Before the Arbiter for Financial Services

Case No. 419/2016

QP

vs

Hollingsworth International Financial Services Ltd. (C32457)

Hearing of the 13 November 2017

The Arbiter,

Preliminary

QP and her partner, NM, (holder of British Passport XXXXXX) lodged a complaint with the OAFS on 17 August 2017, against the financial services provider.

During the first hearing (22 November 2016)[1], the Arbiter observed that the cases filed by NM and QP (OAFS Ref: 420/2016) refer to each other. As the merits of the cases were not the same, the two cases were heard separately.

[1] A fol 165

The Complaint

The complainant made a joint complaint with NM, whose case has been decided separately. In their complaint they stated:

'*Both QP and I questioned the advice given by Mark Hollingsworth and on realising we were not going to receive any monies back from the LM Managed Performance Fund we officially complained. Having already lost £20,000 with LM QP cashed in her RBC Income Note early as it was looking that she may lose all the £20,000 invested. The main points are:-*

1. *Mark Hollingsworth did not follow known and legal processes. He did not complete a Reasons Why letter or issue a copy of the Client Fact Find and other legally binding documents. QP received no completed or signed paperwork. Mark did not recommend Recognised Funds. He changed information without any notification or knowledge and in our opinion altered forms, only realising this on going through requested copies before complaining.*

2. *He gave us professional advice which he is personally responsible for.*

3. *He recommended high risk products to totally inexperienced Retail Investors.*

4. *We asked for low risk investments to give us regular income. Jill only received one quarterly payment from the RBC Income and lost over £9000 when she pulled out early (against Mark Hollingsworth's advice). The Note does not mature until April 2017 and has only paid out the once in over four years. As it stands to date it will not pay out on maturity and Jill would have lost the full £20,000! Mark Hollingsworth sold us high risk products, with high incentives and fees for his gain.'*

The complainant is seeking[2] *'… to be compensated for losing most of our life savings (which we could not afford to lose), plus loss of income.*

[2] A fol 7

QP - £29,100 invested plus lost income of £17,350 (1yr at £1,200 LM Fund – 5 years at £3,400 pa RBC – 1 payment received).'

The service provider replied as follows:

'Reply in terms of Section 22(3)(c) of Chapter 555 of the Laws of Malta (the "**Act**"), by Hollingsworth International Financial Services Limited (C32457) (the "**Company**") to the complaint (the "**Complaint**") of NM (British Passport Number XXXX) ("**Complainant 1**") and QP (British Passport Number XXXX) ("**Complainant 2**" while Complainant 1 and Complainant 2 are hereinafter together referred to as the "**Complainants**") which Complaint was formally served on the Company on September 6, 2016.

1. That preliminarily, the Complaint is null and void and ought to be rejected with costs because each of the Complainants had a separate account with the Company while they opted to file two joint identical complaints (the Complaint and another one bearing reference OAFS420/16, both filed on the same date, that is on 17 August 2016) evidently seeking a double remedy;

2. That also, preliminarily and without prejudice to the above, the Office of the Arbiter for Financial Services does not have the jurisdiction to deal with the Complaint insofar as Complainant 2 is concerned (under Section 11(1)(a) of the Act) and the Arbiter for Financial Services does not have the jurisdiction to deal with, determine and adjudge the Complaint (under Sections 19, 20 and 21 of the Act) because the Company and Complainant 2 agreed to submit to the jurisdiction of the Maltese Courts (Document 1);

3. That also, preliminarily and without prejudice to the above, insofar as Complainant 1 is concerned, in accordance with Section 2156(f) of the Civil Code (Chapter 16 of the Laws of Malta, hereinafter referred to as the **"Civil Code"**), the Complaint is time-barred by the lapse of five years since the contractual relationship between the Company and Complainant 1 was concluded on 19 November 2010 (Document 2);

4. That also, preliminarily and without prejudice to the above, the Company rejects the allegation in paragraph 2 of Section D of the Complaint that Mark Hollingsworth "is personally responsible for" the advice given to the Complainants. Firstly, in accordance with Section 2153 of the Civil Code, there being no contractual relationship between Mark Hollingsworth personally and the Complainants, any claim against Mark Hollingsworth is time-barred by the lapse of two years and secondly, the service provider in this case was always the Company only;

5. That, entirely without prejudice to the above and on its merits, the Complaint is unfounded because of the following reasons:

   (i) Insofar Complainant 1 is concerned, she requested products that generated a high return that were either not linked to the stock market or if they were, that an element of capital protection existed. She was advised that with interest rates at nearly zero, achieving a return of 2 to 3% must involve risk. Accordingly, she was informed about the LM Managed Performance Fund as this investment could be for a one-year term, it was not linked to the stock market in accordance with her request and had a good track record of strong performance with no default on income payments. However, Complainant 1 was well informed that the Fund invested in Australian Property so the investment *did* carry a risk in respect of capital. The risk of delayed income payments was also explained. She was explicitly told that if she required a guaranteed income, the LM Fund was not the Fund in which she should invest. Nonetheless, she accepted these risks because she did not want anything on the stock market, unless some element of capital protection, nor did she want bonds because the returns were "not high enough". One year later, a second investment was made into the RBC Income Note. This offered a guaranteed income of 8% per annum. The capital was protected at maturity (3 years) so long as the stock market indices did not fall more than 50%. This proved a successful investment with Complainant 1 receiving £4,800 on the original capital invested of £20,000 (24%). Having enjoyed a positive return

on the LM investment in the first year and subsequent success for the next three years with RBC, there is no evidence that the client herself deemed these products unsuitable for her. Complainant 1 wanted to invest the majority of her savings. She was specifically warned that this is not advisable but wanted to proceed with the first investment because Complainant 2 had savings on which Complainant 1 could turn to, if required. Besides, she informed the Company that the Complainants worked part-time and this work generates additional income. She was also advised that the Company offers a "portfolio" approach in order to spread the risk but this was not feasible with an investment of €20,000, and accordingly the LM Managed Performance Fund remained the choice as a stand-alone product.

(ii) Insofar as Complainant 2 is concerned, she wanted an alternative to a bank deposit held in the UK which was yielding a very low rate of interest. She was attracted to the LM Managed Performance Fund due to Complainant 1 already having invested in it. Nonetheless, she was specifically advised that any property-related investment involves risk to capital and potential liquidity delays. Accordingly, she was specifically advised that by investing into such products she must accept that her capital may well be at risk. At no time did Complainant 2 express any interest in any other type of investment;

(iii) It is absolutely not true that the Complainants asked for low risk investments. It is reiterated that they were attracted to a high yield and they were specifically warned that this carries a fair amount of risk which they accepted;

(iv) The Complainants invested in products that were available to retail investors. Indeed, the LM Managed Performance Fund was never perceived to be unsuitable for retail investors;

(v) The allegation that Mark Hollingsworth "*changed information without any notification or knowledge and … altered forms*" is

vehemently rejected, is downright defamatory and in this regard, all rights are reserved;

(vi) Nor is it true that "*Mark Hollingsworth sold"* to the Complainants "*high risk products, with high incentives and fees for his gain*." Indeed, this allegation is contradictory in itself because such practice risks being short lived with a resultant impact on what is perceived to be "*gained*" thereby;

(vii) Although there was an option for investment in the LM Managed Performance Fund for longer terms, the Company recommended the shortest term, i.e. one year. Yet, upon maturity, Complainant 1 elected, out of her own free will, to roll over the investment. The obvious conclusion to be drawn from this very telling fact is that she was rightly pleased with the outcome of this investment and did not consider this investment to be unsuitable for her;

(viii) After investing in the LM Managed Performance Fund, Complainant 2 elected to invest more money and specifically into two structured products from RBC. These were fully explained to her and so were the risks associated with them. She did very well with the first of these products – investing £20,000 into the Nomura East to West Phoenix. This made a positive return of £1,200 (6%) in the first six months and matured at that time as it was so successful she then reinvested this capital into a second product with RBC but she decided to cash this in more than two years before its maturity date thereby incurring a partial capital loss. This she did in spite of the fact that the product has a safety feature at maturity whereby **all** the capital is returned provided that none of the stocks fall below 50% on maturity. It follows that by withdrawing the entire investment more than two years before maturity, Complainant 2 decided to forgo that potential security;

6. That on the merits of the Complaint and without prejudice to the above, in page 7 of the Complaint, Complainants are claiming more than what the investments are actually worth at this point in time and this is further aggravated by the cumulative effect of this Complaint and the other

complaint (OAFS 420/16) filed by them contemporaneously for the same amounts;

7. That it is always disappointing that an investment loses out on its value. However, this could never be taken to imply responsibility on the part of the service provider or that the service provider is bound to make good for any loss (obviously without benefitting from any increase in the value of the investment). Nonetheless, this is what seems to be the underlying basis of the Complaint. Indeed, this approach presupposes a guarantee for what is known as *moral hazard* that burdens the service provider in favour of the investor which is neither just and equitable nor does it exist at law;

8. That accordingly, and always without prejudice to the above, the Complaint is unfounded in fact and at law and should therefore be rejected with costs because:

(i) It seeks to obtain a double remedy for the Complainants, i.e. to recoup double their alleged loss;

(ii) At all times, the Company acted in accordance with the standards required by the regulatory framework and in accordance with the highest standard of diligence under applicable law and, if need be, this could be adequately proved during the hearing of this case;

(iii) Any loss in the value of the investments complained of was the result of an inherent *Credit Risk* and in the case of the LM investment, there was the alleged fraudulent action on the part of third parties upon which the Company had and could not have had any control;

(iv) At the time the investments complained of actually took place, and in accordance with the best evidence in the Company's possession, the investments fitted the profile of the Complainants;

(v) No guarantee was ever given to the Complainants that the investments being the subject of the Complaint will pay back all that was expected of them. Such '*automatic*' guarantee does not exist at law;

9. That in view of the above, it is submitted that there could be no remedy to the Complaint as it is unjustified in fact and at law.

The Arbiter,

Having considered the complaint and the reply by the service

provider, having seen and considered all the documents,

Having heard the parties,

Considers

Plea of Nullity of the complaint

The service provider submits that the complaint is null and void because *'each of the complainants had a separate account and they opted to file two joint identical complaints evidently seeking a double remedy.'*

The Arbiter cannot entertain this plea. Firstly, because as has been also retained by our Courts, the plea of nullity of an act is an extreme measure which the Courts were reluctant to accept unless there is evidence that the other party will be prejudiced by the formality (or lack of it) of the act.

The procedure before the Arbiter is not a formalistic one and Chapter 12 of the Laws of Malta does not apply except where Chapter 555 expressly states so. It is sufficient that a complainant writes a simple letter to the Arbiter in accordance with Article 22(1) of CAP 555.

Furthermore, the difficulty raised by the service provider in this regard has been solved during the first hearing where it was decided that the case of NM and the complainant will be heard and decided separately.

Consequently, there can be no prejudice to the service provider and the plea as to the nullity of the complaint are being rejected.

Plea as to the jurisdiction of the Arbiter

The second plea deals with the alleged lack of jurisdiction of the Arbiter on the basis of Section 11 (1)(a) of Chapter 555 and '***because the Company and Complainant 2 agreed to submit to the jurisdiction of the Maltese Courts (Document 1***).'

The service provider refers to Document 1 but does not explain which part of that document excludes the jurisdiction of the Arbiter. The Arbiter examined Document 1 and could not find this exclusion of the Financial Arbiter or any other jurisdictional clause.

However, there seems to be a *lapsus* because the service provider must have meant Document 2 and it is obviously a typing error. The Arbiter examined also Document 2[3] which, on page 11 of the same document, states that apart from the jurisdiction of the Maltese Courts, the complainant had '*the right to complain to an independent external body'* and the service provider refers the complainant to the Consumer Complaints Manager of the MFSA which, similarly to the Arbiter for Financial Services, was an Alternate Dispute Resolution (ADR) entity.

However, with the establishment of the Office of the Arbiter for Financial Services[4] (OAFS) the Consumer Complaints Manager of the MFSA was wound up and the MFSA started to refer all complainants to the OAFS.

In a letter addressed to the complainant[5] by the Consumer Complaints Manager (MFSA) the complainant was informed that:

'At this point we would like to make you aware that the remit of the Consumer Complaints Unit [6]within the MFSA is being currently phased out and replaced by the Office of the Arbiter for Financial Services……

[3] A fol 44 et seq
[4] Chapter 555, with effect from the 18/4/2016
[5] A fol 21 et seq
[6] The Consumer Complaints Manager and the Consumer Complaints Unit were the same entity

The Office of the Arbiter for Financial Services is an autonomous and independent setup.

As a result of this development, we will not be investigating your complaint further.'

In Document 2, the Maltese Courts were not granted exclusive jurisdiction because the same document refers to the '*right to complain to an independent external body*' and the OAFS is such an entity. Apart from the fact that, as evidenced above, the Arbiter replaced the Consumer Complaints Manager of the MFSA, Document 2 is generic in the sense that it refers to '*an independent external body'* of which the Consumer Complaints Manager was just an example. The diction of Document 2 did not limit the complainant to proceed to the Courts or the Consumer Complaints Manager only but to '*any independent external body.*'

However, it is pertinent to state that Chapter 555 of the Laws of Malta establishing the Office of the Arbiter (OAFS) came into effect on the 18 April 2016, and therefore, when the parties entered into their contractual obligations in 2010, the parties could not have excluded it in their agreement.

Apart from that, the Court of Appeal has decided that:

'*meta f'kuntratt il-partijiet ma jkunux spjegaw ruhhom car,* ***jew posterjorment ghall-kuntratt jintervjeni avveniment li jkollu bhala konsegwenza kwistjoni li ma tkunx giet preveduta***[7]*u li hemm bzonn tigi maqtugha, allura l-Qrati jkunu obbligati jinterpretaw il-konvenzjoni; u din ghandha tigi primarjament interpretata skont l-intenzjoni tal-partijiet li jkunu hadu parti fil-kuntratt u li tkun tidher car mill-kumpless tal-konvenzjonijiet.'*

As already stated, after the conclusion of the agreement between the parties, the legislator decided to establish this specialised forum to deal better with disputes in the financial services sector.

Although the competence of the ordinary Courts was not excluded, the Arbiter has concurrent jurisdiction with the Courts and it was the presumed intention

[7] Bold by the Arbiter

of the complainant, that she will avail herself of this forum created by the legislator as an alternative to the Law Courts.[8]

When the legislator enacted Chapter 555 of the Laws of Malta, it had the intention of alleviating the Law Courts from the burden of these specialised cases and create a forum which is less formal and expensive and more consumer friendly.

Chapter 555 has the added advantage of granting the complainant some kind of relief in cases where investment providers go bankrupt by providing the possibility of compensation from the relevant compensation schemes up to €20,000, and also the possibility of mediation.

It was the legislator's intention to establish a forum that, being less formal and more specialised, it would decide cases in a shorter period of time.

Had the Arbiter to accept this plea, he would be defeating the legislator's aims, and a good number of the numerous cases that are being filed with the OAFS would all end up in Court.

Moreover, Chapter 555 gives the Arbiter jurisdiction whenever the parties are on the one hand '*eligible clients'* and on the other '*financial service providers'* in accordance with the definition in Article 2 of the Act.

Since the complainant is an '*eligible client* 'and the respondent is a *'financial services provider'* in accordance with the law, and for the above-stated reasons, the Arbiter is rejecting this plea and assumes competence to hear this case.

Pleas of Prescription

The service provider raises the plea of prescription and submits that *'insofar as Complainant 1[9] is concerned, in accordance with section 2156 (f) of the Civil Code, the complaint is time-barred by the lapse of five years since the contractual*

[8] 'Edgar Cuschieri -vs-Perit Gustavo R. Vincenti', Appell Civili, 13 ta' Frar 1950

[9] In its first paragraph the service provider refers to NM as complainant 1 and the complainant, QP, as complainant 2. However, the Arbiter considers this error in indicating QP as 'complainant 2' to be a minimal one and is considered to be a typing error.

relationship between the company and complainant 1 was concluded on 19 November 2010'.

The service provider also raises the plea of prescription in accordance with Section 2153 of the Civil Code only in so far if it is established that Mark Hollingsworth is personally responsible, something that the service provider emphatically rejects.

The Arbiter is convinced that Mark Hollingsworth was not acting in his personal capacity but on behalf of his company as all the documents show, and, therefore, the plea of prescription on the basis of Section 2153 of the Civil Code is no longer relevant.

As to the plea of prescription on the basis of section 2156 (f) of the Civil Code, being a contractual relationship between the complainant and Hollingsworth International Financial Services Limited (the service provider), the period of prescription is that of five years.

Since the plea of extinctive prescription, if upheld, brings the action to an end, it has been circumscribed by certain conditions and restrictions.

The plea has to be proven by party raising it. As stated in 'Stencil Pave (Malta) Limited vs Dr Maria Deguara noe:[10]

'*Hija regola ewlenija fil-procedura li l-prova li l-azzjoni hija preskritta trid issir minn min iqanqal l-eccezzjoni, u ghalkemm il-parti attrici tista' tressaq provi biex tittanta xxejjen dawk tal-parti mharrka billi tmieri li ghadda z-zmien jew billi ggib 'il quddiem provi li juru li l-preskrizzjoni kienet sospiza jew interrotta, il-piz jaqa' principalment fuq min jallega l-preskrizzjoni. Hi l-parti mharrka li trid tipprova li l-parti attrici ghaddhielha z-zmien utli biex tressaq il-kawza, u dan minn zmien minn meta dik il-kawza setghet titressaq.'*

The service provider has also to prove the statutory period from which the period of prescription should run. It is pertinent to quote what the Court of Appeal stated on this matter:

[10] Deciza mill-Prim'Awla tal-Qorti Civili nhar it-30 ta' Ottubru 2003

'Min jeccepixxi l-preskrizzjoni hu obbligat li jaghmel prova sodisfacenti tad-data meta l-perijodu tal-preskrizzjoni jibda jiddekorri ghaliex diversament il-Qorti qatt ma tkun f'pozizzjoni li tikkonstata jekk il-perijodu applikabbli tal-preskrizzjoni jkunx iddekorra jew le.'[11]

Moreover, Section 2137 of the Civil Code stipulates that:

'Subject to any other provisions of the law, the prescription of an action commences to run ***from the day on which such action can be exercised….****'*

The only reference to the plea of prescription made by the service provider is in its reply and no further evidence was produced during the proceedings. It was neither discussed in the final note of submissions.

The service provider states that prescription should run from the date '*since the contractual relationship between the company and complainant 1 was concluded on 19 November 2011 (Document 2).'*

The Arbiter examined Document 2 and the date of conclusion of the contract is indicated as 6 December 2011.[12] Even in Document 1, there are two dates. The complainant signed on the 4 November 2011, and the service provider signed the form on the 19 November 2011.[13]

This leaves a serious doubt as to the date of the '*contractual relationship'* and, as already stated above, in case of doubt, the Arbiter cannot uphold the plea of prescription.

Moreover, in the case of a financial product, it is not logical, fair or reasonable to establish the objective date from which an action can be instituted as the date of the inception of the contractual relationship because the complainant (as well as the service provider) do not presume that from that date there might be a breach of rights that warrant the filing of a judicial act against the defendant company.

For the above-stated reasons the Arbiter is rejecting the pleas of prescription.

[11] Causon vs Sheibani, 4 /12/1987

[12] A fol 50

[13] A fol 42

Plea number four has already been dealt with under '*pleas of prescription'* above.

The Merits of the Case

The Arbiter has to decide the case ***'by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case'.***[14]

Briefly, the complainant is questioning the advice she had been given by the provider prior to acquiring two investments, the LM Management Performance Fund and the RBC 'Global Luxury' Phoenix Note, on which she is complaining about. She claims that she is an inexperienced retail investor and the service provider advised her on investments which were unrecognised, high risk and suitable for professional investors.

The value of her investment in the LM Managed Performance Fund (which she acquired for GBP20,000) has been virtually wiped out.

She redeemed her investment in the RBC 'Global Luxury' Phoenix Note prematurely and lost GBP9,100.

She is also alleging that the provider changed information without prior notification or knowledge and altered forms.

The complainant is seeking compensation for the losses she sustained on these two investments, as well as loss of income.

In her complaint, she asked[15] '*… to be compensated for losing most of our life savings (which we could not afford to lose), plus loss of income.*

QP - £29,100 invested plus lost income of £17,350 (1yr at £1,200 LM Fund – 5 years at £3400 pa RBC – 1 payment received).'

In reply, the service provider claims that the complainant showed interest in the LM Managed Performance Fund as her partner had already invested in it. However, the provider claims that he advised her about the risks relating to property-related investments. The provider claims that the LM Managed

[14] CAP 555, Section 19(3)(b)

[15] A fol 7

Performance Fund was never perceived to be unsuitable for retail investor. He had proposed the complainant a one-year term of this investment, which she rolled over for another year on her own volition as, according to the reply, she was pleased with the outcome of this investment.

The provider claims that she was attracted to high yield and rejected the claim that the complainant asked for low risk investments. Moreover, the complainant requested an alternative to a bank deposit held in the UK which was yielding a very low interest rate.

After investing in the LM Managed Performance Fund, the complainant invested into two structured products from RBC. The provider stated that he had provided information about these two investments. From her first investment, the complainant made a positive return.

In regard to the second product, she encashed it prior to maturity incurring a partial capital loss. The provider claims that by disposing of her investment, the complainant renounced the potential capital security element (which was dependant on the performance of the underlying investments) which was in-built in the investment.

The provider rejected the complainant's allegations that he changed information.

The provider claims that he had always acted in accordance with the standards required by the regulatory framework and, at the time the investment took place, the investments fitted the profile of the complainant.

For the Arbiter, to decide whether the claim is fair, equitable and reasonable, he has to analyse the case from various aspects.

Investment history with the financial services provider

The complainant met Mark Hollingsworth in Cyprus on 14 September 2011. In the previous year, her partner, NM, had invested through the same financial provider into the LM Managed Performance Fund.[16]

[16] A fol 17

The complainant had £40,000 "*to invest in a safe low risk investment with regular quarterly payments to make my new life in Cyprus comfortable and worry free*".[17] She claims that she was very sceptical with investing and asked for reassurances from the financial provider that her money was being invested safely and in her best interest.

In an email sent by the provider on 27 September 2011, he summarised some characteristics of the RBC Global Index Income Note (hereinafter referred to as the 'RBC Notes') and the Nomura East to West Phoenix (hereinafter referred to as the 'Nomura Notes') and provided a copy of the term sheets. Her partner, NM (420/2016), invested in the RBC Global Index Note around the same time that the complainant invested in the Nomura Notes.

Besides investing in the Nomura Notes (GBP20,000) during the last quarter of 2011, the complainant also invested in the LM Managed Performance Fund (hereinafter referred to as the 'LM Fund').

The Contract Note[18] issued to the complainant in regard to her investment in the LM Fund is dated 26 October 2011. The investment (GBP20,000) had an earning rate of 6.5%. The term of the investment was for one year (anniversary date 26 October 2012).

The investment in the LM Fund was automatically rolled over for another year on the first anniversary (26 October 2012).[19] In March 2013, LM announced that it has entered into voluntary administration.

The complainant stated that the investment in the LM Fund had been sold to her '*as it had my partner, as being a good safe investment with regular investment payments, I was informed that the only possible risk was the delay in paying back my capital on maturity. As my partner NM had €20,000 invested I didn't want to put all my £40,000 into one (basket) investment. The only other product offered to me was the RBC income note which was connected to the FTS (thankfully this investment matured very quickly). I was then offered*

[17] Ibid

[18] A fol 197

[19] A fol 122

a further RBC 'Global Luxury' Phoenix Note (see evidence 3). I now see and understand that these notes are for Professional Investors only and not retail clients like myself.'[20]

In the first six months, the investment in the Nomura Notes made a 6% positive return on the investment and matured at that time paying GBP1,200 interest and the full capital.

Previous Investment experience with other intermediaries

The complainant had one bond which matured mid-2011.[21] The bond was held with the National Westminster Bank on the UK.[22]

According to her testimony,[23] '*I had no investments before. The money in this investment came from my divorce settlement. I have secondary education and I worked as an administrative assistant in a school. It was a clerical job.*'

Analysis of the case

A. The fact-finding process and the compilation of the Client Fact Finds

The fact-finding process – that is, the process of collecting information from the complainant prior to assessing and advising on the investment products suitable for her requirements – has been questioned by the complainant as she is claiming that she was not only unaware of this document but that the provider changed information without pre-advice, an allegation the provider rejects in no uncertain terms.

This aspect needs to be looked into in some detail because the fact-finding aspect is fundamental to the question as to whether the investments being complained of were suitable for the needs of the complainant.

[20] A fol 17, fifth paragraph
[21] A fol 108

[22] A fol 455
[23] A fol 166

There appears to be '*two versions'* of the Fact Find. The first version of the Fact Find is that which the service provider sent to the complainant by e-mail in September 2011[24] (hereinafter referred to as the '*September version*'). The second version is that which was compiled in December 2011[25] (hereinafter referred to as the '*December version'*).

Both versions are different in format and content.

In regard to the September version, dated *27 September 2011,*[26] the form is completely blank, except for the last two pages (pages 6 and 7). The first three questions of the Assessment of Suitability are marked ('*Yes*'). Under the heading '*Recommendations by Financial Adviser'* there is written: '*LM Managed Performance Fund – 1 year term*' and '*Sparkasse Safe Custody Account – holding either RBC Global Index Note or Nomura East to West Phoenix Note*'.

As to the December version, dated *5 October 2011 and signed on 6 December 2011,*[27] *a* number of fields in this form are compiled electronically, except for pages 6, 7 (partially) and 8 (partially) which were compiled by hand. Investment advice is being provided. The complainant is classified as '*Retail Client'*.

In regard to the question '*With which financial instrument/s is the client familiar with',* the reply is *'property renting'.* Bank deposits: '*Euro50,000'*.

Under heading '*Investment Objectives, Planning and Risk profile*', the following is indicated:

- Client wished to invest £20,000 over a period of 3-5 years
- Does not wish to invest on a frequent basis
- Purpose of investment: 'maximise income'

[24] A fol 26a to 26h. This is the version of the Client Fact Find which, according to the complainant was '*Sent by email for me to complete & sign 27/9/2011*'.

[25] A fol 26i to 26z. This is the version of the Client Fact Find which, according to the complainant was '… sent to me by email on request 13/11/2015 (totally different form)'.

[26] A fol 26a to 26h

[27] A fol 26i to 26v

- Investor's attitude to risk: 'Medium'

- Amount needed for emergency: £10,000

Assessment of suitability: the '*NO'* tick box is marked indicating that the client is not familiar with the type of service, transaction and financial instrument being offered.

Page 9 is signed by the complainant.

Page 12 is the '**Personal Investment Review for Client**'. As this is a very important aspect in the whole document, it will be dealt with in further detail below.

As to '*Asset Allocation'*, the advice given relates to two investments: one year in the LM Fund and the Nomura Notes (the latter are not subject to a complaint as the investment paid interest and capital shortly after it was acquired).

The '*Client Confirmation'* is signed by both the complainant and the financial provider.

According to the evidence provided, the service provider submitted two emails to the complainant and her partner, NM, on 27 September 2011, (one at 12.23[28] and the other at 14:17:17 EEST[29]). In both emails, the provider asks for the completion and signing of the Fact Find by the complainant.

In her testimony on 22 November 2016, the complainant said: '*I am showing the Arbiter, a form that I declare that I received another Client Fact Find Form in 2011 which is different from Doc 3 filed with my complaint. I state that the form that I received in 2011 is different from the one that I signed.'*

When the complainant lodged her complaint with the provider on 25 November 2015,[30] she claimed that she had completed the Client Internal Fact Finder **and posted it to the provider in December 2011 (our emphasis)**. She did not keep a copy but, when she eventually asked for one in 2015, she was surprised

[28] A fol 174

[29] A fol 26w

[30] A fol 82 et seq

to discover that she had been categorised as '*medium risk'*. She claims, in that letter, that she would have never signed showing a medium rating.

During her testimony,[31] she said she was unable to remember the documents she was asked to sign, although she said she probably signed just one document. She said:[32]

'*When I signed the documents they were not explained to me. Probably, I signed just one document, but I do not remember. With reference to my Client Fact File Form, which everyone is supposed to fill to assess the client's suitability, I never received one in the whole three or four years. I had to ask for the Client Fact Find when I was told by someone else when I could raise a claim against him. There are a lot of anomalies in the Fact Form, namely the Client Fact Find Form, I recognise my signature on page 9, but I want to stress that I signed in blank. The form was typed later by Mr Hollingsworth and not in my presence.*'

The complainant disagreed with the contents of the form, claiming that some of the information is not true. '*I specify that I never was a medium risk investor, I didn't tell him to maximise my income*', she said.

The Fact Find which the complainant claims to have received by e-mail on 27 September 2011, was never filled in. The complainant confirmed so in the hearing when she said:[33] '*I did not complete the missing part in the Fact Find Form. I could have signed something, not when I received the email but when I met Mr. Hollingsworth later in the year. … Mr Hollingsworth wanted just the signature but I couldn't scan it back.'*

During the same hearing, the complainant went through each page of the December version of the Fact Find. Two particular aspects stand out in page 7 (of 14). Under the heading '*Investment Objectives, Planning and Risk Profile'*, the complainant claims that the details are not correct as she did not sign for a medium risk investment. Earlier, she also said that she did not want to maximise income. The complainant is also disputing her signature and dating system on page 13.

[31] A fol 166
[32] Ibid.
[33] A fol 168

In his testimony,[34] the provider said:

'*On being asked why I sent the Complainant two different versions of the Client Fact Find, I say that the only Client Fact Find that was signed and retained is the one in the evidence supplied.*'

Unlike an application form, the Fact Find is not merely a formality. It is a document which reflects the replies that a prospective client provides to a financial provider. It is not a document for the client to fill in.

The September version of the Fact Find contained no information except for the very brief references to the LM Managed Performance Fund and the structured notes (RBC and Nomura).

On file,[35] there is an exchange of emails which indicates that the complainant and the provider were planning to meet (in Cyprus) on the Wednesday following 28 September 2011. This happened to be 5 October 2011, which is the date indicated (a) on the cover of the December version of the Fact Find and (b) on the application form for the LM Fund.

The evidence and testimony of the complainant and the provider do not give a clear answer as to why the December version of the Fact Find had not been signed on 5 October 2011 but rather on 6 December 2011 –a full two months after the transaction occurred. The complainant claims that she sent the Fact Find by post but did not keep a copy. However, she claims that she was asked to sign in blank but she could not recall what she signed.

However, the provider confirmed that he did not provide a copy of the Fact Find to the complainant.[36] Had she requested, he would have willingly provided it. However, he claims that by not providing a copy, he did nothing irregular[37] as in 2011, he was not obliged by the regulations to do so,[38] and that, in any case, the

[34] A fol 448
[35] A fol 119
[36] See reply the provider sent to the complainant on 8 January 2016, a fol 14
[37] A fol 465
[38] In their final note of submission (a fol 465), the respondents are arguing '*there was in 2011 no regulatory obligation to provide or right to obtain copies of internal document such as the CCF*' and that '*the suitability assessment is not the completion of the CCF but the intellectual assessment of the information contained in the CCF*'.

complainant signed off her rights ("*I do not require a copy of the document*")[39] in the September version of the Fact Find.

This argument does not apply. The complainant did not sign the September version of the Fact Find (that is, the first version of the Fact Find which had been sent to her by email). The complainant signed the second version (that dated 5 October 2011) in December 2011, and there is no reference in this version that the complainant did not wish a copy of the document.

In their final note of submission, the Respondents – referring to the second version of the Fact Find – state that:[40]

'The same CCF was supplemented by the information obtained by the Respondent's representative during the meeting in Cyprus and consolidated into one document two months later.'

The '*Personal Investment Review for Client*'[41] in the December version of the Fact Find is specifically addressed to the Client ('*We are pleased to provide this report regarding your investment, which has been specially prepared for your use.')*

If the September version of the Fact Find served as basis for the December version, then the provider – who is required to act in the best interest of the client – was obliged to provide his assessment to the complainant in sufficient time to enable her make an informed decision about her investment choices.

It would have served no purpose for an investment recommendation to be prepared for internal purposes with the ultimate beneficiary of such information being kept in the dark about it.

[39] See Note of submission, a fol 465: In the Complainant's final note of submissions as well as throughout the proceedings, she alleges misconduct by the Respondent for not giving her a copy of the CCF. "Firstly, the Complainant confirmed in the CCF that '*I do not require a copy of this document'. The Complainant was sent this document in September 2011 in order to fill in dislose her personal information and was therefore well aware of the confirmations and declarations bearing her signature."*

[40] A fol 458, see paragraph A4

[41] A fol 26t

B. The '*Personal Investment Review*' ('*PIR*') in the December version of the Fact Find

When providing investment advice, financial providers are required[42] to obtain information from potential clients to enable them understand facts about their client and that, when recommending a specific transaction, it satisfied the following criteria:–

- it meets the investment objectives of the client;
- it is such that the client is able to financially bear any related investment risks consistent with her investment objectives; and
- it is such that the client has the necessary knowledge and experience to understand the risks involved in the transaction.

Among other requirements, providers are also required[43] to provide appropriate information, in a comprehensible form to its clients, such that they are reasonably able to understand the nature and risks of the investment service to be provided and of the specific type of instrument offered. The purpose of this requirement is to ensure that the investor is able to take investment decisions on an informed basis.

The complainant started her testimony[44] as follows:

'I was introduced to Mr Hollingsworth by my partner, NM. She had already invested some money with Hollingsworth and I wanted to invest money myself in anything that could have low risk with regular income with no capital loss.'

If one were to follow carefully the complainant's investment process with the firm, she was not inclined to take unknown risks as she knew that the preservation of her capital was important for her. She did make this aspect clear

[42] SLC 2.16 *Assessment of Suitability* - Part BI: Standard Licence Conditions, page 25, http://www.mfsa.com.mt/pages/viewcontent.aspx?id=262#PartB-AIFM (Although the version that is being linked to came into effect on 1 January 2014, the Suitability Requirements as applicable in 2011 are identical to those in this version)

[43] SLC 2.27 *Client Disclosure Requirements* - Part BI: Standard Licence Conditions

[44] A fol 165

to the provider so much so that there is reference to her wishes in the 'Reasons Why' part of the December version of the Fact Find,[45] as follows:

'*Although income is received from property rental, additional income is required from money held on deposit and although this may involve a moderate risk, short term and/or capital protected investments are recommended that yield a return at a level to at least match inflation.*'

It appears, therefore, that the **Investment Objectives** of the complainant were income and capital protection.

In terms of investment *knowledge and experience,* the complainant had neither experience in property funds nor in structured notes. This was observed by the provider in his '***Personal Investment Review for Client***' in the December version of the Fact Find.[46]

The complainant's investment in the LM Fund occurred around one year after her partner, NM, invested in it. NM invested for one year and earned interest from the investment. The positive experience of her partner in this investment led the complainant to express an interest in the same product.

The complainant confirmed so during her testimony[47]:

'Yes, I wanted an alternate investment to my bank account. Yes, my partner did very well with the LM investment and I was encouraged by her to do so.

Yes, it was I who suggested the LM investment to Mr Hollingsworth.

No, Mr Hollingsworth did not mention that I was risking the capital but he mentioned potential delays. I am not sure whether this was in relation to the receipt of dividends or receiving the maturity.

Yes, I was aware that the investment was related to property. I am being asked how did I expect that it was in low risk when I asked to invest in LM, I say that I

[45] A fol 26t
[46] Ibid.

[47] A fol 167

was inexperienced and naïve investor and I wanted to be led by someone professional in this business.'

The service provider, in his affidavit,[48] elaborated further on this:

'Throughout prior dealings that I had with NM, the Complainant was also in attendance at every meeting. At the outset and at this early part of my affidavit I would like to make it absolutely clear that QP contacted HIFS to invest the money specifically into the LM fund that her partner had invested into. Since she had attended all meetings with her partner she was therefore fully aware of the LM Product (LM Management Performance Fund). She herself, arbitrarily, asked me to assist her in investing with the same product as her partner so that she can also benefit from the returns which her partner was benefitting from at the time. This is of crucial importance as it must be made clear that at no point in time did I or any other representative of HIFS, recommend or suggest the LM Fund to QP.'

During the hearing of 22 November 2016, the complainant claimed:[49]

'*About the LM product, he said it was a very stable product and I was going to receive regular payments with no risk to capital. I was encouraged to invest by my partner because she already had invested, and our product was recommended to us by our adviser, Mr Hollingsworth.'*

On cross-examination,[50] she said*:*

'No, Mr Hollingsworth did not mention that I was risking the capital but he mentioned potential delays. I am not sure whether this was in relation to the receipt of dividends or receiving on maturity.'

In his affidavit[51] the financial provider said:

'It was explained to QP that the investment was linked to Australian property, that it involved risk to both return of capital, amount of interest and

[48] A fol 440, para 8
[49] A fol 166
[50] A fol 167
[51] A fol 441

potential delays to both income payments and capital return, due to it being linked to property and that it is an illiquid asset class'.

The provider, therefore, knew that investing in a property fund would involve risk to capital and potential liquidity delays. However, he still proceeded with recommending the LM Fund to the complainant.

C. The disclosure of investment risk to the complainant

It is important to analyse how the risk for the products that were recommended to the complainant had been portrayed and explained.

Under '***Asset Allocation***'[52] (a sub-section under the Personal Investment Review), the provider provides a short description of the two investment products he was recommending: the '*1 year – LM Managed Performance Fund*' and '*Sparkasse Safe Custody Account – Nomura East to West Phoenix Autocall*.'

The short summary explaining the *Nomura East to West Phoenix Autocall* indicates that neither income nor capital were *fully protected.*[53] Income was paid '*…so long as the underlyings do not fall >25% on the observation dates compared to the starting levels*.' Capital would have been repaid in full if held till maturity '*… so long as none of the indices have fallen more than 50%*.' A term sheet with full terms and conditions is being referred to.

Separately, key highlights of the product were provided by the provider to the complainant in his 27 September 2011, email.[54]

Six months following this investment, which paid income (6%) as well as the initial capital, the complainant invested the same amount in another investment – RBC Notes[55] – which had some similar characteristics to the first investment (i.e. Nomura Notes).

[52] A fol 26t

[53] A copy of the Term Sheet for the Nomura East to West Phoenix Autocall was not provided with the evidence submitted.

[54] A fol 174

[55] A fol 26aa, 26ab (as well as a fol 153 to 156)

The RBC Notes[56] are described as '*[a]n investment combining the potential for Annualised Returns of up to 17%. Early redemption opportunities every 3 months, and linked to the performance of selected Global Luxury Stocks*.' The Term Sheet contains a heading stating '***For Professional Investors Only***'. A graphical representation, with explanation, to describe '*Capital Risk'* is shown under *Key Features*. The investment was not 100% capital protected.

The complainant claims that the investment in the RBC Notes paid dividend once in four years which went against her request for regular income. In January 2015, she prematurely withdrew from the investment against the advice of her provider. She lost £9,100 in capital.

The description of the '*1 year – LM Managed Performance Fund*' under '*Asset Allocation*' is more intent on providing a description of the interest that is payable and the options the investor has in regard to roll-over and payment of withholding tax. There is no reference to risk. On the same page, under the section '*Reasons Why'*, the provider provides some further information about the LM fund.[57]

Separately, in the same email of 27 September 2011, the provider gives a three-paragraph explanation of the LM Fund. The provider gives[58] a description of LM's strategy in the property market and explains the *raison d'être* for adjusting some of their rates. The three paragraphs appear to have been lifted from LM marketing material as it makes reference to '*yourselves and for your client'* and, in other words, not adapted for the use and understanding of the potential investor. There is no reference to the inherent risks of the LM Fund in this email.

The complainant disputes that the LM GBP Fact Sheet, which the provider includes with the Note submitted on 20 December 2016,[59] had been provided

[56] A fol 26aa

[57] *"You have expressed an interest for the LM Managed Performance Fund as your partner invested into this last year. You have no experience of this type of investments as it is into Australian property with the fund lending money to developers. The fund has been running for over 5 years and without any problems. You must however understand that any property related investment involves risk to capital and potential liquidity delays. Our advice is to look to build a balanced portfolio to match your medium risk profile."*

[58] A fol 175

[59] A fol 176

to her.[60] The LM GBP Fact Sheet (dated 31 May 2011) provides key facts about the investment and its objectives. There is a list of 'Who Can Invest' (the list starts with *Experienced Investors)* but does not define the term and there is no reference to risks.

D. The investment in the LM Fund

It is important to provide some general information about the LM Fund by referring to publicly available information based on research conducted by the Arbiter.

According to a Summary Flyer for the LM Fund issued in July 2008,[61] the fund is described as follows: '*Established in 2001 as a high performance income fund, the MPF has a proven track record for the provision of attractive investor returns with zero volatility on its unit price ... Since established in 2001, the LM Managed Performance Fund holds an impeccable track record for delivery of its performance objectives. The Fund aims to provide a steady, premium income stream and provide an investment with a stable unit price. The LM Managed Performance Fund invests in commercial loans; direct real property; The LM First Mortgage Income Fund (assets of which are Australian first registered mortgages, cash and 'at call' securities); and cash.'*

The fund was not required to be registered with the Australian securities regulator (Australian Securities & Investment Commission) and did not have the same disclosure and reporting obligations as with other funds.

In regard to the fund's investment objectives, reference should be made to the *Information Memorandum and Application*, a document which provides an amplified description of the fund, how and in what manner it could invest, as well as who was eligible to invest in the said fund.[62]

[60] A fol 455 – Paragraph VIII

[61] http://oysterbayfundsdirect.com/documents/1302399878_LM%20mpf%20summary.pdf (accessed 22 March 2017). This document is located on servers which appear to be unrelated to the fund.

[62] The version of the *Information Memorandum and Application* that was applicable at the time the investment had been made is dated 25 November 2009 (https://promo-manager.server-secure.com/download/files/02045/150233/MPF+IM.pdf) This document is hosted on internet servers which do not belong to the fund or its manager, the LM Investment Management Limited. The official website of LMIM is no longer online.

In the section relating to risk in the said *Information Memorandum*, '*Investors should be aware that there is risk involved in investing in the Fund, due to its diverse investment mandate*.' A list of potential risks are listed, the first being '*Capital Risk'*: '*The investments of the Fund are not capital guaranteed, and there is a risk that the value of the investment might decline. No losses have occurred, or are expected to occur at the date of this Information Memorandum.*'

In page 11 of the *Information Memorandum* (November 2009), under the heading '*Withdrawal Notice Period'* it is stated: '*To protect all fund investments, payment of withdrawals is currently slowed and is being managed over longer timeframes, as determined necessary by the Manager.*'

Therefore, nothing in the *Information Memorandum* and *Summary Flyer* is there any reference to '*capital preservation'* and by no stretch of imagination could one interpret the reference to '*zero volatility on its unit price'* to mean '*capital preservation'*.

Given its characteristics and risks, the fund was not suitable to all investors.

Complete documentation relating to the LM Fund is not available in the evidence. As part of her evidence, the complainant submitted an extract from '*Glossy brochure from LM Performance* Fund'[63]. Under the heading '*Who can invest?*', there is written: ***> Non-Australian resident investors and Australian investors can invest directly as personal investors. Australian resident investors must be 'wholesale' or 'sophisticated' investors; and > Operators of global platforms, global portfolio bonds, master trusts and wrap accounts.***

From a purely geographical perspective, both investors residing in Australia, as well as those residing outside of this continent, could have invested in the fund.

However, in terms of the category of investors, investors in Australia had to be '*wholesale'* or *'sophisticated'* and had to prove so when applying. Such a classifi-

[63] A fol 26ad

cation was not obligatory for investors outside Australia as the specific reference to *'wholesale'* and '*sophisticated'* is in regard to *'Australian resident investors'* only.

Irrespective of the geographical location of the investor, the same risks applied. The fund did not have two separate classes – one for Australian and another for non-Australian investors. It was one fund.

Therefore, it was incumbent on the service provider to assess – along with other tests such as the spirit of criteria applicable to Australian investor – whether a potential investor was eligible to invest in such a fund. This in view of the overarching conduct of business obligations, which arise from SLC 2.01[64] of the Investment Services Rules, which require a provider to act in the best interest of the client.

By no measure could the complainant have been deemed to be '*wholesale*' or *'sophisticated'*.

Conclusions

The complainant measured risk by her own assessment of personal investment experiences as well as those of others. She was inexperienced in investing and reliance on a financial provider to guide her through the investment process was to be expected. On the basis of her level of education, she is capable of reading and understanding some key basic terms and explanations.

The complainant provided evidence, in the form of email exchanges with the provider between **November and December 2012**, for a preference towards '***a regular, safe income'***[65] when the opportunity for other investments arises.

[64] Part BI: Standard Licence Conditions, page 21: (*2.01 When providing Investment Services to clients, a Licence Holder shall act honestly, fairly and professionally in accordance with the best interests of its clients* …..), http://www.mfsa.com.mt/pages/viewcontent.aspx?id=262#PartB-AIFM

[65] A fol 123 and 124

(i) The investment in the RBC Notes

The literature about this product clearly stated that this investment was **only suitable for professional investors.**

The complainant was clearly a retail client and as such the service provider should not have sold her this product and, therefore, should carry a certain degree of responsibility.

On her part, the complainant pulled out of the investment prematurely against the advice of the service provider[66] at a loss.

Therefore, both parties contributed to the resulting loss of GBP 9,100.

On the basis of what is fair, equitable and reasonable, this loss should be borne equally by the service provider and the complainant.

(ii) The investment in the LM Fund

The LM Fund did not offer any sort of capital preservation. It had risks and liquidity delays since 2009 (according to the *Information Memorandum*), which the provider acknowledged in his advice. Such a key aspect rendered the LM Fund unsuitable for the complainant because it did not meet her requirements as outlined in the December version of the Fact Find.

The fact that the complainant was aware of the LM Fund, as she used to be present in meetings with her partner, does not discharge the provider's obligation to ensure that the investment in a property fund was suitable for the complainant's requirements.

The fact that the complainant's partner invested in the LM Fund (irrespective if that investment was suitable for her requirements or not), does not imply that it was deemed equally suitable for the complainant's requirements. Indeed, the

[66] A fol 167

reply in the assessment of suitability[67] to the question: *Is the client familiar with the type of service, transaction and financial instruments being offered?* is '*no*'.

Additionally, the fact that it was the complainant who suggested the LM Fund to the provider[68] does not exonerate the provider from assessing the complainants' needs against the '*suitability test'* requirements. This was not an *'execution only'* transaction.[69]

The provider has not proven that the complainant had the knowledge and experience to understand and process the information she might have overheard a year earlier to determine if the product he had sold her was suitable for her requirements.

She could not make an informed choice, and the provider has proven so because the *Personal Investment Review* had not been provided to her; and he did not indicate when, how and in what manner its contents had been conveyed to her.

What is discordant is the observation made by the financial provider in the December version of the Fact Find[70] which states: '*Again you have no past experience of these but wish to invest in one or more of these to gain experience*.'

One wonders what experience the complainant was intent of building up if, according to the Fact Find, the complainant had no intention to invest on a frequent basis (same page 7 of the Fact Find) and that she only had GBP10,000 for emergency out of GBP50,000 in liquid funds.

Moreover, the complainant was not able to financially bear any risks arising from the investment.

The complainant did not have the necessary knowledge and experience to understand the risks involved in investing in a property fund such as the LM.

---

[67] A fol 26q
[68] A fol 167: '*Yes, it was I who suggested the LM investment to Mr Hollingsworth*.'
[69] In terms of MiFID, the LM fund was a complex investment product and could not have been sold without a suitability test or an appropriateness test (the latter when no investment advice is given).
[70] A fol 26t

The LM Fund was therefore unsuitable for the complainant and, therefore, the product was mis-sold to the complainant who should be reinstated in full for the amount invested in this fund, less any interest she might have received.

On the other hand, in the case of the RBC Capital Markets 'Global Luxury' Phoenix Notes, while the service provider should hold responsibility for selling it to the complainant who was not a professional investor, the complainant must share responsibility for taking the unilateral decision of pulling out of the product prematurely against the advice given by the service provider. The responsibility should be shared equally between the parties.

Decision

For the above stated reasons, the Arbiter is upholding the claim in full in the case of the LM Managed Performance Fund, and partially accepting it in the case of the RBC 'Global Luxury' Phoenix Note and, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, orders Hollingsworth International Financial Services Limited to pay the complainant the global sum of twenty four thousand, four hundred and fifty British Pounds (£24,450) being: £20,000 as the sum invested in the LM Managed Performance Fund, and £4,550 being half the loss sustained on the RBC 'Global Luxury' Phoenix Note.

With legal interest to be paid from the date of this decision until the date of payment.

The legal costs of this case are to be borne as to one-fifth by the complainant and four-fifths by the service provider.

Dr Reno Borg
Arbiter for Financial Services