

Before the Arbiter for Financial Services

Case No: 126/2018

AT ('the Complainant')

vs

XNT Limited (C 52182)

('the Service Provider')

Hearing of the 15 September 2020

The Arbiter,

Having seen the complaint, whereby the complainant submits that he was misled into investing in the High Protection Fund Eur Growth Plus (the Fund) as he was not made aware of three important and relevant facts of the Fund being sold to him.

The complainant stated that in November 2016, he sold his house in Ireland and paid a deposit on an apartment in Qawra which he agreed to buy off-plan. In January 2017, he was advised by David Pulis, Head of Institutional Trading at XNT, to invest in the Fund and, subsequently, invested €275,000 for 2,675.4955 shares at a price of 102.7847. He claimed that this investment was made on the clear understanding that these funds were the proceeds of his house sale in Ireland, which he would eventually need to be withdrawn to finalise the purchase of his apartment in Malta when this would be completed around the end of 2017, whilst his capital not being at risk.

He stated that he was assured that there would be no problem to get back the capital invested, and a couple of weeks would be all that would be required.

The complainant submitted that, despite the fact that in early November 2017, he signed a Redemption Form for €230,000 and expected that this amount would be transferred to his bank account shortly after the next Dealing Day, this did not happen. He was then informed by the service provider that the Fund required three months' notice for Redemption and no exception will be made and, thus, his funds would not be released until the first week of March 2018, which was appalling for him as the contract to purchase his apartment was the 28 February 2018.

He stated that when the redemption finally took place on the 21 March 2018, as there was even a delay in the Dealing Day, he received only €120,000, with €110,000 paid as penalty. XNT informed him that this was due to the fact that it was a five-year Fund, a fact which he claimed not to be made aware of when investing.

As at 10 January 2018, the value of the Fund was €296,748.09 when the price of shares was 110.912, which, eventually, rose to 112.434 by March 2018, whilst also held a cash balance, independent of the Fund, which amounted to €1,751.93 which was then reduced to €449.71.

The complainant insists that he was totally misled as he was not aware of three important and relevant facts of the Fund which were indeed omitted from the Key Features of the Fund Fact Sheet presented to him and on which his decision to invest was eventually made, **with the three facts being: the three months' notice provision for redemption; the 5-year duration of the Fund; and the penalties for redemption.**¹

He also affirmed that XNT were fully made aware of the source of the funds and that these could only be invested for a short period of time as these were needed to finalise the purchase of an apartment by the end of 2017.

In this respect, the complainant is requesting XNT to:

- Reimburse him the sum of €110,000 penalty with legal interest from the 21 March 2018;

¹ Emphasis of the Arbitrator

- To restore his number of shares remaining in the Fund to reflect the share price value at redemption, that is, €112.43; and
- To restore the cash in his account to €1,761 with legal interest from 21 March 2018.

Having seen the reply by the service provider which in essence states that:

1. **XNT does not recognize any violations of the CAT2 Investment services Licence requirements nor admits any investment advice services provided to AT.**

As XNT is regulated by the Malta Financial Services Authority and governed by MiFID, XNT is authorised to provide the Investment Services by the MFSA under License No.: IS/52182m, which does not include the right to provide any investment advisory services. The above requirement is clearly stated in XNT Terms of business and employee procedures.

2. AT has not provided any documental proofs or any evidence of receiving any investment advice, which caused the investment of AT's assets into the Fund. In this regard, XNT considers the claim provided by AT as a mere unsubstantiated claim, due to absence of any evidence. Regarding the explanatory note, received from Mr. Dave Pulis, AT was the initiator of the investment through XNT and have chosen the Fund independently from the list, which was provided to him during the meeting where AT was informed about his obligation on the due diligence of the Fund to be taken.
3. Within the Account opening procedure at XNT, AT has acknowledged and agreed on the XNT's binding documents and Categorization documents, which are online, available in the Client's profile at any time (Annex 1). During the registration and approval procedure, based on provided details and documents, AT was classified as 'Professional/Elective Professional' client and the classification was confirmed by the Client. In this regard, AT was fully responsible for an investment decision taken, recognition and understanding the risks taken. The categorisation as a Professional/ Elective Professional Client implies, that the Client is subject to a lower degree of client protection under the applicable Laws. AT has

accepted Terms of Business, and other binding documents on 2016-05-09, which became legally binding on the same date.

4. According to Clause 4.1 of the Terms of Business (hereinafter 'TOB'), XNT is acting as an execution broker within Category 2 license provided by MFSA and does not provide any investment advice. XNT offers investment services through the platform, which allows its Clients to place orders, enter into Contracts and conduct transactions in instruments with various counterparties, moreover, XNT provides related services, including the maintenance of the Client's Account, subject to the terms and conditions set out in this Agreement (the 'Services'). As part of the Services, XNT may receive and transmit orders on behalf of the Client only.

XNT does not make personal recommendations or provide advice on the merits of purchasing, selling or otherwise dealing in particular Instruments, placing of Orders, entering into Contracts or particular Transactions, their taxation consequences or the composition of any account or any other rights or obligations attaching to such Investments, Orders, Contracts or Transactions. Client should bear in mind that merely explaining the terms of a Transaction, Contract or Instrument or its performance characteristics does not in itself amount to advice on the merits thereof.

5. According to clause 3 and clause 4.13 of the TOB, AT acknowledged and agreed, that the Funds listed at XNT are independent third parties. Although, XNT does perform all the needed due diligence checks on the Funds listed at the platform, to ensure that the entities are operating within the laws and procedures applicable, XNT does not have any impact or controls on the performance of the funds **neither XNT can alter their subscription/redemption conditions.**

AT's acceptance of the TOB, (clause 3.9.) is considered as his acknowledgement that he has carefully read, understood and prepared to accept the risks outlined in the TOB. By accepting the TOB, he has confirmed that was informed, that if there is anything the Client does not understand, it is recommended to seek specialist an independent financial and/or legal advice. The investment of 275 000 EUR in the Fund

was solely his personal and independent decision as an Elective Professional Client.

6. According to the TOB clause 3.6.1, XNT may provide general trading recommendations, market commentary, guidance on shareholding disclosure or other information solely to enable the Client to make his own investment decisions and does not amount to a personal recommendation or investment advice.
7. According to clause 3.6.2 of the TOB, XNT gives no representation, warranty or guarantee as to the accuracy or completeness of such information or as to the legal, tax or accountancy consequences of any Transaction where information is in the form of a document containing a restriction on the person or category of persons for whom that document is intended or to whom it is distributed and AT agreed that he shall not pass it on contrary to that restriction.
8. Clause 4.1. of the TOB states, that AT agreed to bear in mind that merely explaining the terms of a Transaction, Contract or Instrument or its performance characteristics does not itself amount to advice on the merits thereof.

The access to the Fund through the Services does not constitute any investment advice, recommendation or other endorsement by XNT or any of its Affiliates of any Counterparty nor does it imply the desirability of any Counterparty in respect of any particular Contract or Transaction.

9. Regarding to clause, 18.1, 18.2, and 18.5 of the TOB, AT agreed, that in no circumstances shall XNT be liable to the Client, or responsible, for any trading losses or costs or expenses of any kind arising out of or in connection with the placement of Orders, or the entering into Contracts or Transactions by the Client, the carrying out of any Transactions or the holding of Instruments in accordance with the TOB.

Taking into consideration all of the above, XNT strongly believes that AT's claim against XNT for the amount of 110 000 EUR is not reasonable and grounded and shall not be recognised and processed further.

The Complainant's Version

The complainant testified that he had applied for the Malta Retirement Programme in 2015 with the Maltese Government, which is a residency with conditions. He is Irish and resident in Malta and rented an apartment for a year from 2015 to 2016, which he claimed to be part of the conditions of the Malta Retirement Programme.

He used to work at the, and, over time, his employer decided to give employees bonuses in shares in the company instead of paying cash. He held such shares with Davie, a stockbroker in Dublin.

The complainant testified that:

*'I have to state clearly that I am not a professional investor. All the money that I had was in the shares.'*²

In May 2016, the complainant wanted to transfer his shares from Ireland to Malta and came across XNT on Google. When visiting their office without making an appointment, he understood that they were stockbrokers. He claimed that he was not asked whether he had any experience in financial investments whilst he was neither asked what assets did he possess.

He stated that:

*'I deny that I told the service provider that I was an experienced financial investor. I never informed the service provider that I was a professional investor; and I did not know that they were classifying me as a professional investor.'*³

Eventually, he asked XNT to transfer his shares from Ireland just to hold them on his behalf.

The complainant also stated that he was told that, should he wanted to deposit money with XNT, he would receive a return of 4.55% per annum. Eventually, he transferred €65,000 which he had held with BOV to XNT. In addition to such amount, the service provider was also holding the shares on his behalf.

² A fol. 138

³ A fol. 165

In this regard, he was told that the shares and the deposit were being kept separately.

The complainant submitted that he wanted to buy an apartment in Malta and had paid a deposit of €27,500 on the preliminary agreement, which was subject to the sale of his house in Ireland by the end of November 2016; something he in fact managed to do. He also stated that when he received the proceeds from the sale of his house in Ireland in December 2016, he deposited €210,000 with XNT to earn 4.55% interest offered to him. The amount was then added to the €65,000 deposited earlier.

He claimed that a couple of days later, David Pulis of XNT asked him to visit the office whereby he suggested that the money could be invested in the High Protection Fund for a better return which, however, the complainant

*'... told them that I could not do that because I needed the money to buy the apartment in Malta. He told me that there would be no problems for me, and if I advised a few days before, I could withdraw the money invested in the HP Fund.'*⁴

The complainant admitted that he trusted David Pulis and agreed to invest in such Fund since, despite himself being sceptical that he would receive the 4.55% on the deposit, David Pulis kept his word for six months and had, in fact, paid the interest on such deposit.

The complainant affirmed that:

*'He told me that there was no risk in the investment because the fund managers would know the return they would get before they purchased the policies. They would invest in American policies. They said that there was no risk and I could withdraw the money within a couple of days' notice.'*⁵

He further stated that:

*'I deny that this product was indicated by me; I already stated that it was suggested to me by the service provider.'*⁶

⁴ A fol. 139

⁵ A fol. 140

⁶ A fol. 165

At that time, he provided a copy of his passport together with the details of the portfolio that he had, that is, the shares and small holdings in Trinity Biotech and Goldman Sachs shares.

At the beginning of 2017, the complainant visited XNT's office, whilst on the 9 November 2017, he sought the redemption of €230,000 to pay for the apartment, with the redemption form being processed by 'Francesco' at the service provider's office.

The complainant stated that:

*'Dave Pulis told me that there was a problem that he was not aware of which stated that I had to give 3 months' notice. He said that he was not aware of it and I confirm that he did not tell me about this condition. And in the document that I signed there is nothing about the duration of the fund and there is nothing about the 3 months' notice.'*⁷

He stated further that although David Pulis tried to arrange something by also getting in touch with the Fund and asking them to make an exception in his case, this did not happen.

The complainant added that due to a lot of pressure from the builder of the apartment, he ended up forwarding to him €100,000. This amount was lent to him by the service provider against his shares that he held.

Also, as a result of the pressure from the builder, the complainant attempted to get a bridge loan amounting to €130,000 from BOV to be able to pay his apartment but the Bank refused to grant the loan.

When reverting to XNT about this, David Pulis then promised him that he would find him another client to buy his investment in the Fund and would then be able to give him the money which, however, did not happen.

The complainant explained that the latest proposal by David Pulis informed him that he will definitely get the money by the 8 March 2018. The money was not received by that date, correspondence was exchanged between XNT and Gan from the Fund, and the complainant received an email dated 12 March 2018

⁷ A fol. 140

from David Pulis whereby he was advised that XNT had received the sum of €119,500.

He was also told that the service provider was checking what had happened to the rest of the money invested in the Fund. Then he received the sum of €120,000 instead of €230,000, as a result of which, his wife ended up helping him to pay the full amount of the purchased property. At that stage, David Pulis informed him that he could not do anything else for him.

The Service Provider's Version:

The service provider produced David Pulis as their witness. He used to work with XNT and was the Account Manager of the complainant.

He explained that the complainant approached the service provider and expressed an interest in transferring assets and three stocks from his broker in Ireland. An account was therefore opened with XNT. David Pulis claimed that he did not recall who filled the details of the complainant's client profile and he did not remember exactly what happened in this specific case, but admitted that, normally, this would be filled by the Account Manager who is the person dealing with the client.

He confirmed that:

*'I categorised AT on three criteria that I used for all clients. I used to take into consideration their experience in trading, their net worth and the portfolio, what is being moved already to the company.'*⁸

He stated that in carrying out this assessment, he did not make an independent assessment and only gathered the information from the client himself. He told the complainant that he did not have the licence required to give advice as that was a specific licence and he was not an investment advisor.

David Pulis added that the complainant wanted some extra liquid cash and wanted to invest some money in something safe, but he only had information on what the company was providing at the time. Pulis stated that the company

⁸ A fol. 170

had three funds in total and he proposed or gave information about these products as compiled by the company. These in-house funds, which were a fixed income fund and two other funds, were offered to the complainant. David Pulis alleged that the latter was not interested and asked if there was something British and the only British fund on the platform was the fund the complainant invested in.

The witness added that the service provider did not have any information on this British fund, so he checked on the internet and provided that information but stated that:

*'... I could not know exactly what these funds were as they were not associated with us. The only information obtained was after calling them and, also, from the stuff available online.'*⁹

With regards to the fact whether the complainant asked about the clause whereby he could opt out of the Fund, David Pulis stated that, at some point in time, the complainant wanted to buy a property.

David Pulis declared that:

*'I believe he said that in a year and a half's time, he had to move into an apartment. He said that he had to buy a property.'*¹⁰

David Pulis stated further that when they made the investment, he was never made aware of any lock-up period of the fund. He affirmed that the information that was provided was from the internet, whilst also stated that when the complainant expressed the wish that he wanted to know more information about the Fund, they contacted the management company and gave the complainant the information which was provided to them.

At the time of the redemption, they emailed the Fund to make the withdrawal, but were told that there was a lock-up period, which he claimed he was not aware of, and then they called the company.

David Pulis said that:

⁹ A fol. 171

¹⁰ Ibid.

*'I told them that this was not correct and asked to waive the redemption penalty for the lock-up period. We came back and forth with the company for quite some time but the company wouldn't budge.'*¹¹

Pulis also admitted that the biggest surprise was when the service provider submitted the redemption form because although they were expecting a certain sum of money minus the fee, they received much less.

David Pulis stated that:

*'The penalty for the lock-up period was a few percentage points, approximately 5% or 6, but to our surprise we received even less money, so it was more than 5%. It was unheard of.'*¹²

He admitted that the Fund itself was performing pretty well, and he confirmed that he didn't know about the lock-up period as this came up when they asked for the redemption. Despite being told to wait for the redemption fees to get lower, they still incurred the fees.

When asked whether, at initial stage, the complainant was given to understand that it would be possible for him to withdraw his money in a short period of time so that he could buy an apartment, David Pulis stated:

*'... I confirm that yes, redemption periods are normally calculated after the next NAV, until the next month, you get the NAV and submit the redemption form for processing. We have to wait until next month's NAV, strictly speaking a month or a month and a half. That was standard procedure.'*¹³

The witness confirmed that all the funds on the ATP are intended for professional investors. The Fund merit of this case was also a professional investors' fund.

Further Considers

¹¹ A fol. 172

¹² Ibid.

¹³ A fol. 173

The complaint mainly revolves around the fact that the complainant believes that the Fund was mis-sold to him on the basis that despite the service provider was made fully aware of the source of his funds, and that they were needed to complete the purchase of an apartment at the end of year 2017, he was not advised of the five-year duration of the Fund; of the three months' notice for redemption; and of the penalties for such redemption, which were not even included in the Key Features of the Fund Fact Sheet provided to him and on which his decision for investment was made.

On the other hand, the service provider argues that they were not licensed to provide investment advisory services and, above all, it was the complainant who was the initiator of the investment. He had chosen the Fund independently from the list provided to him and he was fully responsible for the investment decisions taken. Furthermore, they submitted that they did not have any control on the performance of the funds, and neither could they alter their subscription/redemption conditions.

The Arbiter shall determine and adjudge the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.¹⁴

The relationship between the complainant and the service provider started in the year 2016 when the complainant applied for the Malta Retirement Programme in 2015 and eventually wanted to buy an apartment. He had shares that he wanted to transfer and through a Google search he became aware of the service provider and subsequently visited their offices in Malta.

The service provider in its reply to the complaint, argued that the complainant had been classified as a 'Professional/Elective Professional' and such classification was confirmed by himself.

However, the Arbiter has reservations on this classification and is not convinced that the complainant was a professional client. He does neither share the defence raised by the service provider that it was the client who chose the Fund,

¹⁴ Cap. 555, Art. 19(3)(b)

who preferred to be classified as a professional investor, and that he is responsible for the investment decision for the following reasons.

The Classification of the Client as a Professional/Elective Professional

David Pulis, a witness produced by the service provider, and who was the Account Manager of the complainant, stated that he had classified the complainant as a professional investor by using three criteria:

*'I categorised AT on three criteria that I used for all clients. I used to take into consideration **their experience in trading**, their **net worth** and the **portfolio**, what is being moved already to the company.'*¹⁵

From the facts as they emerged during these proceedings it has been established that the complainant did not have any extensive experience 'in trading' in financial services.

As admitted by David Pulis himself in his testimony:

*'AT used to work for an company. When he approached us he was already retired.'*¹⁶

The only witness produced by the service provider did not prove in any way that the complainant was an experienced investor or that he had traded in financial investments to such an extent as to make him capable of having the knowledge to make investment decisions 'as a professional investor' about an investment which David Pulis himself admitted to be a professional fund:

*'I believe all the funds on the ATP are intended for professional investors. I believe that even this fund was intended for professional investors.'*¹⁷

The other criterion mentioned by David Pulis which in his assessment qualified the complainant as a professional investor was the complainant's '**net worth**'. Also, in this regard the service provider did not prove that the complainant had such wealth as to qualify him as a professional on the basis of his '**net worth**'.

¹⁵ A fol. 170. Emphasis by the Arbitrator

¹⁶ *Ibid.*

¹⁷ *Ibid.*

The only evidence brought before the Arbiter was that the complainant had only shares donated to him by his former employer and two other stocks.

David Pulis admitted that:

*'AT expressed interest to transfer assets, three stocks to transfer to XNT from his broker in Ireland and we opened an account with XNT to be able to transfer these stocks. It was why he came through the door.'*¹⁸

This is corroborated by the complainant himself:

'I worked at the And, at first, they started to pay us Christmas bonuses in cash and, then, they decided to give shares in the company instead. In the 80s, they did a deal with the post office in Ireland in which people could save over 5 years and at the end of that 5 years, they could buy shares of the company at the price of the first year.'

*I had dealings with a stock broker in Dublin called Davie. I had a number of shares and small holdings and that is the only portfolio that I had. I have to state clearly that I am not a professional investor. All the money that I had was in the shares.'*¹⁹

The service provider was made clearly aware what the complainant's 'net worth' was from the very beginning of the relationship:

*'I provided also the details of the portfolio that I had; of my shares and small holdings in Trinity Biotech and Goldman Sachs shares.'*²⁰

On the basis of this criterion, the service provider could not classify the complainant as a professional client.

The third criterion used by David Pulis was: *'the **portfolio**, what is being moved already to the company'*.

The Arbiter cannot fathom how the service provider could classify the complainant as a professional investor on the portfolio that he transferred with XNT, as already explained above.

¹⁸ *Ibid.*

¹⁹ *A fol. 138*

²⁰ *A fol. 166*

None of the criteria which the service provider had set for itself to classify a client a professional investor was satisfied.

Moreover, even the criteria set by the service provider do not in themselves provide the comfort, that if satisfied, would have qualified the complainant as a professional investor. *Inter alia*, a professional investor must have **the level of expertise, experience and knowledge** to enable him to make his own investments decisions and of understanding the risks involved in an investment.

The complainant did not even originally approach the service provider to invest. He just wanted the services of a stockbroker to look after his shares and his other two stocks. It was after David Pulis had promised him a return of 4.55% and was offered the ‘*opportunity*’ to invest did the complainant agree to invest in the Fund.

Categorization through Documents

The service provider pleaded that the complainant had ‘*acknowledged and agreed on the XNT’s binding documents and Categorization document which are online available in the client’s profile at any time (Annex 1). During the registration and approval procedure, based on provided details and documents, AT was classified as ‘Professional/Elective Professional’ client and the classification was confirmed by the Client*’.²¹

The service provider does not prove this plea for the following reasons:

1. The only witness produced by the service provider (David Pulis) did not explain what documents he presented to the complainant and whether it was the client or the service provider who ticked the box accepting the classification of the complainant as a professional investor.

The complainant stated on oath that he did not upload these documents and his testimony was not contradicted by the service provider. David Pulis himself admitted that the documents would normally be prepared by the service provider and, in this case, on the balance of probability, the

²¹ A fol. 60

Arbiter is convinced that all the documents were completed and 'ticked' by the service provider.

2. Moreover, the Arbiter cannot have any comfort that the categorization of a customer as a professional investor should be processed through the ticking of a box unless there is ample proof that the service provider would have explained carefully and in simple language to the customer that such classification would prejudice his rights as a retail client. The preparation of a document indicating such loss of rights by itself does not exonerate the service provider from its obligations to give all the necessary information to the customer and make him aware of the consequences inherent in a professional investor's classification. The complainant, not contradicted by the service provider, asserted that no such information was given to him and was not aware that he was being classified as a professional investor.
3. The service provider had clear motives for classifying the complainant as a professional/elective professional investor. Firstly, as admitted by the service provider itself they were not licensed to offer advisory services by the MFSA and all the funds they were offering were all professional investors' funds including the Fund in question. The complainant stated that he was not made aware of this fact and his intention was to obtain the 4.55% promised by David Pulis. Initially, he didn't even approach the service provider to invest but only to obtain the simple service of a stockbroker to look after the already obtained shares and two other simple stocks. It was the service provider who convinced him to invest in the Fund even though the service provider knew that the complainant could only invest in a very short-term investment which protected his capital since he needed the cash to buy a property in Malta.

The Terms of Business (TOB)

The service provider based his reply mainly on the provisions of the TOB. The only copy of the TOB produced during these proceedings was filed by the service

provider.²² The complainant categorically stated that this document was never shown to him and he came to know about it when it was attached by the service provider to its reply during these proceedings.

'... the first I heard of Terms of Business was in their reply to my claim'.²³

Apart from the fact that this statement is not contradicted by the service provider, the veracity of this statement also lies in the fact that the TOB is not signed by the complainant but **signed only by the service provider**.

Since this Agreement is signed only by the service provider, contractually it does not bind the complainant. There is no proof that the TOB was agreed to by the complainant and therefore it does not bind him.

Moreover, the Arbiter notes that the TOB is 56 pages long, it is highly technical and it would have been impossible that in the few hours that the complainant spent at XNT office the service provider would have had the opportunity to give a detailed and accurate explanation of such a lengthy document.

Even if the complainant would have just signed the document, the signature alone does not satisfy the service provider's obligation to explain in simple and clear terms the implications of such signature.

The First Hall Civil Court clearly stated that:

'Il-Qorti tqis illi nonostante l-firma tal-atturi fuq dan id-dokument, ma rrizultax li dan inqralhom u qabdu u ffirmawh minghajr ma gie spjegat lilhom meta kienet cara li l-intenzjoni taghhom kienet li jigu moghtija prodott sigur u mhux wiehed "high risk" bla ebda indikazzjoni jew prova li fil-fatt xi hadd spjegalhom ezatt ghal liema tip ta' investment kienu dehlin. Il-firma taghhom ma tfissirx akkwixxenza tar-riskji u l-ezoneru tas-service provider li fuqu tinkombi r-responsabilita u l-prova illi dan l-investment ma kienx dak mixtieq izda nonostante dan, l-investitur wera ruhu kapaci u intenzjonat jixtri dan il-prodott bis-riskji kollha li kien fih u li gew spjegati lilu b'mod car.'²⁴

²² A fol. 75 et seq

²³ A fol. 186

²⁴ Evelyn Farrugia et vs Global Capital Financial Management Unit Limited, PA, 26.07.2016

The complainant did not even sign such document and, as already stated, he was not bound by it.

Moreover, the service provider did not prove that the Conduct of Business document²⁵ was explained to the complainant who did not sign it and was not aware of it.

The *Notice Letter - Elective Professional Clients* document²⁶ is also not signed by the complainant and no tangible proof was provided by the service provider that this document was explained to the complainant and highlighting the serious repercussions such categorization would have on the client's rights as a retail client.

The same applies to the document titled *Categorization as a Professional Client (Per Se/Elective)*.²⁷

This document states at the very end:

*'By pressing 'Yes, I agree' button I, AT understands that I/the Company have accepted that XNT Ltd categorizes me/us as per se professional/Elective client as applicable.'*²⁸

The Arbiter does not see a valid reason why in the particular circumstances of this case the complainant was not asked to **sign** this document since he visited the provider's office personally and there was no need to *'press the button'* as it seems that this procedure is intended for online business.

However, the Arbiter still insists that such devastating declarations should be thoroughly explained to the consumer and there must be clear proof that the customer had clearly understood its implications.

The Arbiter is convinced that these documents were only intended to exonerate the service provider from its obligations should the investment fail; to satisfy the High Protection Fund investment's criteria and to be in line with the MFSA's

²⁵ A fol. 65 et seq

²⁶ A fol. 71 et seq

²⁷ A fol. 73 et seq

²⁸ A fol. 74

licence which limited the service provider's services to professional investors only.

Our Courts have unequivocally stated that clauses in consumer contracts intended to exonerate a party to the agreement do not bind the other party:

'Kif intqal minn din il-Qorti, Sede Inferjuri, fil-kawza Muscat v. Falzon, deciza fit-12 ta' Mejju 2003, "patt ta' ezoneru ma jezentax jekk fl-ezekuzzjoni tal-kuntratt wiehed ikun tbieghed mill-mod kif suppost li kellu jeseqwih".

F'dan il-kaz, is-socjetà kontraenti agixxiet bi vjolazzjoni cara tad-dover li assumiet, u ma tistax tinvoka klawsola ta' ezoneru meta tbieghdet minn dak li suppost kellha taghmel (ara wkoll Formosa & Camilleri Ltd v. Sea Malta Co. Ltd, deciza mill-Prim'Awla tal-Qorti Civili fit-13 ta' Novembru 2008, li enfasizzat fuq "xi forma ta' twettieq" tal-obbligazzjoni qabel ma d-debitur ikun jista' jecepixxi nuqqas tar-responsabbiltà tieghu a bazi ta' xi klawsola ta' ezoneru).'²⁹

The Arbiter applies the Court's reasoning to this case.

The Suitability of the investment and whether it was mis-sold to the complainant

From the facts of this case, it results that originally the complainant did not contact the service provider to invest his money, but to transfer the holding held with the Irish stockbroker to Malta due to his relocation.

He clearly stated that:

'I understand that XNT were stockbrokers, so I asked XNT to transfer my shares from Davie in Ireland to XNT, just to hold them'.

He then declared that he had transferred a sum of €65,000 which he previously held with BOV as he was told by the service provider that if he wanted to deposit money with them, they would give him interest at the rate of 4.55%.

Such transfer was made solely for the purpose of receiving this income:

²⁹ Evelyn Farrugia et vs GlobalCapital Financial Management Unit Ltd, PA, 27/06/2016

*'... in Ireland they will not offer you anything. They charge you for holding your money.'*³⁰

He was enticed to invest the €65,000 held at BOV by the service provider and, in fact, he transferred this amount to XNT:

*'At this point in time, XNT were holding the shares on my behalf and were also in possession of the €65,000 which I passed to them for investment.'*³¹

The complainant emphasised that he was in the process of selling his house in Ireland to be able to pay the apartment he was setting to buy in Malta. Once he sold his property in Ireland, the proceeds amounting to €210,000 were also transferred to XNT *'... to take the 4.55% interest on them and they added them to the €65,000 I had deposited earlier.'*³²

The complainant stated that the amount invested in the *High Performance Fund* was that of €275,000.

The complainant was very clear that the proceeds from the sale of his house in Ireland were intended to be used to pay for his apartment in Malta.

The Arbiter believes that it was amply clear that the sum of €210,000 was solely transferred to XNT because the complainant was promised a return of 4.55% and not because the complainant wanted to speculate his money or because he was keen to invest in a particular fund.

David Pulis was highly aware of this and declared:

*'... AT wanted to buy a property at some point in time, and asked if he mentioned a specific timeframe, I say that he did not mention a specific timeframe, but not in a long period of time. I believe he said that in a year and a half's time, he had to move into an apartment. He said that he had to buy a property.'*³³

Conscious of this fact, the service provider should have exercised better discretion on what investment it should suggest to the client. An investment has to be suitable to the particular circumstances of the client to make it suitable for

³⁰ A fol. 139

³¹ Ibid.

³² Ibid.

³³ A fol. 171

him; it must also meet the particular needs of the client. The service provider was the expert in these transactions and as such it should have guided the complainant much better.

The service provider was, to say the least, insensitive to the particular needs of the client who wanted to preserve his capital in order to pay for the property he was buying in Malta. Surely, he did not want to speculate his money or to lock it and eventually pay hefty fines to redeem it.

The service provider promised the complainant a 4.55% return but did not disclose to him how such return could be realised.

Ex admissis, the service provider did not conduct a proper due diligence of the product. For instance, David Pulis stated that the service provider did not have any information on the Fund and so he checked on the internet: *'... I could not know exactly what these funds were as they were not associated with us. The only information obtained was after calling them and, also, from the stuff available online.'*³⁴

He further stated that when the service provider placed the investment, he was never made aware of any lock-up period of the Fund.

At the time of the redemption, they emailed the Fund to make the withdrawal, but were told that there was a lock-up period, which he claimed not to be aware of at the time of the investment.

When they called the company:

*'I told them that this was not correct and asked to waive the redemption penalty for the lock-up period. We came back and forth with the company for quite some time but the company wouldn't budge.'*³⁵

About the redemption penalty, Pulis stated that his biggest surprise was when the provider submitted the redemption form and, although they were expecting a certain sum of money minus the fee, they received much less:

³⁴ *Ibid.*

³⁵ *A fol. 172*

*'The penalty for the lock-up period was a few percentage points, approximately 5% or 6, but to our surprise we received even less money so it was more than 5%. It was unheard of.'*³⁶

It amply results that the service provider did not even have basic knowledge about the product let alone carrying out a proper due diligence.

When asked whether, at initial stage, the complainant was given to understand that it would be possible for him to withdraw his money in a short period of time so that he could buy the apartment, David Pulis stated:

*'Being asked if AT, when he was investing in the Fund, was given to understand that it would be possible for him to withdraw his money in a short period of time, in three weeks' time, so that he could buy an apartment, I confirm that yes, redemption periods are normally calculated after next NAV, until the next month, you get the NAV and submit the redemption form for processing. We have to wait until next month's NAV, strictly speaking a month or a month and a half. That was the standard procedure.'*³⁷

This is confirmed by the complainant:

*'... David Pulis asked me to go to the Office and he suggested that the money could be invested in the High Protection Fund to get a better return. At this time, I told them that I could not do that because I needed the money to buy the apartment in Malta. He told me that there would be no problems for me, and if I advised them a few days before, I could withdraw the money invested in the HP Fund.'*³⁸

The service provider, as the expert in the transaction, should have known even from the Fact Sheet that this Fund was a long-term fund.

Under the Investment Strategy section, it states that:

³⁶ *Ibid.*

³⁷ *A fol. 173*

³⁸ *A fol. 139*

*'The fund aims to achieve long term capital growth by investing in a portfolio of Traded Life Policies (or TLPs), which are also known as Life Settlements in the USA.'*³⁹

At the time of the investment, the complainant was 73 years old, and it could hardly be argued that such long-term investment could be suitable for him.

Moreover, the complainant never intended to invest in a long-term investment because he needed his capital in a short while to pay for his property in Malta. It is clearly evident that the investment in question was not suitable for him.

The complainant's main grievance is that the investment was mis-sold to him.

Mis-selling of an investment occurs when any of the following occurs:

- When the client is not informed about the risk involved.
- When the client is not informed how the capital is being invested.
- When the product does not suit the needs of the client or attitude to risk;
- When the service provider fails to clearly explain the product being sold or clearly explain its terms;
- When making misleading statements about the product being sold;
- When the service provider fails to explain relevant charges and penalties for early termination;

The above list is not exhaustive but an illustrative one.

The Arbiter is convinced that from the facts emerging in this case, and as mentioned above in this decision, the Fund was not suitable to the particular needs of the complainant. Since the service provider did not carry out a proper due diligence of the product and *ex admissis* did not have enough knowledge about it, it was not in a position to inform the client about the risk involved; to explain the product being sold and clearly explain its terms; and, even more, to explain ***the relevant charges and penalties for early termination.***

³⁹ A fol. 29

Therefore, the service provider mis-sold the investment to the complainant.

Moreover, the service provider did not act in the best interest of the client as it was obliged to do as a financial services provider. Furthermore, the service provider did not meet the *'reasonable and legitimate expectations of the consumer'*.⁴⁰

Once the service provider knew that its MFSA licence precluded it from offering an advisory service, it should have declined to suggest and invest the funds of a retail client who must necessarily receive such advice. It acted in bad faith when it classified the complainant as a professional investor when he was not. It also failed to exercise *'good industry practice'*,⁴¹ and its negligent behaviour resulted in the loss which the complainant suffered as a direct consequence of such behaviour.

The Arbiter is convinced that the complainant was a retail client and as such he should have been given the special protection that retail clients are entitled to, especially in the financial services sector where there is an inherent imbalance in expertise between the service provider and the consumer.

For the above-stated reasons, the Arbiter decides that the complaint is fair, equitable and reasonable in the particular circumstances of the case and is upholding it in so far it is compatible with this decision.

Compensation

In the complaint form submitted, the complainant requested reimbursement of the sum of €110,000 in respect of the penalty imposed on redemption. This amount is not contested by the service provider. The other requests by the complainant have not been adequately proven and are being rejected.

Therefore, in virtue of Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter is ordering XNT Ltd to pay the complainant the sum of €110,000.

⁴⁰ Cap. 555, Art. 19(3)(c)

⁴¹ *Ibid.*

With legal interest from the date of this decision until the date of effective payment.

The legal costs of these proceedings are to be borne by the service provider.

**Dr Reno Borg
Arbiter for Financial Services**