MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-15 ta' Ġunju, 2022

Appell Inferjuri Numru 47/2020LM

L-Avukat Dr. Noel Bartolo u l-Prokuratur Legali Quentin Tanti ġew maħtura kuraturi deputati permezz ta' digriet tat-22 ta' Diċembru, 2020, sabiex jirrapreżentaw lill-assenti Emma Louise Rooney (K.I. Passaport Nru. 508123626) u b'nota tal-14 ta' Ġunju, 2021, ġiet maħtura l-Avukat Dr. Yanika Bugeja minflok Dr. Noel Bartolo stante li ġie elevat għal Maġistrat
('l-appellata')

***vs*.**

Momentum Pensions Malta Limited (C 52627)
('l-appellanta')

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **Momentum Pensions Malta Limited (C 52627)** [minn issa 'l quddiem 'is-soċjetà appellanta'] mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru']

mogħtija fit-28 ta' Lulju, 2020, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti **Emma Louise Rooney (Detentriċi tal-Passaport nru. 508123626)** [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, 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-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 allegatament tgħid li sofriet l-appellata mill-investiment li hija kienet għamlet f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] jew QROPS fl-2012 ġestita mis-soċjetà appellanta, permezz tal-polza ta' assikurazzjoni fuq il-ħajja maħruġa minn Skandia International [minn issa 'l quddiem 'Skandia'], li aktar tard ħadet l-isem Old Mutual International [minn issa 'l quddiem 'OMI'], liema polza kienet magħrufa bħala *Executive Investment Bond*. Dan seħħ wara li hija kienet ikkonsultat lil *Montpelier (Labuan) Ltd* [minn issa 'l quddiem 'Montpelier'] li hija kienet ħatret bħala l-konsulent finanzjarju tagħha għall-fini tal-investiment tal-*premium* ta' dik il-polza.

Mertu

3. L-appellata għalhekk ippreżentat lment quddiem l-Arbitru fit-28 ta' Awwissu, 2018 fil-konfront tas-soċjetà appellata, fejn esprimiet l-fehma tagħha li Montpelier għalkemm debitament awtorizzata minnha sabiex tagħmel ċertu deċiżjonijiet finanzjarji għan-nom tagħha, bla dubju din kienet naqset milli tagħmel deċiżjonijiet tajbin. Madankollu s-soċjetà appellanta kienet naqset milli tistaqsi dwar dawk l-istess deċiżjonijiet kemm magħha u anki ma' Montpelier meta kellha d-dover ta' kura sabiex tħares il-fond tal-pensjoni tagħha kontra l-insigurtà. Għalhekk hija kienet qegħda tippretendi kumpens tat-telf kollu tal-kapital tal-investiment tagħha.

4. Is-soċjetà appellanta wieġbet fit-18 ta' Settembru, 2018 billi talbet lill-Arbitru sabiex jiċħad l-ilment tal-appellata. Hija eċċepiet fost affarijiet oħra li (i) l-azzjoni kienet preskritta *ai termini* tal-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555; (ii) l-appellata kienet indikat il-konsulent finanzjarju tagħha fl-Applikazzjoni għal Sħubija, u dan bl-awtorità li jittieħdu deċiżjonijiet finanzjarji f'isimha; (iii) hija bħala Amministratriċi tal-Iskema u *Trustee* kellha d-dover li tassigura li l-investimenti fl-Iskema qed jiġu amministrati skont dak li tirrikjedi l-liġi u r-regolamenti u skont it-termini u l-kundizzjonijiet tal-Iskema u t-*Trust Deed* u regolamenti; (iv) hija ma kinitx tagħti parir dwar investiment u dan kienet tafu sew l-appellata; (v) l-appellata ma tispjegax jew turi kif is-soċjetà appellanta *"had a duty of care to safeguard my pension fund against any measures that threatened its security";* (vi) id-deċiżjonijiet finanzjarji kienu saru skont l-istrateġija ta' investiment li ġiet imfassla bejn l-appellata u l-konsulent finanzjarju tagħha; (vii) l-appellata kellha tkun taf dwar l-andament tal-

investimenti tagħha għaliex is-soċjetà appellanta kienet tibgħat rendikonti annwali lill-membri tal-Iskema għas-snin l-2013 sa l-2016; (viii) hija kienet iżżomm dritt fiss għas-servizzi reżi minnha; u (ix) hija ma kinitx imxiet b'mod negliġenti jew bi ksur ta' xi obbligu tagħha, u għalhekk it-telf kien attribwibbli lill-konsulent finanzjarju tal-appellanta.

Id-deċiżjoni appellata

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

> ***"Further Considers:***
>
> ***Preliminary***
>
> The Service Provider raises the plea that since
>
> 'the Complainant transferred out of the Scheme over two years ago in May 2016 to a scheme provided by Momentum Pensions (Gibraltar) Limited, in doing so and in considering the period of time that has passed since the transfer out, the complaint cannot be entertained and should be dealt with by the relevant body in Gibraltar'. (*fn. 4 Page 1/2 of MPM's Reply before the Arbiter for Financial Services)*
>
> *The Arbiter notes that the Service Provider did not specify on what legal grounds it is basing this plea. Chapter 555 of the Laws of Malta confers jurisdiction on the Arbiter when the complainant is an '*eligible customer' *and the complaint is against a financial services provider licensed or authorised by the Malta Financial Services Authority (MFSA). At the time of the Complaint, MPM was a licensed financial services provider and, consequently, a provider against whom a complaint could be raised.*
>
> *The definition of financial service provider stipulates that:*
>
> "'financial services provider' means a provider of financial services which is or has been licensed or otherwise authorised by the Malta Financial Services Authority in terms of the Malta Financial Services Authority Act or any other financial services law, including but not restricted to investment services, banking, financial institutions,

credit cards, pensions and insurance, which is or has been resident in Malta or is or has been resident in another EU/EEA Member State and which offers or **has offered** (f*n. 5 Emphasis made by the Arbiter)* its financial services in and, or from Malta. A provider of financial services which has had its licence suspended or withdrawn by the competent authority, but which was licensed during the period in relation to which a complaint by an eligible customer is made to the Arbiter, shall be considered as falling within the definition of a financial services provider'.

The legislator contemplates the situation where a complainant can also raise a complaint for 'past' *services given by the service provider and does not impose a limit as to the time when the service was offered save the provisions of Article 21(1)(b)(c)(d) and the relevant Articles relating to prescription.*

In arguing that the Complaint should be heard in Gibraltar, the Service Provider is hinting that the Complainant should lodge a complaint in Gibraltar against a different company, namely, Momentum Pensions (Gibraltar) Limited.

Since the Complaint relates to the conduct of the Service Provider at the time when the Complainant was receiving a service from a licensed service provider, the Arbiter cannot refrain from considering the case. However, in this connection, the Arbiter has to consider the other pleas raised by the Service Provider based on Article 21(1)(b) and (c).

Preliminary Plea regarding the Competence of the Arbiter

The Service Provider raised the plea that the Arbiter has no competence to consider this case based on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta.

Plea relating to Article 21(1)(b) of Chapter 555 of the Laws of Malta

Article 21(1(b) states that:

'An Arbiter shall have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider which occurred on or after the first of May 2004:

Provided that a complaint about conduct which occurred before the entry into force of this Act shall be made by not later than two years from the date when this paragraph comes into force.'

Firstly, the Arbiter notes that it took over three and a half months for the Service Provider to send the Complainant a reply to her formal complaint. (fn. 6 The

Complainant's formal complaint dated 16 February 2018 was answered by the Service Provider on 4 June 2018) The Arbiter does not see a valid reason why the Service Provider took so long to send a reply and related documents, even if it had to deal with other complaints around the same time.

The Arbiter deems it as very unprofessional for a service provider to make all in its powers to hinder a complaint against it, procrastinate and then raise the plea of lack of competence on the pretext that the action is 'time-barred'*. It is a long accepted legal principle that no one can rest on his own wrong.*

As to Article 21(1)(b), it is noted that the said article stipulates that a complaint related to the 'conduct' of the financial service provider which occurred before the entry into force of this Act shall be made not later than two years from the date when this paragraph comes into force. This paragraph came into force on the 18 April 2016.

The law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

Consequently, the Arbiter has to determine whether the conduct complained of took place before the 18 April 2016 or after, in accordance with the facts and circumstances of the case.

In the case of a financial investment, the conduct of the service provider cannot be determined from the date when the transaction took place and, it is for this reason that the legislator departed from that date and laid the emphasis on the date when the conduct took place.

In this case, the conduct complained of involves the conduct of the Service Provider ***as trustee and retirement scheme administrator of the Scheme****, during the period in which Montpelier was the adviser, which role MPM occupied since the Complainant became a member of the Scheme and continued till May 2016 when the Complainant left the scheme in Malta and seemingly changed her adviser at the time of transfer.*

It is also noted that with respect to the contested investments, which were done at the time Montpelier was adviser and when MPM was acting as trustee and retirement scheme administrator of the scheme, such investments still formed part of the Complainant's portfolio not only upon the transfer from the Malta Scheme to the Gibraltar Scheme but also after May 2016. (fn. 7 As per the Valuation Statements dated June 2018 presented by the Complainat in her additional submissions) Hence, the Service Provider did not prove either in this particular case that the contested investments no longer formed part of the portfolio after the coming into force of Chapter 555 of the Laws of Malta.

Since Chapter 555 of the Laws of Malta came into effect on the 18 April 2016, it is amply clear that the conduct complained of continued even after Chapter 555 of the Laws of Malta came into force, and, therefore, Article 21(1)(b) of the law does not apply.

Article 21(1)(c)

The Service Provider, alternatively, also raises the plea that Article 21(1)(c) of Chapter 555 should apply.

Article 21(1)(c) provides that:

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

*In that case, the Complainant had two years to complain to the Service Provider '*from the day on which the complainant first had knowledge of the matters complained of'*.*

In its Reply before the Arbiter for Financial Services, the Service Provider only submitted that more than two years have lapsed since the conduct complained of took place and did not elaborate any further as to why the Complaint cannot be entertained in terms of the said article.

In its additional submissions, MPM 'pleaded prescription in terms of art 21(1)(c) of Cap. 555' and submited that 'the complaint is prescribed on the basis that the Member has exited the Momentum scheme over 3 years ago'.

The Complainant exited the Retirement Scheme in May 2016, and the formal complaint with the Service Provider was made by the Complainant on 16 February 2018 and, accordingly, less than two years had passed from the time of exit of the Momentum scheme till the formal complaint to the Service Provider as is established by law.

With respect to the exit from the Momentum scheme, even if one had to take the date when the Complainant completed the 'Pension Transfer Document'*, which was presented by MPM in its additional submissions and which document was signed by the Complainant on 10 March 2016 and by the receiving scheme (that is the Gibraltar scheme) on 25 April 2016, the two years' timeframe referred to in Article 21(1)(c) did not expire even with reference to such dates given that the formal complaint with the service provider was filed on 16 February 2018 as indicated.*

It is also noted that not even two years had passed from the coming into force of Chapter 555 of the Laws of Malta and the date when the formal complaint was made by the Complainant with the Service Provider.

For the above-stated reasons, this plea is also being rejected and the Arbiter declares that he has the competence to deal with this Complaint.

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. 8 Cap. 555, Art. 19(3)(b))*

The Arbiter is considering all 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. 9 Art 19(3)(d)) which stipulates that he should deal with the complaints in 'an economical and expeditious manner'.

The Complainant

The Complainant is of British nationality and resided in Brunei at the time of application as per the details contained in the Application for Membership of the Momentum Malta Retirement Trust *('the Application Form for Membership').*

Her occupation was indicated as 'Teacher' in the Application Form for Membership. It was not proven during the case that the Complainant was a professional investor, and consequently the Complainant can be treated as a retail client.

The Complainant was accepted by MPM as member of the Retirement Scheme on 31 October 2012. The risk profile of the Complainant was indicated of 'Medium Risk' *in her Application Form for Membership.*

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator (fn. 10 https://www.mfsa.mt/financial-services-register/result/?id=3453) *and acts as the Retirement Scheme Administrator and Trustee of the Scheme.*

The Legal Framework

The Retirement Scheme and MPM 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) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015. (fn. 11 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 MFSA under the RPA. Registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and, hence, the framework under the RPA became applicable as from such date.

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 MPM's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

Indeed, 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 Retirement Scheme in respect of which the Complaint is being made and the contested Underlying Investments

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA (fn. 12 https://www.mfsa.com.mt/financial-services-register/result/?id=3454) as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 and under the Retirement Pensions Act in January 2016. (fn. 13 As per the Registration Certificates issued by MFSA to the Scheme attached to an affidavit by Stewart Davies of MPM, presented in Case Number 127/2018 decided today)

*The Arbiter notes that the case in question does not involve a member-directed personal retirement scheme with an investment adviser advising the Member on the choice of investments, but a member-directed personal scheme with a third party managing the member's investments on a discretionary basis (fn. 14 As per condition 9.2(b), Part B.9 of the '*Supplementary Conditions in the case of entirely Member Directed Schemes' *of the Pension Rules for Personal Retirement Schemes)*

This is reflected by MPM in its Reply before the Arbiter for Financial Services (fn. 15 Para. 6, Page 2 of MPM's Reply)

The assets held in the Complainant's account with the Retirement Scheme was used to acquire a whole of life insurance policy, this being the Executive Redemption Bond issued by Skandia International (fn. 17 Skandia International eventually rebranded to Old Mutual International - *https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandiainternational-rebrands-to-old-mutual-international/)/Old Mutual International.*

The premium in the said policy was in turn invested in investment instruments under the disrectionary mandate of the adviser whose investment instructions were accepted and executed by MPM.

The investments contested by the Complainant involved the following:

- *an investment of GBP28,000 invested into two structured notes – GBP19,000 into a structured note issued by BNP and GBP9,000 into a structured note issued by RBC;*
- *an investment of GBP30,500 invested into collective investment scheme offered by Inspirato. (fn. 18 Section D of the Complaint Form and email dated 13 June by the Complainant to MPM, pg. 9/10 of the attachment to the Complainant Form)*

The said transactions occurred whilst the Complainant was a member of the Malta Retirement Scheme. The two structured note investments were identified by Momentum as the RBC US Large Cap Phoenix ('the RBC investment') and the BNP

European Recovery Phoenix ('the BNP investment'). (fn. 19 Letter dated 4 June 2018, sent to the Complainant by the Group Chairman of Momentum, which reply was sent for Momentum Pensions Malta Limited and Momentum Pensions (Gibraltar) Limited.)

In her additional submissions, the Complainant provided documentation which indicated the following:

- *the final maturity of the BNP investment in 2019, which investment provided a final cash payout of GBP8,112.83; (fn. 20 A fol. 125 –* 'Payment Confirmation – Final Maturity' *sheet issued by OMI in respect of this product; A fol. 134 & 135 also refer)*
- *according to a valuation issued by OMI dated 6 June 2018, the RBC US Large Cap Phoenix note experienced an unrealised loss of GBP6,850.80 at the time;*
- *an investment in three Inspirato collective investment schemes for a total of GBP30,500, which according to a valuation statement issued by OMI as at 25 February 2019 had an unrealised loss of GBP266.76, GBP371.21 and GBP500.43 respectively and, thus, in total an unrealised loss of GBP1,138.40 at the time.*

In its additional submissions, the Service Provider in turn submitted the following:

- *that whilst the Complainant claimed a loss of GBP19,000 on the BNP investment, this* 'product returned capital of £9,442 together with coupons of £1,330 resulting in a Net Loss of £8,112' *(fn. 21 A fol. 140)*

The Arbiter notes that the figure of 'Net Loss' *of £8,112 indicated by MPM does not tally with the statement provided by the Complainant which actually indicated a cash payment of £8,112 as indicated above. It seems the Service Provider wanted to indicate that the product returned capital of £9,442 made up of coupons of £1,330 and the cash payment upon maturity of £8,112. The resulting realised Net loss would in turn amount to £9,558 and not* 'a Net Loss of £8,112'*. (fn. 22 €19,000 less £9,442)*

- *with respect to the RBC investment, MPM submitted that whilst the Complainant claimed a loss of £9,000 on this investment, this '*product returned capital of £3573.5 together with coupons of £720 resulting in a Net Loss of £2,853.50'*. (fn. 23 Ibid.)*

Again, the figures here provided by the Service Provider do not tally

- *with respect to the Inspirato funds, MPM noted that whilst the Complainant is seeking MPM to reimburse the value of these funds, MPM noted that* 'at

this stage, the evidence presented suggest little or no loss (total LOSS £1,138.40 – NOT THE £30,000 SHE IS CLAIMING)'. *(fn. 24 A fol. 141)*

Investment Adviser

The Application Form for Membership indicates Montpelier (Labuan) Ltd ('Montpelier'), of Suite A-13-1, 13th Floor, Manara UOA Bangsar, 5 Jalan Bangsar Utama 1, 59000 Kuala Lumpur, as the investment adviser appointed by the Complainant, with Diana Ducherty indicated as the individual adviser of Montpelier. (fn. 25 As per pg. 1/2 of MPM's reply to the OAFS)

The Application Form for Membership dated 17 October 2012, further indicated Montpelier being a regulated entity, with the regulator identified as the 'Labuan FSA'.

The Skandia International Application Form in respect of the Executive Redemption Bond, and Skandia's 'appointment of fund adviser' form signed in October/November 2012, (fn. 26 Attached as Appendix 2 and 3 to the MPM's Reply) both indicate an entity with a slightly different name this being Montpelier Malaysia Limited, as the adviser. In the said forms, Montpelier Malaysia Limited bears the same contact details of Montpelier (Labuan) Ltd indicated in MPM's Application Form. The name of the individual adviser of Monteplier Malaysia Limited is indicated as Stuart Williamson in Skandia's form.

Monteplier Malaysia Limited was indicated, in Skandia's 'appointment of fund adviser' *form, as having a discretionary mandate, meaning that* 'the fund adviser has complete discretionary authority, without consulting me/us, to make all investment decisions, to buy or sell assets, hold cash or other investments'. *(fn. 27* 'Option 2 – Discretionary investment manager authority'*, selected in Skandia International form titled* 'appointing a fund adviser to your Royal Skandia portfolio bond'*)*

Further Considerations

Responsibilities of the Service Provider

MPM 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

In terms of the MFSA's Registration Certificate dated 28 April 2011 issued to MPM under the SFA, MPM was required, in the capacity of Retirement Scheme Administrator, 'to perform all duties as stipulated by articles 17 and 19 of the Special Funds (Regulation) Act, 2002 … in connection with the ordinary or day to-day operations of a Retirement Scheme registered under the [SFA]'. *(fn. 28 As per the*

Registration Certificate issued by MFSA attached to an affidavit by Stewart Davies of MPM, presented in Case Number 127/2018 decided today.)

The obligations of MPM as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the various conditions stipulated in the original Registration Certificate which inter alia also referred to various Standard Operational Conditions (such as those set out in Sections B.2, B.5, B.7 of Part B and Part C) of the 'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002' *('the Directives').*

In terms of the said Registration Certificate issued under the SFA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the SFA, the regulations and the Directives issued thereunder.

*Following the repeal of the SFA and issue of the Registration Certificate dated 1 January 2016 under the RPA, MPM was subject to the provisions relating to the services of a retirement scheme administrator in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the RPA. As a Retirement Scheme Administrator, MPM was subject to the conditions outlined in the '*Pension Rules for Service Providers issued under the Retirement Pensions Act' *('the Pension Rules for Service Providers') and the '*Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' *('the Pension Rules for Personal Retirement Schemes').*

In terms of the said Registration Certificate issued under the RPA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the RPA, the regulations and the Pension Rules issued thereunder.

*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 MPM in its role as Retirement Scheme Administrator under the SFA/ RPA regime respectively, it is pertinent to note the following general principles: (fn. 29 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 MPM 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 MPM 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 MPM as a Scheme Administrator under the SFA, provided that:*

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

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

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

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

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

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

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

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

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

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 MPM considering its capacity as Trustee of the Scheme. This is an important aspect on which not much emphasis on, and reference to, has been made by the Service Provider in its submissions.*

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 MPM.*

The said article provides that:

'(1) **Trustees shall in the execution of their duties and the exercise of their powers and discretions act <u>with the prudence, diligence and attention of a</u> <u>bonus paterfamilias</u>,** 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, MPM 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. 30 Editor Dr 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. 31. 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 pater familias in the performance of his obligations**'. *(fn. 32 Page 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017)*

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

***The above are considered to be crucial aspects which should have guided MPM 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 in respect of the Scheme including with respect to investments**. The Arbiter is aware, that as acknowledged by the Service Provider in other cases involving the Scheme, (fn. 33 Affidavit presented by Stewart Davies Director of MPM, submitted in a number of other cases made against MPM in relation to the Scheme, such as in Case Number 127/2018, decided today), whilst MPM's duties did not involve the provision of investment advice, however, MPM did*

'… **retain the power to ultimately decide whether to proceed with an investment or otherwise**'. *(fn. 34 Para. 17, page 5, of the said affidavit of Stewart Davies) Once an investment decision is communicated to the retirement scheme administrator, it is noted that:*

'**The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed)** …'. *(fn. 35 Para. 31, Page 8, of the said affidavit of Stewart Davies)*

MPM had accordingly the final say prior to the placement of a dealing instruction*, in that, if MPM was satisfied that the level of diversification is suitable and in order, and the member's portfolio as a whole is in line with his attitude to risk and investment guidelines '*the dealing instruction will be placed with the insurance company and the trade will be executed. **If the RSA is not so satisfied, then the trade will not be proceeded with**'. *(fn. 36 Para. 33, Page 9, of the affidavit of Stewart Davies. Para 17 of Page 5, of the said affidavit also refers)*

This, in essence, reflected the rationale behind the statement reading:

'I accept that I or my chosen professional adviser may suggest investment preferences to be considered, however, **the Retirement Scheme administrator will retain full power and discretion for all decisions relating to the purchase, retention and sale of the investments** within my Momentum Retirement Fund',

which featured in the 'Declarations' *section of the Application Form for Membership signed by the Complainant.*

The MFSA regarded the oversight function of the Retirement Scheme Administrator as an important obligation where it emphasised, in recent years, the said role.

The MFSA explained that it:

'… is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'. *(fn. 37 Pg. 7 of the MFSA's Consultation Document dated 16 November 2018*

titled 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions act' *(MFSA Ref. 15/2018 – https://www.mfsa.com.mt/publications/policy-and-guidelines/consulation-doucments-archive/)*

The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment adviser stating that:

'the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments'. *(fn. 38 Pg. 9 of MFSA's Consultation Document dated 16 November 2018 titled* 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' *(MFSA Ref. 15/2018)*

Despite that the above-quoted MFSA statements were made in 2018, an oversight function applied during the period relating to the case in question as explained earlier on. Indeed, in the Application for Membership signed by the Complainant dated October 2012, the section titled 'Investment Policy Statement' *included a provision that:*

'Momentum Pensions Malta Ltd are professional Retirement Scheme Administrators. **We will consider your Investment preferences and ensure your retirement fund is managed in line with the relevant regulatory requirements of HMRC and the Malta Financial Services Authority**. **The Retirement Scheme Administrator will retain ultimate power and discretion with regards to the investment decisions.** The Retirement Scheme Administrator binds himself to review the performance of the Scheme using generally accepted local and international benchmarks prevalent at the time and fully in line with the requirements of SOC B 1.3.2 iii of the Directive issued under the Act. **The Retirement Scheme Administrator, furthermore, shall ensure that any investments made are within the diversification parameters established under the prevailing legislation whilst at the same time, having due regard to any Member's 'letter of wishes'. However, it is clear that the Retirement Scheme Administrator will use his absolute discretion at all times and will place any investments in the best interests of the Members and the Beneficiaries** as explained in Clause 13.1 of the Trust Deed'.

Other Observations and Conclusions

Key considerations relating to the principal alleged failures

The Arbiter will now consider the principal alleged failure which, in essence, involved the claim that the Service Provider, as trustee of the scheme, did not adequately exercise its duty of care by allowing unsuitable investments made by the Complainant's adviser, Montpelier, within the Retirement Scheme.

As to the claimed unsuitability of the investments, the Complainant, in essence alleged that the structured note investments were for professional investors and 'not geared or suitable for retail investors' *and did not reflect her* 'medium risk profile'*, whilst the investments into the Inspirato funds were questionable as it was claimed Montpelier had a vested interest in Inspirato.*

General observations

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

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 decided 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, ***MPM 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 MPM 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 losses for the Complainant.

A. The permitted portfolio composition

Investment into Structured Notes

Preliminary observations

The sale of, and investment into, structured notes is an area which has attracted various debates internationally including reviews by regulatory authorities over the years. Such debates and reviews have been occurring even way back since the time when the Retirement Scheme was granted registration in 2011.

The Arbiter considers that caution was reasonably expected to be exercised with respect to investments in, and extent of exposure to, such products since the time of the Scheme's registration. Even more so when taking into consideration the nature of the Retirement Scheme and its specific objective. *A typical definition of a structured note provides that:*

'A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index' *(fn. 39 https://www.investopedia.com/terms/s/structurednote.asp)*

*A structured note is further described as '*a debt obligation – basically like an IOU from the issuing investment bank – with an embedded derivative component; in other words, it invests in assets via derivative instruments'*. (fn 40 https://www.investopedia.com/articles/bonds/10/strutured-notes.asp)*

In its additional submissions, the Service Provider attached product sheets in respect of the two structured note investments allowed within the Complainant's portfolio of investments. In addition to the product sheet presented, the Office of the Arbiter for Financial Services ('OAFS') also traced the fact sheet in respect of the RBC structured note investment that featured in the Complainant's portfolio. (fn. 41 Fact Sheet for the RBC structured note bearing ISIN No. XS0994307295: https://www.portmanassociates.com/wp-content/uploads/2015/08/RBC-US-Large-Cap-Phoenix-Autocallable-Notes-FactSheet.pdf)

It is to be noted that the product sheets/fact sheet sourced highlighted a number of risks in respect of the capital invested into these products.

Apart from the credit risk of the issuer and the liquidity risk, the product/fact sheet of the said structured products 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 of the type of structured notes invested into, involved the application of capital buffers and barriers. In this regard, the product/fact sheet of such products described and included warnings that the invested capital was at risk in case of a particular event occurring. Such event typically 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 fall in value would typically be observed on maturity/final valuation of the note. The specified percentage in the fall in value mentioned in the relevant product/fact sheet

was of 50% of the initial value. The underlying asset to which the structured notes were linked comprised equities.

The said product/fact sheets further included a warning, on the lines of:

'If any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity'. *(fn. 42 Example – Fact Sheet of the structured note issued by RBC with ISIN no. XS1000868247- https://www.portman-associates.com/wp-content/uploads/2013/11/RBC-Festive-Fixed-IncomeFACTSHEET.pdf)*

It is accordingly clear that there were certain specific risks in the structured products invested into and there were material consequences if just one asset, out of a basket of assets to which the respective note was linked, fell foul of the indicated barrier. The implication of such a feature should have not been overlooked nor discounted. Given the particular features of the structured notes invested into, neither should have comfort been derived regarding the adequacy of such products just from the fact that the structured notes were linked to a basket of quoted shares.

Whilst the Arbiter notes that, as highlighted by the Service Provider in its submissions, the respective issuer of these structured product was a large institution, the Arbiter does not however consider this aspect to justify either, on its own, the investment into such products as other issues need to be taken into consideration, not the least the nature of these products and the effects any events or barriers that may form part of the key features of such products would have on the investment if and when such events occur as detailed above. Another important aspect that had to be considered is to whom these products were actually targeted, which will be considered in the subsequent section.

Investments into Structured Products **Targeted for Professional Investors**

The key aspect relating to this Complaint indeed revolves around the nature of the structured products and whether the said products, allowed within the Complainant's portfolio, were aimed solely for professional investors.

The Service Provider has not claimed that the Complainant was a professional investor. No details have either emerged indicating the Complainant, as not being a retail investor as explained above.

The fact sheet traced by the OAFS in relation to the RBC investment, which bears the ISIN number indicated in the product sheet produced by the Service Provider, (fn. 43 Ibid.) ***specifies that this structured note was indeed targeted for professional investors only.*** *The said fact sheet in respect of the RBC investment clearly indicates*

*that this note was '*For Professional Investors Only' *and '*not suitable for Retail distribution' *with the '*Target Audience' *for this product being clearly specified as '*Professional Investors Only' *as outlined in the '*Key Features' *section of the fact sheet.*

With respect to the BNP structured note investment, it is noted that the 'Important Information' *section of the fact sheet presented by the Service Provider in respect of this product provided inter alia that the fact sheet '*has been prepared by a Sales and Marketing function within BNP Paribas ('BNPP') for, and is directed at, (a) Professional Customers and Eligible Counterparties as defined by the Markets in Financial Investments Directive, and (b) where relevant, persons who have professional experience in matters relating to investments falling within Article 19(1) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, and at other persons to whom it may lawfully be communicated'.

The same section also highlighted that:

'The Securities have no capital protection at any time and investing does put your capital at risk. Investors should be aware that there is risk of partial or total loss of any capital invested. **Investment in the Securities is highly speculative and should only be considered by investors who can afford to lose the entire capital invested**'.. *(fn. 44 Page 5 of the fact sheet in respect of the BNP European Recovery Phoenix Autocall – Attachment to MPM's Additional Submissions) (fn. 45 Emphasis added by the Arbiter)*

In its submissions, the Service Provider claimed that the references to 'Professional Investors only' *in the fact sheets referred to the marketed documentation. This is, however, not really the case. Besides that, no fact sheets were produced indicating the contested structured notes as targeted for retail investors, it is clear that the fact sheets presented and sourced were issued purposely for those investors who were eligible to invest in the product. It is also clear that such products were not aimed for retail investors but only for professional investors.*

Therefore, it is considered that there is sufficient evidence resulting from the product/fact sheet produced and sourced which show that the two structured products allowed by MPM within the Complainant's portfolio were not appropriate and suitable for a retail client. In this regard, it is considered that there was a lack of consideration by the Service Provider with respect to the suitability and target investor of the said structured notes with such lack of consideration not being reflective of the principle of acting with* 'due skill, care and diligence' *and* 'in the best interests of' *the member as the relevant laws and rules mentioned above obliged the Service Provider to do.

The crucial aim of a retirement scheme, being that to provide for retirement benefits – an aspect which forms the whole basis for the pension legislation and regulatory framework to which the Retirement Scheme and MPM were subject to – needs to be kept into context in this regard. The provision of retirement benefits was indeed the Scheme's sole purpose and investments which were* 'highly speculative' *as indicated in the fact sheet of the BNP structured note itself, went counter to such purpose.

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainant on her investments in structured notes ***cannot*** *just be attributed to the underperformance of the investments as a result of general market and investment risks as MPM has inter alia suggested in these proceedings.*

The deficiencies on the part of MPM in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as highlighted above impinge on the diligence it was required and reasonably expected to exercise in such roles.

It is considered 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 MPM undertaken its role adequately and as duly expected from it, in terms of the obligations resulting from the law, regulations and rules stipulated thereunder and the conditions to which it was subject to 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 MPM being one of such parties.

In the particular circumstances of this case, the losses experienced on the Retirement Scheme are ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which MPM was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainant.

Final Considerations

As indicated earlier, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance of the specified rules.

The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, ***the Retirement Scheme Administrator had clear duties to check and ensure that the portfolio composition recommended by the investment adviser involved instruments which were all suitable for the Complainant in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme****.*

The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

It is considered that, had there been a careful consideration of the contested structured products, the Service Provider would and should have intervened, queried, challenged and raised concerns relating to the suitability of such products and not allow the investments made in the said structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others*.*

The Complainant ultimately relied on MPM 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 pension portfolio needs to reflect a properly diversified, balanced and prudent approach and only consist of suitable investments for the member concerned. The investments undertaken need to ultimately reflect and promote the scope for which the pension product has been created****.*

For the reasons explained it is considered that there was, at the very least, a lack of diligence by the Service Provider in the carrying out of its duties as Trustee in regard to the oversight function with respect to the structured note investments allowed within the Complainant's portfolio. It is also considered that with respect to such function there are instances which indicate the Service Provider's approach and actions not being reflective of the requirements and obligations to which it was subject to, as explained above in this decision. The Service Provider failed to act with the prudence, diligence and attention of a **bonus paterfamilias*****. (fn. 46 Cap 331 of the Laws of Malta, Art. 21(1))***

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*' *(fn. 47 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. 48 Cap. 555, Article 19(3)(b)) and is accepting it in so far as it is compatible with this decision.

Cognisance needs to be taken, however, of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment adviser 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 in relation to the structured note investments.

Compensation

Being mindful of the key role of Momentum Pensions Malta Limited as Trustee and Retirement Scheme Administrator of the Momentum Malta Retirement Trust 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 Momentum Pensions Malta Limited for part of the realised losses as further stipulated below.

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited, to be held responsible for seventy per cent of the losses sustained by the Complainant on the structured note investments after offsetting any realised profits from other investments constituted by Montpelier at the time the Complainant was a member of the Retirement Scheme, as further stipulated in detail hereunder.

The Arbiter does not consider that he can accept the Complainant's claims in respect of the Inspirato funds given that the alleged inappropriateness of such investments

have, on the basis of the information and documentation provided, not been substantiated nor emerged during the proceedings of the case in question.

Moreover, no sufficient evidence has either emerged, of there being sufficient material deficiencies on the part of MPM in relation to the appointment of the investment adviser, (which in this case, was Montpelier), to reasonably justify compensation on any realised losses on such investments as well. Accordingly, the Complainant's request for a refund on the total investment into the Inspirato funds is being rejected.

The Arbiter notes that the details of the status and performance of the portfolio created by Montpelier until the transfer to the Gibraltar Scheme, are not sufficient and current. The Arbiter shall accordingly formulate how compensation for the Complainant is to be calculated by the Service Provider for the purpose of this decision.

The Service Provider is, in this regard, being directed to pay the Complainant compensation equivalent to 70% of the sum of the Realised Loss resulting on the structured note investments after offsetting any realised profits made on the remaining portfolio of investments constituted under Montpelier within the Retirement Scheme. The Realised Loss on which compensation is to be paid shall, in the particular circumstances of this case, be determined as follows:

(i) ***In respect of the indicated two structured note investments which, it is noted have already matured or been redeemed at a loss, it shall be calculated the realised loss resulting from the difference in the purchase value and the sale/maturity value (amount realised) from such investments. The realised loss on the respective structured note 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 on the said two investments.***

(ii) ***The realised loss on the two structured note investments as calculated in paragraph (i) above shall be reduced by the Net Realised Profit, if any, resulting from other investments in order to reach the figure of the Realised Loss on which the stipulated compensation is to be calculated for the purposes of this decision.***

In accordance with Article 26 (3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Momentum Pensions Malta 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 should be provided to the Complainant.

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

Each party is to bear its own legal costs of these proceedings

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fis-17 ta' Awwissu, 2020 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka u tħassar id-deċiżjoni appellata billi tilqa' l-aggravji tagħha. Tgħid li l-aggravji tagħha huma s-segwenti: (i) l-Arbitru applika u nterpreta ħażin il-liġi u r-regoli meta ddeċieda li ż-żewġ *structured products* ma kienux addattati għall-appellata, u għalhekk is-soċjetà appellanta ma kinitx aġixxiet b'kura, diliġenza u ħila ta' *bonus paterfamilias;* (ii) l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet infondati.

7. Permezz tad-digriet ta' din il-Qorti tat-22 ta' Diċembru, 2020, ġew maħtura l-Avukat Noel Bartolo u l-P.L. Quentin Tanti bħala kuraturi deputati rappreżentanti lill-assenti appellata. Dawn intavolaw ir-risposta tagħhom fis-27 ta' Jannar, 2021 fejn issottomettew is-segwenti: (a) is-soċjetà appellanta għandha tressaq prova li hija għamlet kull tentattiv skont il-liġi għall-fini ta' notifika tal-appellata qabel m'għaddew għall-proċedura tal-ħatra ta' kuraturi deputati; (b) huma mhumiex edotti mill-fatti, u għalhekk kienu qegħdin jitolbu lis-soċjetà appellanta sabiex tipprovdilhom kull informazzjoni li hija jista' jkollha dwar kull mezz ta' komunikazzjoni mal-appellata bil-għan li jsiru t-tentattivi

neċessarji għall-kuntatt magħha u għalhekk huma kienu qegħdin jirriżervaw li jippreżentaw risposta ulterjuri jekk u meta jsir tali kuntatt; (ċ) id-deċiżjoni appellata hija ekwa u ġusta u m'hemmx lok li tiġi disturbata la fattwalment u lanqas legalment; (d) l-aggravji huma nfondati fil-fatt u fid-dritt; (e) qed jintalab li din il-Qorti terġa' tagħmel apprezzament mill-ġdid tal-provi u tal-konsiderazzjonijiet tal-Arbitru, u dan ma jistax isir minn qorti ta' reviżjoni, sakemm ma jirriżultax li jkun sar apprezzament manifestament żbaljat tal-provi u tal-liġi fejn issir inġustizzja lejn xi parti, u dan ma kienx il-każ hawnhekk; (f) ġaladarba jirriżulta b'mod ċar li l-analiżi tal-Arbitru tal-fatti u tal-liġi hija ġusta, il-Qorti m'għandhiex tiddisturba l-apprezzament tiegħu.

<u>Konsiderazzjonijiet ta' din il-Qorti</u>

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

<u>L-ewwel aggravju</u>:

9. Meta tfisser l-ewwel aggravju tagħha, is-soċjetà appellanta tirrileva li l-eżerċizzju li kellha tagħmel fil-konfront tal-appellata bħala Amministratriċi tal-Iskema u *Trustee* tagħha, kien li tikkunsidra l-portafoll sħiħ tagħha, li l-investimenti joffru diversifikazzjoni, li l-investiment jirrispetta l-profil ta' riskju tagħha, u li dan kien fil-parametri tal-linji gwida u tar-regoli maħruġa mill-MFSA. Jekk imbagħad hija tkun wettqet l-imsemmi eżerċizzju u tiddeċiedi li l-investiment jista' isir, dan kien ifisser li l-investiment huwa *"appropriate and*

suitable". Tgħid li fil-fatt ma kien hemm l-ebda deċiżjoni tal-Arbitru fejn dan sab li hija kienet naqset milli tosserva xi regola tal-MFSA fir-rigward tal-portafoll, jew li hija kienet naqset milli ssegwi l-linji gwida tal-investiment tagħha stess. It-tieni punt li s-soċjetà appellanta tgħid li tixtieq tirrileva, huwa li d-deċiżjoni jekk hija għandhiex tipproċedi b'negozju partikolari, trid isir fil-kuntest tal-portafoll sħiħ tal-membru, u dan spjegah fl-affidavit tiegħu Stewart Davies li għalih jagħmel riferiment l-Arbitru fid-deċiżjoni appellata. Is-soċjetà appellanta ssostni li huwa l-livell ta' riskju li jġorr miegħu portafoll sħiħ li għandu jiġi evalwat u l-argument tal-Arbitru hawn kien wieħed żbaljat meta qies li għandu jiġi kkunsidrat il-livell ta' riskju ta' kull strument. Tgħid li l-Arbitru fid-deċiżjoni appellata jsemmi l-prodotti strutturati, u jidher li huwa ħa l-impressjoni li dawn huma prodotti ta' riskju ogħla min-natura tagħhom stess. Iżda tirrileva li kemm il-linji gwida tagħha u anki r-regoli tal-MFSA dejjem ippermettew investiment f'dawn il-prodotti, u qatt ma kien ipprojbit sakemm isir fil-parametri permissibbli. Tkompli billi ssostni li huwa magħruf li kwalunkwe investiment fih element ta' riskju inerenti, u għalhekk il-fatt li investiment iġorr miegħu ċerti riskji kif assoċjati miegħu, ma jindika jew jissuġġerixxi xejn aktar. Taċċetta madankollu li hija kellha l-obbligi li tassigura li f'kwalunkwe mument il-portafoll ta' kull ilmentatur kellu jinżamm fil-parametri tal-profil ta' riskju tal-membru u tal-linji gwida u tar-regoli applikabbli. Tgħid li l-Arbitru skarta is-sottomissjonijiet tagħha meta stqarr li l-*fact sheets* kienu nħargu għal min kien eliġibbli li jinvesti.

<u>It-tieni aggravju</u>:

Is-soċjetà appellanta tgħid li hija tħossha aggravata wkoll għaliex l-Arbitru ddikjara li hija kienet parzjalment responsabbli għal 70% tat-telf soffert mill-

appellata. Tgħid li fl-ewwel lok l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet li hija kienet diġà fissret li kienu nfondati, iżda jekk imbagħad wieħed kellu jaċċetta li l-Arbitru kellu raġun, tgħid li huwa naqas milli jispjega kif attribwixxa lilha r-responsabbiltà ta' 70% tat-telf. Dan filwaqt li tgħid li sabiex jiddikjara responsabbiltà, huwa kellu qabel xejn isib li hemm ness kawżali bejn in-nuqqasijiet tagħha u t-telf soffert mill-appellata. Iżda ma kienet ġiet ippreżentata l-ebda prova min-naħa tal-appellata dwar dan in-ness. Tirrileva li l-Arbitru fl-ebda ħin ma ttenta li jindirizza l-kweżit li kienu tassew in-nuqqasijiet fil-kondotta tal-ġestjoni tagħha li sarrfu fit-telf li ġarbet l-ilmentatriċi jew ikkontribwew għalih. Is-soċjetà appellanta tikkontendi li sabiex ikun hemm responsabbiltà għat-telf, dan irid ikun prevedibbli u direttament attribwibbli għan-nuqqasijiet. Tgħid li dan jirrikjedi valutazzjoni serja tal-provi. Tkompli tgħid illi fil-każ odjern jidher li l-Arbitru għamel xi konsiderazzjoni dwar dan il-kweżit, iżda din ma tirriżultax fid-deċiżjoni appellata, għalkemm hija setgħet tikkonkludi b'riferiment għal dik id-deċiżjoni appellata, li Montpelier li kienu l-konsulenti finanzjarji tal-appellata, kellhom responsabbiltà. Tikkontendi li fil-fatt la kienu jeżistu provi u lanqas saret analiżi. Hawnhekk is-soċjetà appellanta tikkontendi li r-responsabbiltà tagħha ċertament qatt ma setgħet tkun akbar minn ta' min ta l-parir, jiġifieri Montpelier. Tagħmel ukoll riferiment għar-riskji naturali tas-suq, u tisħaqq li meħud dan kollu in konsiderazzjoni, ir-responsabbiltà tagħha kellha tkun inqas minn 70%.

10. Il-Kuraturi Deputati maħtura sabiex jirrappreżentaw lill-assenti appellata, fl-ewwel lok jissottomettu li s-soċjetà appellanta għandha tressaq prova li hija kienet għamlet kull tenattiv sabiex tinnotifika lill-appellata qabel ma rrikorrew

għall-proċedura tal-ħatra tagħhom. Fit-tieni lok issottomettew li huma mhumiex edotti mill-fatti, u għalhekk talbu lis-soċjetà appellanta sabiex tipprovdilhom kull informazzjoni li jista' jkollha sabiex huma jkunu jistgħu jagħmlu kuntatt magħha, u għalhekk irriżervaw li jippreżentaw risposta ulterjuri jekk u meta jsir dak il-kuntatt. Fit-tielet lok jikkontendu li mill-atti notifikati lilhom ma kienx jidher li hemm lok ta' appell, u għalhekk id-deċiżjoni appellata m'għandhiex tiġi ddisturbata fattwalment jew legalment. Komplew jgħidu li l-aggravji tas-soċjetà appellanta huma għal kollox infondati fil-fatt u fid-dritt u għalhekk għandhom jiġu respinti. Jissottomettu li s-soċjetà appellanta permezz tal-appell tagħha qegħda titlob lil din il-Qorti sabiex tagħmel apprezzament mill-ġdid tal-provi u tal-konsiderazzjonijiet tal-Arbitru, u dan fejn skont il-ġurisprudenza ma jistax isir, għajr fejn jirriżulta apprezzament manifestament żbaljat tal-provi jew tal-liġi, li jwassal għal preġudizzju lil xi parti. Jgħidu li dan ċertament ma kienx il-każ hawnhekk, u din il-Qorti m'għandhiex tiddisturba l-apprezzament u l-valutazzjoni tal-fatti u tal-liġi magħmula mill-Arbitru.

11. Din il-Qorti tibda billi tikkonsidra din l-aħħar sottomissjoni. Tgħid li huwa minnu li l-insenjament tal-qrati tal-appell huwa li huma m'għandhomx jindaħlu fid-deċiżjoni ta' qorti jew tribunal tal-ewwel istanza, madankollu kif il-kuraturi deputati stess jirrilevaw, dan huwa biss rilevanti fejn ma tirriżulta l-ebda raġuni serja u mpellenti li tirrikjedi l-indħil tagħhom, sabiex b'hekk jiġi evitat preġudizzju lil xi parti. Għal dan il-għan il-Qorti tgħid li hija għandha teżamina sew id-deċiżjoni appellata, u wara biss li tagħmel dan hija tkun f'pożizzjoni li tiddeċiedi jekk hemmx lok għall-intervent tagħha. Dwar l-ewwel sottomissjoni tal-Kuraturi Deputati, il-Qorti tgħid li l-kwistjoni tal-ħatra o meno tagħhom

kienet ġiet sorvolata minnha permezz tad-digriet tagħha tal-24 ta' Settembru, 2020, u ċertament din il-Qorti ma kinitx ser taċċetta t-talba għall-ħatra tagħhom fin-nuqqas tal-eżawriment ta' kull proċedura rikjesta mil-liġi.

12. 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 huwa għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellata mill-Applikazzjoni għas-Sħubija tal-Iskema[1], innota li ma kienx ġie ndikat jew ippruvat li l-appellata hija investitur professjonali, u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti ssib li dawn l-osservazzjonijiet huma kollha kemm korretti u anki f'lokhom, u tikkonstata li m'hemm l-ebda kontestazzjoni dwarhom.

13. Wara li spjega l-qafas legali li kien jirregola l-Iskema u anki lis-soċjetà appellanta, l-Arbitru rrileva li tali Skema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta u kif awtorizzata mill-MFSA bħala *Retirement Scheme* f'April 2011 taħt l-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar) u f'Jannar 2016 taħt l-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta). L-Arbitru osserva li l-assi fil-kont tal-appellata miżmum fl-Iskema, kienu ġew utilizzati għax-xiri ta' polza ta' assikurazzjoni fuq il-ħajja maħruġa minn Skandia/OMI, u l-*premium* ta' dik il-polza mbagħad ġie investit f'żewġ noti strutturati skont il-mandat diskrezzjonarju mogħti mill-appellata lill-konsulent finanzjarju tagħha, fejn imbagħad l-istruzzjonijiet tiegħu ġew aċċettati u

[1] Ara *a fol.* 32 *et seq.*

eżegwiti mis-soċjetà appellanta, kif kien jirriżulta mill-*Investor Profile,* u dan taħt id-direzzjoni tal-konsulent finanzjarju tagħha, kif aċċettat mis-soċjetà appellanta.

14. L-Arbitru kkonsidra li Montpelier kienet il-konsulent finanzjarju kif maħtura mill-appellata sabiex tagħtiha parir dwar l-assi miżmuma fl-Iskema. Irrileva li skont l-Applikazzjoni għal Sħubija tas-17 ta' Ottubru, 2012[2], Montpelier kienet indikata bħala entità regolata minn *Labuan FSA*. Imbagħad fl-Applikazzjoni ta' Skandia International fir-rigward tal-*Executive Redemption Bond* u anki fil-formola tal-ħatra tal-konsulent tal-fondi kif iffirmata f'Ottubru/Novembru 2012[3], din l-entità kienet indikata b'mod daqsxejn differenti bħala *Montpelier Malaysia Limited,* iżda d-dettalji ta' kuntatt kienu l-istess. Skont l-imsemmija formola, l-Arbitru jgħid li din is-soċjetà kienet tgawdi mandat diskrezzjonarju.

15. L-Arbitru mbagħad għadda sabiex ikkonsidra li s-soċjetà appellanta bħala Amministratriċi u *Trustee* tal-Iskema kienet soġġetta għall-obbligi, funzjonijiet u responsabbiltajiet applikabbli, kemm dawk legali u anki dawk li kienu stipulati fiċ-Ċertifikat ta' Registrazzjoni tagħha kif maħruġ mill-MFSA fit-28 ta' April, 2011 li jagħmel riferiment għall-i*Standard Operational Conditions* [minn issa 'l quddiem 'SOC'] tad-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002* [minn issa 'l quddiem 'id-Direttivi']. Huwa hawn għamel riferiment għall-Att li Jirregola Fondi Speċjali, li ġie sostitwit permezz tal-Att dwar Pensjonijiet

[2] *Ibid.*
[3] *A fol.* 89 u 106 rispettivament.

għall-Irtirar u għar-regoli magħmula taħthom, li għalihom ġiet soġġetta s-soċjetà appellanta mal-ħruġ taċ-Ċertifikat ta' Reġistrazzjoni tal-1 ta' Jannar, 2016 taħt il-Kap. 514. Sostna li wieħed mill-obbligi ewlenija tagħha bħala Amministratur tal-Iskema skont il-Kap. 450 u l-Kap. 514, kien proprju li taġixxi fl-aħjar interessi tal-Iskema.

16. Il-Qorti hawn 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 meta saret l-assenjazzjoni tal-polza lis-soċjetà appellanta fis-sena 2012 meta kienu applikabbli d-dispożizzjonijiet 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.

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-reġim tal-Kap. 450 kif imħassar, u tal-Kap. 514 li ssostitwixxa dan tal-aħħar. Għal darb'oħra l-Qorti tirrileva li jirriżulta li s-soċjetà appellanta bħala Amministratur tal-Iskema kienet tenuta li timxi b'kull ħila dovuta, kura u diliġenza fl-aħjar interessi tal-benefiċċjarji 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.

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 u *Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-30 ta' Ġunju, 1989 kif sussegwentement emendat, u l-Arbitru għamel 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 tenuta saħansitra li tamministra l-Iskema u l-assi tagħha skont diliġenza u responsabbiltà għolja. In sostenn ta' dan kollu, l-Arbitru għamel riferiment għall-pubblikazzjoni bl-isem An Introduction to Maltese Financial Services Law[4], u anki silta 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* u anki permezz tal-Kodiċi Ċivili.

19. L-Arbitru mbagħad aċċenna għal obbligu ieħor tas-soċjetà appellanta li huwa qies importanti u rilevanti għall-każ in kwistjoni, dak ta' sorveljanza u monitoraġġ tal-Iskema, inkluż l-investimenti magħmula. Huwa għamel riferiment għall-affidavit ta' Stewart Davies[5], fejn dan aċċetta li s-soċjetà appellanta fl-aħħar mill-aħħar kellha s-setgħa li tiddeċiedi jekk l-investiment għandux isir, imma meta kkonsidrat il-portafoll sħiħ, tali investiment kien jassigura livell adegwat ta' diversifikazzjoni u kien jirrifletti l-attitudni ta' riskju tal-membru u tal-linji gwidi ta' dak iż-żmien. Dan kollu kif imfisser, tgħid il-Qorti, jagħmel ċar li s-soċjetà appellanta kienet taf sew x'inhuma l-obbligi tagħha lejn il-membri tal-Iskema, u li dawn kienu saħansitra obbligi pożittivi fejn hija kienet tenuta tħares il-portafoll tal-membru individwali tal-Iskema u taġixxi skont il-każ. L-Arbitru osserva li x-xhieda ta' Stewart Davies kienet saħansitra riflessa fil-

[4] Ed. Max Ganado.
[5] *A fol.* para. 17, u para. 31 u 33 tal-imsemmi affidavit kif ippreżentat f'atti oħra deċiżi fl-istess jum.

Formola tal-Applikazzjoni għal Sħubija ffirmata mill-appellata.[6] Qal li l-MFSA ukoll kienet tqis il-funzjoni ta' sorveljanza bħala obbligu importanti tal-Amministratur tal-Iskema u huwa ċċita siltiet mill-*Consultation Document* tagħha maħruġ fis-16 ta' Novembru, 2018, filwaqt li nsista li l-istqarrijiet hemm magħmula kienu applikabbli wkoll għaż-żmien li fih sar l-investiment in kwistjoni. Għamel ukoll riferiment għal dak li kienet tipprovdi s-sezzjoni 'Investment Policy Statement' fil-Formola tal-Applikazzjoni għal Sħubija.

20. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju ż-żewġ punti li fuqhom huwa msejjes l-ewwel aggravju tas-soċjetà appellanta. Huwa aċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi bħal Montpelier. 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 t-telf riżultanti tal-appellata.

21. L-Arbitru rrileva li fil-*product sheets* ippreżentati mis-soċjetà appellanta fir-rigward tan-noti strutturati in kwistjoni, u anki fil-*fact sheets* li OAFS ittraċċjat minn jeddha, kien hemm indikati għadd ta' riskji fir-rigward tal-kapital investit f'dawn il-prodotti.

[6] *Ibid.*

22. L-Arbitru mbagħad għadda sabiex irrileva x'kienu dawk ir-riskji li sar aċċenn għalihom 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. 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. 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.

23. L-Arbitru mbagħad ikkonsidra jekk il-prodotti strutturati permessi fil-portafoll tal-appellata kienux intiżi biss għal investituri professjonali, iżda osserva li s-soċjetà appellanta ma kinitx allegat li l-appellata kienet proprju investitur professjonali. Barra minn hekk ma kien hemm xejn li seta' juri li hija ma kinitx *'retail investor'.* L-Arbitru spjega li l-fact sheet misjuba mill-OAFS fir-rigward tal-investiment ta' RBC, kienet tindika li l-prodott kien ntiż għal investituri professjonali biss. Hawn ukoll il-Qorti tgħid li dan il-fatt kellu mhux biss jiġi osservat mis-soċjetà appellanta, iżda hija kellha d-dover li saħansitra tieħu d-debita azzjoni billi ma taċċettax li jsir l-investiment imsemmi u/jew tiġbed l-attenzjoni tal-appellata. L-Arbitru osserva li anki fir-rigward tan-nota strutturata maħruġa minn BNP fis-sezzjoni ntestata *'Important Information'* fil-*fact sheet* li s-soċjetà appellanta ppreżentat, kien hemm indikat li din kienet intiża għal klijenti professjonali u li kellhom esperjenza professjonali tal-investimenti regolati mis-subartikolu 19(1) tal-*Financial Services and Markets*

Act 2000 (Financial Promotion) Order 2005, u kull persuna oħra li kien jidhrilha li għandha tirċeviha. Irrileva li fis-sottomissjonijiet tagħha s-soċjetà appellanta kienet iddikjarat li r-referenzi għal *'Professional Investors only'* fil-*fact sheets* kienu jagħmlu riferiment biss għal dik id-dokumentazzjoni ntiża għall-promozzjoni tal-prodott. Iżda qal li fil-fehma tiegħu dan ma kienx il-każ, għaliex filwaqt li osserva li l-ebda *fact sheet* ma ġiet ippreżentata fejn ġie indikat li n-noti strutturati kkontestati kien intiżi għall-investituri bl-imnut, kien ċar li dawk il-*fact sheets* li kienu ġew ippreżentati u dawk misjuba mill-OAFS, kienu ntiżi għal dawk l-investituri li kienu eliġibbli sabiex jinvestu fil-prodotti li wara kollox ma kienux l-investituri bl-imnut.

24. L-Arbitru għadda sabiex ittratta l-kwistjoni tan-ness kawżali tad-danni sofferti mill-appellata. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ b'riżultat tal-andament negattiv tal-investimenti fis-suq 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 tagħhom tal-partijiet prinċipali nvoluti fl-Iskema, fosthom is-soċjetà appellanta. Qal li seħħew diversi avvenimenti li s-soċjetà appellanta kienet obbligata u setgħet saħansitra twaqqaf u tinforma lill-appellata dwarhom. Il-Qorti tikkondividi b'mod sħiħ l-fehma 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 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 anki fallew 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 mill-investimenti tagħha.

25. 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) għalkemm ma kinitx responsabbli sabiex tagħti parir finanzjarju lill-appellata, u lanqas ma kellha r-rwol ta’ amministratur tal-investimenti, hija kienet tenuta tassigura li l-kompożizzjoni tal-portafoll tal-appellata kien jipprovdi għal diversifikazzjoni adegwata u li kien iħares ir-rekwiżiti applikabbli sabiex b’hekk ukoll jintleħaq l-għan prinċipali tal-Iskema permezz tal-prudenza;

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

26. Għalhekk l-Arbitru esprima l-fehma, liema fehma 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 oriġinali kif investit, permezz ta' diversifikazzjoni tajba, bilanċjata u prudenti tal-investimenti. Iżda 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 fejn kellu x'jaqsam il-konsulent finanzjarju. L-Arbitru qal li fil-fatt is-soċjetà appellanta ma kinitx laħqet 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.

27. Għaldaqstant il-Qorti ma ssibx li l-aggravji mressqa mis-soċjetà appellanta huma ġustifikati, u tiċħadhom.

<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