



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-14 ta' Settembru, 2022

Appell Inferjuri Numru 36/2021 LM

June Doris Burleston (Detentriċi tal-Passaport nru. 520191868)
(‘L-appellata’)

vs.

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

Il-Qorti,

Preliminari

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

mogħtija fis-6 ta' April, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti **June Doris Burleston (Detentriċi tal-Passaport nru. 520191868)** [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 tinzamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara 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-pagament effettiv, filwaqt li s-soċjetà appellanta kellha tħallas l-ispejjeż kollha 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 fis-sena 2012 tal-Aon Minet Pension Fund [minn issa 'l quddiem 'il-Fond'], permezz tal-konsulent finanzjarju tagħha Continental Wealth Management Limited [minn issa 'l quddiem 'CWM'] f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'], amministrata mis-soċjetà appellanta.

Mertu

3. L-appellata pprezentat ilment quddiem l-Arbitru fis-17 ta' Settembru, 2019 fil-konfront tas-soċjetà STM Malta Trust and Company Management

Ltd, għaliex fil-fehma tagħha din kienet naqset mill-obbligu tagħha li twettaq *due diligence* xieraq qabel m'acċettat it-trasferiment tal-Fond għall-Iskema fuq parir ta' CWM. Sussegwentement, is-soċjetà appellanta kienet naqset ukoll lejha billi ħalliet lil CWM tinvesti flusha kollha f'noti strutturati ta' riskju għoli ntizi għal investituri professjonali u li għalhekk ma kienux xierqa għaliha bħala *retail investor* bla esperjenza f'*stocks* u ishma. Dan filwaqt li l-istess soċjetà appellanta naqset ukoll milli tiġbdilha l-attenzjoni għat-telf li kien qed isofri l-Fond. Bħala riżultat hija sofriet telf sostanzjali u għalhekk talbet li tiġi kumpensata fil-valur tal-investimenti originali tagħha fis-somma ta' €175,501.78, filwaqt li mill-istess somma jitnaqqsu l-pagamenti magħmulin lilha u anki *s-surrender value*.

4. L-imsemmija soċjetà kif aktar tard sostitwita mis-soċjetà appellanta, wiegħbet fit-8 ta' Ottubru, 2019 billi eċċepiet li (a) l-appellata kienet imxiet fuq il-parir li hija kienet irċeviet mingħand Premier Pension Solutions CL, liema konsulent finanzjarju kienet għażlet hija stess, u li magħha s-soċjetà appellanta ma kellha l-ebda relazzjoni legali jew kuntrattwali; (b) fl-applikazzjoni għas-sħubija tal-Iskema kien hemm spjegat sew l-informazzjoni li ngħatat u l-appellata kienet iffirmit għal numru ta' dikjarazzjonijiet, garanziji u indennizzi; (ċ) hija ma setgħetx tinzamm responsabbli għall-azzjonijiet ta' terz konsulent finanzjarju li kienet għażlet l-appellata stess; (d) hija ma kinitx toffri parir dwar investimenti, u kienet tħalli f'idejn il-konsulent finanzjarju magħżul mill-appellata sabiex jiġu rakkomandati investimenti xierqa; (e) ogggettivament ma kienx jidher li l-investimenti magħżulin mill-konsulent finanzjarju dak iż-żmien ma kienux xierqa sabiex jagħmlu parti minn

portafoll fejn il-profil ta' riskju kien dak tal-appellata; (f) it-telf soffert mill-appellata seta' kien rizultat ta' ċaqliq fis-suq tal-valur tal-investimenti u mhux minħabba xi frodi, nuqqas jew negligenza min-naħa tagħha fit-twettiq tal-obbligi tagħha jew parti minnhom, u li tagħhom l-appellata ma gābet l-ebda prova; (g) l-appellata ma kinitx uriet xi tħassib mas-socjetà appellanta qabel ma pprezentat l-ilment tagħha; (ħ) b'riferiment għas-sezzjoni 10 tal-applikazzjoni, l-appellata kienet iddikjarat li hija kienet tikkonsidra lilha nnifisha bħala investitur ta' ċertu għarfien u li hija kienet għamlet investimenti diretti f'ishma ta' kumpanniji; (h) l-istruzzjonijiet għax-xiri tal-investimenti kienu jgħorru l-firma tal-appellata; u (i) l-investimenti kienu saru fil-parametri stabbiliti mir-regolamenti għall-iskemi tal-pensjoni bħall-Iskema.

Id-deċiżjoni appellata

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

“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. 18 Cap. 555, Art. 19(3)(b))

The Arbiter is considering all the parts of the complaint and all the pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555 (fn. 19 Art. 19(3)(d)) which stipulates that he should deal with complaints in ‘an economical and expeditious manner’.

The Complainant

The Complainant, born on February 1957, was indicated in the Service Provider's Application Form to join the Retirement Scheme as residing in Spain. (fn. 20 A fol. 259)

The occupation of the Complainant was indicated as 'Housewife'. (fn. 21 A fol. 259/260) Her attitude to risk in the Application Form for Membership, was indicated as the lowest category of risk, this being 'Cautious' where such category was described as 'providing an annual income whilst protecting the capital'. (fn. 22 A fol. 263)

The other available options, which were not selected by the Complainant were of 'Balanced - moderate risk investments within a balanced and diversified portfolio' and 'Aggressive - high risk investments aimed at achieving superior returns'. (fn. 23 Ibid.)

The Service Provider

STM Malta is licensed as a Retirement Scheme Administrator (fn. 24 <https://www.mfsa.mt/financial-services-register/result/?id=204>) by the Malta Financial Services Authority and acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 25 A fol. 266)

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. 29 <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. 30 This being the regulatory framework applicable in Malta for personal retirement schemes at the time of the Complainant's Application for Membership into the Retirement Scheme in 2012) The scope of the Scheme is to provide for retirement benefits where it was 'established to provide a life-time income to its members'. (fn. 31 A fol. 258)

The assets held into the Complainant's Retirement Scheme account were used to purchase a life insurance contract, the 'Generali International Professional Portfolio' ('the Generali Plan') issued by Generali International Limited in Guernsey. (fn. 32 A fol. 269 & 287)

The type of policy selected in respect of the Complainant was the 'Personal Professional Portfolio' which, in Generali International's application form, was described as 'The Personal Professional Portfolio consists of a life assurance contract, which can invest its capital in listed equities, bonds, collectives, currencies and some structured products, subject to the agreement of Generali International Limited'. (fn. 33 A fol. 271)

The Application Form in respect of the Generali Plan indicates that a total of GBP275,000 was to be invested in the said plan. (fn. 34 A fol. 275)

The value of the Complainant's account with the Retirement Scheme is linked to the value of the underlying Generali Plan which is, in turn, linked to the performance of the respective portfolio of underlying investments held within the said policy

Statements and dealing forms presented

As part of her complaint form, the Complainant attached a voluminous pack of extracts of various official statements, namely:

- a) *extracts of 'Investment Fund or Portfolio Valuation' statements and 'Quarterly Valuation Statement Summary' in respect of various years and at different time periods (typically as at end February, May, August and November over the years 2012 to 2018) (fn. 35 Extracts of the 'Investment Fund or Portfolio Valuation' statements were submitted in this order indicating the position as at: 31/05/19; 28/02/19; 30/11/18; 31/08/18; 31/05/18; 28/02/18; 30/11/17; 31/08/17; 31/05/17; 28/02/17; 30/11/16; 31/08/16; 31/05/16; 29/02/16; 30/11/12; 31/08/12; 30/11/15; 31/08/15; 31/05/15; 28/02/15; 30/11/14; 31/08/14; 31/05/14; 28/02/14; 30/11/13; 31/08/13; 31/05/13 and as at 28/02/13) (fn. 36 The 'Quarterly Valuation Statement Summary' indicated inter alia the 'Total Contributions', the 'Total encashments' and 'Indicative Surrender Value' apart from total valuation. Extracts of the 'Quarterly Valuation Statement Summary' presented by the Complainant indicated, in this order, the position as at: 31/05/19; 28/02/19; 30/11/18; 31/05/18; 28/02/18; 30/11/17; 31/08/17; 28/02/17; 30/11/16; 31/08/16; 31/05/16; 29/02/16; 30/11/15; 31/08/15; 31/05/15; 30/11/14; 31/08/14; 31/05/14; 28/02/14; 30/11/13; 31/08/13; 31/05/13; 28/02/13; 30/11/12 and as at 31/08/12.)*
- b) *extracts of the 'Cash Account Transaction Report', (fn. 37 The Complainant presented various extracts of the 'Cash Account Transactions Reports' issued by Generali International, in this order, as follows, from: 01/03/19 to 31/05/19; 01/12/18 to 28/02/19; 01/09/18 to 30/11/18; 01/06/18 to*

31/08/18; 01/03/18 to 31/05/18; 01/12/17 to 28/02/18; 01/06/17 to 31/08/17; 01/09/17 to 30/11/17; 01/03/17 to 31/05/17; 01/12/16 to 28/02/17; 01/09/16 to 30/11/16; 01/06/16 to 31/08/16; 01/03/16 to 31/05/16; 01/12/15 to 29/02/16; 01/09/15 to 30/11/15; 01/06/15 to 31/08/15; 01/03/15 to 31/05/15; 01/10/14 to 28/02/15; 01/09/14 to 30/11/14; 01/06/14 to 31/08/14; 01/03/14 to 31/05/14; 01/12/13 to 28/12/14; 01/09/13 to 30/11/13; 01/06/13 to 31/08/13; 01/03/13 to 31/05/13; 01/12/12 to 28/02/13; 01/09/12 to 30/11/12 and from 01/06/12 to 31/08/12) 'Trading Statement – Disposals' (fn. 38 Extracts of 'Trading Statement – Disposals' statements were from: 01/03/19 to 31/05/19; 01/12/18 to 28/02/19; 01/12/17 to 28/02/18; 01/06/17 to 31/08/17; 01/03/17 to 31/05/17; 01/12/16 to 28/02/17; 01/09/16 to 30/11/16; 01/03/16 to 31/05/16; 01/09/15 to 30/11/15; 01/06/15 to 31/08/15; 01/03/15 to 31/05/15; 01/10/14 to 28/02/15; 01/03/14 to 31/05/14; 01/12/13 to 28/02/14; 01/03/13 to 31/05/13 and from 01/12/12/ to 28/02/13) and 'Trading Statement – Acquisitions' (fn. 39 Extracts from the 'Trading Statement – Acquisitions' statements were from 01/09/16 to 30/11/16; 01/03/16 to 31/05/16; 01/12/15 to 29/02/16; 01/09/15 to 30/11/15; 01/06/15 to 31/08/15; 01/03/15 to 31/05/15; 01/10/14 to 28/02/15; 01/09/14 to 30/11/14; 01/03/14 to 31/05/14; 01/12/13 to 28/02/14; 01/09/13 to 30/11/13; 01/03/13 to 31/05/13; 01/12/12 to 28/02/13 and from 01/06/12 to 31/08/12) over the years.

During the proceedings of the case a number of dealing instruction notes relating to the sale/purchase orders in respect of some (but not all) of the investments undertaken during the tenure of CWM were also presented by the Complainant and Service Provider. (fn. 40 A fol. 20-24 & 292-309)

Underlying Investments

Whilst neither the Complainant nor the Service Provider have presented any table summarising the investments undertaken during the contested period of CWM, the Arbitrator as part of the investigatory powers granted under Cap. 555, was able to extract details of the underlying investment portfolio from the statements submitted during the case as mentioned in the preceding section.

Table A below includes an overview of the investments' transactions undertaken within the underlying policy as per the information resulting from the various 'Cash Account Transaction Reports' presented by the Complainant:

Table A – Overall Portfolio

Investment Name (as indicated in the 'Cash Account Transaction Report')	Date bought	Units purchased	CCY	Purchase amount	Date sold/matured	Units Sold	CCY	Maturity / Sale price	Capital Loss/ Profit (excl. div.)	% of Capital loss/ profit (excl. div) on capital invested
RBC Capital Markets Precious	08 Aug 12	920	GBP	92,000	21 Feb 13	920	GBP	84,953	-7,047	-7.66
Commerzbank AG 1yr	17 Aug 12	1750	GBP	175,000	19 Mar 13	1750	GBP	173,250	-1,750	-1.00
RBC Capital Markets	18 Mar 13	920	GBP	92,000	10 Dec 13 18 Mar 14	460 460	GBP GBP	46,000 46,000	0	0
RBC Capital Markets 1 yr	11 Apr 13	1000	GBP	100,000	25 Sep 13 11 Apr 14	510 490	GBP GBP	50,490 49,000	-510	-1
Nomura International 5 yr	15 Apr 13	680	GBP	67,320	15 Oct 13	680	GBP	72,080	4,760	7.07
RBC Capital Markets 2yr	03 Oct 13	500	GBP	50,000	07 Mar 14	500	GBP	49,500	-500	-1
RBC Capital Markets 2yr	31 Oct 13	360	GBP	36,000	02 Nov 15	360	GBP	12,982	-23,018	-64
Commerzbank AG 1 yr	15 Nov 13	350	GBP	35,000	13 Nov 14	350	GBP	15,603	-19,397	-55
Commerzbank AG	18 Dec 13	460	GBP	46,000	18 Jun 15	460	GBP	3,786	-42,214	-92
Commerzbank AG	21 Mar 14	250	GBP	25,000	23 Mar 15	250	GBP	25,000	0	0

RBC Capital Markets 2 Yr	17 Apr 14	250	GBP	25,000	18 Apr 16	350	GBP	87.89	-34,912	-99.75
	17 Apr 14	100	GBP	10,000						
Nomura	29 Apr 14	360	GBP	36,000	29 Apr 15	360	GBP	36,000	0	0

International										
Commerzbank AG	13 May 14	450	GBP	45,000	13 May 15	450	GBP	45,000	0	0
RBC Capital Markets 2 Yr	13 May 14	60	GBP	6,000	13 May 15	60	GBP	6,000	0	0
EFG Financial Products 1.5yr	23 Oct 14	30	GBP	3,000	29 Jan 15	30	GBP	3,000	0	0
EFG Financial Products	01 Dec 14	90	EUR	9,000	01 Dec 16	90	EUR	803.13	-8,197	-91
EFG Financial Products	01 Dec 14	180	EUR	9,000	05 Oct 16	180	EUR	17,420	8,420	94
Commerzbank AG 2yr Autocall Note GBP 31/03/17	27 Mar 15	30	GBP	3,000	31 Mar 17	110	GBP	3,438	-7,562	-68.75
	09 Apr 15	80	GBP	8,000						
EFG Financial Products 2 Yr Multi Barrier GBP 20/03	10 Apr 15	90	GBP	9,000	20 Mar 17	90	GBP	551	-8,449	-93.87

EFG Financial Products 2 Yr Multi Barrier 16/03/17	17 Apr 15	80	GBP	8,000	17 Apr 17	80	GBP	8,000	0	0
EFG Financial Products	09 Jun 15	230	GBP	23,000	05 Jun 17	230	GBP	1,004	-21,996	-96.63
EFG Financial Products	30 Jun 15	220	GBP	22,000	30 Jun 17	220	GBP	7,307	-14,693	-66.79
Leonteq Securities 1.5 yr	13 Jul 15	180	GBP	18,000	29 Apr 16	180	GBP	2,286	-15,714	-87.30
*Marlboroug h Intl Mngt Ltd	28 Jul 15	5061	GBP	5,000	**					
*Rudolf Wolf Income Fd Ltd	03 Jul 15	5.007	GBP	5,000	**					
*Vam Managed Funds (Lux)	03 Aug 15	35.71	GBP	7,000	**					
*Vam Fund (Lux)	19 Feb 16	101.1	GBP	10,000	06 Mar 17**	54	GBP	6,077		
*Rudolf Wolf Income Fd Ltd	01 Mar 16	11.06	GBP	10,000	**					
*IFSL Brooks MacDonald	01 Nov 16	5296	GBP	6,000	**					
*Gemini Investment Funds	02 Nov 16	182.3	GBP	17,000	**					
Total capital loss (excl. of dividends) on GBP & EUR denominated structured note investments									(-GBP176,991) & EUR223	

**These products are collective investment schemes. All other products listed in the table are structured notes.*

***Open positions by the time of CWM's cessation of business in September 2017.*

It is accordingly clear that the investment portfolio, at times, constituted solely or predominantly of structured notes. Material investments into structured notes still featured in the later years of the investment portfolio including in 2016 and up until early/mid-2017 when the last remaining structured notes matured or were sold.

The above table further indicates substantial capital losses (exclusive of dividends) arising from such investments. It is also noted that, as indicated in Table B below, even when taking into consideration the dividends received (which result from the information in the various 'Cash Account Transaction Reports') substantial realised losses still arise on the overall portfolio of structured notes.

Table B - Performance of Structured Note investments (inclusive of dividends)

Investment Name <i>(as indicated in the 'Cash Account Transaction Report')</i>	CCY	Capital Loss/ Profit (excl. div.)	Total Dividends Received	Total Loss/Profit (inclusive of dividends)	% of Total loss/ profit (incl. of div) on capital invested
RBC Capital Markets Precious	GBP	-7,047	5,060	-1,987	-2.16
Commerzbank AG 1yr	GBP	-1,750	7,875	6,125	3.50
RBC Capital Markets	GBP	0	6,900	6,900	7.50
RBC Capital Markets 1 yr	GBP	-510	6,175	5,665	5.67
Nomura International 5 yr	GBP	4,760	-	4,760	7.07
RBC Capital Markets 2yr	GBP	-500	1,100	600	1.20
RBC Capital Markets 2yr	GBP	-23,018	6,120	-16,898	-46.94
Commerzbank AG 1 yr	GBP	-19,397	3,500	-15,897	-45.42
Commerzbank AG	GBP	-42,214	6,210	-36,004	-78.27
Commerzbank AG	GBP	0	2,500	2,500	10

RBC Capital Markets 2 Yr	GBP	-34,912	7,000	-27,912	-79.75
Nomura International	GBP	0	3,240	3,240	9.00
Commerzbank AG	GBP	0	4,050	4,050	9.00
RBC Capital Markets 2 Yr	GBP	0	480	480	8.00
EFG Financial Products 1.5yr	GBP	0	75	75	2.49
EFG Financial Products	EUR	-8,197	1,800	-6,397	-71.08
EFG Financial Products	EUR	8,420	0	8,420	93.56
Commerzbank AG 2yr Autocall Note GBP 31/03/17	GBP	-7,562	1,760	-5,802	-52.75
EFG Financial Products 2 Yr Multi Barrier GBP 20/03	GBP	-8,449	1,613	-6,836	-75.95
EFG Financial Products 2 Yr Multi Barrier 16/03/17	GBP	0	1,370	1,370	17.12
EFG Financial Products	GBP	-21,996	0.00	-21,996	-95.63
EFG Financial Products	GBP	-14,693	0.00	-14,693	-66.79
Leonteq Securities 1.5 yr	GBP	-15,714	1,258	-14,456	-80.31
Total capital loss/profit (incl. div.) on GBP & EUR denominated structured note investments				(-GBP126,716) & EUR2,023	

According to the statements provided, the Complainant is actually calculated to have experienced a material total realised capital loss (inclusive of dividends) of (GBP126,716) on the portfolio of GBP denominated structured note investments. On the two EUR denominated structured notes, a realised total profit (inclusive of dividends) of EUR2,023 was calculated. It is clear, that the Complainant has accordingly experienced a material loss overall on her portfolio of structured notes which, as indicated above, formed a substantial part of her investment portfolio.

With respect to the remaining investments, comprising the indicated collective investment schemes, it is noted that the investment position for the said funds was

still open according to the 'Investment Fund Valuation' dated 31/05/19 with the market value of the remaining investments as at that date being in total GBP49,726 as compared to a total book cost of GBP51,284 and thus signifying a slight drop of - 3.04% overall on such remaining investments as at that date.

Hence, it has clearly emerged that the Complainant did indeed experience substantial capital losses on her investment portfolio, with such material losses attributed to the structured note investments as indicated above.

The Legal Framework

As part of the consideration of this Complaint, it is pertinent to refer to the legal framework applicable to STM Malta and the Retirement Scheme and the responsibilities, duties and obligations emerging under such 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. 41 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 ...’.

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. 42 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’.

Duties as a Trustee

As highlighted 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 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. 43 Editor Max Ganado, 'An Introduction to Maltese Financial Services Law', Allied Publications 2009, p.174)

As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'. (fn. 44 Op. cit. p.178)

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 paterfamilias in the performance of his obligations'. (fn. 45 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.

Observations and Conclusions

Key consideration

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 with the Complainant raising various aspects. (fn. 46 A fol. 7-8)

In the particular circumstances of this case and on the basis of the evidence resulting in this case, the Arbiter considers that he is in a position to consider a principal alleged failure made by the Complainant against STM Malta.

This principal alleged failure relates to the claim that STM Malta failed to ensure that the investments were: in line with her risk profile; diversified; and in her best interest as she claimed her capital was all invested in totally unsuitable high risk structured notes aimed for professional investors only. The Arbiter shall consider this aspect based on the information resulting from this case.

General observation

On a general note, it is clear that STM Malta did not provide itself investment advice in relation to the underlying investments of the Retirement Scheme. The role of the investment adviser was the duty of other parties, such as, CWM.

This would reflect on the extent of responsibility that the financial adviser 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 investment portfolio, **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.

Permitted portfolio composition

The Arbiter refers to the composition of the permitted investment portfolio and the realised losses as indicated in the section titled 'Underlying Investments' above and notes that the Complainant's portfolio had been allowed to comprise substantial

exposure to structured notes investments with considerable exposure to individual structured note products also prevailing in multiple instances.

The portfolio of investments indeed commenced with over 95% of the Complainant's portfolio being allowed to be invested into just two structured notes at the time. The Complainant's underlying investment portfolio continued to remain substantially exposed (albeit on a reducing basis) to structured notes investments in subsequent years as can be seen, for example, in the 'Portfolio Valuation' statement dated 30/11/15, (fn. 47 A fol. 60/61 & a fol. 58/59 - A material investment of GBP175,000 into one single product, the Commerzbank AG 1 yr Inc Nt Energy Companies T2 GBP, and another substantial investment of GBP92,000 into the RBC Capital Markets Precious Commodities Phoenix Nt 3 GBP, together amounting to GBP267,000 and constituting at the time 96.13% of Total Portfolio Valuation as at 31/08/12 of GBP277,758) The Complainant's underlying investment portfolio continued to remain substantially exposed (albeit on a reducing basis) to structured notes investments in subsequent years as can be seen, for example, in the 'Portfolio Valuation' statement dated 30/11/15, (fn. 48 A fol. 62-63) the 'Portfolio Valuation' statement dated 30/11/16, (fn. 49 A fol. 47-48) and the 'Investment Fund Valuation' statement dated 31/05/17, (fn. 50 A fol. 41-43) that were provided by the Complainant as attachments to her complaint form.

The said 'Investment Fund/Portfolio Valuation' statements indicate inter alia that:

- *as at 30/11/15 there was a total book cost of GBP140,250 exposed to structured notes (fn. 51 A fol. 62 - Original investment of GBP11,000 into 'Commerzbank AG 2yr Autocall Note GBP 31/03/17'; GBP,7124 into 'EFG Financial Products 2yr Express Cert 28/11/16 EUR'; GBP7,126 into 'EFG Financial Products 2yr Discount Cert 28/11/16 EUR'; GBP9,000 into 'EFG Financial Products 2 yr Multi Barrier GBP 20/03/17'; GBP8,000 into 'EFG Financial Products 2yr Multi Barrier 16/03/17 GBP'; GBP22,000 into 'EFG Financial Products 2yr Express Cert GBP 01/06/17'; GBP23,000 into 'EFG Financial Products 2yr Express Cert GBP 05/06/17'; GBP18,000 into 'Leonteq Securities 1.5yr Multi Barrier GBP 29/12/16'; GBP35,000 into 'RBC Capital Markets 2 Yr GBP Reverse Con Note') as compared to a total book cost of GBP17,000 in collective investment schemes;*
- *as at 30/11/16 there was a total book cost of GBP80,124 exposed to structured notes (fn. 52 A fol. 47 - Original investment of GBP11,000 into 'Commerzbank AG 2yr Autocall Note GBP 31/03/17'; GBP,7124 into 'EFG Financial Products 2yr Express Cert 28/11/16 EUR'; GBP9,000 into 'EFG Financial Products 2 yr Multi Barrier GBP 20/03/17'; GBP8,000 into 'EFG Financial Products 2yr Multi Barrier*

16/03/17 GBP'; GBP22,000 into 'EFG Financial Products 2yr Express Cert GBP 01/06/17'; GBP23,000 into 'EFG Financial Products 2yr Express Cert GBP 05/06/17') as compared to a total book cost of GBP60,000 in collective investment schemes;

- as at 31/05/17 there was a total book cost of GBP45,000 exposed to structured notes (fn. 53 A fol. 41 – Original investment of GBP22,000 into 'EFG Financial Products 2 yr Express Cert GBP -1/06/17'; GBP23,000 into 'EFG Financial Products 2 yr Express Cert GBP 05/06/17') as compared to a total book cost of GBP54,654 in collective investment schemes.

The official statements provided by the Complainant indicate that apart from the overall high exposure to investments into structure notes across the years, the said statements also indicate that there were even various instances of high exposures to single structured note investments as well as high exposure to single issuers (such as RBC, Commerzbank and EFG) where in the case of high exposures to single issuers this occurred at the time of purchase of the respective product and/or through cumulative purchases of structured notes issued by the same issuer.

The said exposures to structured products, both overall and individually, that were allowed to prevail by the Service Provider in the Complainant's portfolio do not provide any comfort regarding the prudence that was required to be achieved with respect to the investment portfolio, nor comfort regarding an adequate level of diversification being ensured or that such a portfolio composition was reflective of and compatible to a portfolio of a retirement scheme whose scope was to provide for retirement benefits.

The underlying portfolio composition did indeed also not really reflect the description of the 'Personal Professional Portfolio' which was selected in respect of the underlying policy. The said 'Personal Professional Portfolio' was described in Generali's form as consisting of 'a life assurance contract, which can invest its capital in listed equities, bonds, collectives, currencies and some structured products'. (fn. 54 A fol. 271 - Emphasis added by the Arbiter.) As inferred in such description, investments in structured products, if any, were to be ancillary to investments in other main asset classes, such as listed equities, bonds and collective investment schemes. Not only was the capital of the underlying policy of the Retirement Scheme not invested in 'listed equities, bonds, collectives' for a number of years but exposure to structured notes was the predominant, if not, the sole type of investment product invested into as indicated in the section titled 'Underlying Investments' above.

As trustee and Retirement Scheme Administrator of the Scheme, STM Malta should have indeed intervened and not allow such portfolio composition. Whilst STM Malta was not the investment adviser, however, in its capacity of Trustee of the Scheme and Retirement Scheme Administrator, it had the power and authority, besides the duty, not to permit such portfolio composition to be undertaken within its Scheme, given that the portfolio was not reflective of the requirement which it had to ensure that assets were to be invested in a prudent manner nor was the portfolio reflective of the scope for which the scheme was created, that is, to provide for retirement benefits and thus not as a speculative investment vehicle.

The Service Provider itself chose not to demonstrate and submit any proof whatsoever that the investments allowed within the Retirement Scheme were done in a prudent manner and reflective of the rules to which it was subject as mentioned in the section titled 'Responsibilities of the Service Provider' above.

In its reply and submissions, the Service Provider chose to omit and not delve into any details and breakdowns of the actual investment portfolio and neither did it submit any justifications and explanations of how the investment portfolio of the Complainant was in line with the applicable requirements. This despite the material nature of the claim made by the Complainant including that the investments were outside of her risk profile.

Another important aspect relevant to the determination of the inadequacy of the portfolio composition which has been considered by the Arbiter in arriving to the above conclusions, is also the nature, as well as the features of the type of structured note investments, that were being allowed to be invested into within the Scheme as described hereunder.

Fact sheets

The Complainant did not submit any fact sheets herself in respect of the contested underlying investments, nor were any fact sheets presented by the Service Provider. Details of the investments comprising the investment portfolio, however, emerged from the various statements and the dealing instructions notes as indicated in the section above titled 'Statements and dealing forms presented'.

As part of its investigatory powers, the Arbiter undertook general searches over the internet on the underlying investments in respect of which the respective ISIN numbers emerged from the dealing instruction notes.

The search yielded fact sheets in respect of the following structured notes which were listed in the same dealing notes:

- *the 'RBC Autos Income Note' bearing ISIN - XS0964863590; (fn. 55 A fol. 292) (fn. 56 <https://www.portman-associates.com/wp-content/uploads/2013/09/RBC-Motors-Income-Note-FactSheet.pdf>)*
- *the 'Comm 10% Pharma' bearing ISIN - XS1035007969; (fn. 57 A fol. 293) (fn. 58 <https://www.portman-associates.com/wp-content/uploads/2014/03/Commerzbank-10-Fixed-Global-PharmaIncome-Note-2-FACTSHEET.pdf>)*
- *the 'RBC 10% Energy Income' bearing ISIN - XS1015499921; (fn. 59 A fol. 294) (fn. 60 <https://www.portman-associates.com/wp-content/uploads/2014/04/RBC-10-Fixed-Income-Energy-Note.pdf>)*
- *the 'Nomura 9% US Tech' bearing ISIN - XS1048446188; (fn. 61 A fol. 294) (fn. 62 <https://www.portman-associates.com/wp-content/uploads/2014/03/Nomura-9-1Y-US-Technology-IncomeFACTSHEET.pdf>)*
- *the 'Commerzbank 9% Future Pioneers' bearing ISIN - XS1057776392; (fn. 63 A fol. 295) (fn. 64 <https://www.portman-associates.com/wp-content/uploads/2014/05/Commerzbank-9-Fixed-Future-PioneersFACT-SHEET.pdf>)*
- *the 'RBC Automotive' bearing ISIN - XS1027492278. (fn. 65 A fol. 295) (fn. 66 <https://www.portman-associates.com/wp-content/uploads/2014/04/RBC-8AutomotiveIncomeAutocallableFactSheet.pdf>)*

The fact sheets for the said notes indicated the products as being linked to a number of underlying stocks. Fixed income returns ranging from 8%-10%p.a. were indicated in the said fact sheets.

It is noted that the high rate of returns indicated on these products in themselves reflect the high level of risk being taken as per the risk-return tradeoff. 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 also included a warning on the lines 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. 67 E.g. Fact sheet in respect of the RBC Autos Income Note with same or similar disclosure featuring in the other fact sheets sourced.)

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, even more so when high individual exposures to single structured notes were being taken.

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 outlined in the section titled 'Responsibilities of the Service Provider' above. Such investments also did not reflect the low/cautious risk attitude of the Complainant.

It is noted that the Service Provider, argued inter alia in its reply that 'on the basis of objective assessment, it is not apparent that the investments chosen by the adviser at the time would not have been suitable for inclusion in a portfolio with the Claimant's risk profile'. (fn. 68 A fol. 253)

STM Malta did not, however, provide any basis or substantiated its claims in this regard.

Indeed, the Arbiter considers that, contrary to what was claimed by the Service Provider, an objective assessment of the investment portfolio would rather indicate that the investments chosen were, in the context of a pension scheme, not even suitable for an investor with a higher attitude to risk, let alone for the Complainant, a housewife, who had the lowest risk attitude and a cautious investment profile. By its very nature, a pension scheme is not a speculative investment account/vehicle.

The Arbiter is of the view that not only was the investment portfolio not of 'low risk', but rather one involving substantial high risks as reflected in the extent of realised losses experienced by the Complainant, where many of the structured notes invested into yielded a capital loss, some of which on nearly all or substantial parts of the capital invested as detailed in section titled 'Underlying Investments' above.

Moreover, it is also noted that the fact sheets sourced all specify that the target audience for these products were 'Professional Investors Only' (fn. 69 Factsheets refer - For example section titled 'Key Features' and 'Target Audience' in the factsheets issued by RBC refer.) and, accordingly, such products were not aimed for retail investors, as the Complainant was and, accordingly, cannot be deemed to have somehow either been in her best interests - as they did not reflect her profile of a retail investor - nor a cautious attitude to risk.

Other

In its submissions, the Service Provider also argued that in her Application Form for Membership, the Complainant indicated that she considered herself an informed investor as she had previously made direct investments in company shares. Whilst the underlying assets to which the structured notes were linked involved company shares, however, one cannot reasonably construe an investor who had only invested directly in company shares to have knowledge, or be able to understand structured notes, given that the nature and particular features of such products work and are completely different to a company share.

Furthermore, as already indicated, no adequate comfort has emerged that the investments were 'suitable for inclusion in a portfolio with the Claimant's risk profile' (fn. 70 A fol. 253) as claimed by the Service Provider in its reply, something which the Service Provider never substantiated during the proceedings of this case.

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 determined that the Complainant's portfolio included investments not suitable for a retail member and of a high risk.

The Complainant is ultimately claiming losses which are equivalent to more than 60% of the total amount invested under her Scheme. (fn. 71 (GBP175,501.78 of sum invested in the Generali Plan of GBP277,978.94 (A fol. 251) = 63%)

The Arbiter further notes that during the proceedings of this case, the Service Provider never contested the extensive losses claimed by the Complainant.

The material losses claimed are indeed in themselves indicative of the failure in achieving the Retirement Scheme's primary objective 'to provide a life-time income to its members', (fn. 72 A fol. 258) and in the failure to ensure an adequate level of diversification and assets being invested in a prudent manner. Such material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have otherwise not occurred.

It is clear that STM Malta permitted an investment portfolio that cannot be construed as reflecting the principle of prudence and in the best interests of the Complainant as was required in terms of the rules as amply explained above.

Causal link

The actual cause of the losses experienced by the Complainant on her Retirement Scheme cannot just be attributed to the alleged actions/fraud by the investment adviser as argued by the Service Provider in its submissions and/or losses of market movements in the value of the investments selected by the adviser.

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 STM Malta was required and reasonably expected to exercise in such roles.

It is also sufficiently 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, the Retirement Scheme Administrator had a duty to check and ensure that the portfolio composition recommended by the investment adviser 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 were 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, promoting in the process the scope for which the Scheme was established.

The principal purpose of a personal retirement scheme is ultimately that to provide retirement benefits. Such purpose is so important that it has been ingrained and reflected in the primary legislation, the Special Funds (Regulation) Act ('SFA') (fn. 74 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'), itself. (fn. 74 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'.)

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.

Moreover, with respect to the portfolio composition, the Arbiter considers that 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 with respect to the permitted investment portfolio.

The Arbiter also considers that the Service Provider did not meet the 'reasonable and legitimate expectations' (fn. 75 Cap. 555, Article 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 (fn. 76 Cap 555, Article 19(3)(b)) 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 minimised 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, 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 as calculated below.

Given that there were still open positions within the investment portfolio, and since the Arbiter has no sufficient detail with respect to all the respective underlying investments comprising the portfolio including the respective amount of realised gains/losses on all the investment portfolio, he shall explain how the amount of compensation shall be calculated.

Given that the Complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of CWM acting as adviser, compensation shall be provided solely on the investment portfolio constituted under CWM and allowed by the Service Provider.

In this regard, the amount of compensation shall be calculated on the total cumulative realised losses (after deducting any realised gains) arising on the underlying investment portfolio constituted by CWM, taking also into consideration any dividends or other income received from such investments.

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 constituted by CWM, as at the date of this decision.

In case where any currency conversion is required for the purpose of finally netting any realised profits/losses within the portfolio which remain denominated in different currencies such conversion shall, if and where applicable, be made at the spot exchange rate sourced from the European Central Bank and prevailing on the date of this decision. Such a direction on the currency conversion is only being given in the very particular circumstances of such case for the purpose of providing clarity and enabling the calculation of the compensation formulated in this decision and avoid future unnecessary controversy.

- (iii) *In case of any remaining investment which was constituted at the time of CWM and is still held within the Schemes' respective portfolio of underlying investments as at, or after, the date of this decision, such investment shall not be subject of the compensation stipulated above.*

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the indicated amount of compensation to the Complainant.

A full and transparent breakdown of the calculations made by the Service Provider in respect of the compensation, as decided in this decision, shall be provided to the Complainant.

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

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

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fis-26 ta' April, 2021 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-segwent: (i) l-Arbitru naqas milli jikkonsidra li (a) hija ma kellha l-ebda obbligu li tqis, tqajjem kwistjonijiet jew li tagħmel verifiki dwar il-pariri li l-appellata ngħatat minn CWM li nħatret skont l-għażla tagħha; (b) il-kontenut tal-portafoll ma kienx ġie magħżul minnha, u fi kwalunkwe każ ma kien hemm xejn x'juri li kien hemm ksur kuntrattwali, regolatorju jew tal-linji gwida, jew nuqqas ta' prudenza min-naħa tagħha fir-rigward tal-għażla, jew li hija saħansitra ma ħaditx in konsiderazzjoni l-profil ta' riskju tal-appellata; (ċ) ma kien hemm l-ebda ness kawżali bejn l-allegat nuqqas jew ommissjoni tagħha u t-telf soffert mill-appellata; u (ii) ma taqbilx mal-kwantum tad-danni kif likwidati favur l-appellata.

7. L-appellata wiegħbet fit-18 ta' Frar, 2022 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 tikkonsidra l-aggravji tas-soċjetà appellanta, u dan fid-dawl tal-konsiderazzjonijiet magħmulin mill-Arbitru fid-deċiżjoni appellata, u tar-risposta ppreżentata mill-appellata.

9. Meta tfisser l-ewwel aggravju tagħha, is-soċjetà appellanta tikkontendi li meta l-Arbitru ddecieda li hija kienet naqset li tassigura li l-investimenti magħmulin mill-appellata jkunu skont il-profil ta' riskju tagħha, u li dawn ikunu ddiversifikati u skont l-aħjar interess tagħha, ma kkonsidrax li hija ma kienet taħt l-ebda obbligu li tqis, tqajjem kwistjonijiet jew li tagħmel verifiki dwar il-pariri li l-appellata ngħatat minn CWM, li nħatret skont l-għażla tagħha. B'mod xettiku tistaqsi b'liema mod seta' obbligu speċifiku li ma kienx jeżisti dak iż-żmien, jiġi estiż għall-obbligu ġenerali ta' *trustee* fil-konfront tal-benefiċċjarju ta' *trust*. Tkompli tgħid li anki l-għażla tal-investimenti formanti parti mill-portafoll, ma kinitx tagħha u kien jispetta lill-konsulent finanzjarju tal-appellata li jassigura ddiversifikazzjoni tal-portafoll tal-appellata. Hija min-naħa tagħha tgħid li ma kienet tat l-ebda parir dwar l-investimenti lill-appellata, u għalhekk kienet biss konsapevoli ta' dawk l-investimenti li l-istess appellata fuq parir ta' CWM kienet poġġiet fl-Iskema. Tirrileva li l-istruzzjonijiet kollha kienu ġew iffirmati mill-appellata stess u anki mill-konsulent finanzjarju tagħha, u hija dejjem aġixxiet fil-parametri tal-istess. Is-soċjetà appellanta tgħid ukoll li l-appellata dejjem qieset lilha nnifisha bħala *informed investor* fid-dikjarazzjonijiet li hija kienet għamlet qabel ma ssieħbet fl-Iskema. Imbagħad dwar il-kwistjoni tan-noti strutturati, l-Arbitru ddecieda minn jeddu u dan fin-nuqqas ta' kwalsiasi prova, li jagħmel tajjeb permezz ta' rikerka bi ksur ċar tal-prinċipju *quod non est in actis, non est in mundo*. B'hekk huwa serraħ il-konklużjoni tiegħu fuq ir-riċerka, jiġifieri 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' investment applikabbli u r-regolamenti tal-MFSA, huwa permissibbli li jsiru investimenti fi *structured notes*, u jixhet l-oneru ta' prova fuqha fejn isostni li kienet hija li kellha turi kif dawn kienu tajbin fil-parametri ta' skema tal-pensjoni tal-appellata, minflok ma ddikjara li l-appellata stess kellha turi kif dawn ma kienux tajbin f'kuntest ta' skemi tal-pensjoni. Tkompli tgħid li l-Arbitru ma ta l-ebda raġuni għaliex *structured notes* ma kienux tajbin għal *retail member*. Imbagħad tkompli tgħid li kemm l-appellata u anki l-Arbitru mkien ma jindikaw li kien hemm frodi, *wilful default* jew *gross negligence* min-naħa tas-soċjetà appellanta. Hija tiċċita r-regola 12.1 tat-*Trust Rules*, filwaqt li tikkontendi li l-ebda negligenza ma tista' tiġi attribwita lilha għadarba hija kienet straħet fuq struzzjonijiet, garanziji u indemnifikazzjonijiet u dikjarazzjonijiet iffirmati mill-appellata. Is-soċjetà appellanta tikkontendi li l-appellata kienet legalment obligata 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 negligenza tagħha u għalhekk huwa nieqes in-ness kawżali. Għal dak li jirrigwarda t-tieni aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru naqas milli jindika għaliex hija għandha tinzamm responsabbli għad-danni sofferti mill-appellata minħabba t-telf tagħha fil-percentwali ta' 70%, aktar u aktar meta l-Arbitru kien irrikonoxxa li hija ma kinitx konsulent tal-investment, u ma tat l-ebda parir ta' investment. Tinsisti li jekk jirrizulta xi nuqqas min-naħa tagħha, ċertament hija ma setgħetx tkun responsabbli għat-telf soffert, meta kien ċar li kienu terzi l-kawża tiegħu.

10. L-appellata tilqa' billi qabel xejn tirrileva li r-rikors tal-appell għandu jiġi ddikjarat null u bla effett. Tgħid li dan għaliex isimha mhux indikat bl-istess mod kif indikat fl-ewwel istanza fejn tniżżel bħala June Doris Burletson, u tispjega li dan tal-aħħar huwa isimha proprju kif jirriżulta mill-kopja tal-passaport Inġliż tagħha li hija kienet qegħda tannetti bħala Dok. A. Imbagħad dwar l-ewwel aggravju tas-soċjeta' appellanta tikkontendi li għaladarba 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 tiċċita is-subartikolu 1(2) tal-Att dwar *Trusts* u *Trustees* [Kap. 331 tal-Liġijiet ta' Malta], u anki il-para. (ċ) tas-subartikolu 43(6) u l-artikolu 21 tal-istess liġi. Hija tagħmel ukoll riferiment għal pubblikazzjoni tal-MFSA u tiċċita silta minnha, liema dokument tgħid 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. L-appellata ċċitat 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 numru ta' riskji assoċjati mal-kapital investit f'dan it-tip ta' prodotti, u kien hemm saħansitra 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 indipendenti li wettaq l-Arbitru 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 kolloxx, id-dokumenti li straħ fuqhom l-Arbitru kienu jikkonsistu *f'fact sheets* li kienu dehru fil-portafoll tal-appellata, u għaldaqstant kien inwketanti li s-soċjetà appellanta qegħdha tgħid li ma kellhiex l-opportunità li teżaminahom filwaqt li kienet qegħda tamministra l-Iskema. L-appellata tilqa' billi tissottometti li għall-kuntrarju l-Arbitru kien spjega sew fid-dettall ir-rabta bejn l-aġir tas-soċjetà appellanta u t-telf soffert mill-appellata.

11. Il-Qorti tibda billi tikkonsidra l-ewwel sottomissjoni tal-appellata fejn qegħda tirrileva n-nullità tar-rikors tal-appell stante li isimha mhux indikat bl-istess mod kif indikat fl-ewwel istanza. Tagħraf li d-differenza fl-isem huwa pjuttost wieħed żgħir tassew, u dan qed jingħad filwaqt li tikkonsidra li n-numru tal-passaport tagħha huwa ndikat korrettement, u għalhekk m'hemm l-ebda dubju dwar l-identità tal-appellata. Għaldaqstant il-Qorti mhijiex ser tikkonsidra ulterjorment din il-kwistjoni.

12. Għal dak li jirrigwarda l-mertu, il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. Huwa jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jigifieri 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 huwa għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellata mill-Applikazzjoni għas-Shubija esebita fl-atti¹, għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà

¹ Ara *a fol. 258 et seq.*

appellanta u anki fir-rigward tal-konsulent finanzjarju CWM. Il-Qorti ssib li dawn kollha huma korretti u anki f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

13. Imbagħad l-Arbitru rrileva li l-Iskema kienet tikkonsisti f'*trust* b'domicilju hawn Malta, u kif awtorizzata mill-MFSA bħala '*personal retirement scheme*'. Osserva li l-appellata kienet ittrasferiet il-valur ta' GBP275,000 mill-pensjoni tagħha fl-Iskema, filwaqt li l-assi mbagħad kienu ġew utilizzati għax-xiri tal-*Generali International Professional Portfolio* jew *Generali Plan*, li kienet polza tal-assikurazzjoni tal-ħajja maħruġa minn *Generali International Limited*, li kienet topera minn Guernsey. Irrileva li din il-polza kienet indikata fl-Applikazzjoni għal Sħubija ta' din is-soċjetà bħala '*Personal Professional Portfolio*' deskritta bħala "*... a life assurance contract, which can invest its capital in listed equities, bonds, collectives, currencies and some structured products, subject to the agreement of Generali International Limited*".²

14. Wara li ħa konjizzjoni tad-dokumenti voluminużi pprezentati mill-appellata, u anki tad-diversi struzzjonijiet mogħtija fir-rigward tal-bejgħ u tax-xiri ta' uħud mill-investimenti magħmula matul iż-żmien li CWM kienet il-konsulent finanzjarju tal-appellata, l-Arbitru elenka dik l-informazzjoni li huwa seta' jestrappola minn dawk ir-rendikonti li ġew ipprezentati matul il-proċeduri quddiemu. B'hekk huwa wasal għall-konklużjoni li l-appellata tassew sofriet telf kif allegat minnha, liema telf seta' jiġi attribwit lill-investimenti fin-noti strutturati. Il-Qorti hawn tosserva li ma jidhirx li hemm kontestazzjoni bejn il-partijiet dwar dan kollu.

² A fol. 271.

15. L-Arbitru mbagħad għadda sabiex ikkonsidra li s-soċjetà appellanta bħala Amministratriċi u *Trustee* tal-Iskema, kienet sogġetta 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. Dawn ir-referenzi l-Qorti tgħid li huma mhux biss utli, iżda anki relevantissimi stante l-applikabbiltà tagħhom għall-każ odjern.

16. 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-registrazzjoni tas-soċjetà appellanta 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 il-Pension Rules for Personal Retirement Schemes Issued under the Retirement Pensions Act. L-Arbitru aċċenna fuq l-obbligu tal-Amministratur tal-Iskema tal-Irtirar sabiex dan jaġixxi fl-aħjar interessi tal-Iskema, u dan kif jirrikjedi s-subartikolu 19(2) tal-Att li Jirregola Fondi Speċjali (Kap. 450) u s-subartikolu 13(1) tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514). Il-Qorti żżid 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-investment fis-sena 2012 meta kienu applikabbli d-

disposizzjonijiet tal-Kap. 450, u anki sussegwentement meta gie fis-seħħ l-Att dwar Pensjonijiet għall-Irtirar fis-sena 2015, u l-appellata kienet għadha membru tal-Iskema u garrbet it-telf allegat.

17. Minn hawn l-Arbitru għadda sabiex elenka diversi prinċipji li kienu applikabbli fil-konfront tas-soċjetà appellanta skont il-*general conduct of business rules/standard licence conditions* applikabbli taħt ir-regim tal-Kap. 450 kif imħassar, u tal-Kap. 514 li ssostitwih. 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 diligenza fl-aħjar interessi tal-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li anki minn dan li ngħad, jirriżulta li d-difiża tagħha li hija qatt ma setgħet tinzamm responsabbli stante li ma kellha l-ebda obbligu fil-konfront tal-appellata, ma tistax tirnexxi.

18. Iżda l-Arbitru ma waqafx hawn, għaliex ikkonsidra wkoll il-kariga tagħha bħala *trustee*, u rrileva li hawn kienu applikabbli l-provvedimenti tal-Att dwar Trusts and Trustees (Kap. 331), li l-Qorti tirrileva li kien gie fis-seħħ fit-30 ta' Ġunju, 1989, kif sussegwentement emendat, u jagħmel riferiment partikolari għas-subartikolu 21(1), u l-para. (a) tas-subartikolu 21(2) tiegħu. 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 tenuta saħansitra tamministra l-Iskema u l-assi tagħha skont diligenza u responsabbiltà għolja. In sostenn ta' dan kollu huwa jicċita l-pubblikazzjoni ntitolata An Introduction to Maltese Financial Services Law³ u l-pubblikazzjoni riċenti tal-

³ Ed. Max Ganado.

MFSA tas-sena 2017, fejn din ittrattat principji diġà stabbiliti qabel dik id-data permezz tal-Att dwar Trusts u Trustees (Kap. 331) u anki permezz tal-Kodiċi Ċivili.

19. L-Arbitru qal 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 ċerti 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 investigat 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-rizultanti telf lill-appellata.

20. L-Arbitru hawn għadda sabiex ikkonsidra l-kompożizzjoni tal-portafoll tal-appellata, flimkien mat-telf attwali soffert minnha, u kkonstata li dan il-portafoll kien haddan numru sostanzjali ta' noti strutturati, fejn f'bosta okkażjonijiet kienet ukoll esposta għal noti strutturati individwali. Għalhekk fil-bidu kien hemm aktar minn 95% tal-portafoll investit biss f'żewġ noti strutturati u fis-snin li segwew baqa' espost, għalkemm veru b'mod inqas qawwi, għall-investimenti f'noti strutturati, u dan kif kien jirrizulta mill-*Portfolio Valuation* tat-30 ta' Novembru, 2015, tat-30 ta' Novembru, 2016 u tal-31 ta' Mejju, 2017, li esebiet l-appellata mal-ilment tagħha. Mill-istess rendikonti pprezentati mill-appellata, l-Arbitru qal li kien irrizulta wkoll li kien hemm istanzi fejn il-portafoll ġie espost sew għal investimenti b'nota strutturata waħda u għal emittenti singolari bħal ma kienu RBC, Commerzbank, u EFG. L-Arbitru ġustament għalhekk iddikjara li

dan kollu ma kienx ta' serġan il-moħħ fir-rigward tal-prudenza u l-livell xieraq ta' diversifikazzjoni mitluba mis-soċjetà appellanta, jew li l-kompożizzjoni tal-portafoll kien jirrifletti u kien kompatibbli ma' portafoll ta' skema tal-irtirar fejn l-iskop kien ta' provvista ta' beneficiċċji ta' irtirar. Qal li anki l-kompożizzjoni tal-portafoll ma kinitx tassew tirrifletti l-għażla ta' '*Personal Professional Portfolio*' li saret fir-rigward tal-polza sottoskritta, fejn fl-applikazzjoni ta' Generali din ġiet deskritta bħala '*a life assurance contract, which can invest its capital in listed equities, bonds, collectives, currencies and some structured products*'. Esprima l-fehma tiegħu li skont din id-deskrizzjoni, l-investimenti f'prodotti strutturati kellhom ikunu anċillari għall-investimenti oħra prinċipali. L-Arbitru sewwa għaraf li s-soċjetà appellanta għalkemm tassew ma kinitx il-konsulent finanzjarju, kellha s-setgħa u l-awtorità minbarra wkoll id-dover, li tintervjeni fil-kapaċità tagħha ta' *trustee* u Amministratrici tal-Iskema billi ma tippermettix li l-portafoll jiġi kompost b'dak il-mod, għadarba l-imsemmi portafoll kien jagħmel parti mill-istess Skema. Qal li s-soċjetà appellanta għażlet minflok li ma tressaq l-ebda prova li setgħet turi li l-investimenti kienu saru b'mod għaqli u b'mod li jirriflettu r-regolamenti li kienet soġġetta għalihom. Naqset li tindirizza l-kwistjoni tal-kompożizzjoni tal-portafoll anki fir-risposta u fis-sottomissjonijiet tagħha.

21. L-Arbitru mbagħad spjega li permezz ta' eżerċizzju sempliċi ta' tfittxija fuq l-*internet* dwar l-investimenti sottoskritti, kien sab *fact sheets* fir-rigward tal-*RBC Autos Income Note, Comm 10% Pharma, RBC 10% Energy Income, Nomura 9% US Tech, Commerzbank 9% Future Pioneers* u *RBC Automotive*. Filwaqt li ħa konjizzjoni tad-deskrizzjoni li tingħata fir-rigward ta' kull wieħed minn dawn il-

prodotti, osserva li kien hemm indikat fihom rati ta' imghaxijiet relattivament għolja, u li għalhekk kienu juru l-livell għoli ta' riskju li l-investment kien jinvolvi.

22. Il-Qorti hawn ser tikkonsidra dak li gie rilevati 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 mill-imsemmija dokumentazzjoni fis-sottomissjonijiet tagħha, anki fejn giet miċħuda kull responsabbiltà u ngħataw diversi twissijiet, mingħajr ma ppreżentat l-imsemmija dokumentazzjoni. Il-Qorti wkoll 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 huwa kien qed jiddeċiedi l-ilment fil-parametri tal-para. (b) tas-subartikolu 19(3) tal-istess liġi. Il-Qorti tirrileva li r-risultat tat-tfittxija tal-Arbitru juri kemm huwa kien korrett li ma jieqafx fl-investigazzjoni tiegħu minħabba l-informazzjoni limitata a dispożizzjoni diretta tiegħu, li l-Qorti tqis li ma kinitx ir-risultat ta' nuqqas ta' attenzjoni, u b'hekk allura jkun qed jgħin id-difiża tas-soċjetà appellanta. Ma tqisx li b'hekk min-naħa l-oħra kif tallega s-soċjetà appellanta huwa kien qed jgħin il-każ imressaq mill-appellata, aktar milli jaċċerta li ssir għustizzja. Is-soċjetà appellanta tilmenta wkoll li l-partijiet ma kellhomx l-opportunità li jeżaminaw il-

kontenut tal-informazzjoni tal-*fact sheets*, iżda jirrizulta minn dak li qal l-Arbitru li l-informazzjoni ma kinitx waħda diffiċli li tinkiseb permezz ta' ricerka fuq l-*internet*, u għalhekk din kienet disponibbli anki għall-pubbliku, inkluż is-soċjetà appellanta. B'hekk ukoll is-soċjetà appellanta kellha kull opportunità, imma wara kollox naqset milli tagħmel, li tikkontesta dik l-informazzjoni miksuba. Imma 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*.

23. 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 joħroghom u anki r-riskju tal-likwidità, u twissijiet li n-noti ma kellhomx il-kapital protett. Il-Qorti tgħid li dankollu huwa ferm indikattiv tal-fatt li l-investment 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-segwenzi 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 investment ma kienux hemm jew ma setgħux jinstabu, iżda ddikjara li kien tassew ċar li l-portafoll tal-appellata kellu noti strutturati li kienu jgħorru 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.

24. L-Arbitru rrileva li għalkemm is-soċjetà appellanta kienet qegħda ssostni li *“on the basis of objective assessment, it is not apparent that the investments chosen by the adviser at the time would not have been suitable for inclusion in a portfolio with the Claimant’s risk profile”*, hija ma kinitx spjegat il-bażi tal-allegazzjoni tagħha jew sostanzjat l-istess b’xi mod. L-Arbitru stqarr li għall-kuntrarju, oġġettivament seta’ jiġi kkonstatat li l-investimenti magħżulin ma kienux adegwati f’kuntast ta’ skema tal-irtirar, anki għal investitur b’profil ta’ riskju aktar għoli, u għalhekk wisq aktar għall-appellata li kienet mara tad-dar b’profil ta’ riskju mill-iktar baxx u kawt. Stqarr li min-natura tagħha skema tal-irtirar ma kinitx spekulattiva. Għal dak li jirrigwarda l-insistenza tas-soċjetà appellanta li l-appellata fl-Applikazzjoni għal Sħubija kienet indikat li hija kienet investitur ta’ ċertu għarfien għaliex hija kienet għamlet diversi investimenti diretti f’ishma ta’ kumpanniji, l-Arbitru ma kkonsidrax li dan kien ifisser li setgħet tifhem in-noti strutturati, li kienu differenti għal kollox mill-ishma ta’ kumpannija. L-Arbitru reġa’ enfasizza, u hawn ukoll il-Qorti tikkondividi l-fehma tiegħu, li ma kien ingħata l-ebda konfort li l-investimenti kienu tassew *‘suitable for inclusion in a portfolio with the Claimant’s risk profile’* kif allegat mis-soċjetà appellanta. L-Arbitru hawn irrileva li s-soċjetà appellanta qatt ma kkontestat l-allegazzjoni tal-appellata li hija kienet tilfet 60% mis-somma investita, u dan it-telf fih innifsu kien jindika li ma kienx intlaħaq l-oġġettiv primarju tal-iskema, li kien *‘to provide a life-time income to its members’*, filwaqt li kien hemm nuqqas ta’ diversifikazzjoni mingħajr ma ġew evitati riskji żejda. Għal dawn ir-raġunijiet

kollha, sewwa għamel l-Arbitru, tgħid il-Qorti, li m'acċetax dak li kienet qegħda ssostni s-soċjetà appellanta.

25. 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 minħabba l-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' diligenza. 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 jew min-nuqqas ta' azzjonijiet tal-partijiet prinċipali involuti 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 l-fehma sħiħa tal-Arbitru. Jirriżulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkonsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-appellata. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà għan-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 anki fallew l-aspettattivi tal-appellata. 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. Imma kif gie kkonsidrat minn din il-Qorti, id-difiża tas-socjeta' appellanta ma tistax tirnexxi fid-dawl tal-obbligi legali u regulatorji tagħha, u huwa proprju għalhekk li n-nuqqasijiet tagħha għandhom jitqiesu li kkontribwew lejn it-telf soffert mill-appellata mill-investimenti tagħha.

26. 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-socjeta' appellanta:

- (i) kienet tenuta tfittex u tassigura li l-mod kif kien magħmul il-portafoll kif rakkommandat mill-konsulent tal-investment, 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 tenuta ukoll li tassigura li l-kompożizzjoni msemmija tal-portafoll kienet tagħti lok għall-għan tal-Pjan ta' Irtirar, filwaqt li tassigura 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; u
- (iii) 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 assicurata l-pensjoni;

27. Għalhekk l-Arbitru esprima l-fehma, li din il-Qorti tikkondividi pjenament, li filwaqt li kien mifhum li t-telf dejjem jista' jsir fuq investimenti f'portafoll, dawn jistgħu jitnaqqsu u saħansitra jinżamm il-kapital originali kif investit, permezz ta' diversifikazzjoni tajba, bilanċjata u prudenti tal-investimenti. Imma fil-każ odjern kien jirrizulta pjenament li seta' jingħad li mill-inqas kien hemm nuqqas ċar ta' diligenza 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 laħqet ir-*'reasonable and legitimate expectations'* tal-appellata. Il-Qorti filwaqt li tiddikjara li hija qegħda tagħmel tagħha l-konkluzjonijiet kollha tiegħu, tgħid li m'għandhiex aktar x'izzid mad-deċiżjoni appellata tassew mirquma u studjata.

28. Il-Qorti tgħid li fit-tieni aggravju tagħha, is-soċjetà appellanta qegħda ttenni l-istess argumenti miġjuba minnha fl-ewwel aggravju, u dan filwaqt li tikkonsidra li d-deċiżjoni tal-Arbitru fir-rigward tar-responsabbiltà tas-soċjetà appellanta hija daqstant ċara, fejn fl-ebda ħin ma jeżoneraha mqar xi ftit minnha. Għalhekk filwaqt li tagħmel riferiment għal dak kollu li ġie kkonsidrat minnha fl-eżami tal-ewwel aggravju, il-Qorti tgħid li anki t-tieni aggravju tas-soċjetà appellanta mhux iġustifikat, u tiċħdu.

Decide

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 tal-proċeduri quddiem l-Arbitru għandhom jibqgħu kif deċiżi, filwaqt li l-ispejjeż ta' dan l-appell għandhom ikunu a karigu tas-socjetà appellanta.

Moqrija.

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

**Rosemarie Calleja
Deputat Registratur**