



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-18 ta' Settembru, 2024

Appell Inferjuri Numru 25/2023 LM

Rupert Baskcomb (Passaport Numru: 549237624)
(l-appellat)

vs.

Optimus Fiduciaries (Malta) Ltd (C 90147)
(l-appellanta')

Il-Qorti,

Preliminari

1. Dan huwa appell magħmul mis-soċjetà intimata **Optimus Fiduciaries (Malta) Ltd (C 90147)** [minn issa 'l quddiem 'is-soċjetà appellanta'], mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fit-13 ta' Frar, 2023, dwar il-każ 107/2021 [minn issa 'l quddiem 'id-

deċiżjoni appellata’], li permezz tagħha ddecieda li jilqa’ parzjalment l-ilment tar-rikorrenti **Rupert Baskcomb (Passaport Numru 549237624)** [minn issa ‘l quddiem ‘l-appellat’], kif ġej:

“Decision and Compensation

For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case, (fn. 78 Cap. 555, Article 19(3)(b)) and is partially accepting it in so far as it is compatible with this decision.

Being mindful of the key roles of Optimus Fiduciaries (Malta) Limited as Trustee and Retirement Scheme Administrator, and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, the Arbiter concludes that the Complainant should be given compensation by Optimus for the damages suffered by the Complainant in relation to his scheme.

Whilst the Arbiter does not accept the extent of compensation requested by the Complainant given that:

- (i) only the loss in respect of the TRG investments has resulted; and***
- (ii) other external parties, like the investment adviser and the previous trustee and RSA of the Scheme were involved and also carried responsibility, with respect to the disputed investments,***

the Arbiter considers that in the particular circumstances of this case, it is fair, equitable, and reasonable for Optimus Fiduciaries (Malta) Limited to compensate the Complainant for the amount of forty per cent (40%) of the total net contributions resulting in respect of the TRG investments. (fn. 79 P. 30 The Service Provider indicated this amount of GBP16,220.40)

Given that the Arbiter does not have the exact figure of the total net contributions resulting in respect of the TRG investments, the Arbiter shall stipulate how this is to be calculated. In this regard, the total net contributions resulting in respect of the TRG investments is to be calculated as the sum of the following:

- (i) The amount initially invested into the TRG fractional property holding plus any management and administration fees or fractional payments paid directly from the Scheme’s account in respect of the fractional holding, less any income already paid into the Scheme from the***

investment and throughout the term of the holding up to the date of this decision;

- (ii) The amount initially invested into the TRG bonds less any income received from the investment throughout the term of the investment up to the date of this decision.***

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the laws of Malta, the Arbiter is therefore, ordering Optimus Fiduciaries (Malta) Limited to pay the complainant 40% of the total net contributions resulting in respect of the TRG investments as calculated above.

The above is without prejudice to any action in terms of law that the complainant may be entitled to take with respect to other parties to the scheme.

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

The expenses of this case are to be borne by the Service Provider.”

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw l-investiment tal-appellat fi skema tal-irtirar magħrufa bl-isem ‘*The Optimus Retirement Benefit Scheme No. 1*’ [minn issa ‘l quddiem ‘l-Iskema’] stabbilita bħala *trust* u amministrata mis-soċjetà intimata fil-kariga ta’ *Trustee* u anki ta’ Amministratrici, kif liċenzjata mill-MFSA.

Mertu

3. L-appellat ippreżenta l-ilment tiegħu quddiem l-Arbitru, u spjega kif ġej:

“Failure to meet regulatory obligations:

Optimus Fiduciaries (Malta) Ltd failed to conduct their business with due skill and care. They failed to assess our client’s investment knowledge and attitude to risk. Had they complied with their duties and made any attempts to assess our client’s personal circumstances, they would have realised that our client was not in a position to make this investment. No adequate due diligence was undertaken, otherwise they would not have allowed the transfer of funds into the investments. If due diligence was

undertaken they failed to act on it with due skill and care and continued to allow the investments to take place, despite their total unsuitability. Optimus Fiduciaries (Malta) Ltd failed to pay regard to the best interests of our client and treat him fairly. They should have realised the investments were high risk and refused to allow them, or at least obtain appropriate clarification before proceeding (There is no evidence this was carried out and, has resulted in the loss of the pension.) They knew that there was a significant risk that the investment would be illiquid and should also have taken into consideration what was fair, reasonable and good industry practice. Throughout the transaction they did not consider our client's best interests.

The failure to undertake due diligence on investment:

They failed to act according to the standards expected of a regulated SIPP operator. SIPP providers have discretion to refuse to carry out instructions, should they consider an investment is generally not suitable to be held in a SIPP."

Huwa fisser it-talbiet tiegħu kif ġej:

"£46,246.00 (less any potential FSCS award)

Interest @ 8% since the 14th of August 2015 OR the amount that the £46,246.00 would have been worth had it not been transferred to you, whichever is greater;

Compensation for the stress and aggravation in the sum of £1,000 and;

Professional fees incurred with bringing this complaint."

4. Is-soċjetà intimata wiegħbet permezz tal-*email* tagħha tad-9 ta' Awwissu, 2021, fejn kienet issottomettiet li l-pretensjonijiet kollha tal-appellat fil-konfront tagħha ma kienux korretti u/jew kienu invalidi, għaliex hija ma kienitx teżisti bħala entità, u lanqas għalhekk ma kienet *Trustee* tal-Iskema fiz-żmien in kwistjoni.

L-Appell

5. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata, u fis-6 ta' Marzu, 2023, intavolat appell fejn qiegħda titlob lil din il-Qorti sabiex:

“...jogħgobha tilqa’ dan l-Appell u tħassar u tirrevoka s-Sentenza tal-Arbitru datata 13 ta’ Frar 2023 fl-intier tagħha u dan billi tilqa’ u tikkonferma l-aggravji mressqa mis-soċjetà appellanti.

Bl-ispejjeż kollha taż-żewġ istanzi kontra l-appellat.”

Tgħid li l-aggravji tagħha huma s-segwent: (a) l-Arbitru straħ fuq argument li sar fin-nota ta’ sottomissjonijiet, u għalhekk wara l-għeluq tal-provi; (b) l-Arbitru għamel apprezzament żbaljat tal-fatti; (ċ) l-Arbitru applika ħażin il-liġi; u (d) l-Arbitru għamel apprezzament żbaljat tal-fatti.

6. L-appellat wieġeb fis-6 ta’ Frar, 2024, fejn qiegħed isostni li d-deċiżjoni appellata hija waħda ġusta, u għalhekk timmerita konferma.

Konsiderazzjonijiet ta’ din il-Qorti

7. Din il-Qorti ser tgħaddi sabiex tikkunsidra l-aggravji tas-soċjetà appellanta, u dan fid-dawl tal-konsiderazzjonijiet magħmula mill-Arbitru fid-deċiżjoni appellata, u meqjusin ukoll is-sottomissjonijiet tal-appellat.

L-Ewwel Aggravju: [L-Arbitru kiser il-prinċipju tal-audi alteram partem]

8. L-ewwel aggravju tas-soċjetà appellanta huwa li l-Arbitru kiser il-prinċipju tal-*audi alteram partem* meta straħ fuq argument li kien sar għall-ewwel darba fin-nota ta’ sottomissjonijiet. Għalhekk hija ma kellha l-ebda opportunità sabiex tipprezenta l-provi opportuni sabiex tirribatti l-argument tal-appellat, u b’hekk tiddefendi ruħha b’mod raġonevoli. Hija ssostni li l-premessi u t-talbiet li l-appellat ipprezenta fl-ilment tiegħu quddiem l-Arbitru, kienu jirrigwardaw il-kondotta tat-*Trustee* u Amministratrici tal-Iskema preċedenti, li kienet is-soċjetà

Integrated Capabilities (Malta) Ltd [minn issa 'l quddiem 'ICML'], meta din naqset li taççetta l-istruzzjonijiet sabiex l-investimenti f' 'The Resort Group' [minn issa 'l quddiem 'TRG'] jiġu eżegwiti. Is-soċjetà appellanta tirrileva li mill-illment jirrizulta li l-appellat kien taħt l-impressjoni li fit-2015 huwa kien ittrasferixxa l-fond tal-pensjoni tiegħu lilha, u mhux lil ICML kif fil-fatt ġara. Is-soċjetà appellanta tirrileva wkoll li fix-xhieda tiegħu tas-17 ta' Jannar, 2022, meta mistoqsi jekk kellux relazzjoni magħha fi-żmien li saru l-investimenti, l-appellat wieġeb *"I say that 'contractual' in so far as they were managing it, yes"*. Is-soċjetà appellanta tissottometti li l-prova ewlenija li hija kellha tagħmel għall-fini tal-eċċezzjonijiet tagħha, kienet il-prova li kienet ġiet esebita, jiġifieri l-konferma min-naħa tal-Awtorità ta' Malta għas-Servizzi Finanzjarji ['l-AMSF'] li fiż-żmien meta saru l-investimenti f' TRG, hija ma kienitx it-Trustee u l-Amministrattriċi tal-Iskema, anzi hija saħansitra hija kienet għadha ma ġietx inkorporata. Hija tagħmel riferiment dak li qal James Milner, rappreżentant tal-MFSA, waqt ix-xhieda tiegħu tal-1 ta' Frar, 2022, fejn iddikjara li *"The Transfer of trusteeship with respect to the Optimus Retirement Benefit Scheme No. 1, was transferred from Integrated-Capabilities (Malta) Ltd to Optimus Fiduciaries (Malta) Limited on the 29 May 2020"*. Filwaqt li tagħmel riferiment għas-subartikoli 30(3) u 34(2) tal-Kap. 331 tal-Liġijiet ta' Malta, tgħid li l-Arbitru minflok għażel li jistrieħ fuq il-kwalifika taħt is-subartikolu 30(3) appena msemmi, li jeżiġi li trustee ġdid għandu jieħu dawk il-passi neċessarji sabiex jirrimedja l-ksur ta' trust li jkun seħħ qabel il-ħatra tiegħu, u hekk kif il-ksur ikun ġie a konjizzjoni tiegħu. Is-soċjetà appellanta tgħid li madankollu l-Arbitru naqas milli japprezza l-limitazzjonijiet legali u ġurisprudenzjali ta' din il-kwalifika li ġiet allegata mill-appellat biss fin-nota ta' sottomissjonijiet tiegħu. Is-soċjetà appellanta tikkontendi li huwa

tassew ingust li fejn il-kwistjoni ma kienitx giet issollewata waqt il-proċeduri u anki fejn ma tressqet l-ebda evidenza fir-rigward, l-Arbitru straħ fuq dikjarazzjoni tal-appellat sabiex sabha responsabbli lejha għall-allegat ksur ta' *trust* min-naħa tat-*Trustee* preċedenti. Is-soċjetà appellanta tgħaddi sabiex tispjega liema prova hija kienet lesta biex tagħmel fl-eventwalità li l-ilment kien sar fir-rigward tal-imgħiba tagħha fejn naqset li turrimedja ksur ta' *trust* qabel iż-żmien li fih hija kienet maħtura fil-kariga ta' *Trustee* u Amministratriċi tal-Iskema. Is-soċjetà appellanta tgħid li din l-evidenza ma setgħetx tiġi pprezentata, għaliex proprju l-ilment u l-proċeduri marbutin miegħu ma kienux jirrigwardaw il-kwistjoni li giet sollewata biss fin-nota ta' sottomissjonijiet, jiġifieri wara l-għeluq tal-provi. Filwaqt li s-soċjetà appellanta tiċċita dak li qalet il-Qorti tal-Appell dwar il-prinċipju ta' *audi alteram partem* fis-sentenza tagħha tas-6 ta' Frar, 2015, fl-ismijiet **Edwin Zarb noe vs. Gilbert u Chantelle Spiteri**, hija ndikat fejn fil-fehma tagħha l-Arbitru fid-deċiżjoni appellata kien wasal għal konkluzjoni żbaljata. Hija tagħmel ukoll diversi sottomissjonijiet dwar fejn l-Arbitru fil-fehma tagħha kien żbalja, u tikkontendi li hija ċertament ma kienitx ippermettiet l-investimenti f'TRG. Is-soċjetà appellanta tissottometti li ma kien hemm l-ebda logika fit-tħassib tal-Arbitru li l-investimenti in kwistjoni baqgħu jagħmlu parti mill-portafoll tal-appellat, wara li hija kienet giet maħtura bħala *Trustee* u Amministratriċi tal-Iskema, u dan għaliex is-soluzzjonijiet kienu tassew ferm limitati. Tispjega li l-imsemmija investimenti mhumiex kwotati fuq xi borża, u ma kien hemm l-ebda suq sekondarju għalihom, u tfiggħer l-għażliet li hija kellha quddiemha bħala konsegwenza. Imma peress li dawn l-investimenti ma setgħux jiġu mifdija, u ma kienx gie identifikat kumpratur li kien dispost jixtrihom, hija kienet ħadet id-deċiżjoni li tibda proċess ta' ristrutturar filwaqt li rriżervat id-

dritt li tiegħu passi legali kontra l-partijiet involuti jekk dan ikun opportun. Hawnhekk, is-soċjetà appellanta tispjega li sabiex jittiegħdu passi legali fejn it-*Trustee* kien ser jikkommetti l-proprjetà tat-*trust* għall-fini tal-iffinanzjar tal-azzjoni, kien hemm bżonn li din tal-aħħar tkun waħda b'prospett raġonevoli ta' suċċess. Izda tgħid li hija ma kienitx konvinta li dan kellu jkun hekk fil-każ odjern.

9. L-appellat isostni li dan l-aggravju huwa wieħed frivolu għaliex ma kienx jirriżulta ksur tal-prinċipju *audi alteram partem*. L-appellat jikkontendi li l-prova li kellha tressaq is-soċjetà appellanta ma kienitx konferma li hija ma kienitx it-*Trustee* u l-Amministratriċi tal-Iskema fiż-żmien in kwistjoni, izda li hija kienet għamlet minn kollox sabiex ma jirriżultax telf wara li hija ħadet f'idejha l-portafoll tiegħu. L-appellat jiċċita d-disposizzjonijiet tas-subartikolu 30(3) tal-Kap. 331, u jissottometti li m'hemm xejn skorrett li xi parti tressaq argument legali waqt l-istadju ta' sottomissjonijiet. Izda jekk l-ilment tas-soċjetà appellanta huwa li hija ma ngħatatx l-opportunità li tressaq prova ta' dak kollu li hija kienet għamlet sabiex issewwi l-ħsara li kienet saret, dan tassew ma jirriżultax mill-atti proċesswali. Barra minn hekk, jirrileva li s-soċjetà appellanta ma kienet għamlet l-ebda talba sabiex twaqqaf il-prolazzjoni tad-deċiżjoni.

10. L-appellat jissottometti wkoll li huwa ċar mid-deċiżjoni appellata, li l-Arbitru kien ikkunsidra l-passi li hija kienet ħadet, u saħansitra għamel riferiment għalihom. L-appellat jinsisti li wara kollox l-Arbitru kellu kull dritt li jissollewa dan huwa stess skont il-funzjonijiet u l-poteri mogħtija lilu *ai termini* tas-subartikolu 19(3) tal-Kap. 555, u partikolarment il-paragrafi (b) u (ċ) tiegħu.

11. Il-Qorti tgħid li s-soċjetà appellanta għandha raġun. Minn qari tal-ilment tal-appellat li stabbilixxa l-parametri tal-istess ilment, jirriżulta mingħajr dubju li

s-soċjetà appellanta ma kienitx l-istess *Trustee* u Amministratriċi tal-Iskema li lejha kien indirizzat l-imsemmi lment. Irriżulta waqt il-proċeduri permezz tax-xhieda ta' James Milner, *Senior Manager* mal-MFSA, li din l-Awtorità kienet ħarġet liċenzja lis-soċjetà appellanta sabiex taġixxi bħala amministratriċi ta' skemi ta' irtirar reġistrati taħt l-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta) fl-4 ta' Frar, 2019, u dan fejn l-appellat stqarr fl-ilment imressaq quddiem l-Arbitru, li l-pensjoni tiegħu kienet ġiet trasferita lis-soċjetà appellanta fl-14 ta' Awwissu, 2015. Għalhekk ċertament it-trasferiment tal-pensjoni ma seta' qatt seħħ kif allegat mill-appellat. B'hekk ukoll minn qari tas-sezzjoni fl-ilment intestata *'Describe clearly the reason or reasons why your financial services provider has let you down'*, joħroġ ċar li l-allegazzjonijiet tal-appellat ma setgħu qatt jirriżultaw fil-konfront tas-soċjetà appellanta, għaladarba ma kienitx hi t-*Trustee* u l-Amministratriċi tal-Iskema fiż-żmien li saru l-investimenti in kwistjoni. Fl-imsemmi lment tiegħu, l-appellat stqarr li:

'Had they complied with their duties and made any attempts to assess our client's personal circumstances, they would have realised that our client was not in a position to make this investment. No adequate due diligence was undertaken, otherwise they would not have allowed the transfer of funds into the investments. If due diligence was undertaken they failed to act on it with due skill and care and continued to allow the investments to take place, despite their total unsuitability ... They should have realised the investments were high risk and refused to allow them, or at least obtain appropriate clarification before proceeding (There is no evidence this was carried out and, has resulted in the loss of the pension.) They knew that there was a significant risk that the investment would be illiquid and should also have taken into consideration what was fair, reasonable and good industry practice ... The failure to undertake due diligence on investment: They failed to act according to the standards expected of a regulated SIPP operator. SIPP providers have discretion to refuse to carry out instructions, should they consider an investment is generally not suitable to be held in a SIPP'.

12. Minn dan kollu jirrizulta b' mod inekwivoku, li l-appellat qiegħed jindirizza l-ilment tiegħu lejn dik is-soċjetà li lilha huwa kien ittrasferixxa l-pensjoni tiegħu bil-għan li din tiġi nvestita. Hawnhekk huwa qiegħed jilmenta dwar l-imġiba ta' *Trustee* u Amministratriċi partikolari tal-Iskema li taħtha sar l-investment tiegħu li sofra telf, u bl-ebda mod l-ilment tiegħu jista' jinftiehem li kien qiegħed jindirizza t-tutela ta' dak l-investment. Għalhekk l-ilment ma jista' qatt jolqot lis-soċjetà appellanta, li saħansitra ma kienitx teżisti fiż-żmien li sar l-investment lamentat. Jekk sussegwentement irrizulta waqt it-trattazzjoni tal-imsemmi lment quddiem l-Arbitru, li hija kienet negligenti fl-imġiba tagħha lejha wara li l-investment ġie trasferit lilha bħala t-*Trustee* u l-Amministratriċi l-ġdida tal-Iskema, l-appellat kien tenut jieħu dawk il-passi neċessarji sabiex jassigura li jsalva l-istess ilment, jekk dan kien possibbli. Imma dan ma sarx, u l-Arbitru ma kienx korrett meta sab li s-soċjetà appellanta kienet responsabbli lejn l-appellat għad-danni li huwa sofra rizultat tat-telf fl-investment tiegħu, minhabba l-allegat nuqqas min-naħa tagħha li tassigura fil-mument li hija ġiet fdata bħala t-*Trustee* u l-Amministratriċi l-ġdida tal-Iskema, li din kienet konformi mal-provvedimenti regolatorji, il-kundizzjonijiet tat-*Trust Deed* u l-iskop tal-Iskema stess. Il-parametri tal-ilment tal-appellat kienu differenti, u l-Arbitru ma seta' qatt jiddeċiedi 'l barra minn dawk l-istess parametri.

13. Għaldaqstant l-ewwel aggravju tas-soċjetà appellanta huwa ġustifikat, u l-Qorti tilqgħu. Għaladarba hija ser tgħaddi sabiex tħassar id-deċiżjoni appellata, il-Qorti tastjeni milli tiegħu konjizzjoni tal-kumplement tal-aggravji tas-soċjetà appellanta.

Decide

Għar-raġunijiet premessi, il-Qorti taqta' u tiddeciedi dwar l-appell tas-soċjetà appellanta, billi tilqgħu u b'hekk tħassar id-deċiżjoni appellata fl-intier tagħha, bl-ispejjeż taż-żewġ istanzi kontra l-appellat.

Moqrija.

**Onor. Dr Lawrence Mintoff LL.D.
Imħallef**

**Rosemarie Calleja
Deputat Registratur**