MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tad-19 ta' Jannar, 2022

Appell Inferjuri Numru 42/2020LM

Elizabeth Green (Passaport Ingliż nru. 210802400)
('l-appellata')

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 fit-28 ta' Lulju, 2020, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li

permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti **Elizabeth Green (Detentriċi tal-Passaport Ingliż nru. 210802400)** [minn issa 'l quddiem 'l-appellata'] fil-konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinżamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lill-appellata l-kumpens bil-mod kif stabbilit, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-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 tgħid li sofriet l-appellata mill-investiment f'polza ta' assikurazzjoni fuq il-ħajja bl-isem European Executive Investment Bond Policy maħruġa minn Old Mutual International jew 'OMI'[1], f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] jew QROPS fis-sena 2015, kif ġestita mis-soċjetà appellanta u wara li l-appellata kienet ikkonsultat lil Trafalgar International Gmbh [minn issa 'l quddiem 'Trafalgar'].

[1] Ara ittra ta' OMI fejn ġiet milqugħa l-applikazzjoni tal-appellata *a fol.* 65.

Mertu

3. L-appellata għalhekk ippreżentat lment quddiem l-Arbitru fid-9 ta' Awwissu 2018 fil-konfront tas-soċjetà appellanta, fejn allegat li din qatt ma kienet imxiet fl-aħjar interessi tagħha. Sostniet li s-soċjetà appellanta ppermettiet li l-fondi tagħha jiġu nvestiti f'prodotti li ma kienux kompatibbli ma' skema tal-irtirar. L-appellata qalet ukoll li hija kienet ġiet imwegħda li kien ser ikun hemm monitoraġġ mirqum tal-investimenti tagħha u jekk l-Iskema tibda tagħmel telf, dawn jitneħħew minn hemm immedjatament. Kienet saret taf ukoll li Trafalgar ma kellhom l-ebda liċenzja sabiex jagħtu parir finanzjarju. Għalhekk hija talbet rifużjoni tat-telf kollu li sofriet, inklużi d-drittijiet li hija kienet ħallset lis-soċjetà appellanta u anki il-kummissjonijiet imħallsa lil terzi għall-investimenti li saru, u kull spiża nkorsa sabiex tressaq l-ilment quddiem l-Arbitru.

4. Is-soċjetà appellanta wieġbet fit-30 ta' Awwissu, 2018 billi talbet lill-Arbitru sabiex jiċħad l-ilment tal-appellata. Hija eċċepiet fost affarijiet oħra li (i) l-azzjoni kienet preskritta *ai termini* tal-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555; (ii) safejn kienet taf hi l-appellata ma kinitx istitwixxiet proċeduri fil-konfront ta' CWM jew l-uffiċċjali tagħha jew/u fil-konfront ta' Trafalgar u/jew Global Net, li kienu tawha l-parir sabiex tinvesti f'prodotti li wasslu għat-telf tagħha, u wara kollox hi ma setgħetx tirrispondi għall-parir mogħti minn CWM; (iii) l-investimenti saru skont il-profil ta' riskju tal-appellata u skont il-linji gwida applikabbli fiż-żmien li ġiet ippreżentata l-applikazzjoni u hija kienet żammet dak id-dritt fiss għas-servizzi provduti; (iv) hija ma kinitx tagħmel parti mill-proċeduri

istitwiti minn Old Mutual International Ireland Limited fil-konfront ta' Leonteq Securities AG, li kienet ipprovdiet waħda min-noti strutturati; (v) il-mod kif kellu jsir l-investiment kien ġie deċiż bejn l-appellata u l-konsulent finanzjarju tagħha, u fi kwalunkwe każ kien permess li tiġbed somma flus mill-fond tal-pensjoni tagħha; (vi) is-somma li attwalment ġiet investita kienet ta' GBP137,672.31 u l-ammont li kellu jiġi nvestit kien ta' GBP132,913.86 kif miftiehem, filwaqt li d-drittijiet kienu wkoll ġew miftehma; (vii) meta l-appellata lmentat magħha, ma kien hemm l-ebda allegazzjoni ta' frodi u ma kienx minnu li s-soċjetà appellanta kienet appuntat lil Trafalgar; (viii) l-appellata naqqset milli tispjega l-allegazzjoni tagħha li hija ma kinitx imxiet fl-aħjar interessi tagħha u lanqas ma qalet min kien wegħda li ser ikun hemm monitoraġġ; (ix) is-soċjetà appellanta bagħtet lill-appellata r-rendikonti għas-snin 2015 u 2016, kif ukoll korrispondenza oħra flimkien mad-dokumenti tal-polza; u (x) hija ma kellhiex liċenzja sabiex tipprovdi parir finanzjarju u lanqas ma kienet għamlet dan lill-appellata, kif kien ċar mill-applikazzjoni għas-sħubija u t-*terms and conditions of business.*

Id-deċiżjoni appellata

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

> ***"Further Considers:***
>
> ***Preliminary Plea regarding the Competence of the Arbiter***
>
> *The Service Provider raised the preliminary plea that the Arbiter has no competence to consider this case based on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta.*

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

Article 21(1)(b) stipulates that:

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

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

Firstly, the Arbiter notes that it took over two months for the Service Provider to send the Complainant a reply to her formal complaint. (fn. 1 The Complainant's formal complaint dated 2 April 2018 was answered by the Service Provider on 11 June 2018) The Arbiter does not see a valid reason why the Service Provider took so long to send a reply and related documents, even if it had to deal with various other complaints around the same time.

The Arbiter deems it as very unprofessional for a service provider to make all in its powers to hinder a complaint against it, procrastinate and then raise the plea of lack of competence on the pretext that the action is 'time-barred'*.*

It is a long accepted legal principle that no one can rest on his own bad faith.

As to Article 21(1)(b), 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.***

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 another issue 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. (fn. 2 Furthermore, the Arbiter notes that there is actually clear evidence from the Investor Profile presented in respect of the Complainant that structured notes, being the main type of products predominantly invested into as will be considered later in this decision, still formed part of the Complainant's portfolio after 18 April 2016)*

The Arbiter also makes reference to the comments made further below ***relating to the maturity of such products****.*

It is also 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 adviser 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. 3 Para. 44, Section E, of the affidavit of Stewart Davies, Director of MPM – A fol. 231) CWM was, therefore, still accepted by the Service Provider and acting as the investment adviser to the Complainant after the coming into force of Chapter 555 of the Laws of Malta. It has emerged that CWM was only replaced in September 2017 when MPM no longer accepted business from CWM. 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 occurred before 18 April 2016 and, therefore, the plea as based on Article 21(1)(b) cannot be upheld.

Article 21(1)(c)

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

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

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

The fact that the Complainant was sent an Annual Member Statement, as stated by the Service Provider in its notes of submissions, could not be considered as enabling the Complainant to have knowledge about the matters complained of.

This taking into consideration a number of factors including that the said Annual Member Statement was a highly generic report which only listed the underlying life assurance policy. The Annual Member Statement issued to the Complainant by MPM included no details of the specific underlying investments held within the said policy, which investments contributed to the losses and are being disputed by the Complainant.

Hence, the Complainant was not in a position to know, from the Annual Member Statement what investment transactions were actually being carried out within her portfolio of investments.

It is also noted that the Annual Member Statement sent to the Complainant by the Service Provider had even a disclaimer highlighting that certain underlying investments may show a value reflecting an early encashment value or potentially a zero value prior to maturity and that such value did not reflect the true performance of the underlying assets.

The disclaimer read as follows:

'Investment values are provided to Momentum Pensions Malta Limited by Investment Platforms who are responsible for the accuracy of this information. Every

effort has been made to ensure that this statement is correct but please accept this statement on this understanding.

Certain underlying assets with the Investment may show a value that reflects an early encashment value or potentially a zero value prior to the maturity date. This will not reflect the true current performance of such underlying assets.'

Such a disclaimer did not reveal much to the Complainant about the actual state of the investments and the whole scenario could not have reasonably enabled the Complainant to have knowledge about the matters being complained of.

Moreover, the Arbiter, makes reference to Case Number 137/2018 (fn. 4 Decided today) against MPM, whereby it results that the Service Provider itself declared in July 2015, in reply to a member's concern regarding losses, that:

'… whilst we, as Trustees, will review and assess any losses, **these can only be on the maturity of the note**, (Emphasis of the Arbiter) as any valuations can and will be distorted ahead of the expiry'. *(fn. 6 Case Number 137/2018 (a fol. 7 of the file)*

The Service Provider did not prove the date of maturity of the structured notes, being a main type of instrument included in the Complainant's portfolio. The Arbiter also refers to the comments already made above with respect to the products forming part of the portfolio after the coming into force of Chapter 555.

The Arbiter has also discovered from Case Number 127/2018 (fn. 7 Decided today) that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM. (fn. 8 Case Number 127/2018 (a fol. 53 of the file)

In this regard, in September 2017, members were notified by MPM about the suspension of the terms of business that MPM had with CWM. Later, in October 2017, MPM also notified the members of the Scheme about the full withdrawal of such terms of business with CWM.

The Complainant in this case made a formal complaint with the Service Provider on 2 April 2018 and thus within the two-year period established by Art. 21(1)(c) of Chapter 555.

Therefore, the Service Provider did not prove that the Complainant in the said cases raised the complaint 'later than two years from the day on which the complainant first had knowledge of the matters complained of'.

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

For the above-stated reasons, this plea is also being rejected and the Arbiter declares that he has the competence to deal with 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. 9 Cap. 555, Art. 19(3)(b))

*The Arbiter is considering all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555 (fn. 10 Art. 19(3)(d)) which stipulates that he should deal with the complaints in '*an economical and expeditious manner'*.*

The Complainant

The Complainant, of British nationality and born in 1965, resided in Turkey at the time of application for membership as per the details contained in the Application Form for membership of the Scheme ('the Application Form for Membership').

The Complainant's occupation was indicated as 'Retired' *in the said Application Form. It was not proven, during the case, that the Complainant was a professional investor and the Complainant can accordingly be deemed as a retail client.*

The Complainant was accepted by MPM as member of the Retirement Scheme on 25 September 2015.

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. 11 https://www.mfsa.mt/financial-services-register/result/?id=3453) and acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 12 Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

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. 13 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. 14 As per pg. 1 of the affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 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. 15 https://www.mfsa.com.mt/financial-services-register/result/?id=3454) as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 (fn. 16 Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit)) and under the Retirement Pensions Act in January 2016. (fn. 17 Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit))

*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. 18 Important Information section, pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit). and is* 'an approved Personal Retirement Scheme under the Retirement Pensions Act 2011' *(fn. 19 Regulatory Status, Pg 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).*

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. 20 Ibid.)*

The case in question involves a member-directed personal retirement scheme where the Member was allowed to appoint an investment adviser 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 Old Mutual International ('OMI').

The premium in the said policy was in turn invested in a portfolio of investment instruments under the direction of the Investment Adviser and as processed and accepted by MPM.

The underlying investments in respect of the Complainant comprised extensive investments in 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 ('the Table of Investments'). (fn. 21 The* 'Investor Profile' *is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant)*

The 'Investor Profile' *presented by the Service Provider in respect of the Complainant included a table with the '*current valuation' *as at 23/05/2018 indicated in both GBP and EUR as '127794GBP/145829.32 EURO'. The said table indicated that the* 'Total Amount Invested' *was '132,913 GBP/189479 Euro'. It is noted that the current valuation (in both GBP and EUR) is of a lower value than the total amount invested, with the net loss calculated in Euros amounting to EUR43,649.68 and the net loss calculated in GBP amounting to GBP5,119 according to the same figures provided by the Service Provider. (fn. 22 (EUR189,479-EUR145829.32=EUR43,649.68); (GBP132,913-GBP127,794=GBP5,119)*

The Service Provider, from its part, excluded the fees of GBP7,822 and GBP1,740 from its calculations to arrive at a gross profit on investments that it indicated in its table of GBP4,443. The said alleged profit would result into a loss on the Scheme when taking into consideration the overall fees. Besides not indicating any currency conversions and exchange rates used, the Service Provider does not either indicate whether the claimed (gross) profit figure comprises ***realised*** *or* ***paper gains****.*

Investment Advisor

Continental Wealth Management ('CWM') was the investment advisor appointed by the Complainant. (fn. 23 As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant) The role of CWM was to advise the Complainant regarding the assets held within her Retirement Scheme.

It is noted that in the notices issued to members of the Scheme in September and October 2017, MPM described CWM as 'an authorised representative/ agent of Trafalgar International GMBH', *where CWM's was Trafalgar's* 'authorised representative in Spain and France' *(fn. 24 For example, in Case Number 127/2018 against MPM decided today)*

In its reply, 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. 25 Pg. 1 of MPM's reply to the Arbiter for Financial Services)*

*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*', (fn. 26 Para. 39, Section E titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies) 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. 27 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' *information sheet provided by the Service Provider. (fn. 28 Attachment to the* 'Additional submissions' *made by MPM in respect of the Complainant)*

The said table indicates the investments made which reveal extensive investments into structured notes, indicated as 'SN' in the column titled 'Asset Type' during the tenure of CWM as investment adviser.

It is noted that the table of investments attached to the additional submissions made by the Service Provider indicates the following investments into structured notes all undertaken at the same time in November 2015 which together constituted 65.75% of the policy value, at the time of purchase:

(i) *an investment of EUR21,249 into Morgan Capital: 3 YR GBP Index Phoenix Autocall (60% EKIP) indicated as being issued by Morgan Stanley and constituting 11.19% of the policy value at the time of purchase;*

(ii) *an investment of EUR17,929 into Leonteq 6Y MB Express Cert 10% Oct 1 indicated as being issued by Leonteq and constituting 9.44% of the policy value at the time of purchase;*

(iii) *an investment of EUR17,929 into Leonteq 3Y Express Cert 50% Multi Barr 4 Underlying indicated as being issued by Leonteq TCM and constituting 9.44% of the policy value at the time of purchase;*

(iv) *an investment of EUR25,879 into Leonteq Credit LKD NT Indices 5% P.A. Coupon indicated as being issued by Leonteq and constituting 13.63% of the policy value at the time of purchase;*

(v) *an investment of EUR25,879 into Leonteq Contingent Cap Protected Cert indicated as being issued by Notenstein and constituting 13.63% of the policy value at the time of purchase;*

(vi) *an investment of EUR16,000 into Leonteq 6Y Autocall European Stocks and Indices indicated as being issued by EFG and constituting 8.42% of the policy value at the time of purchase.*

The same table indicates the sale of the following structured notes in 2016 and 2017, (all quoted in EUR) in the said table:

(i) *the sale, in March 2016, of the Leonteq Contingent Cap Protected Cert for the amount of EUR18,616;*

(ii) *the sale, in November 2017, of the Morgan Capital: 3YR GBP Index Phoenix Autocall (60% EKIP) for the amount of EUR14,265;*

(iii) *the sale, in November 2017, of the Leonteq 6Y MB Express Cert 10% Oct 1 for the amount of EUR12,912;*

(iv) *the sale, in November 2017, of the Leonteq 3Y Express Cert 50% Multi BARR 4 Underlying for the amount of EUR13,650;*

(v) *the sale, in November 2017, of the Leonteq Credit LKD NT Indices 5% PA Coupon for the amount of EUR17,499.*

It is to be noted, however, that certain information provided by the Service Provider in the 'Investor Profile' *does not match the information included in the statement issued by OMI. Whilst MPM quoted the sale figure of the structured notes in EURO, the exact same figure is indicated in the statement issued by OMI in a different currency, being GBP. There are accordingly inconsistencies/inaccuracies in the information provided to the Arbiter.*

The 'Historical Cash Account Transactions' *issued by OMI dated 25/05/2018, indicates the following with respect to the structured note investments: (fn. 29 Attached to the Complaint Form)*

(i) *An investment of GBP15,000 into Morgan Capital: 3 YR GBP Index Phoenix Autocall (60% EKIP), which was then sold for GBP14,265.*

(ii) *An investment of GBP13,000 into Leonteq 6Y MB Express Cert 10% Oct 1, which was then sold for GBP12,911.60.*

(iii) *An investment of GBP13,000 into Leonteq 3Y Express Cert 50% Multi Barr 4 Underlying, which was then sold for GBP13,650.*

(iv) *An investment of GBP19,000 into Leonteq Credit LKD NT Indices 5% P.A. Coupon, which was then sold for GBP17,499.*

(v) *An investment of GBP19,000 into Leonteq Contingent Cap Protected Cert, which was then sold for GBP18,616.20.*

(vi) *An investment of EUR16,000 into Leonteq 6Y Autocall European Stocks and Indices, which had not yet been sold/matured at the date of the statement.*

The OMI valuation dated 15 April 2019, presented by the Complainant in her additional submissions indicated an unrealised loss on the Leonteq 6Y Autocall European Stocks and Indices of 1,803.20 in EUR as at that date. (A fol. 212)

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. 31 Emphasis added by the Arbiter)

a) *Rule 2.6.2 of Part B.2.6 titled 'General Conduct of Business Rules applicable to the Scheme Administrator' of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that:*

   'The Scheme Administrator **shall act with due skill, care and diligence – in the best interests of the Beneficiaries** …'.

   *The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled 'Conduct of Business Rules' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, and which applied to MPM as a Scheme Administrator under the RPA, provided that '*The Service Provider **shall act with due skill, care and diligence** …'.

b) *Rule 2.7.1 of Part B.2.7 titled 'Conduct of Business Rules related to the Scheme's Assets', of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that:*

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

   The same principle continued to apply under the rules issued under the RPA. Standard Condition 3.1.2, of Part B.3 titled 'Conditions relating to the

investments of the Scheme' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provided that:

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

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

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

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

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

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

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

Trustee and Fiduciary obligations

As highlighted in the section of this decision titled 'The Legal Framework' above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is also relevant for MPM considering its capacity as Trustee of the Scheme. This is an important aspect on which not much emphasis on, and reference to, has been made by the Service Provider in its submissions.

Article 21(1) of the TTA which deals with the 'Duties of trustees', stipulates a crucial aspect, that of the ***bonus paterfamilias****, which applies to MPM.*

The said article provides that:

'**(1) Trustees shall in the execution of their duties and the exercise of their powers and discretions act 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. 32 Editor Dr Max Ganado, 'An Introduction to Maltese Financial Services Law', Allied Publications 2009 p. 174)*

As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, **to act honestly and in good faith and with**

impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'. *(fn. 33 Op. Cit, p 178)*

The fiduciary and trustee obligations were also highlighted by MFSA in a recent publication where it was stated that:

'**In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries.** It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations'**. *(fn. 34 Page 9 - Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 December 2017))*

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

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

Other relevant aspects

*One other important duty relevant to the case in question relates to the o**versight 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. 35 Para. 17, page 5 of the affidavit of Stewart Davies)*

Once an investment decision is taken by the member and his/her investment adviser, 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. 36 Para. 31, page 8 of the affidavit of Stewart Davies)*

MPM had accordingly the final say prior to the placement of a dealing instruction, *in that, if MPM was satisfied that the level of diversification is suitable and in order, and the member's portfolio as a whole is in line with his attitude to risk and investment guidelines,* 'the dealing instruction will be placed with the insurance company and the trade will be executed. **If the RSA is not so satisfied, then the trade will not be proceeded with'**. *(fn. 37 Para. 33, Page 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers)*

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

'I accept that I or my chosen professional adviser may suggest investment preferences to be considered, however, **the Retirement Scheme administrator will retain full power and discretion for all decisions relating to the purchase, retention and sale of the investments** within my Momentum Retirement Fund', *which featured in the 'Declarations' section of the Application Form for Membership signed by the Complainant.*

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

'… is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'. *(fn. 38 Pg. 7 of the MFSA's Consultation Document dated 16 November 2018 titled 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' (MFSA*

Ref. 15/2018) - https://www.mfsa.com.mt/publications/policy-and-guidelines/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 adviser stating that:

'the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments'. *(fn. 39 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 indeed also provided that:

'The Trustee needs 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. 40 Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies. The same statement is also included in page 9 of the scheme Particulars of May 2018 (also attached to the same affidavit)*

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 …'.

Other Observations and Conclusions

Key considerations

The Arbiter will now consider the principal alleged failures made by the Complainant who claimed that there was a lack of care by MPM and that MPM never acted in her best interests. The Complainant alleged that MPM allowed an unsuitable portfolio

of underlying investments to be created within the Retirement Scheme comprising of high-risk structured products unsuitable for a pension fund where her portfolio was tied into products of long term and early release penalties.

The Complainant also raised the aspect that she was now of the understanding that her advisers were actually not licensed to give financial advice. (fn. 41 Section D of the Complaint Form and other additional related aspects and clarifications made by the Complainant in her additional submissions on the points raised in the Complaint Form)

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 adviser was the duty of other parties, such as CWM. This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case.

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested financial instruments, ***MPM had, nevertheless, certain obligations to undertake in its role of Trustee and Scheme Administrator. The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial bearing on the operations and activities of the scheme and affect directly, or indirectly, its performance****.*

Consideration thus needs to be made as to whether MPM failed in any other 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 Adviser

It is noted that the Complainant chose the appointment of CWM to provide her 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. MPM even had itself an introducer agreement with CWM.

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 Adviser

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

*It is considered that **MPM accepted and allowed inaccurate and incomplete material information relating to the Adviser 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 included in the Application Form. **If inaccurate and incomplete material information was made in the Application Form for Membership on 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 adviser and, also, decide with whom to enter into terms of business**. The section titled 'Professional Adviser's Details' in the Application Form for Membership for the Complainant indicated a different name for the adviser with this being indicated as 'Continental Wealth Trust' rather than 'Continental Wealth Management'. More importantly, in the same section of the Application Form, the section of the 'Regulator' and 'Licence Number' for the adviser were left empty and accordingly the section dealing with the 'Professional Adviser' was incomplete in respect of the regulatory status and license of such party.*

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 adviser. 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.

The application form in respect of the policy issued by Old Mutual International, includes the stamp of another party, that of 'Trafalgar International GmbH' ('Trafalgar') (with one stamp indicating the Head Office of Trafalgar in Germany and another stamp indicating a correspondence address for Trafalgar in Cyprus), next to the section titled 'Financial adviser details' which also made reference to 'Continental Wealth' in Spain. Trafalgar is then also featured in the section titled 'Financial adviser declaration' in the same form with the field for 'Financial adviser stamp' in the same section just including the stamps of Trafalgar (in Germany and Cyprus).

There was accordingly 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.

iii. *No proper distinctions between CWM and Trafalgar*

It is also unclear why the Annual Member Statements sent by MPM to the Complainant for the years ending December 2015 and 2016, indicated in the same statement 'Continental Wealth Management' as 'Professional Adviser' *whilst at the same time indicated another party, 'Trafalgar International GmbH' as the* 'Investment Adviser'. *(fn. 42 Attachments to the Reply submitted by MPM before the Arbiter for Financial Services)*

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 her 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, <u>including all parties' roles</u> <u>and responsibilities were clearly outlined to you in the literature</u> <u>provided ensuring no ambiguity</u> *(fn. 43 Emphasis added by the Arbiter),* **including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules'.** *(fn. 44 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)*

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

iv. No regulatory approval in respect of CWM

During the proceedings of this case no evidence has either emerged about the regulatory status of CWM. As indicated earlier, in its submissions MPM only referred to the alleged links between CWM and Trafalgar and only provided a copy of the authorisations issued to Trafalgar International GmbH in Germany which just indicated that Trafalgar (and not CWM) held an authorisation as at 05.02.2016 as 'Investment intermediary' *and 'Insurance intermediary and insurance consultant' from IHK Frankfurt am Main, the Chamber of Commerce and Industry in Frankfurt 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. 45 Copy of authorisations issued to Trafalgar were attached to the Reply of MPM submitted before the Arbiter for Financial Services and/or specifically referred to in para.39 Section E, titled 'CWM and Trafalgar International GmbH' in the affidavit of Stewart Davies)*

*With respect to authorisations issued by IHK, the Arbiter makes reference to Case 068/2018 and Case 172/2018 against MPM. (fn. 46 Decided today) The said correspondence involved replies issued by IHK in 2018 to queries made in respect of CWM. In this regard, it is noted that in an email from IHK dated 19 April 2018, IHK indicated inter alia that it was not aware of an official affiliation between CWM and Trafalgar and that Trafalgar held the financial investment intermediation licence (34f para. 1 GewO) from June 2013 until March 2016 where the licence was '*not extendable' *and '*even back then it did not cover the activities of another legal personality'. *(fn. 47 Email from IHK dated 19 April 2018 – A fol. 166/167 of Case Number 068/2018 against MPM decided today)*

Similarly, in a letter dated 20 April 2018 issued by IHK it was inter alia noted by IHK that:

*'*Trafalgar International GmbH is a German limited company headquartered in Frankfurt am Main. The company currently holds a licence under 34d para.1 German Trade Law (German: Gewerbeordnung, GewO) (insurance intermediation). The German licence as an insurance intermediary cannot be extended to another legal personality and it does not authorize the licence holder to regulate other insurance or financial investment intermediaries*.' (fn. 48 Letter from IHK dated 20 April 2018 – A fol. 12/13 of Case Number 172/2018 against MPM decided today)*

*MPM's statement that CWM '*was operating under Trafalgar International GmbH licenses' *(fn. 49 Para. 39, Section E, titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies) has not been backed up by any evidence during the proceedings of this case and has actually been contradicted by communications issued by IHK as indicated above. It is accordingly clear that no comfort can be taken 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. 50 Pg. 1, Section A titled 'Introduction', of the Reply of MPM submitted before the Arbiter for Financial Services)***, *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 is itself no regulatory authority but a licensed entity itself;*

(ii) *the lack of clarity/ incomplete information as to the regulatory status of the investment adviser in the Application Form for Membership as well as the confusing and unclear references in the sections relating to the investment adviser in other documentation 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, indeed provided specific requirements on the registration of tied agents. (fn. 51 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. 52 Para. 39, Section E, titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies)*

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 adviser ***within the Scheme's structure****.*

The responsibility of MPM in accepting and allowing CWM to act in the role of investment adviser takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM where no details were included in its own form in respect of the regulatory status of such entity with the respective fields in the form being left empty.
MPM allowed and left uncontested, incomplete key information in its own Application Form for Membership of the Retirement Scheme with respect to the regulatory status of the investment adviser.

The Service Provider argued inter alia *in its submissions that it was not required, in terms of the rules, to require the appointment of an adviser which was regulated 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 adviser to be regulated.*

However, the Arbiter believes that MPM as Trustee had in any case the obligation to act with the required diligence of a **bonus paterfamilias** ***throughout, and was duty bound to raise with the Complainant, and not itself accept, material aspects missing relating to the investment adviser.***

The appointment of an entity such as CWM as investment adviser meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where an adequately regulated adviser is appointed*. An adequately regulated financial adviser 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 adviser.

Besides the issue of the regulatory status of the adviser, MPM also allowed and left uncontested important information, which was convoluted, misleading, unclear and lacking as explained above, with respect to the investment adviser, 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 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 adviser was allowed by the trustee and scheme administrator to provide investment advice to the member of a member-directed scheme (on the basis of clear understanding by the member of such unregulated status and implications of such, and the member's subsequent consent for such type of adviser), ***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. <u>The permitted portfolio composition</u>

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 exposure to structured notes allowed within the Complainant's portfolio was extensive, with the insurance policy underlying the Scheme being at times fully or predominantly invested into such products.

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. 53* 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. 54 https://www.investopedia.com/articles/bonds/10/structured-notes.asp)

As indicated above, the portfolio was extensively invested into structured products with these constituting 65.75% of the policy value at the time of purchase of these products.

No relevant fact sheets of structured products forming part of the Complainant's portfolio have been produced in the case in question. Neither has the Office of the Arbiter for Financial Services managed to source any fact sheet in respect of any of the structured products featuring in the Complainant's portfolio.

The Arbiter nevertheless observes that the exposure to structured products in the portfolio was extensive as already indicated and also notes high exposure to the same single issuer, through cumulative purchases in products issued by the same issuer, this being Leonteq.

The Arbiter shall accordingly consider only this aspect in the circumstances

Portfolio not reflective of the MFSA rules

The high exposure to structured products as well as high exposure to single issuers, which was allowed to occur by the Service Provider in the Complainant's portfolio, jars 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. 55 Para. 21 & 23 of the Note of Subissions filed by MPM in 2019)

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. 56 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. 57 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. 58 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. 59 SOC 2.7.2 (3)) 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. 60 SOC 2.7.2(h)(iii) & (v))*

Despite the standards of SOC 2.7.2, MPM allowed the portfolio of the Complainant to, at times, comprise predominantly of structured products. An individual exposure to Leonteq as single issuer of higher than the 20% threshold in diversified products such as collective investment schemes and even higher than the 30% maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above, also emerges from the information provided. (fn. 61 Doc. EG1 attached to MPM's additional submissions) 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.

<u>Other observations & synopsis</u>

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. Nothwithstanding that the portfolio had a high exposure of 32.51% to the same issuer, through three structured notes issued by Leonteq which respectively comprised 9.44%, 9.44% and 13.63% of the policy value at the time of purchase in 2015, it has not been demonstrated either that such products had underlying guarantees.

Apart from the fact that no sensible rationale has emerged for exposing the composition of the pension portfolio extensively 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 despite the Complainant's selected risk profile.

In the circumstance where the portfolio of the Complainant was at times extensively invested in structured products with a high level of exposure to single issuer, and for the reasons explained above, the Arbiter does not consider 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. 62 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. 63 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, ***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 extensive exposure to structured products and single issuer nevertheless 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. <u>The extent of loss or otherwise experienced on the Scheme</u>

As indicated above whilst the Complainant alleged in her Complaint Form a loss of EUR43,399.70 as at 8 June 2018, the Service Provider did not contest that the Complainant made a loss in its reply before the Arbiter for Financial Services. It only contested this in its additional submissions as will be considered further hereunder.

Firstly it is noted that, in its reply, MPM stated that the Complainant's allegation that her original investment on 30 November 2015 stood at EUR189,633.13, was incorrect and in this regard referred to its own Client Account Statement dated 3 December 2015. (fn. 64 Attached as Appendix 3 to MPM's Reply) The Client Account Statement inter alia *indicated that on 18 November 2015, the Complainant's account with the Scheme had '*Funds received from Royal London' *of GBP137,672.31. The same Client Account Statement indicated that on 19 November 2015 there was an '*Investment – Old Mutual' *of GBP132,913.86.*
It is to be noted, however, that the attachments that MPM submitted to its Reply, included a confirmation letter dated 23 November 2015 issued by OMI in relation to the investment into the European Executive Investment Bond. (fn. 65 Appendix 8 to its Reply) The said letter and attached schedules to the policy clearly indicate that the OMI policy in respect of the Complainant, bearing a 'Contract Date' *of 23 November 2015, had indeed a '*Premium' *of '*EUR189,633.13'.

*Furthermore, notwithstanding that the OMI policy confirmation letter and schedules indicated the premium being in EURO, in the OMI '*Historical Cash Account Transactions' *statement dated 25 May 2018, the OMI statement indicates a '*Transfer of Initial Premium' *on 23/11/2015 of GBP132,913.86.*

No explanations were provided as to the differences emerging in this regard and what currency conversions, if any, had been made and reasons therefor had been made.

It is further noted that in its additional submissions, MPM claimed that according to a 'current valuation at 23/05/2018' *the Complainant made a profit of (GBP) '4,443'. (fn. 66 Doc. EG1 to MPM's additional submissions). As indicated above, in the section titled '*The Retirement Scheme in respect of which the Complaint is being made'*, the alleged (gross) profit is one which excludes fees.*

The Service Provider did not state whether the said figure was a realised/ unrealised gain, besides not providing a more recent valuation.

It is also noted that MPM alleged in its additional submissions that 'Reflecting notional foreign exchange rates, which are entirely relevant, **the complainant has suffered NO LOSS**'. *(fn. 67 Emphasis made by the Service Provider) MPM made reference in this regard to a communication dated 6 August 2019 issued by OMI to the Complainant. It is noted, however, that the said communication sent by OMI just provides an example of the effects in the movement in the exchange rate and this only with reference to the original premium - where it just calculated the conversion of the original premium of GBP132,913.86 into EUROs at the GBP/EUR rate applicable as at 23/11/2015 and comparing the same figure of premium, that is, GBP132,913.86 (with no investments) with the GBP/EUR rate applicable on the valuation as at 23/05/2018 to explain paper losses.*

The said communication by OMI cannot reasonably be construed as confirming that the complaint has suffered no loss, and it is misleading for one to try to argue that the Complainant has not suffered any loss just by referring to such communication. Neither has the Service Provider provided clear and sufficient evidence to back its allegation that 'the Complainant has suffered NO LOSS' *for the reasons already indicated.*

In addition, the Service Provider just refers to notional foreign exchange rates and does not clearly indicate realised losses and gains. Besides, the Service Provider chose to provide in its additional submissions sent in August 2019, a dated valuation showing only the value as at 23/05/2018.

The Arbiter cannot accordingly reasonably and safely rely on the indicated calculations presented by the Service Provider to determine the actual position of the Complainant and whether the Complainant suffered a loss (excluding fees) or otherwise on the Scheme.

The actual position of the Complainant will be considered accordingly in the calculations that the Arbiter will direct the Service Provider to undertake as stipulated further on in this decision.

As indicated above, the letter from OMI dated 23 November 2015, confirming the acceptance of the investment into the European Executive Investment Bond, refers to an initial premium in Euros of EUR189,633.13.

It is further noted that in her additional submissions the Complainant presented a communication dated 10 June 2019 issued by MPM, where MPM confirmed that

the* 'Current Value Held at Momentum'** ***estimated as at 10 June 2019 was of EUR118,705.58 thus indicating a reduction in value of EUR70,927.55. The* 'Current Estimated Transfer Value'** ***communicated by MPM after deducting its fees was indeed indicated as EUR116,755.58 in the same communication. This is in contradiction to the Service Provider's claim that the Complainant did not make a loss. Given that the OMI statements however indicate the investments in GBP and a surrender value in GBP, the transfer value would be different if the transfer value had to be made in GBP instead of EUROs.

Hence, MPM's claim in its additional submissions that the Complainant has suffered no loss, has not been adequately substantiated.

The Arbiter would also like to make some observations regarding other inconsistencies and confusing references emerging in certain documents submitted. Such inconsistencies and confusing references emerged both in the OMI statements (where the exact same figures were at times shown as being in EUR and at other times in GBP) and the table of investments presented by MPM (where certain figures did not reconcile with those shown in the OMI statements). This is in addition to the lack of clarity of having the confirmation letter of the OMI policy showing a premium in EURO whilst certain statements showing a premium in GBP as indicated above.

It is noted that the 'Valuation Summary' *issued by OMI dated 23/05/2018 and another one dated 06/06/2018 were issued in EUR and both showed* 'Total Premiums Paid' *of '**132,913.86 EUR**'.* (*fn. 68 OMI Statements attached to the Complaint Form refer; Emphasis added by Arbiter) However, another* 'Valuation Summary' *issued by OMI and dated 15/04/2019 was issued in GBP indicating the same figure of* 'Total Premiums Paid' *of '**132,913.86 GBP**'. (fn. 69 A fol. 211; Emphasis added by Arbiter)*

With respect to the table of investments presented by MPM in its additional submissions, it is noted that whilst MPM indicated the sale figures of the structured notes in EURO the exact same figures are however shown in GBP in the 'Historical Cash Account Transactions' *statement issued by OMI dated 25/05/2018. (fn. 70 Statement attached to the Complaint Form)*

Moreover, it is somewhat odd that MPM has reported the value of the policy in EUR in its Annual Member Statements and itself indicated in the 'Investor Profile' *attached to its Additional Submissions that the* 'Investment Policy Currency' *is in*

'EUR', when the bulk of the transactions were apparently in GBP and the latest statement issued by OMI for the policy is also in GBP throughout. (fn. 71 Doc. EG1 to MPM's Additional Submissions)

The Arbiter would like to highlight the importance for the Trustee to ensure that clear, full, correct and consistent information is provided. Relevant and clear explanations should have also been made in the respective statements in respect of any currency conversions, distinguishing between actual conversions and conversions made for reporting purposes.

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainant on her account within the Retirement Scheme ***cannot*** *just be attributed to the underperformance 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.*

Deficiencies on the part of MPM in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme has emerged 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. 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 with the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

The Complainant ultimately relied on MPM as the Trustee and Retirement Scheme Administrator of the Scheme as well as other parties within the Scheme's structure, to achieve the scope for which the pension arrangement was undertaken, that is, to provide for retirement benefits and also reasonably expect a return to safeguard her pension.

Whilst losses may indeed occur on investments within a portfolio, a 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 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 and the oversight functions with respect to the Scheme and portfolio structure. The Service Provider failed to act with the prudence, diligence and attention of a* bonus paterfamilias*. *(fn. 72 Cap. 331 of the Laws of Malta, Art. 21(1))*

The Arbiter also considers that the Service Provider did not meet the* 'reasonable and legitimate expectations'** *(fn. 73 Cap. 555, Article 19(3)(c))* ***of the Complainant who had placed her trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case (fn. 74 Cap. 555, Article 19(3)(b)) and is accepting it in so far as it is compatible with this decision.

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

Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be only partially held responsible for the losses incurred.

Compensation

Being mindful of the key role of 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 net realised losses on her 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 her investment portfolio as stipulated hereunder.

The Arbiter notes that the latest valuation and list of transactions provided by the Service Provider in respect of the Complainant is not current and adequate for the reasons explained above.

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

Given that the Complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of Continental Wealth Management acting as adviser, compensation shall be provided solely on the investment portfolio existing and constituted under Continental Wealth Management in relation to the Scheme.

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 existing and constituted under Continental Wealth Management and allowed within the Retirement Scheme by the Service Provider.

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

(i) ***For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Member's current investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised) inclusive of any realised currency gains or losses. 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 and any realised currency gains or losses), such realised profit shall be accumulated from all such investments and netted off against the total of all the realised losses from the respective investments calculated as per (i) above to reach the figure of the Net Realised Loss within the indicated portfolio.***

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

In case where any currency conversion/s is/are required for the purpose of (a) finally netting any realised profits/losses within the portfolio which remain denominated in different currencies and/or (b) crystallising any remaining currency positions initiated at the time of Continental Wealth Management, such conversion shall, if and where applicable, be made at the spot exchange rate sourced from the European Central Bank and prevailing on the date of this decision. Such a direction on the currency conversion is only being given in the very particular circumstances of such cases for the purposes 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 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 of the novelty of this case each party is to bear its own legal costs of these proceedings."

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fis-17 ta' Awwissu, 2020 intavolat appell fejn qed titlob lil din il-Qorti

sabiex tirrevoka u tħassar id-deċiżjoni appellata billi tilqa' l-aggravji tagħha. Tgħid li l-aggravji tagħha huma s-segwenti: (i) l-Arbitru applika u interpreta ħażin il-liġi meta ddeċieda li s-soċjetà 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-appellata; u (b) il-kompożizzjoni u s-superviżjoni tal-portafoll tal-appellata ma kienx skont il-liġijiet, regoli u linji gwida applikabbli; (ii) ma kienx jeżisti l-ebda ness kawżali u għalhekk l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet infondati; u (iii) ma kien hemm l-ebda mala fede min-naħa tagħha kif iddeċieda l-Arbitru.

7. L-appellata wieġbet fl-24 ta' Novembru, 2020 fejn issottomettiet li d-deċiżjoni appellata hija ġusta, u għaldaqstant timmerita li tiġi kkonfermata għal dawk ir-raġunijiet li hija tispjega fit-tweġiba tagħha.

Konsiderazzjonijiet ta' din il-Qorti

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

L-ewwel aggravju

9. Meta tfisser l-ewwel aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru ddeċieda ħażin li hija kienet responsabbli għaliex naqset mill-obbligi tagħha meta ħalliet lil CWM taġixxi bħala *investment advisor,* hekk kif din kienet

ġiet maħtura mill-appellata stess. Tirrileva li l-Arbitru stess kien osserva li CWM ġiet magħżula mill-appellata stess u li s-soċjetà appellanta ma kellha l-ebda obbligu li tivverifika jekk din kinitx entità regolata jew jekk kinitx awtorizzata taħt sistema regolatorja sabiex tipprovdi pariri dwar investimenti. Tgħid li l-obbligu tagħha sabiex tivverifika jekk CWM kellhiex awtorizzazzjoni regolatorja sabiex tagħti pariri ta' investiment jew jekk kinitx entità regolata, 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. Issostni li l-punt ċentrali kien jekk hija kellhiex obbligu tivverifika li CWM kienet liċenzjata u mhux jekk fil-fatt din kinitx liċenzjata, iżda l-Arbitru ddeċieda li hija min-naħa tagħha ma kinitx ressqet l-ebda prova sabiex turi li CWM kienet liċenzjata biex tagħti pariri ta' investiment, u tispjega kif din il-konklużjoni hija waħda difettuża f'żewġ 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 kienet proprju l-appellata li volontarjament ħatret lil CWM bħala l-konsulent finanzjarju tagħha. Iżda fid-deċiżjoni appellata tal-Arbitru, is-soċjetà appellanta tgħid li dan mar lil hinn mill-punt kruċjali u straħ fuq l-obbligu ġenerali tat-*trustee* li jaġixxi fl-aħjar 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 tiddikjara li hija ma kinitx qegħda tikkontesta l-obbligu ġenerali tat-*trustee* li f'kull każ jaġixxi fl-aħjar interess tal-benefiċjarji u bl-attenzjoni ta' *bonus paterfamilias,* is-soċjetà appellanta tikkontendi li dan l-obbligu tat-*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-appellata innifisha. Tikkontendi li kieku l-obbligu kien diġà jeżisti qabel ma l-MFSA bidlet ir-regolamenti applikabbli fl-2019, proprju ma kienx ikun hemm l-ħtieġa li ssir il-bidla. Dwar it-tieni parti ta' dan l-ewwel aggravju tas-soċjetà 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 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-appellata u jevalwa r-riskju individwali skont il-kompożizzjoni tal-portafoll sħiħ. Filwaqt li tirrileva li hija ssottomettiet l-informazzjoni kollha dwar il-portafoll tal-appellata, anki il-profil ta' riskju tagħha u l-istruzzjonijiet li kienu ngħataw lilha, tgħid li hija aġixxiet fil-parametri tal-linji gwida applikabbli u ttenni li ma kien sar l-ebda telf. Tgħid li jidher li l-Arbitru kellu l-impressjoni li l-prodotti strutturati kellhom riskju ogħla minn dak li fil-fatt intrinsikament kellhom. Is-soċjetà appellanta hawn tirrileva li l-MFSA dejjem kienet tippermetti investiment f'dawn il-prodotti, kif

kienu wkoll il-linji gwida tagħha, u l-investiment għalhekk qatt ma kien ipprojbit iżda kellu jsir fil-parametri permissibbli. Tirrileva mbagħad li kull investiment fih element ta' riskju inerenti, u dan filwaqt li taċċetta li hija kienet obbligata li tassigura li l-portafoll kien f'kull mument fil-parametri tal-profil ta' riskju tal-membru u anki tal-linji gwidi u tar-regoli applikabbli. Filwaqt li tiċċita dak li jirrileva l-Arbitru fir-rigward ta' prodotti strutturati, tgħid li kuntrarjament għal dak li jgħid, il-profil kien juri li l-linji gwida applikabbli kienu ġew osservati meta sar in-negozju, inkluż l-espożizzjoni għall-imsemmija prodotti u għal prodotti strutturati u għal emittenti singolari. Minn hawn is-soċjetà appellanta tgħaddi sabiex tissottometti kif l-Arbitru applika ħażin ir-regoli tal-MFSA. Tikkontendi li mhux ċar l-Arbitru x'ried ifisser biha l-kelma "*jars*", 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..."*. Tgħid li l-Arbitru applika ħażin l-i*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 tbiddlet u sar applikabbli l-kunċett ta' diversifikazzjoni f'livell tal-membru u mhux tal-Iskema biss, iżda l-bidla saret biss 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 ta' membru. Tgħid li skont l-appellata, l-investimenti ma kienux skont il-profil ta' riskju tagħha u hi min-naħa tagħha kienet ikkontestat din l-allegazzjoni. Filwaqt li għal darb'oħra tagħmel riferiment għall-affidavit ta' Stewart Davies, issostni li l-profil ta' riskju kien għaliha jagħmel parti integrali 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. Minn hawn is-soċjetà appellanta tgħaddi sabiex ittenni għal darb'oħra li l-appellata ma sofriet l-ebda telf għalkemm l-Arbitru ddeċieda mod ieħor. Hija tagħmel diversi sottomissjonijiet dwar l-analiżi li wettaq l-Arbitru fir-rigward tal-profil li ġie ppreżentat minnha, u fir-rigward tad-dokumentazzjoni ta' OMI. Hija tagħmel ukoll diversi sottomissjonijiet dwar l-allegazzjoni tal-appellata li l-*premium* li hija kienet investit kien ta' €189,633.13.

It-tieni aggravju

Is-soċjetà appellanta tgħid li hija tħossha aggravata wkoll għaliex l-Arbitru ddikjara li hija kienet parzjalment responsabbli għal 70% tat-telf soffert mill-appellata. Tgħid li fl-ewwel lok l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet li hija kienet diġà fissret li kienu nfondati, iżda jekk imbagħad wieħed kellu jaċċetta li huwa kellu raġun, tgħid li hu naqas milli jispjega kif attribwixxa lilha r-responsabbilta' ta' 70% tat-telf. Dan filwaqt li tgħid li sabiex jiddikjara responsabbiltà, huwa kellu qabel xejn isib li hemm ness kawżali bejn in-nuqqasijiet tagħha u t-telf soffert mill-appellata. Hawn is-soċjetà appellanta tikkontendi li ċertament ir-responsabbiltà tagħha qatt ma setgħet tkun akbar minn ta' min ta l-parir, jiġifieri CWM jew tal-appellata li ħadet id-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%.

L-aħħar aggravju

Skont is-soċjetà appellanta l-Arbitru ddeċieda ħażin meta sab li hija kienet aġixxiet b'mala fede, u dan stante li ma kien hemm l-ebda prova in sostenn ta' dan.

10. L-appellata tilqa' billi tikkontendi li ġaladarba hija kienet tikkwalifika bħala *'retail client',* jiġifieri hija ma kinitx investitur professjonali, kien mistenni aktar diliġenza min-naħa tas-soċjetà appellanta. Tgħid li kif sewwa osserva l-Arbitru fid-deċiżjoni appellata, għalkemm is-soċjetà appellanta ma ndaħlitx fl-għażla tagħha tal-konsulent finanzjarju, hija kellha ftehim ma' CWM fejn kienet aċċettat li tintroduċi lil din tal-aħħar mal-membri bħala konsulent finanzjarju u saħansitra kienet imniżżla fl-applikazzjoni tas-soċjetà appellanta. B'hekk il-klijent seta' kien influwenzat biex jagħżel lil CWM bħala konsulent finanzjarju tiegħu għaliex bħala *retail client* aktar kienet ser tistrieħ fuq ir-rakkomandazzjonijiet mogħtija mis-soċjetà appellanta. Iżda bħala *trustee* u Amministratur tal-Iskema tal-Irtirar, l-appellata tgħid li l-obbligi bażiċi tas-soċjetà appellanta kienu jirrikjedu wkoll diliġenza u prudenza fil-ftehim li għamlet ma' CWM. Iżda mill-applikazzjoni stess kien jirriżulta li s-soċjetà appellanta kienet aċċettat u anki ħalliet informazzjoni ineżatta dwar il-konsulent finanzjarju. Tgħid li anki dwar dan kien irrileva l-punt l-Arbitru. Jirrileva 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 wkoll ikkonstatah 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'.* Hawn l-appellata tiċċita is-subartikolu 1(2) tal-Att dwar *Trusts* u *Trustees* (Kap. 331), u anki l-para. (ċ) tas-subartikolu 43(6) u l-srtikolu 21 tal-istess liġi. Hija tagħmel ukoll riferiment għal pubblikazzjoni tal-MFSA u tiċċita silta minnha, liema dokument tgħid li kien ġie ppubblikat fl-2017, iżda kien jitratta prinċipji ġenerali tat-Kap. 331 u tal-Kodiċi Ċivili li kienu diġà fis-seħħ qabel dik is-sena. Għalhekk l-Arbitru jiċċita ukoll l-*Investment Guidelines* ta' Jannar 2013. Imbagħad tagħmel riferiment għall-para. 3.1 tas-sezzjoni ntestata *'Terms and Conditions'* fil-formola tal-Applikazzjoni għas-Sħubija tal-Iskema, u ssostni li minkejja li s-soċjetà appellanta kellha d-dettalji tat-transazzjonijiet kollha u anki tal-portafoll sħiħ, hija naqset fl-obbligu ta' rapportaġġ u saħansitra ma ressqet l-ebda prova dwar dan. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru dwar il-kompożizzjoni tal-portafoll tagħha, l-appellata tikkontendi li kien irriżulta tassew ċar li kien hemm għadd ta' riskji assoċjati mal-kapital investit f'dan it-tip ta' prodotti u saħansitra kien hemm noti li seta' jintilef il-kapital. Għal dak li jirrigwarda l-argument tas-soċjetà appellanta dwar l-i*Standard Operational Conditions* 2.7.1 u 2.7.2, hija tibda billi tiċċita l-istess u anki dak li qal l-Arbitru fir-rigward, filwaqt li tissottometti 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. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru li s-soċjetà appellanta ma kinitx toffri informazzjoni adegwata lill-membri tal-Iskema, l-appellata tgħid li l-Arbitru tajjeb osserva li ma kien hemm l-ebda raġuni għalfejn is-soċjetà appellanta naqset. Tgħid li l-argument tas-soċjetà appellanta li hija ma kellha l-ebda obbligu

speċifiku għaliex id-Direttivi jitkellmu dwar l-Iskema ma jreġix, għaliex hija ma setgħetx tinjora l-obbligi tagħha fir-rigward tal-Iskema b'mod ġenerali u l-obbligi ta' *bonus paterfamilias* kienu jservu sabiex jirregolaw sitwazzjonijiet li forsi ma kienux regolati permezz ta' provvediment partikolari tal-liġi.

11. Il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. Huwa jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġjonevoli fic-cirkostanzi partikolari, u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad, wara li huwa għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellata mill-Applikazzjoni għas-Sħubija tal-Iskema[2], innota li ma kienx ġie ndikat jew ippruvat li l-appellata hija investitur professjonali, u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti ssib li dawn kollha 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'domiċilju hawn Malta u kif awtorizzata mill-MFSA bħala *Retirement Scheme* f'April 2011 taħt l-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar) u f'Jannar 2016 taħt l-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta). Osserva li l-fondi li ġew trasferiti fl-Iskema kienu ntużaw sabiex inxtrat polza ta' assikurazzjoni fuq il-ħajja magħrufa bħala *European Executive*

[2] Ara *a fol.* 52 *et seq*.

Investment Bond li kienet inħarġet minn OMI, u sussegwentement il-*premium* ta' dik il-polza ġie investit f'portafoll ta' prodotti bid-direzzjoni tal-konsulent finanzjarju tal-appellata, u li ġie aċċettat mis-soċjetà appellanta. Fost dawk l-investimenti, jirrileva li kien hemm numru kbir ta' noti strutturati kif kien jirriżulta mill-*Investor Profile* esebit mis-soċjetà appellanta stess, minn fejn kien jirriżulta ukoll li l-valur fit-23 ta' Mejju, 2018 f'GBP/EUR kien 127,794/145,829.32, filwaqt li t-total investit kien ta' 132,913GBP/189,479EUR, sabiex b'hekk it-telf kien ta' EUR43,649.68 jew GBP5,119. Jirrileva li s-soċjetà appellanta kienet hawn ħalliet barra d-drittijiet fis-somma ta' GBP7,822 u GBP1,740, sabiex b'hekk wasslet għall-profitt gross ta' GBP4,443. Għalhekk meħud in konsiderazzjoni d-drittijiet imħallsa, il-profitt allegat kien jirriżulta f'telf mill-Iskema. L-Arbitru rrileva wkoll li s-soċjetà appellanta kienet naqset milli tindika r-rati tal-kambju applikati u anki jekk iċ-ċifra tal-profitt gross li allegatament sar kienx wieħed reali.

13. L-Arbitru kkonsidra li CWM kienet il-konsulent finanzjarju kif maħtura mill-appellata sabiex tagħtiha parir dwar l-assi miżmuma fl-Iskema. Irrileva li s-soċjetà appellanta fl-avviż li bagħtet lill-appellata f'Ottubru 2017, kienet iddeskriviet lil CWM bħala *'an authorised representative/agent of Trafalgar International GMBH'*[3]*,* fejn CWM kienet *'authorised representative in Spain and France'* ta' Trafalgar*,* u dan filwaqt li għamel ukoll riferiment għar-risposta tal-imsemmija soċjetà appellanta u għas-sottomissjonijiet tagħha fejn terġa' tirrileva dan il-fatt. Irrileva wkoll li s-soċjetà appellanta kienet issottomettiet li CWM kienet aġent ta' Trafalgar u kienet qegħda topera taħt il-liċenzji ta' din tal-

[3] *A fol.* 130.

aħħar, li kienet liċenzjata u regolata permezz ta' Deutsche Industrie Handelskammer (IHK) ġewwa l-Ġermanja.

14. Filwaqt li l-Arbitru osserva li l-investimenti magħmulin taħt il-polza ta' assikurazzjoni tal-ħajja tal-appellata kienu indikati fl-elenku tat-transazzjonijiet esebit mis-soċjetà appellanta stess, qal li mill-istess elenku kien jirriżulta li l-investimenti f'noti strutturati kienu sostanzjali u saħansitra kien hemm żmien fejn il-portafoll kien magħmul biss jew l-aktar mill-imsemmija noti strutturati matul iż-żmien li CWM kienet il-konsulent finanzjarju. Għalhekk skont l-istess elenku kien jirriżulta wkoll li saru diversi investimenti f'noti strutturati fis-sena 2015, fejn dawn kienu jikkostitwixxu fil-mument tax-xiri tagħhom 65.75% tal-valur tal-polza, u b'hekk għadda sabiex elenka liema kienu dawn l-imsemmija investimenti u anki il-bejgħ ta' diversi noti strutturati fis-sena 2016 u 2017. Dan kollu filwaqt li rrileva li l-informazzjoni mogħtija mis-soċjetà appellanta ma kinitx taqbel ma' dik maħruġa minn OMI, għaliex l-istess ammont tar-rikavat mill-bejgħ tan-noti strutturati kien indikat minn din tal-aħħar f'munita differenti, jiġifieri GBP.

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

Att li Jirregola Fondi Speċjali li ġie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar, u għar-regoli magħmula taħthom li għalihom ġiet soġġetta s-soċjetà appellanta mal-ħruġ taċ-Ċertifikat ta' Reġistrazzjoni tal-1 ta' Jannar, 2016 taħt il-Kap. 514. Sostna li wieħed mill-obbligi ewlenija tagħha bħala Amministratur tal-Iskema skont il-Kap. 450 u l-Kap. 514, kien proprju li taġixxi fl-aħjar interessi tal-Iskema. Il-Qorti hawn iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta hawn kellha obbligi daqstant ċari li timxi fl-aħjar interess tal-Iskema, anki stante l-applikabbilità fil-konfront tagħha tad-dispożizzjonijiet tal-Att dwar Pensjonijiet għall-Irtirar, li ġie fis-seħħ fis-sena 2015.

16. Minn hawn l-Arbitru għadda sabiex elenka diversi prinċipji li kienu applikabbli fil-konfront tas-soċjetà appellanta skont il-*General Conduct of Business Rules/Standard Licence Conditions* applikabbli taħt ir-reġim tal-Kap. 450 kif imħassar, u tal-Kap. 514 li ssostitwih. Għal darb'oħra l-Qorti tirrileva li jirriżulta li s-soċjetà appellanta bħala Amministratur tal-Iskema kienet tenuta li timxi b'kull ħila dovuta, kura u diliġenza fl-aħjar interessi tal-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li minn dan li diġa ngħad, jirriżulta li d-difiża tagħha li hija qatt ma setgħet tinżamm responsabbli għaliex ma kellha l-ebda obbligu fil-konfront tal-appellata, ma tistax tirnexxi.

17. Iżda l-Arbitru ma waqafx hawn għaliex ikkonsidra wkoll il-kariga tagħha bħala *trustee,* u rrileva li hawn kienu applikabbli l-provvedimenti tal-Att dwar *Trusts* u *Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-30 ta' Ġunju, 1989 kif sussegwentement emendat, u l-Arbitru għamel riferiment partikolari għas-subartikolu 21(1), u l-para. (a) tas-subartikolu 21(2). Hawn il-Qorti tgħid li

għal darb'oħra d-difiża tas-soċjetà appellanta ma ssib l-ebda sostenn. L-Arbitru rrileva li fil-kariga tagħha ta' *trustee*, is-soċjetà appellanta kienet tenuta saħansitra tamministra l-Iskema u l-assi tagħha skont diliġenza u responsabbiltà għolja. In sostenn ta' dan kollu, hu ċċita l-pubblikazzjoni An Introduction to Maltese Financial Services Law[4], u anki silta mill-pubblikazzjoni riċenti tal-MFSA tas-sena 2017, fejn din ittrattat prinċipji diġà stabbiliti qabel dik id-data permezz tal-Att dwar *Trusts* u *Trustees* u anki permezz tal-Kodiċi Ċivili.

18. L-Arbitru mbagħad aċċenna fuq obbligu ieħor tas-soċjetà appellanta li huwa qies importanti u rilevanti għall-każ in kwistjoni, dak ta' sorveljanza u monitoraġġ tal-Iskema, inkluż l-investimenti magħmula. Huwa għamel riferiment għall-affidavit ta' Stewart Davies[5] fejn dan aċċetta li s-soċjetà appellanta fl-aħħar mill-aħħar kellha s-setgħa li tiddeċiedi jekk l-investiment għandux isir, u li meta kkonsidrat il-portafoll sħiħ, tali investiment kien jassigura livell adegwat ta' diversifikazzjoni u kien jirrifletti l-attitudni ta' riskju tal-membru u tal-linji gwidi ta' dak iż-żmien. Dan kollu kif imfisser, tgħid il-Qorti, jagħmel ċar li s-soċjetà appellanta kienet taf sew x'inhuma l-obbligi tagħha lejn il-membri tal-Iskema, u li dawn kienu saħansitra obbligi pożittivi fejn hija kienet tenuta tħares il-portafoll tal-membru individwali tal-Iskema u taġixxi skont il-każ. L-Arbitru osserva li x-xhieda ta' Stewart Davies kienet saħansitra riflessa fil-Formola tal-Applikazzjoni għal Sħubija ffirmata mill-appellata.[6] L-Arbitru qal li anki l-MFSA kienet tqis il-funzjoni ta' sorveljanza bħala obbligu importanti tal-Amministratur tal-Iskema, u huwa ċċita siltiet mill-*Consultation Document*

[4] Ed. Max Ganado.
[5] A *fol.* 224 para. 17, *fol.* 227 para. 31 u *fol.* 228 para. 33.
[6] *Ibid.*

tagħha maħruġ fis-16 ta' Novembru, 2018 filwaqt li nsista li l-istqarrijiet hemm magħmula kienu applikabbli wkoll għaż-żmien li fih sar l-investiment in kwistjoni. Għamel ukoll riferiment għall-*Investment Guidelines* magħmulin mis-soċjetà 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.

19. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju ż-żewġ punti li fuqhom huwa msejjes l-ewwel aggravju tas-soċjetà appellanta. Huwa aċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi bħal CWM. L-Arbitru ddikjara li kien tal-fehma, kif inhi din il-Qorti, li s-soċjetà appellanta bħala l-Amministratur ta' Skema għall-Irtirar u t-*Trustee* kellha ċerti obbligi importanti li setgħu jkollhom rilevanza sostanzjali fuq l-operat u l-attivitajiet tal-Iskema u li jaffettwaw direttament jew indirettament l-andament tagħha. Kien għalhekk li kellu jiġi investigat jekk is-soċjetà appellanta naqset mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura safejn dan kellu effett fuq l-andament tal-Iskema u r-riżultanti telf tal-appellata.

20. L-Arbitru osserva li l-appellata kienet għażlet hija stess li taħtar lil CWM sabiex din tipprovdiha b'pariri dwar l-investimenti formanti parti mill-portafoll tagħha fl-Iskema, u min-naħa tagħha s-soċjetà appellanta aċċettat u/jew ħalliet il-konsulent joffri l-parir tiegħu lill-appellata. Osserva li s-soċjetà appellanta saħansitra kellha *introducer agreement* ma' CWM. L-ewwel punt li rrileva hawn, 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 tiġbed l-attenzjoni tal-appellata 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-isem tal-konsulent finanzjarju ndikat fl-Applikazzjoni għas-Sħubija kien differenti, fejn dan kien indikat bħala *Continental Wealth Trust.* Barra minn hekk tħallew vojta d-dettalji dwar *'Regulator'* u *'Licence Number'*, filwaqt li l-informazzjoni fis-sezzjoni *'Professional Adviser'* ma kinitx tindika l-istat regolatorju u l-liċenzja ta' tali konsulent. Il-Qorti hawn tgħid li f'dan il-kuntest hija irrilevanti għalhekk s-sottomissjoni tas-soċjetà appellanta fir-rigward tal-kummenti tal-Arbitru dwar l-applikazzjoni tal-MiFID I Directive meta jirriżultaw nuqqasijiet daqstant ċari min-naħa tagħha. It-tieni punt li qajjem l-Arbitru jirrigwarda n-nuqqas ta' kjarezza fil-Formola ta' Sħubija fir-rigward tal-kapaċità li fiha kienet qegħda taġixxi CWM. Il-Qorti hawn iżżid tgħid li s-soċjetà appellanta tonqos li tikkonvinċi lil din il-Qorti kif dan seta' ma kienx minnu, anki permezz tas-sottomissjonijiet ulterjuri magħmulin fl-Anness I tar-rikors tal-appell tagħha. Imbagħad it-tielet punt tiegħu jirrigwarda l-kwistjoni li ma kienx hemm distinzjoni ċara bejn CWM u Trafalgar, u ma kienx jirriżulta 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 kinitx entità regolata. Huwa hawn għamel riferiment għal żewġ deċiżjonijiet oħra tiegħu, fejn huwa kien ikkonstata korrispondenza li kienet turi li kienu saru ċertu mistoqsijiet dwar CWM minn IHK fejn kien saħansitra jirriżulta li CWM ma kinitx qegħda topera taħt il-liċenzji

maħruġa lil Trafalgar. Iżda qal li min-naħa tagħha s-soċjetà appellanta ma pproduċiet l-ebda evidenza dwar dak allegat minnha fir-rigward tal-awtorizzazzjoni ta' CWM.

21. 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 diliġenza professjonali bħal fil-każ ta' *bonus paterfamilias.* L-Arbitru hawn 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 konoxxenti ta' dan il-fatt u li tassigura li l-appellata jkollha 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, imma anki hi 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 kunflitt ta' interess potenzjal fejn l-entità li kienet soġġetta għas-sorveljanza partikolari mis-soċjetà appellanta, fl-istess ħin kienet qegħda tgħaddilha n-negozju. Il-Qorti ma tistax ma tikkondividiex din il-fehma u tikkonsidra minn dak kollu li s'issa ġie rilevat u kkonsidrat, li ċertament l-kariga tas-soċjetà appellanta ma setgħetx tkun dik ta' amministrazzjoni sempliċi u bażika, meħud kont li hija saħansitra kienet ukoll *Trustee* tal-Iskema.

22. 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 iktar u jinvestiga dwar l-azzjonijiet ta' dik l-entità mhux regolata, sabiex b'hekk jitħarsu l-interessi tal-membri l-oħra tal-iskema u jitnaqqsu r-riskji.

23. 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 l-aktar jew biss f'noti strutturati. Irrileva li ma kienux ġew ippreżentati fl-atti mill-ebda parti l-*fact sheets* fir-rigward tan-noti strutturati in kwistjoni. Madankollu qal li hu seta' jikkonstata li l-portafoll kien ġie espost b'mod estensiv għanl dawn il-prodotti strutturati kif diġà ndikat minnu aktar 'il fuq, u saħansitra kien hemm wkoll espożizzjoni għolja għall-istess emmittent permezz ta' xiri kumulattiv ta' prodotti ta' dak l-istess emmittent li kien Leonteq. B'hekk huwa qal li kien ser jieħu dawn il-fatti in konsiderazzjoni.

24. 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 nħolqot 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-applikabbilità u r-rilevanza ta' dawn il-kondizzjonijiet 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-appellata xi kultant ikun magħmul biss jew fil-parti l-kbira tiegħu minn prodotti strutturati. Barra minn hekk l-espożizzjoni għal emittent waħdieni kienet f'xi drabi viċin il-massimu ta' 30% stabbilit mir-regoli għal investimenti aktar siguri bħal depożiti. Osserva li matul il-proċeduri ma kienx ġie ndikat jekk il-prodotti strutturati kienux ġew negozjati f'suq regolat. Is-soċjetà appellanta tittenta targumenta quddiem din il-Qorti li r-regoli suriferiti jolqtu biss l-Iskema iżda mhux il-portafoll tal-membru individwali, 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-kumplament tal-iskema. Wara dawn l-osservazzjonijiet, l-Arbitru għadda sabiex osserva wkoll li ma kienx ġie ndikat matul il-proċeduri jekk il-prodotti strutturati li fihom kien sar l-investiment kienux ġew negozjati f'suq regolat.

25. Imbagħad l-Arbitru osserva wkoll li fil-fehma tiegħu s-soċjetà appellanta m'għenitx id-difiża tagħha meta naqset milli tipprovdi informazzjoni dettaljata dwar l-investimenti sottoskritti. Huwa aċċenna għal darb'oħra fuq dawk l-aspetti li kellhom jiġu kkonsidrati mis-soċjetà appellanta fir-rigward tal-

kompożizzjoni tal-portafoll tal-appellata. Tajjeb osserva li ma kienet tirriżulta l-ebda raġuni valida għalfejn il-portafoll tal-pensjoni tal-appellata kien ġie espost estensivament għall-prodotti strutturati, u ddikjara li huwa ma kien qed isib l-ebda serħan tal-moħħ adegwat u suffiċjenti li l-kompożizzjoni tal-portafoll kienet tirrifletti l-prudenza mistennija minn portafoll tal-pensjoni minkejja l-profil ta' riskju tal-appellata. Għalhekk huwa kkonsidra li l-investiment tal-portafoll f'kull ħin ma kienx jirrispetta SOC 2.7.2(a) u (b) tal-Parti B.2.7 tad-Direttivi, u lanqas ma kien konvint li dan kien jirrifletti l-kondizzjonijiet u l-limiti tal-investiment tar-regolamenti tal-MFSA. Stqarr li l-Amministratur u *Trustee* tal-Iskema kellu jimxi mal-ispirtu u mal-prinċipji li fuqhom kien magħmul il-qafas regolatorju u fil-prattika kellu wkoll jippromwovi l-iskop li għalih saret l-Iskema. Il-Qorti tikkondividi pjenament dan il-ħsieb u tgħid li hekk biss is-soċjetà appellanta setgħet tiġi kkonsidrata li wriet il-*bona fide* u li osservat dan l-obbligu inerenti fir-rwol tagħha ta' *Trustee* u ta' Amministratriċi tal-Iskema li kif sewwa jgħid l-Arbitru, l-għan tagħha huwa dak li tipprovdi għal benefiċċji tal-irtirar, li wara kollox huwa l-qofol tal-liġi u l-qafas regolatorju li għalih hi u s-soċjetà appellanta huma soġġetti.

26. Dwar it-telf allegat mill-appellata fis-somma ta' EUR43,399.70 kif riżultanti fit-8 ta' Ġunju, 2018, l-Arbitru kkonsidra li s-soċjetà appellanta ma kinitx ikkontestat din l-allegazzjoni fir-risposta tagħha, madankollu għamlet dan fis-sottomissjonijiet addizzjonali tagħha. Filwaqt li ħa konjizzjoni ta' dawn is-sottomissjonijiet fejn is-soċjetà appellanta għamlet riferiment għar-rendikont tagħha tat-3 ta' Diċembru, 2015, fejn kien hemm indikat li fit-18 ta' Novembru, 2015 *Funds received from Royal London'* kienu fis-somma ta' GBP137,672.31,

qal li kien hemm indikat li fid-19 ta' Novembru, 2015 sar '*Investment – Old Mutual*' ta' GBP132,913.86. Irrileva li flimkien mad-dokumenti esebiti mar-risposta tas-soċjetà appellanta, kien hemm ittra ta' konferma tat-23 ta' Novembru, 2015[7] ta' OMI fejn il-*premium* kien indikat f'ammont ta' EUR189,633.13. Imbagħad fil-'*Historical Cash Account Transactions*' ta' OMI datat 25 ta' Mejju, 2018, kien hemm indikat l-ammont ta' GBP132,913.86 bħala '*Transfer of Initial Premium*' fit-23 ta' Novembru, 2015. Irrileva li ma ngħataw l-ebda spjegazzjonijiet dwar id-differenzi riżultanti u liema konverżjoni tal-munita, jekk applikata, kienet intużat u r-raġunijiet għal dan. Irrileva li fis-sottomissjonijiet addizzjonali, is-soċjetà appellanta kienet iddikjarat li fit-23 ta' Mejju, 2018 l-appellata kienet għamlet profitt ta' GBP4,443, b'dana li ma kienx hemm miżjuda hawn id-drittijiet. Kompla jgħid li s-soċjetà appellanta hawn ma spjegatx jekk l-ammont kienx jirrappreżenta qligħ realizzat/mhux realizzat, u dan minbarra li naqset milli tippreżenta stima aktar riċenti. L-Arbitru hawn ikkonsidra s-sottomissjoni tas-soċjetà appellanta li *'[r]eflecting notional foreign exchange rates, which are entirely relevant, the complainant has suffered NO LOSS',* filwaqt li għamlet riferiment għal kommunikazzjoni tas-6 ta' Awwissu, 2019 ta' OMI mal-appellata. Qal li madankollu din il-kommunikazzjoni turi biss l-effetti tal-moviment fir-rata tal-kambju għal dak li jirrigwarda l-*premium* oriġinali, u għalhekk ma setgħetx tittieħed bħala konferma li l-appellata ma kienet sofriet l-ebda telf, u l-argument tas-soċjetà appellanta għalhekk kien qarrieqi. Dan filwaqt li hija ma kienet ressqet l-ebda prova ċara u suffiċjenti sabiex tissostanzja l-allegazzjoni tagħha. Qal li barra minhekk lanqas ma wriet sew it-telf u l-qligħ attwali, u l-istima li pproduċiet kienet dik rilevanti għat-23

[7] A *fol.* 182.

ta' Mejju, 2018. Għalhekk huwa ma setax jistrieħ fuq il-kalkolazzjonijiet ippreżentati mis-soċjetà appellanta sabiex jistabbilixxi jekk l-appellata għamlitx telf jew qliegħ mill-Iskema. Irrileva li l-appellata ippreżentat kommunikazzjoni mingħand is-soċjetà appellanta datata 10 ta' Ġunju, 2019 fejn din ikkonfermat li l-valur tal-investiment kif stmat fl-10 ta' Ġunju, 2019 kien ta' EUR118,705.58, jiġifieri tnaqqis fil-valur ta' EUR70,927.55, filwaqt li l-valur tat-trasferiment tal-investiment kif stmat kien ta' EUR116,755.58. L-Arbitru qal li dan kollu kien jikkontradixxi l-allegazzjoni tas-soċjetà appellanta li l-appellata ma kinitx għamlet telf. Wara li spjega d-diversi inkonsistenzi li huwa seta' jikkonstata mid-dokumenti fir-rigward tal-valur tal-investiment, l-Arbitru aċċenna għall-importanza li t-*Trustee* jassigura li tingħata informazzjoni li tkun ċara, sħiħa u konsistenti, anki fir-rigward tal-konverżjoni tal-munita. Il-Qorti taqbel mal-ħsibijiet tal-Arbitru, u tgħid li kif sewwa jirrileva l-Arbitru, is-soċjetà appellanta naqset li tressaq prova tajba u suffiċjenti sabiex tissostanzja l-allegazzjoni tagħha li l-appellata ma batiet l-ebda telf. L-uniku xhud tagħha Stewart Davies, li għandu l-kariga ta' Direttur magħha, ma jagħti l-ebda spjegazzjoni fl-affidavit tiegħu. Fin-nuqqas ta' prova kuntrarja s-soċjetà appellanta ċertament ma tistax tippretendi li l-allegazzjoni tagħha kif espressa fis-sottomissjonijiet finali tagħha quddiem l-Arbitru tista' tirnexxi. Lanqas ukoll ma tista' tirnexxi quddiem din il-Qorti fl-istadju tal-appell, meta l-Qorti tgħid li mhux biss s-sottomissjonijiet tagħha fir-rikors tal-appell mhumiex daqstant ċari bil-mod kif inhuma espressi, u jonqsu li jindirizzaw tajjeb il-punt kruċjali, iżda anki li kieku dawn jinftehmu, dawn ma jistgħux jintlaqgħu f'dan l-istadju tal-appell minflok il-prova li kienet tenuta tressaq is-soċjetà appellanta in sostenn tal-argumenti miġjuba minnha.

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

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

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

(i) Ir-rwol tagħha bħala *Trustee* u Amministratriċi tal-Iskema kien aktar wiesgħa u kien imur oltre il-ħarsien tar-regoli speċifiċi;

(ii) kienet straħet fuqha l-appellata sabiex jintlaħaq l-għan tagħhom li tirċievi benefiċċji tal-irtirar filwaqt li tiġi assigurata l-pensjoni.

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

Arbitru, tgħid li m'għandhiex aktar x'iżżid mad-deċiżjoni appellata tassew mirquma u studjata.

30. L-aħħar aggravju tas-soċjetà appellanta huwa dwar il-kumment tal-Arbitru fir-rigward ta' dak li huwa kkonsidra bħala tnikkir min-naħa tagħha sabiex tgħaddi lill-appellata d-dokumenti rikjesti minnha, imma mbagħad irrilevat il-preskrizzjoni tal-azzjoni kontriha. Fil-fehma tal-Arbitru huwa kkonsidra li dan kien aġir tassew nieqes mill-professjonalità, u qal li l-prinċipju legali aċċettat żmien ilu huwa li ħadd ma jista' jistrieħ fuq il-*mala fede* tiegħu stess. Tikkontendi li dan l-Arbitru qalu mingħajr ma tressqet l-ebda prova li hija kienet aġixxiet in *mala fede,* u kien inaċċettabbli li deċiżjoni bħal din saħansitra kienet laħqet id-dominju pubbliku. Il-Qorti hawn ukoll tikkondividi l-ħsieb tal-Arbitru u ma tara l-ebda raġuni għalfejn is-soċjetà appellanta kienet tardiva fir-risposti tagħha, u hija stess saħansitra ma toffri l-ebda spjegazzjoni. Hawn ukoll l-obbligu tagħha li tagħti informazzjoni f'waqtha lill-appellata għandu rilevanza qawwija f'sitwazzjoni fejn l-investimenti allegatament kienu qegħdin jesperjenzaw telf qawwi. Għaldaqstant il-Qorti ma ssibx li l-aggravji mressqa mis-soċjetà appellanta huma ġustifikati, u tiċħadhom.

<u>Decide</u>

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

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

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur