regulation) Act, at the time of membership of the Retirement Scheme in 2014, may have not specifically provided for, or mentioned a similar condition to that of Standard Licence Condition 9.5(d)(ii)(bb) included in the current Pension Rules issued under the Retirement Pensions Act, it is considered that **the Service Provider should, in any case, have taken into consideration the retail nature of the retirement scheme which it was administering in considering whether to allow, or otherwise, the investment in the said structured products. The Service Provider was indeed itself cognisant of the retail nature of the Retirement Scheme.**¹²⁸

Having taking into consideration all the relevant facts and the matters and issues raised and presented during the case, it is considered that it was only reasonable and proper for the Service Provider to query and challenge the

¹²⁶ A fol. 392

¹²⁷ A fol. 263

¹²⁸ In its letter to the MFSA dated 7 April 2017, the Service Provider stated that *‘The reason why retirement scheme administrators ensure that an investment advisor is in fact appointed by a member is precisely because as retirement scheme administrators they do not have the obligation or the desire or the necessary human resources and operational capacity to provide any members with investment advice and portfolio management on an individual basis when it is in fact meant to simply manage a retail product’* - A fol. 196

Exane investments exercising the requested level of prudence, diligence and attention requested of a *bonus paterfamilias* in the process.

For the reasons explained, it is considered that in the case in question there was a certain lack of diligence by the Service Provider with respect to the Exane investments within the Scheme and did not exercise the diligence expected of a *bonus paterfamilias*.

The Arbiter is also convinced that inaction and lack of diligence exercised by the Service Provider prevented the losses from being minimised and in a way contributed in part to the losses experienced. The inactions that occurred, as explained in this decision, enabled such losses to result within the Scheme, impinging on the achievement of the Scheme's objective.

Had the Service Provider undertaken its role adequately and as duly expected from it, in terms of the obligations resulting from the law, regulations and rules stipulated thereunder, such losses would have been avoided or mitigated accordingly.

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with the Service Provider being one of such parties.

In the particular circumstances of this case, the losses experienced are ultimately tied, connected and attributed to the Exane investments that were allowed to occur within the Retirement Scheme and which the Service Provider was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainant for the reasons indicated.

Conclusion

The Arbiter decides that it is considered fair, equitable and reasonable to partially uphold the complaint in view of the shortfalls aforementioned in this decision.

Having taken into consideration the particular circumstances of this case, the Arbiter concludes that the Complainant should not be compensated for the

establishment charges and ongoing charges of the Service Provider, nor for the exit penalty to be waived with respect to a transfer out of the Retirement Scheme. This is also in view that the Retirement Scheme has continued to be actively operated with various underlying investments effected subsequent to the disputed Exane investments.

Compensation

Taking into consideration the Service Provider's important role as Trustee and Retirement Scheme Administrator of the Retirement Scheme, the Arbiter further concludes that the Complainant should be compensated by the Service Provider for part of the losses incurred on the initial portfolio constituted within the Retirement Scheme involving the Exane investments detailed throughout this case.

In light that the Service Provider has not itself provided the investment advice on the failed investment instruments, which advice was provided to the Complainant by another unrelated third party, and being cognisant also of other factors relating to the Retirement Scheme including the extent of investments that were made into the high risk instruments which did not exceed 20% of the Complainant's total value within his Retirement Scheme at the time, the Arbiter considers it fair, equitable and reasonable in the particular circumstances of this case for the Service Provider to be directed to pay a third of the loss resulting from the contested Exane investments, amounting to GBP10,056.67.¹²⁹

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders TMF International Pensions Limited to pay the amount of ten thousand and fifty-six British pound sterling and sixty-seven cents.

With legal interests from the date of this decision till the date of effective payment.

Each party is to bear its own legal costs of these proceedings.

¹²⁹ 1/3 of GBP30,170

Dr Reno Borg
Arbiter for Financial Services