



MALTA

QORTI TAL-APPELL
(Kompetenza Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tas-16 ta' Dicembru, 2022

Appell Inferjuri Numru 124/2021 LM

Martin Peter Cooper (Passaport nru. 506127969)
(‘l-appellat’)

VS.

Momentum Pensions Malta Limited (C 52627)
(‘l-appellanta’)

Il-Qorti,

Preliminari

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 fid-19 ta’ Ottubru, 2021, [minn issa ‘l quddiem ‘id-deċiżjoni appellata’],

li permezz tagħha ddecieda li jilqa' l-ilment tar-rikorrent **Martin Peter Cooper (Detentur tal-Passaport nru. 506127969)** [minn issa 'l quddiem 'l-appellat'] 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-appellat bħala kumpens sebghin fil-mija tat-telf nett realizzat li garrab ir-rikorrent fil-portafoll tal-investiment tiegħu, bl-imghaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-pagament effettiv, 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 jgħid li sofra l-appellat fl-investiment tal-pensjoni tiegħu fi skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] jew QROPS, ġestita mis-soċjetà appellanta wara li kkonsulta lil *Continental Wealth Management* [minn issa 'l quddiem 'CWM'] fis-sena 2014.¹

Mertu

3. L-appellat ipprezenta lment quddiem l-Arbitru fit-30 ta' April, 2019 fil-konfront tas-soċjetà appellata, fejn esprima l-fehma tiegħu li din kienet

¹ Ara Note 1 a fol. 10.

negligenti u wriet diversi nuqqasijiet fl-obbligu tagħha ta' kura lejha, iżda wkoll fl-obbligi fiduċjarji tagħha bħala *trustee* tal-Iskema, u dan filwaqt li spjega liema kienu dawn l-obbligi. Spjega li wara li kien sar l-investment fl-2014, huwa kien irċieva rendikont annwali fl-istess sena, u sussegwentement fis-sena 2017, meta gie nformat li l-investment tiegħu kien niżel minn £101,000 għal £29,000. Qal li mbagħad skopra li għalkemm ir-riskju tiegħu kien wieħed medju, il-pensjoni tiegħu kienet giet investita f'noti strutturati ta' natura professjonali u ta' riskju għoli, meta huwa ma kien jaf xejn dwar dan. Sar jaf ukoll li s-soċjetà appellanta kienet aċċettat negozju mingħand id-ditta ta' konsulenza CWM li ma kellha l-ebda liċenzja, li l-profil ta' riskju tiegħu kien gie aġġustat mingħajr ma kien jaf, u li l-firma tiegħu fuq l-istruzzjonijiet tan-negozju kienet giet ikkuppjata. Għalhekk huwa kien qed jippretendi kumpens tat-telf kollu li sofra fl-ammont ta' mhux inqas minn £101,813.30.

4. Is-soċjetà appellanta wiegħbet fit-22 ta' Frar, 2018, billi talbet lill-Arbitru sabiex jiċċad l-ilment tal-appellat. 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-appellat kien ħatar lil CWM bħala l-konsulent finanzjarju tiegħu u hija ma kellhiex twieġeb għall-informazzjoni, parir jew assikurazzjoni li din kienet tat lill-imsemmi appellat; (iii) kien l-appellat stess li għażel li l-profil ta' riskju tiegħu kien wieħed medju sa għoli, u kellu jikkjarifika jekk kienx qed jallega li kienet is-soċjetà appellanta li bidlet din l-indikazzjoni; (iv) l-investimenti saru skont il-profil ta' riskju tal-appellat u skont ir-regoli u l-linji gwida applikabbli dak iż-żmien; (v) hija kienet bagħtet rendikonti annwali lill-appellat sa mis-sena 2014; (vi) l-istruzzjonijiet tan-negozju ma tagħmilhomx hi u f'kull każ, hija vverifikat il-

firma tal-appellat mad-dokumenti miżmuma minnha; (vii) l-appellat kien ġie mgħarraf bid-dritt tal-konsulent finanzjarju fl-*Skandia Investment Application form* u fis-Sezzjoni 1 tal-*Appointment of a Fund Advisor Form*; (viii) kull dokument ta' konsultazzjoni maħruġ mill-MFSA wara li l-appellat issieheb fl-iskema ma jorbtux lis-soċjetà appellanta u mhumiex rilevanti għall-ilment odjern; (ix) ir-riferiment għal 'The Pensions Act 2011 part D.1' ma kinitx ċara, u 'Part D' tal-regoli magħmulin taħt l-Att dwar Pensjonijiet għall-Irtirar fir-rigward ta' *introducers* kienu applikabbli fil-konfront tagħha mill-1 ta' Jannar, 2016, jiġifieri wara li l-appellat sar membru tal-iskema; (x) ir-regola 7 tal-L.S.330.07 ma kinitx applikabbli; (xi) kull arrangament għall-kumpens jew offerta kif allegat, kienu ta' natura kunfidenzjali, u kwalunkwe ftehim dwar kumpens li hija għamlet ma' terzi kien irrilevanti għal dawn il-proċeduri; (x) hija ma kellhiex liċenzja sabiex tagħti, u hija fil-fatt ma kinitx tagħti pariri finanzjarji u lanqas qatt ma tat parir finanzjarju lill-appellat; (xi) hija ma kinitx responsabbli għall-ħlas ta' kwalunkwe ammont pretiż mill-appellat, u min-naħa tagħha hija ma kinitx imxiet b'negligenza, u dejjem osservat l-obbligi tagħha lejn l-appellat, inklużi dawk fiduċjarji u dawk imposti mir-regoli tal-MFSA; u (xi) l-appellat kellu jressaq prova tan-ness kawżali bejn id-danni sofferti u l-allegat agir tagħha.

Id-deċiżjoni appellata

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

"Further Considers:

The Service Provider raised the plea that the Arbiter does not have the competence to deal with this case in terms of Article 21(1)(b) of Chapter 555 of the Laws of Malta.

Article 21(1)(b) of Chapter 555 of the Laws of Malta stipulates:

‘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 nearly four months for the Service Provider to send the Complainant a reply to his formal complaint. (fn. 21 The Complainant’s formal complaint dated 2 November 2017 was answered by the Service Provider through a letter dated 22 February 2018 – A fol. 12) The Arbiter does not see a valid reason why the Service Provider took so long to send a reply and related documents.

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 bad faith.

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, which role MPM

*occupied since the Complainant became member of the Scheme and **continued to occupy beyond the coming into force of Chapter 555 of the Laws of Malta.***

It is considered that the Service Provider's arguments with respect to Article 21(1)(b) have certain validity only with respect to the alleged failures raised by the Complainant on the legal right to cancel, that is, the cooling off period. This is in view that the right of withdrawal is a distinct right which applied and existed at the time of purchase of the underlying policy of the Scheme, the European Executive Investment Bond, in September 2014. (fn. 22 A fol. 120)

It is noted that the right to cancel is clearly specified in the covering letter to the policy which specifies inter alia that 'You have 30 days from the date of this letter to tell us if you want to cancel your Policy'. (fn. 23 Ibid.) The said letter was attached to the email sent by the Service Provider to the Complainant on 10 September 2014. Hence, the Complainant was provided with the legal right to cancel at the time. Moreover, the alleged misconduct of the Service Provider, of not providing the Complainant with the cooling off period, could have only been raised with the Arbiter by 18 April 2018. The complaint filed with the Office of the Arbiter for Financial Services ('OAFS') was received on 30 April 2019. (fn. 24 A fol. 1) Accordingly, the Arbiter cannot, in any case, consider the part of the complaint relating to the alleged failure of the Service Provider to provide the Complainant with the indicated cooling off period and is thus rejecting this part of the complaint.

*In addition to the complaint made with respect to the legal right to cancel, the Complainant raised other key aspects in his Complaint. Even if, for argument's sake only, the Arbiter had to limit himself to the question of the investment portfolio, (which is not the case because the Complainant raised other issues and the Service Provider had other obligations apart from the oversight of the portfolio as explained later in this decision), the Service Provider did not prove in this particular case that the products invested into no longer formed part of the portfolio **after** the coming into force of Chapter 555 of the Laws of Malta. The onus of proof for such evidence rests with the Service Provider.*

Furthermore, the Arbiter notes that there is actually clear evidence from a dealing instruction form dated 26.08.2016 and the Table of Investments presented by the Service Provider that the structured notes - being the sole products constituting the Complainant's investment portfolio - as will be considered later in this decision - still formed part of his portfolio after 18 April 2016. As per the said statements, the last structured note was indeed purchased on 26/08/2016, after the coming into force of the Act. (fn. 25 A fol. 50 & a fol. 208)

*It is further noted that the complaint in question involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the advisor of the Complainant in relation to the Scheme. The Service Provider itself declares that it no longer accepted business from CWM as from **September 2017**. (fn. 26 Para. 44, Section E of the affidavit of Stewart Davies, Director of MPM – A fol. 139.)*

CWM was therefore still accepted by the Service Provider and acting as the investment advisor to the Complainant after the coming into force of Chapter 555 of the Laws of Malta. (fn. 27 A fol. 18) The responsibility of MPM in this regard is explained later on in this decision.

The Arbiter considers that the actions related to the Retirement Scheme complained about cannot accordingly be considered to have all occurred before 18 April 2016 and, therefore, the plea as based on Article 21(1)(b) is being rejected, and the Arbiter declares that he has the competence to deal with the 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. 28 Cap. 555, Art 19(3)(b))

The Complainant

The Complainant, born in 1968, is of British nationality and resided in Spain at the time of application for membership as per the details contained in the Application Form for Membership of the Momentum Malta Retirement Trust ('the Application Form for Membership'). (fn. 29 A fol. 73)

The Complainant's occupation was indicated as Travel Agent in the said Application Form.

It was not indicated, nor has it emerged, during the case that the Complainant was a professional investor. The Complainant can accordingly be regarded as a retail client. The Complainant was accepted by MPM as member of the Retirement Scheme on 12 August 2014. (fn. 30 A fol. 118)

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. 31 <https://www/mfsa/mt/financial-services-register/result/?id=3453>) and acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 32 A fol. 162 – Role

of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit)

Certain allegations made by the Complainant

Allegations in relation to fees

The Complainant claimed that he was not notified of any dealing charges. He also quoted rules requiring service providers to provide details of the direct/indirect charges or fees before the offering of a service and also about the need for trustees to avoid unfair or unreasonable charges. (fn. 33 A fol. 4 & 9)

The Complainant has not provided any further basis and explanation for the allegations made and the reasons why he quoted the rules in question. Nor was any evidence about such allegations or inferences provided.

The Arbiter further notes that the dealing charges and other fees relating to the underlying policy were described in the Charges Schedule which was attached to the covering letter dated 1 September 2014 issued by Skandia International in respect of the policy, a copy of which was sent by email to the Complainant on the 10 September 2014 as evidenced during the proceedings of this case. (fn. 34 A fol. 119)

In the circumstances, the Arbiter considers that there is insufficient basis and evidence for him to consider further the allegations made in respect of fees.

Allegations relating to the signature on the dealing instructions

The Complainant alleged that the dealing instructions were copied with an identical signature. He further claimed fraudulent dealing instructions. (fn. 35 A fol. 4 & 9)

These are serious allegations which had to be specifically proven by specific facts and in the case of the said alleged allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation. However, the Complainant did not provide further clarifications on this matter nor enough evidence to the Arbiter to accept this allegation.

Allegations relating to changes to the Complainant's risk profile

In his Complaint, the Complainant alleged that his risk profile was medium and that this was changed without his knowledge.

It is noted that during the hearing of 3 November 2020, the representative of the Service Provider noted inter alia that:

'... the records that we got and produced as evidence reflect the fact that two boxes were ticked, and that was medium risk and medium to high risk'. (fn. 36 A fol. 211)

MPM's Application Form for Membership provides five different options that could be selected by the applicant to describe his risk profile, that is, 'Low', 'Lower to Medium', 'Medium', 'Medium to High' and 'High'. (fn. 37 A fol. 75)

Two selections, that of 'Medium' and 'Medium to High', were made in MPM's Application Form completed in respect of the Complainant. (fn. 38 A fol. 106)

The Arbiter considers that such dual selection is however quite odd and creates grounds for confusion given that one is either of 'Medium' risk or 'Medium to High' and not both. If one was of 'Medium to High' risk, then there was no reason to select also the 'Medium' option as was done in this case and vice-versa.

MPM should have thus not accepted such obfuscation of the risk profile of the Complainant, and should have not allowed and accepted multiple risk profiles to be selected in its own Application Form for Membership.

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. 39 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.

As confirmed by the Service Provider, 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. (fn. 40 As per pg. 1 of the Affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1st January 2016 attached to his affidavit.)

Despite not being much mentioned by MPM in its submissions, 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

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. 41 <https://www.mfsa.mt/financial-services-register/result/?id=3454>) as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 (fn. 42 Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's Affidavit).) and under the Retirement Pensions Act in January 2016. (fn. 43 Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit) - A fol. 160)

As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme 'was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap. 331) on the 23 March 2011' (fn. 44 Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit) – A fol. 160) and is 'an approved Personal Retirement Scheme under the Retirement Pensions Act 2011 (Cap. 514 of the Laws

of Malta'. (fn. 45 Regulatory Sdtatus, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit) – A fol. 162)

The Scheme Particulars specify that:

'The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death'. (fn. 46 Ibid.)

The case in question involves a member-directed personal retirement scheme where the Member was allowed to appoint an investment advisor to advise him on the choice of investments.

The assets held in the Complainant's account with the Retirement Scheme were used to acquire a whole of life insurance policy for the Complainant.

The life assurance policy acquired for the Complainant was called the European Executive Investment Bond issued by Skandia International (fn. 47 Skandia International eventually rebranded to Old Mutual International - <https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-2014/skandiainternational-rebrands-to-old-mutual-international/> Old Mutual International ('OMI'). (fn. 48 A fol. 120)

The premium in the said policy was in turn invested in a portfolio of investment instruments under the direction of the Investment Advisor and as accepted by MPM. The underlying investments comprised solely of investments into structured notes as indicated in the table of investments forming part of the 'Investor Profile' presented by the Service Provider during the proceedings of the case. (fn. 49 The 'Investor Profile' is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant. A fol. 208)

The 'Investor Profile' presented by the Service Provider in respect of the Complainant also included a table with the 'current valuation' as at 16/09/2020.

The said table indicated a loss (excluding fees) of GBP69,801 as at that date. (fn. 50 A fol. 208)

The loss experienced by the Complainant is higher when taking into account the fees incurred and paid within the Scheme's structure. The loss inclusive of fees indeed amounts to GBP82,617 on the total amount invested of GBP101,797 based on a 'current valuation at 16/09/20' of GBP19,179.

It is to be noted that the Service Provider does not explain whether the loss indicated in the 'current valuation' for the Complainant relates to realised or paper losses or both.

Investment Advisor

Continental Wealth Management ('CWM') was the investment advisor appointed by the Complainant. (fn. 51 As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant (A fol. 67) and Section 5 of the Application Form for Membership (A fol. 74) The role of CWM was to advise the Complainant regarding the assets held within his Retirement Scheme.

In its reply to this complaint, MPM explained inter alia that CWM

'is a Company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH'. (fn. 52 Pg. 1 of MPM's reply to the OAFS – A fol. 67)

In its submissions, it was further explained by MPM that:

'CWM was appointed agent of Trafalgar International GmbH ('Trafalgar') and was operating under Trafalgar International GmbH licenses', (n. 53 Para. 39, Section E titled 'CWM and Trafalgar International GmbH' of Stewart Davies' affidavit – A fol. 137) and that Trafalgar 'is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number:

D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'. (fn. 54 Ibid.)

Underlying Investments

As indicated above, the investments undertaken within the life assurance policy of the Complainant were summarised in the table of investment transactions included as part of the 'Investor Profile' provided by the Service Provider. (fn. 55 Attachment to the additional submissions made by MPM in respect of the Complainant – A fol. 208)

The investment transactions undertaken within the Complainant's portfolio, as reflected in the information from the said 'Investor Profile', are summarised below: (fn. 56 Ibid.)

- an investment of GBP20,000 into the RBC Online Large Caps Income NT (ISIN no. XS1092556452) purchased on 28/08/2014;

- *an investment of GBP20,000 into the Leonteq 1.5Y Multi Barrier GBP (ISIN no. CH0245655888) purchased on 04/09/2014;*
- *an investment of GBP20,000 into the Leonteq 1.5Y Multi Barrier Expr GBP (ISIN no. CH0245655904) purchased on 04/09/2014;*
- *an investment of GBP20,000 into the Commerzbank 1.5Y AC PHNX NT ARO (ISIN no. XS1112506180) purchased on 04/09/2014;*
- *an investment of GBP20,000 into the Nomura Inc NT US Diversified ST (ISIN no. XS1105454521) purchased on 04/09/2014;*
- *an investment of EUR15,000 into the EFG Red April 5 (ISIN no. CH0273397270) purchased on 24/04/2015;*
- *an investment of EUR16,000 into the EFG Red April 6 (ISIN no. CH0273397429) purchased on 24/04/2015;*
- *an investment of GBP9,700 into the RBC GBP Notes Linked to P UN, Yelp UN, CTRP UQ, Expe UQ (ISIN no. XS1468789208) purchased on 26/08/2016.*

During the tenure of CWM, eight structured notes were thus purchased in total between 2014-2016 with such structured notes comprising the only investments in the Complainant's investment portfolio.

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

As indicated in 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]'.

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. 57 Emphasis added by the Arbitrator)

- 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

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 or 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 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, 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. 58 Ganado Max (Editor), ‘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. 59 Op. cit. p.178)

The fiduciary and trustee obligations were also highlighted by MFSA in a 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. 60 Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6th December 2017) p.9)

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.** As acknowledged by the Service Provider 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. 61 Para. 17, page 5 of the affidavit of Stewart Davies – A fol. 132)*

Once an investment decision is taken by the member and his/her investment advisor, and such decision is communicated to the retirement scheme administrator, MPM explained that as part of its duties:

'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. 62 Para. 31, Page 8 of the affidavit of Stewart Davies – A fol. 135)

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. 63 Para. 33, Page 9 of the affidavit of Stewart Davies (A fol. 136) & Para. 17 of Page 5 of the said affidavit also refers (A fol. 132).

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

'I accept that I or my designated 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 Pensions Retirement Fund', which featured in the 'Declarations' section of the Application Form for Membership signed by the Complainant. (fn. 64 A fol. 80)

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. 65 Pg. 7 of the MFSA's Consultation Document dated 16th 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/consultation-documents-archive/.](https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/))

The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment advisor 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. 66 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.***

As far back as 2013, MPM's Investment Guidelines also provided that:

'The Trustee need to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification ...', (fn. 67 Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies (A fol. 175). The same statement is also included in page 9 of the Scheme Particulars of May 2018 (also attached to the same affidavit) - A fol. 167.) whilst para. 3.1 of the section titled 'Terms and Conditions' of the Application Form for Membership into the Scheme also provided *inter alia* that:

'... in its role as Retirement Scheme Administrator [MPM] will exercise judgement as to the merits or suitability of any transaction ...'. (fn. 68 A fol. 82)

Key considerations relating to the principal alleged failures

*As indicated above, the Complainant raised a number of **main aspects** in his Complaint alleging that MPM was negligent and had failed in its fiduciary duties and duties of care as trustee claiming, in essence, that:*

- (i) MPM accepted business from CWM when it approved it as his financial advisor despite being an unlicensed advisory firm;*
- (ii) MPM did not ensure that his funds were invested in a prudent manner and in his best interests with the funds instead invested in professional high risk structured notes;*
- (iii) MPM failed to adequately inform him about the investments.*

General observations

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

This would reflect on the extent of responsibility that the financial 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 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 direct, 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 appointment of the Investment Advisor

It is noted that the Complainant chose the appointment of CWM to provide him with investment advice in relation to the selection of the underlying investments and composition of the portfolio within the member-directed Scheme. **However, from its part, MPM allowed and/or accepted CWM to provide investment advice to the Complainant within the Scheme's structure.** The Arbiter has also knowledge that **MPM even had itself an introducer agreement with CWM and makes reference to the cases against MPM decided by him on the 28 July 2020.**

There are a number of aspects which give rise to concerns on the diligence exercised by MPM when it came to the acceptance of, and dealings with, the investment adviser as further detailed below.

Inappropriate and inadequate material issues involving the Investment Advisor

- i. *Incomplete and inaccurate material information relating to the advisor in MPM's Application Form for Membership*

It is considered that **MPM accepted and allowed inaccurate and incomplete material information relating to the Advisor to prevail in its own Application Form for Membership.** MPM should have been in a position to identify, raise and not accept the material deficiencies arising in the Application Form.

If inaccurate and incomplete material information arose in the Application Form for Membership in respect of such a key party it was only appropriate and in the best interests of the Complainant, and reflective of the role as Trustee as a bonus paterfamilias, for MPM to raise and flag such matters to the Complainant and not accept such inadequacies in its form. MPM had ultimately the prerogative whether to accept the application, the selected investment advisor and also decide with whom to enter into terms of business.

The section titled 'Professional Adviser's Details' in the Application Form for Membership in respect of the Complainant indicated 'Continental Wealth Management' ('CWM') as the company's name of the professional advisor.

In the same section of the Application Form, CWM was indicated as having a registered address in Spain. It was further indicated in the Application Form that 'InterAlliance Worldnet' was the regulator of the professional advisor.

The Arbitrator considers the reference to InterAlliance as regulator of CWM to be inadequate and misleading.

With respect to the reference to 'InterAlliance' such reference was not defined or explained in the Application Form. Neither was such reference ever explained or referred to during the comprehensive submissions made by the Service Provider during the proceedings of the case.

It has not emerged either that Inter-Alliance are, or were, a regulatory authority for investment advisors in Spain or in any other jurisdiction. It appears that 'InterAlliance Worldnet', an abbreviation apparently for 'Inter Alliance WorldNet Insurance Agents & Advisors Ltd' was a service provider itself in Cyprus, but clearly it was not a regulatory authority. (fn. 69 <https://international-adviser.com/iaw-fined-cypriot-regulator>) Indeed, no evidence was actually submitted by MPM of CWM being truly regulated.

The reference to InterAlliance could thus not have reasonably provided any comfort to MPM that this was a regulator of CWM and neither that there was some form of regulation and adequate controls and/or supervision on CWM equivalent to that applicable for regulated investment services providers.

ii. Lack of clarity/convoluted information

It is also noted that the Application Form submitted in respect of the purchase of the underlying policy includes lack of clarity and convoluted information relating to the investment advisor.

MPM, as Trustee of the Scheme had clear sight of the said application and had indeed signed the application for the acquisition of the respective policy in its role as trustee.

It is noted that the Application Form of the policy provider refers to, and includes, the stamp of another party as financial advisor. The first page of the said application form includes a section titled 'Financial adviser details' and a field for 'Name of financial adviser', with such section including a stamp bearing the name of 'Inter-Alliance Worldnet Insurance Agents & Advisors Ltd' ('InterAlliance') apart from reference to CWM. Inter-Alliance is then featured in the section titled 'Financial adviser

declaration' of the said form which section also includes the same stamp of Inter-Alliance (with a PO Box in Cyprus), in the part titled 'Financial adviser stamp'.

There is accordingly a lack of clarity on the exact entity ultimately taking responsibility for the investment advice being provided to the Complainant. For the reasons explained, the information on the financial adviser is also somewhat inconsistent between that included in MPM's application form and the application form of the issuer of the underlying policy.

ii. No proper distinctions between CWM, Inter-Alliance and Trafalgar

It is also unclear why the Annual Member Statement aimed for the Complainant and produced by MPM during the case indicated 'Continental Wealth Management' as 'Professional Adviser' whilst at the same time indicated another party, 'Trafalgar International GmbH' as the 'Investment Adviser'. (fn. 70 A fol. 118)

No indication or explanation of the distinction and differences between the two terms of 'Professional Adviser' and 'Investment Adviser' were either provided or emerged nor can reasonably be deduced.

Besides the lack of clarity on the entity taking responsibility for the investment advice and the lack of clear distinction/links between the indicated parties in the application forms and statements, it has also not emerged that the Complainant was provided with clear and adequate information regarding the respective roles and responsibilities between the different mentioned entities throughout.

If CWM was acting as an appointed agent of another party, such capacity, as an agent of another firm, should have been clearly reflected in the application forms and other documentation relating to the Scheme. Relevant explanations and implications of such agency relationship and respective responsibilities should have also been duly indicated without any ambiguity.

It is also noted that during the proceedings of this case MPM has not provided evidence of any agency agreement between CWM and Trafalgar.

In the reply that MPM sent directly to the Complainant in respect of his formal complaint, MPM itself explained that 'Momentum in its capacity as Trustee and RSA, in exercising its duty to you ensured: The full details of the Scheme, including all parties' roles and responsibilities were clearly outlined to you in the literature provided ensuring no ambiguity (fn. 71 Emphasis added by the Arbitrator), including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules'. (fn. 72 Section 3, titled 'Overview of Momentum Controls in

place in exercising a duty to all members' in MPM's reply to the Complainant in relation to the complaint made in respect of the Scheme – A fol. 15)

The Arbiter does not have comfort that such a duty has been truly achieved in respect of the advisor for the reasons amply explained above.

iv. No regulatory approval in respect of CWM

During the proceedings of this case no evidence was produced about the regulatory status of CWM. As indicated earlier, MPM provided no details about Inter-Alliance, and in its submissions only referred to the alleged links between CWM and Trafalgar. In the affidavit of Stewart Davies, reference was made to the authorisations issued to Trafalgar International GmbH in Germany where reference was made that Trafalgar (and not CWM) was authorised and regulated by IHK, the Chamber of Commerce and Industry in Germany with the 'Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'. (fn. 73 Para. 39 Section E, titled 'CWM and Trafalgar International GmbH' in the affidavit of Stewart Daves – A fol. 137-138)

MPM's statement that CWM 'was operating under Trafalgar International GmbH licenses' (fn. 74 Para. 39, Section E titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies – A fol. 137) has not been backed up by any evidence during the proceedings of this case. No comfort can thus be taken either from the authorisation/s held by Trafalgar.

Indeed, no evidence of any authorisation held by CWM in its own name or as an agent of a licensed institution, authorising it to provide advice on investment instruments and/or advice on investments underlying an insurance policy has, ultimately been produced or emerged during the proceedings of this case.

In the absence of such, the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM 'was authorised to trade in Spain and in France by Trafalgar International GmbH' (fn. 75 Pg. 1, Section A titled 'Introduction', of the Reply of MPM submitted before the Arbiter for Financial Services – A fol. 67), are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant.

This also taking into consideration that:

(i) *Trafalgar and/or InterAlliance were themselves no regulatory authority;*

(ii) *the inconsistency and lack of clarity as to the regulatory status of the investment advisor in the Application Forms as well as the confusing and unclear references in the statements relating to the advisor as indicated above;*

(iii) *legislation covering the provision of investment advisory services in relation to investment instruments, namely the Markets in Financial Instruments Directive (2004/39/EC) already applied across the European Union since November 2007.*

No evidence was provided that CWM, an entity indicated as being based in Spain, held any authorisation to provide investment advisory services, in its own name or in the capacity of an agent of an investment service provider under MiFID.

Article 23(3) of the MiFID I Directive, which applied at the time, provided specific requirements on the registration of tied agents. (fn. 76 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN>)

No evidence of CWM featuring in the tied agents register in any EU jurisdiction was either produced or emerged.

Neither was any evidence produced of any exemption from licence under MiFID or that CWM held an authorisation or exemption under any other applicable European legislation for the provision of the contested investment advice.

The Service Provider noted inter alia that ‘CWM was appointed agent of Trafalgar International GmbH’. (fn. 77 Para. 39, Section E titled ‘CWM and Trafalgar International GmbH’ of the affidavit of Stewart Davies – A fol. 137)

The nature of the agency agreement that CWM was claimed to have was not explained nor defined, and it was not indicated either in terms of which European financial services legislation such agency agreement was in force and permitted the provision of the disputed investment advice. Nor evidence of any agency agreement existing between CWM and any other party was produced during the proceedings of this case as indicated above.

Other observations & synopsis

As explained above, albeit being selected by the Complainant, the investment adviser was however accepted, at MPM’s sole discretion, to act as the Complainant’s investment advisor within the Scheme’s structure.

The responsibility of MPM in accepting and allowing CWM to act in the role of investment advisor takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM. As indicated above, MPM accepted CWM when, as verified in the Complainant’s Application Form for

Membership, it was being stated in MPM's own application form that CWM was a regulated entity. However, no evidence has transpired that this was so, as amply explained above.

MPM allowed and left uncontested key information in its own Application Form for Membership of the Retirement Scheme with respect to the regulatory status of the investment advisor.

The Service Provider argued inter alia in its submissions that it was not required, in terms of the rules, to require the appointment of a regulated advisor during the years 2013-2015 under the SFA regime and until the implementation of Part B.9 titled 'Supplementary Conditions in the case of entirely Member Directed Schemes' of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA updated in December 2018, where the latter clearly introduced the requirement for the investment advisor to be regulated. (fn. 78 A fol. 138)

The Arbiter notes in this regard that in his affidavit Steward Davies highlighted that: 'There was no law or rule requiring Momentum to carry out any due diligence or ensure that CWM/ Trafalgar was licensed'. (fn. 79 Ibid.)

However, the Arbiter strongly believes that the aspect of scrutinising an investment advisor known to the RSA and Trustee to be operating in relation to a retirement scheme, impinges on the RSA and Trustee duty of care and professional diligence. This goes beyond the mere legalistic approach of shedding off responsibility by interpreting regulatory rules, which are in the first place intended to establish the minimum standards expected of a licensed operator, in such a way as to avoid responsibility.

The Arbiter wants to underscore that the compliance with regulatory rules does not substitute the further obligations that an RSA and Trustee of a retirement scheme have towards the members of the scheme. As amply stated earlier in this decision under the section titled 'The legal framework', a Trustee must act diligently and professionally in the same way as a bonus paterfamilias. A bonus paterfamilias does not abdicate from his responsibilities to suite his interests.

The appointment of an entity such as CWM as investment advisor meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where an adequately regulated advisor is appointed. An adequately regulated financial advisor is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory authority. MPM, being a regulated

entity itself, should have been duly and fully cognisant of this. It is was only in the best interests of the Complainant for MPM to ensure that the Complainant had correct and adequate key information about the investment advisor.

Besides the issue of the regulatory status of the advisor, MPM also allowed and left uncontested important information, which was convoluted, misleading, unclear and lacking as explained above, with respect to the investment advisor, namely in relation to:

- ***CWM's alleged role as agent of another party, and the respective responsibilities of CWM and its alleged principal;***
- ***the entity actually taking responsibility for the investment advice given to the Complainant as more than one entity was at times mentioned with respect to investment advice;***
- ***the distinctions between CWM, Inter-Alliance and Trafalgar.***

It is also to be noted that apart from the above, MPM had itself a business relationship with CWM, having accepted it to act as its introducer of business. Such relationship gave rise to potential conflicts of interest, where an entity whose actions were subject to certain oversight by MPM on one hand was on the other hand channelling business to MPM.

Even in case where, under the previous applicable regulatory framework, an unregulated advisor was accepted by the Trustee and Scheme Administrator to provide investment advice to the member of a member-directed scheme, one would, at the very least, reasonably expect the Retirement Scheme Administrator and Trustee of such a scheme to exercise even more caution and prudence in its dealings with such a party in such circumstances.

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

It would have accordingly been only reasonable, to expect the trustee and retirement scheme administrator, as part of its essential and basic obligations and duties in such roles, to have an even higher level of disposition in the probing and querying of the actions of an unregulated investment adviser in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances.

The Arbiter does not have comfort that such level of diligence and prudence has been actually exercised by MPM for the reasons already stated in this section of the decision.

B. 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.

Nevertheless, the Complainant's investment portfolio constituted solely of structured notes as detailed in the section titled 'Underlying Investments' above.

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. 80 <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. 81 <https://www.investopedia.com/articles/bonds/10/structured-notes.asp>)

The Complainant presented a number of fact sheets in respect of structured note investments. One of these fact sheets was traced in relation to a structured note which featured in the Complainant's portfolio. This was in respect of the structured note issued by EFG whose ISIN no. CH0273397429 matched that found on the fact sheet. (fn. 82 A fol. 51/52 & 208) As part of the investigatory powers granted under Cap. 555 of the Laws of Malta, the Arbiter managed to source another fact sheet in respect of a structured note which formed part of the Complainant's portfolio (fn. 83A fol. 208) - this being the RBC Online Large Caps Income Note with ISIN no. XS1092556452. (fn.

84 <https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-10pa-Online-Large-Caps-Income-FACTSHEET.pdf>)

Apart from inter alia the credit risk of the issuer and the liquidity risk, the said fact sheets included other risks that are typically highlighted for structured notes with no guarantees on the return of the original capital invested - such as the warning that the investor could possibly receive less than the original amount invested or potentially even losing all of the investment.

The fact sheet referred to above issued by RBC indeed specified inter alia that:

'The Notes are not capital protected, and investors may receive back less than the original amount invested...investors can potentially lose all of their investment', (fn. 85 <https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-10pa-Online-Large-Caps-Income-FACTSHEET.pdf>) whilst the fact sheet referred to above of the structured note issued by EFG specifies inter alia that:

'Products involve a high degree of risk, including the potential risk of expiring worthless. Potential investors should be prepared in certain circumstances to sustain a total loss of the capital invested to purchase this Product'. (fn. 86 A fol. 51)

The underlying asset to which the structured notes were linked to typically comprised stocks. A particular feature emerging of the type of structured notes invested into, involved the application of capital buffers and barriers. For example, the fact sheets referred to above 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 specified percentage, 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 fact sheet for the RBC structured note highlighted, for example, the risk that where the performance of the worst performing underlying measured a fall of 50% or more, investors would receive a capital amount equivalent to the performance of the worst performing asset.

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 note respectively was linked, fell foul of the indicated barrier. The implication of such a feature should have not been overlooked nor discounted. Given the said particular features 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.

Excessive exposure to structured products and to single issuers in respect of the Complainant's portfolio

The portfolio of investments in respect of the Complainant comprised solely of structured products. Such excessive exposure to structured products occurred over a long period of time. This clearly emerges from the Table of Investments forming part of the 'Investor Profile' provided by the Service Provider as detailed in the section titled 'Underlying Investments' above.

In addition, high exposures to the same single issuer/s, both through a singular purchase and/or through cumulative purchases in products issued by the same issuer emerged in the Complainant's portfolio.

Even in case where the issuer of the structured product was a large institution, the Arbiter does not consider this to justify or make the high exposure to single issuers acceptable even more in the Scheme's context. The maximum limits relating to exposures to single issuers outlined in the MFSA rules and MPM's own Investment Guidelines did not make any distinctions according to the standing of the issuer. Hence, the maximum exposure limits to single counterparties should have been applied and ensured that they are adhered to across the board. The credit risk of the respective issuer was indeed still one of the applicable risks.

Moreover, one cannot have comfort that the structured notes were in themselves diversified through the exposure to their underlying as remarked by the Service Provider in its 'Investment Guidelines Commentary' provided with its submissions, (fn. 87 A fol. 197) given the particular nature of the structured notes invested into as considered above.

Context of entire portfolio and substance of MPM's Investment Guidelines

For the avoidance of doubt and with reference to the emphasis made by the Service Provider for investments to be seen in the context of the entire portfolio, (fn. 88 Affidavit of Steward Davies – A fol. 135) the Arbiter would like to point out that consideration has indeed been duly made of the entire investment portfolio held in the Complainant's individual account within the Scheme including how such portfolio was constituted at inception and (to the extent possible on the basis of the information provided), how the constitution of the portfolio progressed over the years.

Furthermore, the Arbiter has also considered what percentage of the policy value each respective underlying investment constituted at the time of their respective purchase, on the basis of the information provided by the Service Provider itself in the table of

'Investor Profile' attached to its submissions. (fn. 89 A fol. 208) Consideration was then further made of how the said percentage allocation, reflected the maximum limits outlined in the investment restrictions and diversification requirements in the MFSA Rules as well as MPM's own Investment Guidelines that were applicable at the time of purchase.

It is to be pointed out that in the case of a member-directed scheme, each member would have his/her own individual account within the retirement scheme, with such account having its own specific and distinct investment portfolio. Hence, it is only reasonable and correct for the principles, including the investment restrictions specified for the Retirement Scheme, to have been applied and adhered to at the level of the individual account.

Failure to do so would have meant that the safeguards emanating from the investment conditions and diversification requirements would have not been adopted and ensured in practice in respect of the individual member's portfolio, defeating the aim of such requirements in the first place.

The application of investment restrictions at a general level, that is, at scheme level without application on an individual account basis, would only make sense and be reasonable in the context of, and where, the members of such a scheme are participating in the same portfolio of assets held within the scheme and not in the circumstance where the members have their own individual separate investment portfolios, as was the case in question.

An analogy can be made in this regard to the market practice long adopted in the context of collective investment schemes, namely in respect of stand-alone schemes (fn. 90 i.e., a collective investment scheme without sub-funds) and umbrella schemes. (fn.91 i.e., a collective investment scheme with sub-funds, where each sub-fund would typically have its own distinct investment policies and separate and distinct investment portfolios)

Whilst investment restrictions would be applied at scheme level in the case of a stand-alone scheme, in the case of an umbrella fund, the investment restrictions are not applied at scheme level but at the sub-fund level and would indeed be tailored for each individual sub-fund given that each sub-fund would have its own distinct and separate investment portfolio and investment policy.

As to the substance of MPM's Investment Guidelines, it is noted that the Service Provider seemed to somehow downplay the importance and weighting of its own Investment Guidelines by stating that these were just to provide guidance,

'but should not be applied so strictly so as to stultify the ultimate objective, that the investment is placed in the best interests of the member'. (fn. 92 A fol. 136 – Para. 32 of the affidavit of Stewart Davies)

Apart that it is contradictory to infer that by not adhering with the guidelines one would be acting in the best interests of the member - given that the scope of such guidelines should have been, in the first place, to ensure that the portfolio is diversified and risks are spread and thus to ensure the best interests of the member - it has, in any case, not been demonstrated or justified in any way what instances were somehow deemed appropriate by the Service Provider where it was more in the best interests of the member to depart and not comply with the investment guidelines rather than to ensure adherence thereto.

It is further to be noted that the specific parameters and limits outlined in MPM's Investment Guidelines were themselves stipulated in MPM's key documentation, and as specified in the same documentation, MPM itself had to ensure adherence with the specified limits and conditions in its role of Trustee of the Retirement Scheme. (fn. 93 For example, as clearly outlined in the Investment Guidelines marked 'January 2013' and 'Mid-2014' in the Scheme's Application form)

Furthermore, no qualifications or any disclaimers regarding the compliance or otherwise with such guidelines have emerged in this case. Neither has it emerged in what circumstances, divergences could possibly be permitted, if at all. Hence, the stipulated Investment Guidelines were binding and should have been followed accordingly.

Even if one had to, for the sake of the argument only (which was not the case as outlined above), somehow construe that these were 'just' guidelines and not strict rules as the Service Provider tried to argue, (fn. 94 A fol. 136 – Para 32 of the affidavit of Stewart Davies) one would in any case reasonably not expect any major departure from the limits and maximum exposures specified in the stipulated guidelines.

With respect to the Complainant's portfolio, it is considered that not only were various investments not reflective of MPM's Investment Guidelines but, on multiple occasions, there were material departures from such guidelines where the maximum limits were materially exceeded as outlined further below.

Portfolio not reflective of the MFSA rules

The high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio, jarred with the regulatory requirements that applied to

the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the 'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002', ('the Directives') which applied from the Scheme's inception in 2011 until the registration of the Scheme under the RPA on 1 January 2016. The applicability and relevance of these conditions to the case in question was highlighted by MPM itself. (fn. 95 Para. 21 & 23 of the Note of Submissions filed by MPM – A fol. 192)

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

SOC 2.7.2 in turn required the Scheme to ensure inter alia that, the assets of a scheme are 'invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole' (fn. 96 SOC 2.7.2(a)) and that such assets are 'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'. (fn. 97 SOC 2.7.2 (b))

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be 'predominantly invested in regulated markets'; (fn. 98 SOC 2.7.2(c)) to be 'properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings', (fn. 99 SOC 2.7.2 (e)) where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme. (fn. 100 SOC 2.7.2 (h)(iii) & (v))

Despite the standards of SOC 2.7.2, MPM allowed the portfolio of the Complainant to comprise solely of structured products.

In the case of the Complainant, it has also clearly emerged that individual exposures to single issuers were at times even higher than 30%, this being the maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above. It would have been more sensible for the maximum limit of 10% applicable to single issuers in case of securities to have been similarly applied for those structured products which featured barrier events and provided risk of loss similar to an investment in the worst performing underlying.

Instead, there were exposures to individual securities as high as 29.76% of the policy value at the time of purchase (such as in the case of the RBC GBP Notes in 2016) and collective exposures to a single issuer above 39% of the policy value (such as to EFG through the multiple purchases made in 2014). (fn. 101 A fol. 208)

The structured products invested into were also not indicated, during the proceedings of this case, as themselves being traded in or dealt on a regulated market.

The portfolio also included material positions into high-risk investments where the high risk is reflected in the high rate of return - for example of 10% p.a. as featuring in the fact sheet sourced in respect of the RBC Online Large Caps Income. (fn. 102 <https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-10pa-Online-Large-Caps-Income-FACTSHEET.pdf>)

Portfolio not reflective of MPM's **own** Investment Guidelines

In its submissions, MPM produced a copy of the Investment Guidelines marked 'January 2013' and 'Mid-2014', which guidelines featured in the Application Form for Membership, and also Investment Guidelines marked '2015', '2016', 'Mid-2017', 'Dec-2017' and '2018' where, it is understood the latter respectively also formed part of the Scheme's documentation such as the Scheme Particulars issued by MPM.

*Despite that the Service Provider claimed that the investments made in respect of the Complainant were in line with the Investment Guidelines, **MPM has however not adequately proven such a claim.***

The investment portfolio in the case reviewed was ultimately solely invested in structured notes.

It is unclear how a portfolio comprising solely of structured notes truly satisfied certain conditions specified in MPM's own Investment Guidelines such as:

- (i) The requirement that the member's assets had to be 'predominantly invested in regulated markets'.***

This was a condition which prevailed in all of the presented MPM's Investment Guidelines since January 2013 till that of 2018. (fn. 103 Investment Guidelines attached to the affidavit of Stewart Davies)

The said requirement of being 'predominantly invested in regulated markets' meant, and should have been construed to mean, that investments had to be predominantly invested in listed instruments, that is financial instruments that were admitted to trading.

With reference to industry practice, the terminology of ‘regulated markets’ is referring to a regulated exchange venue (such as a stock exchange or other regulated exchange).

The term ‘regulated markets’ is in fact commonly referred to, defined and applied in various EU Directives relating to financial services, including diversification rules applicable on other regulated financial products. (fn. 104 Such as UCITS schemes – the Undertakings for Collective Investments in Transferable Securities (UCITS) Directive (Directive 2009/65/EC) as updated). The Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EC as repealed by Directive 2014/65/EU) also includes a definition as to what constitutes a ‘regulated market’) Hence, the interpretation of ‘regulated markets’ has to be seen in such context.

The reference to ‘predominantly invested in regulated markets’ cannot be interpreted as referring to the status of the issuers of the products and it is typically the product itself which has to be traded on the regulated market and not the issuer of the product.

Moreover, a look through approach, could not either be sensibly applied to the structured notes for the purposes of such condition taking into consideration the nature and particular features of the structured notes invested into.

No evidence was submitted that predominantly the portfolio, which comprised solely of structured notes, constituted listed structured notes in respect of the Complainant. On its part the Service Provider did not prove that the portfolio of the Complainant was ‘predominantly invested in regulated markets’ on an ongoing basis.

Furthermore, when investment in unlisted securities was itself limited to 10% of the Scheme assets, as stipulated throughout MPM’s own Investment Guidelines for 2013 to 2018, it is unclear how the Trustee and Scheme Administrator chose to allow higher exposures (as indicated in this section) to structured notes, a debt security, which are typically unlisted.

(ii) The requirement relating to the liquidity of the portfolio.

The Investment Guidelines of MPM marked January 2013 required no more than a ‘maximum of 40% of the fund (fn. 105 The reference to ‘fund’ is construed to refer to the member’s portfolio) in assets with liquidity of greater than 6 months’.

This requirement remained, in essence, also reflected in the Investment Guidelines marked 'Mid-2014' which read 'Has a maximum of 40% of the fund in assets with expected liquidity of greater than 6 months', as well as in the subsequent Investment Guidelines marked 2015 till 2018 which were updated by MPM and tightened further to read a 'maximum of 40% of the fund in assets with expected liquidity of greater than 3 months but not greater than 6 months'.

It is evident that the scope of such requirement was to ensure the liquidity of the portfolio as a whole by having the portfolio predominantly (that is, at least 60%) exposed to liquid assets which could be easily redeemed within a short period of time, that is 3-6 months (as reflected in the respective conditions) whilst limiting exposure to those assets which take longer to liquidate to no more than 40% of the portfolio.

It is noted that the structured notes invested into typically do not have a maturity of a few months but a longer term of one or more years (two years in the case of the fact sheet sourced/presented). It is unclear how the 40% maximum limit referred to above could have been satisfied in such circumstances where the portfolio constituted solely of structured notes which themselves had long investment terms.

It is further noted that the possibility of a secondary market existing for structured notes meant that a buyer had to be first found in the secondary market in case one wanted to redeem a holding into the structured note prior to its maturity.

The secondary market could not have provided an adequate level of comfort with respect to liquidity.

There are indeed various risks highlighted in relation to the secondary market as highlighted in the fact sheet sourced.

MPM should have been well aware about the risks associated with the secondary market as the lower values of the structured notes on the secondary market would have affected the Scheme's value when reporting on such in its own Annual Member Statements.

Hence, no sufficient comfort about liquidity could have possibly been derived with respect to the secondary market in case of unlisted structured notes.

The Arbiter is not accordingly convinced that the conditions relating to liquidity were being adequately adhered to, nor that the required prudence

was being exercised with respect to the liquidity of the portfolio when considering the above-mentioned aspects and when keeping into context that the portfolio of investments that was allowed to develop within the Retirement Scheme was solely invested into structured notes.

It is also to be noted that even if one had to look at the composition of the Complainant's portfolio purely from other aspects, there is still undisputable evidence of non-compliance with other requirements detailed in MPM's own Investment Guidelines.

This is particularly so with respect to the requirements applicable regarding the proper diversification, avoidance of excessive exposure and permitted maximum exposure to single issuers.

Table A below shows some examples of excessive single exposures allowed within the portfolio of the Complainant as emerging from the respective 'Table of Investments' forming part of the 'Investor Profile' produced by MPM as part of its submissions. (fn. 106 A fol. 208)

Table A – Examples of Excessive Exposure to a Single Issuer of Structured Notes ('SNs')

<i>Exposure to single issuer in % terms of the policy value at time of purchase</i>	<i>Issuer</i>	<i>Date of purchase</i>	<i>Description</i>
<i>39.96%</i>	<i>EFG</i>	<i>Sept 2014</i>	<i>2 SNs issued by EFG respectively constituted 19.98% each of the policy value at the time of purchase in Sept 2014.</i>

Over 31.55%	EFG	April 2015	2 SNs issued by EFG constituted 15.27% and 16.28% respectively of the policy value at the time of purchase in April 2015. This is apart from a previous exposure to another EFG product not indicated as having been sold by the time of these additional purchases - as per the Table of Investments.
29.76%	RBC	August 2016	1 SN issued by RBC constituted 29.76% of the policy value at the time of purchase in August 2016.

The fact that such high exposures to a single counterparty was allowed in the first place indicates, in itself, the lack of prudence and excessive exposure and risks to single counterparties that were allowed to be taken on a general level.

The Arbitrator notes that the Service Provider has along the years revised various times the investment restrictions specified in its own 'Investment Guidelines' with respect to structured products, both in regard to maximum exposures to structured products and maximum exposure to single issuers of such products. The exposure to structured notes and their issuers was indeed progressively and substantially reduced over the years in the said Investment Guidelines.

The specified maximum limit of 66% of the portfolio value in structured notes having underlying guarantees which featured in the 'Investment Guidelines' marked 2015 (fn. 107 MPM's Investment Guidelines '2015' as attached to the affidavit of Stewart Davies) was reduced to 40% of the portfolio's value in the 'Investment Guidelines' marked December 2017. (fn. 108 MPM's Investment Guidelines 'Dec-2017' as attached to the affidavit of Stewart Davies) and subsequently reduced further to 25% in the 'Investment Guidelines' for 2018. (fn. 109 MPM's Investment Guidelines '2018' as attached to the affidavit of Stewart Davies)

Similarly, the maximum exposure to single issuers for 'products with underlying guarantees', that is structured products as referred to by MPM itself, in the

'Investment Guidelines' marked Mid-2014 and 2015 specifically limited maximum exposure to the same issuer default risk to no more than (33.33%), one third of the portfolio. The maximum limit to such products was subsequently reduced to 25%, one quarter of the portfolio, in the 'Investment Guidelines' marked 2016 (fn. 110 MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies) and mid-2017 (fn. 111 MPM's Investment Guidelines 'Mid-2017' as attached to the affidavit of Stewart Davies) reduced further to 20% in the 'Investment Guidelines' marked December 2017 and subsequently to 12.5% in the 'Investment Guidelines' for 2018.

In the case reviewed, there were instances where the extent of exposure to single issuers was clearly higher than the limits mentioned above of 33.33% applicable in mid-2014/2015 and the limit of 25% applicable in 2016.

There is clearly no apparent reason, from a prudence point of view, justifying such high exposure to single issuers.

The Arbiter considers that the high exposure to structured products as well as to single issuers in the Complainant's portfolio jarred, and did not reflect to varying degrees, with one or more of MPM's own investment guidelines applicable at the time when the investments were made, most particularly with respect to the following guidelines: (fn. 112 Emphasis in the mentioned guidelines added by the Arbiter)

Investment Guidelines marked 'January 2013':

o Properly diversified in such a way as to avoid excessive exposure:

▪ Singular structured products should be avoided due to the counterparty risk but are acceptable as part of an overall portfolio.

Investment Guidelines marked 'Mid-2014':

- Where products with underlying guarantees are chosen, no more than one third of the overall portfolio to be subject to the same issuer default risk.***

<p><i>In addition, further consideration needs to be given to the following factors:</i></p> <ul style="list-style-type: none">• ...• Credit risk of underlying investment• ...• ...
<ul style="list-style-type: none">• <i>In addition to the above, the portfolio must be constructed in such a way as to avoid excessive exposure:</i>• ...• To any single credit risk
<p><u><i>Investment Guidelines marked '2015':</i></u></p>
<ul style="list-style-type: none">• <i>Where products with underlying guarantees are chosen, i.e. Structured Notes, these will be permitted up to a maximum of 66% of the portfolio's values,</i>
<p><i>with no more than one third of the portfolio to be subject to the same issuer default risk.</i></p>
<p><i>In addition, further consideration needs to be given to the following factors:</i></p> <ul style="list-style-type: none">• ...• Credit risk of underlying investment• ...• ...
<ul style="list-style-type: none">• <i>In addition to the above, the portfolio must be constructed in such a way as to avoid exposure:</i>• ...• To any single credit risk.
<p><u><i>Investment Guidelines marked '2016' & 'Mid-2017':</i></u></p>
<ul style="list-style-type: none">• <i>Where products with underlying Capital guarantees are chosen, i.e. Structured Notes, these will be permitted up to a maximum of 66% of the portfolio's values,</i>
<p><i>with no more than one quarter of the portfolio to be subject to the same issuer/guarantor default risk.</i></p>
<ul style="list-style-type: none">• <i>Where no such Capital guarantee exists, investment will be permitted up to a maximum of 50% of the portfolio's value.</i> <p>...</p>

<ul style="list-style-type: none">• <i>In addition, further consideration needs to be given to the following factors:</i>• ...• <i>Credit risk of underlying investment; ...</i>
<ul style="list-style-type: none">• <i>In addition to the above, the portfolio must be constructed in such a way as to avoid exposure:</i>• ...
<ul style="list-style-type: none">• <i>To any single credit risk.</i>

Besides the mentioned excessive exposure to single issuers, it is also noted that additional investments into structured notes were observed (fn. 113 'Table of Investments' in the 'Investor Profile' provided by MPM refers – a fol.208) to have been allowed to occur within the Complainant's portfolio, in excess of the limits allowed on the overall maximum exposure to such products.

MPM's Investment Guidelines of 2015 and 2016 specifically mentioned a maximum limit of 66% of the portfolio value to structured notes. In the case reviewed the Service Provider still continued to allow further investments into structured products at one or more instances when the said limits should have applied. The additional investments also occurred despite the portfolio being already exposed to structured notes more than the said percentage at the time when the additional purchase was being made.

For the reasons amply explained, the Arbiter has no comfort that MPM's role as RSA and Trustee in ensuring the Scheme's investments are managed in accordance with relevant legislation and regulatory requirements and in accordance with its own documentation, has been truly achieved by MPM generally, and at all times, in respect of the Complainant's investment portfolio.

Other observations & synopsis

The Service Provider did not help its case by not providing detailed information on the underlying investments as already stated in this decision. Although the Service Provider filed a Table of Investments it did not provide adequate information to explain the portfolio composition and justify its claim that the portfolio was diversified. It did not provide fact sheets in respect of the investments comprising the portfolio of the Complainant and it did not demonstrate the features and the risks attached to the investments.

Various aspects had to be taken into consideration by the Service Provider with respect to the portfolio composition. Such aspects include, but are not limited to:

- *the nature of the structured products being invested into 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 already detailed above;*
- *the potential rate of returns as indicative of the level of risk being taken;*
- *the level of risks ultimately exposed to in the respective product and in the overall portfolio composition; and*
- *not the least, the issuer/counterparty risk being taken.*

The extent of realised losses experienced on the capital of the Complainant's portfolio is in itself indicative of the failure in adherence with the applicable conditions on diversification and avoidance of excessive exposures. Otherwise, material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have not occurred.

Apart from the fact that no sensible rationale has emerged for limiting the composition of the pension portfolio solely to structured products, no adequate and sufficient comfort has either emerged that such composition reflected the prudence expected in the structuring and composition of a pension portfolio. Neither that the allocations were in the best interests of the Complainant despite his risk profile of Medium Risk.

In the circumstance where the portfolio of the Complainant was solely invested into structured products with a high level of exposure to single issuer/s, and for the reasons amply explained above, the Arbiter does not consider that there was proper diversification nor that the portfolio was at all times 'invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole' (fn. 114 SOC2.7.2(a) of Part B.2.7 of the Directives) and 'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'. (fn. 115 SOC2.7.2(b) of Part B.2.7 of the Directives)

Apart from the fact that the Arbiter does not have comfort that the portfolio was reflective of the conditions and investment limits outlined in the MFSA's Rules and MPM's own Investment Guidelines, it is also being pointed out that over and above the duty to observe specific maximum limits relating to diversification as may have been specified by rules, directives or guidelines applicable at the time, the

behaviour and judgement of the Retirement Scheme Administrator and Trustee of the Scheme is expected to, and should have gone beyond compliance with maximum percentages and was to, in practice, reflect the spirit and principles behind the regulatory framework and in practice promote the scope for which the Scheme was established.

The excessive exposure to structured products and their issuers nevertheless clearly departed from such principles and cannot ultimately be reasonably considered to satisfy and reflect in any way a suitable level of diversification nor a prudent approach.

This is even more so when considering 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. The provision of retirement benefits was indeed the Scheme’s sole purpose as reflected in the Scheme Particulars.

C. The Provision of information

Another aspect raised by the Complainant related to the lack of reporting and notifications about his investment transactions. With respect to reporting to the member of the Scheme, MPM mentioned and referred only to the Annual Member Statement in its submissions. The said annual statements issued by the Service Provider to the Complainant are however highly generic reports which only listed the underlying life assurance policy and included no details of the underlying investments, that is, the structured notes comprising the portfolio of investments.

Hence, the extent and type of information sent to the Complainant by MPM as a member of the Scheme in respect of his underlying investments is considered to have been lacking and insufficient.

SOC 9.3(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes of 1 January 2015 already provided that, in respect of member-directed schemes,

‘a record of all transactions (purchases and sales) occurring in the member’s account during the relevant reporting period should be provided by the Retirement Scheme Administrator to the Member at least once a year and upon request ...’.

It is noted that the Pension Rules for Personal Retirement Schemes under the RPA became applicable to MPM on 1 January 2016 and that, as per the MFSA’s communications presented by MPM, (fn. 116 MFSA’s letter dated 11 December 2017, attached to the Note of Submissions filed by MPM in 2019), Part B.9 of the said rules did not become effective until the revised rules issued in 2018.

Nevertheless, it is considered that even where such condition could have not strictly applied to the Service Provider from a regulatory point of view, the Service Provider as a Trustee, obliged by the TTA to act as a bonus paterfamilias and in the best interests of the members of the Scheme, should have felt it its duty to provide and report fully to members adequate information on the underlying investment transactions.

Moreover, prior to being subject to the regulatory regime under the RPA, the Service Provider was already subject to regulatory requirements relating to the provision of adequate information to members such as the following provisions under the SFA framework:

- *Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002 (fn. 117 condition 2.2 of the Certificate of Registration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives) respectively already provided that:*

'2.6.2 The Scheme Administrator shall act with due skill, care and diligence in the best interests of the Beneficiaries. Such action shall include:

...

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

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

...

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

There is no apparent and justified reason why the Service Provider did not report itself on key information such as the composition of the underlying investment portfolio, which it had in its hands as the trustee of the underlying life assurance policy held in respect of the Complainant.

The general principles of acting in the best interests of the member and those relating to the duties of trustee as already outlined in this decision (fn. 118 The section titled 'Responsibilities of the Service Provider') and to which MPM was subject to, should

have prevailed and should have guided the Service Provider in its actions to ensure that the Member was provided with an adequate account of the underlying investments within his portfolio.

The provision of details on the underlying investments could have ultimately enabled the member of the Scheme to highlight any transactions on which there were any issues.

D. Other - Structured Products Targeted for Professional Investors

*The fact sheet traced by the OAFS in relation to the RBC Online Large Caps Income note, **specifies that this structured note was indeed targeted for professional investors only. This is in clear conflict with the profile of the Complainant as a retail investor.***

The said fact sheet 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.

No evidence has emerged or been produced by the Service Provider that the products allowed to be invested into within the Retirement Scheme were retail products.

Indeed, in view of the reasons explained above, there is no comfort that the Service Provider has not allowed products targeted solely for professional investments not to feature in the Complainant's portfolio.

Causal link and Synopsis of main aspects

*The actual cause of the losses experienced by the Complainant **cannot** just be attributed to the under-performance of the investments as a result of general market and investment risks and/or the issues alleged against one of the structured note providers, as MPM has inter alia suggested in these proceedings. (fn. 119 For example, in the reference to litigation filed against Leonteq – A fol. 140)*

There is sufficient and convincing evidence of deficiencies on the part of MPM in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above which, at the very least, impinge on the diligence it was required and reasonably expected to be exercised in such roles.

It is also evidently clear that such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced. The actions and inactions that occurred, as explained in this decision, enabled such losses to

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

Had 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 in terms of its own Retirement Scheme documentation 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 the cases reviewed, 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 remarks

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 however clear duties to check and ensure that the portfolio composition recommended by the investment advisor provided a suitable level of diversification, and was inter alia in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme. The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

It is considered that, had there been a careful consideration of the contested structured products and extent of exposure to such products and their issuers, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in 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 his pension.

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

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly when it came to the dealings and aspects involving the appointed investment adviser; the oversight functions with respect to the Scheme and portfolio structure; as well as the reporting to the Complainant on the underlying portfolio. It is also considered that there are various instances which indicate non-compliance by the Service Provider with applicable requirements and obligations as amply explained above in this decision.

The Arbiter also considers that the Service Provider did not meet the 'reasonable and legitimate expectations' (fn. 120 Cap. 555, Article 19(3)(c)) of the Complainant who had placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

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

Cognisance needs to be taken however of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment 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 partially held responsible for the losses incurred.

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 on his pension portfolio.

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 net realised losses sustained by the Complainant on his investment portfolio.

The Arbiter notes that the latest valuation and list of transactions provided by the Service Provider in respect of the Complainant is not current. Besides, no detailed breakdown was provided regarding the status and performance of the respective investments within the disputed portfolio.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for the purpose of this decision in order for the performance on the whole investment portfolio to be taken into consideration.

The Service Provider is accordingly being directed to pay the Complainant compensation equivalent to 70% of the sum of the Net Realised Loss incurred within the whole portfolio of underlying investments constituted under Continental Wealth Management and allowed by the Service Provider.

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

- (i) For every such investment 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.

In case where any currency conversion/s is/are required for the purpose of finally netting any realised profits/losses within the portfolio which remain denominated in a different currency 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 this case for the purpose of providing clarity and enabling the calculation of the compensation formulated in this decision and avoid future unnecessary controversy.

- (iii) Investments which were constituted under Continental Wealth Management in relation to the Scheme and are still held and remain open within the current portfolio of underlying investments as at, or after, the date of this decision are not the subject of the compensation stipulated above. This is without prejudice to any legal remedies the Complainant might have in future with respect to such investments.***

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.

Because the Arbiter did not uphold certain allegations made in the complaint, 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 fit-8 ta' Novembru, 2021 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-segwent: (i) l-Arbitru applika u nterpreta ħażin il-liġi meta ddeċieda li s-socjetà appellanta naqset mid-dmirijiet tagħha fil-kwalità tagħha ta' *trustee* jew mod ieħor, iżda partikolmarment meta ddeċieda fost affarijiet oħra li (a) hija kienet naqset għaliex ippermettiet lil CWM taġixxi bħala *investment adviser* tal-appellat; (b) il-kompożizzjoni tal-portafoll tal-appellat ma kienx skont il-liġijiet, regoli u linji gwida applikabbli; u (ċ) hija ma kinitx ipprovdiet informazzjoni biżżejjed jew adegwata lill-appellat; (ii) ma kienx jeżisti l-ebda ness kawżali, u għalhekk l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet infondati; u (iii) l-Arbitru għamel apprezzament ħażin tal-fatti meta ddeċieda li hija kienet aġixxiet in *mala fede*.

7. L-appellat wieġeb fit-8 ta' April, 2022 fejn issottometta li d-deċiżjoni appellata hija ġusta, u għaldaqstant timmerita li tiġi kkonfermata għal dawk ir-raġunijiet li huwa jispjega fit-tweġiba tiegħu.

Konsiderazzjonijiet ta' din il-Qorti

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

9. L-ewwel aggravju. Meta tfisser l-ewwel aggravju tagħha, is-socjetà appellanta tikkontendi li l-Arbitru ddeċieda ħażin li hija kienet responsabbli għaliex naqset mill-obbligi tagħha meta ħalliet lil CWM taġixxi bħala *investment adviser*, hekk kif din kienet ġiet maħtura mill-appellat stess.

Tirrileva li l-Arbitru stess kien osserva li CWM giet magħżula mill-appellat innifsu u li s-soċjetà appellanta ma kellha l-ebda obbligu li tivverifika jekk din kinitx entità regolata jew jekk kinitx awtorizzata taħt sistema regolatorja sabiex tipprovi pariri dwar investimenti. Tgħid li l-obbligu tagħha sabiex tivverifika jekk CWM kellhiex awtorizzazzjoni regolatorja sabiex tagħti pariri ta' investment jew jekk kinitx entità regolatorja, daħal fis-seħħ fis-sena 2019 meta nbidlu r-regoli mill-MFSA, u għalhekk dawn l-obbligi mhumiex applikabbli għall-każ odjern. Madankollu l-Arbitru xorta waħda sostna li hija kienet naqset fl-obbligi tagħha. Tirrileva li l-Arbitru semma erba' aspetti fejn naqset is-soċjetà appellanta, iżda hija tinsisti li ma kien hemm l-ebda obbligu, u għaldaqstant ma seta' jkun hemm l-ebda nuqqas. Iżda l-Arbitru fittex minflok nuqqasijiet oħra sabiex jiġġustifika l-konklużjoni tiegħu li hija kienet naqset fl-obbligi tagħha. Is-soċjetà appellanta ssostni li l-punt ċentrali kien jekk hija kellhiex obbligu tivverifika jekk CWM kinitx liċenzjata u mhux jekk fil-fatt din kinitx liċenzjata, iżda l-Arbitru ddecieda li hija min-naħa tagħha ma kinitx ressqet l-ebda prova sabiex turi li CWM kienet liċenzjata biex tagħti pariri ta' investment, u tispjega kif din il-konklużjoni hija waħda difettuża f'zewġ aspetti. Hija tagħmel riferiment għal dak li xehed Stewart Davies fl-affidavit tiegħu, fejn dan stqarr li ma kien hemm l-ebda liġi jew regola dak iż-żmien li kienet titlob li s-soċjetà appellanta tagħmel eżerċizzju ta' *due diligence* jew li tassigura li CWM kienet liċenzjata, u dan fejn wara kollox kien proprju l-appellat li volontarjament ħatar lil CWM bħala l-konsulent finanzjarju tiegħu. Iżda fid-deċiżjoni appellata tiegħu, is-soċjetà appellanta tgħid li l-Arbitru mar lil hinn mill-punt kruċjali, u straħ fuq l-obbligu ġenerali ta' *trustee* li jaġixxi fl-añjar interess tal-benefiċjarji sabiex wasal għall-konklużjoni tiegħu. Tirrileva li l-Arbitru saħansitra għamel

interpretazzjoni tassew wiesgħa ta' dak li kienet tipprovdi l-formola tal-Applikazzjoni għal Sħubija. Filwaqt li s-socjetà appellanta tiddikjara li hija ma kinitx qegħda tikkontesta l-obbligu generali ta' *trustee* li jaġixxi f'kull każ fl-aħjar interess tal-benefiċjarji u bl-attenzjoni ta' *bonus paterfamilias*, hija tikkontendi li dan l-obbligu ta' *trustee* ma kienx iħaddan ukoll l-obbligu speċifiku li ssir verifika dwar jekk il-konsulent finanzjarju kienx liċenzjat jew le, u dan meta l-imsemmi konsulent finanzjarju kien magħżul mill-appellat innifsu. Tikkontendi li kieku l-obbligu kien diġà jeżisti qabel ma l-MFSA bidlet ir-regolamenti applikabbli fl-2019, ma kienx hemm proprju l-ħtieġa li ssir il-bidla. Dwar it-tieni parti ta' dan l-ewwel aggravju tagħha, is-socjetà appellanta tissottometti li d-deċiżjoni appellata hija msejsa fuq il-konklużjoni li kien hemm "*excessive exposure to structured products and to single issuers*", sabiex b'hekk il-portafoll ma kienx jirrifletti r-regoli tal-MFSA u l-*investment guidelines* tagħha stess, u ma kienx hemm diversifikazzjoni xierqa jew '*prudent approach*'. Għalhekk l-Arbitru ddeċieda li hija kienet naqset mill-obbligu tagħha li timxi bl-attenzjoni ta' *bonus paterfamilias* bħal ma kienet tenuta li tagħmel fil-kwalità tagħha ta' *trustee*. Tgħid li madankollu d-deċiżjoni appellata hija żbaljata u l-Arbitru hawn kien naqas ukoll milli jieħu in konsiderazzjoni l-profil ta' riskju tal-appellat u jevalwa r-riskju individwali skont il-kompożizzjoni tal-portafoll sħiħ. Filwaqt li tirrileva li hija ssottomettiet l-informazzjoni kollha dwar il-portafoll tal-appellat, anki l-profil ta' riskju tiegħu u l-istruzzjonijiet li kienu ngħataw lilha, tgħid li hija aġixxiet fil-parametri tal-linji gwida applikabbli. Is-socjetà appellanta tgħid li jidher li l-Arbitru kellu l-impressjoni li l-prodotti strutturati kellhom riskju oġġla minn dak li fil-fatt intrinsikament kellhom. Is-socjetà appellanta hawn tirrileva li l-MFSA dejjem kienet tippermetti investment f'dawn il-prodotti, kif kienu

jagħmlu wkoll il-linji gwida tagħha, u l-investment għalhekk qatt ma kien ipprojbit, iżda kellu jsir fil-parametri permissibbli. Tirrileva mbagħad li kull investment fih element ta' riskju inerenti, u dan filwaqt li taççetta li hija kienet obligata li tassigura li l-portafoll kien f'kull mument fil-parametri tal-profil ta' riskju tal-membru, u anki tal-linji gwida u tar-regoli applikabbli. Filwaqt li tiççita dak li jirrileva l-Arbitru fir-rigward ta' prodotti strutturati, is-soçjetà appellanta tgħid li kuntrarjament għal dak li jgħid l-Arbitru, il-profil kien juri li l-linji gwida applikabbli kienu ġew osservati meta sar in-negozju, inkluż l-espożizzjoni għall-imsemmija prodotti strutturati u għal emittenti singolari. Is-soçjetà appellanta tikkontendi b'riferiment għal *Table A* f'pagna 47 tad-deçizjoni appellata, li l-Arbitru jagħmel biss riferiment għall-profil li hija kienet ipprezentat fir-rigward tal-allegata espożizzjoni żejda għal prodotti strutturati. Tispjega b'riferiment għal dak li qal l-Arbitru, fejn osserva li matul is-snin hija kienet naqset il-limitu permissibbli ta' investment f'noti strutturati, li dawn dejjem baqgħu permissibbli fil-limiti identifikati, u li l-limiti, bħal fil-każ ta' kull prodott ieħor, dejjem kienu dinamici. Tgħid li anki fir-rigward tal-allegat *excessive exposure to single issuers*, l-Arbitru għalhekk kien żbaljat ukoll fattwalment. Minn hawn is-soçjetà appellanta tgħaddi sabiex tissottometti kif l-Arbitru applika ħażin ir-regoli tal-MFSA. Tikkontendi li mhuwiex çar x'ried ifisser biha l-kelma "jarred", u lanqas kif wasal għall-konklużjoni li "...*The high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio jarred with the regulatory requirements that applied to the Retirement Scheme at the time...*". Is-soçjetà appellanta tgħid li l-Arbitru applika ħażin l-*Standard Operational Conditions* 2.7.1 u 2.7.2 għaliex dawn

kienu applikabbli fir-rigward ta' skema fit-totalità tagħha u mhux fir-rigward ta' portafoll. Tirrileva li sussegwentement ir-regola kienet inbidlet, u sar applikabbli l-kunċett ta' diversifikazzjoni fil-livell tal-membri u mhux tal-iskema biss, iżda l-bidla saret wara 2017. Għalhekk peress li l-obbligu ma kienx jeżisti, l-Arbitru ma setax jgħid li hija kellha xi obbligu li tapplika l-prinċipji fil-livell tal-membri. Minn hawn is-soċjetà appellanta tgħaddi sabiex tagħmel is-sottomissjonijiet tagħha fejn hija kienet qegħda ssostni li l-Arbitru ddecieda hażin fir-rigward tal-linji gwida dwar l-investment tagħha stess. Filwaqt li tagħmel riferiment għall-affidavit ta' Stewart Davies fuq imsemmi, tikkontendi li l-linji gwida huma intiżi sabiex iservu ta' gwida, iżda fl-istess ħin iżommu livell ta' flessibilità li jirrikjedi kull każ partikolari, u għalhekk m'għandhomx jiġu applikati b'mod tassattiv. Tinsisti li m'hemmx *'one size fits all'* fl-applikazzjoni ta' dawn il-linji gwida. Min-naħa tagħha hija kienet ipprezentat il-profil tal-appellat, iżda xorta waħda l-Arbitru ddecieda li hija ma kinitx ressqet evidenza sabiex turi b'mod sodisfaċenti li l-investimenti saru skont il-linji gwida in kwistjoni. Tirrileva li r-regola ġenerali hija li min jallega għandu l-oneru tal-prova, u għalhekk hawnhekk l-appellat kellu l-obbligu li jsostni l-ilment tiegħu, u dan filwaqt li tikkontendi li hija fil-fatt kienet ġabet prova sodisfaċenti sabiex turi li l-linji gwida kienu ġew osservati. Is-soċjetà appellanta tgħid li l-Arbitru mbagħad żbalja wkoll meta skarta l-prova tagħha anki meta din ma kinitx ġiet ikkontestata mill-appellat. Tgħid li l-Arbitru għażel żewġ eżempji sabiex jispjega kif hija ma kinitx applikat il-linji gwida tagħha stess. Dwar l-ewwel wieħed, li kien l-investment kellu jsir l-aktar f'swieq regolati, hija tgħid li ma ngħatatx l-opportunità sabiex tispjega kif kienet applikat din il-linja gwida, u għalhekk illum tinstab rinfaccjata b'deciżjoni li qatt ma kellha l-opportunità li tikkontestaha.

Barra minn hekk hija ma kinitx taf minn fejn l-Arbitru kien sab l-informazzjoni, jew liema kienu l-*fact sheets* li huwa kkonsulta, u dan kien ipogġiha f'pożizzjoni fejn ma setgħetx tikkontesta l-pożizzjoni meħuda minnu. Is-soċjetà appellanta ssostni li din il-Qorti issa kienet ser issib ukoll li hija ma setgħetx tieħu pożizzjoni, għaliex ma kienx ċar jekk din l-informazzjoni li straħ fuqha l-Arbitru kinitx tagħmel parti mill-proċess. Dwar dak li kien iddikjara l-Arbitru, is-soċjetà appellanta tgħid li l-investimenti kollha, anki in-noti strutturati, kienu fil-fatt '*listed*' jew fuq l-elenku, u għalhekk setgħu jiġu negozjati fi swieq li jiffacilitaw u li jiġġestixxu n-negozju fi strumenti finanzjarji. Għalhekk, tkompli tgħid, il-konklużjoni tal-Arbitru li l-linja gwida ma kinitx giet osservata fil-kompożizzjoni tal-portafoll, kienet żbaljata. It-tieni eżempju meħud mill-linji gwida, kien jirrigwarda l-konklużjoni tal-Arbitru li huwa ma kienx konvint li l-kundizzjonijiet ta' likwidità kienu qed jiġu osservati adegwament. Tikkontendi li hija kellha tinstab responsabbli mhux fuq sempliċi nuqqas ta' konvinzjoni, u mingħajr ma tingħata raġuni għal tali konvinzjoni. Fil-mertu, is-soċjetà appellanta tgħid li l-Arbitru huwa żbaljat għaliex il-prodott kien '*realisable*' fl-intier tiegħu f'kull stadju, u s-suq għall-prodott kien pprovdut minn min kien ħareġ in-nota, għaliex dan kien jixtri lura dik in-nota. Ir-raba' punt li tqajjem is-soċjetà appellanta huwa li l-Arbitru naqas milli jikkonsidra l-profil ta' riskju tal-investitur. Tgħid li skont l-appellat, l-investimenti ma kienux skont il-profil ta' riskju tiegħu, u hija kienet ikkontestat din l-allegazzjoni. Filwaqt li għal darb'ohra tagħmel riferiment għall-affidavit ta' Stewart Davies, issostni li l-profil ta' riskju tal-appellat kien għaliha jagħmel parti ntegrali mill-konsiderazzjonijiet tagħha bħala amministratur, u li kieku dan ma kienx il-każ, ma kinitx tistaqsi għalih fil-formola tal-applikazzjoni tagħha stess. Dan filwaqt li tirrileva li x-xhieda ta'

Stewart Davies ma kinitx ġiet ikkontestata, u għalhekk l-Arbitru kellu jistrieħ fuqha. Għal dak li kien jirrigwarda d-deċiżjoni appellata fejn l-Arbitru ddikjara li ma kien hemm l-ebda raġuni ġustifikata għaliex is-soċjetà appellanta kienet naqset milli tagħti nformazzjoni dwar l-investimenti sottoskritti, tgħid li hawn l-Arbitru jirrepeti l-iżball tiegħu, meta filwaqt li jirrikonoxxi li hija ma kellha l-ebda obbligu speċifiku, huwa ddikjara li bħala *trustee* bl-obbligu li timxi bħala *bonus paterfamilias*, hija kienet tenuta li tipprovdi rendikont iktar dettaljat. B'hekk l-Arbitru kien saħansitra nferixxa obbligi fir-rigward tal-kwalità u l-estent ta' dik l-informazzjoni, u ħoloq incertezza dwar x'kienu l-obbligi tagħha taħt il-liġi, billi silet obbligi mill-obbligi ġenerali li jirregolaw it-*trustees*. Is-soċjetà appellanta ssostni li SOC 2.6.2 u 2.6.3 jirreferu għall-iskema fit-totalità tagħha, meta l-appellat ma kienx qed jilmenta li huwa ma ngħatax informazzjoni dwar l-iskema, li ma kienx ukoll il-punt li kien qed jiġi deċiż. Il-ħames punt li tirrileva s-soċjetà appellanta, huwa li l-Arbitru ddeċieda ħażin fir-rigward tal-prodotti strutturati li qal li kienu ntiżi għal investituri professjonali. Dan tgħid li qalu skont dak li kkonstata mill-*fact sheets* li huwa kien sab, u dan minflok ma ta każ ix-xhieda ta' Stewart Davies, u hawn hija tagħmel riferiment partikolari għal dak li qal dan ix-xhud dwar il-fatt li tittieħed in konsiderazzjoni l-portafoll sħiħ fir-rigward ta' struzzjonijiet għal negozju ta' investiment. Tispjega li għandha ssir evalwazzjoni tal-livell ta' riskju li jgħorr portafoll sħiħ meta jiġi kkonsidrat jekk il-profil ta' riskju ta' membru kienx qed jiġi sodisfatt. Izda tgħid li l-Arbitru ma mexiex b'dan il-mod.

It-tieni aqgravju. Is-soċjetà appellanta tgħid li hija tħossha aggravata wkoll għaliex l-Arbitru ddikjara li hija kienet parzjalment responsabbli għat-telf għal

70% tat-telf soffert mill-appellat. Tgħid li fl-ewwel lok l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet li hija digà fissret li kienu nfondati, iżda jekk imbagħad wieħed kellu jaċċetta li huwa kellu raġun, tgħid l-Arbitru 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-appellat. Hawnhekk is-soċjetà appellanta tikkontendi li ċertament ir-responsabbiltà tagħha qatt ma setgħet tkun akbar minn ta' min ta l-parir, jiġifieri CWM, jew tal-appellat li ħa d-deċiżjoni. Tagħmel ukoll riferiment għar-riskji naturali tas-suq, u tisħaqq li meħud dan kollu in konsiderazzjoni, ir-responsabbiltà tagħha kellha tkun inqas minn 70%.

It-tielet aggravju. Is-soċjetà appellanta tgħid li ma kien hemm l-ebda *mala fede* min-naħa tagħha fid-dewmien, meta wiegħbet l-ilment tal-appellat. Tgħid li hija tħossha aggravata fejn l-Arbitru mingħajr provi ddecieda li hija kienet hawnhekk aġixxiet *in mala fede*, u tispjega li l-implikazzjoni ta' din il-parti tad-deċiżjoni hija ferm iktar wiesgħa mill-kuntest li l-Arbitru għamel il-kummenti tiegħu. Tispjega li hija żzomm liċenzja mill-MFSA u għandha klijenti madwar id-dinja, u dan filwaqt li hemm deċiżjoni fid-dominju pubbliku, li tgħid li hija kienet aġixxiet *in mala fede*.

10. L-appellat jilqa' billi jikkontendi li għadarba huwa jikkwalifika bħala '*retail client*', jiġifieri huwa ma kienx investitur professjonali, kien mistenni aktar diligenza min-naħa tas-soċjetà appellanta. Jgħid li kif sewwa osserva l-Arbitru fid-deċiżjoni appellata, għalkemm is-soċjetà appellanta ma ndaħlitx fl-għażla tal-appellat tal-konsulent finanzjarju tiegħu, hija kellha ftehim ma' CWM fejn

kienet aċċettat li tintroduċi lil din tal-aħħar mal-membri bħala konsulent finanzjarju, u CWM saħansitra kienet imniżżla fl-applikazzjoni tas-soċjetà appellanta. B'hekk il-klijent seta' kien influwenzat biex jagħżel lil CWM bħala konsulent finanzjarju tiegħu, u jgħid li f'każ ta' *retail client* aktar kien il-każ li dan jistrieħ fuq ir-rakkomandazzjonijiet mogħtija mis-soċjetà appellanta. Izda bħala *t-trustee* u l-amministratur tal-iskema tal-irtirar, l-appellat jgħid li l-obbligi bażiċi tas-soċjetà appellanta kienu jirrikjedu wkoll diligenza u prudenza fil-ftehim li għamlet ma' CWM. Izda mill-applikazzjoni stess, kien jirriżulta li s-soċjetà appellanta kienet aċċettat u anki ħalliet informazzjoni ineżatta dwar il-konsulent finanzjarju. Jgħid li dwar dan il-punt anki l-Arbitru kien irrileva. L-appellat irrileva li hemm dubbji dwar x'kienu r-riċerki li saru dwar CWM u Trafalgar, għaliex għalkemm fl-applikazzjoni kien hemm miktub li CWM kienet entità regolata, hija ma ressqet l-ebda prova dwar dan. L-Arbitru dan kollu ikkonstatah ukoll fid-deċiżjoni appellata, kif ukoll sab illi fl-applikazzjoni ma kienx ċar dwar min fil-fatt kellu r-rwol ta' konsulent finanzjarju, u ma kien hemm l-ebda indikazzjoni jew spjegazzjoni dwar id-differenza bejn it-termini '*Professional Adviser*' u '*Investment Adviser*'. Hawnhekk l-appellat jiċċita is-subartikolu 1(2) tal-Att dwar *Trusts* u *Trustees* [Kap. 331], u anki l-para. (ċ) tas-subartikolu 43(6) u l-artikolu 21 tal-istess liġi. Huwa jagħmel ukoll riferiment għal pubblikazzjoni tal-MFSA, u jiċċita silta minnha, liema dokument jgħid li kien ġie ppubblikat fl-2017, izda kien jittratta prinċipji ġenerali tat-Kap. 331 u tal-Kodiċi Ċivili, li kienu diġà fis-seħħ qabel dik is-sena. L-appellat għalhekk jiċċita ukoll l-*Investment Guidelines* ta' Jannar 2013. Imbagħad l-appellat jagħmel riferiment għall-para. 3.1 tas-sezzjoni ntestata '*Terms and Conditions*' fil-formola tal-Applikazzjoni għas-Sħubija tal-Iskema, u jsostni li minkejja li s-

soċjetà appellanta kellha d-dettalji tat-transazzjonijiet kollha, u anki tal-portafoll sħiħ, hija naqset fl-obbligu ta' rapportaġġ, u ma ressqet l-ebda prova dwar dan. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru dwar il-kompożizzjoni tal-portafoll tagħha, l-appellat jikkontendi li kien irriżulta tassew ċar li kien hemm numru ta' riskji assoċjati mal-kapital investit f'dan it-tip ta' prodotti, u kien hemm saħnsitra noti li tali prodotti kienu riżervati għal investituri professjonali biss u li seta' jintilef il-kapital. Għal dak li jirrigwarda l-argument tas-soċjetà appellanta dwar l-*Standard Operational Conditions* 2.7.1 u 2.7.2, l-appellat jibda billi jiċċita l-istess, u anki dak li qal l-Arbitru fir-rigward, filwaqt li jissottometti li s-soċjetà appellanta ma kinitx ħielsa milli tosserva l-obbligi tagħha fuq livell individwali, għaliex l-iskema kienet tirrifletti l-investimenti u l-portafolli individwali. Dwar l-argument tas-soċjetà appellanta li l-Arbitru kien applika u ddecieda ħażin fir-rigward tal-linji gwida magħmulin minnha stess, l-appellat jirrileva li huwa diffiċli li wieħed jikkontendi għas-soċjetà appellanta, li targumenta li dawn ma kellhomx japplikaw b'mod rigoruż u li hija setgħet tagħzel li ma ssegwihomx. Filwaqt li jagħmel riferiment għal dak li kienu jipprovdu dwar il-massimu ta' assi li setgħu jinżammu b'likwidita' ta' iktar minn 6 xhur jew inqas, l-appellat jirrileva li mill-proċeduri quddiem l-Arbitru, kien irriżulta li l-investimenti f'noti strutturati kellhom tipikament maturità jew terminu ta' investiment ta' madwar sena jew sentejn, jew saħnsitra ta' ħames snin. L-appellat jirrileva li kif gie osservat mill-Arbitru, kien hemm ukoll f'ċerti każi l-possibilità ta' suq sekondarju għal dawn in-noti strutturati, iżda dan ma setax jipprovdi livell ta' kumdità adegwata dwar il-likwidità. L-appellat ikompli fuq il-kwistjoni li l-prodotti strutturati kienu mmirati lejn investituri professjonali, u jiċċita dak li qal l-Arbitru dwar l-investigazzjoni li saret għall-

verifika ta' dan il-punt u l-konkluzjoni tiegħu. Jissottometti dwar l-ilment tas-soċjetà appellanta fir-rigward tal-investigazzjoni li kien wettaq l-Arbitru, li dan kellu kull dritt li jagħmel riċerka li qies bżonnjuża, u hawn huwa jagħmel riferiment għall-artikolu 25 tal-Kap. 555. Dwar l-argument tas-soċjetà appellanta, għandu jiġi evalwat l-livell ta' riskju li jgħorr miegħu il-portafoll sħiħ, sabiex wieħed jikkonstata jekk il-profil ta' riskju tal-membru ġiex sodisfatt, jikkontendi li madankollu ma jista' qatt isir investment f'prodotti li huma limitati għal investituri professjonisti meta l-investitur ikun *retail client* u mhux professjonist. Għal dak li jirrigwarda l-allegat ness kawżali, l-appellat jgħid li għall-kuntrarju l-Arbitru ma naqasx milli jagħraf l-imsemmi ness kawżali u n-nuqqasijiet tas-soċjetà appellanta fil-konfront tat-telf soffert minnu. L-appellat jiċċita dawk il-partijiet mid-deċiżjoni appellata fejn l-Arbitru ttratta proprju din il-kwistjoni, u anki fejn iddikjara kif għandu jiġi kkalkulat it-telf. Fir-rigward tal-kummenti tas-soċjetà appellanta dwar il-*mala fede* li l-Arbitru assoċja man-nuqqas tagħha li twieġeb għall-ilment tal-appellat, dan tal-aħħar jirriveva li l-Arbitru kien straħ fuq il-provi fattwali u fi kwalunkwe każ is-soċjetà appellanta ma ressqet l-ebda aggravju dwar id-deċiżjoni tiegħu dwar il-preskrizzjoni. Jagħlaq l-aħħar kummenti tiegħu, billi jsostni li l-aggravji quddiem din il-Qorti għandhom ikunu limitati għal punti ta' liġi u mhux jittrattaw kummenti li setgħu saru mill-Arbitru fil-konsiderazzjonijiet tiegħu.

11. Il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. Tibda billi tikkunsidra l-aħħar aggravju tas-soċjetà appellanta, li huwa fir-rigward ta' dik il-parti tad-deċiżjoni appellata fejn l-Arbitru esprima l-fehma tiegħu li hija kienet uriet *mala fede* fid-dewmien tagħha meta wiegħbet l-ilment tal-appellat.

Il-Qorti tgħid li stante li din kienet biss fehma kif espressa mill-Arbitru filwaqt li huwa kien qed jittratta l-eċċezzjoni tagħha ta' preskrizzjoni, huwa ma ddecieda xejn fir-rigward tagħha. Għalhekk ma tikkunsidrax li l-kumment tal-Arbitru jista' jikkostitwixxi bażi ta' aggravju li għandu jiġi deċiż minn din il-Qorti. Għaldaqstant mhijiex ser tikkunsidra ulterjorment dan l-aħħar aggravju tagħha, u ser tgħaddi sabiex tikkunsidra l-kumplement tad-deċiżjoni appellata. L-Arbitru jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeciedi l-ilment skont dak li fil-fehma tiegħu huwa 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-appellat mill-Applikazzjoni għas-Sħubija, li kopja tagħha tinstab esebita fl-atti², innota li ma kienx ġie ndikat jew ippruvat li l-appellat huwa investitur professjonali, u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti dawn kollha ssib li huma korretti u anki f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

12. 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'domicilju 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-appellat miżmum fl-Iskema, kienu ġew utilizzati għax-xiri ta' polza ta' assikurazzjoni fuq il-ħajja maħruġa minn

² Ara a fol. 73 et seq.

Skandia/OMI, u l-*premium* ta' dik il-polza mbagħad gie nvestit f'portafoll ta' diversi prodotti, bosta minnhom noti strutturati, kif kien jirriżulta mill-*Investor Profile*, u dan taħt id-direzzjoni tal-konsulent finanzjarju tiegħu kif aċċettat mis-soċjetà appellanta. L-Arbitru spjega li mill-istess *Investor Profile* ipprezentat mis-soċjetà appellanta stess, kien jirriżulta li fis-16 ta' Settembru, 2020 kien hemm ġà telf ta' GBP69,801, u dan mingħajr ma ttieħdu in konsiderazzjoni d-drittijiet imħallsa, u għalhekk jgħid li t-telf soffert mill-appellat kien fil-fatt ikbar. Irrileva li hawn is-soċjetà appellanta ma kinitx spjegat ukoll jekk it-telf kienx wieħed attwali.

13. L-Arbitru kkonsidra li CWM kienet il-konsulent finanzjarju kif maħtura mill-appellat, sabiex tagħtih parir dwar l-assi miżmuma fl-Iskema. Irrileva li s-soċjetà appellanta fl-avviż li bagħtet lill-appellat f'Ottubru 2017, kienet iddeskriviet lil CWM bħala '*an authorised representative/agent of Trafalgar International GMBH*³, u dan filwaqt li għamel ukoll riferiment għar-risposta tal-imsemmija soċjetà appellanta u għas-sottomissjonijiet tagħha, fejn terġa' tirrileva dan il-fatt. L-Arbitru rrileva wkoll li s-soċjetà appellanta kienet issottomettiet li CWM kienet aġent ta' Trafalgar, u kienet qegħda topera taħt il-liċenzji ta' din tal-aħħar, li kienet liċenzjata u regolata permezz ta' Deutsche Industrie Handelskammer (IHK) ġewwa l-Ġermanja.

14. L-Arbitru osserva li l-investimenti magħmulin taħt il-polza ta' assikurazzjoni tal-ħajja tal-appellat, kienu ndikati fl-elenku tat-transazzjonijiet esebit mis-soċjetà appellanta stess. Qal li mill-istess elenku kien jirriżulta li l-

³ A fol. 130.

investment kien sar f'tmien noti strutturati, u li ma kien hemm l-ebda prodott għajrhom fil-portafoll tal-appellat.

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, 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-*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 gie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar u għar-regoli magħmula taħthom, li għalihom giet sogġetta s-soċjetà appellanta mal-ħruġ taċ-Ċertifikat ta' Registrazzjoni tal-1 ta' Jannar, 2016 taħt il-Kap. 514. L-Arbitru sostna li wieħed mill-obbligi ewlenija tagħha bħala amministratur tal-Iskema skont il-Kap. 450 u l-Kap. 514, kien proprju li tagixxi fl-aħjar interessi tal-Iskema.

16. Il-Qorti hawn iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta hawnhekk kellha obbligi daqstant ċari li timxi fl-aħjar interess tal-Iskema, kemm fiż-żmien fejn saret l-assenjazzjoni tal-polza lis-soċjetà appellanta fis-sena 2014, meta kienu applikabbli d-dispożizzjonijiet tal-Kap. 450, u anki sussegwentement meta gie fis-seħħ l-Att dwar Pensjonijiet għall-Irtirar fis-sena 2015, u l-appellat kien għadu membru tal-Iskema u garrab 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 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 diligenza fl-aħjar interessi tal-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li digà minn dan li ngħad, jirriżulta li d-difiza tagħha li hija qatt ma setgħet tinzamm responsabbli stante li ma kellha l-ebda obbligu fil-konfront tal-appellat, ma tistax tirnexxi.

18. Iżda l-Arbitru ma waqafx hawn, għaliex ikkonsidra wkoll il-kariga tagħha bħala *trustee*, u rrileva li hawnhekk kienu applikabbli l-provvedimenti tal-Att dwar *Trusts* u *Trustees* (Kap. 331), li l-Qorti tirrileva li kien gie fis-seħħ fit-30 ta' Ġunju, 1989, kif sussegwentement emendat, u l-Arbitru għamel riferiment partikolari għas-subartikolu 21(1) tiegħu, u l-para. (a) tas-subartikolu 21(2). Hawnhekk il-Qorti tgħid li għal darb'oħra d-difiza tas-soċjetà appellanta ma ssib l-ebda sostenn. L-Arbitru rrileva li fil-kariga tagħha ta' *trustee*, is-soċjetà appellanta kienet tenuta li tamministra l-Iskema u l-assi tagħha skont diligenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa ċċita l-pubblikazzjoni An Introduction to Maltese Financial Services Law⁴, u anki silta mill-pubblikazzjoni riċenti tal-MFSA tas-sena 2017, fejn din ittrattat prinċipji digà stabbiliti qabel dik id-data permezz tal-Att dwar *Trusts* u *Trustees* u anki permezz tal-Kodiċi Ċivili.

19. L-Arbitru mbagħad aċċenna fuq obbligu ieħor tas-soċjetà appellanta, li huwa qies li kien importanti u rilevanti għall-każ in kwistjoni, dak ta' sorveljanza u monitoraġġ tal-Iskema, inkluż l-investimenti magħmula. Huwa għamel

⁴ Ed. Max Ganado.

riferiment għall-affidavit ta' Stewart Davies⁵, fejn dan aċċetta li s-socjetà appellanta fl-aħħar mill-aħħar kellha s-setgħa li tiddeċiedi jekk l-investment għandux isir iżda meta kkonsidrat il-portafoll sħiħ tal-investment kien jassigura livell adegwat ta' diversifikazzjoni u kien jirrifletti l-attitudni ta' riskju tal-membri u tal-linji gwidi ta' dak iż-żmien. Dan kollu kif imfisser, tgħid il-Qorti, jagħmel ċar li s-socjetà 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 li tħares il-portafoll tal-membri individwali tal-Iskema, u taġixxi skont il-każ. L-Arbitru osserva li x-xhieda ta' Stewart Davies kienet saħansitra riflessa fil-Formola tal-Applikazzjoni għal Sħubija ffirmata mill-appellat.⁶ Qal li l-MFSA kienet tqis ukoll 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 għaž-żmien li fih sar l-investment in kwistjoni. Għamel ukoll riferiment għall-*Investment Guidelines* magħmulin mis-socjetà appellanta fis-sena 2013, u għal darb'oħra għal dak li kien jipprovdi l-para. 3.1 tas-sezzjoni ntestata '*Terms and Conditions*' 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-socjetà appellanta. Huwa aċċetta li kien inekwivoku li s-socjetà appellanta ma kinitx iprovdiet 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-socjetà appellanta bħala

⁵ A fol. 118 para. 17, fol. 121 para. 31 u fol. 122 para. 33.

⁶ A fol. 54.

amministratur ta' Skema għall-Irtirar u t-*trustee*, kellha ċerti obbligi mportanti li setgħu jkollhom rilevanza sostanzjali fuq l-operat u l-attivitajiet tal-Iskema, u li jaffettwaw direttament jew indirettament l-andament tagħha. Kien għalhekk li kellu jiġi nvestigat jekk is-soċjetà appellanta naqsitx mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura safejn dan kellu effett fuq l-andament tal-Iskema u r-rizultanti telf tal-appellat.

21. L-Arbitru osserva li l-appellat kien għażel huwa stess li jaħtar lil CWM sabiex din tipprovdi b'pariri dwar l-investimenti formanti parti mill-portafoll tiegħu fl-Iskema, u min-naħa tagħha s-soċjetà appellanta aċċettat u/jew ħalliet il-konsulent joffri l-parir tiegħu lill-appellat. L-Arbitru osserva li s-soċjetà appellanta saħansitra kellha *introducer agreement* ma' CWM. L-ewwel punt li rrileva hawn l-Arbitru, huwa li s-soċjetà appellanta ppermettiet li l-Formola ta' Applikazzjoni għal Sħubija tħaddan informazzjoni mhux sħiħa, u preċiża fir-rigward tal-konsulent finanzjarju, u spjega dawn x'kienu. Jirrileva li fir-rwol tagħha ta' *trustee* u *bonus paterfamilias*, hija kienet tenuta tigbed l-attenzjoni tal-appellat għal dawn in-nuqqasijiet, u qal li fl-aħħar mill-aħħar hija kellha l-prerogattiva li taċċetta jew le l-applikazzjoni, lill-konsulent finanzjarju u anki l-persuna ma' min kienet ser tinnegozja. Osserva li l-ebda prova ma tressqet li kienet turi li CWM kienet fil-fatt regolata. It-tieni punt li qajjem l-Arbitru jirrigwarda n-nuqqas ta' kjarizza fil-Formola ta' Sħubija fir-rigward tal-kapaċità li biha kienet qegħda taġixxi CWM. Imbagħad it-tielet punt tiegħu jirrigwarda l-kwistjoni li ma kienx hemm distinzjoni ċara bejn CWM, Inter-Alliance u Trafalgar, u ma kienx jirrizulta b'mod inekwivoku jekk CWM kinitx qegħda taġixxi bħala aġent in rappreżentanza ta' ditta oħra, meta dan kellu jkun rifless

b'mod ċar fid-dokumentazzjoni kollha. Fir-raba' punt tiegħu, l-Arbitru stqarr li ma rriżultat l-ebda evidenza li kienet turi jekk CWM kienet entità regolata. Iżda qal li min-naħa tagħha s-soċjetà appellanta ma pproduċiet l-ebda evidenza dwar dak allegat minnha fir-rigward tal-awtorizzazzjoni ta' CWM.

22. Fir-rigward tal-argument miġjub mis-soċjetà appellanta li bejn 2013 u 2015 taħt il-qafas regolatorju tal-Kap. 450, u sakemm ġew implimentati l-*Pension Rules for Personal Retirement Schemes* taħt il-Kap. 514, hija ma kellha l-ebda obbligu li teżiġi l-ħatra ta' konsulent regolat, l-Arbitru sostna li xorta waħda kien mistenni li l-amministratur u t-*trustee* jeżegwixxu l-obbligu tagħhom ta' kura u diligenza professjonali bħal fil-każ ta' *bonus paterfamilias*. L-Arbitru hawnhekk sostna li l-ħatra ta' entità li ma kinitx regolata sabiex isservi ta' konsulent, kienet tfisser li l-appellata kienet tgawdi minn inqas protezzjoni, u s-soċjetà appellanta kienet tenuta tkun konsapevoli ta' dan il-fatt, u li tassigura li l-appellat ikollu l-informazzjoni korretta u adegwata dwar il-konsulent. Qal li mhux biss is-soċjetà appellanta naqset milli tindirizza l-kwistjoni li l-konsulent ma kienx regolat, iżda wkoll hija bl-ebda mod ma qajmet dubju dwar informazzjoni importanti fir-rigward ta' diversi aspetti oħra konċernanti CWM. L-Arbitru rrileva li l-ftehim eżistenti bejn is-soċjetà appellanta u CWM, li diġà sar riferiment għalih aktar 'il fuq f'din is-sentenza, qajjem potenzjal ta' kunflitt ta' interess fejn l-entità li kienet soġġetta għas-sorveljanza partikolari tas-soċjetà appellanta, fl-istess ħin kienet qegħda tgħaddilha n-negozju. Il-Qorti ma tistax ma tikkondividiex din il-fehma, u tikkonsidra ċertament minn dak kollu li s'issa ġie rilevat u kkonsidrat, li l-kariga tas-soċjetà appellanta ma setgħetx tkun dik

ta' amministrazzjoni sempliċi u bażika, tenut kont li hija saħansitra kienet ukoll *trustee* tal-Iskema.

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

24. Dwar it-tieni punt sollevat mis-soċjetà appellanta fl-ewwel aggravju tagħha, l-Arbitru osserva li l-investimenti li kienu sottoskritti l-polza ta' assikurazzjoni taħt l-Iskema, kienu magħmula biss minn noti strutturati. Irrileva li fil-*fact sheets* ippreżentati mill-appellat fir-rigward tan-noti strutturati in kwistjoni, kien hemm indikati għadd ta' riskji fir-rigward tal-kapital investit f'dawn il-prodotti.

25. 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 r-riskju tal-likwidità, u twissijiet li n-noti ma kellhomx il-kapital protett. Kollox tgħid il-Qorti, ferm indikattiv tal-fatt li l-investment fin-noti strutturati ma kienx wieħed kompatibbli mal-informazzjoni dwar l-appellat. 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' percentwali. Għalhekk, qal l-Arbitru, kien hemm

konegwenzi materjali jekk il-valur ta' wieħed biss mill-assi kollha tan-noti strutturati kien jinżel mill-minimu ndikat.

26. L-Arbitru mbagħad osserva wkoll li l-portafoll tal-appellant kien ġie espost b'mod eċċessiv għal prodotti strutturati, u dan għal żmien twil, u kif kien jirrizulta mit-*Table of Investments*, li kienet tagħmel parti mill-*Investor Profile* li esebiet is-soċjetà appellanta. Osserva wkoll li kien hemm espożizzjoni għolja għar-riskju għaliex kienu n-xtraw prodotti permezz ta' transazzjoni waħda, jew permezz ta' diversi transazzjonijiet mingħand emittent wieħed, meta fil-fehma tiegħu kellhom jiġu applikati l-limiti massimi kif imfissra fir-regoli tal-MFSA u fl-*Investment Guidelines* tas-soċjetà appellanta stess.

27. L-Arbitru mbagħad għadda sabiex indirizza l-insistenza tas-soċjetà appellanta li l-investimenti kellhom jiġu kkunsidrati fil-kuntest tal-portafoll kollu, u ddikjara li huwa kien ħa in konsiderazzjoni l-portafoll sħiħ sa minn meta dan kien ġie kostitwit, u kif dan inbidel minn żmien għal żmien. Ikkunsidra li l-prinċipji iżda anki r-restrizzjonijiet fuq l-investment li kienu jorbtu l-iskema, kienu applikabbli fir-rigward ta' kull membru tagħha, għaliex hawn wieħed ma kienx qed jitkellem dwar ċirkostanzi fejn il-membri kollha kellhom l-istess portafoll ta' investimenti. L-Arbitru kompli billi qies dak li kienet qegħda tinsisti fuqu anki s-soċjetà appellanta, jiġifieri li l-*Investment Guidelines* tagħha kienu ntiżi bħala sempliċi gwida, u li ma kellhomx jiġu applikati b'mod strett li b'hekk l-għan tagħhom jintilef. L-Arbitru jsostni li fl-ewwel lok kien kontradittorju li jingħad li kien fl-aħjar interessi tal-membri li l-linji gwidi ma jiġux segwiti, u dan filwaqt li fit-tieni lok is-soċjetà appellanta ma wrietx f'liema ċirkostanzi dan kellu jkun il-każ. Għalhekk l-*Investment Guidelines*, qal l-Arbitru, kienu jorbtuha u

konegwentement kellhom jiġu segwiti, iżda jekk wieħed kellu jaċċetta l-argument tas-soċjetà appellanta li dawn kienu biss linji gwida u mhux regoli stretti, ma kienx mistenni li wieħed imur wisq lil hinn mil-limiti u l-massimi ta' espożizzjoni hemm imniżżla.

28. L-Arbitru minn hawn għadda sabiex iddikjara li l-espożizzjoni qawwija għal prodotti strutturati u għal emittent singolari li tħalliet issir mis-soċjetà appellanta, ma kinitx tirrispetta r-rekwiżiti regolatorji applikabbli għall-Iskema dak iż-żmien, u huwa jagħmel riferiment partikolari għal SOC 2.7.1 u 2.7.2 li kienu applikabbli sa mill-bidunett meta nholqot l-Iskema fis-sena 2011, sad-data li din ġiet reġistrata fl-1 ta' Jannar, 2016 taħt il-Kap. 514. Qal li s-soċjetà appellanta stess kienet għamlet aċċenn dwar l-applikabbiltà u r-rilevanza ta' dawn il-kundizzjonijiet għall-każ odjern. L-Arbitru ċċita partijiet minn dawn id-Direttivi, u rrileva li minkejja li SOC 2.7.2 kien jeżiġi ċertu livell, is-soċjetà appellanta kienet ippermettiet li l-portafoll tal-appellat xi kultant ikun magħmul biss jew fil-parti l-kbira tiegħu minn prodotti strutturati. Barra minn hekk l-espożizzjoni għal emittent waħdieni kien f'xi drabi iktar mill-massimu ta' 30% stabbilit mir-regoli għal investimenti aktar siguri b'hal depożiti. L-Arbitru osserva li ma kienx ġie ndikat matul il-proċeduri jekk il-prodotti strutturati kienux ġew negozjati f'suq regolat, u jekk ukoll ir-rati għolja ta' imgħax kienux indikazzjoni tar-riskju għoli tal-prodotti. Is-soċjetà appellanta tittenta targumenta quddiem din il-Qorti li r-regoli suriferiti jolqtu biss l-Iskema, iżda mhux il-portafoll tal-membri ndividwali, imma l-Qorti mhijiex tal-istess fehma, u għaldaqstant mhijiex qegħda tilqa' dan l-argument. Tgħid li huwa daqstant ċar mid-diċitura ta' dawn ir-regoli, li l-intendiment huwa li jiġu regolati l-investimenti kollha li

jaqgħu fl-iskema, u dan mingħajr distinzjoni bejn l-iskema nnifisha u l-portafoll ta' kull membru. Il-Qorti żżid tgħid li l-argument tas-soċjetà appellanta lanqas jista' jitqies li huwa wieħed loġiku, meħud in konsiderazzjoni l-fatt li jekk ifalli portafoll ta' membru, dan jista' ċertament ikollu effett fuq il-kumpliment tal-iskema.

29. L-Arbitru mbagħad jaqbad, iżda din id-darba iktar fil-fond, il-kwistjoni li l-portafoll saħansitra ma kienx jirrifletti l-*Investment Guidelines* tas-soċjetà appellanta. Filwaqt li ħa konjizzjoni tal-imsemmija linji gwida għas-snin 2013 sa l-2018, li s-soċjetà appellanta annettiet mas-sottomissjonijiet tagħha, irrileva li hija ma kienx irnexxielha turi b'mod adegwat li dawn kienu ġew applikati fir-rigward tal-investimenti in kwistjoni. Qal li l-portafoll tal-appellat kien kompost biss min-noti strutturati.

30. Wara dawn l-osservazzjonijiet, l-Arbitru għadda sabiex ittratta żewġ istanzi fejn il-kompożizzjoni tal-portafoll ma kinitx tirispetta l-linji gwida. L-ewwel rekwiżit li kkonsidra, huwa li l-assi kellhom jiġu investiti l-aktar fi swieq regolati. Wara li ta t-tifsira tal-frazi "*predominantly invested in regulated markets*" kif din kienet tidher fil-linji gwida, sostna li ma giet sottomessa l-ebda evidenza li kienet turi li l-portafoll kien magħmul kollu kemm hu jew l-aktar min-noti strukturati elenkati. Is-soċjetà appellanta hawnhekk issostni li l-Arbitru ikkonsidra li l-kliem '*regulated markets*' għandhom ikollhom l-istess tifsira bħall-kliem '*listed instruments*', iżda l-Qorti ma tikkonsidrax li dan huwa minnu, u dak li qegħda tittenta tagħmel is-soċjetà appellanta, huwa li tilgħab bil-kliem. Huwa daqstant ċar mid-deċiżjoni appellata, li l-Arbitru qies li suq regolat f'dan il-każ

kien *'regulated exchange venue'* fejn il-prodott jista' jiġi negozjat, u mhux l-emittent tal-imsemmi prodott.

31. L-Arbitru korrettament irrimarka li ma kienx ċar kif fid-dawl tal-massimu ta' 10% tal-assi tal-Iskema impost mil-linji gwida għas-snin bejn 2013 sa 2018 fir-rigward ta' investiment f'titoli mhux elenkati, it-*trustee* u l-amministratur tal-Iskema ippermetta investiment b'espożizzjoni aktar għolja f'noti strutturati li kienu garanzija ta' debitu u li s-soltu ma kienux elenkati. It-tieni rekwizit li jittratta l-Arbitru huwa l-likwidità tal-portafoll. Wara li osserva li l-linji gwida ta' Jannar 2013 u għal nofs is-sena 2014 kienu jirrikjedu li mhux aktar minn 40% tal-fond jew tal-portafoll tal-membri kellu jiġi nvestit f'assi li kellhom likwidità ta' aktar minn 6 xhur, osserva wkoll li aktar tard fis-snin 2015 sa 2018, it-terminu tnaqqas għal bejn tlieta u sitt xhur. Irrileva li kien jirriżulta li n-noti strutturati fejn sar l-investiment tal-portafoll kellhom terminu twil ta' maturità ta' bejn sena u sentejn, u xi drabi oħra sa ħames snin, kif muri fil-*fact sheets* relattivi. Osserva li l-possibilità ta' suq sekondarju fir-rigward ta' noti strutturati, ma kienx jiggarantixxi assikurazzjoni adegwata ta' likwidata, u aċċenna fuq il-valuri aktar baxxi li dan is-suq kien joffri, tant li l-istess valuri kellhom effett fuq l-Iskema sħiħa kif irriżulta mir-rendikonti annwali maħruġa lill-membri mis-soċjetà appellanta.

32. L-Arbitru qal li kien hemm diversi aspetti oħra fejn il-kompożizzjoni tal-portafoll ma kinitx tirrispetta r-rekwiziti l-oħra mfissra fil-linji gwida tas-soċjetà appellanta stess, u fosthom kien hemm id-diversifikazzjoni xierqa, it-twarrib ta' espożizzjoni eċċessiva, u l-espożizzjoni massima permessa għal emittenti singolari, u għadda sabiex ta diversi eżempji ta' dan. Irrileva li matul is-snin, is-

soċjetà appellanta kienet saħansitra emendat il-linji gwida tagħha sabiex naqqset l-espożizzjoni għal noti strutturati u l-emittenti tagħhom, iżda osserva li dawn ma ġewx segwiti fil-każ tal-portafoll tal-appellat, u dan mingħajr raġuni li setgħet tiġġustifika espożizzjoni tant għolja għal emittenti singolari. L-Arbitru hawnhekk silet ir-rekwiziti partikolari fil-linji gwida li kienet f'argħet is-soċjetà appellanta matul is-snin, bil-għan li tiġi evitata l-espożizzjoni eċċessiva tal-investimenti. Innota wkoll li kien sar investiment mill-portafoll tal-appellat f'noti strutturati li kien jeċċedi l-massimu tal-espożizzjoni għal dawn il-prodotti.

33. Il-Qorti hawnhekk ser tikkonsidra dak li ġie rilevat mis-soċjetà appellanta, li l-Arbitru ddecieda li jagħmel minn jeddu investigazzjoni dwar l-investimenti billi jissorsja *l-fact sheets* tagħhom. Min-naħa tiegħu l-Arbitru fid-deċiżjoni appellata għamel osservazzjoni aħħarija li s-soċjetà appellanta saħansitra dgħajfet id-difiża tagħha meta naqset milli tipprezenta informazzjoni dettaljata dwar l-investimenti sottoskritti. Il-Qorti ikkostatat ukoll 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 f'halliet 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 meta ddecieda li jfittex għal aktar informazzjoni, u dan skont kif ċirkoskritt mill-artikolu 25 tal-Kap. 555, u mingħajr dubju sabiex jassigura li huwa kien qed jiddeciedi l-ilment fil-parametri tal-para. (b) tas-subartikolu 19(3) tal-istess liġi. Il-Qorti tirrileva li r-rizultat tat-tfittxija al-Arbitru jista' biss juri kemm kien korrett li ma jjeqafx fl-investigazzjoni tiegħu minħabba l-informazzjoni limitata a dispożizzjoni diretta tiegħu, li l-Qorti tqis li ma kinitx ir-rizultat 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 huwa kien qed jgħin il-każ imressaq mill-appellat, iktar milli jaċċerta li ssir ġustizzja. Is-soċjetà appellanta tilmenta wkoll li hija qatt ma kellha l-opportunità li tieħu konjizzjoni tal-informazzjoni meħuda mill-*fact sheets*, iżda jirriżulta minn dak li qal l-Arbitru li l-informazzjoni saħansitra ma kinitx waħda diffiċli sabiex tinkiseb permezz ta' riċerka fuq l-*internet*, u għalhekk din kienet disponibbli wkoll għall-pubbliku, inkluża is-soċjetà appellanta. B'hekk ukoll is-soċjetà appellanta kellha kull opportunità, kif fil-fatt naqqset milli tagħmel wara kollox, li tikkontesta dik l-informazzjoni miksuba. Iżda l-Qorti tikkonsidra li jekk hija għandha temmen li s-soċjetà appellanta qatt ma kellha din l-informazzjoni a dispożizzjoni tagħha, tassew din kienet qegħda tonqos minn kull obbligu ta' *bonus paterfamilias*.

34. Imbagħad l-Arbitru aċċenna għal darb'oħra għal dawk l-aspetti li kellhom jiġu kkonsidrati mis-soċjetà appellanta fir-rigward tal-kompożizzjoni tal-portafoll tal-appellat, u qal li t-telf tal-kapital soffert mill-appellat, kien juri n-nuqqas min-naħa tas-soċjetà appellanta li tassigura d-diversifikazzjoni u li tiġi evitata espożizzjoni eċċessiva. Kieku dan in-nuqqas ma seħħx, l-Arbitru iddikjara li ma kienx ikun hemm it-telf li raġonevolment mhux mistenni f'prodott li kellu l-iskop li jipprovdi għal benefiċċji ta' irtirar.

35. L-Arbitru mbagħad ikkunsidra kwistjoni oħra li qajjem l-appellat, dik ta' nuqqas ta' rappurtagġ u notifika dwar it-transazzjonijiet. Filwaqt li ħa konjizzjoni tal-fatt imressaq mis-soċjetà appellanta, li hija kienet tibgħat rendikonti annwali lill-membri tal-iskema, osserva li dawn kienu ġeneriċi fin-natura tagħhom, fejn kien hemm indikat biss il-polza tal-ħajja mingħajr dettalji fir-rigward tal-investimenti sottoskritti, li kienu jikkonsistu fin-noti strutturati. Għaldaqstant

sewwa kkonsidra l-Arbitru li din l-informazzjoni mibgħuta lill-appellat bħala membru tal-Iskema, ma kinitx biżżejjed u suffiċjenti. Huwa hawn jagħmel riferiment għal SOC 9.3(e) tal-Parti B.9 tal-*Pension Rules for Personal Retirement Schemes*, li kienu applikabbli fir-rigward tas-soċjetà appellanta sa mill-1 ta' Jannar, 2016, b'dana li rrileva li l-Parti B.9 saret biss applikabbli fis-sena 2018. Izda esprima l-fehma, u hawn għal darb'oħra l-Qorti tgħid li qegħda taqbel, li madankollu bħala *bonus paterfamilias* li kellha timxi fl-aħjar interessi tal-membri tal-Iskema, is-soċjetà appellanta kellha l-obbligu li tagħti rappurtagġ sħiħ lill-membri dwar it-transazzjonijiet tal-investimenti sottoskritti. Is-soċjetà appellanta tikkontendi għal darb'oħra li hawnhekk hija ma kellha l-ebda obbligu speċifiku, u l-Arbitru ddecieda ħażin meta silet l-obbligu mill-prinċipju ġenerali, li hija kienet tenuta timxi skont id-doveri tagħha ta' *bonus paterfamilias*. Izda l-Qorti hawnhekk ukoll mhijiex qegħda taċċetta l-argument tas-soċjetà appellanta, u dan mhux biss fid-dawl tal-obbligi tagħha ta' *bonus paterfamilias*, li kif diġà ngħad, ma jistgħu qatt jitwarrbu fl-assenza ta' obbligi speċifiċi, iżda anki għar-raġuni oħra li ta l-Arbitru. Huwa qal li s-soċjetà appellanta kienet diġà qabel ma ġie fis-seħħ il-Kap. 514, soġġetta għad-dispożizzjonijiet tar-regolamenti li kienu saru taħt il-Kap. 450, u hawn huwa jiċċita SOC 2.6.2 u 2.6.3 tal-Parti B.2 tad-Direttivi. L-Arbitru ddikjara li ma kienet tirriżulta l-ebda raġuni għaliex is-soċjetà appellanta ma kinitx għaddiet informazzjoni mportanti, u ċertament tgħid il-Qorti, li hawn is-soċjetà appellanta wriet nuqqas kbir min-naħa tagħha li gabet l-inkarigu tagħha fix-xejn, għal dak ta' sempliċi amministrazzjoni tal-Iskema.

36. L-Arbitru kkunsidra wkoll li skont il-*fact sheet* ittraċċjata mill-OAFS fir-rigward tal-investment magħmul fl-*RBC Online Large Caps Income Note*,

irriżulta li din kienet intiza għal investituri professjonali biss, u dan kien jikkunfliggi mal-profil tal-appellat fejn tnizzel li huwa *retail investor*. Irrileva li min-naħa tagħha s-soċjetà appellanta ma pproduċiet l-ebda prova sabiex turi li l-prodotti li fihom sar l-investment, kienu *retail products* u li hija ma kinitx ippermettiet li dawn il-prodotti jagħmlu parti mill-portafoll tal-appellat.

37. L-Arbitru għadda sabiex ittratta l-kwistjoni tan-ness kawzali tad-danni sofferti mill-appellat. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ konsegwenza tal-andament negattiv tal-investimenti riżultat tas-suq u tar-riskji inerenti u/jew tal-allegat frodi tal-konsulent finanzjarju, kif allegat mis-soċjetà appellanta. Qal li kien hemm evidenza biżżejjed u konvinċenti ta' nuqqasijiet da parti tas-soċjetà appellanta fit-twettiq tal-obbligazzjonijiet u d-doveri tagħha kemm bħala *trustee* u anki bħala amministratur tal-Iskema tal-Irtirar, li kienu juru nuqqas ta' diligenza. Qal li l-istess nuqqasijiet saħansitra ma ħallew l-ebda mod li bih seta' jigi 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 gie kkawżat mill-azzjonijiet u min-nuqqas tagħhom tal-partijiet prinċipali nvoluti fl-Iskema, fosthom is-soċjetà appellanta. Qal li seħħew diversi avvenimenti li din tal-aħħar kienet obligata u saħansitra setgħet twaqqaf, u tinforma lill-appellat 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-appellat. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà tan-nuqqasijiet tagħha, billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tal-appellat li kien mexxih lejn l-investimenti li eventwalment fallew, mhux biss b'mod reali iżda

anki fallew l-aspettattivi tiegħu. 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-appellat u anki l-andament tal-investimenti, u żżomm linja ta' komunikazzjoni miftuħa mal-appellat. Iżda kif gie kkonsidrat minn din il-Qorti, id-difiża tas-socjeta' 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-appellat mill-investimenti tiegħu.

38. 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) għalkemm ma kinitx responsabbli sabiex tagħti parir finanzjarju lill-appellat, u lanqas kellha r-rwol ta' amministratur tal-investimenti, hija kienet tenuta tassigura li l-kompożizzjoni tal-portafoll tal-appellat 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 it-tħassib tagħha dwar ċerti investimenti f'noti strutturati formanti parti mill-portafoll tal-appellat, u saħansitra ma kellhiex tħalli li jsiru investimenti riskjużi, għaliex dawn kienu kontra l-objettivi tal-iskema tal-Irtirar, u fost affarijiet oħra ma kienux fl-aħjar interess tal-appellat; u

- (iii) kienu straħu fuqha l-appellat, u anki terzi nvoluti fl-istruttura tal-Iskema, sabiex jintlaħaq l-għan tagħhom li jirċievu benefiċċji tal-irtirar, filwaqt li tiġi assicurata l-pensjoni

39. 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 originali kif investit, permezz ta' diversifikazzjoni tajba, bilanċjata u prudenti tal-investimenti. Izda 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 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-appellat skont il-para. (ċ) tas-subartikolu 19(3) tal-Kap. 555. Il-Qorti filwaqt li tiddikjara li hija qegħda tagħmel tagħha l-ħsibijiet kollha tiegħu, tgħid li m'għandhiex aktar x'izzid mad-deċiżjoni appellata tal-Arbitru tassew mirquma u studjata.

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

Decide

Għar-raġunijiet premissi 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 Registratur**