MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-10 ta' Diċembru, 2021

Appell Inferjuri Numru 64/2020 LM

Christine Elizabeth Cook (Detentriċi tal-Passaport nru. 707594581)
('l-appellata')

***vs*.**

STM Malta Trust Company Management Limited kif sostitwita minn STM Malta Pension Services Limited (C 51028)
('l-appellanta')

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **STM Malta Pension Services Limited (C 50128)** [minn issa 'l quddiem 'is-soċjetà appellanta'] li ssostitwit **lis-soċjetà STM Malta Trust Company Management Limited**, mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru']

mogħtija fil-15 ta' Settembru, 2020, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti **Christine Elizabeth Cook (Detentriċi tal-Passaport nru. 707594581)** [minn issa 'l quddiem 'l-appellata'] fil-konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinżamm biss parzjalment responsabbli għad-danni sofferti, iddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lill-appellata l-kumpens bil-mod kif stabbilit, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effetiv pagament, filwaqt li kull parti kellha tħallas l-ispejjeż tagħha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li l-appellata allegatament tgħid li sofriet mill-investiment li hija kienet għamlet tramite s-soċjetà appellanta f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema']. Jirriżulta li l-imsemmija appellata kienet avviċinat lill-konsulenti finanzjarji Continental Wealth Management [minn issa 'l quddiem 'CWM'] għall-ħabta tas-sena 2012, bil-għan li l-pensjoni tagħha tiġġenera introjtu ulterjuri permezz ta' investiment f'*a Qualifying Recognised Overseas Pension Scheme [QROPS].* Fl-istess sena hija ġiet introdotta lis-soċjetà appellanta, u skont l-istruzzjonijiet li din tal-aħħar irċeviet mingħand l-appellata tramite Premier Pensions Solutions SL, liema soċjetà l-appellata kienet ukoll qiegħda tistrieħ fuq il-pariri tagħha, id-depożitu

tal-pensjoni tagħha minn ma' Prudential fir-Renju Unit, ġie trasferit lis-soċjetà appellanta li kienet Amministratriċi u anki *Trustee* tal-Iskema.

Mertu

3. L-appellata ppreżentat ilment quddiem l-Arbitru fil-25 ta' Mejju, 2018 fil-konfront tas-soċjetà STM Malta Trust and Company Management Ltd, li fil-fehma tagħha kienet negliġenti meta kellha x'taqsam ma' kumpannija li saħansitra ma kinitx reġistrata, filwaqt li flusha tqegħdu f'QROPS fejn ġew investiti f'prodotti li kienu jġorru riskju għoli u li ma kienux tajbin għaliha. Bħala riżultat hija sofriet telf sostanzjali, u għalhekk talbet li tiġi kumpensata għat-telf fil-valur tal-fond tal-pensjoni u fl-introjtu mitluf minn dak il-fond fl-aħħar sentejn.

4. L-imsemmija soċjetà kif aktar tard sostitwita mis-soċjetà appellanta, wieġbet fl-1 ta' Novembru, 2018 billi eċċepiet li (a) il-parti l-kbira tal-ilment kien jirrigwarda l-allegati attivitajiet frawdolenti ta' CWM u terzi oħra, iżda hija kienet ser tirrispondi biss għall-allegazzjonijiet tal-appellata fil-konfront tagħha; (b) fl-applikazzjoni għas-sħubija tal-Iskema kien hemm spjegat sew l-informazzjoni li ngħatat u l-appellata kienet iffirmat għal għadd ta' dikjarazzjonijiet, garanziji u indennizzi; (ċ) l-appellata kienet ikkonfermat lis-soċjetà appellanta li hija kienet fittxet u ottjeniet parir dwar jekk *structured notes* kienux konformi mal-profil ta' riskju tagħha; (d) fid-dawl tal-allegazzjonijiet ta' frodi magħmula mill-appellata fil-konfront ta' CWM u meħud in konsiderazzjoni li *fraus omnia corrumpit*, hija ma kellhiex tinżamm responsabbli lejn l-appellata; (e) kien hemm ukoll diversi garanziji u indennizzi

oħra li l-appellata ffirmat favur is-soċjetà appellanta u hija ma ppreżentat l-ebda prova tan-negliġenza tagħha; u (f) ma kienx ċar lis-soċjetà appellanta jekk l-appellata kinitx jew kinitx ser tipproċedi skont kwalunkwe rimedju li kellha kontra CWM, OMI u/jew terzi, u għalhekk l-Arbitru kellu l-ewwel jistenna l-eżitu ta' dawk il-proċeduri.

Id-deċiżjoni appellata

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

> *"**Further Considers:***
>
> Basis of the complaint
>
> *The Arbiter notes that in her additional submissions the Complainant highlighted new aspects which were not raised in the original complaint filed with the Office of the Arbiter for Financial Services. The Complainant cannot change the basis of her complaint and the Arbiter will accordingly only consider the complaint as originally filed.*
>
> Nature of certain additional allegations
>
> *In her additional submissions, the Complainant made* inter alia *allegations of a criminal nature when she alleged that* 'STM was systematically facilitating what was effectively financial crime (2012 to 2017)' *and* 'that STM had habitually contravened regulations in both Malta and Gibraltar'. *(fn. 15 A fol. 60). Various circumstances allegedly involving STM were subsequently mentioned by the Complainant in her additional submissions. (fn. 16 Section titled 'STM's History' in Complainant's submissions refers) Besides not providing any evidence and not substantiating in any way such allegations, the Complainant has not explained either the relevance of the claims made in this regard to the case in question.*
>
> *As stated above, the Arbiter shall consider the Complaint as originally filed and take cognisance only of matters related and relevant to the issues raised by the Complainant in her Complaint.*

Joinder request by the Service Provider

*In its additional submissions, the Service Provider requested the joinder of Continental Wealth Management in Spain ('CWM') and Old Mutual International Isle of Man Limited in the Isle of Man, British Iles, ('OMI') as parties to the Complaint on the basis of the definition of '*parties' *in Article 2 of the Arbiter for Financial Services Act, Chapter 555.*

*STM Malta emphasised that, besides the Complainant and the financial service Provider against whom the complaint is made, the definition of '*parties' *in the said Article also makes reference to '*and any other person who in the opinion of the Arbiter should be treated as a party to the complaint'*. (fn. 17 A fol. 78*.) *The Service Provider* inter alia *argued that the Complaint is also directed towards CWM and OMI given that the Complainant claimed that CWM had invested her money into high risk companies for whcih she never gave permission and also claimed that OMI facilitated the fraud carried out by CWM.*

STM Malta further argued inter alia that:

'Noting the age-old maxim **fraus omnia corrumpit**, it is submitted that in the interest of justice CWM and OMI should answer for themselves in these proceedings in respect of the fraud which the Complainant is attributing to them. It would not be fair and equitable on the Respondent to have any responsibility imputable to it if this results from the fraud of a third party'. *(fn. 18 Ibid.), claiming also that STM Malta may itself have been a victim of the alleged fraud.*

This issue was raised by the Service Provider in the additional submissions and, therefore, at a late stage of the proceedings. This issue should have been raised in the reply and not in the additional submissions. Since the joinder request was related to the issue of fraud allegations, and the Arbiter is not considering the issue for reasons already stated in this decision, there is no scope of treating CWM and OMI as a party to the complaint.

For the purposes of Article 22(1) of the Arbiter For Financial Services Act (Cap. 555) ('the Act'), it is noted that in Section C of its complaint form, (fn. 19 A fol. 3) the Complainant identified STM Malta as the financial services provider against whom the Complaint is being made in relation to the QROPS (fn. 20 Qualifying Recognised Overseas Pension Scheme – in this case, this being the STM Malta Retirement Plan, which the Complainant became a member of on 28 August 2012 (A fol. 67)) scheme. It is further noted that, as emerging during the proceedings of the case, the Complaint

made by the Complainant in essence relates to the alleged shortcomings of the Service Provider as Administrator and Trustee of the Scheme.

Moreover, both CWM and OMI are not financial service providers licensed or authorised by the MFSA and, therefore, do not fall within the jurisdiction of the Arbiter.

Having considered the particular circumstances of this case, in the Arbiter's opinion CWM and OMI should not be treated as a party to the Complaint presented before the Arbiter and, accordingly, the Service Provider's request cannot be upheld in this case.

The Merits of the Case

The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case. *(fn. 21 Cap. 555, Art. 19(3)(b))*

The Complainant

The Complainant stated that she is a '1950-s born British National who has been resident in Spain since 2014'. (fn. 22 A fol. 58) She described herself as a 'low/medium risk, retail investor'. (fn. 23 A fol. 28)

As indicated in the report issued by Premier Pension Solutions SL, the Universities Superannuation Scheme was the previous UK pension of the Complainant prior to her pension transfer to the Retirement Scheme. (fn. 24 A fol. 7) The Complainant's employment history accordingly involved universities and other higher education institutions (fn. 25 The Universities Superannuation Scheme Annual Report and accounts for the year ended 31 March 2019 specifies that the 'Universities Superannuation Scheme (USS) was established in 1974 as the principal pension scheme for universities and other higher education institutions in the UK' – https://www.uss.co.uk/how-uss-is-run/running-uss/annual-reports-and-accounts)

It has not been indicated or proven during the case that the Complainant was a professional investor.

The Complainant became a member of the Retirement Scheme on the 28 August 2012 (fn. 26 A fol. 75)

The Service Provider

The Retirement Scheme was established by STM Malta. (fn. 27 A fol. 8) STM Malta is licensed as a Retirement Scheme Administrator (fn. 28

https://www.mfsa.mt/financial-services-register/result/?id=204) *and acts as the* ***Retirement Scheme Administrator and Trustee of the Scheme.***

The Legal Framework

The Retirement Scheme and STM Malta are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the 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. (fn. 29 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/)

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 authorisation 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 Article 43(6)(c) of the TTA, in light of STM Malta's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

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',

with Article 43(6)(c) in turn providing 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 …'.

Particularities of the Case

The Product in respect of which the Complaint is being made and other background information

The STM Malta Retirement Plan ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta authorised by the Malta Financial Services Authority ('MFSA') as a Personal Retirement Plan. (fn. 30 https://www.mfsa.mt/financial-services-register/result/?id=209). *The Scheme was initially registered with MFSA under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta). (fn. 31 A fol. 8)*

As indicated above, prior to transferring her pension into the Retirement Scheme, the Complainant had a UK pension, the Universities Superannuation Scheme. (fn. 32 A fol. 7) The Complainant noted that following advice received in 2012 from CWM and Premier Pension Solutions SL, she transferred her pension into the Retirement Scheme. (fn. 33 A fol. 58) It was indicated that the initial transfer value made by the Complainant into the Scheme was of GBP 81,446.81 (fn. 34 A fol. 61)

The assets held into the Retirement Scheme were used to purchase the Executive Investment Bond on the 2 October 2012. The Executive Investment Bond ('the Policy'), is a life policy investment wrapper issued by Old Mutual International (previously known as Royal Skadia). (fn. 35 http://www.isleofman.com/News/details/69075/royal-skandia-becomes-old-mutual-international*) The Policy had a total investible premium of GBP77,843.69 (fn. 36 A fol. 24 & & 75)*

The investible premium within the Policy was in turn invested, on the advice of CWM, into underlying investment instruments.

The contested underlying investments within the said Policy included various investments into structrued notes as emerging from the dealing instruction notes attached to the Complaint. (fn. 37 A fol. 15-22)

*In her Complaint, the Complainant claimed that her money was invested in '*high risk companies' *(fn. 38 A fol. 4) with the Service Provider noting that they take this to mean that she was referring to* 'the structured notes which Continental Wealth had recommended'. (*fn. 39 A fol. 50)*

*In her formal complaint with the Service Provider, the Complainant specifically referred to the '*high-risk, professional-investor-only structured notes' *that she was invested into. (fn. 40 A fol. 33)*

In addition to structured notes, the Complainant's portfolio also constituted investments in collective investment schemes as acknowledged by both parties to the Complaint. (fn. 41 A fol. 62 & 75)

Underlying Investments

The Complainant enclosed a number of dealing instruction forms with her Complaint Form as follows: (fn. 42 A fol. 15-22)

a) *Dealing instruction dated 24 June 2014 to sell GBP 16,000 of the **RBC Biotech Income**; (fn. 43 Security identifier/ISIN– XS0979786620 – A fol. 15)*

b) *Dealing instruction dated 02 July 2014 to buy GBP 15,000 of the **Nomura 10% Energy**; (fn. 44 Security identifier/ISIN – XS1078774871 – A fol. 16)*

c) *Dealing instruction dated 15 July 2014 to sell all the units in the RBC Biotech Income; (fn. 45 Security identifier/ISIB – XS0979786620 – A fol. 17)*

d) *Dealing instruction dated 25 July 2014 to buy GBP 10,000 of **Nomura 10% Retail** and also to buy GBP 5,000 of RBC Cloud; (fn. 46 Their security identifier/ISIN being XS1089856824 and XS1078168876 respectively – A fol. 18)*

e) *Dealing instruction dated 30 July 2014 to buy GBP **RBC Online Large Caps**; (fn. 47 Security identifier/ISIN – XS1092556452 – A fol. 19)*

f) *Dealing instruction dated 02 April 2015 to sell 1,000 units of the **RBC Online Large Caps**; (fn. 48 Security identifier/ISIN – XS1092556452 – A fol. 20)*

g) *Dealing instruction dated 29 October 2015 to buy GBP 4,000 of the **Marlborough Multi Cap**; (fn. 49 Security identifier/ISIN – GG00BKM40874 – A fol. 21)*

h) *Dealing instruction dated 26 August 2016 to sell all the **RBC Online Large Cap** and also to buy GBP 5,000 of the **RBC Online Large Cap**. (fn. 50 Their security identifier/ISIN – XS1092556452 and XS1468789208 respectively – A fol. 22)*

The said dealing instruction form indicated by the Complainant thus cover transactions in structured notes with the exception of the Marlborough Multi Cap, this being a mutual fund.

It is noted that the dealing instruction forms presented during the case seem to only cover certain transactions in 2014, 2015 and 2016.

Valuation Statement

*The Complainant submitted a valuation statement dated 20 February 2018 in respect of the Executive Investment Bond ('the Policy'). (fn. 51 A fol. 23) The statement indictes the named policyholder as '*STM Malta Trust & Company Management Limited as trustee of STM Malta Ret Plan: C Cook'. (fn. 52 Ibid.)

The valuation statement indicates that a total premium of GBP77,843.69 was paid into the Executive Investment Bond and a total withdrawal of GBP15,845.86 was made from the Policy as at 20 February 2018. (fn. 53 A fol. 24)

The statement also indicates that the total current market value of the Policy as at 20 February 2018, amounted to GBP20,540.81 with this figure comprising a cash balance of GBP16,619.46 (80.91% of the policy value as at that date) and an investment in a collective investment scheme, the 'Marlborough Intern Marlborough Multi Income F GBP'*, (fn. 54 A fol. 25 of GBP3,921.35 (19.09% of the policy value as at that date). (fn. 55 A fol. 24)*

The Executive Investment Bond accordingly experienced a reduction in value of GBP41,457.02 (fn. 56 Total premiums paid of GBP77,843.69 into the Executive Investment Bond less Total Withdrawals as at 20 February 2018 of GBP15,845.86 amounts to GBP61,997.83. The current market value as at 20 February 2018 is indicated as GBP20,540.81, with the total reduction in value after withdrawals thus amount to GBP41,457.02 (GBP61,997.83 less GBP20,540.81) – A fol. 24) (net of withdrawals) over the 5-year period from commencement of the Policy in 2012 till 20 February 2018. This equates to a reduction in value equivalent to 53.257% of the total investible premium of the Policy. (fn. 57 GBP41,457.02 as a percentage of GBP77,843.69)

The only remaining investment which featured in the valuation statement dated 20 February 2018, was the 'Marlborough Intern Marlborough Multi Income F GBP', with a market value GBP3,921.35. (fn. *58 A fol. 24 & 25) This investment has the same asset identifier no/ISIN GG00BKM40874 of the instrument indicated in the dealing instruction note of 29 October 2015 relating to an investment of GBP4,000 in the* 'Marlborough Multi Cap'. *(fn. 59 fol. 21). The portfolio valuation statement as at 20 February 2018 thus indicates an unrealised paper loss of GBP78.65 (fn. 60 Book Cost of GBP4,000 less Market Value of GBP3,921.35) on this investment.*

The reduction in value on the Policy of GBP41,457.02 (fn. 61 Total premiums paid of GBP77,843.69 into the Executive Investment Bond less Total Withdrawals as at 20 February 2018 of GBP15,845.86 amounts to GBP61,997.83. The current market value as at 20 February 2018 is indicated as GBP20,540.81, with the total reduction in value excluding withdrawals thus amounting to GBP41,457.02 (GBP61,997.83 less GBP20,540.81) – A fol. 24) accordingly features an unrealised loss of GBP78.65 on the only pending investment. The actual realised loss experienced by the Complainant on the underlying investments together with the fees paid within the overall Scheme's structure amounts to GBP41,378.37 according to the said statement. This reflects an actual realised loss (inclusive of fees paid to STM Malta and to other parties) equivalent to 53.155% of the total premiums paid by the Scheme into the policy as at that date. (fn. 62 GBP41,457.02 as a percentage of GBP77,843.69)

Responsibilities of the Service Provider

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

Obligations under the SFA, RPA and directives/rules issued thereunder

*The obligations of STM Malta as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the applicable conditions that at the time were outlined in the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002' *('the Directives').*

*Following the repeal of the SFA and eventual registration under the RPA, STM Malta became subject to the provisions relating to the services of a retirement scheme administrator under the RPA. As a Retirement Scheme Administrator under the RPA, STM Malta became 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 STM Malta in its role as Retirement Scheme Administrator under the

SFA/RPA regime respectively, it is pertinent to note the following general principles: (fn. 63 Emphasis added by the Arbiter)

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 STM Malta 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 STM Malta as a Scheme Administrator under the RPA, provided that:*

'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 STM Malta 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'.

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 STM Malta 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 STM Malta.

The said article provides that:

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

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

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

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

*The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property '*as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'. *(fn. 64 Pg.174, 'An Introduction to Maltese Financial Services Law', Editor Dr Max Ganado, Allied Publications 2009)*

As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: **to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'**. *(fn. 65 Pg. 178 'An Introduction to Maltese Financial Services Law', Editor Dr Max Ganado, Allied Publications 2009)*

The fiduciary and trustee obligations were also highlighted by 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 pater familias in the**

performance of his obligations'. *(fn. 66 Pg. 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.*

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

***The above are considered to be crucial aspects which should have guided STM Malta in its actions and which shall accordingly be considered in this decision**.*

Other relevant aspects

*One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider with respect to the Scheme and its investments**.*

Whilst the Service Provider has not made reference to such function in this case, but chose to highlight other aspects instead, it is clear that such a duty applied to STM Malta in its role of Retirement Scheme Administrator and Trustee of the Scheme.

Other Observations and Conclusions

Claims relating to the signature on the dealing instructions & other important aspects

*The Complainant claimed that her signature on the dealing instructions were forged stating that although the dealing instructions showed her signature, however, on no occasion did she authorise such instructions. The Complainant just explained in this regard that her signature was '*100% identical, which is impossible to achieve naturally'. *(fn. 67 A fol. 4)*

The claim of a forged signature is a serious allegation which had to be specifically proven by specific facts and, in the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation. However, the Complainant making this allegation did not provide enough evidence for the Arbiter to accept her allegation.

The Arbiter observes that the claim of forged signatures involves dealing instructions which span over two years, from June 2014 till August 2016. The allegations of false signatures over such a long period of time raises another aspect, that relating to the adequacy of the communications and reporting of the Service Provider.

Indeed, it is noted that during this case no details were presented of the type of ongoing reporting made by the Service Provider to the Complainant with respect to the Scheme, its performance and underlying investments.

It is noted that the Complainant claimed inter alia *that:*

'In fact, I had no direct correspondence with STM ... I received no annual statements which might have alerted me to downturns in my fund value ... I had never seen those dealing instructions before I requested them in 2017, so in five years I was never informed of the progress, or not, of my investments'. (*fn. 68 A fol. 63)*

The Service Provider did not refer to, nor present any statements and reports it issued to the Complainant on the status of the Scheme and its underlying investments. Neither did the Service Provider contest the above-mentioned statements made by the Complainant.

The claims made by the Complainant* inter alia*, thus, put into question the procedures used and methods of communications adopted by STM Malta with the Complainant.

The serious allegations about the false signatures on dealing instructions, which were alleged to have occurred over a long period of time, could have been easily avoided and/or at least addressed in a timely manner with simple measures and safeguards adopted by the trustee and scheme administrator if there were adequate communication and reporting.

In the context of member-directed schemes such measures could have involved, for example, accepting communications either from the Complainant or with the Complainant being in copy in certain communications involving dealing instructions/confirmation of exectuition; and/or the member being adequately and promptly informed by the Service Provider of the purchases and redemptions being made within the portfolio of investments.

The apparent lack of adequate controls and administrative procedures reasonably put into question the Service Provider's adherence with the requirements to have adequate operational, administrative and controls in place in respect of its business and that of the Scheme as it was required to do in terms of Rule 2.6.4 of Part B.2.6 of the Directives under the SFA *(fn. 69 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 STM Malta 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 effective, prepared to manage, reduce and mitigate the risks to which it is exposed...') ***and Standard Condition 4.1.7, Part B.4.1. of the Pension Rules for Service Providers issued under the RPA*** *(fn. 70 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'.) ***as well as Standard Condition 1.2.2, Part B.1.2, Part B.1.2 of the Pension Rules for Personal Retirement Schemes*** *(fn. 71 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, 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.'*)* ***issued in terms of the RPA during the respective periods when such rules applied as outlined above.***

Moreover, the Arbiter further notes that prior to being subject ot the regulatory regime under the RPA, which also included requirements relating to the provision of information and ongoing reporting, (fn. 72 Such as condition 9.3(e) of Part b.9 of the Pension Rules for Personal Retirement Schemes of 1 January 2015.) the Service Provider was subject to regulatory requirements relating to inter alia *the provision of adequate information to members.*

The following provisions under the SFA framework are relevant in this regard:

- Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002[1] *respectively already provided that:*
'2.6.2 The Scheme Administrator shall act with due skill, care and diligence in the best interests of the Beneficiaries. Such action shall include:
…

[1] Condition 2.2 of the Certificate of Registration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives.

b) ensuring that contributors and prospective contributors are provided with adequate information on the Scheme to enable them to take an informed decision …';

'2.6.3 The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and nor misleading. This shall include:

…

b) reporting fully, accurately and promptly to contributors the details of transactions entered into by the Scheme …'.

The Arbiter has not been provided during the case in question with any comfort as to whether the Complainant was being adequately and promptly informed by STM Malta regarding the status of the Scheme, its performance and underlying investment portfolio, choosing also not to contest either the statements about the lack of adequate reporting made by the Complainant as indicated.

The above aspects relating to the apparent lack of adequate reporting as well as controls and administrative procedures will be given their due weight in the final decision after the Arbiter considers the remaining principal alleged failures which follow next.

<u>Other key considerations relating to the principal alleged failures</u>

As emerging during this case, the Complaint in essence revolves around the claim that the Complainant experienced a loss on her Retirement Scheme due to STM Malta not having adequately carried out its duties as administrator and trustee of the Scheme in line with the applicable regulations and requirements.

Two principal alleged failures made against the Retirement Scheme Administrator are that:

(i) *That STM Malta were negligent in dealing with an unregistered company with the Complainant claiming that CWM was not registered to operate in Spain;*

(ii) *That the pension portfolio was invested in high risk companies when she is a much more cautious investor. Hence, this claim relates to the suitability of the portfolio of investments allowed within the Scheme.*

General observations

On a general note, it is clear that STM Malta did not provide investment advice in relation to the underlying investments of the member-directed scheme. The role of the investment advisor was the duty of other parties, such as CWM.

This would reflect on the extent of responsibility that the financial advisor and the RSA and Trustee had in this case as will be later seen in this decision.

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested financial instruments, ***STM Malta had nevertheless certain obligations to undertake in its role of Trustee and Scheme Administrator.***

The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial bearing on the operations and activities of the scheme and affect directly, or indirectly, its performance*.*

Consideration thus needs to be made as to whether STM Malta failed in any relevant obligations and duties and, if so, to what extent any such failures are considered to have had a bearing or otherwise on the financial performance of the Scheme and the resulting loss for the Complainant.

(i) Regulatory status of the investment advisor

The Complainant chose herself the appointment of Continental Wealth Management to provide her with investment advice in relation to the selection of the underlying investments and composition of the portfolio within her Scheme. The Retirement Scheme Administrator, from its part, allowed and/or accepted the investment advisor to provide investment advice to the Complainant within the structure of the Retirement Scheme.

The Complainant explained inter alia *that:*

'At the time I made the new arrangements to my pension, I assumed that Continental Wealth Management SL was a bona fide financial advisory firm which was legally licensed …'. *(fn. 74 A fol. 58)*

The Complainant also explained that:

'CWM was, at the time, a tied agent of Inter-Alliance Worldnet, a firm in Cyprus which was regulated with the Cyprus Insurance Companies Control Service. Inter-Alliance had an insurance licence – however, this was only for Inter-Alliance and could not be passed on to another entity'. *(fn. 75 Ibid.)*

The Complainant further explained that in 2016, Inter-Alliance folded and was replaced by a firm called Trafalgar International which was regulated in Germany for both insurance and investment advice. It was noted that such authorisation could not be passed to another separate legal entity and that CWM continued to be an entirely unlicensed corporate entity. (fn. 76 A fol. 59)

Whilst no evidence has emerged throughout the case indicating that CWM was a regulated party, it is noted that the Complainant has however not submitted any documentation related to the Scheme which indicated, or could have led her to assume, that her financial advisory firm, CWM, was legally licensed.

It is further noted that in its submissions, the Service Provider, from its part did not delve into the regulatory status of such party.

*The regulatory framework applicable to the Scheme and the Service Provider in Malta has been updated over the years. At the time of the Complainant's membership into the Scheme in August 2012, the regulatory framework seems to have allowed certain scenarios with respect to the appointment of an investment advisor until the coming into force and application of relevant provisions in section B9 of Part B of the Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011. (fn. 77 Pages 4/5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017/15-2018) issued in relation to the '*Consultation on Amendments to Pension Rules for Personal Retirement Schemes' *https://www.mfsa.com.mt/publications/policy-and-guidelines/feedback-and-statements/; Page 9 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) also refers - https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/)*

The said section of the latest rules includes inter alia the criteria that need to be satisfied in respect of investment advisors of member directed schemes. These include the requirement for the investment advisor to be subject to inter alia authorisation and regulation as is specified in standard licence condition 9.6 (b) of the said rules. (fn. 78 Last updated 28 December 2018 – https://www/mfsa/com/mt/firms/regulation/pensions/pension-rules-applicable-as-from -1-january-2015/#Pension%20Rules)

Such an equivalent condition has not been found in the framework under the SFA regime and indeed the MFSA allowed a transitional period, until 1 July 2019, for

*compliance with the rules indicated above stipulating the criteria to be satisfied in respect of investment advisors. (fn. 79 Page 5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017 / 15-2018) issued in relation to the '*Consultation on Amendments to Pension Rules for Personal Retirement Schemes'.)

Hence, the Arbiter has no clear and sufficient evidence that the Retirement Scheme Administrator was prohibited, by the applicable regulatory framework at the time, from allowing the appointment of an unregulated investment advisor.

However, the appointment of an unregulated entity to act as investment advisor meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where a regulated advisor is appointed. An adequately regulated financial advisor is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory authority. The Retirement Scheme Administrator and Trustee of the Retirement Scheme, a regulated entity itself, should have been duly cognisant of this.

In the scenario where an unregulated advisor was allowed to provide investment advice to the member of a member-directed scheme, ***one would reasonably expect the Service Provider, in its role of Retirement Scheme Administrator and Trustee of the Retirement Scheme, to exercise even more caution and prudence in its dealings with an unregulated party****.*

This is even more so, when the activity in question, that is, one involving the recommendations on the choice and allocation of underlying investments, has a material bearing on the financial performance of the Scheme and the objective of the retirement scheme to provide for retirement benefits.

It would have accordingly been only reasonable to expect the retirement scheme administrator and trustee to have an even higher level of disposition in the probing and querying of the actions of such unregulated party in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances. This aspect shall be taken into account in the decision taken in this case.

(ii) The permitted portfolio composition

A general search over the internet on the underlying investments indicated in the dealing instructions notes presented by the Complainant yielded fact sheets for the RBC Biotechnology Income Note (fn. 80 ISIN XS0979786620 –

https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-Income-Note-FACTSHEET.pdf) and the RBC Online Large Caps Income Note (fn. 81 ISIN XS1092556452 - https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-10pa-Online-Large-Caps-Income-FACTSHEET.pdf)

The fact sheet for the RBC Biotechnology Income Note describes inter alia *the product as a* 'Reverse Convertible Notes linked to a selection of biotechnology stocks', and 'an investment providing fixed levels of income of 8.5% p.a. over a 2 year term, and linked to the performance of the Biotechnology sector'. *(fn. 82 https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-Income-Note-FACTSHEET.pdf) The fact sheet for the RBC Online Large Caps Income Note describes inter alia the product as an* 'Autocallable Fixed Income Notes linked to a selection of online companies specialised on retail and discretionary services', being *'an investment providing fixed levels of income of 10% p.a., over a 2 year term, and linked to the performance of online companies'. (fn. 83 https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-2yr-RBC-Biotechnology-10pa-Online-Large-Caps -IncomeFACTSHEET.pdf)*

Both fact sheets indicate, in the Key features *section, that the target audience for these products were '*Professional Investors Only'*.*

The high rate of returns indicated on these products in themselves reflect the high level of risk as per the risk-return trade-off. The fact sheets of the said structured notes also highlighted a number of risks in respect of the capital invested into these products.

Apart from inter alia the credit risk of the issuer and the liquidity risk, the indicated fact sheets also highlighted risk warnings about the notes not being capital protected, warning that the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment.

A particular feature emerging in the indicated structured notes, involved the application of capital buffers and barriers. In this regard, the fact sheets described and included warnings that the invested capital was at risk in case of a particular event occurring. Such event comprised a fall, observed on a specific date of more than a percentage specified in the respective fact sheet, in the value of any underlying asset to which the structured note was linked.

The said fact sheets all included a warning that:

'If any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity, and capital will be lost'. *(fn. 84 https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-Income-Note-FACTSHEET.pdf https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-10pa0Online-Large-Caps-Income-Note-FACTSHEET.pdf*

It is clear that there were material consequences if just one asset, out of a basket of assets to which the said structured notes were linked, fell foul of the indicated barrier. The implication of such a feature should have not been overlooked nor discounted.

Whilst the fact sheets of other structured notes invested into were not presented or not traced, it is nevertheless clear that the portfolio of the Complainant indeed included structured notes which carried certain risks not reflective of a prudent approach as one would expect in a pension portfolio, and as ultimately required in terms of the rules (as outlined in the section of this decision titled '*Responsibilities of the Service Provider' *above).

The Service Provider, on its part, argued **inter alia** ***that '*****structured notes may be a suitable investment to be included in pension schemes' noting that 'Structured notes in general are designed so that within certain parameters they have less volatility than the underlying benchmark securities or indices'.**

Nevertheless, STM Malta has not shown nor provided any details itself on what basis the structured notes which were extensively and at times exclusively invested into, were considered suitable within the Complainant's pension scheme. Nor has the Service Provider demonstrated that the structured notes constituting the Complainant's portfolio carried less volatility or were not of high risk as it implied in its submissions.

The features of the structured notes outlined in the fact sheets sourced as described above, cannot be considered to have less volatility or not being of high risk in view of their particular features as outlined above. In the circumstances of this case, it has clearly transpired that the portfolio actually included investments which cannot be considered to reflect the arguments brought forward by the Service Provider in its reply as justification for the investment into structured notes.

In its submissions, the Service Provider noted that the MFSA had recognised the possible inclusion of structured notes in the portfolio of pensions schemes.

The Service Provider stated* inter alia *that:

'We note that the MFSA, in its recent draft revised regulations has recognised explicitly that structured notes may be held in pension schemes'. *(fn. 85 A fol. 50)*

Whilst the current pension rules issued by the MFSA indeed do allow a limited exposure to structured notes, it is nevertheless important to keep in mind and consider other relevant and appropriate aspects mentioned in the same MFSA rules. Indeed, the current Pension Rules for Personal Retirement Schemes also provide inter alia for the requirement to ensure that in case of a retail member the chosen investments are of a retail nature as per Standard Licence Condition 9.5(d)(ii)(bb) of the said rules. *(fn. 86 The said condition provides the following: '(bb) unless a Member requests to be classified as a professional member, a Member may only invest in investments which can be classified as suitable for a retail member: Provided that the responsibility of the Retirement Scheme Administrator in assessing the investments chosen shall be limited to carrying out due diligence on the proposed investment, following which the Retirement Scheme Administrator is satisfied on reasonable grounds that the investment can be classified as suitable for a retail member').*

Hence, the general statements made by the Service Provider do not provide any comfort whatsoever in the circumstances of this case, even more so, when it has been clearly determined that the Complainant's portfolio included investments not suitable for a retail member. The information found on the said products are indeed indicative of high risks being taken in the Complainant's portfolio.

Moreover, they indicate instances where STM Malta permitted investments targeted for professional investors within the Complainant's portfolio with such investments clearly not reflective of the Complainant's profile as a retail investor and, thus, cannot be construed as reflecting the principle of prudence or in acting in the best interests of the Complainant as was required in terms of the rules.

Excessive exposure to structured notes and single issuers

The Complainant claimed that 75% of her money was invested in structured notes (RBC) and that STM Malta did not query whether this was a wise investment. (fn. 87 A fol. 63)

Whilst such figure could not be verified from the documentation presented by the Complainant, the Service Provider has not, however, contested either such a statement that 75% of her money was invested into such products.

*The dealing instruction notes presented by the Complainant nevertheless indicate various transactions in structured notes as listed in the section titled '*Underlying investments' *above.*

The extent of losses experienced by the Complainant, where the statement as at 20 February 2018 indicated a realised loss of GBP41,378.37 inclusive of fees paid (equivalent to more than half of the total premiums paid into the Scheme), and a further unrealised loss on the remaining investment of GBP78.65, as indicated in the section titled 'Valuation Statement' above, is in itself indicative of the failure in achieving the Scheme's objective and ensuring adequate diversification and avoidance of excessive exposures. Otherwise, material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have not occurred.

Other observations

STM Malta did not help its case by not providing information on the underlying investments and not presenting other documentation relating to the Scheme. The Service Provider chose not only not to present any details on the investment portfolio, including charges and valuation, but it did not even submit copies of any documentation relating to the Scheme relevant to the case in question, opting instead to discretionally select and quote parts of documentation in its submissions, namely, various disclaimers and warnings relating to the Scheme, without actually presenting the actual and full document referred to.

Causal link

The actual cause of the losses experienced by the Complainant on her Retirement Scheme cannot just be attributed to the under-performance of the investments as a result of general market and investment risks and/or the alleged fraud by the investment advisor as argued by the Service Provider in its submissions.

There is sufficient and convincing evidence of deficiencies on the part of STM Malta in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above. At the very least, such deficiencies 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. The actions and inactions that occurred, as explained in this decision, enabled such losses to

result within the Scheme, leading to the Scheme's failure to achieve its key objective.

Had STM Malta undertaken its role adequately and as duly expected from it in terms of the obligations resulting from the law, regulations and rules stipulated thereunder, as explained above, 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 STM Malta being one of such parties.

The losses experienced on the Retirement Scheme is, in the case in question, ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which STM Malta was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainant.

Final remarks

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, and to select the underlying investments of the Retirement Scheme, the Retirement Scheme Administrator had a duty to check and ensure that the portfolio composition recommended by the investment advisor was inter alia in line with the applicable requirements and reflected the profile and objective of the Complainant in order to ensure that the interests of the Complainant are duly safeguarded.

It should have also ensured that the portfolio composition was one enabling the aim of the Retirement Plan to be achieved with the necessary prudence as one would reasonably expect from a retirement plan. The Scheme Administrator and Trustee had to, in practice, promote the scope for which the Scheme was established by allowing a portfolio of investments which reflected such scope.

The principal purpose of a personal retirement scheme is ultimately that to provide retirement benefits. Such purpose is reflected under the primary legislation, the Special Funds (Regulation) Act ('SFA') *(fn. 88 Article 2(1) of the SFA defined a* 'scheme' *to mean* 'a scheme or arrangement which is registered under this Act under which payments are made to beneficiaries for the principal purpose of providing retirement benefits...') ***and the Retirement Pensions Act ('RPA').*** *(fn. 89 Article 2 of the RPA defines a* 'personal retirement scheme' *as:* 'a retirement scheme which is not an occupational retirement scheme and to which contributions

are made for the benefit of an individual'. *A* 'retirement scheme' *is, in turn, defined under Article 2 of the RPA,* as 'a scheme or arrangement as defined in article 3', where Article 3(1) stipulates that 'A retirement scheme means a scheme or arrangement with the principal purpose of providing retirement benefits'. *Article 2 of the RPA also defines 'retirement benefit' as meaning:* 'benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death')

It is considered that, had there been a careful consideration of the contested structured products, the Service Provider should have intervened and raised concerns at the very least on certain investments into structured notes forming part of the Complainant's portfolio. It should have not allowed risky investments as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others. Apart from being its duties as a Retirement Scheme Administrator, the Service Provider was also the Trustee who had to act in the best interests of its client.

The Complainant ultimately relied on STM Malta 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 and also reasonably expect a return to safeguard her pension.

Whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

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 portfolio structure as well as the reporting to the Complainant on her underlying portfolio.

It is also considered that there are various instances which indicate non-compliance by the Service Provider with applicable requirements and obligations as amply explained above in this decision.

The Arbiter also considers that the Service Provider did not meet the 'reasonable and legitimate expectations' *(fn. 90 Cap. 555, Art. 19(3)(c)* ***of the Complainant who had placed her 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.

However, cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment advisor to the member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be only partially held responsible for the losses incurred.

Compensation

Being mindful of the key role of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of The STM Malta Retirement Plan and, 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 minimized and in a way contributed in part to the losses experienced on the Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by STM Malta for part of the realised losses on her pension portfolio.

In the particular circumstances of this case, considering the role of STM Malta as Trustee and Retirement Scheme Administrator of the Scheme and the extent of deficiencies determined, the Arbiter considers it fair, equitable and reasonable for STM Malta to be held responsible for seventy per cent of the realised losses sustained by the Complainant on her overall investment portfolio.

The Arbiter notes that the latest valuation is not current and during the proceedings no full details emerged of the realisedlosses on investments.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for the Complainant for the purpose of this decision.

Given that the Complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of Continental Wealth Management acting as advisor, compensation shall be provided solely on the investment

portfolio constituted under Continental Wealth Management and allowed by the Service Provider.

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

(i) ***For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Complainant's investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised).***

Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

(ii) ***In case where an investment in (i) above is calculated to have rendered a profit after taking into consideration the amount realised (inclusive of any total interest or other total income received from the respective investment), such realised profit shall be accumulated from all such investments and netted off against the total of all the realised losses from the respective investments calculated as per (i) above to reach the figure of the Net Realised Loss within the indicated portfolio.***

The computation of the Net Realised Loss shall accordingly take into consideration any realised gains or realised losses arising within the portfolio, as at the date of this decision.

(iii) ***In case where the remaining investment which was held by the Complainant as reflected in OMI's Valuation Summary dated 20 February 2018, is still held within the Scheme's portfolio of underlying investments as at, or after, the date of this decision such investment shall not be subject of the compensation stipulated above.***

This is without prejudice to any legal remedies the Complainant might have in the future with respect to such investment."

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fil-5 ta' Ottubru, 2020 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka d-deċiżjoni appellata billi tilqa' l-aggravji tagħha, filwaqt li tilqa' wkoll l-eċċezzjonijiet kollha tagħha, bl-ispejjeż kontra l-appellata. Tgħid li l-aggravji tagħha huma s-segwenti: (i) ma kien hemm l-ebda raġuni ġustifikabbli għaliex l-Arbitru ċaħad it-talba għall-kjamata fil-kawża ta' CWM u ta' OMI; (ii) l-Arbitru naqas milli jikkonsidra l-eċċezzjoni ta' *lis alibis pendens;* (iii) l-Arbitru ma setax raġonevolment jiddeċiedi (a) li l-istess soċjetà appellanta kienet responsabbli għal xi nuqqas stante li ħalliet lil CWM tkun *investment advisor* tal-appellata, meta hija ma kellha l-ebda obbligu regolatorju dak iż-żmien f'dan ir-rigward; (b) li l-kontenut tal-portafoll tal-appellata ma kienx skont il-liġijiet, ir-regoli u l-linji gwida applikabbli dak iż-żmien; (ċ) li hija ma kinitx ipprovdiet informazzjoni adegwata u suffiċjenti lill-ilmentatriċi; u (iv) li l-*quantum* tad-danni kif kwantifikat huwa kkontestat.

7. L-appellata wieġbet fl-4 ta' Novembru, 2020 fejn issottomettiet li d-deċiżjoni appellata hija ġusta, u għaldaqstant timmerita li tiġi kkonfermata.

Konsiderazzjonijiet ta' din il-Qorti

8. Din il-Qorti ser tgħaddi sabiex tikkunsidra l-aggravji tas-soċjetà appellanta, u dan fid-dawl tar-risposta ntavolata mill-appellata u anki tal-konsiderazzjonijiet magħmulin mill-Arbitru fid-deċiżjoni appellata.

L-ewwel aggravju: *[ma kien hemm l-ebda raġuni ġustifikabbli għaċ-ċaħda tat-talba għall-kjamata fil-kawża ta' CWM u ta' OMI]*

9. Wara li s-soċjetà appellanta tispjega kif hija ma kinitx tagħti pariri dwar investimenti, u dan kif kien jirriżulta wkoll mill-atti, hija tgħaddi sabiex tagħmel is-sottomissjonijiet tagħha dwar dan l-ewwel aggravju tagħha. Tgħid li l-Arbitru ma kellu l-ebda raġuni ġustifikabbli sabiex jiċħad l-imsemmija talba għall-kjamata fil-kawża ta' CWM u ta' OMI, meta l-ilment kien dirett fil-konfront tagħhom. Is-soċjetà appellanta hawn tgħaddi sabiex tagħmel riferiment għal dak li qalet l-appellata stess fl-ilment u anki fl-*email* tagħha tat-8 ta' Marzu, 2018 lill-OMI, fejn sostniet li din kienet assistiet f'reat finanzjarju ipperpetrat minn CWM. B'hekk huwa ċar li l-ilment tal-appellata huwa dirett ukoll fil-konfront ta' CWM u ta' OMI, iżda għalkemm il-kwistjoni tqajmet mill-ewwel mis-soċjetà appellanta, l-Arbitru ddeċieda li kien tard wisq fil-proċeduri sabiex tintlaqa' t-talba għall-kjamata fil-kawża. Tikkontendi li l-parametri tal-kwistjoni preżenti kienu ġew stabbiliti permezz tal-ilment meta l-appellata ressqet it-talbiet tagħha fil-konfront ta' dawn iż-żewġ entitajiet oħra u dawn kellhom jiġu kjamati fil-kawża *ai termini* tal-artikolu 2 tal-Kap. 555. Hija tagħmel ukoll riferiment għall-artikoli 961 u 962 tal-Kap. 12, u tikkontendi li t-talba għall-kjamat fil-kawża tista' ssir f'kull stadju tal-proċeduri odjerni. Tgħid li l-CWM u OMI għandhom jirrispondu għalihom infushom dwar l-allegat frodi, u ma kienx ġust li tirrispondi hi għar-responsabbiltà imputabbli lil terzi jekk din tirriżulta mill-frodi tat-terzi. Is-soċjetà appellanta fl-aħħar nett issostni l-Arbitru ma setax jiġġustifika d-deċiżjoni tiegħu b'riferiment għal dak li ġie deċiż dwar il-mertu.

10. Min-naħa tagħha l-appellata filwaqt li tagħmel riferiment għal dak li qal l-Arbitru meta ċaħad it-talba għall-kjamata fil-kawża proposta mis-soċjetà appellanta, issostni li mill-proċeduri quddiem l-Arbitru u kif huwa stess irrikonoxxa, l-ilment sar fil-konfront tas-soċjetà appellanta dwar in-nuqqasijiet tagħha bħala Amministratur u Trustee tal-Iskema u mhux dwar nuqqasijiet oħra min-naħa ta' CWM u OMI. L-appellata irrilevat b'riferiment għad-dispożizzjonijiet tal-artkolu 2 tal-Kap. 555, li l-Arbitru wasal għal din il-konklużjoni hekk kif għamel l-evalwazzjoni tiegħu li dawn ma kellhomx interess li jidħlu bħala parti fil-proċeduri. Issostni li l-Arbitru l-ewwel għandu jfittex sabiex jara jekk il-kjamati fil-kawża għandhomx interess wara kollox li jidħlu fil-proċeduri, filwaqt li għandu d-dritt li jikkonsidra x'risposti dawn setgħu jressqu. L-appellata tagħmel riferiment għall-provvedimenti tal-artikoli 19 *et seq.* tal-Kap. 555 u tiċċita l-artikolu 2 tal-istess liġi, fejn tenfażizza l-fatt li d-definizzjoni ta' '*provditur tas-servizzi finanzjarji*' tillimita l-ġurisdizzjoni u l-kompetenza, tant li kien ser ikun inutli li CWM u OMI jissejħu fil-kawża.

11. Il-Qorti tikkonsidra li d-deċiżjoni tal-Arbitru fejn ċaħad it-talba għall-kjamata fil-kawża ta' dawn iż-żewġ entitajiet hija waħda tajba. Tosserva li t-talba għall-kjamata fil-kawża ta' CWM u ta' OMI kienet saret mis-soċjetà appellanta fir-risposta tagħha li tinstab *a fol.* 66 *et seq*. tal-atti tal-Arbitraġġ. Fid-deċiżjoni appellata l-Arbitru għaraf li t-talba meta tressqet, din saret fir-rigward tal-allegazzjoni ta' frodi magħmula mill-appellata. Qal li ġaladarba huwa ma kienx qed jikkonsidra din l-allegazzjoni għal dawk ir-raġunijiet li huwa fisser aktar 'il fuq fid-deċiżjoni appellata, ma kien hemm l-ebda raġuni għaliex CWM u OMI kellhom jitqiesu bħala parti fil-proċeduri quddiemu. Għall-fini tas-subartikolu

22(1) tal-Kap. 555, osserva li fl-ilment tagħha l-appellata kienet identifikat lis-soċjetà appellanta bħala l-provditur tas-servizzi finanzjarji kontra minn hija kienet qiegħda tintavola l-imsemmi lment. Imbagħad mill-proċeduri kien irriżulta li l-ilment tal-appellata kien jirrigwarda l-allegati nuqqasijiet tal-provditur tas-servizz bħala Amministratriċi u bħala Trustee tal-Iskema. Barra minn hekk, kemm CWM u OMI ma kienux provdituri ta' servizzi finanzjarji kif liċenzjati jew awtorizzati mill-MFSA, u għalhekk huma ma kienux jaqgħu fil-ġurisdizzjoni tal-Arbitru.

12. Il-Qorti tirrileva li ma jirriżultax b'mod ċar meta saret din it-talba, iżda anki jekk it-talba ma tirriżultax li saret tardivament waqt il-proċeduri tal-arbitraġġ, tqis li l-Arbitru xorta waħda kien korrett meta ċaħadha, u dan għaliex huwa ħa in konsiderazzjoni wkoll il-fatt li l-appellata kienet indikat fl-ilment tagħha li dan kien qed jiġi dirett proprju kontra s-soċjetà appellanta minħabba n-nuqqasijiet tagħha, kemm bħala Amministratriċi u wkoll bħala *Trustee* tal-Iskema. Il-Qorti tirrileva li l-ilment tal-appellata ma jħalli l-ebda dubju li hija kienet qiegħda tħossha offiża kif aġixxiet is-soċjetà appellanta fil-konfront tagħha.

13. Rilevanti hawn ukoll hija s-sottomissjoni tal-appellata li tenut kont it-tifsira li jagħti l-artikolu 2 tal-Kap. 555, l-Arbitru m'għandux ġurisdizzjoni u kompetenza li jiddeċiedi xi lment magħmul kontra CWM u OMI għal dik ir-raġuni li l-Qorti tifhem tirrigwarda l-fatt kif rilevat mill-Arbitru wkoll, li dawn mhumiex liċenzjati jew awtorizzati mod ieħor mill-Awtorità għas-Servizzi Finanzjari ta' Malta. Il-Qorti tirrileva li lanqas ma jirriżulta li CWM jew OMI kienu joffru s-servizzi finanzjarji tagħhom hawn Malta jew minn Malta, u ġaladarba huma ma

jistgħux jitqiesu bħala provdituri ta' servizzi finanzjarji *ai termini* tat-tifsira kif mogħtija fl-artikolu 2 tal-Kap. 555, l-ilment tal-appellata ma jistax jaqa' fl-ambitu tal-kompetenza tal-Arbitru kif stabbilita permezz tal-artikolu 21 tal-istess Att.

14. Għaldaqstant dan l-ewwel aggravju tas-soċjetà appellanta mhux ġustifikat, u l-Qorti tiċħdu.

It-tieni aggravju: *[l-Arbitru naqas milli jikkonsidra l-eċċezzjoni ta'* lis alibi pendens*]*

15. Is-soċjetà appellanta tirrileva li l-Arbitru naqas milli jikkonsidra l-eċċezzjoni tagħha ta' *lis alibi pendens.* Tgħid li mhux ċar mid-dokumenti li tqegħdu għad-dispożizzjoni tagħha jekk l-appellata qegħda tftittex jew ser tfittex rimedji oħra fil-konfront ta' CWM u ta' OMI u/jew terzi oħrajn quddiem l-*Isle of Man Financial Services Ombudsman.* Issostni li stante ma kienx ekwu li l-Arbitru japporzjona jew jikkwantifika xi responsabbiltà min-naħa tas-soċjetà appellata, qabel xejn għandhom jiġu riżolti u konklużi dawk ir-rimedji mfittxija mill-appellata, anki sabiex jiġi evitat li hija tiġi kkumpensata diversi drabi għall-istess telf allegat minnha.

16. Filwaqt li l-appellata tagħmel riferiment għall-Artikolu 792 tal-Kap. 12 tal-Liġijiet ta' Malta u għall-artikolu 29 u 30 tar-Regolament 1215/2012, u tiċċita minn sentenza tal-Qorti tal-Appell (Superjuri) fl-ismijiet **Crocifissa Sammut et *vs.* Joseph Spiteri**[2], tirrileva li l-elementi neċessarji sabiex tirnexxi din l-

[2] 10.10.2003.

eċċezzjoni ma jreġux, għaliex ma kien hemm l-ebda ċertezza li ser jiġu ntavolati jew li ġew intavolati l-allegati proċeduri.

17. Il-Qorti hija tal-istess ħsieb, u filwaqt li tagħmel riferiment għad-disposizzjonijiet tas-subartikolu 21(2) tal-Kap. 555 li jirregolaw is-setgħat tal-Arbitru, tgħid li ġaladarba ma jirriżultax li l-appellata fil-fatt intavolat proċeduri dwar l-istess mertu, l-eċċezzjoni mressqa mis-soċjetà appellanta ma tistax tirnexxi.

18. Għaldaqstant dan it-tieni aggravju tas-soċjetà appellanta mhux ġustifikat, u l-Qorti qiegħda tiċħdu.

It-tielet aggravju: *[l-Arbitru ma setax b'mod raġonevoli jikkonkludi li:*

(a) Is-soċjetà appellanta kienet responsabbli għal xi negliġenza meta ħalliet lil CWM taġixxi bħala investment advisor *tal-appellata; u*

(b) Il-kontenut tal-portafoll tal-appellata ma kienx skont il-liġijiet, regoli u linji gwida applikabbli għal dak iż-żmien.]

19. Meta tfisser it-tieni aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru ma setax b'mod raġonevoli jsib li hija kienet responsabbli minħabba negliġenza meta ħalliet lil CWM taġixxi bħala *investment advisor* tal-appellata jew li l-kompożizzjoni tal-portafoll tal-investimenti tal-appellata ma kienx skont il-liġijiet, ir-regoli u l-linji gwida applikabbli. Issostni li l-Arbitru kien skorrett meta sab li hija kienet naqset fl-obbligi tagħha bħala *trustee* u attribwixxa

responsabbilità parzjali għat-telf li l-appellata kienet sofriet. L-Arbitru kien mexa saħansitra *ultra petita* meta ddeċieda din il-kwistjoni, għaliex l-appellata ma kienet għamlet l-ebda allegazzjoni. Tikkontendi li l-Arbitru ma seta' qatt jasal għal din il-konklużjoni bl-applikazzjoni u bl-interpretazzjoni korretta tal-liġi. Tirrileva li l-Arbitru stess kien osserva li CWM ġiet magħżula mill-appellata u li s-soċjetà appellanta ma kellha l-ebda obbligu li tivverifika jekk din kinitx entità regolata jew jekk kinitx awtorizzata taħt sistema regolatorja sabiex tipprovdi pariri dwar investimenti. Tgħid li l-obbligu tagħha sabiex tirċievi struzzjonijiet biss mingħand *investment advisors* regolati*,* daħal fis-seħħ fis-sena 2019, u għalhekk dan l-obbligu mhuwiex applikabbli għall-każ odjern. Madankollu l-Arbitru xorta waħda sostna li hija kienet kisret l-imsemmi obbligu. Tinsisti li dawk l-obbligi prinċipali tagħha fil-konfront tal-appellata kienu kif imfissra u kontroffirmati fid-dokument sabiex hija ssir membru ta' *pension plan,* u l-istess soċjetà appellanta ma kellha l-ebda obbligu ulterjuri sabiex tivverifika jekk CWM kinitx liċenzjata jew le. Is-soċjetà appellanta tirrileva wkoll li l-oneru tal-prova li hija kienet aġixxiet b'mod illegali, irresponsabbli jew mill-inqas bi ksur tal-obbligi fiduċjarji tagħha, kien jinkombi fuq l-appellata, iżda fil-każ odjern ma tirriżulta l-ebda evidenza. Is-soċjetà appellanta tkompli tgħid li hija ma kienet bl-ebda mod responsabbli għall-għażla ta' dawk l-investimenti u ma kienx jirriżulta mill-atti li kien hemm xi ksur tal-obbligi kuntrattwali li hija kellha fil-konfront tal-appellata jew tar-regoli applikabbli tal-MFSA, tal-gwidi ta' investiment applikabbli, jew li kien hemm nuqqas ta' prudenza min-naħa tagħha jew li hija ma kinitx ikkonsidrat il-profil ta' riskju tal-appellata. Is-soċjetà appellanta tissottometti li kienet ir-responsabbiltà tal-*investment advisor* tal-appellata li jassigura li l-portafoll sħiħ, u mhux biss dik il-parti li ġiet ittrasferita fil-*pension plan,* kien

adegwatament iddiversifikat. Hija min-naħa tagħha ma kienet qiegħda tagħti l-ebda pariri dwar investimenti u kienet taf biss b'dawk l-assi li l-appellata kienet qegħdet magħha fuq parir ta' CWM. Tirrileva li l-istruzzjonijiet li kienet irċeviet dwar l-investimenti kienu kollha ffirmati mill-appellata stess u mill-*investment advisor* tagħha, u għalhekk hija dejjem imxiet fil-parametri tal-gwidi ta' investment kif applikabbli. Għal dak li kien jirrigwarda l-kummenti tal-Arbitru dwar l-i*structured notes,* is-soċjetà appellanta tgħid li ma kien hemm l-ebda prova dwarhom, iżda l-Arbitru ddeċieda li jagħmel tajjeb għan-nuqqas tal-appellata u bi ksur tal-prinċipju *quod non est in acti non est in mundo* meta għamel riċerka u jserraħ il-konklużjoni tiegħu fuqha, iġifieri l-*fact sheets* li ma kienux parti mill-atti. Dan filwaqt li l-partijiet ma kellhom l-ebda opportunità li jagħmlu eżami ta' dawn il-*fact sheets,* u b'hekk is-soċjetà appellanta titlob sabiex il-konklużjoni tal-Arbitru kif imsejsa fuq din ir-riċerka għandha tiġi skartata fl-intier tagħha. Issostni li l-Arbitru saħansitra naqas milli jikkonsidra li skont il-gwidi ta' investiment applikabbli u r-regolamenti tal-MFSA, huwa permissibbli li jsiru investimenti fi *structured notes* u jixħet l-oneru ta' prova fuqha, fejn isostni li kienet hi li kellha turi kif dawn kienu tajbin fil-parametri ta' skema tal-pensjoni tal-appellata, minflok li ddikjara li l-appellata stess kellha turi kif dawn ma kienux tajbin f'kuntest ta' skemi tal-pensjoni. Tkompli tgħid li l-Arbitru ma offra l-ebda raġuni għaliex *structured notes* ma kienux tajbin għal *retail member.* Għal dak li jirrigwarda l-allegat nuqqas ta' rappurtaġġ, is-soċjetà appellanta tikkontendi li hija ma kellha l-ebda obbligu speċifiku li tipprovdi xi informazzjoni partikolari lill-benefiċjarju, iżda l-Arbitru ddeċieda li ġaladarba fil-kwalità tagħha ta' *trustee* hija kellha taġixxi bħala *bonus paterfamilias,* u dan minkejja t-termini kuntrattwali li l-appellata kienet aċċettat meta ssieħbet fl-

Iskema, flimkien mal-garanziji u indennizzi oħra li mingħajrhom hija ma kinitx titħalla tissieħeb. B'hekk l-Arbitru qiegħed lis-soċjetà appellanta f'inċertezza sħiħa dwar x'kienu l-obbligi tagħha f'għajnejn il-liġi. Imbagħad kemm l-appellata u anki l-Arbitru mkien ma jindikaw li kien hemm frodi, *wilful default* jew *gross negligence* min-naħa tas-soċjetà appellanta. Is-soċjetà appellanta tiċċita r-regola 12.1 tat-*Trust Rules,* filwaqt li tikkontendi li l-ebda negliġenza ma tista' tiġi attribwita lilha ġaladarba hija kienet straħet fuq struzzjonijiet, garanziji u indemnifikazzjonijiet u dikjarazzjonijiet iffirmati jew li in buona fede kienet emmnet li kienu ffirmati. U dan fid-dawl tal-fatt li l-appellata kienet għażlet li tinvesti s-sottofond kollu tagħha fl-ammont ta' £77,843 fir-*Royal Skandia Bond* u sussegwentement li tiżbanka diversi ammonti aktar kmieni. Lanqas fid-dawl tal-allegazzjoni ta' frodi mwettqa minn CWM, ma setgħet tinżamm responsabbli s-soċjetà appellanta għan-nuqqas ta' osservazzjoni tal-obbligi fiduċjarji min-naħa tal-imsemmija CWM, jew li din naqset milli taġixxi b'mod prudenti. Issostni li l-appellata saħansitra kienet ikkonfermat diversi drabi permezz tal-firma tagħha, inkluż fl-*Application for Retirement Benefits,* li *"...the Retirement Fund may reduce to a level which will result in the discontinuation of income payments in the future".* Is-soċjetà appellanta tirrileva li minkejja l-allegazzjonijiet tal-appellata fil-konfront ta' CWM, hija kompliet tieħu minn jeddha l-pariri mingħand Neil Hathaway. Filwaqt li tiċċita siltiet mid-*Deed of Indemnity* kif iffirmat mill-appellata, is-soċjetà appellanta tikkontendi li l-appellata kienet legalment obbligata tonora l-indennizzi magħmulin favur is-soċjetà appellanta skont ir-regolament 12.1 tat-*Trust Rules*, u dan filwaqt li tiċċita wkoll ir-regolament li jsegwi 12.2. Barra minn hekk, tgħid is-soċjetà appellanta, l-appellata ma ressqet l-ebda prova dwar l-allegat negliġenza

tagħha, u inqas u inqas li hija kienet *"facilitated CWM's financial crime"* jew li hija *"deliberately ignored"* l-interessi tagħha, u għalhekk huwa nieqes in-ness kawżali.

20. L-appellata tilqa' billi tikkontendi li ġaladarba hija kienet tikkwalifika bħala *'retail client',* jiġifieri hija ma kinitx investitriċi professjonali, kien mistenni aktar diliġenza min-naħa tas-soċjetà appellanta, u kif tajjeb osserva l-Arbitru, is-soċjetà appellanta xorta waħda kellha l-obbligi ġenerali fil-kariga tagħha ta' *Trustee* u Amministratriċi tal-Iskema. Hawn l-appellata tagħmel riferiment għas-subartikolu 1(2) tal-Att dwar *Trusts* u *Trustees* (Kap. 331), u anki l-para. (ċ) tas-subartikolu 43(6) u l-artikolu 21 tal-istess liġi. Hija tagħmel riferiment ukoll għal pubblikazzjoni tal-MFSA u tiċċita silta minnha, liema dokument tgħid li kien ġie ppubblikat fl-2017, iżda kien jittratta prinċipji ġenerali tat-Kap. 331 u tal-Kodiċi Ċivili li kienu diġà fis-seħħ qabel dik is-sena. Għalhekk iċċitat ukoll l-*Investment Guidelines* ta' Jannar 2013. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru dwar il-kompożizzjoni tal-portafoll tagħha, l-appellata tikkontendi li kien irriżulta tassew ċar li kien hemm għadd ta' riskji assoċjati mal-kapital investit f'dan it-tip ta' prodotti, u saħansitra kien hemm noti li tali prodotti kienu riżervati għal investituri professjonali biss u li seta' jintilef il-kapital. Hija tiċċita dak li qal l-Arbitru dwar ir-riskji tal-investimenti in kwistjoni. Imbagħad dwar l-ilment tas-soċjetà appellanta dwar l-allegata investigazzjoni li wettaq l-Arbitru minn jeddu sabiex wasal għad-deċiżjoni tiegħu, tgħid li huwa kellu kull dritt li jagħmel dak li deherlu bżonnjuż sabiex jasal għad-deċiżjoni tiegħu, u hawn hija tiċċita s-subartikolu 25(1) tal-Kap. 555, filwaqt li ssostni li l-Arbitru sabiex jasal għad-deċiżjoni tiegħu, għandu setgħat wesgħin u tiċċita d-disposizzjonijiet tas-subartikoli 25(5), (6) u (7) tal-Kap. 555. Tgħid li wara kollox, id-dokumenti li straħ

fuqhom kienu jikkonsistu f'*fact sheets* li kienu dehru fil-portafoll tal-appellata, u għaldaqstant kien inwketanti li s-soċjetà appellanta qegħda tgħid li ma kelliex l-opportunità li teżaminahom, filwaqt li kienet qegħda tamministra l-Iskema.

21. Il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. L-Arbitru jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġonevoli fiċ-ċirkostanzi partikolari, u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad, wara li għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni limitata li huwa seta' jieħu dwar l-appellata minn diversi dokumenti esebiti fl-atti[3]*,* innota li ma kienx ġie ndikat jew ppruvat li l-appellata hija investitur professjonali, u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti ssib dawn kollha korretti u anki f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

22. Imbagħad l-Arbitru rrileva li l-Iskema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta u kif awtorizzata mill-MFSA bħala *"Personal Retirement Scheme".* Osserva li l-appellata kienet ittrasferiet il-valur ta' GBP81,446.81 mill-pensjoni tagħha fl-Iskema minn taħt il-*Universities Superannuation Scheme* fir-Renju Unit, u dan wara l-parir li tawha CWM u Premier Pension Solutions SL. Osserva li l-assi miżmuma mill-Iskema kienu ġew utilizzati għax-xiri tal-*Executive Investment Bond,* li kienet polza tal-assikurazzjoni tal-ħajja maħruġa minn *Old Mutual International,* li qabel kienet magħrufa bħala *Royal Skandia,* fejn ġiet investita skont il-pariri ta' CWM f'prodotti finanzjarji sottoskritti, inklużi noti

[3] Ara a *fol.* 28 u *fol.* 58.

strutturati u investimenti oħra f'skemi ta' investiment kollettiv. Wara li ħa konjizzjoni tal-formoli bl-istruzzjonijiet tal-appellata u anki ta' rendikont bil-valur tal-polza skont is-suq kurrenti ndikat fis-somma ta' GBP20,540.81 fid-data tal-20 ta' Frar, 2018 fejn kien hemm indikat li b'kollox kien sar żbank ta' GBP15,845.86. Ikkonsidra li għalhekk bejn 2012 u l-20 ta' Frar, 2018 kien hemm tnaqqis ta' GBP41,457.02 fil-valur tal-polza u l-appellata kienet għamlet telf attwali ta' GBP41,378.37 skont dak l-istess rendikont. Il-Qorti hawn tosserva li ma jidhirx li hemm kontestazzjoni bejn il-partijiet dwar dan kollu.

23. L-Arbitru mbagħad għadda sabiex ikkonsidra li s-soċjetà appellanta bħala Amministratriċi u *Trustee* tal-Iskema kienet soġġetta għall-obbligi, funzjonijiet u responsabbiltajiet applikabbli. Huwa hawn għamel riferiment għall-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar), li ġie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta) li ġie fis-seħħ fl-1 ta' Jannar, 2015, u għad-direttivi/regoli magħmula taħthom, u anki għall-Att dwar *Trusts* u *Trustees* (Kap. 331 tal-Liġijiet ta' Malta), partikolarment applikabbli għas-soċjetà appellanta fejn għamel riferiment għal dak li jipprovdu s-subartikoli 21(1) u 21(2) tiegħu fir-rigward tar-responsabbiltà li timxi bil-prudenza, diliġenza u attenzjoni ta' *bonus paterfamilias* bl-akbar *bona fide,* u billi tevita kull kunflitt ta' interess u bl-akbar diliġenza u responsabbiltà. Dawn ir-riferimenti l-Qorti tgħid li huma mhux biss utli, iżda anki rilevantissimi stante l-applikabbiltà tagħhom għall-każ odjern.

24. L-Arbitru spjega li l-obbligi tas-soċjetà appellanta kienu mfissra fl-Att li Jirregola Fondi Speċjali u anki fid-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds*

(Regulation) Act, 2002. Meta mbagħad ġie mħassar dak l-Att u r-reġistrazzjoni tas-soċjetà appellanta saret taħt il-Kap. 514, l-obbligi tagħha bdew jiġu regolati permezz ta' dik l-istess liġi, u anki permezz tal-*Pension Rules for Service Providers issued under the Retirement Pensions Act* u l-*Pension Rules for Personal Retirement Schemes Issued under the Retirement Pensions Act.* L-Arbitru aċċenna għall-obbligu tal-Amministratur tal-Iskema tal-Irtirar sabiex din taġixxi fl-aħjar interessi tal-Iskema, u dan kif jirrikjedi s-subartikolu 19(2) tal-Att li Jirregola Fondi Speċjali (Kap. 450) u s-subartikolu 13(1) tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514). Il-Qorti iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta kellha obbligi daqstant ċari hawn li timxi fl-aħjar interess tal-Iskema, kemm fiż-żmien li sar l-investiment fis-sena 2012 meta kienu applikabbli d-disposizzjonijiet tal-Kap. 450, u anki sussegwentement meta ġie fis-seħħ l-Att dwar Pensjonijiet għall-Irtirar fis-sena 2015 u l-appellata kienet għadha membru tal-Iskema u ġarrbet it-telf allegat.

25. Minn hawn l-Arbitru għadda sabiex jelenka diversi prinċipji li kienu applikabbli fil-konfront tas-soċjetà appellanta skont il-*general conduct of business rules/standard licence conditions* applikabbli taħt ir-reġim tal-Att 450 kif imħassar, u tal-Att 514 li ssostitwixxa dan tal-aħħar. Għal darb'oħra l-Qorti tirrileva li jirriżulta li s-soċjetà appellanta bħala Amministratriċi tal-Iskema kienet tenuta li timxi b'kull ħila dovuta, kura u diliġenza fl-aħjar interessi tal-benefiċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li diġà minn dan li ngħad, jirriżulta li d-difiża tagħha li hija qatt ma setgħet tinżamm responsabbli stante li ma kellha l-ebda obbligu fil-konfront tal-appellata, ma tistax tirnexxi.

26. Iżda l-Arbitru ma waqafx hawn għaliex ikkonsidra wkoll il-kariga tas-soċjetà appellanta bħala *Trustee,* u rrileva li hawn kienu applikabbli l-provvedimenti tal-Att dwar *Trusts* and *Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-30 ta' Ġunju, 1989, kif sussegwentement emendat, u jagħmel riferiment partikolari għas-subartikolu 21(1), u l-para. (a) tas-subartikolu 21(2). Hawn il-Qorti tgħid li għal darb'oħra d-difiża tas-soċjetà appellanta ma ssib l-ebda sostenn. L-Arbitru rrileva li fil-kariga tagħha ta' *Trustee,* is-soċjetà appellanta kienet saħansitra tenuta tamministra l-Iskema u l-assi tagħha skont diliġenza u responsabbiltà għolja. In sostenn ta' dan kollu, l-Arbitru jiċċita An Introduction to Maltese Financial Services Law[4], u mill-pubblikazzjoni riċenti tal-MFSA tas-sena 2017 fejn din ittrattat prinċipji diġà stabbiliti qabel dik id-data, permezz tal-Att dwar *Trusts* u *Trustees* (Kap. 331) u anki permezz tal-Kodiċi Ċivili.

27. L-Arbitru kkonsidra wkoll l-allegazzjoni tal-appellata li l-firma fuq l-istruzzjonijiet għan-negozju tal-investimenti kienet ġiet iffalsifikata, u hija ma kienet tat l-ebda kunsens għal dawk l-istruzzjonijiet. Iżda fil-fehma tal-Arbitru l-appellata naqset milli tressaq prova suffiċjenti sabiex huwa seta' jaċċetta din l-allegazjoni. Il-Qorti tikkondividi l-fehma tal-Arbitru, filwaqt li tirrileva li ma jidhirx li dan il-punt ġie kkontestat mis-soċjetà appellanta li talbet il-kjamata fil-kawża ta' terzi sabiex jirrispondu għall-allegazzjoni tal-appellata.

28. Minn hawn l-Arbitru ħa l-ispunt u kkonsidra jekk il-komunikazzjonijiet mingħand is-soċjetà appellanta lill-appellata u r-rapportaġġ tagħha dwar l-

[4] Ed. Max Ganado.

andament tal-Iskema u tal-investimenti sottoskritti, kienux adegwati. Sewwa osserva l-Arbitru, tgħid il-Qorti, li l-ebda spjegazzjoni ma ngħatat dwar l-imsemmi rappurtaġġ. Huwa ċċita dak li qalet l-appellata dwar in-nuqqas ta' informazzjoni li ngħatat dwar il-progress *o meno* tal-investimenti tagħha, u qal li s-soċjetà appellanta min-naħa tagħha ma kkontestatx l-ilmenti tal-appellata, filwaqt li m'għamlet l-ebda riferiment u ma ppreżentat l-ebda rendikonti jew rapport li hija kienet għaddiet lill-appellata fir-rigward tal-andament tal-Iskema u l-investimenti sottoskritti. Sewwa qal l-Arbitru wkoll li l-allegazzjonijiet dwar il-firem foloz fuq l-istruzzjonijiet li saru fuq tul ta' żmien, setgħu faċilment ġew evitati jew indirizzati f'waqthom permezz ta' miżuri sempliċi u salvagwardji kieku nżammet komunikazzjoni adegwata bejn il-partijiet u anki rappurtaġġ skont kif huwa rikjest mir-Regola 2.6.4 tal-Parti B.2.6 tad-Direttivi magħmulin taħt l-Att li Jirregola Fondi Speċjali u *Standard Condition* 4.1.7, Part B.4.1 tal-*Pension Rules for Service Providers* magħmulin taħt l-Att dwar Pensjonijiet għall-Irtirar u *Standard Condition* 1.2.2, Part B.1.2 tal-*Pension Rules for Personal Retirement Schemes,* li saru wkoll taħt l-Att dwar Pensjonijiet għall-Irtirar matul il-perijodi rispettivi meta dawn kienu applikabbli. Ċertament tgħid il-Qorti li hawn is-soċjetà appellanta wriet nuqqas kbir min-naħa tagħha li ġabet l-inkarigu tagħha fix-xejn u għal sempliċi amministrazzjoni tal-Iskema. L-Arbitru ċċita wkoll l-i*Standard Operating Conditions* 2.6.2 u 2.6.3 tas-Sezzjoni B.2 tad-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties* li saru taħt l-Att li Jirregola Fondi Speċjali.

29. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju ż-żewġ punti li fuqhom huwa msejjes dan it-tielet aggravju tas-soċjetà appellanta. Huwa jaċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar

l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi bħal CWM. L-Arbitru ddikjara li kien tal-fehma, kif inhi din il-Qorti, li s-soċjetà appellanta bħala Amministratur ta' Skema għall-Irtirar u t-*Trustee,* kellha ċertu obbligi importanti li setgħu jkollhom rilevanza sostanzjali fuq l-operat u l-attivitajiet tal-Iskema u li jaffettwaw direttament jew indirettament l-andament tagħha. Kien għalhekk li kellu jiġi nvestigat jekk is-soċjetà appellanta naqsitx mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura safejn dan kellu effett fuq l-andament tal-Iskema u r-riżultanti telf tal-appellata.

30. Osserva li l-appellata kienet għażlet hija stess li taħtar lil CWM sabiex din tipprovdiha b'pariri dwar l-investimenti formanti parti mill-portafoll tagħha fl-Iskema, u min-naħa tagħha s-soċjetà appellanta aċċettat u/jew ħalliet il-konsulent joffri l-parir tiegħu lill-appellata. Filwaqt li ħa konjizzjoni tal-allegazzjoni tal-appellata li fil-fatt CWM ma kinitx regolata permezz ta' liċenzja relattiva, osserva li ma tressqet l-ebda prova li kienet turi li CWM kienet fil-fatt regolata, iżda barra minn hekk l-appellata ma kienet ressqet l-ebda prova li kienet turi jew li setgħet waslitha sabiex tassumi li CWM kienet fil-fatt liċenzjata. L-Arbitru għaraf li fiż-żmien li l-appellata kienet issieħbet fl-Iskema f'Awwissu 2012, il-qafas regolatorju kien laxk dwar ċertu aspetti fir-rigward tal-ħatra ta' konsulent finanzjarju, iżda l-aħħar regoli tas-sezzjoni B9 tal-Parti B tal-*Pension Rules for Personal Retirement Schemes* kif magħmulin taħt l-Att dwar il-Pensjonijiet għall-Irtirar, kienu jipprovdu għal ċertu kriterji li kellhom jiġu sodisfatta mill-konsulenti finanzjarji ta' skemi kontrollati mill-membri. Għalkemm l-Arbitru għaraf ukoll li ma kienx hemm evidenza ċara u suffiċjenti li l-Amministratur ta' Skema għall-Irtirar kien ipprojbit mill-qafas regolatorju ta'

dak iż-żmien li jaċċetta l-ħatra ta' konsulent finanzjarju li ma kienx regolat, qal li l-ħatra ta' entità li ma kinitx regolata sabiex isservi ta' konsulent, kienet tfisser li l-appellata kienet tgawdi minn inqas protezzjoni, u s-soċjetà appellanta kienet tenuta tkun konoxxenti ta' dan il-fatt u li tkun aktar kawta u prudenti fin-negozju tagħha ma' dik l-entità. Il-Qorti ma tistax ma tikkondividiex din il-fehma u tikkonsidra ċertament dak kollu li s'issa ġie rilevat u kkonsidrat, li l-kariga tas-soċjetà appellanta ma setgħetx tkun dik ta' amministrazzjoni sempliċi u bażika tenut kont li hija kienet ukoll *Trustee* tal-Iskema.

31. L-Arbitru għalhekk sewwa jgħid li s-soċjetà appellanta kellha turi aktar kawtela u prudenza, aktar u aktar meta l-għażla u l-allokazzjoni tal-investimenti sottoskritti kien ser ikollhom effett fuq l-andament tal-Iskema nnifisha u l-objettiv tagħha li tipprovdi għal benefiċċji għall-irtirar. Il-Qorti hawn tikkondividi wkoll il-ħsieb tal-Arbitru li l-amministratur tal-Iskema u t-*trustee* tagħha kien mistenni li jfittex aktar u jinvestiga dwar l-azzjonijiet ta' dik l-entità mhux regolata, sabiex b'hekk jitħarsu l-interessi tal-membri l-oħra tal-iskema u r-riskji jitnaqqsu.

32. Dwar it-tieni punt sollevat mis-soċjetà appellanta fit-tieni aggravju tagħha, l-Arbitru spjega li permezz ta' eżerċizzju sempliċi ta' tfittxija fuq l-*internet* dwar l-investimenti sottoskritti, kienu ġew akkwistati *fact sheets* fir-rigward tal-RBC Biotechnology Income Note u l-RBC Online Large Caps Income Note. Filwaqt li ħa konjizzjoni tad-deskrizzjoni li tingħata fir-rigward ta' kull wieħed minn dawn il-prodotti, l-Arbitru osserva li l-*fact sheets* tagħhom kienu jindikaw taħt is-sezzjoni ntestata *'key features',* li dawn kienu mmirati lejn *'Professional Investors Only'.* Kien hemm ukoll indikat r-rati ta' imgħax

relattivament għolja u li għalhekk kienu juru l-livell għoli ta' riskju li l-investiment kien jinvolvi. Jirrileva li fl-imsemmija *fact sheets* ta' dawk in-noti strutturati kien hemm indikati għadd ta' riskji fir-rigward tal-kapital investit f'dawn il-prodotti.

33. Il-Qorti hawn ser tikkonsidra dak li ġie rilevat mis-soċjetà appellanta fir-rigward tal-investigazzjoni mwettqa mill-Arbitru, li qegħda tallega li saret bi ksur tal-prinċipju *quod non est in acti non est in mundo.* Min-naħa tiegħu l-Arbitru fid-deċiżjoni appellata għamel osservazzjoni aħħarija li s-soċjetà appellanta saħansitra dgħajfet id-difiża tagħha meta naqset milli tippreżenta informazzjoni u anki prova dokumentarja dwar l-investimenti sottoskritti jew dwar l-Iskema nnifisha. Qal li dan filwaqt li għażlet li tiċċita siltiet partikolari magħżula minnha mid-dokumentazzjoni fis-sottomissjonijiet tagħha, anki fejn ġiet miċħuda kull responsabbiltà u ngħataw diversi twissijiet, mingħajr ma ppreżentat l-imsemmija dokumentazzjoni. Anki l-Qorti ikkonstatat dan kollu, u tgħid li ċertament dan il-fatt ma għenx id-difiża tas-soċjetà appellanta fejn saħansitra jibqa' d-dubju jekk b'dan il-mod hija ħalliet mistura dettalji jew informazzjoni li ma kienux favur id-difiża tagħha. Tqis għalhekk li l-Arbitru m'għamel xejn li ma tippermettix l-kompetenza tiegħu skont kif ċirkoskritta mill-artikolu 25 tal-Kap. 555, u mingħajr dubju sabiex jassigura li hu kien qed jiddeċiedi l-ilment fil-parametri tal-para. (b) tas-subartikolu 19(3) tal-istess liġi. Il-Qorti tirrileva li r-riżultat tat-tfittxija tiegħu turi kemm kien korrett li ma jieqafx fl-investigazzjoni tiegħu minħabba l-informazzjoni limitata a dispożizzjoni diretta tiegħu, li l-Qorti tqis li ma kinitx ir-riżultat ta' nuqqas ta' attenzjoni, u b'hekk allura jkun qed igħin id-difiża tas-soċjetà appellanta. Ma tqisx min-naħa l-oħra li b'hekk kif tallega s-soċjetà appellanta, huwa kien qed jgħin il-każ imressaq mill-appellata, aktar milli jaċċerta ruħhu li ssir ġustizzja. Is-soċjetà appellanta tilmenta wkoll li l-partijiet

ma kellhomx l-opportunità li jeżaminaw il-kontenut tal-informazzjoni tal-*fact sheets,* iżda jirriżulta minn dak li qal l-Arbitru li l-informazzjoni ma kinitx waħda diffiċli sabiex tinkiseb permezz ta' riċerka fuq l-*internet,* u għalhekk din kienet disponibbli wkoll għall-pubbliku, inkluż is-soċjetà appellanta. B'hekk ukoll is-soċjetà appellanta kellha kull opportunità, kif fil-fatt naqqset milli tagħmel wara kollox, li tikkontesta dik l-informazzjoni miksuba. Iżda l-Qorti tikkonsidra li jekk hija għandha temmen li s-soċjetà appellanta qatt ma kellha din l-informazzjoni a dispożizzjoni tagħha, tassew din kienet qegħda tonqos minn kull obbligu ta' *bonus paterfamilias.*

34. L-Arbitru mbagħad għadda sabiex irrileva x'kienu dawk ir-riskji li sar aċċenn fuqhom fil-*fact sheets,* fost oħrajn ir-riskju tal-kreditu ta' min kien qed joħroġhom u anki ir-riskju tal-likwidità, u twissijiet li n-noti ma kellhomx il-kapital protett. Dan filwaqt li kixef ukoll li fihom kien hemm speċifikat bħala wieħed mill-fatturi prinċipali li huma kienu ntiżi għall-investituri professjonali biss. Kollox tgħid il-Qorti ferm indikattiv tal-fatt li l-investiment fin-noti strutturati ma kienx wieħed kompatibbli mal-informazzjoni dwar l-appellata*.* L-Arbitru qal li kien hemm aspett partikolari li ħareġ minn dawn in-noti, fejn kien hemm twissija f'kull waħda mill-*fact sheets* dwar l-eventwalità ta' tnaqqis fil-valur tal-kapital kif marbut ma' perċentwali. Huwa ċċita s-segwenti twissija*: "if any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity, and capital will be lost".* Għalhekk, qal l-Arbitru, kien hemm konsegwenzi materjali jekk il-valur ta' wieħed biss mill-assi kollha tan-noti strutturati kien jinżel mill-minimu ndikat, u qal li l-implikazzjoni ta' din il-kundizzjoni ma setgħetx tiġi skartata. Ammetta li

l-*fact sheets* tan-noti strutturati l-oħra li fihom kien sar investiment ma kienux hemm jew ma setgħux jinstabu, iżda ddikjara li kien tassew ċar li l-portafoll tal-appellata kellu noti strutturati li kienu jġorru ċerti riskji li ma kienux jirriflettu l-aspett prudenti kif kien mistenni minn portafoll tal-pensjoni, u kif mitlub mir-regolamenti li għalihom kien sar riferiment aktar 'il fuq.

35. L-Arbitru rrileva li għalkemm is-soċjetà appellanta kienet qegħda ssostni li *"structured notes may be a suitable investment to be included in pension schemes",* hija ma kinitx uriet jew ipprovdiet dettalji sabiex turi kif dawn kienu kkonsidrati tajbin fl-ambitu tal-iskema tal-pensjoni tal-appellata jew li dawk in-noti strutturati li kienu jagħmlu parti mill-portafoll tal-appellata ma kellhomx l-istess volatilità jew li ma kienux daqstant ta' riskju għoli kif kienet qegħda tallega. Qal li fir-risposta tagħha s-soċjetà appellanta kienet insistiet li l-MFSA kienet irrikonoxxiet il-possibbiltà li *structured notes* jagħmlu parti mill-portafoll ta' skema tal-pensjonijiet, iżda l-Arbitru sostna li għalkemm dan huwa minnu, wieħed irid jikkonsidra aspetti oħra rilevanti u xierqa li kien hemm fir-regoli maħruġa mill-MFSA. Huwa hawn għamel riferiment f'loku għall-preżenti *Pension Rules for Personal Retirement Schemes* li kienu jitolbu li fil-każ ta' *retail member* l-investimenti magħżula kellhom ikunu tal-istess natura, u dan skont l-i*Standard Licence Condition* 9.5(d)(ii)(bb) ta' dawk ir-regoli, iżda dan ma kienx hekk fil-każ odjern. Għalhekk sewwa għamel tgħid il-Qorti, meta m'aċċetax dak li kienet qegħda ssostni fuqu s-soċjetà appellanta.

36. Imbagħad l-Arbitru għadda sabiex ikkonsidra l-allegazzjoni min-naħa tal-appellata li 75% tal-portafoll tagħha kien magħmul fil-parti l-kbira tiegħu min-noti strutturati u li s-soċjetà appellata ma kinitx staqsiet jekk dan kienx sar

b'mod għaqli. Filwaqt li rrileva li mid-dokumentazzjoni ppreżentata quddiemu huwa ma setax jivverifika din l-allegazzjoni, għalkemm mill-istruzzjonijiet li ngħataw huwa seta' jifhem li kienu saru diversi transazzjonijiet, osserva wkoll li s-soċjetà appellata ma kinitx ikkontestat il-fatt li 75% tal-portafoll tal-appellata kien investit f'noti strutturati. B'riferiment għar-rendikont tal-20 ta' Frar, 2018 fejn kien hemm indikat telf ta' GBP41,378.37 inklużi d-drittijiet, u li kien ekwivalenti għal aktar min-nofs il-*premia* mħallsa fl-Iskema, u anki telf ieħor ta' GBP78.65, kien juri li l-Iskema ma kinitx leħqet l-oġġettiv tagħha, filwaqt li kien hemm nuqqas ta' diversifikazzjoni mingħajr ma ġew evitati riskji żejda. Il-Qorti tirrileva li hawn ukoll il-*Pension Rules for Personal Retirement Schemes* jindikaw almenu l-limitazzjonijiet applikabbli sa mis-7 ta' Jannar, 2015, fejn ċertament dawn laqtu lis-soċjetà appellanta u għaldaqstant hija kellha tirrevedi l-pożizzjoni tagħha fir-rigward tal-appellata.

37. Id-difiża tas-soċjetà appellanta hija li hi bl-ebda mod ma kienet naqset lejn l-appellata għaliex ma kellha l-ebda obbligi lejha skont ir-reġim regolatorju li kien fis-seħħ dak iż-żmien, u kien proprju l-konsulent finanzjarju li kien responsabbli għall-mod kif sar l-investiment. B'hekk hija tevita li tispjega jew tikkontesta d-dikjarazzjoni tal-appellata li hija kienet *"...a low/medium risk, retail investor...",* u għaliex l-investiment fin-noti strutturati kien saħansitra fil-perċentwal ta' 75% tal-Iskema. Iżda l-Qorti tgħid li mhijiex konċepibbli sitwazzjoni fejn amministratur ta' skema tal-irtirar jgħaddi minn reġim assolutament mhux kontrollat għal wieħed kontrollat, għaliex fl-assenza ta' liġi u regoli speċifiċi, kif rajna aktar 'il fuq, għandha tapplika l-liġi ġenerali.

38. L-Arbitru mbagħad għadda sabiex jittratta l-kwistjoni tan-ness kawżali tad-danni sofferti mill-appellata. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ riżultat tal-andament negattiv tal-investimenti riżultat tas-suq u tar-riskji inerenti u/jew tal-allegat frodi tal-konsulent finanzjarju, kif allegat mis-soċjetà appellanta. Qal li kien hemm evidenza biżżejjed u konvinċenti ta' nuqqasijiet da parti tas-soċjetà appellanta fit-twettiq tal-obbligazzjonijiet u d-doveri tagħha kemm bħala *Trustee* u anki bħala Amministratur tal-Iskema tal-Irtirar, li kienu juru nuqqas ta' diliġenza. Qal li l-istess nuqqasijiet saħansitra ma ħallew l-ebda mod li bih seta' jiġi minimizzat it-telf, u fil-fatt ikkontribwew għall-istess telf, u b'hekk l-Iskema ma kinitx laħqet l-għan prinċipali tagħha. Fil-fehma tiegħu, it-telf kien ġie kkawżat mill-azzjonijiet u min-nuqqas ta' azzjonijiet tal-partijiet prinċipali nvoluti fl-Iskema, fosthom is-soċjetà appellanta. Qal li seħħew diversi avvenimenti li din tal-aħħar kienet obbligata u saħansitra setgħet twaqqaf u tinforma lill-appellata dwarhom. Il-Qorti tikkondividi bi sħiħ l-fehma tal-Arbitru. Jirriżulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkunsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-appellata. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà tan-nuqqasijiet tagħha, billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tal-appellata li kien mexxiha lejn l-investimenti li eventwalment fallew mhux biss b'mod reali, iżda fallew ukoll l-aspettattivi tagħha. Dan filwaqt li tgħid ukoll li hija bl-ebda mod ma kienet tenuta taċċerta l-identità tal-imsemmi konsulent finanzjarju u fl-istess ħin tħares dak kollu li kien qed isir, inkluż il-kompattibilità tal-istruzzjonijiet mal-profil tal-appellata u anki l-andament tal-investimenti, u żżomm linja ta' komunikazzjoni miftuħa mal-appellata. Iżda kif ġie kkonsidrat minn din il-Qorti, id-difiża tas-soċjetà appellanta ma tistax tirnexxi fid-dawl tal-

obbligi legali u regolatorji tagħha u huwa proprju għalhekk li n-nuqqasijiet tagħha għandhom jitqiesu li kkontribwew lejn it-telf soffert mill-appellata fl-investimenti tagħha.

39. Fir-rimarki finali tiegħu, l-Arbitru jagħmel riassunt ta' dak kollu li huwa kien ikkonstata u kkonsidra kif imfisser hawn fuq. Il-Qorti tqis li għandha tirrileva s-segwenti punti prinċipali minn dan ir-riassunt, li huma deċiżivi fil-kwistjoni odjerna, jiġifieri li s-soċjetà appellanta:

(i) kienet tenuta tfittex u tassigura li l-mod kif kien magħmul il-portafoll kif rakkommandat mill-konsulent tal-investiment, kien fost affarijiet oħra jirrifletti kemm ir-rekwiżiti relattivi u l-profil u l-oġġettiv tal-appellata għall-aħjar protezzjoni tal-interessi tagħha;

(ii) kienet ukoll tenuta tassigura li l-kompożizzjoni msemmija tal-portafoll kienet tagħti lok għall-għan tal-Pjan ta' Irtirar, filwaqt li jassigura wkoll il-prudenza kif mistenni b'mod raġonevoli minn pjan ta' irtirar intiż li jipprovdi għal benefiċċji ta' irtirar kif jipprovdu għalih l-Att li Jirregola Fondi Speċjali u l-Att għall-Pensjonijiet tal-Irtirar;

(iii) kienet tenuta tikkonsidra l-prodotti in kwistjoni u mill-ewwel u tal-inqas turi t-tħassib tagħha dwar ċertu investimenti f'noti strutturati formanti parti mill-portafoll tal-appellata, u saħansitra ma kellhiex tħalli li jsiru investimenti riskjużi, għaliex dawn kienu kontra l-oġġettivi tal-Iskema tal-Irtirar u fost affarijiet oħra ma kienux fl-aħjar interess tal-appellata; u

(iv) kienet straħet fuqha l-appellata, u anki terzi nvoluti fl-istruttura tal-Iskema, sabiex jintlaħaq l-għan tagħhom li jirċievu benefiċċji tal-irtirar, filwaqt li tiġi assigurata l-pensjoni;

40. Għalhekk l-Arbitru esprima l-fehma, liema fehma din il-Qorti tikkondividi bi sħiħ, li filwaqt li kien mifhum li t-telf dejjem jista' jsir fuq investimenti f'portafoll, dawn jistgħu jitnaqqsu u saħansitra jinżamm il-kapital oriġinali kif investit, permezz ta' diversifikazzjoni tajba, bilanċjata u prudenti tal-investimenti. Imma fil-każ odjern kien jirriżulta pjenament li seta' jingħad li mill-inqas kien hemm nuqqas ċar ta' diliġenza min-naħa tas-soċjetà appellanta fl-amministrazzjoni ġenerali tal-Iskema u anki fl-esekuzzjoni tal-obbligi tagħha bħala *trustee,* partikolarment meta wieħed iqis l-obbligu ta' sorveljanza tal-Iskema u l-istruttura tal-portafoll. Qal li fil-fatt is-soċjetà appellanta ma kinitx leħqet ir-*'reasonable and legitimate expectations'* tal-appellata skont il-para. (ċ) tas-subartikolu 19(3) tal-Kap. 555. Il-Qorti filwaqt li tiddikjara li hija qegħda tagħmel tagħha l-konklużjonijiet kollha tal-Arbitru, tgħid li m'għandhiex aktar x'iżżid mad-deċiżjoni appellata tassew mirquma u studjata.

41. Għaldaqstant dan it-tielet aggravju wkoll mhux ġustifikat u l-Qorti qegħda tiċħdu.

Ir-raba' aggravju: [il-quantum tad-danni kkwantifikati huwa kkontestat]

42. Is-soċjetà appellanta tikkontendi li l-Arbitru naqas milli jindika għaliex hija għandha tkun responsabbli għad-danni sofferti mill-appellata tat-telf tagħha fil-perċentwal ta' 70%, aktar u aktar meta huwa kien irrikonoxxa li hija ma kinitx

konsulent tal-investiment u ma tat l-ebda parir ta' investiment. Tinsisti li jekk jirriżulta xi nuqqas min-naħa tagħha, ċertament hija ma setgħetx tkun responsabbli għat-telf soffert meta kien ċar li kienu terzi l-kawża tiegħu.

43. L-appellata tilqa' billi tissottometti li għall-kuntrarju l-Arbitru kien spjega sew fid-dettal ir-rabta bejn l-aġir tas-soċjetà appellanta u t-telf soffert minnha.

44. Il-Qorti tgħid li fir-raba' aggravju tagħha, is-soċjetà appellanta qiegħda ttenni l-istess argumenti miġjuba minnha fit-tieni aggravju. Għalhekk filwaqt li tagħmel riferiment għal dak kollu li ġie kkonsidrat minnha fl-eżami tal-imsemmi tieni aggravju, il-Qorti tgħid li anki l-aħħar aggravju tas-soċjetà appellanta mhux ġustifikat u tiċħdu.

<u>Decide</u>

Għar-raġunijiet premessi l-Qorti tiddeċiedi dwar l-appell tas-soċjetà appellanta billi tiċħdu, filwaqt li tikkonferma d-deċiżjoni appellata fl-intier tagħha.

L-ispejjeż marbuta mad-deċiżjoni appellata għandhom jibqgħu kif deċiżi, filwaqt li l-ispejjeż ta' dan l-appell għandhom ikunu a karigu tas-soċjetà appellanta.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur