The Office of the Arbiter for Financial Services

Case No. 420/2016

NM

vs

Hollingsworth International Financial Services Ltd. (C32457)

Hearing of the 27 September 2017

The Arbiter,

Preliminary

NM and her partner, QP lodged a complaint with the OAFS on 17 August 2016 against Hollingsworth International Financial Services Ltd. (the financial services provider/the service provider).

During the first hearing (22 November 2016), the Arbiter observed that the cases filed by NM and QP (OAFS Ref: 419/2016) refer to each other. As the merits of the cases were dissimilar, it was decided that they will be heard and decided separately.

The Complaint:

The complainant submitted the following:

"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.

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. … 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. …. Mark Hollingsworth sold us high risk products, with high incentives and fees for his gain."

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

NM - €20,000 invested plus lost income of £1,200 (12 months @ £100 pm)."

The Reply:

The service provider responded as follows:

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 OAFS419/16, 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 (OAFS419/16) 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.

Having heard both parties,

Having seen the documents,

The Arbiter considers:

Preliminary Pleas

The first plea deals with the nullity of the complaint because it was filed together with her partner QP. Apart from the fact that the plea of nullity is an extreme

remedy which has been considered as such by our Courts,[1] proceedings before the Arbiter are deemed by the law to be less formal, and if a case is similar in nature, can be filed together by more than one complainant and the Arbiter may treat such case as one case.[2]

However, during the first sitting it was decided that the case of QP and the complainant were not similar and it was decided that both cases would be heard and decided separately.

The complaint satisfies all the requisites of Section 22(1) of CAP 555 of the Laws of Malta.

The Arbiter finds no reason why this complaint should be considered as null and void and is rejecting this plea.

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 CAP 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.

In the final note of submissions, the service provider does not make any specific reference or explain this plea.

The plea of lack of jurisdiction is a serious plea with far-reaching consequences because it is intended to halt the proceedings.

It is a basic principle in any judicial or quasi-judicial process that the party raising a plea has to explain and prove it.

On this basis alone, the Arbiter can reject this plea.

[1] See the recent case: Roland Darmanin Kissaun vs GlobalCapital Financial Management Ltd, PA, 16/6/2017
[2] CAP 555, S 30

However, there seems to be a mistake because the service provider must have meant Document 2 and it is obviously a typing error. The Arbiter examined also Document 2[3] where, on page 11 of the same document, it is stated 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] 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……

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 Arbiter 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 an example. The diction of Document 2 did not limit the complainant for all times to go either

[3] A fol 46 et seq
[4] CAP 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

to the Courts or the Consumer Complaints Manager only but also to *"any independent external body".*

However, it is pertinent to state that CAP 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."*[8]

As already said, 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 of the complainant, after this occurrence after the contract, that she will avail herself of this forum created by the legislator which is considered to be more adequate in such cases than the Courts.

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

CAP 555 has the added advantage of granting the complainant some kind of relief in cases where investment providers go bankrupt by creating the

[7] Bold by the Arbiter

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

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, CAP 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.

Plea of prescription

The service provider bases the plea of prescription on section 2156(f) of the Civil Code which states as follows:

"2156 :*The following actions are barred by the lapse of five years:*

(f) *actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed."*

Since the plea of prescription, if accepted, leads to the extinction of the cause, both the Civil Code and our Courts have circumscribed this plea with numerous restrictions.

First of all, the service provider has to prove the plea and, in cases of doubt, the plea is to be rejected.

Moreover, section 2137 of the Civil Code specifies that:

"2137**:** *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,*

irrespective of the state or condition of the person to whom the action is competent."

In its judgement, ***Stencil Pave (Malta) Ltd. vs Dr Maria Deguara noe decided by the First Hall of the Civil Court on the 30 October 2003, the Court held that:***

"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 ghaddielha z-zmien utli biex tressaq il-kawza, u ***dan minn zmien minn meta dik il-kawza setghet titressaq.****"*[9]

The Court in its judgement ***Paola Galea et vs John Cauchi*** et[10] held that:

"*Illi minhabba li l-preskrizzjoni mressqa mill-konvenut u l-kjamata fil-kawza hija wahda estintiva tal-azzjoni attrici (almenu f'dik il-parti li tirrigwarda l-likwidazzjoni tad-danni), jidhol fis-sehh il-principju li z-zmien preskrittiv jghaddi biss minn dakinhar li jkun tnissel id-dritt jew setghet tinbeda l-azzjoni meqjusa biex thares dak id-dritt. Dan il-principju huwa mibni fuq il-massima li "actioni non natae non praescribitur". (P.A. (JRM) "Raymond Grech et vs Stefan Borg" - 14 ta' Gunju 2001)."*

Moreover,

Baudry-Lacantinerie and Tissier f'dan ir-rigward josservaw li:-'Quanto alla prescrizione estintiva, il suo corso comincia in principio a partire dal giorno in cui e' nato il diritto o l' azione che e' destinata ad estinguere…' Izjed 'il quddiem, izidu jghidu illi, "La prescrizione estintiva in materia di diritti eventuali non decorre evidentemente se non dopo il verificarsi dell'evento che fa nascere il diritto rimasto fin allora puramente eventuale."

The adjudicator has to consider the nature of the cause, taking into consideration the circumstances and facts of the case. In this case, the claimant is stating that service provider did not honour the contractual obligations it

[9] Bold by Arbiter
[10] PA , 31/01/2008

assumed when it provided her financial advice and sold her the financial product in question. She alleges that in executing the contract the service provider gave her bad advice and gave her a product that was not suited for her.

The provision of advice and the eventual sale of a financial product is not a simple contract but is one which is specialised and subject to special laws and regulations especially those issued by the MFSA[11] the Consumers Affairs Act (CAP 378).

The regulations issued by the MFSA[12] inter alia oblige the Licence Holder (in this case the service provider) to provide advice and sell a financial product which is either suitable or appropriate to the investor, depending on the type of service provided.

The service provider indicates the date of contract as the date from which prescription should run.

In the case of these contracts, this is illogical since the client cannot take action from such date because on that date she can rightly presume that the advice and the sale of the product given to her are correct and suitable to her.

In accordance with the above-stated jurisprudence, on that date she could not start 'the action'.

If she had taken action from that date, the service provider could have rightly claimed that the action is pre-emptive and unjustified.

Consequently, the Arbiter is of the opinion that the objective date for the filing of a cause by the complainant cannot be the date when she was given the service because on that date she was not in a position to commence the action as stated in section 2137 of the Civil Code.

The law has to be interpreted in a logical, realistic and just way.

For the above-stated reasons, the plea of prescription is being rejected.

[11] Part B –Investment Services Rules-Standard Licence Conditions (ISR-SLC)
[12] Ibid

As to the fourth plea, namely that Mark Hollingsworth cannot be held personally responsible for the service given to the complainant, the Arbiter is of the opinion

that the contract was concluded between the complainant and Hollingsworth International Financial Services Ltd. and, therefore, Mark Hollingsworth is not personally liable in the eventuality that the Arbiter finds in favour of the complainant.

The merits of the case

The issue relates to the provision of an investment service and the sale of a financial product by the financial services provider to the complainant in November 2010. Through this service, the provider offered the LM Managed Performance Fund (LM fund) and the complainant invested EUR20,000 in this investment for a period of one year, which was rolled over for another period.

Review of the product being complained of

The LM Managed Performance Fund was acquired by the complainant in November 2010.

Neither the complainant nor the service provider submitted copies of documents pertaining to the LM fund which were relevant at the time the investment had been sold to the complainant. The document that the financial services provider presented on 20 December 2016,[13] related to a GBP Fact Sheet as at May 2011, is totally irrelevant to this complaint. However, the Arbiter carried out his own research to understand the nature of the LM fund.

In terms of the Australian companies' legislation, an investment scheme which principally sources its capital from international sources was not required to be registered. The LM Managed Performance Fund was not registered with the Australian securities regulator (*Australian Securities & Investment Commission*) and, therefore, the fund did not have the same disclosure and reporting obligations as with other funds.

[13] A fol 162 and 163

According to a Summary Flyer issued in July 2008 by LM Investment Management Limited,[14] the fund was marketed as follows (page 1):

"*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*."

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 is the *Information Memorandum And Application*.[15]

As to the Investment Objective of the Fund (page 8), "*The investment objective for the Fund is to provide a steady income stream relevant to the risk return of the Fund. Non Australian dollar investments in this Fund are hedged in the relevant currency against Australian dollar currency movements.*"

Under the heading "Investment Approach" (page 12), the approach is "*for the Fund is to target opportunities arising out of its daily business as an Australian funds management company. The Manager employs alternative investment strategies and targets an expanded range of investment opportunities with no restrictions*". Examples of types of investments the Fund could invest in were also provided.

In the section relating to risk (page 25), the document states "*Investors should be aware that there is risk involved in investing in the Fund, due to its diverse investment mandate.*"

[14] LM Managed Performance Fund – An Enhanced Income Fund, Summary Flyer. Document produced during July 2008.

[15] LM Managed Performance Fund: Information Memorandum and Application. Issued on 25 November 2009. LM Investment Management Limited

There is also stated: "*While the Manager does invest in a range of conventional investments, investors should be aware that the Fund will also participate in less conventional investment activities should the opportunity arise*". It is also stated that: "*Investors should be aware that there are a number of significant risks associated with investments of this nature*."

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*". It is significant to know that, under "Distribution Risk", the document says: "*Distributions to investors depend on the performance of the underlying investments. The Manager is unable to guarantee that investors will receive a return on their investment".* The list of potential risks includes Unit price, Currency Risk, Property Market Risk, Liquidity Risk and Borrowing Risk.

As to the type of investors who were eligible to invest in the fund, the Information Memorandum states (page 15): *The Fund allows for investment by:-*

• Non-Australian Resident Investors and Australian Resident Investors can invest in the Fund directly as ("Personal Investors"). Australian resident investors must be "wholesale" or "sophisticated" investors; • Operators of global platforms, global portfolio bonds, master trusts and wrap accounts and institutions ("Global Platform/Portfolio Bond Investors") investing the funds of their clients ("Indirect Investors").

Both investors in Australia as well as those from outside this continent were able to invest into the fund. However, investors in Australia had to be "wholesale" or "sophisticated". Such classification did not seem to be required for investors outside of Australia as the Information Memorandum only makes specific reference to 'wholesale' and 'sophisticated investors' for 'Australian resident investors' only.

In page 9, under the heading "*Withdrawal Notice"* the following is written: *"For both Personal Investors and Global Platform/Portfolio Bond Investors the*

withdrawal notice must be received by the Manager at least 90 days prior to the maturity date of the investment term. … To protect all fund investments, payment of withdrawals is currently slowed and is being managed over longer timeframes, as determined necessary by the Manager".

Furthermore, on this aspect of "Withdrawals", page 11 of the same Information Memorandum, 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.*"

In the **Portfolio Update issued by the same fund on 31 July 2010,**[16] there is a paragraph with this title: "*Updated Withdrawal Information*". The investor is being informed that, from time to time, it may be necessary for the fund manager to extend the timeframes for the payment of withdrawals or to suspend the payment of withdrawals. "*This management mechanism allows composure and time to realise cash from the fund's property related assets, which by their nature are not immediately liquid ...*" The paragraph continues as follows: "*The need to implement this measure to protect the fund arose for the first time last year, as per the Information Memorandum. Timeframes for withdrawal payments are currently slower than general, due to market conditions brought on by the global financial crisis. Liquidity conditions are improving in the market place and payment timeframes will return to normal as soon as possible.*"

This aspect was amply evident in Novembru 2009, where in its *Information Memorandum* it was stated that: "*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, liquidity risks were real even before the service provider sold the product to the complainant .

Such aspect should have been taken more into consideration before the service provider should have given advice to the complainant to acquire this investment in November 2010.

[16] LM Managed Performance Fund, Portfolio Update 31 July 2010

Sequence of events and documentation

The complainant[17] came across an advert issued by the financial provider in a local magazine in Cyprus and made an online enquiry. The advert[18] did not feature the name of the investment but merely reproduced, in very large font size, the potential return which could be payable.

The provider responded by e-mail on 21 October 2010.[19] A meeting was arranged for 2 November 2010, "*and again Mark only talked about the LM product.*"[20] At that meeting, the complainant claimed that she was "*cautious inexperienced and new to investing and was mainly looking for regular income.*"

She wrote: "*An Internal Client Fact Finder, I think I partially completed this at the first meeting or afterwards and then posted to Mark in Malta. I never received a copy of this important document. I requested a copy from Hollingsworth International, in November 2015, at the start of writing my complaint, I eventually received a copy 6 days later, after asking for a second time. Mark conceded in his reply to my complaint that this document was never issued to me.*"

The email of 21 October 2010 served to provide an introduction to the service provider's service. In regard to the provider's strategy, the email stated: "*In additional to capital protected notes, we also recommend low-risk funds offering fixed income which run for a much shorter duration."*

It further gives an example of such type of investments: "*LM Managed Performance Fund: A 1 year product that provides a fixed return in sterling, euro or US Dollar with the option to continue beyond the 1 year term."* The complainant replied on 26 October 2010,[21] to which the financial provider replied the day after.[22]

[17] See especially a fol 13 and 14
[18] A fol 85
[19] A fol 86
[20] A fol 13
[21] A fol 87
[22] A fol 87

The service provider followed up the meeting of 2 November with an email[23] addressed to the complainant. This e-mail was sent on 4 November 2010.[24] With that e-mail, the provider attached a "*recommendation letter for the LM fund as discussed*".[25]

In this letter (which was sent by email only), the provider once again gives a description of the services he was able to provide and gives a description of the LM Managed Performance Fund. The letter provides information about particular characteristics of the investment, namely about the Fixed Interest that is payable after one year, the option to have interest distributed monthly or quarterly, a description of the fund's objectives and the reasons for investing. It describes the LM fund as a "*financing fund that offers loans to specific property developers at rates below the bank rates. The Australian property market is very stable ….*" As to the reasons for investing, it says "*There is a risk that on maturity date redemptions are delayed due to liquidity issues at the time. This has however only happened once in nine years the fund has been running.*"

With the same email, the provider requested the complainant "*the completing of our internal Client Fact Find. I attach this and would appreciate it if you could complete the missing information where applicable.*"

The version of the Client Fact Find as sent to the complainant is made up of seven pages.[26] The front page includes NM's name and telephone number. On page 1, some basic details (name, date of birth, marital status, mobile phone number and e-mail address) of the complainant are inserted. Replies to fields in page 2 and 3 are blank. In Page 4, under the section "Investment Objectives, Planning and Risk Profile", it is indicated that the period over which the client wishes to invest is 1 year, the Client does not wish to invest on a frequent basis, the purpose of her investment is income and the investor's attitude to risk is Medium. In page 5, there are details of the complainant's passport details and in page 6, under the heading "Recommendations by Financial Advisor", it is stated: "LM Managed Performance Fund for a 1 year term". The provider also

[23] A fol 109 and 110
[24] See declaration signed by the complainant, a fol 81
[25] A fol 97
[26] A fol 88 to 94

sent the complaint a Rate Sheet with details of the applicable Interest Distribution Rates on 1 August 2010.

The compiled Confidential Client Fact Find was provided as part of the evidence during the proceedings.[27]

According to the complainant, she had never been provided with a copy of this document at least until she requested it in 2015 when she complained with the provider in regard to this same investment.

There appears to be two versions of the Fact Find. The first version would be that which the provider sent to the complainant to fill in the blanks. The second version would be that which NM compiled. This latter version was signed by the investor on 4 November 2010 and the provider on 19 November 2010.

The complainant[28] observed:

"*It is very relevant and important that the two client Fact Finders I attach are scrutinised and compared, as I believe the wording has been changed in "Recommendations by Financial Advisor" (not HIFS). Why was this important information not completed before I was asked to sign the form? Surely I need to read* ***his***[29] *recommendations! I believe the wording has been changed (at the time of me requesting a copy), to fit the product and not me as a Client.*"

When the financial provider replied on 8 January 2016 to the complainant's letter of complaint[30] he stated that:

"*I would like to clarify that the Client Fact Find was completed by myself by inserting all known details such as name, address, passport details that were provided by you. This information was typed. There is no doubt or dispute that you are a retail investor. ….. Your agreed risk rating of "medium" was fully agreed and disclosed to you as You subsequently manually completed and signed the same page (4) … There is no evidence on the Client Fact Find or anywhere*

[27] A fol 118 to 124
[28] A fol 81
[29] Complainant's emphasis
[30] A fol 16 to 20

else that supports Your statement that You were a low risk investor. The recommendation section summarises Your investment requirements. This confirms that You requested a high level of income. There is no evidence to the contrary."

Not all blank fields in the second version of the Fact Find were completed. It is observed that the service provider did not indicate which fields the complainant was required to compile. Some important questions remained unanswered – that is not the fault of the complainant who left them blank but rather of the service provider who was responsible for the compiling of the Fact Find.

What is material is the evident modification to the last page of the entire document – the Assessment of Suitability and the Recommendations by Financial Adviser. In the first version,[31] the Assessment of Suitability was left blank and the Recommendations included one sentence: "LM Managed Performance Fund for a 1 year term". This page was not signed when the provider emailed it to the complainant.

In the signed version,[32] all questions in the Suitability Test are marked YES, except that which asks: "*Is the Client familiar with the type of service, transaction and financial instrument being offered?"*

In regard to the "Recommendation by Financial Adviser", there is a detailed paragraph which supposedly reflects the discussion the provider had with the complainant when they met on 2 November 2010.

This paragraph was evidently inserted to exonerate the service provider from responsibility should the product fail.

In the opinion of the Arbiter, this behaviour on the part of the service provider is very unprofessional and serious, and was not done in good faith and in the best interest of the client.[33] It was inserted to exonerate the service provider.

[31] A fol 94
[32] A fol 124
[33] ISR-SLC Rule 2.01

Previous investments/investment knowledge of the complainant

During the hearing of 22 November 2016,[34] the complainant declared that she had never invested with anyone before.

"*This was my first investment of any time. My only money were in bank accounts, mainly in England. I did not have any experience in any kind of investments*," she declared.

The complainant attended college in business studies, has a post secondary education and mainly related to office work. She was a civil servant employed in customer service.

Observations

How the investment was described/relayed to the complainant in the advert

In both the documents submitted and during the first hearing of 22 November 2016, the complainant declares that she came across an advert (Document AY).[35]

The complainant presented two versions. In the first advert, there is displayed in large type a rate of interest of 7% per annum for sterling investments and 6% per annum on euro investments. The advert displays prominently: "1 year Fixed Term".

In the second advert, in a larger print compared to the first, there is displayed a Semi Annual Coupon of 6.5% - sterling or euro – but with a closing date of 30 November 2010. The small print in *both* adverts reads: "*The returns are not guaranteed and may accumulate at a rate less than the amount quoted.*

Prospective purchasers should read the brochure for the full terms and conditions and all the associated risks before making an investment."

In neither of the two adverts is there a clear reference that the rates displayed relate to an investment. Neither is there any reference to the name and nature

[34] A fol 151
[35] A fol 153

of the investment. It is only in the small print at the bottom that there is a reference to an investment and a prospectus being available. But there is no direct link between the rates displayed and the small print. Indeed, one may well argue that – as far as the first advert is concerned – the rates were related to a bank deposit. The phrase "1 year Fixed Term" could easily be understood as being for a one year fixed deposit account.

It may be true that potential investors should not solely rely on an advert on which to base their decision to invest. However, the fairly large print in both adverts, the reference to "Fixed Term" (in the first advert") and relegating the reference to "investment" in the small print fails to reflect the requirement in the MFSA's Standard Licence Condition (SLC) 3.01 to Investment Firms[36] that marketing communications for clients and potential clients should be "fair, clear and not misleading".

Indeed, if one were to assess the contents and presentation of the advert with the requirements as laid out under section 3 of these Standard Licence Conditions: "*Disclosure Requirements for Information to Clients, including Marketing Communications*", it becomes evidently clear that the advert breaches SLC 3.01 and SLC 3.02 whereby in the latter condition, the provider was required, inter alia, to ensure that in its adverts "*… in particular [it] shall not emphasise any potential benefits of an Investment Service or Instrument without also giving a fair and prominent indication of any relevant risks.*" The advert was totally opposite of what the MFSA's standard licence conditions required.

In terms of clarity, therefore, the adverts were misleading for consumers.

The information about the investment as provided to the investor

During the first hearing, the complainant said that when Mr Hollingsworth had visited Cyprus in 2010, he had described the LM Managed Performance Fund as a good and sound investment.[37]

"*The only risk that Mr Hollingsworth mentioned to me was that there might be a delay on the date of redemption and I accepted.*"

[36] Investment Services Rules for Investment Services Providers – Part BI – Standard Licence Conditions applicable to Investment Services Licence Holders (Excluding UCITS Management Companies) – (ISR-SLC)
[37] A fol 150 et seq

He had also mentioned that it was an investment in the Australian property market.

The complainant also claims that she wanted "a low risk investment" and that she was attracted by the interest.

Although there was a one-to-one meeting in Cyprus on 2 November 2010, before the acquisition of the investment, there were a couple of email exchanges between the complainant and the provider in which particular aspects about the product's characteristics had been explained.

Prior to the meeting, the provider sent an email to the complainant (dated 21 October 2010)[38] with details about the latter's services and the LM Managed Performance Fund.

The text in this email was largely replicated in the letter sent on 4 November 2010,[39] to the complainant. Under the heading "*Our Strategy*", the last sentence of that paragraph reads: "*In addition to capital protected notes, we also recommend low-risk funds offering fixed income which run for a much shorter duration.*"

The next four paragraphs describe the LM Managed Performance Fund.

This investment is being described as "low risk".

However, official product documentation issued by LM Investment Management Limited, the managers of the LM Managed Performance Fund, does not indicate or describe the investment as "low risk".

The next paragraph explains the features of the fund focusing on the payment of the fixed return. Then, there is a paragraph on the fund, not really on its characteristics but rather the purpose of the use of the funds (to loan to developers at lower rates than banks). The last paragraph starts with a further reference to the rate of return.

[38] A fol 158 and 159
[39] A fol 97

There is mention that there may be risk that redemptions will be delayed on maturity but that in the nine years the fund had been running, such occurrence never occurred.

The service provider did not deem it important to relay to the investor other information such as to whom the fund may be suitable, who is eligible to invest in the fund, and most importantly, some further details about the potential risks of the fund as provided by the provider.

The Client Fact Find that was sent to the complainant for compiling is also scant about details relating to the investment.

The document that the financial provider presented on 20 December 2016,[40] related to a GBP Fact Sheet as at May 2011, which is totally irrelevant to this complaint.

In her statement,[41] the complainant stated that "*Mark Hollingsworth did not fully explain and go through on a one-to-one basis with me, important documents (main one my Client Fact Finder) the content including risks or the level of risk, especially as I was new to investing.*"

The fact that the complainant had brochures in hand does not exonerate the provider from its duty of care towards his client. Even if the complainant could have been able to read the documents provided, she did not have the capacity to understand its contents to the extent that a person with good knowledge of investing should have been able to do.

The LM Managed Performance Fund was not a "retail fund" and its characteristics were such that rendered it suitable for particular classes of investors, but certainly not of the type of the complainant who declared, confirmed, that she had no previous investment experience and the amount she wanted to invest was all she had available.

It is evident that the information which was provided to the investor in the email of 21 October 2010, the subsequent letter of 4 November 2010, and the first version of the Client Fact Find was more inclined towards emphasising the rate

[40] A fol 162 and 163
[41] A fol 80, fifth bullet

of return that is payable rather than the characteristics and risks of the investment.

The investor was not provided with a clear and holistic description of the product characteristics, a requirement which emanates from SLC3.10.[42]

In addition, the provider was also obliged to provide the investor with information on costs and associated charges related to the investment in terms of SLC3.22.[43]

Although the provider provided information relating to bank charges, the contract note that was presented (which was issued by LM Investment Management Limited) is completely silent on the fees or commissions payable to him (i.e. the provider).

SLC 2.02[44] of the same Investment Services Rules sets requirements in respect of the general duty to act in accordance with the best interests of clients. Quoting from the Guidance Notes to the Investment Services Rules for Investment Services Provider[45] issued by the MFSA, SLC 2.02 "*is intended, in particular, to set standards for the payment and receipt by Licence Holders of fees, commissions and non-monetary benefits. This is because such benefits, in*

[42] Part BI: Standard Licence Conditions, page 63: (*3.10 The Licence Holder shall provide clients or potential clients with a general description of the nature and risks of Instruments, taking into account, in particular, the client's categorisation as either a Retail Client or a Professional Client. That description must explain the nature of the specific type of Instrument concerned, as well as the risks particular to that specific type of Instrument in sufficient detail to enable the client to take investment decisions on an informed basis.*)

[43] Part BI: Standard Licence Conditions, page 65 : (*3.22 The Licence Holder shall provide its Retail Clients with information on costs and associated charges that includes such of the following elements as are relevant:*
a. the total price to be paid by the client in connection with the Instrument or the Investment Service or Ancillary Service, including all related fees, commission, charges and expenses, and all taxes applicable via the Licence Holder or, if an exact price cannot be indicated, the basis for the calculation of the total price so that the client can verify it. Commissions charged by the Licence Holder shall be itemised separately in every case; ……), http://www.mfsa.com.mt/pages/viewcontent.aspx?id=262#PartB-AIFM

[44] Part BI: Standard Licence Conditions, page 21: (*2.02 The Licence Holder shall not be regarded as acting honestly, fairly and professionally in accordance with the best interests of a client if, in relation to the provision of an investment or Ancillary Service to the client, it pays or is paid any fee or commission, or provides or is provided with any non-monetary benefit, other than the following: a. a fee, commission or non-monetary benefit paid or provided to or by the client or a person on behalf of the client; b. a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the following conditions are satisfied: …… c. proper fees which enable or are necessary for the provision of Investment Services such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, cannot give rise to conflicts with the Licence Holder's duties to 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

[45] http://www.mfsa.com.mt/pages/viewcontent.aspx?id=262#6

some circumstances, place the firm in a situation where it would not be in compliance with the general duty to act in accordance with the best interests of clients. In order to do so, SLC 2.02 applies in relation to the receipt or payment by a Licence Holder of any fee, commission or non-monetary benefit, but applies in a different way to different types. It does not deal with payments made within the Licence Holder, such as internal bonus programmes, even though these could give rise to a conflict of interest covered by SLC 2.97."

Furthermore, the Guidance Notes state that: *"SLC2.02 sets conditions that must be met in order for a fee, commission or non-monetary benefit to be allowed. In doing so, it applies to all fees, commissions and non-monetary benefits that are paid or provided to or by a Licence Holder in relation to the provision of an investment or ancillary service to a client. Therefore, SLC 2.02 should not be treated as applying only to payments or receipts that are made with the purpose or intent to influence the actions of a Licence Holder*".

Nothing in the MFSA rules prohibited the financial provider from levying a fee for the provision of an investment service. However, that fee was required to be disclosed to the client.

Client's eligibility to invest in the LM Managed Performance Fund

In her final submissions,[46] following the hearing of 30 January 2017, the complainant states (third bullet): "*In the glossy LM Summary brochure it advises who can invests, along with the LM Fact Sheet, both provided by Mr Hollingsworth, advising only for high end investors …… Neither mention Retail Investors, as Mr Hollingsworth has tried to suggest, was included. If Retail investors were included,* ***why is it not listed?***"

In their final submissions,[47] the service provider quote from the LM Summary Flyer and states that "*In clear language, the document provides "****Australian Resident investors*** *must be wholesale or sophisticated investors: and operators of global platforms, global portfolio binds, master trusts and wrap accounts".*

Non Australian resident investors, as is the Complainant may invest by "Direct Retail investment" as provided on the right column of the same document." The

[46] A fol 409
[47] A fol 417

respondents add: *"In point of fact, the enhanced summary flyer of the product provides 'Investors who do not reside in Australia do not have to certify as wholesale/sophisticated investor.'"*

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". Such a classification was not obligatory for investors outside of Australia as the Information Memorandum makes a specific reference to "wholesale" and "sophisticated" in regard to "Australian resident investors" only. The Information Memorandum gives a detailed description of the four categories of Australian investors that were eligible to invest in the fund. The criteria for such Australian investors were quite high and onerous.

The fact that, in regard to these Australian investors, such eligibility criteria were onerous and high is in itself an indication that this was a different fund of particular characteristics. In regard to Australian investors, the eligibility criteria are such that they impose a measure of protection on such investors. Not all Australian investors were able to invest in the fund but only those that met the criteria.

In regard to non-Australian Investors, the Information Memorandum does not make any reference that they had to be "retail investors". The document states: "*The Fund allows for investment by:- Non-Australian Resident Investors and Australian Resident Investors can invest in the Fund directly as ("Personal Investors")."*

The eligibility criteria for Australian investors did not extend to investors from outside Australia.

However, the fund and its characteristics, such as its regulatory status, how and in what manner it may invest, as well as its risks, were such that do not render the fund appropriate for the mass retail market.

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, even if the Information Memorandum did not impose any particular eligibility criteria for non-Australian investors, 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[48] 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".

Assessment of Suitability

The complainant received investment advice from the service provider. It is customary and, really, a requirement[49] that when providing investment advice, the provider is required to obtain the necessary information as to the potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial position and his investment objectives so as to enable that service provider to recommend to the potential customer the Investment Service or instrument that is suitable for him.

In his affidavit,[50] the provider explains the manner he had serviced the complainant in October and November 2010. "*On my next visit to Cyprus, an initial meeting was held on 02/11/10. The purpose of the meeting was for me to gather financial information on the Complainant to then in turn allow me to make a recommendation to her as regards the money she wished to invest. The meeting was followed up with a letter from me dated 04/11/10. At the first meeting, the key information required to make the recommendation was collected. Certain "softer" information was not collected (as not essential to the advisory process) and a request to complete any missing information was*

[48] 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 …..*)

[49] Standard Licence Condition 2.13, Investment Services Rules for Investment Services Providers, Standard Licence Conditions, page 43

[50] Dok 21, a fol 385

requested when sending the partially completed fact find to the Complainant on 04/11/10. The advisory process was therefore conducted professionally and in line with regulatory requirements".

During the hearing of 30 January 2017,[51] the provider said that "*…. at the first meeting only some information was collected, and she did not sign at that point. The Fact Find was subsequently sent to her on the 4th November, to her to complete any missing information which was then returned. She signed the Fact Find; the recommendation by the financial adviser, on page 6, was filled afterwards, after her signature, but the other parts were filled before her signature was put on the document.*"

Later on in his cross-examination,[52] when the Arbiter questioned the service provider why some parts of the Fact Find were left empty "*…. and filled them afterwards, even if they were what you call softer or non-critical information, I [the provider] say that a lot of information was asked from NM at the first meeting but the* client *Fact Find was sent to her subsequently to finalise the missing information.*"

(The provider described such "*softer (non-critical) information*" as "*her address, any dependent children. The important information was her risk profile, that was critical.*")[53]

Other than the fact that there seems to be inconsistencies in the provider's evidence during the hearing of 30 January 2017, it is clearly evident that the version of the Fact Find that the provider asked the complainant to fill in (i.e. the first version) was very rudimentary in terms of the details that the financial advisor ought to have collated and recorded.

The Client Profiling exercise and the Assessment of Suitability are such important aspects of the advisory process. It is that moment when the advisor examines the potential's client's requirements, his expectations of the investment, his risk profile, his understanding of the investment that may be recommended to him. There is therefore substantial information that is

[51] A fol 405 and 406
[52] A fol 407
[53] A fol 407

required to be collected and collated at the first meeting *by the advisor*. This is not simply a form-filling exercise.

The advisor is required – in terms of the MFSA's SLC 2.16[54] – to establish the investment objectives of the client; assess if the client is able to financially bear any related investment risks consistent with his investment objectives; and that the client has the necessary knowledge and experience to understand the risks involved in the transaction.

By and large, the first criterion appears to have been met. The same cannot be said for the second and the third criteria. The sections on "Occupation, Income and Knowledge in Investment Field" and "Summary of Assets" were left blank. It was not the responsibility of the complainant to fill in the fields, but rather for the provider to ask the pertinent question for him to be able to compile a detailed Fact Find. It was incumbent on the provider to seek information about the investment services and the financial instruments the client was familiar with especially in view of the fact that the provider became aware that the complainant did not have any previous experience of investing.

The Assessment of Suitability[55] compiled on 19 November 2010, and therefore **after** the complainant had returned the Fact Find to the provider, to the question "Is the client familiar with the type of service, transaction and financial instrument being offered?" the reply is "No". On the basis of this reply, coupled with other information relating to the complainant's level of expertise in investing, a property fund should have never been offered to such a novice investor.

The information that the complainant filled in the section about her assets speaks volumes as to why the rules require financial advisers to assess if their client was able to financially bear any risks consistent with her investment objectives.

The amount of bank deposits the complainant declared that she had at the bank was €20,000 which was exactly the amount of capital she wanted to invest. A loss of her investment would have impacted her overall financial situation.

[54] Part BI: Standard Licence Conditions, page 25
[55] A fol 124

Following their 2 November 2010 meeting, the provider had arrived at the conclusion that the complainant was a "medium" risk investor. In his affidavit,[56] the provider writes in bold type: *"At no time did she state that she wanted no or little risk"*. Cross-examined on 30 January 2017,[57] the provider claims that "*… the only piece of evidence is page 4 of the Fact Find which confirms that she is medium risk – that she had signed*".

The provider repeatedly claims that by signing the Fact Find, she accepted its contents and, therefore, she acknowledged that she was a "medium risk" investor. On the other hand, the investor claims that "*this terminology was not explained to her*".

The initial e-mail exchanges, which were then followed up in the 4 November 2010 letter, do not make any reference to the fact that the complainant wanted a "low-risk investment". Rather, it was the provider who – in his 21 October 2010 e-mail and 4 November 2010 letter – made reference to "low risk funds" proceeding to providing information about the LM Managed Performance Fund.

The profiling of an investor as "medium" without taking into consideration other aspects which ought to have been established as part of the provider's assessment of the investor could give a wrong or distorted picture of the investor's profile.

A "medium" risk investor would likely be a person who can afford to take some risk over a span of time, among other characteristics. It was clear that she wanted "income".

The service provider as advisor had other information at hand to assess what level of risk tolerance the complainant was able to take on board. Her summary of assets indicated quite clearly that the bulk of her wealth was tied up in property (an illiquid asset). She had no other investments and was not interested in investing on a frequent basis.

At the hearing of 30 January 2017, the provider said: "*Being asked whether I altered her Recommendations in the part of the Client Fact Find, I repeat what I*

[56] A fol 388, para 13
[57] A fol 407

said before, that ***this information was added after she signed. It was added and not altered."***[58]

In his final note of submissions, the service provider[59] categorically denies that the Client Profile was altered. The respondents claim that "*The fact finding exercise occurred on two occasions and consolidated into one document*".

When the complainant was provided with the Fact Find on 4 November 2010, the recommendation of her advisor was a simple one liner. She returned the Fact Find to the provider with her written responses.

The level and extent of detail which is disclosed in the revised page 6 of the Client Fact Find could only have been gathered by the provider at the meeting of 2 November 2010. There were no further e-mail exchanges of the sort that contained such material information between the date of the meeting and the date (19/11/10) which appears under the provider's signature. If such information had been discussed, then one would have expected it to be included in the version which the provider sent to the complainant on 4 November 2010.

Surely, the service provider must have had a reason for it not to have been included and "added" afterwards with the service provider not feeling obliged to relay it to the complainant.

By not disclosing his "full" recommendation to the complainant at the time he had sent her the Fact Find for additional responses, the provider was in breach of the trust the complainant had given him when she accepted to be provided with an advisory service and the sale of the investment.

There is absolutely no indication that the client had withheld any information from the provider. Rather, the additional text in the Recommendation, unbeknown to the complainant, reflects a very unprofessional manner of service and certainly not in the best interest of the client, as required by MFSA rules.

[58] Bold by Arbiter
[59] A fol 412, paragraph A4

The Juridical Context

The Arbiter has to decide the complaint by reference "to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case".[60]

It is clearly evident that, in providing the advice and selling this investment to the complainant, the service provider infringed various Investment Services Rules issued by the MFSA to licence holders as clearly indicated above.

Since the enactment of CAP 555, these rules do not serve only regulatory purposes. The Act stipulates[61] that in carrying out his functions in deciding the case, the Arbiter shall:

"consider and have due regard, in such manner and to such an extent as deems appropriate, to applicable and relevant laws, ***rules and regulations, in particular those governing the conduct of a service provider, including guidelines issued by national and European Union supervisory authorities****,*[62] *good industry practice and reasonable and legitimate expectations of consumers and this with reference to the time when it is alleged that the facts giving rise to the complaint occurred."*

The non-observance of the Investment Services Rules issued by 'the national supervisory authority (MFSA)' are of material importance for the Arbiter to decide whether the complaint is equitable, just and reasonable because being based on the MiFID Directive, they are intended to regulate the conduct of business of service providers in the financial services sector to give investors a degree of protection.

Furthermore, as amply stated above, the service provider did not follow good industry practices and did not fulfil the reasonable and legitimate expectations of the consumer.

[60] Section 19(3)(b)
[61] CAP 555, section 19(3)(C)
[62] Bold by the Arbiter

Also, the service provider did not act in good faith when it compiled the second fact find by 'adding' parts that were only intended to exonerate the service provider.

The service provider gave the wrong advice on a product which was not suitable for the investor thereby mis-selling the product.

The provider's behaviour was in breach of his contractual obligations towards the complainant.

For the above-stated reasons, the Arbiter finds that the complaint is fair, equitable and reasonable in the particular circumstances and substantial merits of the case.

In this case, the complainant ought to be placed in her position before making the investment.

In accordance with section 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Hollingsworth International Financial Services Ltd. to pay the complainant the sum of twenty thousand euros (€20,000) together with legal interest from the date of this judgement until the date of payment.

Any receipts that the complainant might have received on this investment have to be deducted from this sum.

The service provider shall bear all the expenses of this case.

Dr Reno Borg
Arbiter for Financial Services