

Before the Arbiter for Financial Services

Case ASF 019/2022

BY ('the Complainant')

vs

MC Trustees (Malta) Limited

(C 48412)

('MCT' or 'the Service Provider')

Sitting of the 15 September 2023

The Arbiter,

Having seen **the Complaint** relating to *The MCT Malta Private Retirement Scheme* ('the Retirement Scheme' or 'Scheme'), this being a personal retirement scheme established in the form of a trust and administered by MC Trustees (Malta) Limited ('MCT' or 'the Service Provider'), as the Scheme's Trustee and Retirement Scheme Administrator.

The Complaint

The Complaint relates to the claim that material losses were sustained by the Complainant on his Retirement Scheme due to the alleged negligence of the Service Provider and other parties. In essence, the Complainant claimed that investment transactions were undertaken within his Retirement Scheme which were of high risk and not in line with his risk attitude. He further claimed that the transactions were made without his approval or awareness and were not made in his interest but only to earn commissions. An overpayment of fees was also claimed to have occurred within his Retirement Scheme.

Background and submissions made by the Complainant¹

The Complainant explained that in 2013 he was advised by a financial advisor in Cyprus to move his pension held with *Legal and General*. He explained that a lot of paperwork was involved regarding such a move, including, a risk statement that confirmed that he chose a low attitude to risk.

When the Complainant eventually noticed that the value of his new Scheme had dropped significantly, he queried this with MCT and his financial advisor but claimed that he received no firm reason for the drop in value.

Subsequently, the Complainant cancelled the services of the Cyprus financial advisor and advised MCT that no further commission should be paid from his pension plan.

The Complainant explained that he requested help from MCT as to how he could stop his pension from going into free fall given the poor investments. MCT informed him that they could not comment or advise him regarding his investments. He submitted that in 2015, MCT however had chosen to agree to his investments made with *Cornhill*.

He explained that his pension plan was invested with *Cornhill* management and the professional fund manager was *Delubec Bank Paris*. He wrote emails and tried to contact the fund manager at *Delubec Bank* but received no reply or feedback. The Complainant alleged that the situation with the said fund manager was questionable and should be investigated.

The Complainant also explained that in April 2021, he started closing his portfolio and asked for a breakdown of figures and investments. It was at that time that he could see some figures which did not seem correct. He first found an overpayment by MCT of management fees to *Cornhill* and, also, some '*interesting transactions*' that occurred in 2015.²

The Complainant claimed that his investments chosen by *Cornhill* were of a very high-risk nature not reflective of his risk profile that he had signed at the opening

¹ Page (P.) 2-77

² P. 3

of his pension plan. He asked MCT to provide the reasons for such transactions and MCT subsequently opened an investigation into *Cornhill*.

The Complainant noted that in mid-2021, he tried to get to the bottom of the matter and find out what his investments were. He claimed that he found a policy called '*Lombard 82*' but could not find where this was registered or how it worked until he was sent a document which he believed had been just drawn up.

He submitted, with reference to the *Lombard 82* structure, that *Cornhill* hid behind a management company called *Xantis Sa* which seemed to be run by a director of *Cornhill*. The Complainant claimed that the *Lombard 82* structure appeared to provide financial aid/cash flow to *Cornhill*. He claimed that the set-up was nothing short of a Ponzi Scheme. He also pointed out that redemptions on his investments were stopped and were being deferred.

The Complainant claimed that MCT appeared to know nothing about the structure in which he had his funds invested into until he made them aware of such matter.

He explained that he also found another investment within his portfolio, the *India fund*, that was high risk, and which was also having some legal issues. The Complainant alleged that *Cornhill* kept advising that the funds would be paid out without, however, this ever occurring.

The Complainant explained that *Cornhill* continued to take their fees despite the fact that he was quickly losing money. He claimed that *Cornhill* had no concern about his situation at all.

He further explained that he eventually managed to get through to a director of *Cornhill* and requested records of his account. This occurred after he received a payment from MCT of approximately GBP 38,000. Such payment was made with no explanation of where such money came from until he requested a breakdown. He claimed that it was at this point that he became aware of '*what a mess this whole situation was*'.³

³ *Ibid.*

The Complainant further claimed that *Cornhill* informed him that no records could be found prior to 2015. He submitted that this was questionable given that *Cornhill* has a legal obligation to keep all records of his account.

The Complainant explained that he started questioning MCT regarding their responsibility as trustee of his Scheme but not much progress was made.

He noted that during the dispute over his assets, there was no commitment as to when he would receive his full investment back or what he would receive. The Complainant claimed that his investment portfolio however had actually reduced by over a half.

The Complainant stated that he was alarmed when it was confirmed that *Cornhill* had requested to level out his policy in 2015. He claimed that he was not aware of such changes until later communications and after receiving the payout on his plan, of what he thought was going to be nearly GBP 100,000.

The Complainant claimed that the changes to his pension plan were agreed to without his approval. He further claimed that *Cornhill* sold the policy and invested it into *Lombard 82*, which appeared to be their own in-house cash flow product, whilst charging him for '*the privilege*'.⁴ He claimed that such changes seem to have been made just to generate cash to the provider.

He submitted that, even after a year from his initial dispute with MCT, he still cannot confirm what *Lombard 82* is. He explained that he asked some very serious financial people in Paris about this product, but they could not find either what this product was.

The Complainant claimed that he found a document on the internet that if one invested in *Lombard 82*, the fee was to be GBP 50 per year and that approximately 8% would be paid monthly. He claimed that he was however charged by *Cornhill* GBP 7,000 as from 2013.

Given his frustration with the matter and given that no progress was being made with *Cornhill*, a director of MCT later intervened into his situation and followed up on his complaint with *Cornhill*. The Complainant further explained that

⁴ P. 4

various team calls and emails were exchanged with MCT eventually ending up filing a complaint against *Cornhill* with the (National) Bank of Slovakia.

It was noted that after 90 days of their complaint, the (National) Bank of Slovakia confirmed they had received no correspondence from *Cornhill* and the Complainant was thus concerned that this matter could be dragged on for years.

The Complainant noted that he was unsure whether he should be waiting for MCT to resolve his financial dispute with *Cornhill* or whether he should be pointing the finger at MCT.

He further noted that after seeking financial advice from some bankers in Paris who looked into his situation, he was advised that his pension plan should be in the region of GBP 150,000 and that it was clear that his investments were made just to earn a commission and were not made in the investor's interest.

The Complainant also claimed that in 2021, he was informed that MCT could possibly pay him and then seek to recover this loss given that MCT had authorised the investment. This however never happened.

The Complainant is frustrated with his situation and believes that there is professional negligence, which nobody was however admitting.

He referred to a case against MCT in April 2021, where MCT was fined EUR 150,000 by MFSA. The Complainant claimed that this case seemed very similar to his situation.

The Complainant was looking into making a statement to the police given, he claimed, '*there is some very poor financial accounting and something is not clear*'.⁵ He noted that the *Lombard 82* scheme appears unregistered and they would investigate accordingly.

He ultimately submitted that his financial situation has gone from GBP 90,000 to GBP 38,000 since 2013 due to the poor management by *Cornhill* and MCT.

⁵ P. 5

Remedy requested

The Complainant sought compensation to recover his initial fund invested, thus, claiming the sum of GBP 50,000 as he only received GBP 38,000.⁶ He noted that he was not seeking what he would call compensation but was just asking for the return of his money that was not invested correctly.

In its reply, MCT essentially submitted the following:⁷

That the Service Provider's formal complaints procedure has not been adhered to. It claimed that the Complainant bypassed the process and submitted a complaint to the Arbiter first before making a formal written complaint to MCT.

MCT acknowledged that the Complainant, however, had approached it in 2021 with a complaint against his investment provider, *Cornhill Management* ('Cornhill') - that is, with a complaint about a third-party service provider.

After numerous emails and video calls between MCT and the Complainant in relation to a loss in value of his investments, MCT sent a formal complaint to *Cornhill* on the Complainant's behalf.

MCT noted that the response from *Cornhill* was, unfortunately, unsatisfactory and *Cornhill* was informed by MCT that the complaint would thus be escalated to its regulator, the National Bank Slovakia.

A formal complaint was subsequently submitted to the National Bank Slovakia on 17 September 2021 and this complaint was still ongoing. MCT noted that the last update from the Slovak regulators was that a full response would be provided by 15 March 2022 when the investigation against *Cornhill* comes to its conclusion. MCT submitted that the Complainant was provided with every update.

The Service Provider referred to the Complainant's statement in his complaint that '*I am not sure if I should be waiting for MC Trustees to resolve a financial dispute with Cornhill or I should be pointing the finger at MC Trustees*',⁸ and submitted that the only complaint to be made is against Cornhill, the investment

⁶ *Ibid.*

⁷ P. 83 - 94

⁸ P. 83

provider. It noted that the complaint against this investment provider was still ongoing, and a response was to be received on 15 March 2022.

MCT further submitted that there is no evidence to suggest that it has acted negligently, or it has breached any of its duties throughout its relationship.

MCT confirmed that it is happy to proceed with a full comprehensive response to all of the Complainant's points, despite that its standard complaints procedure has not been followed. It submitted that the majority of the points raised are, however, against *Cornhill* and not MCT.

The Service Provider reiterated that the matter has been escalated to *Cornhill's* regulators and was pending a response from the regulator.

Preliminary

Plea relating to the inadequate filing of the Complaint

With respect to the preliminary plea raised by the Service Provider in its reply that the Complainant filed his complaint with the Office of the Arbiter for Financial Services ('OAFS') before first submitting a formal written complaint to MCT, the Arbiter considered such matter in detail first and issued a decree on 28 July 2023.⁹

In the said decree, the Arbiter asserted his competence to continue his deliberations on the case for the reasons detailed in the same decree.¹⁰

The Arbiter further communicated that he shall accordingly proceed to deliberate on the merits of the case and, also, requested both parties to provide him with certain information and documents in order to finalise his decision. The documents and information provided were considered as parts of the merits of the case.

Other preliminary matters

In light of certain statements made by the Complainant in his Complaint to the OAFS, the Arbiter would like to point out that any allegations of criminal fraud

⁹ P. 105 - 107

¹⁰ P. 106

are not handled by the OAFS. Such type of allegations is a matter for the police to handle.

Any allegations of criminal fraud should accordingly be reported by the Complainant to the police and relevant authorities.

For the avoidance of any doubt, the Arbiter has, in this Complaint, only focused on and considered those matters which fall within his powers under the Arbiter for Financial Services Act (Cap. 555).

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.¹¹

The Complainant

The Complainant, born in 1965, is of British Nationality and was resident in Turkey at the time of application for membership into *The MCT Malta Private Retirement Scheme* ('the Retirement Scheme' or 'Scheme').¹²

The Application Form for membership into the Scheme dated 5 October 2012 ('the Application Form'), indicates the Complainant's occupation as '*Retired*'.¹³

The '*Risk Tolerance Questionnaire*' completed in respect of the Complainant and signed by him and the financial adviser at the time, dated '*10.10.12*', indicates a '*Balanced Risk Profile*' chosen for the Complainant (out of the five options of '*Conservative risk profile*', '*Conservative-to-balanced risk profile*', '*Balanced risk profile*', '*Balanced-to-dynamic risk profile*' and '*Dynamic risk profile*').¹⁴

According to the completed Risk Tolerance Questionnaire, it is further noted that the Complainant indicated that:

¹¹ Cap. 555, Art. 19(3)(b)

¹² P. 145

¹³ *Ibid.*

¹⁴ P. 46

'I have little or no experience',

in reply to the question as to which best described his experience in dealing in investments.¹⁵ It is also noted that, in reply to the question as to which investment strategy best suited his risk profile, the Complainant had selected *'medium risk ...'* in the said Risk Tolerance Questionnaire.¹⁶

The Service Provider

MCT acts as the Retirement Scheme Administrator and Trustee of the Scheme and is licensed by the MFSA as a Retirement Scheme Administrator.¹⁷

The Investment Adviser

As indicated in the Application Form for membership into the Scheme, the appointed investment adviser was *'Astute FMA'*, that is, *'Astute Financial Management Associates Ltd'*, based in Turkey.¹⁸

The appointment of Astute FMA as investment adviser was eventually cancelled by the Complainant. As noted in his Complaint, *'I cancelled the services of the cyprus financial advisor at this point ...'* after noticing a significant drop in value in the pension plan after a few months.¹⁹

During the hearing of 10 May 2022, the Complainant further explained that:

*'Asked if they continued to advise me, I say, no, I stopped them because I now felt that it was in the hands of professionals ... Sebastian Legoff [the mentioned portfolio manager], yourselves as MC Trustees and Cornhill as a company'.*²⁰

The Product and investments 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

¹⁵ P. 45

¹⁶ P. 46

¹⁷ <https://www.mfsa.mt/financial-services-register/>

¹⁸ P. 29, 148 & 155. Despite the office of the adviser being in Turkey, the parties referred to the adviser as a *'cyprus financial adviser'* (e.g., P. 2 & 102).

¹⁹ P. 2

²⁰ P. 97

under the Special Funds (Regulation) Act 2002 (Chapter 450 of the Laws of Malta) and subsequently under the Retirement Pensions Act.

In a letter dated 2 October 2013, issued to the Complainant, MCT confirmed that the processing of his application to become a member of the Scheme was completed, confirming also receipt of the sum of GBP 87,928.85 from the transferring scheme, *Legal & General*.²¹

The Scheme's structure

Given the multiple entities mentioned in this case, the multiple layers involved, the inconsistencies and various unclear or incorrect references at times made in respect of the nature of the underlying financial investments,²² the Arbiter is first summarising hereunder the structure in question. In this regard, according to the information provided and emerging during this case, it transpires that:

- i. The Scheme held its underlying investments through an Investment Platform - the '*International Investment Platform*' ('IIP platform') - offered by an investment firm based in Slovakia, '*Cornhill Management o.c.p., a.s.*' which changed its name to '*International Investment Platform o.c.p., a.s.*'.²³ ('Cornhill-IIP Slovakia').
- ii. An investment account (the '*FlexMax Investment Account* with '*Investment account number: MCT00060*')²⁴ was opened, and held by the Scheme, on the Investment Platform of Cornhill-IIP Slovakia.
- iii. A total amount of GBP 85,928.85 was transferred into the '*FlexMax Investment Account*' to be invested.²⁵
- iv. The money transferred into the '*FlexMax Investment Account*' was used to acquire what was termed as a '*Cornhill FlexMax Portfolio*',²⁶ which in

²¹ P. 60

²² For example, various references were made to a 'policy' (e.g., P. 23, 26, 95 & 96) but no evidence has emerged that an insurance policy was held. As considered further on in this decision, the Scheme's portfolio of investments was rather undertaken through an Investment Account. It is also noted that the Euro Medium Term Note (bond), was at times referred to as a 'fund' or 'securitisation fund' (e.g., P. 21, 22, 26 & 37).

²³ P. 52

²⁴ P. 39 & 62

<https://flex-max.eu/>

²⁵ P. 62

²⁶ P. 41

essence, constituted a selection of investment products according to the chosen investment strategy.

Different investment strategies were seemingly offered under the ‘*Cornhill FlexMax Portfolio*’ – i.e., that of ‘*Conservative*’/‘*Conservative-to-Balanced*’/‘*Balanced*’/‘*Balanced-to Dynamic*’/‘*Dynamic*’. Each strategy involved a particular investment allocation into various investment instruments as per the Term Sheet as at 01 May 2012 issued by Cornhill Management in respect of the ‘*FlexMax QROPS Portfolios*’.²⁷

As per the said Term Sheet [seemingly issued by *Cornhill Management Ltd* in the UK, (‘*Cornhill UK*’)], the said document indicates ‘*Delubac Asset Management*’ as the ‘*Investment Manager*’ (and Sebastien Legoff of Delubac as ‘*Portfolio Manager*’) in respect of the respective investment strategy.²⁸

- v. It is noted that whilst the ‘*Cornhill FlexMax Portfolio*’ was seemingly a discretionary investment management service offered by *Cornhill Management*,²⁹ as indicated by MCT in the summary of its complaint with the National Bank of Slovakia, this was however disputed by Cornhill-IIP Slovakia.

The Arbiter notes that, in its complaint with the National Bank of Slovakia, MCT stated that:

‘The application documentation and initial transactions suggested that the Member’s portfolio was to be managed on a discretionary basis by Cornhill/IIP. As soon as the funds became suspended and subsequently questioned, Cornhill/IIP claim there was never a fund manager managing the funds and any loss will be the fault of the advisor who recommended the funds. The advisor however was under the impression from the documentation that the funds were managed on a discretionary basis and that all investment decisions were being made by Cornhill/IIP. All evidence submitted will demonstrate this. Cornhill as the discretionary fund managers rebalanced

²⁷ P. 47-48

²⁸ P. 47

²⁹ Not exactly clear whether by Cornhill-IIP Slovakia, Cornhill UK or another entity.

the portfolios in 2016 for all of its investors and sent out a letter to advise each investor ...

...

As soon as the funds became suspended and subsequently questioned, Cornhill/IIP claim there was never a fund manager managing the funds and any loss will be the fault of the advisor who recommended the funds.’³⁰

In an email dated 17 June 2021, sent by a Director of Cornhill³¹ to MCT, the Cornhill official noted, however, that:

‘... in the 6 years I have been with the group, no Cornhill entity has operated as a DFM [Discretionary Fund Manager], and transactions on clients’ accounts have always been authorised by the Trustees before execution. Additionally, we don’t provide financial advice, as clients have their own financial advisor (in BY’s case he has confirmed he was being advised by Astute Financial Management’.³²

It is further noted that (in its summary of correspondence forming part of the complaint sent to the National Bank of Slovakia),³³ MCT explained that in an email of 13 August 2021, the ‘Lawyer at Cornhill/IIP’ stated *inter alia* that:

- *The FlexMax is not a product of portfolio management and that the company has never provided investment advice, a discretionary service or managed the portfolio ...*
- *The document ‘Flexmax QROPS Portfolio’ was prepared only for information purposes ...*
- *The investment strategy for the Application has not been provided by the Company. The Company acts as execution-only based on signed instructions provided by MC Trustees ...’.*

³⁰ P. 53

³¹ Simon Smith indicated by MCT as ‘Director Cornhill Management and International Investment Platform o.c.p., a.s.’ (P. 22 & 52)

³² P. 22

³³ P. 55

The Arbiter observes that the '*Cornhill FlexMax Portfolio*' invested into was seemingly a portfolio offered by Cornhill-IIP Slovakia despite that the Term Sheet of the *FlexMax QROPS Portfolios* presented during the case included the address of '*Cornhill Management Ltd*' in the UK.³⁴

It is noted that *Cornhill Management Ltd, UK* was however used as a '*Correspondence address*' by '*Cornhill Management, o.c.p. a.s. Slovakia*' as indicated in the '*Welcome Letter to the FlexMAX Investment Account*' issued by Cornhill Management in Slovakia.³⁵

It further seems that the *Cornhill-IIP Slovakia* was being assisted by *Delubac Asset Management* (mentioned as an investment manager in the Term Sheet of the *FlexMax QROPS Portfolios*),³⁶ in the selection of the investments allocated to the respective portfolio strategy or otherwise there may have possibly been full discretionary management delegated to/carried out by *Delubac Asset Management*.

The exact service and relationships between the mentioned parties, however, could not be determined given that no official contractual agreements/terms of service with respect to the portfolio and investment management service were produced during the case. The Arbiter shall indeed comment on the lack of formal contractual evidence applicable with respect to the portfolio management and selection of the investments further on in this decision.

The Scheme's underlying investments

In a letter dated 14 May 2013, issued to MCT, *Cornhill Management o.c.p., a.s. Slovakia* (with a correspondence address as '*Cornhill Management Limited, UK*') confirmed to MCT that the application to open the '*FlexMax Investment Account*' (in respect of the Complainant) was successful and that a total amount of GBP 85,928.85 was received into the *FlexMax Investment Account*, for investment.³⁷

³⁴ P. 48

³⁵ P. 62

³⁶ P. 47

³⁷ P. 62

The bulk of the said amount of GBP 85,928.85 was then invested into the '*Cornhill FlexMax Portfolio*' held within the said investment account.

The various purchases and sales of investment products forming part of the investment portfolio are listed in the Statement of Transactions, which was presented during the case, for the period 14 May 2013 to 09 March 2021.³⁸

With respect to the Lombard 82 – EMTN Bonds, which is one of the disputed investments, it emerges from the above-mentioned statement of transactions, that since May 2013, the Complainant was invested into two different series (issues) of the Lombard 82 – EMTN Bonds.³⁹

It is noted that in its submissions, the Service Provider noted that '*At the time of BY's initial investment at Cornhill, the balanced portfolio consisted of twelve separate investments*'.⁴⁰ The said portfolio changed as per the said statement of transactions.

In the year 2020, the Complainant provided instructions to redeem his portfolio of investments.

According to a '*Valuation printed 09/09/2020*' in respect of the Complainant's Scheme, the Scheme's underlying investment at the time consisted of:

- the '*Cornhill FlexMax Portfolio*' which had an asset value of '*GBP 62,975.97*' as at 09/09/2020, and
- a cash balance of GBP 1,088.10

in total amounting to GBP 64,064.07.⁴¹

A breakdown of the composition of the '*Cornhill FlexMax Portfolio*' emerges in the '*Portfolio Composition and Valuation*' statement of 06/09/2020 in respect of the FlexMax Investment Account (on the IIP platform).

³⁸ P. 67-73

³⁹ For example, a subscription of GBP 10,311.46 was made on 14.05.2013 in the '*Lombard 82 – EMTN Bonds Series 6*' (P.73); multiple subscriptions into the '*Lombard 82- EMTN Bonds Series 7*' were made in 2015, 2016 and 2017 (P. 69, 67).

⁴⁰ P. 102

⁴¹ P. 41

The said statement of the IIP platform reflects the same '*Current portfolio value*' of '*62,975.97 GBP*' referred to in the Scheme's statement mentioned above.⁴²

It is further noted that the said portfolio held in the FlexMax Investment Account, constituted the following investments as well as cash as at the date of the said statement:

- i. the '*WSF Global Equity Fund GBP B class*' (ISIN no. GG00B4PCNN2), (originally purchased for GBP 27,279.63 and valued, as of 06/09/2020, at GBP 33,598.46 thus reflecting an unrealised gain of 22.27% at the time);
- ii. the '*WIOF India Performance Fund B class*' (ISIN no. LU0419265110), (originally purchased for GBP 13,974.43 and indicated as being in liquidation with the value based on the last known price indicated at GBP 8,900.77 thus reflecting an unrealised loss of -36.31% at the time);
- iii. the '*Providence Investment Fund Dec 2015 GBP*' (ISIN no. GG00BWFY4B93), (originally purchased for GBP 2,694.36 which was indicated as being in suspension and reflected with the same purchase value based on the last known price at the time);
- iv. the '*Providence Investment Fund Dec 2016 GB'P*' (ISIN no. GG00BYNYNF26) (originally purchased for GBP 2,382.31 which was indicated as being in suspension and reflected with the same purchase value based on the last known price at the time);
- v. the '*Lombard 82 - EMTN Bonds Series 7 - Class*' (ISIN no. LU1075904984) (originally purchased for GBP 12,781.80 and reflected with the same purchase value at the time);
- vi. cash in GBP of 2,617.48 and cash in USD of 1.03 (equivalent to 0.97 GBP).

⁴² p. 39

The alleged loss

In his Complaint to the OAFS, the Complainant claimed a loss of GBP 50,000 [given that he indicated to *'have received (GBP) 38,000'* out of his initial funds invested into the Retirement Scheme of GBP 87,928].⁴³

It is further noted that, as explained by the Service Provider, *'In late 2020, the client instructed MC Trustees to close down the Cornhill investment in order for him to withdraw the cash available'*.⁴⁴

Various exchanges were then held by the Complainant and MCT regarding his investments, also leading to MCT filing a complaint against Cornhill-IIP Slovakia.⁴⁵

As noted above, in its capacity as trustee/RSA of the Scheme, MCT eventually also made a formal complaint on behalf of the Complainant against Cornhill/IIP Slovakia with the National Bank of Slovakia on 16 December 2021.^{46, 47}

It is particularly noted that in the said complaint to the National Bank of Slovakia, MCT stated *inter alia* that:

- *'The member has lost a significant amount of his pension fund due to inadequate management of funds by Cornhill/ IIP'*;⁴⁸
- according to a *'Current Valuation'*, the sum of *'GBP 27,010'* of the Complainant's investment portfolio was *'all suspended or in liquidation i.e. not available'* and furthermore was *'unlikely to be restored'*.⁴⁹

In the said complaint to the National Bank of Slovakia, the *'Total claim amount'* requested from Cornhill-IIP Slovakia was indicated as *'GBP 39,649'* – this figure was arrived at by deducting from the initial investment of GBP 85,928 (made into the FlexMax Investment Account held with Cornhill/IIP Slovakia), the *'income'* made by the Complainant indicated as *'GBP 39,007'* and the fees paid

⁴³ P. 5 & 60 – GBP 87,928-GBP 38,000 = GBP 49,928

⁴⁴ P. 103

⁴⁵ P. 15-29

⁴⁶ P. 93

⁴⁷ P. 85-89

⁴⁸ P. 85

⁴⁹ P. 86 – Emphasis added by the Arbiter

in respect of the Scheme (trustee/bank fees of GBP 7,272), exclusive however of the fees paid to Cornhill of 'GBP 6,315'.^{50, 51}

The Arbiter further notes that according to the '*Portfolio Composition and Valuation*' statement issued under the IIP Platform as at 06/09/2020, there were:

- two remaining *Providence Investment Funds* (with an original purchase price of GBP 2,694.36 and GBP 2,382.31) which were in suspension;
- the *WIOF India Performance Fund* (with a purchase cost of GBP 13,974.43) which was in liquidation at the time;⁵²
- another remaining investment the '*Lombard 82- EMTN Bonds Series 7 – Class A GBP*' ('the Lombard 82 investment'), with a purchase cost of GBP 12,781.80 (on which there were also issues as detailed below).

In its submissions, the Service Provider noted that, following the Complainant's instruction to close down the Cornhill investments in late 2020:

'... at this time that the Lombard 82 fund was taking a long time to settle and on 28 April 2021, MC Trustees were advised by Cornhill that redemptions of the Lombard 82 fund had been halted due to a spike in redemption requests and the fallout of the Covid 19 situation ... The latest communication from Cornhill dated 30 November 2021, has provided a timeline as to when redemptions will become available, stating that the Lombard 82 Series 7 (in which BY holds approximately £12,700) can receive redemption requests from June 2023'.⁵³

The Arbiter further notes that in its submissions, MCT stated (with respect to the remaining Lombard 82 investment), that:

⁵⁰ P. 86

⁵¹ At the time of his Complaint to the OAFS of February 2022 (P.1), the Complainant indicated that he received GBP38,000 (P.5). In its complaint to the National Bank of Slovakia of September 2021 (P.93), the Service Provider indicated that the '*Member's income*' at the time was of '*GBP 39,007*' (P. 86). It is noted that the Annual Statement 2021 as at 31 December 2021, issued by MCT in respect of the Complainant's Scheme indeed indicates that the '*Total benefit payments and transfers out*' to the Complainant was of GBP 39,008 (i.e. '*Income payments*' of GBP 9,500 and '*Capital payments*' of GBP 29,508 - P. 112 - 113.

⁵² P. 39

⁵³ P. 103

*'When suspensions are lifted there is a chance that the full value of the portfolio will be restored therefore there will be no loss to BY's portfolio ...'*⁵⁴

Following the Arbiter's decree of 28 July 2023 wherein the Arbiter requested the parties to provide additional information regarding the status of the investments,⁵⁵ the Arbiter was *inter alia* provided with a copy of an email dated 11 October 2022 sent by MCT to the Complainant in respect of the '*Annual Statement for 2021*'. In the said email, MCT stated that:

*'Unfortunately, due to the current suspensions of funds within your investment policy the values of such funds have had to be brought down to zero as no redemptions are currently available. We are still continuing to chase the fund managers and liquidators of these funds in order to obtain full updates ...'*⁵⁶

It is further noted that the Scheme's '*Annual Statement 2021*' (issued by MCT) in respect of the Complainant, indeed indicates a '*Nil*' value for the remaining investments as follows:

'Statement of net assets as at 31 December 2021	£
Financial Assets at Fair Value through Profit or Loss	
<i>WIOF India Performance Fund B Class</i>	-
<i>Providence Investment Fund Dec 2015</i>	-
<i>Providence Investment Fund Dec 2016</i>	-
<i>Lombard 82 – EMTN Bonds Series 7</i>	- ' ⁵⁷

The Arbiter also notes that the '*Portfolio Composition and Valuation*' statement issued by IIP '*as of 27/07/2023*' indicates the following with respect to the Complainant's remaining portfolio of investments:

- the '*Providence Investment Fund Dec 2015 GBP Class A*' still in suspension with a '*Current Value*' of zero;
- the '*Providence Investment Fund Dec 2016 GBP Class A*' still in suspension with a '*Current Value*' of zero;

⁵⁴ P. 104

⁵⁵ P. 105-107

⁵⁶ P. 110-111

⁵⁷ P. 112

- the 'WIOF India Performance Fund B class' still in liquidation with a 'Current Value' of zero;
- the 'Lombard 82 - EMTN Bonds Series 7 – Class A GBP Maturity 2038' with an 'Expected amount to be received' of 'GBP 12,781.80'.⁵⁸

Despite the note included in the IIP's valuation statement with respect to the Lombard 82 investment, there are however material issues involving this investment, which was reflected with a 'nil' value in MCT's Annual Statement as indicated above.

The Arbiter further notes that according to a notice dated September 2022 issued by the management company of the Lombard 82 investment, legal action was being taken against MCT in respect of its failure to settle alleged liabilities (settlement of fees due) since December 2021.⁵⁹ This action arose given that MCT had taken the position that '*any fees due [to the manager of the Lombard 82 investment] will be paid as soon as the suspended funds held within the Lombard 82 Securitisation Fund become available*'.⁶⁰

It is ultimately further noted that according to the said September 2022 notice, the management company of the Lombard 82 investment itself:

'... resolved to adopt an alternative prudent method of valuation for the Fund's Underlying Assets.

In accordance with the revised method, the value of assets that are subject to legal proceedings are to be assigned a nil value pending the outcome of the legal action. The result of the revaluation of the Underlying Assets is that the book value of the Fund's assets has reduced by 98% and below the value of its liabilities ... we confirm that effective 1 October 2022, EMTNs issued by Lombard 82 are to be de-valued as follows:

1 EMTN (GBP series) = £0.015

1 EMTN (USD series) = \$0.015

⁵⁸ P. 137-138

⁵⁹ P. 131 & 141

⁶⁰ P. 131

1 EMTN (EUR series) = €0.015'.⁶¹

It is accordingly evident that there are significant losses (if not the complete erosion of the initial capital) in respect of the remaining investments left with the Complainant's portfolio.

Obligations of MCT as Trustee and RSA of the Scheme

Trustee and fiduciary obligations

Despite not being mentioned by MCT in its submissions, the Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is much relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA. This is in view of MCT's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

The key obligations as trustees emanating under Article 21(1) and (2)(a) of the TTA are particularly relevant.

The said article 21 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'.

'(2)(a) 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 ...'.⁶²

⁶¹ P. 141 – Emphasis added by the Arbiter

⁶² Emphasis added by the Arbiter

In its role as Trustee, MCT was accordingly duty-bound to administer the retirement scheme and its assets to a high standard of diligence and accountability.⁶³

Obligations as a Retirement Scheme Administrator

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

This duty 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 applicable to the Service Provider in its role as Retirement Scheme Administrator.

Oversight & Monitoring obligations of the Service Provider

Whilst it is acknowledged that MCT *'is not an investment house, fund manager or investment advisor'* as highlighted in its submissions,⁶⁴ however, MCT in its function of trustee and RSA of the Scheme had key obligations.

A key obligation and responsibility, which shall be considered in this decision, relates to the oversight and monitoring obligation of MCT, including with respect to the investments.

⁶³ The trustee has to deal with property under trust *'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'*. As 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'* - Editor Max Ganado, *'An Introduction to Maltese Financial Services Law'*, Allied Publications 2009, pages 174 & 178.

⁶⁴ P. 102

The said monitoring obligation applicable to the trustee and RSA of a retirement scheme has been dealt with in detail, in other previous decisions involving retirement schemes that were issued by the Arbiter under the Act.

Particular reference is made in this regard to OAFS Case ASF 026-2021, which also involved investment decisions taken by a discretionary investment manager.⁶⁵

The section titled ‘Oversight and monitoring function’ of Case ASF 026-2021,⁶⁶ considers in detail the key oversight and monitoring function of the trustee and retirement scheme administrator. Such oversight and monitoring functions similarly apply to MCT in the case under consideration.

For all intents and purposes, the principles outlined, and references to the rules/position issued by the Malta Financial Services Authority (‘MFSA’), in the said section of Case ASF 026-2021 regarding the obligations and responsibilities of a trustee and scheme administrator with respect to the discretionary investment management decisions undertaken by another party in respect of the retirement scheme, are considered relevant and applicable to the case in question and are thus being adopted for the purposes of this decision.

The obligations and responsibilities outlined above are considered to be crucial aspects which should have guided MCT in its actions as Trustee and RSA of the Scheme.

Final Observations & Conclusion

Claims raised by the Complainant

In his Complaint to the OAFS, the Complainant, in essence, claimed that:

- (i) there was an *‘over payment from Mc trustees of management fees to cornhill’*⁶⁷

⁶⁵ <https://financialarbiter.org.mt/sites/default/files/oafs/decisions/120/ASF%20026-2021%20-%20BN%20vs%20Sovereign%20Pension%20Services%20Limited.pdf>

⁶⁶ Page 25 to 35 of the OAFS Case ASF 026-2021.

⁶⁷ p. 3

- (ii) his *'investments chosen by cornhill were of a very high risk nature not as [his] risk statement submitted and signed upon opening the agreement'*;⁶⁸
- (iii) he was not aware of certain transactions made within his plan and the investments were not made in his interest but to earn commissions;
- (iv) professional negligence occurred in the management and administration of his pension scheme.

It is further noted that during the hearing of 10 May 2022, the Complainant testified that:

'... We also have on record that my funds were purchased into high-risk purchases of investments when there is a performance certificate signed by myself saying that I am a medium-risk customer.

...

*And I just felt that Mc Trustees have some responsibility here: why were the funds allowed to be invested into high-risk options? Why did they not understand what Lombard 82 was? Why do we still not understand what Lombard 82 was, or is, and where my funds are being held?'*⁶⁹

During the same sitting of 10 May 2022, the Complainant further testified that:

'Asked what I believe MC Trustees' role is, I say that I believe they are there to monitor as I read. They are responsible for protecting my investment.

*Asked how I think they can do that, I say that MC Trustees must have seen how Cornhill were investing my money into high-risk policies and MC Trustees never mentioned it. It has not come about until I asked about the redemption of my money. MC Trustees had no line of communication with Cornhill and weren't aware until after the events that my funds were invested in high-risk options. So how do MC Trustees allow that to happen?'*⁷⁰

⁶⁸ *Ibid.*

⁶⁹ p. 96

⁷⁰ p. 97

The Arbiter shall next detail his conclusion and decision with respect to the claims made.

Overpayment of fees & other aspects

It is first noted that the overpayment of fees was acknowledged and confirmed by the Service Provider itself. In their email of 8 October 2020, MCT stated:

‘that it is obvious that there has been an overpayment of Cornhill fees on your account and we are pursuing them for a full refund. I can assure you that no further fees will be paid to Cornhill until the matter is fully resolved.’⁷¹

During the hearing of 10 May 2022, the Complainant testified on this point that:

‘we had also found that MC Trustees have overpaid Cornhill in their management fees which has now been refunded’.⁷²

Given that the overpaid fees have been refunded, as confirmed by the Complainant himself, the Arbiter shall not look further into this specific matter.

As to the Complainant’s claim that he lacked awareness of dealings within his Retirement Scheme, the Arbiter points out that, as shall be seen further on in this decision, the trustee and RSA itself indicated the lack of awareness and clarity with respect to the investment services provided. The Arbiter shall indeed focus next on the key and most pertinent aspects of this case.

Inappropriate underlying investments & other claims of negligence

Having considered this matter in detail, the Arbiter concludes that the Complainant is justified in his claim about the inadequacy of the investments permitted within his Scheme and negligence in the performance of duties.

The Arbiter considers that the Service Provider, indeed, failed in its duties as trustee and RSA of the Scheme to: safeguard the trust property from loss or damage; protect the interests of the Complainant with respect to his Scheme’s account; act with the diligence of a *bonus paterfamilias* in the performance of its obligations; ensure that the Scheme satisfied the applicable regulatory requirements with respect to the permitted underlying investments by

⁷¹ P. 15

⁷² P. 96 – Emphasis added by the Arbiter

ensuring that the Complainant's funds were *inter alia* invested in a prudent manner and in his best interests.

The said conclusions are based taking various factors into consideration including particularly the following:

- (i) *Failure to ensure clarity and adequate evidence of the obligations and roles of key appointed parties*

In the first place, the Arbiter could not help but notice the communications exchanged between MCT and Cornhill-IIP Slovakia in 2021 where clarifications were sought by MCT about the exact services being provided by Cornhill-IIP Slovakia and the disagreements ensuing as to the actual services offered.⁷³

For example, in its email of 9 July 2021, MCT asked for various clarifications from Cornhill-IIP Slovakia regarding the nature of the service provided by Cornhill. In the said email, MCT *inter alia* asked Cornhill-IIP Slovakia:

*'Could you please confirm that the portfolios as detailed on the attached factsheet were managed by Cornhill and their delegated manager. If not, what are these portfolios and what does the factsheet relate to? ...'*⁷⁴

The provision of discretionary investment management was subsequently disputed by Cornhill-IIP Slovakia. In themselves, the said communications signify and expose the lack of understanding and lack of certainty of the roles of the Cornhill entity/ies and the structure of the *Cornhill FlexMax Portfolio*.

The Arbiter notes that the lack of clarity and certainty on the roles of key providers within the Scheme's structure, and even the lack of formal documentation to back such, even emerges from MCT's complaint to the National Bank of Slovakia – as also referred to in point (iv) of the section titled *'The Product in respect of which the Complaint is being made'* above.

⁷³ P. 21-23

⁷⁴ P. 21

The *'application documentation and initial transactions'*⁷⁵ should have not *'suggested'*, as mentioned by MCT in its complaint to the National Bank of Slovakia, what was the role of Cornhill-IIP Slovakia but rather, reference should have been made to the contractual evidence which should have clearly and unequivocally specified the roles of the parties and capacity in which the transactions were being made.

Likewise, the documentation in hand cannot just give an *'impression'*⁷⁶ (as indicated by MCT) but should outrightly and categorically determine the exact service provided.

Furthermore, as evidence of Cornhill being a discretionary fund manager, MCT just made reference to a letter to investors issued by Cornhill regarding the rebalancing of the portfolio in 2016.

Whilst the above may be indicative of the nature of the service provided, however, one reasonably expects a reference to, and use of, formal contractual agreement/s and Terms of Service documents entered into prior to the purchase of a discretionary investment service/product, as a basis to indicate a party's alleged failure. **Such documentation is also key in pursuing the relevant legal address in case of an alleged failure in the performance of an acquired service/product.**

No reference was, however, made to such documentation nor were such documentation mentioned or produced. Indeed, the Arbiter notes that no formal documentation,⁷⁷ clearly outlining the services offered by Cornhill-IIP Slovakia and/or other Cornhill entity or investment manager in respect of the *'Cornhill FlexMax Portfolio'* and the apparent discretionary investment management decisions taken, was indicated nor presented during the case.

It is clearly a basic obligation of the Trustee and RSA of the Scheme to ensure, in the first place, that there is clarity and certainty as to the roles of key parties and of the investment structure being adopted and

⁷⁵ P. 86

⁷⁶ *Ibid.*

⁷⁷ Other than just a mere Term Sheet on the *'Flex Max QROPS Portfolios'* (P.50) and letter by Cornhill to investors about changes to the portfolio (P.158).

permitted to be undertaken as these have a material bearing on the Scheme and the attainment of its objective. This is also part of the duties as trustees of the Scheme to ensure *‘that the trust property is vested in them or is under their control ...’* and *‘safeguard the trust property from loss or damage’* as obliged in terms of Article 21(2)(a) of the TTA.

The Arbiter has no comfort that this has adequately occurred in respect of the Cornhill/IIP Slovakia and the *‘Cornhill FlexMax Portfolio’*, considering also the convoluted nature of the overall investment structure permitted which featured multiple parties and unclear structures.

- (ii) *Portfolio not appropriate and suitable for the scope of the Retirement Scheme and the Complainant’s risk profile*

The Arbiter notes that the Service Provider did not contest the Complainant’s claim that the investments undertaken within his Retirement Scheme were of high risk and neither that they were not in line with his risk profile.

Despite the Arbiter’s decree of 28 July 2023 where a copy of the fact sheet of the Lombard 82 investment was, *inter alia*, requested from MCT, the Service Provider did not provide such a copy as part of the requested documents (notwithstanding that it indicated that a copy was being ‘attached’ as part of its requested documentation).⁷⁸

A general internet search undertaken by the OAFS with the ISIN numbers in respect of the remaining disputed investments, however, yielded the following information:

- a copy of the *‘Private Investment Memorandum’* of the Lombard 82 investment (LU1075904984), (*‘the Private Investment Memorandum’*);⁷⁹

⁷⁸ P. 135. In its submissions of June 2022, the Service Provider had also indicated that it was *attaching ‘the latest factsheet from 2020’* (p. 104) but no such fact sheet was actually attached either.

⁷⁹ <https://iiplt.com/download?id=10367>

- a fact sheet in respect of the *WIOF India Performance Fund B class'* (ISIN no. LU0419265110).⁸⁰

From the documentation sourced and submissions made during the case, the following key aspects emerge in respect of the mentioned two material investments held and permitted within the Scheme:

The Lombard 82 – EMTN Bond Series

- a. **A general review of the 'Private Investment Memorandum' should have immediately raised questions by the Trustee/RSA of the Scheme regarding the rationale and appropriateness of such an investment, including how: (i) such an unregulated complex speculative investment product fitted within the scope of the Scheme as a pension product; and**

(ii) how it satisfied the Complainant's profile of an inexperienced retail investor who had a balanced risk profile as outlined in the section titled 'The Complainant' above.

- b. The complex nature of the said investment outrightly emerges from the short 'Private Investment Memorandum'. The said document describes the investment as:

'Euro Medium Term Notes (E.M.T.N (called 'Euro Medium Term Notes Serie 7 – GBP/EUR/USD Class A (Distribution)' issued by the Fund and whose development and yield depend on the evaluation of the underlying assets'.⁸¹

In turn, the term 'Fund' is described as:

⁸⁰<https://www.fundsquare.net/download/dl?siteId=FSQ&v=089yK+J0/8sNJytj8/osluNDgpnKi0LsWNeCz/SxdDgQCKC3VYlrJKyri0P8S3GgzSjvSxVdLw28YA1YliKVQ9sNc+yQ5tlKrDBqsMynBnwET0080quPU71TQpCfhUL/YEsvPbOFpqKpBWnBZbQiplCp01OqDhVm0kcG1dHa0fo=>

⁸¹ Page 3 of the Private Investment Memorandum relating to the issuing of 'Euro Medium Term Notes, Lombard 82 Securitisation Fund, Euro Medium Term Notes Series 7 – GBP/EUR/USD Class A (Distribution)', bearing a GBP ISIN of LU1075904984

*'The securitisation fund created in the form of a fiduciary asset, called 'Zero Load' and renamed 'Lombard 82 Securitisation Fund' on 31st of December 2015'.*⁸²

The issuer was defined as *'XANTIS S.A. acting as Management and trust company, issuing the EMTNs on behalf of the Fund'.*⁸³

The *'Underlying Asset'* of the EMTNs was generally defined as:

*'The future receivables acquired by the Fund and held by the Issuer on behalf of the Fund'.*⁸⁴

- c. The investment was interchangeably referred to as a Euro Medium Term Note (i.e., a bond) and, at the same time, as a *'securitisation fund'* - typically distinct financial instruments.
- d. The Private Investment Memorandum stipulated that:

*'The minimum investment by the Bondholder is GBP 125,000, Eur 125,000 or USD 200,000. The Bondholders may only be institutional investors, sophisticated investors, investors investing more than 125,000 GBP, 125,000 EUR or 200,000 USD, or retail investors investing via a Trust, Professional Investor or Discretionary Investment Manager'.*⁸⁵

The typical target investor was thus clear, and the trustee/RSA should have challenged and not placed comfort that this was being bypassed through a trust or discretionary portfolio service when it was not reflective of the Complainant's profile.

- e. The *'Risk Factors'* section of the Private Investment Memorandum ultimately highlighted various aspects, including that:

'Prospective purchasers should be experienced with respect to transactions involving securities such as the EMTNs, in terms of both the risks associated with the economic terms of the EMTNs and the

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Page 4 of the Private Investment Memorandum – Emphasis added by the Arbitrator

risks associated with the way in which the issue of the EMTNs is structured⁸⁶

It is clear that the Complainant had no such experience as evidenced in the 'Risk Tolerance Questionnaire'.⁸⁷

The risk factors also highlighted the speculative nature of the investment wherein it was *inter alia* noted that:

*'The performance of Euro Medium Term Notes is commensurate and depends on the performance of the Underlying Assets (as defined in the Memorandum) and is considered to be a **speculative investment involving a high degree of risk** (significant fluctuation of the value of the Underlying Assets). The Issuer gives no assurance as to the performance of the EMTNs'*.⁸⁸

- f. The Risk Factors stipulated in the Private Information Memorandum further indicated the illiquid nature and lack of diversity of the investment, where the following risks were also highlighted.

'Illiquid Investments

The Issuer has not and will not take any steps with a view to organising a secondary market for the EMTNs and such secondary market is not expected to develop any time. It is expected that holders of Notes will most likely hold their Notes up to maturity.'

...

Lack of Diversity

The Issuer is not subject to specific legal or regulatory risk diversification requirements. Therefore, the Issuer is in principle authorised to make a limited number of investments and, as a consequence, the aggregate returns realised by the Bondholders may

⁸⁶ Page 12 of the Private Investment Memorandum - Emphasis added by the Arbitrator

⁸⁷ P. 45

⁸⁸ Page 13 of the Private Investment Memorandum - Emphasis added by the Arbitrator

be substantially adversely affected by the unfavourable performance of even one investment ...'

...

Lack of Liquidity of Underlying Assets

The investments to be made by the Issuer may be highly illiquid ...'.⁸⁹

- g. It is further noted that with respect to the Lombard 82 investment, the Service Provider submitted that this '*... is a Euro Medium Term Note segregated to make provision to enable Cornhill fees to be paid from the investment policy*'.⁹⁰

Apart that no evidence was provided of such a claim, such a statement is furthermore unclear and rather confusing. It justifiably raises further questions about the rationale of such a structure/set-up.

The WIOF India Performance Fund B Class

- a. Although this fund, which was focused on investing in Indian companies, was a sub-fund of a regulated collective investment scheme in Luxembourg, the fact sheet sourced on this fund (dated 27 January 2017) indicates a risk indicator of 6 (on a risk scale of 1 to 7, with 1 being the lower risk and 7 the higher risk), thus indicating the fund as a high-risk fund.

It is accordingly unclear how this fund fits with the '*Balanced risk profile*' of the Complainant, given the indicated high-risk rating as outlined in the fund's factsheet and also in light that such fund focused solely on the emerging economy of India (thus having a high concentration risk).

Other aspects

- (i) The high-risk nature of the investments made and permitted within the Complainant's Scheme is also evident from the letter issued by Cornhill Management Ltd to investors about the rebalancing of their portfolio. The

⁸⁹ Page 14 of the Private Investment Memorandum.

⁹⁰ P. 104

said letter, which was presented by MCT during the proceedings of the case specified that:

'The Zero Load EMTN Series 7 earns 8% per annum, whilst the Providence Investment Fund generates 10.75% per annum'.⁹¹

The mentioned high rate of returns themselves are indicative of the high-risk nature of the mentioned investments.

- (ii) MCT ultimately itself acknowledged that it did not have the rationale as to why the Lombard 82 investment was in the Complainant's best interest.

In its complaint to the National Bank of Slovakia, MCT itself stated that:

'Cornhill/IIP are unable to provide a rationale as to why they deemed the Lombard 82 Fund to be in the best interest of the member'.⁹²

Such investment had been long undertaken by the time of the said complaint. MCT should have ensured that it had such rationale, in the first place, and questioned it accordingly as part of its monitoring functions in its role as Trustee/RSA of the Scheme.

- (iii) The investment portfolio permitted and allowed by MCT as trustee and RSA of the Scheme included material investments that clearly went against, and are not reflective of the regulatory requirements to which the Retirement Scheme was subject to with respect to *inter alia* **diversification, prudence and liquidity**, as detailed hereunder:

- The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the *'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'*, ('the Directives').

⁹¹ P. 158

⁹² P. 53

The said Directives applied from the Scheme's inception until its registration under the Retirement Pensions Act ('RPA').⁹³

SOC 2.7.1 of Part B.2.7 of the Directives required *inter alia* that the assets were to *'be invested in a prudent manner and in the best interest of beneficiaries ...'*

SOC 2.7.2 in turn required that the assets of a scheme are *'invested in order to ensure the security, quality, liquidity, and profitability of the portfolio as a whole'*⁹⁴ and that such assets are *'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'*.⁹⁵

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be *'predominantly invested in regulated markets'*;⁹⁶ to be *'properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*⁹⁷ where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.⁹⁸

- The Arbiter also notes that the Scheme eventually became subject to the *'Pension Rules for Personal Retirement Schemes issued in terms of the*

⁹³ The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. 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.

⁹⁴ SOC 2.7.2 (a)

⁹⁵ SOC 2.7.2 (b)

⁹⁶ SOC 2.7.2 (c)

⁹⁷ SOC 2.7.2 (e)

⁹⁸ SOC 2.7.2 (h)(iii) & (v)

Retirement Pensions Act 2011' (Pension Rules') when it was registered under the Retirement Pensions Act ('RPA').⁹⁹

It is noted that Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules 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'.¹⁰⁰

The investment restrictions for member-directed schemes under the RPA were outlined in Part B.2 titled '*Investment Restrictions of a Personal Retirement Scheme*' and Part B.9, '*Supplementary Conditions in the case of entirely Member Directed Schemes*' of the Pension Rules.

It is further noted that SLC 3.2.1 (ii) and (iii) of the Pension Rules provided *inter alia* that the Retirement Scheme Administrator shall ensure that the assets of the scheme are: '**... properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole**'; and '**... sufficiently liquid and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits**'.¹⁰¹

The Arbiter accordingly considers that the Trustee and RSA of the Scheme did not protect the Complainant's interests – not only from ensuring clarity and certainty about the party/ies involved in the investment decisions but also from the inadequate high-risk investments which were not reflective of his

⁹⁹ The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided any scheme/ person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

¹⁰⁰ The same principle was reflected in Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*' of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*' which applied to the Service Provider as Scheme Administrator at the time it was subject to the *Special Funds (Regulation) Act*.

¹⁰¹ SLC 3.2.1 (ii) and (iii) of Part B of the Pension Rules.

profile and attitude to risk, the scope of the Scheme and the MFSA rules to which it was subject to.

The Arbiter cannot indeed reasonably conclude that the investment portfolio reflected the Complainant's risk profile, nor the prudence required to achieve the scope of the Scheme as a retirement product and neither that it was in line with, and reflective of, the applicable regulatory requirements.

Conclusion

The Arbiter concludes that MCT has not properly discharged '*prudence, diligence and attention of a bonus paterfamilias*'¹⁰² in the execution of its duties and not properly exercised its powers and discretions when it itself allowed without question the Complainant's funds to be invested inappropriately and within such unclear structure.

In the circumstances, the Arbiter cannot consider that MCT has satisfied the legitimate expectations of the Complainant and neither that it has acted properly and reasonably in line with the applicable requirements in its role of Trustee and Retirement Scheme Administrator. Accordingly, in fairness, it cannot be excused from liability in the circumstances.

Given that there were other parties who carried responsibility for the underlying investments, this aspect shall be taken into consideration in the extent of compensation decided in this case.

Decision and Compensation

For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case,¹⁰³ and is partially accepting it in so far as it is compatible with this decision.

Being mindful of the key roles of MC Trustees (Malta) Limited as Trustee and Retirement Scheme Administrator, and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, the

¹⁰² As required under Article 21 (1) of the TTA

¹⁰³ Cap. 555, Article 19(3)(b)

Arbiter concludes that the Complainant should be given compensation by MCT for the losses suffered by the Complainant in relation to his Scheme.

The Arbiter considers that, in the particular circumstances of this case, it is fair, equitable, and reasonable for MC Trustees (Malta) Limited to be held responsible for seventy per cent of the net losses sustained by the Complainant on his investment portfolio.

Given that the Arbiter has been presented with different figures for withdrawals and has no full statements as at the date of this decision, the Arbiter shall formulate how compensation is to be calculated by the Service Provider for the purpose of this decision in order for the performance on the whole investment portfolio to be taken into consideration.

The Service Provider is accordingly being directed to pay the Complainant compensation equivalent to 70% of the sum of the Net Loss incurred within the whole portfolio of underlying investments constituting the Cornhill FlexMax Portfolio (held within the FlexMax Investment Account), that was allowed by the Service Provider.

The Net Loss calculated on such portfolio shall be determined as at the date of this decision and calculated as follows:

From the original Investment amount of GBP 85,928.85 deduct:

- 1. Drawings/income paid to the Complainant**
- 2. Fees and charges of the Scheme**
- 3. Zero market value of the residual portfolio (as featured in the Scheme's Annual Statement referred to above).**

The amount of the original investment less the sum of items 1,2,3 above shall be the net loss of the portfolio of which 70% is to be paid by the Service Provider to the Complainant.

Given the particular status of the indicated remaining investments as outlined above, the Arbiter further considers that any future proceeds that may be

derived from the remaining investments are to be allocated as 30% to the Complainant with the remaining 70% retained by the Service Provider.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter is, therefore, ordering MC Trustees (Malta) Limited to pay the indicated amount of compensation to the Complainant as calculated above, whilst future proceeds (if any) in respect of the remaining investments indicated in this decision are assigned accordingly between the parties to this Complaint as also stipulated above.

Given the particular circumstances and the only remaining investments within the Scheme are all in suspension, liquidation or not redeemable, the Arbiter is also ordering, as part of the compensation provided to the Complainant in accordance with Article 26(3)(c)(iv) of the Act, that MCT also fully refunds/ waives its own trustee and Scheme fees charged or applicable to the Retirement Scheme as from the period of the Complaint filed with the Office of the Arbiter for Financial Services until the Complainant's Scheme account is closed down. This applies only to those periods in which there are no new investments held within the Scheme.

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

**Alfred Mifsud
Arbiter for Financial Services**