

Before the Arbiter for Financial Services

CASE ASF 026/2021

BN

(‘the Complainant’)

vs

Sovereign Pension Services Limited

(C56627)

(‘SPSL’ or ‘the Service Provider’ or ‘the

Retirement Scheme Administrator’)

Sitting of the 14 June 2022

The Arbiter,

Having seen **the Complaint** relating to The Centaurus Retirement Benefit Scheme (‘the Retirement Scheme’ or ‘Scheme’), this being a personal retirement scheme established in the form of a trust and administered by Sovereign Pension Services Limited (‘SPSL’ or ‘the Service Provider’), as the Scheme's Trustee and Retirement Scheme Administrator.

The Complaint

The Complaint relates to the Complainant's claim that unsuitable investments, consisting of high-risk structured notes and non-retail illiquid funds aimed for experienced investors, were allowed within the Retirement Scheme.

Such investments were claimed to be also in conflict with the Complainant’s risk profile.

The Complaint also involves the allegation that the Service Provider failed to adequately report to the Complainant in respect of updates on the losses and issues involving the underlying *Inspirato* investment funds.¹

Background and submissions made by the Complainant

The Complainant explained that his initial risk score was of '*Medium Risk*', and that as at 31.12.2015, his risk score was of '*Low to Medium Risk*'.

He further explained that under the fund manager, Hume Capital Securities (HCS), he was invested in experienced investor funds, namely, the *Inspirato Fund Limited Global Financial Infrastructure Fund*; the *Inspirato LDN Key Cities and Counties Social Infra*; and the *Inspirato Fund Ltd Global Tech Infrastructure*. The remainder of the portfolio consisted of structured notes as at 31.12.2015.

The Complainant noted that Hume Capital Securities (HCS), which was an FCA regulated fund manager, requested the suspension in trading of its shares in March 2015.

The portfolio was then transferred in-specie to *European Wealth* with the *Inspirato funds* held in a monitored account and not within the live bond. It was noted that the structured notes were held within the *OMI bond*.

Further explanations

The Complainant explained that investment in the *Elysian Fuels* is a documented mis-selling activity that was still under investigation by HMRC. It was further noted that from the Financial Statement for the year ended 31 December 2016, it is stated that since August 2015, the investment in the *Elysian Fuels* through *Cell A* of the *Inspirato Fund* shareholding was valued at zero.

The Complainant pointed out that the Financial Statement for the year ended 31 December 2016 also stated that a further director, Keith Bayliss, was appointed to the Board of Directors, with effect from 7 April 2017. It was noted that Keith Bayliss was the Malaysia Director of *Montpelier* as at 12 February 2016.

¹ Page (P.) 4

Montpelier was the IFA broker which provided advice to the Complainant and had submitted the QROPS transfer to Sovereign on the Complainant's behalf.

The Complainant submitted that in February 2016, it was reported that *Montpelier (Malaysia)* was subject to an internal audit of Business Operations and *Greenwood* was then appointed to manage the day-to-day operations of *Montpelier*.

The Complainant further stated that it was later reported, in May 2016, that servicing of *Montpelier (Malaysia)* client accounts was moved to *Three Sixty Financial*.

The Complainant explained that *Montpelier Asia*, seems to have closed in 2016 as there were no updates to its website since 2016, and *Montpelier Private Clients Ltd* was expelled from *HKCIB* membership in 2016.

It was further noted that, according to the Financial Statement for the year ended 31 December 2016, KPMG gave an Adverse Opinion in relation to Cells E, F and G of the *Inspirato funds* having loaned GBP2,560,000 to the *KB Foundation* by way of loan notes. As at end of 31 December 2016, the total amount due from the *KB Foundation* was GBP2,870,972.

The Complainant submitted that since end of 2016, requests were made to *Sovereign* to investigate the status of the NAV for the *Inspirato funds* and to provide updates if and when redemptions would be available (prior to the loan notes having to be repaid in December 2019).

The Complainant noted that the 'most recent' update was on 28.11.2017 involving the forwarding of a letter from *OMI* to the policy owner.

It was further submitted that subsequent requests for updates have gone unanswered (most recently in February and March 2020) when the loan notes went unpaid and the NAV for the *Inspirato funds* was reduced to zero.

The Complainant stated that *OMI/Quilter* forwarded three letters to the policy owner by way of update as follows:

- 07.04.2017 - status of *Inspirato funds*;

- 08.11.2017 – *OMI* confirming frequent contact with the Gibraltar regulator, informed of the fund position and their belief that *KBF* can and will repay the Loan Notes;
- 20.02.2020 – Loan notes were not repaid in December 2019 as scheduled and the NAV for the 3 *Inspirato funds* reduced to zero.

It was further noted that given that *OMI/Quilter's* repeated attempts for over 3 years to obtain clarity and reassurance as regards the status of the investment to no avail, the overdue repayments in respect of cells E, F and G, and the absence of any audited financial statements for 2018 and 2019, *OMI/Quilter* confirmed that a formal complaint was sent to the Appointed Fund Administrator, *Castle Trust*. Failing a satisfactory response, they have also reported this to the *Gibraltar Financial Services Commission (GFSC)*.

The Complainant claimed that no response was received to requests made to the Service Provider as to whether *Sovereign* has made a complaint against any parties and to the financial regulator in the country where those parties are regulated.

Remedy requested

The Complainant requested the following compensation:²

- GBP20,000 on the *Inspirato Global Financial Infrastructure Fund*;
- GBP15,000 on the *Inspirato Global Tech Infrastructure G GBP*; and
- GBP15,000 on the *Inspirato LDN Key Cities & Counties Social Infra*.

Having considered SPSL's reply where it was essentially submitted the following:³

1. That SPSL established the Centaurus Retirement Benefit Scheme ('the Scheme') by a trust deed, dated 13 July 2012 ('the Scheme Deed'). The Scheme is administered by SPSL as the retirement scheme administrator

² P. 4

³ P. 411-414

('RSA') and the RSA is regulated by the Malta Financial Services Authority ('MFSA').

Complainant's Claim - Allowing an unsuitable portfolio of underlying investments to be created within a QROPS retirement scheme. The portfolio comprised of high-risk structured products and illiquid Experienced Investor Funds of a non-retail nature which conflicted with the risk profile of the scheme member

2. That as per the Scheme Deed and the MFSA's pension rules for personal retirement schemes, the members of the Scheme have the right to appoint their own investment adviser and/or investment manager to provide advice in relation to their investment options and indicate the member's preferred investment strategy to the Trustee accordingly. The RSA is entirely independent of the member's appointed investment adviser and, as the member exercises this right and appoints his own investment adviser, the investments made under the Scheme are described as member directed.
3. In his application to join the Scheme ('Application Form'), which was signed by the Member on the 28 March 2013, the Member identified *Montpelier Malaysia Limited* as his appointed investment adviser ('Montpelier').
4. In page 3 of the Application Form, the Member noted the name of Diane Docherty as Financial Adviser. Despite not having an obligation to do so under the Rules for Personal Retirement Schemes which were in force at the time, the RSA, as part of its due diligence process, collected a passport copy as well as a utility bill copy to properly identify the said individual throughout the course of the business, which documentation is held at SPSL's offices, and which can be submitted at the Arbiter's request. Furthermore, updated checks were conducted at a later stage on *Montpelier* and Diane Docherty.
5. The RSA does not and is not authorised to provide investment advice to the members, and therefore any advice is to be provided solely by the investment adviser as nominated by the Member. Along with the application form, the Member had also provided SPSL with a signed letter

confirming his wishes to appoint *Montpelier* and also indemnifying the RSA against any losses, claims, costs, charges, liabilities and actions which may arise from the appointment of *Montpelier* and that he acknowledges that the RSA has no liability for any resultant loss to the value of the pension fund due to the appointment of *Montpelier*.

6. That, as the Member's appointed investment advisers, *Montpelier* were responsible for providing the Member with on-going investment advice and to ensure that the assets held within the portfolio remained suitable for the Member. Despite the fact that instructions were received from the Member's appointed investment adviser, the RSA still followed the operational and administrative procedures in place and reviewed the dealing instructions accordingly. Any dealing instructions received from *Montpelier* were reviewed and assessed to ensure that they were in line with the Scheme's investment guidelines and that they fall within the Member's selected risk profile.
7. That when the dealing instructions to invest in structured notes were received, the RSA checked that the number of structured products in the portfolio remained in line with its internal investment restrictions which were in force at the time, which are noted in the Application Form, page 12. Furthermore, it submitted that the RSA made sure that the portfolio as a whole remained in line with the Member's selected risk score.
8. That, for each request that was received, the structured notes were not considered in isolation (as being of medium risk), but rather they were considered in the context of the overall portfolio, which was held within the Investment Policy precisely for the purpose of providing a balanced portfolio which satisfied the Member's risk profile noted in the Application Form, page 11.
9. That the RSA received an instruction, dated 2 September 2014, from the Member to appoint *Hume Capital Securities* ('Hume') as discretionary fund managers on the *Skandia policy* held on his behalf. The request was to give *Hume* a full discretionary mandate over the Member's investments. This request was processed and as part of the procedures which SPSL had put in place to safeguard its members, a letter was sent

to *Hume* to inform them of the Member's risk profile and provide them with a copy of SPSL's Scheme's investment guidelines which were in force at the time.

10. *Hume* was regulated by the *Financial Conduct Authority* (FCA) and a member of the *London Stock Exchange* as evidenced by the *Hume* client information form.
11. The *Inspirato funds* were purchased by *Hume*, in their capacity of discretionary fund managers. The RSA was not involved in this purchase. SPSL was only made aware of the nature of the funds after the purchase was made by *Hume*.

The Service Provider submitted that when buying into these funds, *Hume* not only went against SPSL's investment guidelines, but they also went against the product restrictions imposed by *Skandia* as was confirmed in a letter sent to SPSL on the 13 January 2017.

As also confirmed in the same letter, since 2017, both the RSA and *Old Mutual International (ex-Skandia)* ('OMI') have been trying to obtain information on the status of the funds but, so far, they were not able to obtain conclusive information on the matter.

Complainant's Claim - Failure to provide updates relating to losses suffered by client and report direct/indirect issues with the underlying portfolio (i.e. Inspirato funds)

12. That SPSL received the first notification about *Hume* going into special administration in March 2015. It subsequently received a letter from OMI which provided options available to the Service Provider since *Hume* could not remain appointed as Custodians and Discretionary Fund Managers on the policy.

This information was forwarded accordingly to the Member by email on the 30 September 2015 - and agreed to appoint *European Investment Management Limited* ('European Wealth') as the new authorised Custodians and Discretionary Fund Managers in September 2015. *European Wealth* were also FCA regulated as confirmed in the Investment Management Agreement.

13. Following the appointment of *European Wealth* in 2016, SPSL has made numerous attempts to obtain updates in relation to the *Inspirato funds* from all parties involved and other investment managers. None of the Service Provider's attempts were successful and no one that SPSL has contacted was able to obtain any information on the status of the *Inspirato funds* either.

SPSL contacted *OMI*, who currently are still actively trying to resolve the issue. However, *OMI* are still not able to provide SPSL with any discernible information on the funds.

European Wealth were also contacted on several occasions but, like *OMI*, they were unable to provide the Service Provider with any further information as they were waiting to receive responses from the liquidators.

14. When the member appointed *Infinity Financial Solutions Limited* ('Infinity') to act as his investment advisers in November 2016, they immediately submitted queries relating to the *Inspirato funds*. The RSA tried to get in touch with all the parties involved once again to try to provide *Infinity* with all the information requested. Every bit of information that the RSA managed to obtain regarding these funds was shared with *Infinity* accordingly.
15. Since the last update received from *OMI* in January 2020, no further updates were received by the RSA regarding the *Inspirato funds* and SPSL was therefore not able to forward any further information to the Member.
16. That as confirmed in SPSL's response letter to the Member's complaint, and to the complaint submitted by *Infinity*, the RSA maintains the stance that the Service Provider should not be held accountable for the losses suffered by the Member following *Hume's* decisions and actions.

As the RSA and trustee, SPSL has acted on the Member's instructions to appoint *Hume* as discretionary fund managers on his plan. As *Hume* had been granted discretionary authority and been informed of the Scheme's investment guidelines, SPSL was not informed or consulted prior to the

purchase and has no control over the performance of the funds. The Service Provider accordingly submitted that responsibility regarding the appropriateness of this purchase rests solely with *Hume*. SPSL therefore suggested to the Complainant that the matter is taken up with *Montpelier* and *Hume* accordingly.

17. SPSL further submitted that it has acted in accordance with its designated functions as abovementioned namely of (a) ensuring that the investments chosen by *Montpelier* were in line with the Scheme's investment restrictions which were in force at the time (b) ensuring that the investments chosen by *Montpelier* and agreed to by the Member were in line with the Member's elected risk profile (c) maintaining suitable records and forwarding on any notification received from relevant third parties to the Member (d) conducting due diligence checks on the appointed adviser and collecting the relevant documentation for verification purposes throughout the course of the relationship (e) following up and attempting to get information on the *Inspirato funds* to keep the Member updated.

The RSA's scheme deed notes in clause 17.1 that the RSA shall be liable to the Members for any loss suffered by them as a result of fraud, wilful default or negligence.

SPSL submitted that as explained above, there has been no such negative conduct on the RSA's part and consequently the RSA shall not be liable for any action, claims or demands arising out of anything done or caused to be done or omitted by it, whether by way of investment or otherwise, in connection with the Scheme.

The Service Provider further submitted that furthermore, clause 17.2 affirms that the trustee, that is, the RSA, shall be indemnified out of the trust fund to the extent permitted against any such actions or claims.

18. SPSL held that no such negligence, dishonesty or lack of diligence or good faith has been established on the part of the RSA and the RSA is entitled to rely on the exculpatory provisions contained in Clause 17 of the Scheme Deed and as acknowledged by the Member in the Application Form, page 13, clause 9.

Having heard the parties and seen all the documents and submissions made,

Considers:

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.⁴

The Complainant

The Complainant, born in March 195X, is of British Nationality and was resident in XXXXXXXXXXXXX at the time of membership into The Centaurus Retirement Benefit Scheme ('the Retirement Scheme' or 'Scheme').⁵

The Application Form for membership into the Scheme dated 28 March 2013 ('the Application Form'), indicates the Complainant's occupation as an '*Oil & Gas - Manager*'.⁶

It was not indicated, nor has it emerged, during the case that the Complainant was a professional investor. It is further noted that during the hearing of 12 April 2021, the Complainant declared *inter alia* that:

'I must say that I am not very astute in regards to financial affairs and investments. It's not my field of expertise'.⁷

Throughout the proceedings of the case, the Service Provider did not indicate either that the Complainant was a professional/experienced investor.

The Complainant can accordingly be regarded as a retail client.

The Complainant's Risk Profile was indicated as of '*Medium Risk*' out of the five risk category options listed in the Application Form of '*Lower Risk*', '*Lower to Medium Risk*', '*Medium Risk*', '*Medium to High Risk*', and '*High Risk*'.⁸

⁴ Cap. 555, Art. 19(3)(b)

⁵ P. 39

⁶ *Ibid.*

⁷ P. 546

⁸ P. 46

The Application Form also indicates that the '*Investment Objective*' selected by the Complainant was as follows:

'I am comfortable with risk and prepared to take a longer term view. This may mean the overall portfolio value fluctuates over the medium term however provides for the potential for growth over the portfolio over the long term'.⁹

As also detailed in the Application Form, the Scheme was to be funded from the transfer of the previous pension fund held by the Complainant with *Equitable Life* for an approximate transfer value of GBP155,770.¹⁰

The Service Provider

SPSL acts as the Retirement Scheme Administrator and Trustee of the Scheme and is licensed by the MFSA as a Retirement Scheme Administrator.¹¹

The Product in respect of which the Complaint is being made

The Scheme is a trust domiciled in Malta registered with the Malta Financial Services Authority ('MFSA'), as a Personal Retirement Plan, originally registered under the Special Funds (Regulation) Act 2002 (Chapter 450 of the Laws of Malta).

The Retirement Scheme was established by a trust deed dated 13 July 2012 by SPSL.¹²

As described by the Service Provider, the Scheme is member-directed where, the Complainant, as a member of the Scheme, appoints his own investment advisor/investment manager in relation to the investment options.¹³

The Application Form for membership into the Retirement Scheme specifies *inter alia* that:

'The investment objective of The Centaurus Retirement Benefit Scheme is to accumulate a trust fund from which to provide benefits in retirement'.¹⁴

⁹ *Ibid.*

¹⁰ P. 43

¹¹ P. 18 & 411

¹² P. 19

¹³ P. 411

¹⁴ P. 46

The Scheme's trust deed specifies *inter alia* that the Scheme was established '*... to provide retirement annuities and other retirement benefits for the purpose and in the manner more particularly set out therein*',¹⁵ and that the Scheme '*... is to be operated as a defined contribution retirement benefit scheme within the provisions of the Retirement Pensions Act ...*'.¹⁶

The objective and purpose of the Scheme are further specified in clause 5.1 of the trust deed which stipulates that:

*'The objective of the Scheme shall be limited to (a) the receipt of contributions from Contributors and the investment thereof in accordance with the investment policy of the Scheme with the aim of maximising return on investments and to provide retirement benefits to the Members and (b) the carrying out of all matters or functions connected to or ancillary to the above. The principal purpose of the Scheme shall be to provide retirement benefits and the Trustee shall hold the Trust Fund and administer each Member's Plan during the Trust Period for that said purpose ...'*¹⁷

The Complainant became a member of the Scheme in 2013 and the assets held in the Complainant's account with the Retirement Scheme were used to acquire the *Executive Redemption Bond* issued by Old Mutual International ('OMI'), Policy no. 21070407, this being a life assurance policy which commenced on the 29 April 2013 ('the OMI Policy') and had a total premium of GBP154,606.03.¹⁸

The policyholder of the OMI Policy was indicated as '*Sovereign Pension Services Limited as trustee of Centaurus RBS Re: BN*'.¹⁹

The premium in the OMI Policy was in turn invested in a portfolio of investment instruments, initially, under the direction of the Investment Advisor, *Montpelier*, and subsequently under *Hume* as Discretionary Investment Manager as further outlined below.

¹⁵ P. 18

¹⁶ P. 19

¹⁷ P. 22

¹⁸ P. 368-370

¹⁹ P. 368

The initial Investment Advisor and subsequent Discretionary Fund Managers

The Application Form in respect of the Scheme's membership, dated March 2013, indicates *Montpelier Malaysia Limited* ('Montpelier') as the financial advisor chosen by the Complainant.²⁰ The appointment of Montpelier as investment adviser is also reflected in the formal letter dated 17 April 2013 signed by the Complainant and addressed to the Service Provider.²¹

Around a year and a half later, the Complainant advised the Service Provider through a letter dated 2 September 2014, that Montpelier was being replaced by *Hume Capital Securities* in the UK, which was to be appointed in the capacity of a Discretionary Fund Manager for his pension.²²

In a letter dated 11 September 2014 sent by the Service Provider to Hume, SPSL noted *inter alia* that '*... the member has nominated your firm to manage the member's trust fund on a discretionary basis ...*'.²³

It is noted that through a Skandia International²⁴ form titled '*Request to transfer to an authorised custodian account*',²⁵ the Service Provider, as trustee, requested and instructed Royal Skandia '*to open an account and transfer the assets within the bond/account*' to Hume.²⁶

Around 6 months after Hume's appointment, a notification dated 20 March 2015 was sent by a *Joint Special Administrator* notifying *inter alia* the Complainant that by order of the Court on 16 March 2015, *Joint Special Administrators* (which are engaged in respect of a failed investment firm) were appointed in respect of Hume.²⁷

²⁰ P. 39

²¹ P. 58

²² P. 60

²³ P. 70

²⁴ Skandia International/Royal Skandia rebranded to Old Mutual International

<https://www.internationalinvestment.net/internationalinvestment/news/3716610/skandia-international-mutual-international>

²⁵ P. 65

²⁶ P. 66

²⁷ P. 76

The Service Provider contacted the Complainant, by way of an email dated 30 September 2015, on the options on how to proceed once the assets of Hume were to be released by the Joint Special Administrators.²⁸

Subsequent to this, the Complainant signed the forms for the appointment of *European Investment Management Limited*, as the new discretionary investment manager and custodian in respect of his underlying investment portfolio.²⁹

Applicable Legal Framework

The Retirement Scheme and SPSL are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta). The Retirement Pensions Act ('RPA') was published in August 2011 and came into force on the 1 January 2015.³⁰

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted a licence by the MFSA under the RPA.

The Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider, as per Article 1(2) and

²⁸ P. 89

²⁹ P. 91-98

³⁰ Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - <https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/>

Article 43(6)(c) of the TTA, given that SPSL also acted as the Trustee of the Retirement Scheme.³¹

Further Considerations

Main allegations

The Complaint involves two main allegations as follows:

- (i) **Claim of unsuitable investments** - where it was alleged by the Complainant that high-risk structured notes and non-retail illiquid funds aimed for experienced investors were allowed within the Scheme in conflict with the Complainant's risk profile.
- (ii) **Claim of inadequate updates** - where it was alleged by the Complainant that SPSL failed to adequately provide him with updates on the losses and issues involving the *Inspirato* funds.

It is noted that in his Complaint, the Complainant focused on the *Inspirato* funds and in fact claimed compensation on these funds only.

The Arbiter shall accordingly focus his decision on the three *Inspirato* funds in respect of which the Complainant requested reimbursement.

The Arbiter shall consider each alleged failure taking into consideration the responsibilities of the Service Provider.

Obligations & Responsibilities of the Service Provider – Applicable under the SFA, RPA and directives/rules issued thereunder

SPSL is subject to the duties, functions and responsibilities applicable as a Retirement Scheme Administrator and Trustee of the Scheme.

The obligations of SPSL as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the applicable conditions stipulated in the Standard Operational Conditions of the '*Directives for Occupational Retirement*

³¹ Article 1(2) of the TTA provides that '*The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A*'. Article 43(6)(c) in turn provides that '*A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes ...*'.

Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002 ('the Directives') as applied to personal retirement schemes.

Following the repeal of the SFA and eventual registration under the RPA, SPSL was subject to the provisions relating to the services of a retirement scheme administrator in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the RPA. As a Retirement Scheme Administrator, SPSL was subject to the conditions outlined in the '*Pension Rules for Service Providers issued under the Retirement Pensions Act*' ('the Pension Rules for Service Providers') and the '*Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' ('the Pension Rules for Personal Retirement Schemes').

One key duty of the Retirement Scheme Administrator emerging from the primary legislation itself is the duty to '*act in the best interests of the scheme*' as outlined in Article 19(2) of the SFA and Article 13(1) of the RPA.

From the various general conduct of business rules/standard licence conditions applicable to SPSL in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively, it is pertinent to note the following general principles:³²

- a) Rule 2.6.2 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to SPSL as a Scheme Administrator under the SFA, provided that:

'The Scheme Administrator shall act with due skill, care and diligence – in the best interests of the Beneficiaries ...'

The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, and which applied to SPSL as a Scheme Administrator under the RPA, provided that:

³² Emphasis added by the Arbitrator

'The Service Provider shall act with due skill, care and diligence ...'.

- b) Rule 2.7.1 of Part B.2.7 titled *'Conduct of Business Rules related to the Scheme's Assets'*, of the Directives issued under the SFA, which applied to SPSL as a Scheme Administrator under the SFA, provided that:

'The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries ...'.

The same principle continued to apply under the rules issued under the RPA. Standard Condition 3.1.2, of Part B.3 titled *'Conditions relating to the investments of the Scheme'* of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provided that:

'The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document'.

- c) Rule 2.6.4 of Part B.2.6 titled *'General Conduct of Business Rules applicable to the Scheme Administrator'* of the Directives issued under the SFA, which applied to SPSL as a Scheme Administrator under the SFA provided that:

'The Scheme Administrator shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative and financial procedures and controls in respect of its own business and the Scheme to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed ...'.

The same principle continued to apply under the rules issued under the RPA. Standard Condition 4.1.7, Part B.4.1 titled *'Conduct of Business Rules'* of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, provided that:

'The Service Provider shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative and financial procedures and controls in respect of its own business and the

Scheme or Retirement Fund, as applicable, to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed.'

Standard Condition 1.2.2, Part B.1.2 titled 'Operation of the Scheme, of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, also required that:

'The Scheme shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative and financial procedures and controls to ensure compliance with all regulatory requirements'.

Obligations & Responsibilities of the Service Provider - Trustee and Fiduciary Obligations

As highlighted in the section titled 'The Legal Framework' above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta, is also relevant for SPSL considering its capacity as Trustee of the Scheme.

Article 21(1) of the TTA which deals with the 'Duties of trustees', stipulates a crucial aspect, that of the **bonus paterfamilias**, which applies to SPSL.

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, SPSL 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'*.³³

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'***.³⁴

The fiduciary and trustee obligations were also highlighted by the MFSA in a recent publication 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'***.³⁵

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.

Other obligation & responsibility of the Service Provider

Another key obligation and responsibility, which shall be considered further on in this decision, **relates to the oversight and monitoring obligation of SPSL** in its role of Retirement Scheme Administrator and Trustee of the Scheme.

³³ Ganado Max (Editor), *'An Introduction to Maltese Financial Services Law'* (Allied Publications 2009) p. 174.

³⁴ *Op. cit.* p. 178

³⁵ Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 December 2017) p. 9.

The said obligations and responsibilities are considered to be crucial aspects which should have guided SPSL in its actions and which shall accordingly be considered in this decision.

The disputed investments - Inspirato Funds

The Complainant sought compensation for the *Inspirato* Funds and these funds can accordingly be treated as the disputed investments for the purposes of this Complaint.

As confirmed by the Service Provider, these investments were constituted at the time when Hume acted as a discretionary investment manager between 2014 and 2015.³⁶

The Sovereign Valuation Statement as at 31 December 2015, indicates the following *Inspirato* fund investments, these being all cells of the *Inspirato Fund No. 2 PCC Limited*, an open-ended collective investment scheme established in Gibraltar:^{37, 38}

- an investment of GBP20,000 into (Cell E) *Inspirato Fund Limited Global Financial Infrastructure Fund* (ISIN GI000A1181D1);
- an investment of GBP15,000 into (Cell F) *Inspirato LDN Key Cities & Counties Social Infra* (ISIN GI000A12G093);
- an investment GBP15,000 into (Cell G) *Inspirato Fund Ltd Global Tech Infrastructure G* (ISIN GI000A1181E9).

The *Inspirato* fund investments accordingly constituted around 32% of the Complainant's total premium.³⁹

The percentage unrealised gain/loss of the said *Inspirato* investments, as reflected in the Valuation Statements issued by Sovereign, OMI or Quilter,⁴⁰

³⁶ P. 412

³⁷ P. 311 & 327

³⁸ P. 400

³⁹ GBP50,000 of the total premium of GBP154,606

⁴⁰ Old Mutual International was rebranded as Quilter International in 2020 - P. 391

which were presented during the case, is summarised in the table below: ^{41, 42, 43, 44, 45, 46}

| | <i>Sovereign Valuation Statement as at 31/12/2015</i> | <i>Sovereign Valuation Statement as at 31/12/2016</i> | <i>OMI Valuation Statement as at 20/01/2018</i> | <i>OMI Valuation Statement as at 7/12/2019</i> | <i>OMI Valuation Statement as at 19/01/2020</i> | <i>Quilter Valuation Statement as at 13/01/2021</i> |
|--|---|---|---|--|---|---|
| <i>Inspirato Fund Limited Global Financial Infrastructure Fund</i> | -0.51% | -7.9634% | -7.89% | -3.14% | -3.14% | -100% |
| <i>Inspirato LDN Key Cities & Counties Social Infra</i> | -0.63% | -7.6944% | -7.45% | -2.47% | -2.47% | -100% |
| <i>Inspirato Fund Ltd Global Tech Infrastructure G</i> | -0.51% | -10.6623% | -11.21% | -7.15% | -7.15% | -100% |

The Arbiter notes that in one of the letters sent in the year 2017 by OMI in respect of the Inspirato Funds, it was pointed out that:

'... Investment into the Inspirato Fund was subject to an initial 2-year lock-in, which expired in December 2016. Since that time, neither the Fund or their

⁴¹ P. 403

⁴² P. 400

⁴³ P. 396

⁴⁴ P. 371

⁴⁵ P. 387

⁴⁶ P. 379

appointed Administrator have been able to explain how they intend to process or satisfy any redemption requests'.⁴⁷

The Arbiter further notes that as detailed in a letter dated 13 January 2017 issued by OMI to Sovereign Trust International Ltd, OMI noted *inter alia* that:

'as previously advised ... the purchase of [the Inspirato Funds] by your investment adviser was contrary to our product restrictions and that we would be conducting further investigations'.⁴⁸

In the said letter, OMI further outlined its understanding that the investments in the Inspirato funds would be reversed and *'that these reversals will result in a full return of your investment amount in the Fund(s)'.⁴⁹*

Hopes of a potential positive resolution on the repayment of the underlying assets of the funds also emerged from a letter issued by Inspirato Fund No. 2 PCC Ltd dated 8 November 2017.⁵⁰

It is noted that a positive resolution of the said matters however did not occur given that in 2020 a decision was taken by OMI, as outlined in its letter dated 17 January 2020, to reconsider the NAV of the Inspirato funds and *'reduce this to zero'.⁵¹*

In its letter of 17 January 2020, OMI explained the following in respect of the Inspirato Fund:

'Given our repeated attempts to obtain clarity and reassurance as regards the status of this investment to no avail, the overdue repayments in respect of cells E, F and G and the absence of any audited financial statements ... we have now reconsidered the Net Asset Value of the Fund ... and a decision has been made to reduce this to zero ...'.

Hence, it is noted that since 2020, the Complainant became aware of the actual extent of losses on the disputed funds.

⁴⁷ P. 143

⁴⁸ P. 140

⁴⁹ *Ibid.*

⁵⁰ P. 136

⁵¹ P. 100

The Arbiter further notes that the *Inspirato* funds are under administration,⁵² and **that the latest Quilter’s Valuation Statement presented as at 13 January 2021, reflects a full reduction in value in respect of the *Inspirato* funds.**

Appropriateness of the Inspirato Funds

During the proceedings of the case, the Complainant presented a copy of the respective Private Placement Memorandum for the indicated three *Inspirato* funds⁵³ – Cell E, *The Global Financial Infrastructure Fund*;⁵⁴ Cell F, *The London, Key Cities and Counties Social Infrastructure Fund*;⁵⁵ and Cell G, *The Global Technology Infrastructure Fund*.⁵⁶

According to the respective Private Placement Memorandum, it clearly and instantly emerges:

- that the *Inspirato Fund No. 2 PCC Limited* was a company established in Gibraltar as an ‘*Experienced Investor Fund*’, where ‘*Requirements which may be deemed necessary for the protection of retail or non-Experienced Investors, do not apply to Experienced Investor Funds*’;⁵⁷
- that ‘*Investment in Experienced Investor Funds may involve special risks that could lead to a loss of all or a substantial portion of such investment...*’;⁵⁸
- that the shares in the respective cells were only available to participants who satisfied the meaning of ‘*Experienced Investor*’ as defined in the same documents;⁵⁹
- that the minimum permitted subscriptions in the respective funds was Euro100,000 or a lesser amount at the discretion of the Directors.

⁵² <https://www.fsc.gi/regulated-entity/inspirato-fund-no-2-pcc-limited-in-administration-16147>

⁵³ P. 145-366

⁵⁴ P. 145

⁵⁵ P. 254

⁵⁶ P. 200

⁵⁷ P. 311

⁵⁸ *Ibid.*

⁵⁹ P. 316

The illiquid nature of the *Inspirato* funds also emerges from the various disclosure and warning statements outlined in the Private Placement Memorandum of the funds, including in the following statements, that:

- *'Subscribers should bear in mind the illiquid nature of the Fund and the fact that an investment in the Fund is generally intended to be a medium to long term investment'*; ⁶⁰
- in the case of Cell E, F and G:
'The Preference Shares in the Cell are only redeemable at the absolute discretion of the Directors. Applicants for [Cell E, F and G] Preference Shares in the Company should bear in mind that an investment in the Fund is intended to be a long term investment and that the Fund invests in highly illiquid assets ... For each [Cell E, F and G] Preference Shareholder there is a hard lock up period of 2 years'.⁶¹

Accordingly, it emerges that the said *Inspirato* fund investments were not reflective of the Complainant's profile and attitude to risk and did not adhere with the applicable investment principles such as, for example, with the requirement that *'investments must be liquid'*.⁶²

The Arbitrator further notes that the Service Provider in fact did not dispute that the *Inspirato* fund investments were not appropriate for the Complainant's Scheme.

During the proceedings of the case, the Service Provider itself acknowledged the lack of adherence of these investments with the Scheme's own investment guidelines.

In its reply to the complaint, **SPSL declared that:**

'When buying into these funds, Hume not only went against our investment guidelines, but they also went against the product restrictions imposed by Skandia ...'⁶³

⁶⁰ P. 349

⁶¹ P. 162, 217,

⁶² P. 474

⁶³ P. 412 – Emphasis added by the Arbitrator

This was again confirmed in the final submissions, when SPSL admitted that:

*'Whilst SPSL is aware of its responsibilities, it cannot possibly be held responsible for **an investment manager who, having been appropriately regulated at the time, ignored the investment guidelines and restrictions referred to it**'.*⁶⁴

Other observations and Conclusion

Oversight and monitoring function

As noted above, one key duty relevant to the case in question relates to **the Service Provider's oversight and monitoring function in respect of the Scheme's underlying investments.**

The Arbiter notes that in its submissions, the Service Provider seems to suggest that it had a diminished role and/or less responsibility in respect of the disputed *Inspirato* funds given that the said investments were purchased by a discretionary fund manager. SPSL seems to also suggest that it satisfied the oversight and monitoring obligation by just notifying the licensed discretionary investment manager of the Complainant's profile, risk tolerance and the applicable investment guidelines/restrictions, as per its letter of 11 September 2014.⁶⁵

In its reply to the OAFS, SPSL pointed out *inter alia* that:⁶⁶

'The request was to give Hume a full discretionary mandate over the Member's investments. This request was processed, and as part of the procedures which we have put in place to safeguard our members, a letter was sent to Hume ... to inform them of the Member's risk profile and provide them with a copy of our Scheme's investment guidelines ...

...

The Inspirato funds were purchased by Hume, in their capacity of discretionary fund managers, the RSA was not involved in this purchase. SPSL was only made aware of the nature of the funds after the purchase was made by Hume ...

⁶⁴ P. 566 – Emphasis added by the Arbiter

⁶⁵ P. 473

⁶⁶ P. 412-413

...

As Hume had been granted discretionary authority and been informed of the Scheme's investment guidelines, SPSL was not informed or consulted prior to the purchase and has no control over the performance of the funds. Responsibility regarding the appropriateness of this purchase rests solely with Hume'.

It is also noted that during the hearing of 18 May 2021, an official of SPSL testified *inter alia* that:⁶⁷

'Once [Hume] were appointed, we wrote to Hume with the investment guidelines and risk profile of the member and, basically, Hume decided to invest the funds in the Inspirato funds which were regulated in Gibraltar ... And the Trustee provided annual valuations to the member based on data and information provided by Old Mutual.

So, in summary, these decisions were made by UK-regulated and discretionary manager, Hume Capital. The process at the moment as advised by the MFSA is that that's the path of trajectory they want to the Trustees to follow. So, I believe, there are several layers of regulation and the Trustees cannot be held responsible for the ultimate performance of the Inspirato funds'.

SPSL further pointed out in its final submissions that:

*'Hume Capital was appointed as an investment manager and not as an investment adviser which is an important distinction. Whilst the dealing instructions of an investment adviser would be forwarded on to SPSL for processing, an investment manager is given the authority to manage the portfolio itself without recourse to SPSL ...'.*⁶⁸

Firstly, the Arbiter does not consider that the Service Provider's oversight and monitoring function in respect of the underlying investments was in some way diminished by virtue of the investment portfolio being under a discretionary mandate.

Furthermore, the Arbiter cannot consider that the actions taken by SPSL, in seemingly limiting itself to just providing a copy of the investment guidelines

⁶⁷ P. 548-549

⁶⁸ P. 566

and restrictions to the regulated investment manager, were reasonably and justifiably sufficient to safeguard the Complainant's pension and ensure compliance with the applicable investment conditions.

The role of SPSL as trustee of the Retirement Scheme and its monitoring obligation on investments did not stop, or was just limited, to a notification of the relevant investment guidelines and restrictions to the investment manager.

Notwithstanding the investment management mandate, SPSL still had the obligation and responsibility of overlooking and monitoring the compliance of the investment portfolio with the applicable investment guidelines and restrictions. The fact that the Complainant gave discretion to the investment manager to take investment decisions without referring to him, does not waive, change or provide a reason for SPSL to abdicate from its obligation and responsibility of itself overlooking and monitoring the investment portfolio as a party independent from the investment management function.

This is considered so even when taking into consideration a number of factors, including the following:

- a) *Disclosure in SPSL's letter in respect of Hume's appointment as discretionary manager*

It is noted that in the letter dated 11 September 2014 sent by the Service Provider to Hume, SPSL itself stated that:

'As trustee we must ensure that the member's trust fund remains liquid and diversified and we must comply with any investment restrictions imposed by the Inland Revenue Commissioner, in the Scheme trust deed or in any code of practice or guidelines affecting the Scheme'.⁶⁹

The trustee's obligation to ensure that the investment portfolio was in compliance with the principles and applicable investment restrictions was clear.

⁶⁹ P. 70 – Emphasis added by the Arbitrator

Such obligation cannot reasonably and justifiably be deemed to be satisfied by just providing the list of restrictions and investment guidelines to the regulated investment manager. SPSL's duty in ensuring compliance with the applicable investment guidelines and restrictions clearly went beyond that.

b) *Disclosure in the Scheme's Application Form*

As outlined in the '*Investment Objectives*' section of the Scheme's Application Form for Membership:

'Investment restrictions apply ... and under applicable regulations in Malta the trustee must retain ultimate discretion on investment decisions'.⁷⁰

Such a statement has to be seen and considered in the context of SPSL's monitoring and oversight obligations with respect to investment decisions. There is in fact no qualification or disclaimer in the said form, or in any other documentation for the matter either, that this was not applicable in the case of the appointment of a discretionary investment manager.

c) *Disclosure in the Scheme's Trust Deed*

Clause 7.1 of Section 7 titled '*Investment Objective, Strategy and Risk*' of the Scheme's Trust Deed stipulates that:

*'The investment objective for each Member's Plan shall be to accumulate a Trust Fund from which to provide retirement annuities and other benefits. Each Member shall be entitled to nominate an investment adviser and the Member or his nominated adviser shall be entitled to indicate the preferred investment strategy for the Member's Plan for the Trustee's consideration. **The Trustee may have regard to the Member's wishes but shall not be bound by them and shall retain ultimate discretion and responsibility for investments of each Member's Plan in order to ensure compliance with the investment objective of the Scheme and any applicable investment restrictions**'.⁷¹*

⁷⁰ P. 46 - Emphasis added by the Arbiter

⁷¹ P. 23 - Emphasis added by the Arbiter

It is further noted that **in terms of clause 7.3 of the trust deed, SPSL had the duty to ensure that investments were done in line with certain principles to safeguard his pension.**

The said clause provided the following:⁷²

'7.3 Notwithstanding the generality of clause 7.2 the Trustee shall ensure that the Trust Fund shall be:-

7.3.1 invested in the best interests of the Members;

7.3.2 invested in such a manner as to ensure the security, quality, liquidity and profitability of the Trust Fund as a whole;

7.3.3 properly diversified in such a way as to avoid accumulations of risk in the Trust Fund as a whole'.⁷³

The trust deed does not contain any qualification or any other provisions requiring anything different in the case of a discretionary investment manager.

It is further noted that with respect to the reference to the investment adviser in the said clause 7.1 above, the term 'investment adviser' was not defined in the trust deed. In such absence, such term could be considered to refer either to a *non-discretionary* investment adviser or a *discretionary* investment adviser.

- d) *Rules under SFA/RPA* – With respect to the Rules issued under the MFSA, the Arbiter notes that Condition 2.7.2 of the section titled '*Conduct of Business Rules related to the Scheme's Assets*' of the Directives, provided that:

'The Scheme Administrator shall ensure that the assets of a Scheme are:

- a) invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole;**

⁷² P. 24

⁷³ Emphasis added by the Arbiter

b) properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole. ...'⁷⁴

It is further noted that Rule 9.8 of part B.9, titled *Supplementary Conditions in the case of entirely Member Directed Schemes*, of the *Pension Rules for Personal Retirement Schemes*, version issued in January 2015, provided that:

'Where in terms of SLC 9.2(b) an investment manager is appointed on a discretionary basis over a member's investments, the appointment of a custodian by the investment manager is permissible, provided that the Retirement Scheme Administrator has effective access to information relating to the member's investments held by the custodian, so that the Retirement Scheme Administrator can effectively monitor the Scheme in aggregate and as a whole and retain overall control.'⁷⁵

Rule 1.3.3 (s), in the section of Part B.1.3, titled *'Duties of Retirement Scheme Administrators'* of the *'Pension Rules for Service Providers'*, version issued in January 2015, also provided as follows:

'The Scheme Administrator shall perform all duties associated with the ordinary or day-to-day operations of the Scheme, including but not limited to the following:

...

(s) supervise the operation of the Scheme to ensure that the Investment Manager, where appointed, complies with the investment objectives, restrictions and borrowing powers of the Scheme; ...'⁷⁶

Hence, the monitoring obligations by the Scheme Administrator with respect to the investments of the Scheme were duly outlined as per the said rules.

⁷⁴ Emphasis added by the Arbitrator

⁷⁵ Emphasis added by the Arbitrator

⁷⁶ Emphasis added by the Arbitrator

The said rules further corroborate the Service Provider duties with respect to the oversight and monitoring function on investments as explained above.

c) *MFSA's Position*

The Arbiter further notes that as emerging in a publicly available consultation document issued by the MFSA,⁷⁷ **the MFSA regarded the oversight function of the Retirement Scheme Administrator as an important obligation where it emphasised in recent years the said role.**

It is noted that during a consultation exercise undertaken by the MFSA in 2018, the MFSA indicated the feedback from industry respondents and the MARSP.⁷⁸

The latter had submitted that:

*'... where a discretionary investment manager is appointed at member-level, such manager does not give advice but manages the member's account on a discretionary basis under an agreed mandate. In such a case, as long as such manager remains within the parameters given to him by the RSA, the RSA would not be consulted on each transaction and with regard to any changes in the investments. Therefore, the RSA would only obtain confirmation from that manager that the investment portfolio of the member will be managed in line with the client's risk profile and the investment restrictions and would not have to approve all investments'.*⁷⁹

The MFSA was however not in agreement with such view and did not distinguish between the monitoring functions applicable in respect of a discretionary investment manager and an investment advisor.

⁷⁷ MFSA's Consultation Document dated 16 November 2018 titled '*Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions act*' (MFSA Ref. 15/2018) - <https://www.mfsa.mt/publications/policy-and-guidelines/consultations/page/5/>

⁷⁸ Malta Association of Retirement Scheme Practitioners

⁷⁹ Pg. 6/7 of the MFSA's Consultation Document dated 16 November 2018 titled '*Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions act*' (MFSA Ref. 15/2018) - <https://www.mfsa.mt/publications/policy-and-guidelines/consultations/page/5/>

In reply to the industry feedback quoted above, the MFSA had indeed explained that it:

'... is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme.'^{80, 81}

The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment advisor and, or investment manager appointed for the member account.

In one of its consultation documents, the MFSA stated that:

*'In so far as compliance with the diversification requirement at member-level is concerned, the MFSA is of the view that the investment advisor and, or investment manager appointed at the level of the member account, are to ensure that diversification requirement is satisfied prior to providing the advice. However, the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments. **The RSA should give his agreement prior to the investments being executed by the investment manager.** Therefore, the MFSA would like to emphasise that the RSA is responsible to ensure*

⁸⁰ *Ibid.*

⁸¹ Emphasis added by the Arbiter

that the diversification requirement in relation to the member account is complied with'.^{82, 83}

Despite that the above-quoted MFSA statements were made in 2018, an oversight function applied during the period relating to the case in question.

d) *Analogy with a regulated retail fund structure*

Moreover, the Arbiter considers that there was no reasonable justification as to why the Service Provider was not in a position to adequately undertake the monitoring and oversight obligations with respect to the underlying investments in the case of a discretionary investment manager.

If one had to do, for example, an analogy with the monitoring arrangements applicable in other regulated products, such as in a retail collective investment scheme structure, one would find similar safeguard mechanisms to protect the member's investments.

Such safeguards would involve the appointment of a party (such as the custodian) independent from the discretionary investment manager, with such independent party being entrusted with the oversight function on the discretionary manager to ensure *inter alia* that the investment decisions taken by the manager are in compliance with the investment restrictions.

Hence, there is no reasonable excuse as to why the trustee could not properly undertake the oversight and monitoring function on the underlying investments under a discretionary investment management mandate.

e) *No proof or evidence emerging of no, or lower, oversight/monitoring obligations in case of discretionary managers*

⁸² Pg. 9 of MFSA's Consultation Document dated 16 November 2018 titled '*Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' (MFSA Ref. 15/2018).

⁸³ Emphasis added by the Arbiter

SPSL ultimately produced no evidence that there were no, or fewer, oversight and monitoring obligations on its part in the case where a discretionary investment manager is appointed by the member instead of an investment adviser.

In fact, no provisions excluding or reducing the responsibility of the Trustee of the Scheme have been referred to by the Service Provider or even emerged either from the Scheme's documentation or applicable rules in the case of a discretionary investment manager being appointed to manage the member's portfolio.

The Arbiter considers that the Service Provider cannot accordingly try to eliminate, reduce or dilute its responsibilities as Trustee and RSA of the Scheme by highlighting that the portfolio was under a discretionary mandate and/or by being managed on a discretionary basis by a regulated entity.

The Service Provider cannot abdicate from its important monitoring function through the mere provision of the investment guidelines/restrictions to the discretionary manager. The Service Provider's submissions to this effect would rather indicate a certain lack of understanding or appreciation of the key functions of the Trustee and RSA to safeguard the member's Retirement Scheme and of the applicable rules.

It has not emerged, during this case, that SPSL has indeed supervised the operations of the discretionary investment manager adequately to ensure that the asset manager complied with the investment guidelines and restrictions.

Lastly, the Arbiter considers that the Service Provider's own admission that it lacked control over the investments made by the discretionary investment manager; that there was no recourse to SPSL with respect to investments; and that the investment decisions undertaken were ultimately not in line with its own investment guidelines/restrictions, all indicate the lack of adequate measures taken by the Service Provider to safeguard the Complainant's Scheme.

The Arbiter accordingly considers that the Service Provider did not adequately fulfil its obligations when it did not monitor and overlook the investment decisions made by the investment manager to ensure that the portfolio was

being managed in the best interests of the Complainant, and in line with the applicable investment requirements as it was duty bound to do.

Other aspects raised

As to the Complainant's claim that SPSL failed to adequately provide him with updates on the losses and issues involving the *Inspirato* funds, the Arbiter considers that, based on the documentation and submissions produced during the case, there is no sufficient and adequate basis to determine such claim, also, in view of the various official communications from OMI produced by the Complainant himself during the proceedings of the case.

The Arbiter, however, cannot help but notice that it did not emerge either that the Service Provider had taken himself any prompt remedial action for the investment manager to reverse and make good for the inadequate investments made.

Nor has it emerged that the Trustee retained or had a right of action against the discretionary investment manager for breach of the manager's duties in order to ensure that the Complainant's pension is safeguarded.

Causal link and Synopsis of main aspects

In the particular circumstances of this case, the Arbiter considers that there is sufficient and convincing evidence of deficiencies on the part of SPSL in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme in safeguarding the Complainant's retirement scheme as amply highlighted above which, at the very least, impinge on the diligence it was required and reasonably expected to exercise in such roles.

It is also evidently clear that such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Retirement Scheme through the *Inspirato* fund investments.

Had SPSL undertaken its role adequately and as duly expected from it in terms of the obligations resulting from the law, regulations and rules stipulated thereunder and the conditions to which it was subject to, such losses would have been avoided or mitigated accordingly.

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with SPSL being one of such parties.

In the particular circumstances of the case, the losses experienced on the Retirement Scheme through the *Inspirato* funds are ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which SPSL was duty bound and reasonably in a position to prevent.

Final remarks

The role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice/management to the Complainant, **the Retirement Scheme Administrator had, however, clear duties to check and ensure that the underlying investments were *inter alia* in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme. The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.**

The Complainant ultimately relied on SPSL as the Trustee and Retirement Scheme Administrator of the Scheme, as well as other parties within the Scheme's structure, to achieve the scope for which the pension arrangement was undertaken, that is, to provide for retirement benefits, reasonably expect a return to safeguard his pension and for his Retirement Scheme being operated and administered in line with the applicable requirements.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly, when it came to the oversight functions

with respect to the Scheme and the *Inspirato* fund investments as explained above.

The Arbiter also considers that the Service Provider did not meet the *'reasonable and legitimate expectations'*⁸⁴ of the Complainant who had placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

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 and is accepting it in so far as it is compatible with this decision.

Cognisance needs to be taken however of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment manager to the Member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the losses incurred in respect of the *Inspirato* funds.

Compensation

Being mindful of the key role of Sovereign Pension Services Limited as Trustee and Retirement Scheme Administrator of the Centaurus Retirement Benefit Scheme, and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and, in a way, contributed in part to the losses experienced on the disputed funds, the Arbiter concludes that the Complainant should be compensated by Sovereign Pension Services Limited in respect of the said *Inspirato* fund investments.

Considering the oversight and monitoring obligations that the Service Provider had, including its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Sovereign Pension

⁸⁴ Cap. 555, Article 19(3)(c)

Services Limited to be held responsible for seventy per cent of the *Inspirato* fund investments. This is calculated to amount to GBP35,000.⁸⁵

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter accordingly orders Sovereign Pension Services Limited to pay the sum of thirty-five thousand Sterling (GBP35,000) as compensation to the Complainant.

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

The costs of these proceedings are to be borne by the Service Provider.

**Dr Reno Borg
Arbiter for Financial Services**

⁸⁵ 70% of GBP50,000 (GBP20,000 into Cell E, GBP15,000 into Cell F and GBP15,000 into Cell G of the *Inspirato* Funds). It is noted that as disclosed in the Offering Memorandum of Cells E, F and G of the *Inspirato* Funds, no dividend payments were anticipated on such funds (P. 162, 217 & 272).