



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-18 ta' Settembru, 2024

Appell Inferjuri Numru 116/2023 LM

David Curran (li għandu passaport numru 121237329) u martu Laura Curran
(li għandha l-passaport numru 125543580)
(‘l-appellati’)

vs.

STM Malta Pension Services Limited (C 51028)
(‘l-appellanta’)

Il-Qorti,

Preliminari

1. Dawn huma żewġ appelli magħmulin, wieħed mis-soċjetà ntimata **STM Malta Pension Services Limited (C 51028)** [qminn issa ‘l quddiem ‘is-soċjetà appellanta’], u l-ieħor incidentalment mir-rikorrenti **David Curran (passaport numru 121237329)** u martu **Laura Curran (passaport numru 125543580)** [minn

issa 'l quddiem 'l-appellati'], mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fl-10 ta' Novembru, 2023, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' parzjalment l-ilment tal-appellati kif ġej:

“Conclusion

For the above-stated reasons, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case (fn. 103 Cap. 555, Article 19(3)(b)) and is accepting it in so far as it is compatible with this decision.

Cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying policy. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the damages incurred. The claims of the Complainants are not being met in full to inter alia reflect the failure by their financial advisor to note, for example, the difference in policy terms at issue from those in the application forms and key features document, and the failure of Provident Life to issue a Policy with terms and conditions aligned to those signed for in the policy application.

Compensation

Being mindful of the key role of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of the STM Malta Retirement Plan and Policyholder of the Providence Life policy, the Arbiter concludes that the Complainants should be compensated by STM Malta for damages suffered as a result of the lack of protection it afforded to safeguard their property and protect their interests.

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the Complainants the amount of 70% (seventy percent) of the amount of any Marketing Fee that may be charged and paid on their respective underlying policy irrespectively of whether these charges are actually reflected in the valuation statements.

A schedule explaining the amount paid in compensation in terms of this decision is to be filed within 15 days with the OAFS by the Service Provider with a copy to the

Complainants who will have 15 days from its receipt to contest its computation in terms of Article 26(4) of Chapter 555 of the Laws of Malta.

With legal interest from the date of submission of the computation in terms 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 *marketing fee* ta' £26,580 li s-socjetà appellanta qiegħda tippretendi mingħand l-appellat u ta' £8,800 li hija qiegħda tippretendi mingħand l-appellata, b'rabta ma' poloz ta' assigurazzjoni tal-ħajja miżmuma rispettivament mill-appellati wara li huma kienu f'Ottubru 2013 applikaw għat-trasferiment tal-investment tagħhom fuq parir li kien gie mogħti lilhom mill-konsulent finanzjarju tagħhom deVere (UAE). L-imsemmija poloz kienu nħarġu minn Providence Life Limited bħala investment sottostanti ta' skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] amministrata mis-socjetà appellanta, fejn din il-miżata skont l-imsemmija socjetà appellanta, kellha titnaqqas bir-rata ta' 1% fis-sena mill-investment tagħhom. Madankollu huma kienu ġew mgħarrfa mingħand Providence Life Limited li għalkemm il-miżata kienet tnaqqset mill-poloż, it-tnaqqis relattiv ma kienx gie rifless fil-valutazzjoni tagħhom minħabba żball fis-sistema tagħha. Min-naħa tagħhom, l-appellati jikkontendu li fil-ħin li kienu nbiegħu lilhom il-poloż imsemmija, huma ma kienux ġew avżati b'din il-miżata li kellha titħallas.

Mertu

3. L-appellanti pprezentaw ilment quddiem l-Arbitru fl-4 ta' Mejju, 2022, fil-konfront tas-socjetà appellata, fejn issottomettew fost affarijiet oħra li l-parir li

huma kienu ngħataw għax-xiri tal-poloż, ma kienx wieħed tajjeb u li n-negożju kien sar mingħajr ma ġew żvelati l-fatti kollha konċernanti l-istess poloż, anki dwar l-iżvantagġi li dawn kienu joffru mil-lat finanzjarju. Għalhekk, huma talbu sabiex jingħataw rifużjoni sħiħa tal-miżata in kwistjoni jew tal-parti l-kbira tagħha.

4. L-imsemmija soċjetà appellanta wiegħbet fit-3 ta' Ġunju, 2022, billi eċċepiet li (a) l-ilment kien *fuori termine*; (b) l-appellati ma kienux għamlu l-ilment tagħhom magħha, u għalhekk hija ma kellha l-ebda opportunità sabiex tindirizzah, u huma kienu saħansitra waslu f'arrangament ma' Providence Life Limited dwar il-miżata dovuta mingħajr il-kunsens tagħha; (ċ) l-investment in kwistjoni ma kienx wieħed minn dawk li hija kienet toffri; (d) l-ilment ma kienx indirizzat lejha.

Id-deċiżjoni appellata

5. L-Arbitru għamel is-segwent i konsiderazzjonijiet sabiex wasal għad-deċiżjoni appellata:

“Preliminary

In its reply, the Service Provider claimed ‘that the Complainants are out of time to bring the complaint to the Arbiter’. (fn. 6 P. 200) STM Malta claimed that the Complainants were first aware of ‘the quantum of the marketing fee on 26th of September 2013’ when they received email copies of the Policy documents issued by PLL. (fn. 7 Ibid.) The Service Provider submitted that the Arbiter has no competence on the Complaint as this was not brought against it ‘within two years of the coming into force of the Arbiter for Financial Services Act (Cap. 555)’. (fn. 8 Ibid.)

The Arbiter notes first that the Service Provider did not mention any specific article of the Arbiter for Financial Services Act (Chapter 555 of the Laws of Malta) (‘the Act’), as the basis on which it was claiming that the Arbiter has no competence on this

Complaint. STM Malta only referred to the lapse of a two year period within which to file a complaint against it from the time it considered that the Complainants first became aware of the marketing fee.

The onus falls on the Service Provider to adequately prove any plea it raises with respect to the competence of the Arbiter. Taking into consideration the plea and submissions made by the Service Provider, the Arbiter considers that there is no sufficient and adequate basis on which he can accept the plea raised by STM Malta regarding his competence as outlined above. This is for various reasons, including that:

a) STM Malta failed to identify the specific article of the Act in terms of which it considers that the Arbiter has no competence to hear this complaint.

b) In any case, even if, for the sake of the argument only, the Arbiter had to consider that the Service Provider's plea is one made in terms of Article 21(1)(c) of the Act - which deals with the 'Competence of Arbiter' and includes reference to a two year period from when the complainant first had knowledge - the Arbiter however, still finds no adequate basis on which he can accept such a plea.

Article 21(1)(c) of the Act stipulates that:

'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'

The Arbiter notes that the Service Provider considers that the Complainants first had knowledge of the matters complained of on 26 September 2013, this being the date of the 'Welcome Letter' sent by STM Malta to BL which letter included a copy of the 'Providence Life documentation'. (fn. 9 P. 246)

Such letter, however, cannot reasonably be taken as the date when the Complainants first had knowledge of the matters complained of for various reasons, including taking into consideration that:

(i) The Welcome Letter did not identify any discrepancies in documentation relating to the disputed marketing fee (which discrepancies shall be considered in more detail later on in this decision);

- (ii) The disputed marketing fee was not applied and/or reflected in the valuation statements in subsequent years from the year of the acquisition of the policy in 2013 up until the year 2021; and*
- (iii) The Complainants were informed only post-July 2021 (that is, after the letter dated 5 July 2021 that Providence Life had sent to STM Malta), about the system error involving the disputed fee and about such fee not being reflected in their valuation statements. (fn. 10 P. 16)*

Furthermore, the matters complained of involve the disclosure of the marketing fee at the time of the acquisition of the Scheme/underlying policy and also the application of the disputed marketing fee after a failure to reflect such fee over an eight-year period.

Hence, the indicated date of 26 September 2013 cannot reasonably and justifiably be in any way taken as ‘the day on which the complainant first had knowledge of the matters complained of’ for the purposes of Article 21(1)(c) of the Act.

c) The same would apply, if for argument’s sake, the two-year period was meant by the Service Provider to refer to Article 21(1)(b) of the Act which is only applicable if the conduct complained of occurred before the entry into force of Chapter 555 (i.e., on 18 April 2016). The conduct complained of did not occur before 18 April 2016 for the reasons already explained. In terms of Article 21(1)(d), the conduct complained of is indeed considered to have continued well after this date.

Further comments in the next section below with respect to the competence of the Arbiter also refer. The Service Provider’s plea is accordingly being rejected by the Arbiter.

Plea relating to the competence of the Arbiter – Nature of Complaint

In its reply, the Service Provider also submitted that ‘the Complainants have not complained to the Respondent about its behaviour’, (fn. 11 P. 200) where it further highlighted in essence, the following main aspects:

- i. That the Complainants did not file a complaint with STM Malta about STM Malta’s faults but only just made STM Malta aware of the concerns they had on the marketing fee and on the behaviour of their financial adviser/ Providence Life.*
- ii. That even in ‘the complaint brought in front of the Arbiter itself’ the behaviour of STM Malta was not put into question, but what was put into question was rather ‘the behaviour of third parties, namely deVere and Providence Life’.*

- iii. *That the Complainants 'have not communicated the substance of their complaint to the Respondent' and that STM Malta accordingly 'has not had the opportunity to deal with the complaint, prior to the complaint being filed with the Arbiter'. (fn. 12 Ibid.)*

Although the complaint filed by the Complainants with STM Malta by way of their email dated 12 November 2021, (fn. 13 P. 8) indeed includes concerns about the behaviour of Providence Life and their financial adviser, deVere/Fidelius deVere, however, the said email raised general aspects which directly involved the Service Provider.

In particular, the Complainants highlighted, in the said email, the point that they 'were not informed at any stage, during sign up or the subsequent annual review from De Vere, Fidelius De Vere or Providence that we would be eligible for what is now effectively a 10% charge on the investments'. (fn. 14 Ibid.)

Hence, there are clear implications on the Service Provider arising from the claim that they were not informed of the disputed marketing fee at the early stages (of the sign-up process), which the Service Provider was involved in by way of its role as Trustee and administrator of the Retirement Scheme as well as policyholder of the Providence Life Policy (as shall be seen later on), and subsequently from the annual reviews, that is annual valuations, issued by Providence Life, which the Service Provider was also in receipt and control of.

Furthermore, the Service Provider itself ultimately accepted the Complainant's complaint as a complaint filed against it, so much so that it issued a formal response on 30 November 2021, (fn. 15 P. 202) rebutting the Complainants' claims. (fn. 16 P. 9-10 & 666-667) Indeed, in the said response, STM Malta itself referred to the email of November 2021, and stated that:

'...I can confirm that we have conducted a thorough investigation into each of the concerns you raised in the complaint email dated 12 November 2021 and have outlined our findings below...

...

In conclusion, the matter arises from a system error with Providence Life Limited, recommended to you by your financial adviser. STM acted properly in notifying you of the charges at the outset of our relationship, and it appears that these charges are in line with the charges notified to you. Accordingly, whilst sympathizing with your frustration, we do not agree that there is any

basis for a complaint against STM and have no offer to make in this regard'.
(fn. 17 Ibid.)

In its response to the Complainants' email of 12 November 2021, it even directed the Complainants to pursue a formal complaint with the Office of the Arbiter for Financial Services in case they were not satisfied with the outcome of their investigation. (fn. 18 P. 10 & 667)

The Service Provider cannot accordingly now claim that the Complainants did not file a complaint about their behaviour in light of the said response. Neither can it claim, in the circumstances, that the substance of their complaint was not communicated to it nor that it did not have a reasonable opportunity to deal with the Complaint before being filed with the Arbiter.

For the reasons amply mentioned, the Arbiter accordingly dismisses the pleas of the Service Provider summarised in paragraphs (i) and (iii) above. For the avoidance of doubt, the Arbiter further decides that there are no issues with reference to Article 21(2)(b) of the Act (fn. 19 Article 21(2)(b) of the Act provides that '(2) An Arbiter shall decline to exercise his powers under this Act where: ... (b) it results that the customer failed to communicate the substance of the complaint to the financial service provider concerned and has not given that financial service provider a reasonable opportunity to deal with the complaint prior to filing a complaint with the Arbiter ...) and considers that there is no reason for him to decline to exercise his powers under the Act with respect to this Complaint.

With respect to the aspect raised in paragraph (ii) above, the Arbiter is also dismissing the said plea. Whilst the Complaint to the OAFS could have been better articulated it is sufficiently clear that the Complainants are also attributing faults to the Service Provider, primarily for them not being adequately informed at the point of sale about the marketing fee applicable on the underlying policy acquired by the Scheme and neither for them not being informed, during the initial eight years following the policy acquisition, that the marketing fee was not being applied on such policy.

Plea relating to settlement already achieved by the Complainants

The Arbiter notes that the Service Provider further claimed that 'the Complainants do not have a complaint with the Respondent, since they have approached Providence Life Limited and agreed an alternative fee charging structure'. (fn. 20 P. 200)

Whilst the Complainants claimed that the arrangement of revised fees entered into with PLL was not a form of settlement, STM Malta however disputed this.

In the Declaration signed by a senior official of the Service Provider reference was inter alia made to an addendum to the 'Horizon Portfolio Bond Charging Policy' where

it was claimed by the Service Provider that this constituted a settlement on the disputed marketing fee. In its declaration, the Service Provider stated inter alia that:

‘Although STM Malta were not directly involved in the negotiation discussions held between the members and PLL, STM Malta are of the understanding that this addendum reflects changes in the current pricing model (from 1% per annum to 0.5% per annum), as a form of settlement following the dispute. STM Malta has signed the said addendum...and prior to signing PLL informed STM Malta that PLL had proposed a deduction in fees (going forward since a refund was not possible), which the Complainants accepted as, in the long run, the deduction in fees will recoup the amount 1% marketing fee which has been deducted during the past 8 years. Thus, it is STM Malta’s understanding that the grievance has been addressed and a remedy has been found.

Further to the above, on the 13th of December 2021, we had received an email from Providence Life ... informing us that the complaint filed by the Currans ‘had been resolved as we have offered a reduction in the Annual Management fee’ and hence the matter was closed. STM Malta therefore hold firm on the fact that the Complainants have sought and were given a remedy from PLL in settlement of the disputed 1% Management Fee which is the same fee in dispute in this complaint’. (fn. 21 P. 318)

The Arbiter further observes that during the hearing of 14 November 2022, the Service Provider highlighted that:

‘Mr and Mrs Curran have an agreement with the provider to pay discounted fees, so, the position of the provider, which we understood and took to be true, is that they agreed to the charges. And they agreed to reduce the said charges for the remaining of their policies with the provider which is Providence Life.

So, they have agreed to this. What we have been waiting for is confirmation because the terms and conditions which were referred to in the agreement that they have signed, and which was submitted to the OAFS, do not match the terms and conditions that they sent me by email last week’. (fn. 22 P. 597)

During the same sitting, one of the Complainants testified inter alia on this aspect that:

‘... It was not an agreement. It was something to help us. It was not an agreement that we accepted what was going on. There was no word of settlement at all. It was not a settlement.

We signed a document saying that they would change the charges, some of the PLL charges, not the marketing fee. That still stands. It was some of the ongoing annual charges and they reduced them slightly ...

We do not see that as being a settlement or an agreement as to what is going on ...

It was just something that was done to help us as good customer service to make us feel a bit better about what was going on. That is all it was.' (fn. 23 P. 598)

The Arbiter further notes that in an email dated 13 December 2021, sent by Providence Life to the Service Provider, Providence Life confirmed that the Complainants' complaint with Providence Life '... is resolved as we have offered a reduction in the Annual Management fee for policy PLL200328 and PLL200326. Hence, we will now proceed to close this complaint'. (fn. 24 P. 417)

It is further noted that, during the proceedings of the case, the Complainants provided a copy of an email their adviser (Fidelius deVere) received from Providence Life as proof that 'It was only as a good will gesture to appease the situation and not a settlement against the marketing fees being applied'. (fn. 25 P. 311)

The said email of 2 September 2021, stated inter alia that:

'As a senior representative of Providence, I am authorised to propose a discount to the Horizon policies held by your clients Mr & Mrs Curran Specifically, we would like to offer a 50% reduction to their ongoing Bond costs starting January 2022 when the next deduction is due. Furthermore, that reduction will remain based on the original incoming pension transfers...

It is worthwhile to recap that the Horizon Bond does not charge any further costs to your clients. There are no policy fees, dealing or custody charges and simply put, your clients would pay 0.5% per annum on the original values transferred to the Bonds without any further costs.

I am afraid I cannot adjust or offset the overstated units in their plans that represent the Marketing Fee but it's our intention to have this resolved during the months of October & November this year. We are of course very sorry for the issues surrounding this IT failure and our proposal to reduce Bond costs I hope, is a signal to your clients that we very much wish to fix this error, reduce their costs and retain them as clients'. (fn. 26 P. 312)

The Arbiter observes that the discussions with Providence Life were considered by the Complainants as not being a final resolution of the matter, so much so that even

shortly after the said exchanges of emails with Providence Life regarding the discount of fees of September 2021, the Complainants proceeded to file complaints with their financial adviser on 4 October 2021, (fn. 27 P. 12) and STM Malta on 12 November 2021. (fn. 28 P. 8)

Having considered the particular circumstances of the case including the pertinent submissions as summarised above, the Arbiter considers that there is no sufficient and satisfactory basis on which the Service Provider's plea - that 'the Complainants do not have a complaint with the Respondent, since they have approached Providence Life Limited and agreed an alternative fee charging structure' (fn. 29 P. 200) - can be considered acceptable.

This is primarily given that it has not been adequately proven, nor emerged, that the arrangement to pay discounted fees was in full and final settlement on the disputed issue.

By way of a decree dated 24 October 2023, the Arbiter requested the Service Provider to inter alia produce 'a copy of the correct/final Terms and Conditions of the agreement relating to the reduction in fees of the Providence Life policy as referred to during the hearing of 14 November 2022' (fn. 30 P. 600)

The only 'Agreement relating to reduction of fees' (fn. 31 Doc I and Doc J to STM Malta's email of 31 October 2023 – P. 601A) that was presented during the proceedings of the case, (fn. 32 P. 56-59 & 792-793) was just a copy of an 'Addendum to Horizon Portfolio Bond Charging Policy ...', signed by the Complainants in November 2021, as well as by the Trustee as Policyholder which, in essence, only indicates that from '1st January 2022 until the bond is redeemed' the 'Current pricing model' of the annual management fee, 'AMF of 1% per annum' is being revised to 'AMF of 0.5% per annum'. (fn. 33 P. 56, 59, 792, 793) A 'Policy Endorsement' reflecting the said change was to be effective and issued upon acceptance of the signed addendum by PLL. (fn. 34 Ibid.)

It is also noted that in an email dated 30 October 2023, sent by Providence Life to STM Malta, the Customer Service official of Providence Life noted that:

*'I wanted to also take this opportunity to remind you that, for these particular members, **as a gesture of goodwill**, we agreed at the end of 2021 to reduce the Annual Management Fee by 50%. I attach the endorsement for the addendums that were **signed and dated by all parties, including STM Malta at that time**'. (fn. 35 P. 665 -Emphasis added by the Arbiter)*

In the particular circumstances, the Arbiter considers that no reasonable justification has emerged to sufficiently validate the plea raised by the Service Provider.

It is noted that no contractual arrangement signed by the parties involved, confirming that an arrangement was being accepted by the Complainants in full and final settlement of the issue relating to the marketing fee, has been presented as evidence of the final resolution of this matter in the first place.

In the absence of the presentation of a valid legally binding contractual agreement confirming the final resolution of the matter, the Service Provider's claim is therefore considered to be without substance.

Moreover, the arrangement about the discount in fees was ultimately more of a concession made by Providence Life to keep the custom of the Complainants and appease them for being informed of the application of the disputed marketing fees so late after a full 8 years after they were to be deducted and possibly also taking into account that these fees were not properly disclosed in certain documentation, as shall be considered later on in this decision.

The Service Provider's argument that the agreement/settlement reached between the Complainants and Providence Life was "without STM Malta's consent" and that "by reaching a resolution with PLL, the Complainants have denied STM Malta any opportunity to deal with the Complaint" (fn. 36 P. 201) is also considered without basis.

There is no evidence that STM Malta had actually contested the disputed charges with Providence Life when, or soon after, this matter was raised by Providence Life in its letter of 5 July 2021. (fn. 37 P. 16) Furthermore, the Service Provider actually was a signatory to the agreements reached between the Complainants and Providence Life and it has not been indicated nor emerged that it had raised any issues at the time about the possible withholding of their consent or prejudice of their dealings with Providence Life prior to signing the agreements.

For the reasons amply mentioned, the Arbiter is therefore rejecting the said pleas made by STM Malta and shall proceed to consider the merits of the case next.

The Merits of the Case

The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case. (fn. 38 Cap. 555, Art 19(3)(b))

Facts of the Case

The Complainants

The Complainants, both of British nationality, born in 1962 and 1965 respectively were resident in the United Arab Emirates at the time of their membership of The STM Malta Retirement Plan. (fn. 39 P. 605 & 616)

Membership of the Scheme and acquisition of the underlying policy

The Complainants respectively applied to become members of the Retirement Scheme by way of their Application Form for Scheme Membership duly signed and dated by them on 18 February 2013. (fn. 40 P. 70 & 124)

The Scheme's Plan Schedule was attached as part of STM Malta's welcome letter dated 26 September 2013 (for David Curran) and 24 June 2013 (for Laura Curran). (fn. 41 P. 65 & 119)

The Scheme Plan Schedule attached to their respective welcome letter indicated the 'Commencement date' of the Retirement Scheme being the '18th February 2013' for both of the Complainants. (fn. 42 P. 67 & 121) Their respective Schedule also indicated an initial 'Transfer value' into the Scheme of '£223,687' and '£11,513.03' for David Curran and '£40,802' for Laura Curran. (fn. 43 Ibid.) An additional Scheme Plan Schedule was issued for Laura Curran in respect of an additional investment (of '£24,430.02' and '£12,744.48') amounting in total to '£37,058.42'. (fn. 44 P. 163)

The Scheme acquired a Providence Life policy respectively for the Complainants. The Scheme's Plan Schedule listed the 'Investment option' being a 'Whole of Life' policy issued by 'Providence Life' with policy number 'PLL200326' for David Curran (with premiums of '£223,667' and '£11,478.03' in March and July 2013 for the total amount of '£235,145.03'), and with policy number 'PLL200328' for Laura Curran (with premium of '£40,782' in March 2013). (fn. 45 Ibid.) An additional investment into the same policy of Laura Curran was also made in July and August 2013 (of '£24,348.94' and '£12,709.48') for the total amount of '£37,058.42' as indicated in an additional Scheme Plan Schedule issued in her regard. (fn. 46 P. 163)

The 'Providence Life Assurance Bond' ('the policy') acquired for each of the Complainants by their respective Scheme 'is a life assurance policy' with the insurer being Providence Life Limited PCC, based in Mauritius. (fn. 47 P. 107 & 150)

According to the 'Policy Document Whole of Life Policy', the 'Issue Date' of both policies was '30th April 2013'. (fn. 48 P. 73 & 127)

The same respective document and policy schedules issued for each of the Complainants indicate the 'Policyholder' as 'STM Malta Trust & Company Management Ltd' with the Complainants being respectively listed as the 'Principal Life Assured'. (fn. 49 P. 83 - 104, 137 - 147 & 164 - 185)

It is noted that the policy was referred to by the name of the 'Providence Life Portfolio Bond' – as featured in the (two-page) Key Features Document provided in respect of the policy. (fn. 50 P. 105 & 148)

It is further noted that during the proceedings of the case, reference was made to another different name of the policy as the 'Horizon Portfolio Bond' or 'Horizon Bond'. Whilst no evidence was produced regarding a change in name of the policy, it is however sufficiently clear that this name refers to the same underlying policy (as has also been considered in other similar cases by the Arbitrator). (fn. 51 For example, OAFS Case ASF 022/2022 ... vs STM Malta Pension Services Ltd.)

Investment adviser

The Complainants' appointed Financial Adviser, as indicated in their respective Application Form for Membership was PIC deVere based in Abu Dhabi. (fn. 52 P. 605 & 616)

System error in the Providence Life policy valuations

In a letter dated 5 July 2021, Providence Life explained to STM Malta that it identified 'a system error ... which has affected the reflection of policy charges on Horizon Portfolio Bond valuations' (fn. 53 P. 16)

In the said letter, Providence Life explained inter alia that:

'This means that the Marketing Fees have been deducted from the Policy but not reflected on the policy valuations.

As stated in the Horizon Portfolio Bond Terms and Conditions, the Marketing Fee is taken at policy inception as initial units and is used to fund the costs of distributing the policy through the Independent Financial Advisor and Broker channel. The Marketing Fee should be reflected on policy valuations, via unit cancellations at a rate of 1% per year for the first 8 years, but this has not happened.

To rectify this error, policies which remain in force will reflect the cancellation of the initial units to correct the error at the rate of 1% of the initial premium per year for 8 years and the appropriate fee will be shown on the annual policy valuation generated each January ...'. (fn. 54 Ibid.)

Further details on the matter were provided in a frequently asked question document issued by Providence Life titled 'Horizon Portfolio Bond System Error FAQ'. (fn. 55 P. 23 – 25)

In the said FAQ document, Providence Life explained inter alia that: (fn. 56 Ibid.)

'A system error has been identified which has affected the reflection of policy charges on Horizon Portfolio Bond valuations. This means that the Marketing Fees have been deducted from the Policy but not reflected on the policy valuations.'

'... The system error was discovered in April 2021 ...'

'... To rectify this error, policies which remain in force will reflect the cancellation of the initial units to correct the error and the appropriate fee will be shown on the annual policy valuation generated each January. This reflection will be calculated and commence in December 2021 and reflected on the policy valuation in the January thereafter. Should a policy surrender (or partially surrender) before the policy valuation has been corrected, the balance of any non-reflected Marketing Fees will be taken from the policy as an encashment charge together with any accrued fees and charges (all fees and charges are clearly stated in the Horizon Portfolio Bond Terms and Conditions). The company can confirm that no policies will be adversely affected by these actions, the charge shown merely reflects the true position of each policy'.

'... The Horizon Portfolio Bond Terms and Conditions clearly state the fees and charges ... Your appointed Financial Adviser as part of the application stage should have explained the terms and conditions to you together with the applicable fees and charges.'

'... The Marketing Fee should have been reflected on policy valuations, via unit cancellations at a rate of 1% per annum for 8 years. This has not been reflected correctly on policy valuations in the past. To correct this matter, upon the surrender of any Horizon Policies the company is obligated to reflect any accrued fees, including but not limited to the Marketing Fees which had not previously been reflected ... As these initial units have been reflected on the policy valuation incorrectly in the past, any growth that these units may have attracted has been allocated incorrectly to the policy as well. In short, this growth did not exist and must be removed to reflect the correct current policy valuation.'

'... We are obliged to treat all Policyholders fairly and equally, in accordance with our regulatory guidelines and this means applying any accrued fees and charges due for each policy ... these adjustments are legal and compliant and are covered under our non-waiver of rights provision contained in the Horizon Portfolio Bond Terms and Conditions.'

The next section shall consider the charges as disclosed to the Complainants in respect of their respective underlying policy.

Disclosure of the Providence Life policy charges

(A) Application Form for Scheme Membership (signed in February 2013) (fn. 57 P. 610 & 621)

The Application Form for Membership into the Retirement Scheme (version 'V.1//May 2012'), titled 'STM Malta Retirement Plan, QROPS – Application Form & Fee Schedule, For use with the Providence Life Bond', signed by the Complainants on '18/02/13' included a section detailing the 'Charging Structure'. (fn. 58 P. 604 & 615)

The said section ('Section 7, Charging Structure'), outlined the following fees in respect of the Scheme and the underlying policy (the portfolio bond): (fn. 59 P. 604 & 615)

- (i) *An 'Annual Management Charge' which 'covers the costs associated with administering the pension scheme and portfolio bond', based on the trust value. (fn. 60 P. 608 & 619)*

The Annual Management Charge was specified as 1.75% p.a in case of a QROPS trust value of 'Between GBP 50,000 and GBP 199,999'; or 1.40% p.a. in case of a value of 'Between GBP 200,000 and GBP 499,999'; or 1.25% p.a. in case of a higher QROPS trust value of 'Greater than GBP 500,000'. (fn. 61 Ibid.)

- (ii) *A 'Providence Life Bond – fund dealing charge' which consisted of a '2.75% subscription fee' applicable upon the first purchase of funds or switch of funds or additional purchases.*
- (iii) *An administration charge of GBP 500 that 'will be deducted during the first year of operation of the bond'. (fn. 62 Ibid.)*

It is noted that, as already considered in other previous decisions of the Arbiter which dealt with the same subject matter of the marketing fee, the Annual Management Charge was made up of a fee payable to Providence Life and a portion payable to STM Malta. (fn. 63 E.g. Page 9 of 35 of OAFS Case ASF 163/2021 ...vs StM Malta Pension Services Ltd –

<https://financiararbiter.org.mt/sites/default/files/oafs/decisions/475/ASF%20163-2021%20-%20AW%20vs%20STM%20Malta%20Pension%20Services%20Limited.pdf>)

(B) Providence Life Policy Key Features Document

As part of their respective Policy Issue Documents, the Complainants were provided with a two-page 'Providence Life Portfolio Bond Key Features' document. (fn. 64 P. 712-713 & 754-755)

This document formed part of the welcome pack letters of 24 June 2013 and 26 September 2013. (fn. 65 P. 322, 351-352, 364, 404-405)

The said Policy Key Features document specified the following policy charges in the section titled 'Providence Life Portfolio Bond Charging Structure': (fn. 66 P. 352, 405, 713, 755)

- Annual management charge of 1%
- Discounted subscription fee of 2.75% on Providence Life Fund Platform
- Early encashment charge of 8% in year 1, decreasing to zero by the end of year 8'.

(C) The Providence Life Policy Application Form (of February 2013)

The application document in respect of their respective policy, titled the 'Providence Life QROPS Bond Application (fn. 67 P. 623-639 & 643-659) ('the Policy Application'), was signed by both the 'Life Assured' (that is, the Complainants respectively), and the 'Trustee Applicant' (that is, STM Malta), on February/March 2013. (fn. 68 P. 630 & 650) It also included the advisor's signature (under 'Financial adviser details'). (fn. 69 Ibid.)

The said Policy Application form included 'Terms & Conditions' which constituted and formed an integral part of the said application form.

The 'Terms & Conditions' indeed formed part of the said Policy Application form as also reflected in the use of the same footer (reading 'Providence Life Bond Application') and in the continuation of the page numbering throughout the whole document. (fn. 70 P. 631-639 & 651-659)

'Section 6, Policy Charges' of the mentioned Terms & Conditions detailed the applicable charges. (fn. 72 P. 636 & 656) The said charges as reflected in the Terms & Conditions forming part of the Policy Application form signed in 2013 shall be considered in further detail in part (E) below.

(D) The Policy Document issued in April 2013

The respective 'Policy Document Whole of Life Policy' issued by Providence Life, bearing Policy No. PLL200326 and Policy No. PLL200328 both with issue date of 30th April 2013, (fn. 72 P. 680 & 733) included a section dealing with the 'Policy Charges'.

The said section, (section 3.11), specified that: (fn. 73 P. 687 & 740)

'Policy charges could include;

- Annual management charge*
- Dealing charge*
- Any other costs and or expenses incurred in managing the unitised Funds*
- Any stock broking fees incurred on behalf of the policyholder*
- Any marketing expenses incurred in the marketing of either the unitised portfolio or the policy*
- Any taxes and/or regulatory charges and/or similar costs incurred, but not taken into account, elsewhere.'*

The specific details of the charges were then included in a Terms & Conditions document issued with the respective policy of April 2013 which shall be considered in the next section.

(E) Differences in the Policy Charges as emerging between the Terms & Conditions forming part of the Policy Application Form and the Terms & Conditions actually issued with the Policy -

A comparison is made below between the Policy Charges as featuring in:

- the Terms & Conditions document forming part of the Policy Application forms of February 2013 and*
- the Terms & Conditions document that formed part of the Policy upon issue by Providence Life on 30 April 2013 (included with the respective Welcome Letters of STM Malta of 24 June 2013 and 26 September 2013).*

Apart from a change in section numbering, the following key differences emerge between the two documents with respect to the respective section titled 'Policy Charges':

- (i) The Terms & Conditions forming part of the Policy Application form of February 2013 stipulate 'an annual management charge of 1.75% per annum'. (fn. 74 P. 636 & 656) (fn. 75 As indicated in part A, 'Disclosure of the Providence Life policy charges' in this decision, the annual management charge of Providence Life that applied to the Complainants depended on the QROPS trust value as reflected in the Scheme's application Form of February*

2013) The Terms & Conditions sent to the Complainants following the issue of the policy in April 2013, stipulate 'an annual management charge of 1% per annum'. (fn. 76 P. 719 & 761)

- (ii) *The wording relating to the dealing charges between the respective Terms & Conditions documents is slightly different. The Terms & Conditions forming part of the Policy Application of February 2013 stated in this regard that:*

'PLL will deduct a dealing charge each time you instruct PLL to purchase a fund on your behalf. The charge is 2.75% for unitised funds. Structured Notes, individual stocks and other derivatives may have higher charges'. (fn. 77 P. 636 & 656)

The Terms & Conditions sent to the Complainants respectively with their Welcome Letters (of June and September 2013) use slightly different wording as follows:

'PLL will deduct a dealing charge each time you request PLL to effectuate the purchase of any underlying assets. The charge is 2.75% per transaction'. (fn. 78 P. 719 & 761)

- (iii) *Whilst the Terms & Conditions forming part of the Policy Application of February 2013 stipulates that 'A one-time charge of GBP 500.00 will be deducted from the policy when it is established', (fn. 79 P. 636 & 656) no such statement was included in the same section (titled 'Policy Charges') of the Terms & Conditions sent respectively to the Complainants following the issue of the respective Policy in April 2013.*

- (iv) *The Terms & Conditions sent to the Complainants following the issue of the respective Policy in April 2013 state that 'If the Policyholder requests to cash-in any policy during the initial period or additional initial period(s), PLL will pay the Policyholder the cash sum, less any early encashment charges which may apply'. (fn. 80 P. 719 & 761)*

This is not reflected in the same section of the Terms & Conditions forming part of the Policy Application of February 2013.

- (v) ***The Terms & Conditions sent respectively to the Complainants following the issue of the Policy in April 2013 include a new material provision stipulating that:***

'PLL charges an annual marketing establishment fee of 1% each year for the first 8 years of the policy to cover the costs of distributing the policy'. (fn. 81 P. 636 & 656)

No such charge is mentioned in the Terms & Conditions forming part of the Policy Application form of February 2013. (fn. 82 P. 636 & 656)

The disputed Marketing Fee is indeed a key difference emerging between the mentioned two Terms & Conditions documents as outlined above.

Obligations of the Service Provider

Trustee and Fiduciary obligations

The Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is particularly relevant for STM Malta considering its role as Trustee of the Scheme.

*Article 21(1) of the TTA which deals with the 'Duties of trustees', inter alia stipulates that the trustee should act as a **bonus paterfamilias**.*

The said article provides that:

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

It is also to be noted that Article 21(2)(a) of the TTA, further specifies that:

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

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

The Trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property 'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'. (fn. 83 Editor Max Ganado, 'An Introduction to Maltese Financial Services Law', Allied Publications 2009, p. 174) As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the

trust property and to apply the trust property in accordance with the terms of the trust'. (fn. 84 Op. Cit., p. 178)

The fiduciary and trustee obligations were also highlighted by MFSA in one of its publications where it was stated that:

'In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations'.** (fn. 85 Page 9 – 'Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act' (MFSA Ref: 09-2017), dated 6 December 2017)

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

The above are considered to be crucial aspects which should have guided STM Malta in its actions as trustee.

Obligations as a Retirement Scheme Administrator

One key duty, which emerges from the primary legislation itself, applicable to STM Malta as the Retirement Scheme Administrator, is the duty to 'act in the best interests of the scheme'.

This is outlined in Article 19(2) of the Special Funds (Regulation) Act, 2022 ('SFA') - which was the first legislative framework that applied to the Scheme and the Service Provider until this framework was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA') which eventually came into force on the 1 January 2015. The duty to act in the best interests of the scheme is also outlined in Article 13(1) of the RPA.

Apart from the main legislation itself, there are various principles and conditions outlined in the general conduct of business rules/standard licence conditions issued by the Malta Financial Services Authority ('MFSA') under the SFA/RPA regime respectively applicable to the Service Provider in its role as Retirement Scheme Administrator.

With respect to this case, it is pertinent to particularly note the following rules: (fn. 86 Emphasis added by the Arbiter)

- a) *Rules 2.6.2 and 2.6.3 of Part B.2.6 titled ‘General Conduct of Business Rules applicable to the Scheme Administrator’ of the ‘Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002’ (‘the Directives’), which applied to STM Malta as a Scheme Administrator under the SFA, provided that:*

‘2.6.2 The Scheme Administrator shall act with due skill, care and diligence in the best interests of the Beneficiaries. Such action shall include:

...

- b) *ensuring that contributors and prospective contributors are provided with adequate information on the Scheme to enable them to take an informed decision ...’*

‘2.6.3 The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and not misleading ...’.

The same principles continued to apply, in essence, under the rules issued under the RPA.

Rules 4.1.4 and 4.1.5, Part B.4.1 titled ‘Conduct of Business Rules’ of the Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011 dated 1 January 2015 issued in terms of the RPA, and which applied to STM Malta as a Scheme Administrator under the RPA, provided that:

‘4.1.4 The Service Provider shall act with due skill, care and diligence ...’

‘4.1.5 The Service Provider shall ensure the adequate disclosure of relevant material information in a way which is fair, clear and not misleading ...’

Final Observations and Conclusion

The alleged failures

The Arbiter shall not comment upon or consider the matter regarding the appropriateness, or otherwise, of the Marketing Fee applied by Providence Life on the Scheme’s underlying policy given that he has no jurisdiction on the policy nor on Providence Life for the reasons already outlined.

The Arbiter shall however consider the key alleged failures raised by the Complainants against STM Malta, which, in essence, involve the following:

- a) **The allegation that STM Malta failed to disclose and/or ensure the adequate disclosure of the charging structure relating to the Providence Life underlying policy**

Having considered the pertinent matters of this case, the Arbiter considers that STM Malta indeed failed to ensure that the charging structure of the Providence Life policy was clearly and adequately disclosed to the Complainants. This is for the reasons outlined hereunder and other factors highlighted later in this decision:

- i. **Context of the Application Documents; Material Divergences in respect of the policy charging structure emerging in key documentation; and Lack of Disclosure of such divergences**

The Arbiter notes that the Service Provider itself listed the charging structure in respect of the Scheme and the underlying Providence Life policy in its own Application Form for Scheme Membership (signed by the Complainant in June 2013). (fn. 87 P. 608 & 619)

Whilst the Retirement Scheme and the underlying policy are two separate and distinct products issued by separate providers - where the Scheme issued by STM Malta acquired the underlying policy issued by Providence Life - the Arbiter observes that the Complainants were however offered a package for the whole structure in question.

It is evident that the main parties STM Malta (as trustee and RSA of the Scheme) and Providence Life (the issuer of the underlying policy), and deVere Group (the group of the Complainants' financial adviser), had come together to offer a packaged structure. This clearly emerges from the way the Scheme and Policy application forms had been drafted.

STM Malta's own application for membership into the Retirement Scheme was indeed one specifically tailored for use with the policy. The cover page of the Scheme Application Form specifically stated and highlighted that the form was 'For use with the Providence Life Bond'. (fn. 88 P. 604 & 615)

The Scheme's Application Form even included the logo of 'deVere Group' on the cover page. (fn. 89 Ibid.)

Furthermore, the charging structure outlined in the Scheme's Application Form included the fees of the pension scheme and underlying policy. Indeed, the fees of the annual management charge disclosed in the Scheme's Application Form were split between Providence Life and STM Malta as outlined in part A of the section titled 'Disclosure of the Providence Life policy charges' above.

Similarly, the Providence Life Policy Application Form already featured details of STM Malta as trustee of the QROPS, as well as details of the Retirement Scheme, in Section 2 of the said form under 'Trust Details'. (fn. 90 P. 624 & 644)

The Complainant and STM Malta (the latter in its capacity of Scheme Trustee), together signed the application for the purchase of the Providence Life policy (in February/March 2013). (fn. 91 P. 630 & 650)

The said policy application was signed on the basis of the Policy Terms & Conditions that formed an integral part of the policy application form. (fn. 92 P. 631-639 & 651-659)

During the proceedings of this case, it has clearly emerged that the Complainants were issued, in April 2013, with a Providence Life policy which had different Policy Terms & Conditions to those contained in the Policy Application Form.

The Terms & Conditions of the Providence Life Policy issued in April 2013 were provided to the Complainants as part of the welcome pack documentation sent by STM Malta in June and September 2013. (fn. 93 P. 672 & 725)

The said Policy Terms & Conditions (of April 2013) contained the disputed Marketing Fee which clearly and categorically did not feature in the charging structure of the policy detailed in the Scheme's Application Form for Membership, nor in the Policy Application Form signed in February/March 2013, and not even in the two-page Key Features Document which was part of the Policy Issue Documentation as considered earlier above.

It is clear that this had material negative implications. During the hearing of 18 October 2022, the Complainants testified inter alia that:

'We were not advised of this marketing fee which has now brought into play eight years later. We were advised that it was an oversight on

someone's behalf. Now, if we were advised in the first place, we may not have gone with those policies. That was unacceptable ...

...

I would like to add that over these eight years, if we had known at the beginning that we would have to pay this money, we may have not signed up as Dave quite rightly said. However, there have been eight years, any time where anyone who has had dealings with this, could have told us that this amount of money was coming out and that may well have happened, that might actually have made an impact on where we would invest our money and how we decided to invest our money. We never had the opportunity to be able to do that because we were never told, so we feel it had a detrimental impact ...' (fn. 94 P. 307)

Apart from the discrepancies emerging in the documentation provided to the Complainants, the Arbiter notes that no evidence emerged that the Complainant was adequately notified about, and properly made aware of, the material changes and differences transpiring in the revised Policy Terms & Conditions which had a material bearing on their interests.

It is noted that the Complainants were only provided with a copy of new Policy Terms & Conditions, as part of the welcome pack in June and September 2013.

The fact that the Complainants were not alerted to, and adequately informed about, the revised charging structure and the material differences to the terms and conditions they were somehow made subject to (which were materially different from those they originally signed for), is evidently a material shortfall on the part of STM Malta as the Trustee/RSA of the Scheme and the actual Policyholder of the Providence Life policy.

The mere provision, as part of the welcome pack sent by STM Malta to the Complainants in June and September 2013, of a Policy Terms & Conditions document (which contained material divergences to those signed in the respective application forms and Key Feature document), cannot in any way be reasonably considered as some form of adequate notification, nor of proper action reflective of the duties of STM Malta as Trustee/RSA of the Scheme.

As outlined in detail in the section titled 'Obligations of the Service Provider' above, STM Malta ultimately had clear obligations, which the Arbiter considers it has failed, when it did not ensure that the documentation (particularly its own form) reflected the same terms of the policy issue

document, and also when it did not promptly notify and bring to the attention and consideration of the Complainants the material divergences arising between the actual policy documentation and the documents used and considered by the Complainants at the time of application.

Financial services practitioners are aware that even in case of changes to existing terms and conditions of a product held by a consumer, it is customary to follow certain procedures (involving for example prior advance notification and the possibility of an opt-out). (fn. 95 For example, before a material change is done to the terms and conditions of a financial product, the consumer is normally first duly formally informed beforehand and provided with relevant details prior to the changes being implemented. A consumer is, in such circumstances, also typically provided with a period of time to consider the changes and opt out of the product should s/he so desires prior to the changes taking effect.)

The Service Provider was accordingly duty-bound to take the right actions on such sensitive and material aspects.

- ii. ***Inconsistent information as part of the welcome pack – As part of the welcome pack provided by STM Malta through its letters dated 24 June 2013 and 26 September 2013, (fn. 96 P. 672 & 725) the Complainants were furthermore provided with a Providence Life Key Features document which did not include reference to the Marketing Fee.***

The said Key Features document of the Providence Life Portfolio Bond, (fn. 97 P. 712-713 & 754-755) included information not reflective of, and inconsistent with, the Policy Terms & Conditions issued in April 2013 despite being included with the same welcome pack.

Indeed, the said ‘Key Features’ document did not include any reference to the Marketing Fee but only details of the policy charges as outlined in part (B) of the section titled ‘Disclosure of the Providence Life Policy Charges’ above.

- b) The allegation that STM Malta failed to highlight the non-application of the marketing fee for over eight years***

It is noted that in his sworn declaration, the senior official of the Service Provider stated inter alia that:

'The documentation issued by PLL (such as the policy documents, the key features document etc) were all issued by PLL and STM Malta had nothing to do with their content but ensured that the PLL documentation is communicated to each Member who had invested in PLL and was a member of the Trustee ...'. (fn. 98 P. 319)

From a consideration of the documentation produced, namely, the nature and form of the STM Malta and Providence Life Application Forms, it is clear however that STM Malta had a certain level of business interaction with Providence Life in order to enable it to include details of the Providence Life policy in its own forms.

As mentioned above, STM Malta clearly had a duty to ensure that any fees communicated to the member, even more so in its own forms, were current and up to date and that the member was then not made subject to different terms and conditions not reflective of the terms they originally signed for. The mere provision of a 'revised' Policy Terms & Conditions without any communication that such Policy Terms & Conditions differed materially with respect to the Marketing Fee is by no means considered appropriate, professional nor meeting the legitimate expectations of a consumer of financial services.

The Arbiter considers that, moreover, the retrospective application of the Marketing Fee where such policy charge was not reflected due to a system error on PLL's part in policy valuations issued by PLL over an eight-year period, had material implications which negatively affected the interests of the Complainants.

As outlined by Providence Life in its FAQ document, the 'Marketing Fee should be reflected on policy valuations, via unit cancellations at a rate of 1% per year for the first 8 years, but this has not happened'. (fn. 99 P. 23)

The non-reflection of the disputed Marketing Fee in policy valuations implies that, in practice, the Complainants were rather provided, and issued with, incorrect policy valuation statements not reflective of the true position of their respective policy. Their policy was thus seemingly overvalued (up to the amount of any due fees not deducted) in each year, during an eight-year-long period.

Although the policy valuations were issued by Providence Life, STM Malta should, however, have been aware of the fees applicable on the underlying policy. Such awareness should have arisen in its role of Trustee and RSA of the

Scheme and itself being the Policyholder of the respective underlying policy of the Complainants.

Hence, it is considered that, in the case in question, there was negligence on the part of the Service Provider with respect to the issue of the marketing fee both at the time of the acquisition of the policy and on an ongoing basis. This is also for the reasons outlined below in this decision.

Other factors

- i. *Lack of consent sought from the member to proceed with revised terms and conditions and the lack of opportunity provided to them to decline the revised terms*

The Arbiter considers that, as trustee and RSA of the Scheme (and being also the co-signatory to the policy application form), STM Malta should have reasonably sought the member's consent as to whether to proceed with the revised Terms & Conditions.

The Complainants should indeed have been given the opportunity to change their mind and decline to proceed with the revised fee structure and terms and conditions. They could have availed of the cooling-off period applicable with the purchase of the underlying policy at the time.

No evidence has emerged, however, that the Complainants were adequately informed of the change in the Terms & Conditions, let alone that their consent was sought and/or opportunity provided to decline to proceed with the purchase of the policy.

- ii. *STM Malta being the Trustee of the Scheme and Policyholder*

The Service Provider cannot minimise its key functions and roles. Apart from being the Trustee/RSA of the Scheme, STM Malta was also the Policyholder of the Providence Life policy as outlined above.

Hence, it itself had to be duly aware and conscious of any material divergences arising from the Policy Terms & Conditions it had itself applied and signed for and those issued with the actual policy. As mentioned above, any such divergences had to be adequately considered by the relevant parties.

Whilst it is true that the disputed Marketing Fee is not a fee imposed or applied by STM Malta, as it is a fee applied by Providence Life on the underlying policy, this however does not exonerate STM Malta from the

obligations it had as Trustee and RSA of the Scheme and Policyholder of the underlying policy.

The importance of the Policyholder's role in reviewing or analysing the policy was even highlighted in the Policy Application form which included a disclaimer in bold as follows:

'IMPORTANT NOTICE: The Policyholder must analyse the policy to ensure that the cover meets his/her requirements and this policy and all its accompanying documentation should be kept in a safe and secure place, as duplicate copies cannot be provided'. (fn. 100 P. 630 & 650)

STM Malta was ultimately itself in control of the policy and it had a duty to ensure, in the first place, that there were no material divergences from what was applied for and accepted by the Complainants in the respective application forms.

ii. *Lack of action in the best interests of the Complainants*

The Service Provider did not offer valid explanations as to why, and on what basis, the issuer of the policy has accepted the Policy Application Form of February/March 2013 and then issued a policy with materially different terms and conditions to those included in the Policy Application Forms that were accepted at the time.

This is clearly an aspect which STM Malta should have reasonably followed and carefully considered with Providence Life, in order to ensure the best interests of the Complainants prevail and safeguard their assets.

Such lack of action and intervention on the Service Provider's part not only occurred at the time of the issue of the policy and delivery of the welcome pack documentation to the Complainants' but even at the time when Providence Life approached STM Malta, through their letter of 5 July 2021, about the system error it discovered with respect to the Marketing Fee. (fn. 101 p. 16)

STM Malta just informed the Complainants about such development. No evidence has been provided that they took any immediate action at the time to dispute such fees. The manner with which this was handled, despite the prevailing circumstances and evident material shortfalls which all were to the Complainants' detriment, shows lack of effective action by the Service Provider to protect the interest of their members (the Complainants) who had to take the initiative to get some clawback from Providence Life.

Decision & Concluding Remarks

As unsophisticated retail clients, the Complainants cannot be faulted for not reading the whole policy document line by line just in case their Advisor, Trustee and RSA fail to check the policy document properly.

In its capacity as Trustee and RSA of the Scheme and Policyholder of the Complainants' respective Providence Life policy, STM Malta ultimately had the duty to ensure that the policy issued was subject to the same or no lesser favourable terms and conditions to those it applied for together with the Complainants respectively.

It also had the duty and obligation in such roles to properly inform the Complainants of any material change in the terms and conditions of the product actually acquired and seek the relevant consent and direction from the Complainants in the circumstances.

STM Malta ignored or overlooked that there was a material change in the terms and conditions of the Providence Life policy which were different to those it applied for with respect to the marketing fee. It accepted the Providence Life policy with the new terms and conditions, and it did not highlight and raise this material aspect at the proper time with the Complainants.

Not only did it not itself raise any issues at the time of the receipt of the policy documentation, but it even did not take any action to safeguard the interests of the Complainant at the time when Providence Life decided to retrospectively apply a marketing fee for over an eight-year period, which marketing fee was not reflected in the Scheme Application Form, nor in the Policy Application Form accepted by Providence Life and not even in the Key Features document forming part of the policy issue documentation.

The failure to take appropriate action at the time of the acquisition of the policy and at later stages as outlined above had a material adverse implication on the Complainant's respective Retirement Scheme.

After the discovery of the system error by Providence Life, they were unexpectedly charged a material fee, which fee did not even feature in any of the documentation used to apply for the structure in question as explained above.

Furthermore, the Complainants appear to have received policy valuation reports which did not reflect the true value of their respective policy.

The Complainants relied on STM Malta as the Trustee of the Scheme to act with the diligence and attention of a bonus paterfamilias, to account to them and provide

them with information and highlight material aspects in relation to their Scheme, protect their interests and safeguard their property from loss or damage. STM Malta had also to act with due skill, care and diligence and ensure disclosure of relevant material information in a clear and not misleading way. STM Malta was also ultimately the Policyholder of the Providence Life policy and was thus itself in full control of the Complainants' respective policy.

For the reasons amply explained, it is considered that there was accordingly a clear lack of diligence by the Service Provider in the administration of the respective Scheme in respect of the Complainants and in carrying out its duties as Trustee and RSA of the Scheme and Policyholder of the Providence Life policy respectively.

It is also considered that the Service Provider failed to act with the prudence, diligence and attention of a bonus paterfamilias to safeguard the Complainants' interests, including from being applied different and less favourable terms and conditions to those which formed the basis of the original policy application made by the Complainants and the Trustee.

The Arbiter considers that the Service Provider did not meet the 'reasonable and legitimate expectations' (fn. 102 Cap. 555, Article 19(3)(c)) of the Complainants who had placed their trust in the Service Provider, believing in its professionalism and its duty of care and diligence."

L-Appell

6. Is- soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata u ntavolat appell quddiem din il-Qorti fit-30 ta' Novembru, 2023, fejn talbet sabiex:

"...din l-Onorabbli Qorti jogħġobha tirrevoka, tħassar jew tvarja s-sentenza li ttieħdet mill-Arbitru għas-Servizzi Finanzjarji fl-10 ta' Novembru 2023 u dan salv dawk il-provvedimenti li jidhrilha xieraq u opportun din l-Onorabbli Qorti".

Tgħid li l-aggravji tagħha huma li (a) d-deċiżjoni appellata hija *ultra vires*, nulla u bla effett għaliex l-Arbitru mar kontra d-disposizzjonijiet tal-Kap. 555, u b'hekk ċaħħad lill-partijiet mid-dritt tal-appell; (b) mingħajr preġudizzju għall-ewwel

aggravju, l-Arbitru kien żbaljat meta ċaħad l-eċċezzjoni ta' kompetenza *ai termini* tal-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555; u (ċ) l-Arbitru ma kellux il-kompetenza li jittratta l-ilment tal-appellati għaliex Providence Life Limited ma kienitx 'fornitur tas-servizz' skont id-disposizzjonijiet tal-Kap. 555.

7. L-appellati wiegħbu fit-28 ta' Frar, 2024, fejn issottomettew li l-aggravji tas-socjetà appellanta għandhom jiġu miċħuda, u dan filwaqt li pprezentaw appell incidentali, fejn talbu għar-riforma tad-deċiżjoni appellata billi din il-Qorti:

“(1) Tispeċifika li d-Deċiżjoni tikkonsisti f’li l-appellanti provditur tas-servizz iħallas lill-appellati David Curran u Laura Curran sebgħin fil-mija (70%) ta’ £Stg26,580 u £Stg8,800 rispettivament, u allura s-somma definittiva ta’ £Stg18,606 u £Stg6,160, mingħajr il-bżonn ta’ ebda dokumentazzjoni ulterjuri minn naħa tal-provditur tas-servizz;

Alternattivament din l-Onorabli Qorti tal-Appell għandha tibgħat lura l-atti lill-Arbitru biex jieħu l-provvedimenti neċessarji huwa stess biex id-Deċiżjoni tkun definittiva fil-valur fil-mument li tkun ingħatat.

(2) Tordna li l-provditur tas-servizz iħallas l-imgħax legali lill-appellati konjuġi Curran, liema jibda jiddekorri mid-data tad-deċiżjoni tal-Arbitru sal-pagament effettiv;

Alternattivament din l-Onorabli Qorti tal-Appell għandha tibgħat lura l-atti lill-Arbitru biex jieħu l-provvedimenti neċessarji huwa stess biex id-Deċiżjoni tkun definittiva fil-mument li jibda jiddekorri l-imgħax legali.

(3) Tordna li l-ispejjeż legali tal-ewwel istanza flimkien ma’ dawk tal-appell u tal-appell incidentali ikunu a kariku tal-appellant provditur tas-servizz.”

Jgħidu li l-aggravji tagħhom huma dawn: (a) l-Arbitru kellu biżżejjed provi u fatti quddiemu sabiex jistabbilixxi li l-*marketing fee* imposta fuqhom kienet rispettivament ta' £Stg26,580 u £Stg8,800; u (b) bħala konsegwenza tad-deċiżjoni tal-Arbitru, l-imgħax ma bediex jiddekorri u lanqas jista' jibda jiddekorri.

8. Is-soċjetà appellanta wiegħbet għall-appell inċidentali, billi sottomettiet li dan għandu jiġi miċhud minn din il-Qorti, billi wkoll jintlaqa' l-appell interpost minnha.

Konsiderazzjonijiet ta' din il-Qorti

9. Il-Qorti ser tgħaddi sabiex tikkunsidra l-aggravji rispettivi tal-partijiet, u dan fid-dawl ta' dak li ddecieda l-Arbitru, u meqjusa wkoll is-sottomissjonijiet tagħhom rispettivi. Tibda bl-aggravji tas-soċjetà appellanta.

L-Ewwel Aggravju: [Id-deċiżjoni appellata hija ultra vires]

10. L-ewwel aggravju tas-soċjetà appellanta huwa li d-deċiżjoni appellata hija *ultra vires*, nulla u bla effett, għaliex din kienet tmur kontra d-disposizzjonijiet tal-Kap. 555, u ma kienitx tippermetti lill-partijiet id-dritt tal-appell. Issostni li s-setgħat tal-Arbitru u r-rimedji li huwa jista' jagħti huma mfissra fil-liġi. Is-soċjetà appellanta tirrileva li fil-każ odjern wara li kkundannaha tħallas kumpens ta' 70% tal-miżata in kwistjoni, l-Arbitru ordna sabiex il-partijiet jipprezentaw kull wieħed minnhom skeda tal-kwantum tal-kumpens fi żmien ħmistax-il jum mid-data tad-deċiżjoni tiegħu, fejn imbagħad l-appellati kellhom terminu ta' ħmistax-il jum li fih huma setgħu jikkontestaw tali skeda. Hija tikkontendi li permezz ta' din l-aħħar parti tad-deċiżjoni appellata, l-Arbitru ma ħalla l-ebda dritt ta' appell. Filwaqt li hija tagħmel riferiment għas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, is-soċjetà appellanta tikkontendi li l-Arbitru għandu jiddeciedi huwa stess il-kumpens, iżda minflok ħalla dan l-eżerċizzju f'idejn il-partijiet. Is-soċjetà appellanta tgħid li barra minn hekk dan wassal

sabiex l-Arbitru assuma poteri li l-ligi ma tagħtihx, u dan bi preġudizzju għad-dritt tal-appell tal-partijiet, għaliex sakemm huma jesprimu jekk jaqblux o meno mal-kwantum tal-kumpens, ikun għadda t-terminu tal-appell mogħti lilhom. In sostenn tal-argument tagħha li l-Arbitru mar *ultra vires* fid-deċiżjoni appellata, hija tiċċita lill-awtur Inġliż il-Professor Wade, u anki dak li ngħad mill-Qorti Ċivili, Prim'Awla, fis-sentenza tal-14 ta' Frar, 2002, fl-ismijiet **SM Cables Ltd vs. Carmelo Monaco**.

11. Min-naħa tagħhom, l-appellati jinsistu li l-Arbitru fil-fatt ħa deċiżjoni li kienet waħda definittiva, meta s-soċjetà appellanta giet ordnata sabiex tħallas 70% tal-miżata in kwistjoni, li kienet il-mertu tal-azzjoni. Jaċċettaw li jista' jkun il-każ li l-Arbitru mingħajr ma kien hemm bżonn, naqas li jassigura kjarezza fid-deċiżjoni tiegħu, meta talab lis-soċjetà appellanta tippreżenta skeda bl-informazzjoni dwar kemm, kif u meta giet addebitata jew kienet dovuta l-imsemmija miżata. L-appellati jispjegaw li din il-miżata giet indikata fl-ilment tagħhom li gie ppreżentat lill-Arbitru, u l-ammonti rispettivi qatt ma kienu ġew ikkontestati mis-soċjetà appellanta. L-appellati jissottomettu li jekk l-Arbitru kellu xi dubju dwar l-ammont tal-miżata in kwistjoni, huwa kellu jitlob informazzjoni mingħand is-soċjetà appellanta qabel m'għadda għad-deċiżjoni appellata, kif wara kollox kellu kull dritt li jagħmel *ai termini* tas-subartikolu 25(5) tal-Kap. 555. Madankollu dan ma kienx ifisser li d-deċiżjoni appellata ma kienitx waħda valida jew li kienet ċaħħdet lill-partijiet mid-dritt li jappellaw mid-deċiżjoni, tant hu hekk li s-soċjetà appellanta ntavolat appell minnha kif għamli anki huma inċidentalment. L-appellati jissottomettu li s-subartikolu 22(8) tal-Kap. 555 jorbot lill-Arbitru sabiex iħares ir-regoli ta' ġustizzja naturali, u li "*l-ebda proċedimenti quddiem l-Arbitru ma għandhom ikunu invalidi minħabba*

f'xi nuqqas ta' osservanza ta' xi formalitajiet jekk kien hemm konformità sostantiva mal-liġi". L-appellati jagħmlu wkoll riferiment għall-emendi legiislattivi li saru fil-Kap. 12 permezz tal-Att XXIV tal-1995, b'riferiment partikolari għad-disposizzjonijiet tal-artikoli 789 u 790. Huma jiċċitaw ukoll dak li qalu l-Qrati dwar l-eċċezzjoni ta' nullità, u jikkontendu li *dato ma non concesso* li l-Qorti ssib nuqqas fil-proċedura tal-Arbitru, hija għandha tibgħat l-atti lura quddiem l-Arbitru sabiex dak in-nuqqas jissewwa, u dan kif saħansitra sar fi proċeduri oħrajn.

12. Il-Qorti tibda billi tosserva li l-appell stess tas-soċjetà appellanta, jikkontradixxi l-argument tagħha li dak li ddecieda l-Arbitru kellu l-effett li jċaħħad il-partijiet mid-dritt tal-appell. L-appellati ressqu wkoll appell incidentali quddiem din il-Qorti mid-deċiżjoni appellata. Il-Qorti tirrileva li fejn l-Arbitru ordna l-ħlas ta' sebgħin fil-mija (70%) tal-ammont tal-mizata li setgħet tiġi debitata jew li kienet giet debitata lill-polza, id-deċiżjoni tiegħu hija waħda ċara, u kif ser jiġi spjegat aktar 'il quddiem, anki ekwa fil-konfront tal-partijiet. Fil-fatt l-Arbitru fid-*decide*, ordna l-preżentata ta' "*A schedule explaining the amount paid in compensation in terms of this decision...*".¹ Tagħraf li anki fir-rikors tal-appell tagħha, is-soċjetà appellanta mhijiex qiegħda tikkontesta l-ammonti reklamati mill-appellati.

13. Għaldaqstant il-Qorti ma ssibx l-ewwel aggravju tas-soċjetà appellanta ġustifikat, u tiċħdu.

¹ Enfazi tal-Qorti.

It-Tieni Aggravju: [l-Arbitru kien żbaljat meta ċaħad l-eċċezzjoni tas-soċjetà appellanta ta' kompetenza ai termini tal-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555]

14. Is-soċjetà appellanta tikkontendi li l-Arbitru kien żbaljat meta ċaħad l-eċċezzjoni preliminari tagħha dwar il-kompetenza tiegħu, u dan filwaqt li straħ fuq assunzjoni. Tispjega li l-appellati ma kienux indirizzaw direttament l-ilment tagħhom lejha skont kif jitlob il-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555, iżda lill-konsulent finanzjarju tagħhom, u għalhekk l-Arbitru ma kellux il-kompetenza sabiex jiddeċidi l-ilment. Barra minn hekk, filwaqt li tagħmel riferiment għad-disposizzjonijiet tas-subartikolu 19(1) tal-istess liġi, tissottometti li l-ilment fil-konfront tagħha ma kienx ġie reġistrat bil-miktub fit-terminu stabbilit mil-liġi, fejn l-ewwel ittra tagħhom *a fol.* 8 tal-atti kienet ġiet indirizzata lil Fidelius deVere. Tikkontendi li minn din l-ittra joħroġ ċar li l-ilment tal-appellati huwa dirett lejn deVere u Providence Life Limited, u sussegwentement fl-ilment tagħhom quddiem l-Arbitru jiddikjaraw li attribwew it-tort lill-konsulenti finanzjarji tagħhom għall-parir ħażin li ngħataw dwar il-mizata. Filwaqt li s-soċjetà appellanta tiċċita dak li qal l-Arbitru fil-kummenti tiegħu dwar kif kien ġie redatt l-ilment tal-appellati, u anki rigward t-tort li huma attribwew lill-provditur tas-servizz, tinsisti li ma kien hemm x'juri li l-appellati kienu qegħdin jilmentaw mill-impjega tagħha. Is-soċjetà appellanta tagħmel riferiment għall-prinċipju legali proċedurali *quod non est in actis non est in mundo*, issostni li ġudikant għandu jiddeċiedi skont dak li jkun irriżulta mill-provi jew mill-atti, u in sostenn tal-argument tagħha tiċċita dak li qal Lord Diplock fil-każ **Harrocks v. Lowe** (1975) [AC 135,149]. Hija tissottometti li l-Arbitru ried joħroġ għonqu għall-konsumatur, u l-assunzjoni tiegħu hija waħda għal kollox żbaljata u

m'għandhiex mis-sewwa. Dan filwaqt li tagħmel riferiment għall-affidavit tar-rappreżentant tagħha, Erwan Fremond. Tikkontendi li l-Arbitru mill-ewwel kien ikkastigaha meta ma ċċitatx eżatt l-artikolu tal-liġi dwar il-preskrizzjoni, b'dana li kien liberali ferm mal-appellati, fejn ukoll wasal għal konkluzjonijiet li ma kienux jistrieħu fuq l-atti.

15. L-appellati jsostnu li l-Arbitru ddecieda sew meta ċaħad l-eċċezzjoni tagħha ta' preskrizzjoni. Jissottomettu li l-Arbitru huwa marbut skont il-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555, li japplika d-disposizzjonijiet tal-Kodiċi Ċivili u l-ġurisprudenza relattiva. Jgħidu wkoll li skont l-insenjament tal-Qrati tagħna, min jeċċepixxi l-preskrizzjoni għandu jindika l-artikolu tal-liġi rilevanti, u l-Arbitru dejjem segwa dan l-insenjament, u f'għadd kbir ta' deċiżjonijiet huwa ċaħad l-eċċezzjoni tal-preskrizzjoni, u għalhekk ma kien ħoloq l-ebda preġudizzju fil-każ odjern fil-konfront tas-soċjetà appellanta. Għal dak li jirrigwarda l-kumment tagħha dwar li l-Arbitru kien liberali ħafna magħhom, l-appellati jissottomettu li kien proprju bis-saħħa tas-subartikolu 25(1) tal-Kap. 555 li huwa seta' jitlob għal aktar informazzjoni u dokumentazzjoni. L-appellati jispjegaw li d-disposizzjonijiet ta' din il-liġi jistrieħu fuq ir-rapport intestat '*Fundamentals for a financial ombudsman*' tal-World Bank, u jiċċitaw silta li tispjega r-rwol attiv tal-*ombudsman* fl-investigazzjoni tiegħu tal-każ. L-appellati jgħidu li dan ir-raġunament huwa imsaħħaħ bil-fatt li fil-każ odjern huma kien inkarigaw lil min jassistihom biss f'dan l-istadju tal-appell, u jiċċitaw id-disposizzjonijiet tal-para. (d) tas-subartikolu 25(3) tal-Kap. 555 in sostenn tal-argument tagħhom. Huma jagħmlu riferiment għal dak li qalet din il-Qorti fis-sentenza tagħha tat-23 ta' Frar, 2022, fl-ismijiet **Christine Helen Morrison vs. Momentum Pensions Malta Ltd**, u jissottomettu li b'hekk jirriżulta li d-deċiżjoni

tal-Arbitru tista' wkoll tkun msejsa fuq l-għarfien u r-riċerka tal-Arbitru, u dan sakemm huwa jipprovdi motivazzjoni għad-deċiżjoni tiegħu. Fl-aħħarnett l-appellati jirrilevaw li s-soċjetà appellanta ma spjegatx fejn l-Arbitru kien straħ fuq xi ħaga vvintata jew li ma ħarġitx mill-provi.

16. Il-Qorti tikkunsidra li l-Arbitru kien korrett fid-deċiżjoni tiegħu. Wara li kkunsidra dak li kienet qiegħda tinsisti fuqu s-soċjetà appellanta, jiġifieri li *“the Complainants are out of time to bring the complaint to the Arbiter”*, għaliex l-ilment ma kienx tressaq *“within two years of the coming into force of the Arbiter for Financial Services Act (Cap. 555)”*, l-Arbitru għustament mill-ewwel irrileva li l-imsemmija soċjetà appellanta ma kienitx indikat l-artikolu tal-liġi li fuqu hija kienet qiegħda sserraħ l-eċċezzjoni tagħha. Izda l-Arbitru ikkunsidra wkoll li jekk l-eċċezzjoni kienet qiegħda tingħata *ai termini* tal-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555, din ma setgħetx tirnexxi, għaliex l-appellati kienu ġew infurmati wara l-ittra tal-5 ta' Lulju, 2021, mibgħuta minn Providence Life Limited lis-soċjetà appellanta, dwar l-iżball fis-sistema li wassal sabiex il-mizata ma kienitx ġiet riflessa fil-*valuation statements*. L-Arbitru qal li anki jekk kellu jieħu in konsiderazzjoni d-disposizzjonijiet tal-para. (b) tas-subartikolu 21(1) tal-Kap. 555, l-eċċezzjoni ma kienitx tirnexxi għaliex l-imġiba lmentata ma kienitx seħħet qabel it-18 ta' April, 2016, kif kien appena spjega, anzi l-imġiba rriżulta li kienet ipperdurat sew wara l-imsemmija data. Għal dawn ir-raġunijiet l-Arbitru korrettement ċaħad l-eċċezzjoni tal-preskrizzjoni *sollevata* mis-soċjetà appellanta. Il-Qorti tikkondividi dan ir-raġunament preċiż tal-Arbitru, u tgħid li m'għandha xejn iktar x'izzid miegħu.

17. Għalhekk il-Qorti ma ssibx li l-parti ta' dan it-tieni aggravju li tirrigwarda l-preskrizzjoni o meno tal-ilment, hija ġustifikata, u tiċċadha.

18. Imma l-Qorti tagħraf li taht l-istess aggravju, is-soċjetà appellanta tissollewa kwistjoni oħra fir-rigward tal-kompetenza tal-Arbitru. Is-soċjetà appellanta tgħid li l-Arbitru ma kellu l-ebda kompetenza li jiddeċiedi l-ilment tal-appellati għaliex huma m'indirizzawx l-ilment tagħhom lejha skont id-disposizzjonijiet tal-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555. Fid-deċiżjoni appellata, l-Arbitru jirrileva li fl-aħħar mill-aħħar is-soċjetà appellanta kienet irrikonoxxiet li l-appellati kienu qegħdin iressqu lment kontriha, billi wiegħbet għalih fit-30 ta' Novembru, 2021, fejn ċaħdet il-pretensjonijiet tagħhom u għamlet riferiment għall-*email* tagħha ta' Novembru, 2021. Il-Qorti tagħraf li fit-twegiba tas-soċjetà appellanta għall-*email* tal-appellati tat-12 ta' Novembru, 2021, is-soċjetà appellanta kienet stiednet lill-istess appellati sabiex iressqu lment lill-Uffiċċju tal-Arbitru f'każ li huma ma kienux sodisfatti bir-rizultat tal-investigazzjoni. Għalhekk l-Arbitru qal li kien diffiċli għas-soċjetà appellanta li targumenta li l-appellati ma kienux ressqu lment fil-konfront tagħha jew li s-sustanza ta' dak l-ilment ma kienx gie kkomunikat lilhom jew li ma kellhiex l-opportunità sabiex tinvestiga l-ilment qabel ma tressaq quddiem l-Arbitru. Dwar il-kwistjoni li l-ilment ma kienx indirizzat lejn l-imgiba tagħha iżda dik ta' terzi, jigifieri deVere u Providence Life Limited, l-Arbitru hawnhekk ukoll warrab l-eċċezzjoni tas-soċjetà intimata, u dan filwaqt li għaraf li l-ilment nnifsu li kien gie pprezentat fl-Uffiċċju tal-Arbitru mill-appellati, seta' gie redatt b'mod aħjar iżda xorta waħda kien ċar li l-istess appellati kienu qegħdin jallegaw diversi nuqqasijiet fl-imgiba tas-soċjetà appellanta, partikolarment għaliex huma ma kienux gew infurmati fil-ħin li għamlu l-investment tagħhom dwar il-mizata, u anki għaliex sussegwentement ma kellhom l-ebda informazzjoni matul it-tmien

snin li segwew, li din il-mizata ma kienitx qiegħda tiġi applikata fil-konfront tal-polza.

19. Il-Qorti taqbel ma' dan ir-raġunament tal-Arbitru. Tirrileva wkoll li l-ilment li għamlu l-appellati quddiem l-Arbitru, mhux biss indirizzawh fil-konfront tas-soċjetà appellanta, iżda indikaw ukoll li kienet s-soċjetà appellanta li kienet ikkomunikat li rizzultat ta' żball fis-sistema, il-mizata in kwistjoni ma kienitx dehret fl-istess tal-poloż rispettivi tagħhom, għalkemm kienet tnaqqset minnhom. Il-Qorti tagħraf li Providence Life Limited korrettement kienet għarrfet lis-soċjetà appellanta b'dan l-iżball li kien għe skopert, u dan għaliex hija kienet id-detentriċi tal-poloż. Iżda bħala detentriċi tal-imsemmija poloż hija kellha turi iktar attenzjoni fil-ġestjoni tal-investiment billi żżomm ukoll l-appellati nfurmati b'dawk il-mizati applikabbli fil-konfront tagħhom. Huwa proprju għalhekk li mingħajr l-ebda dubju l-allegazzjonijiet tagħhom ta' negliġenza huma diretti lejn l-imġiba tagħha.

20. Għalhekk il-Qorti ma tarax din il-parti tat-tieni aggravju tas-soċjetà appellanta hija ġustifikata, u tiċhadha.

It-tielet aggravju: [l-Arbitru ma kellux il-kompetenza sabiex jittratta l-vertenza odjerna stante li Providence Life Limited mhijiex 'fornitur tas-servizz' skont il-Kap. 555]

21. Is-soċjetà appellanta tikkontendi wkoll li l-Arbitru ma kellu l-ebda kompetenza sabiex jittratta l-ilment tal-appellati, għaliex Providence Life Limited ma kienitx 'fornitur tas-servizz' a tenur tad-disposizzjonijiet tal-artikolu 2 tal-Kap. 555. Tirrileva li filwaqt li l-Arbitru qal li huwa ma kienx ser jidħol fil-

mertu tal-kwistjoni ta' jekk fiċ-ċirkostanzi l-miżata kienitx waħda xierqa o meno, l-appellati fl-ilment tagħhom kienu kkontestaw din il-miżata u t-talba tagħhom ma kienitx tikkonċerna l-iżvelar tagħha. Iżda minflok l-Arbitru kien għamel analiżi fid-dettal dwar l-iżvelar tal-miżata in kwistjoni. Is-soċjetà appellanta tikkontendi li Providence Life ma kienitx soċjetà reġistrata hawn Malta u lanqas ma kellha liċenzja sabiex toffri servizzi ta' investiment. Tgħid li hija biss '*bond-a retirement and saving product*'. Hija tikkontendi li l-proċeduri odjerni jirrigwardaw it-termini u l-kundizzjonijiet ta' Providence Life Limited, u l-applikazzjoni kienet ukoll ta' Providence Life Limited. Għalhekk l-Arbitru messu waqaf hemm għaladarba l-vertenza kienet tikkonċerna Providence Life Limited, anki fejn għaraf li l-miżata in kwistjoni ma ttieħditx minnha, jiġifieri s-soċjetà appellanta stess. Iżda minflok warrab dan kollu, u ordna li hija kellha tħallas kumpens.

22. Min-naħa tagħhom, l-appellati jinsistu li dan l-aggravju tassew huwa wieħed frivolu u vessatorju. Jispjegaw li l-ilment tagħhom ma kienx kontra Providence Life Limited kif qiegħda ssostni s-soċjetà appellanta, iżda kontra s-soċjetà appellanta stess, fejn din kienet taġixxi bħala *Trustee* u Amministratriċi tal-Iskema, imma kienet ukoll id-detentriċi tal-polza maħruġa minn Providence Life Limited, f'liema polza seħħ l-investiment tagħhom. Ikomplu jgħidu li s-soċjetà appellanta kienet għet fdata minnhom sabiex torganizza l-Iskema, u din kellha l-akbar dmir fiduċjarju lejhom. L-appellati jissottomettu li min-naħa l-oħra s-soċjetà appellanta hija kumpannija reġistrata hawn Malta, liċenzjata hawn Malta, u tipprovdi s-servizzi tagħha hawn Malta *ai termini* tal-artikolu 2 tal-Kap. 555. Jgħidu li dan jirriżulta mill-*Financial Services Register* tal-Awtorità tas-Servizzi Finanzjarji ta' Malta, kif ukoll jirriżulta mis-sit elettroniku tas-soċjetà

appellanta, li hija *Trustee* u Amministratriċi tal-Iskema skont is-subartikolu 43(3) tal-Kap. 331. L-appellati jikkontendu li f'dan l-irwol hija kellha l-obbligu li tipproteġi lid-detentur tal-polza, u li taġixxi u tieġu dawk il-miżuri kollha fl-aħjar interess tagħhom.

23. Il-Qorti tgħid li kif appena fissret iktar 'il fuq f'din is-sentenza, l-ilment tal-appellati huwa dirett lejn l-imġiba tas-soċjetà appellanta, u għalhekk l-argument tagħha li Providence Life Limited mhijiex '*fornitur tas-servizz*', u għaldaqstant l-Arbitru ma kellu l-ebda kompetenza jiddeċiedi l-imsemmi lment, huwa wieħed irrilevanti f'dan il-kuntest. Tgħid li għall-istess raġuni huwa inutili l-argument tagħha li l-ilment tal-appellati jirrigwarda l-miżata proprju, u mhux l-iżvelar tagħha.

Ir-raba' aggravju: *[l-Arbitru applika u nterpreta ħażin il-liġi meta qal li hija kienet naqset mid-dmirijiet tagħha ta' Trustee meta ma żvelatx il-miżata dovuta lil terzi]*

24. Ir-raba' aggravju tas-soċjetà appellanta huwa li sabiex wasal għall-konklużjoni tiegħu, l-Arbitru straħ fuq l-obbligi ġenerali ta' *Trustee*, li għandu jimxi fl-aħjar interess tal-benefiċjarju. Tgħid li hija ma kienitx qiegħda tikkontesta l-obbligu ġenerali ta' *Trustee* li jaġixxi bħala *bonus paterfamilias* fil-konfront tal-benefiċjarju ta' *trust*, iżda skont hi d-dinamika u l-iskop ta' skemi tal-irtirar li huma diretti mill-membri stess, huma differenti sew minn dawk ta' *trust* fil-kuntest ġenerali. Is-soċjetà appellanta tikkontendi li l-Arbitru ma jistax jistenna li amminstratur ta' skema tal-irtirar għandu jkun jaf meta jkun hemm żball fis-sistema ta' Providence Life Limited, u li jibghat jinforma lill-membri

qabel ma jkun seħħ l-imsemmi żball. Is-soċjetà appellanta tgħaddi sabiex tispjega li ma kien hemm l-ebda obbligu fir-rigward tal-iżvelar tat-tariffi tal-poloż sottostanti taħt il-kundizzjonijiet tal-liċenzja, jew taħt l-Att li Jirregola Fondi Speċjali jew il-Kap. 450 jew l-*Standard Operating Conditions applicable to pension schemes licenced under the Special Funds (Regulation) Act of 2002* maħruġa mill-MFSA. Dwar l-allokazzjoni ta' responsabbiltà mill-Arbitru, is-soċjetà appellanta tissuggerixxi li dak li qiegħed jgħid l-Arbitru hawnhekk, huwa li wara li membru ta' skema jkun ingħata parir mingħand konsulent finanzjarju magħżul minnu stess, l-amministratur tal-iskema għandu jagħmel ċert li l-imsemmi konsulent finanzjarju għamel ix-xogħol tiegħu sew, u li dan ikun spjega tajjeb il-mizati mposti. Izda skont s-soċjetà appellanta, din l-interpretazzjoni hija waħda wiesgħa, u wara kollox dan kollu huwa d-dmir ta' konsulent finanzjarju u mhux tal-amministratur. Is-soċjetà appellanta tikkontendi li l-amministratur huwa kuncett *ad hoc* intiż l-aktar bħala jeżegwixxi l-istruzzjonijiet u jieħu fiesieb li l-assi tal-membri jinżammu b'mod protett. Is-soċjetà appellanta tgħid li hija qiegħda tikkontesta l-inferenza li l-obbligu ġenerali ta' *Trustee* jabbraċċja wkoll l-obbligu speċifiku li għandu jsir sħarriġ fuq il-pariri finanzjarji li jingħataw lill-membri mill-konsulent finanzjarju magħżul minnu, u dan fid-dawl tal-fatt li l-obbligu ma kienx joħroġ mill-ebda liġi, regola jew gwida. Tgħid li lanqas huwa l-obbligu tagħha li taċċerta li d-dokument li qiegħdin jingħataw lill-membri kienu qiegħdin jinqraw minnhom, u tinsisti li l-Arbitru kien skorrett meta qal li *"[a]s unsophisticated retail clients, the Complainants cannot be faulted for not reading the whole policy document line by line just in case their Advisor, Trustee and RSA fail to check the policy document properly"*. Is-soċjetà appellanta tirrileva li fl-ittra li ntbagħtet minn

Providence Life Limited kien ingħad f' domanda numru 9 (Dok STM 6) li *'[y]our appointed Financial Adviser as part of the application state should have explained the terms and conditions to you together with the applicable fees and charges'*, u dan kien juri li wkoll Providence Life kienet qiegħda tistrieħ fuq il-fatt li l-konsulent finanzjarju kien spjega l-mizati mposti fuqhom. Dwar il-kumpens ta' sebgħin fil-mija (70%) tal-mizata, li hija għet ikkundannata tħallas lill-appellati, is-soċjetà appellanta tgħid li hija qatt ma kienet irċeviet din il-mizata, u għalhekk ma kellhiex tagħmel ir-rifużjoni ordnata. Tisottometti li madankollu jekk il-Qorti jidhrilha li hija kellha tinzamm responsabbli lejn l-appellati, tali responsabbiltà kellha tkun fi grad inqas minn ta' dak li ta l-parir, jiġifieri deVere Group, Providence Life jew tal-appellati stess. Is-soċjetà appellanta tgħid li f' sitwazzjonijiet bħal dawk odjerni, jinstab stabbilit li d-danni għandhom jiġu allokatu ugwalmart bejn il-partijiet għal darbha r-responsabbiltà ma tistax tinqasam b'ċertezza, iżda fi kwalunkwe każ il-Qorti mhijiex marbuta li tapplika l-prinċipji stabbiliti, speċjalment meta r-riżultat ma jwassalx għall-allokazzjoni ġusta.

25. L-appellati jsostnu li l-Arbitru kien korrett fid-deċiżjoni tiegħu. Jissottomettu li s-soċjetà appellanta tammetti li *"l-obbligu ġenerali ta' trustee li jaġixxi fl-aħjar interess tal-benefiċjarju u li ġeneralment kull trustee għandu l-obbligu jaġixxi bħala bonus paterfamilias fil-konfront ta' benefiċjarju ta' trust"*, iżda mbagħad is-soċjetà appellanta tgħaddi sabiex targumenta għaliex hija għandha tiġi liberata mid-dmirijiet tagħha. L-appellati jargumentaw li meta l-liġi timponi obbligu ta' kura u ta' diliġenza, ma kienx neċessarju li tipprovdi għal elenku eżawrenti tal-obbligi relatati. L-appellati jaċċettaw li fil-każ odjern l-obbligi kienu jinkombu wkoll fuq de VereGroup u anki fuq Providence Life

Limited, iżda huma kellhom relazzjoni diretta kuntrattwali mas-soċjetà appellanta biss, li kellha l-obbligu li taċċerta li huma bħala benefiċċjarji ma jbatu l-ebda preġudizzju. Huma jiċċitaw fit-tul dak li jgħid l-Arbitru fid-deċiżjoni appellata dwar ir-responsabbiltà tas-soċjetà appellanta. L-appellati jirribattu l-argument tas-soċjetà appellanta dwar l-allokkazzjoni ta' responsabbiltà, u jiċċitaw id-disposizzjonijiet tal-artikolu 1135 tal-Kap. 16, u anki dak li qalu l-Qrati dwar id-danni li jistgħu jiġu stabbiliti *arbitrio boni viri* u *ex aequo et bono* mill-ġudikant. Huma jiċċitaw id-disposizzjonijiet tal-para. (b) tas-subartikolu 19(3) tal-Kap. 555, u għal darb'oħra jagħmlu riferiment għar-rapport intestat '*Fundamentals for a Financial Ombudsman*' maħruġ mill-World Bank. Jinsistu li din il-Qorti għar-raġunijiet imfissra minnhom, m'għandhiex tiddisturba l-apprezzament tal-fatti li għamel l-Arbitru, u d-deċiżjoni li jalloka sebgħin fil-mija (70%) tar-responsabbiltà għad-danni lis-soċjetà appellanta.

26. Il-Qorti mill-ewwel tgħid li l-Arbitru kien ġust, u anki korrett fattwalment u legalment fid-deċiżjoni tiegħu. L-Arbitru jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġonevoli fic-cirkostanzi partikolari, u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad, wara li għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellati mill-Applikazzjonijiet għas-Sħubija esebiti fl-atti², l-Arbitru għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-sħubija fl-Iskema u l-akkwist tal-poloż rispettivi tal-appellati

² Ara a fol. 604 et seq.

sottostanti, u anki fir-rigward tal-konsulent finanzjarju tagħhom. Il-Qorti tinnota li m'hemm l-ebda kontestazzjoni dwar dan kollu.

27. L-Arbitru kkunsidra li permezz ta' ittra tal-5 ta' Lulju, 2021, mibgħuta minn Providence Life Limited lis-soċjetà appellanta, kien ġie spjegat li hija kienet identifikat *“a system error ... which has affected the reflection of policy charges on Horizon Portfolio Bond valuations”*. L-Arbitru għaraf ukoll li dettalji ulterjuri kienu ġew ipprovduti permezz ta' dokument maħruġ mill-imsemmija Providence Life intestat *“Horizon Portfolio Bond System Error FAQ”*.³

28. Minn hawnhekk l-Arbitru għadda sabiex eżamina d-diversi dokumenti, fejn kienu mfissra l-mizati li kellhom jithallsu mill-appellati fir-rigward tal-polza sottostanti. L-Arbitru beda billi kkunsidra li l-applikazzjoni għal sħubija li kienet ġiet iffirmata fit-18 ta' Frar, 2013, kellha sezzjoni ntitolata *‘Charging Structure’* fejn kien hemm indikati l-mizati li kellhom jithallsu mill-appellati, u għadda sabiex elenkahom. L-Arbitru qies ukoll dak li kien hemm imnizzel fil-*Providence Life Policy Key Features Document* u l-*Providence Life Policy Application Form*, fejn kien hemm imfissra l-mizati applikabbli taħt is-sezzjoni 6. Ikkunsidra wkoll il-*Policy Document* li nħareġ f'April 2013 minn Providence Life Limited bil-polza nru. PLL200326 u polza nru. PLL200328, fejn kien hemm sezzjoni ntestata *‘Policy Charges’*. L-Arbitru rrileva li d-dettalji dwar dawn il-mizati ġew inklużi f'dokument ieħor intestat *‘Terms & Conditions’*, li nħareġ flimkien mal-polza, u għadda sabiex għamel paragun bejn it-termini u l-kundizzjonijiet li ħarġu flimkien mal-*Policy Application Form*, u dawk li kienu meħmuża mal-*Policy*

³ A fol. 23-25.

Document innifisha. Huwa sab li l-*marketing fee* in kwistjoni ssemmiet f'dawn iż-żewġ dokumenti, iżda mkien ma giet indikata fl-applikazzjoni għal sħubija.

29. L-Arbitru kkunsidra wkoll il-kariga tas-soċjetà appellanta bħala *Trustee*, u rrileva li hawnhekk kienu applikabbli l-provvedimenti tal-Att dwar *Trusts and Trustees* (Kap. 331), li l-Qorti tirrileva li kien gie fis-seħħ fit-30 ta' Ġunju, 1989, kif sussegwentement emendat, u jagħmel riferiment partikolari għas-subartikolu 21(1), il-para. (a) tas-subartikolu 21(2). L-Arbitru rrileva li fil-kariga tagħha ta' *Trustee*, is-soċjetà appellanta kienet tenuta li tamministra l-Iskema u l-assi tagħha skont diligenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa jiċcita l-pubblikazzjoni *An Introduction to Maltese Financial Services Law*⁴ u l-pubblikazzjoni tal-MFSA tas-sena 2017 fejn ġew ittrattati prinċipji diġà stabbiliti qabel dik id-data permezz tal-Att dwar *Trusts* u *Trustees* (Kap. 331) u anki permezz tal-Kodiċi Ċivili. F'dan kollu l-Arbitru tajjeb għaraf l-importanza tagħhom u s-soċjetà appellanta kellha ssib gwida fihom fil-funzjoni tagħha ta' *Trustee*.

30. L-Arbitru aċċenna fuq l-obbligu tal-Amministratur tal-Iskema tal-Irtirar sabiex dan jaġixxi fl-aħjar interessi tal-Iskema, u dan kif jirrikjedi s-subartikolu 19(2) tal-Att li Jirregola Fondi Speċjali (Kap. 450) u s-subartikolu 13(1) tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514). Il-Qorti iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta kellha obbligi daqstant ċari hawnhekk li timxi fl-aħjar interess tal-Iskema, kemm fiż-żmien li sar l-investment fis-sena 2013 meta kienu applikabbli d-disposizzjonijiet tal-Kap. 450, u anki sussegwentement

⁴ Ed. Max Ganado.

meta ġie fis-seħħ l-Att dwar Pensjonijiet għall-Irtirar fis-sena 2015, u l-appellati kienu għadhom membri tal-Iskema.

31. Minn hawnhekk l-Arbitru għadda sabiex elenka diversi prinċipji li kienu applikabbli fil-konfront tas-soċjetà appellanta skont il-*General Conduct of Business rules/standard licence conditions* applikabbli taħt ir-reġim tal-Kap. 450 kif imħassar, u tal-Kap. 514 li ssostitwih. Għal darb'oħra l-Qorti tirrileva li jirrizulta li s-soċjetà appellanta bħala Amministratriċi tal-Iskema kienet tenuta li timxi b'kull ħila dovuta, kura u diligenza fl-aħjar interessi tal-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirrizultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li minn dan li diġà ngħad, jirrizulta li d-difiża tagħha li hija ma setgħet qatt tinzamm responsabbli għaliex ma kellha l-ebda obbligu fil-konfront tal-appellati, ma tistax tirnexxi.

32. L-Arbitru mbagħad għadda sabiex għamel l-osservazzjonijiet tal-aħħar tiegħu li l-Qorti ssib ferm utli u rilevanti. Huwa ttratta l-allegati nuqqasijiet tas-soċjetà appellanta, billi qal kif ġej:

(a) Dwar in-nuqqas tagħha li tindika l-marketing fee in kwistjoni - Kien ċar li ma kien hemm l-ebda riferiment għaliha jew dettalji dwarha, u għalhekk l-ilment tal-appellati kellu jiġi milqugħ, filwaqt li osserva s-segwent: (I) għalkemm l-Iskema u l-polza sottostanti kienu prodotti distinti, l-appellati kienu ġew offruti pakkett sħiħ fejn fl-applikazzjoni għal sħubija kien hemm indikat l-miżati tal-Iskema u anki dawk tal-polza sottostanti, filwaqt li l-applikazzjoni tal-polza kellha ndikat fuqha '*For use with the STM Malta Retirement Plan*', u kienet tagħmel riferiment għas-soċjetà appellanta bħala *Trustee* tal-Iskema, u tat dettalji dwar l-Iskema nnifisha.

Imbagħad kienu l-appellati flimkien mas-soċjetà appellanta li ffirmaw l-applikazzjoni għax-xiri tal-polza, li kellha bħala l-bażi tagħha t-termini u l-kundizzjonijiet tal-imsemmija polza, li għalhekk kienu jagħmlu parti mill-istess applikazzjoni. Hawnhekk qal li kien hemm indikat il-*marketing fee* ikkontestata li ma kienitx dehret fl-applikazzjoni għas-sħubija fl-Iskema, u lanqas fl-applikazzjoni għax-xiri tal-polza jew fil-*Key Features Document*, li kien jifforma parti mid-dokumentazzjoni relatata max-xiri tal-polza. Barra minn hekk, ma kienx irrizulta li l-appellati kienu ġew debitament mgħarrfa dwar it-tibdil u d-differenzi materjali li kienu sussegwentement ġew fis-seħħ mar-reviżjoni tat-termini u l-kundizzjonijiet tal-polza. Għalhekk l-Arbitru kkunsidra li l-appellati kienu korretti fl-allegazzjoni tagħhom. L-Arbitru qal li kienu jirrizultaw diversi diskrepanzi fid-dokumenti li ġew mgħoddija lill-appellati, u li qatt ma ngibditilhom l-attenzjoni dwarhom flimkien mar-reviżjoni tal-mizati dovuta. Għalhekk l-Arbitru ikkunsidra li s-soċjetà appellanta kienet kisret l-obbligi tagħha kif imfissra iktar 'il fuq; (II) il-*marketing fee* ma ssemmietx fil-*Providence Life Key Features Document* li kien fih informazzjoni li ma kienitx tidher jew li kienet inkonsistenti mat-termini u l-kundizzjonijiet fl-istess pakkett ta' dokumenti mgħoddija lill-appellati.

(b) Dwar l-allegazzjoni li s-soċjetà appellata kienet naqset li tinfirmahom dwar it-tibdil propost fil-mizati - L-Arbitru qal li s-soċjetà appellanta kellha relazzjoni kummerċjali ma' Providence Life Limited sabiex hija setgħet iżżid dettalji tal-polza fil-formoli tagħha stess, iżda qies li hija kellha l-obbligu li taċċerta li l-informazzjoni dwar il-mizati kienet dik kurrenti u aġġornata. L-Arbitru qal li l-fatt li minħabba żball fis-sistema l-

marketing fee ma kienitx dehret fil-valutazzjoni tal-polza għal tmien snin sħaħ, kellha mpatt negattiv fuq l-interessi tal-appellati. Dan fejn is-soċjetà appellanta fir-rwol tagħha ta' Amministratriċi u *Trustee* tal-Iskema, imma anki bħala titolari tal-polza, kellha tkun konsapevoli tal-mizati applikabbli taħt l-imsemmija polza. Għalhekk fil-fehma tal-Arbitru s-soċjetà appellanta kienet naqset li tagixxi fl-aħjar interessi tagħhom, u dan ħalla konsegwenzi materjali.

33. L-Arbitru aċċenna wkoll fuq diversi fatturi oħra tal-każ, li huma s-segwenzi: (i) bħala *Trustee* u Amministratriċi tal-Iskema, u anki bħala ko-firmatarja fuq l-applikazzjoni għax-xiri tal-polza, is-soċjetà appellanta kienet raġonevolment mistennija li tikseb il-kunsens tal-membru qabel ma tipproċedi taħt it-termini u l-kundizzjonijiet riveduti; (ii) is-soċjetà appellanta kienet ukoll t-titolari tal-polza, u għalhekk kellha tkun taf bid-diverġenzi materjali bejn it-termini u l-kundizzjonijiet tal-polza kif hija kienet applikat għaliha, u dawk li attwalment inħargu flimkien mal-polza attwali, u dan fejn saħansitra kien hemm *disclaimer* fl-applikazzjoni għax-xiri tal-polza; (iii) is-soċjetà appellanta ma pprovdietx raġuni valida għaliex l-emittent tal-polza kien aċċetta l-applikazzjoni għax-xiri tagħha fi Frar/Marzu 2013, iżda mbagħad mponiet termini u kundizzjonijiet differenti minn dawk indikati fl-imsemmija applikazzjoni, u dan fejn hija kienet mistenna li tiegħu azzjoni anki fejn iktar tard gie skopert l-iżball fis-sistema ta' Providence Life Limited fir-rigward tal-mizata in kwistjoni. Dan in-nuqqas tagħha kellu konsegwenzi negattivi fuq l-Iskemi tal-Irtirar rispettivi tal-appellati.

34. B'hekk l-Arbitru għalaq dawn il-konsiderazzjonijiet kollha tiegħu billi korrettement għaraf li l-appellati kienu straħu fuq is-soċjetà appellanta bħala *Trustee* tal-Iskema sabiex din taġixxi b'diligenza u l-attenzjoni ta' *bonus paterfamilias*, tipprovdihom bl-informazzjoni u tispjegalhom l-aspetti materjali tal-Iskema, imma anki sabiex tipprotegi l-interessi u l-assi tagħhom minn telf jew dannu. Wara kollox, l-Arbitru sewwa rrileva li hija kienet fl-aħħar mill-aħħar it-titolari tal-polza, u għalhekk kellha kontroll assolut fuqha. Għar-raġunijiet li huwa kien spjega iktar 'il fuq, l-Arbitru stqarr li s-soċjetà appellanta kienet uriet nuqqas ta' diligenza fl-amministrazzjoni tal-Iskema fir-rigward tal-appellati, u fit-twettiq tal-obbligi tagħha ta' *Trustee* u Amministratriċi tal-Iskema, iżda wkoll ta' titolari tal-polza. Hija kienet naqset milli tilhaq l-aspettativi raġonevoli u legittimi tal-appellati li kienu qiegħdu l-fiducja tagħhom fiha.

35. Il-Qorti tgħid li tikkondividi dan ir-raġunament tal-Arbitru, u tagħmel tagħha wkoll il-konsiderazzjonijiet mirquma tiegħu, fejn fisser tassew tajjeb in-nuqqasijiet u r-responsabbiltajiet tas-soċjetà appellanta. Imma s-soċjetà appellanta qiegħda tilmenta wkoll dwar id-deċiżjoni tal-Arbitru fejn huwa ddikjara li kellha tħallas kumpens lill-appellati ekwivalenti għal sebgħin fil-mija (70%) tal-miżata, għaliex skont hi r-responsabbiltà għandha tinqasam flimkien ma' Providence Life Limited u l-konsulent finanzjarju tal-appellati. Fid-dawl ta' dak kollu li gie kkonstatat u anki kkunsidrat mill-Arbitru, il-Qorti tgħid li taqbel mal-konkluzjonijiet tal-Arbitru, u r-raġunijiet tagħha jinsabu kollha mfissra fis-suespost, u liema raġunijiet juru kemm tassew is-soċjetà appellanta naqset lill-appellati meta ma mxietx bil-prudenza, diligenza u attenzjoni ta' *bonus paterfamilias* kif kellha tagħmel bħala *Trustee* tal-Iskema.

L-appell incidentali tal-appellati

36. Il-Qorti issa ser tgħaddi sabiex tikkunsidra l-aggravji li qegħdin iressqu l-appellati fl-appell incidentali tagħhom fil-konfront tad-deċiżjoni appellata.

L-Ewwel Aggravju: [L-Arbitru kellu biżżejjed provi sabiex jistabilixxi l-miżata]

37. L-appellati jikkontendu li permezz tad-deċiżjoni tiegħu, l-Arbitru ħoloq incertezza bla bżonn dwar jekk l-ammonti ekwivalenti għal sebgħin fil-mija (70%) ta' £Stg26,580 u £Stg8,800 rispettivament, kienux finali. Dan minbarra l-fatt li s-soċjetà appellanta kellha l-opportunità li ma tipprovdiex l-iskeda mitluba mingħandha mill-Arbitru, u b'hekk il-kwistjoni ma tigix konkluzi, b'ingustizzja manifesta fil-konfront tagħhom.

38. Is-soċjetà appellanta tgħid li hija taqbel mat-talba tal-appellati, għaliex din saħansitra tirrifletti t-talba tagħha stess. Tikkontendi li jirrizulta b'mod ċar li l-appellati naqsu milli jippruvaw it-talba tagħhom fil-grad li titlob il-liġi, u l-valur tal-kumpens mitlub minnhom huwa incert u indeterminabbli. Filwaqt li tissottometti li l-prinċipju legali fil-kamp ċivili huwa li min jallega għandu jressaq id-debita prova, huma jagħmlu riferiment għal dak li qalu l-Qrati tagħna fir-rigward. Tikkontendi li n-nuqqas ta' kwantifikazzjoni tal-kumpens fid-deċiżjoni appellata, juri kemm l-Arbitru ma kienx moralment sodisfatt li l-appellati kienu laħqu l-oneru tal-prova rikjest, iżda xorta waħda ddeċieda li hija għandha tkun responsabbli għall-ħlas ta' danni, u b'hekk iffavorixxa l-appellati mingħajr l-ebda bażi valida jew legali. Is-soċjetà appellanta tirrileva li skont il-

ġurisprudenza, deċiżjoni ta' qorti jew ta' tribunal għandha tkun finali u definittiva.

39. Il-Qorti tgħid li dak li ddeċieda l-Arbitru dwar il-mod kif għandu jiġi kkomputat il-kumpens, huwa ġust u ekwu fil-konfront taż-żewġ partijiet, għaladarba l-mizata qiegħda tiġi mposta mill-emittent tal-polza Providence Life Limited u għalhekk magħrufa, jekk l-ittra tagħha tal-5 ta' Lulju, 2021, tipprospetta tnaqqis għat-tmien snin li ġejjin, u stabbilita minnha stess. Barra minn hekk, u dan qed jingħad b'riferiment għall-verbal tal-Arbitru tal-14 ta' Novembru, 2022, jirriżulta li l-appellati waslu personalment f'arranġament mat-terz emittent fejn ingħataw '*appeasement*' sabiex jagħmel tajjeb għad-danni li huma sofrew. Dan ukoll għandu jittiehed in konsiderazzjoni fis-somma finali li għandha titħallas bħala kumpens lill-imsemmija appellati. Għalhekk jirriżulta li ż-żewġ partijiet huma tassew fil-għama dwar is-somma finali li ser tkun dovuta mingħand l-appellati rispettivament rappreżentanti l-mizata pretiża mingħand Providence Life Limited. Ikun jonqos li t-titolari tal-polza li hija s-socjetà appellanta, tistabilixxi ma' Providence Life Limited dak li qiegħed jintalab bħala mizata, meħud in konsiderazzjoni kull arranġament li tkun waslet għalih mal-appellati. Mingħajr dubju, kif sewwa pprovda l-Arbitru, dawn tal-aħħar imbagħad ikollhom kull opportunità li jipprezentaw is-sottomissjonijiet tagħhom.

40. Għaldaqstant dan l-ewwel aggravju tal-appellati mhux ġustifikat u tiċħdu.

It-tieni aggravju: *[bħala konsegwenza tad-deċiżjoni tal-Arbitru, l-imgħax ma bediex jiddekorri u lanqas jista' jibda jiddekorri]*

41. L-appellati jinsistu permezz tat-tieni aggravju tagħhom, li bil-mod kif iddeċieda l-Arbitru, l-imgħax legali ma bediex jiddekorri, u jista' wkoll lanqas jibda jiddekorri, għaliex l-Arbitru ħalla f'idejn is-soċjetà appellanta sabiex tipprezenta skeda bil-kalkolu tal-kumpens dovut. Jgħidu li ċertament dan ma kienx l-intendiment tal-Arbitru, iżda l-mod kif iddeċieda ser iwassal għal ingustizzja manifesta li għandha tisewwa minn din il-Qorti.

42. Is-soċjetà appellanta tikkontendi li dan l-aggravju huwa wieħed irritwali. Filwaqt li tikkontesta t-talba tal-appellati fir-rigward tal-ħlas tal-ispejjeż, tirrileva li l-prinċipju ġenerali huwa li l-imgħax jibda jiddekorri mid-data tal-likwidazzjoni ta' dak dovut. Tgħid li fil-każ odjern il-kumpens ma kienx wieħed definittiv, u għalhekk ma setgħu jiddekorru l-ebda imgħaxijiet mid-data tad-deċiżjoni appellata.

43. Il-Qorti tgħid li s-soċjetà appellanta għandha raġun. L-imgħaxijiet jistgħu biss jiddekorru mid-data li fiha l-ammont dovut ikun ċert, u fil-każ odjern il-kumpens dovut lill-appellati għadu mhuwiex likwidat. B'hekk l-Arbitru kien korrett fid-deċiżjoni tiegħu.

44. Għaldaqstant jirriżulta li anki dan l-aggravju tal-appellati mhuwiex ġustifikat, u l-Qorti tiċċdu.

Decide

Għar-raġunijiet premissi, il-Qorti tiddeċiedi dwar l-appell tas-soċjetà appellanta u l-appell inċidentali tal-appellati billi tiċċadhom, u dan filwaqt li tikkonferma d-deċiżjoni appellata fl-intier tagħha.

L-ispejjeż marbutin mad-deċiżjoni appellata għandhom jibqgħu kif deċiżi, filwaqt li l-ispejjeż tal-appell principali għandhom ikunu a karigu tas-socjetà appellanta, u dawk tal-appell incidentali għandhom ikunu a karigu tal-appellati.

Moqrija.

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

**Rosemarie Calleja
Deputat Registratur**