



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-23 ta' Marzu, 2022

Appell Inferjuri Numru 56/2021 LM

Gavin Alexander Stevenson-Bennett
(Detentur tal-Passaport numru 707607428)
(l-appellat')

vs.

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

Il-Qorti,

Preliminari

1. Dan huwa appell magħmul mis-soċjetà intimata **STM Malta Pension Services Limited (C 5028)** [minn issa 'l quddiem 'is-soċjetà appellanta'] li s-sostitwit **lis-soċjetà STM Malta Trust Company Management Limited**, mid-

deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fit-3 ta' Mejju, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrent **Gavin Alexander Stevenson-Bennett (Detentur tal-Passaport nru. 707607428)** [minn issa 'l quddiem 'l-appellat'] fil-konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinzamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lill-appellat il-kumpens ta' GBP26,977.62 u EUR11,594.36, bl-imghaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effetiv pagament, filwaqt li s-soċjetà appellanta kellha tħallas l-ispejjeż kollha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament jgħid li sofra l-appellat mill-investment li huwa kien għamel fis-sena 2012 tal-polza tal-assikurazzjoni fuq il-ħajja magħrufa bħala l-*Executive Investment Bond*, kif maħruġa minn *Royal Skandia*, fi skema tal-irtirar jew QROPS [minn issa 'l quddiem 'l-Iskema'] bl-isem *STM Malta (US Qualified) Retirement Plan*, kif amministrata mis-soċjetà appellanta, u dan permezz tal-konsulent finanzjarju tiegħu *Continental Wealth Management/GlobalNet Ltd* [minn issa 'l quddiem 'CWM'].

Mertu

3. L-appellat għalhekk ipprezenta lment quddiem l-Arbitru fil-25 ta' Settembru, 2019 fil-konfront tas-soċjetà STM Malta Trust and Company Management Ltd, għaliex fil-fehma tiegħu s-soċjetà appellanta bħala *Trustee* tal-Iskema naqset mid-dmir fiduċjarju tagħha li tipprovdilu l-protezzjoni li huwa kien jistenna mingħand *Trustee* bħala investitur *retail* kif iddikjarat b'riskju baxx. Għaldaqstant huwa kien qed jippretendi li jithallas danni fis-somma ta' €91,768.81, liema somma tkopri wkoll l-imgħaxijiet pretiżi minnu bir-rata ta' 3% mid-data meta huwa kien investa fl-Iskema.

4. L-imsemmija soċjetà, kif aktar tard sostitwita mis-soċjetà appellanta, wiegħbet fil-15 ta' Ottubru, 2019 billi eċċepiet qabel xejn li l-allegat telf ma kienx riżultat ta' frodi, nuqqas jew negliġenza tagħha. Imbagħad eċċepiet is-segweni fost affarijiet oħra: (a) l-appellat kien għażel huwa stess il-konsulenti finanzjarji tiegħu; (b) l-applikazzjoni li ffirmat l-appellat sabiex jissieheb fl-Iskema, kien fiha l-informazzjoni sħiħa u anki diversi dikjarazzjonijiet, garanziji u ndennizzi kif mogħtija mill-appellat; (ċ) stante l-allegazzjoni ta' frodi fil-konfront ta' terzi, li s-soċjetà appellanta titlob sabiex jiġu kjamati fil-kawża, hija ma tistax tinstab responsabbli lejn l-appellat; (d) mingħajr preġudizzju, fl-eventwalità li tinstab responsabbli lejn l-appellat, dan għandu jiġi ndennizzat mis-sottofond tal-membri skont ir-regola 12.1 tat-*Trust Rules*; u (e) mingħajr preġudizzju, hija kienet għamlet offerta *ex gratia* lill-appellat.

Id-deċiżjoni appellata

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

“Considers:

Further Considers:

Allegations relating to copied signatures and alleged fraudulent dealing instructions and Joinder request by the Service Provider

The Complainant alleged that STM Malta accepted documentation, namely the Client Profile Questionnaire and Application Form and dealing instructions for investments which had 'a copied signature'. (fn. 40 A fol. 5 & 7)

This is a serious allegation which had to be specifically proven by specific facts and, in the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation. However, the Complainant did not provide enough evidence to the Arbiter to accept his allegation.

Moreover, fraud is a criminal offence over which the Arbiter has no jurisdiction. If the Complainant has enough evidence to prove fraud, he should report the case to the relevant authorities.

In the context of this allegation, the Arbiter notes that in its reply to the Office of the Arbiter for Financial Services ('OAFS') received on 15 October 2019, STM Malta requested the joinder, as party to the complaint, of a number of parties, that is, of 'Continental Wealth Management, Premier Solutions SL, Stephen Ward, Anthony Poole and Anthony Downs' (collectively referred to as 'the Joinder Parties'). (fn. 41 A fol. 185)

Since the Arbiter has decided that the Complainant did not produce enough evidence to prove fraudulent behaviour, the Arbiter is rejecting the request for the joinder of other parties.

Moreover, the Arbiter notes that, in Section C of the Complaint Form, the Complainant identified STM Malta as the financial services provider against whom his Complaint

before the Arbiter is being made in relation to the Scheme. (fn. 42 A fol. 3) The Complaint that is being considered by the Arbiter under the Act is indeed one relating solely to the alleged shortcomings of the Service Provider as Administrator and Trustee of the Retirement Scheme.

Therefore, the Arbiter will consider STM Malta as the only Service Provider against whom the Complaint is being lodged by the Complainant.

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. 43 Cap. 555, Article 19(3)(b))

The Arbiter is considering the Complaint and 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. 44 Art. 19(3)(d)) which stipulates that he should deal with complaints in 'an economical and expeditious manner'.

The Complainant

The Complainant was born in August 1953, is of British nationality and was indicated as residing in Portugal. (fn. 45 A fol. 190)

The Complainant was indicated, in the Scheme's Application Form for Membership, as having acquired his wealth through the 'Supply + Install Heating Equipment'. (fn 46 Ibid.) In CWM's Confidential Client Fact Find, his occupation was indicated as a self-employed manager. (fn. 47 A fol. 157)

His attitude to risk in the same CWM's form, was indicated as 'Low/Medium' with his 'Financial Planning Priorities' being indicated as '1. Protection; 2. Growth/Income; 3. Tax efficiency; 4. Lump Sum Investments from QROPS'. (fn. 48 A fol. 159)

The fact find also indicates inter alia that the Complainant's experience in investments was limited to investments in 'UK Banks' and 'UK Gov. Premium Bonds'. (fn. 49 A fol. 158)

The Service Provider

STM Malta is licensed as a Retirement Scheme Administrator (fn. 50 <https://www.mfsa.mt/financial-services-register/result/?id=204>) by the Malta Financial Services Authority and acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 51 A fol. 197)

Investment Advisor

The Client Profile Questionnaire and Application Form in respect of the Scheme indicates that the Investment Advisor was Continental Wealth Management ('CWM'), an entity based in Spain with Antony Poole indicated as contact person. (fn. 52 A fol. 193)

The application form in respect of the underlying policy held by the Scheme, the 'Executive Investment Bond' issued by Royal Skandia, (fn. 53 A fol. 122) indicates 'Continental Wealth Management/GlobalNet Ltd' as financial advisor. (fn. 54 A fol. 125)

Particularities of the Case

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

The STM Malta Retirement Plan ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta and authorised by the Malta Financial Services Authority ('MFSA') as a Personal Retirement Scheme. (fn. 55 <https://www.mfsa.mt/financial-services-register/result/?id=209>)

The Scheme was initially registered with MFSA under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta). (fn. 56 This being the regulatory framework applicable in Malta for personal retirement schemes at the time of the Complainant's Application for Membership into the Retirement Scheme in 2012. A fol. 196.) The scope of the Scheme is to provide for retirement benefits where it was 'established to provide a lifetime income to its members'. (fn. 57 A fol. 189)

The assets held into the Complainant's Retirement Scheme account were used to purchase a life insurance contract, the 'Executive Investment Bond' ('the Skandia Plan') issued by Royal Skandia Life Assurance Limited. The policy was in GBP and was issued on 11 January 2013 with a premium of GBP89,644.93. (fn. 58 A fol. 19-20)

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

Underlying Investments

Whilst neither the Complainant nor the Service Provider presented any table summarising the investments undertaken during the contested period of CWM, the Arbitrator was able to extract details of the underlying investment portfolio from the statements submitted by the Complainant attached to his Complaint Form.

Table A below includes an overview of the investments transactions undertaken within the underlying Skandia Plan as per the information resulting from the Historical Cash Account Transactions' statement presented by the Complainant, (fn. 59 A fol. 42-54) which covered the period from 11/01/2013 to 20/08/2019: (fn. 60 A fol. 43)

Table A - Overall Portfolio

Investment Name (as indicated in the said statement)	Date bought	CCY	Purchase amount	Date sold/ matured	CCY	Maturity / Sale price	Capital Loss/ Profit (excl. div.)	% of Capital loss/ profit (excl. div) on capital invested
Nomura 5Y East to West 5	21/02/13	GBP	38,000	19/08/14	GBP	38,190	190	0.5 %
Commerzbank 1Y Pharma Inc NT	22/02/13	GBP	50,000	24/02/14	GBP	50,000	0	0
Commerzbank AG GLBL Pharma Note	21/03/14	GBP	26,000	23/03/15	GBP	26,000	0	0
RBC Large Tech Inc 8% 25/03/16	25/03/14	GBP	26,000	26/03/18	GBP	4,977.90	- 21,022.10	-80.85 %

<i>RBC Online Large Caps Inc Note</i>	05/09/14	GBP	5,000	05/09/16	GBP	2,425	-2,575	-51.50 %
<i>Leonteq 1.5Y Multi Barrier</i>	19/09/14	GBP	5,000	23/04/15	GBP	4,900	-100	-2%
<i>Nomura Inc NT US Diversified ST</i>	1/10/14	GBP	28,000	01/10/15	GBP	464.91	- 27,535.09	-98.34 %
<i>EFG EY MB Exp Cert Red March 1</i>	01/04/15	GBP	1,962.80	20/03/17	GBP	122.50	-1,840.30	-93.76 %
<i>Leonteq TCM Blue 2Y Multi Barr Bitauto Navios Maritime WW</i>	21/04/15	EUR	12,510	06/03/17	EUR	4,529.84	-7,980.16	-63.79 %
<i>Commerzbank 2Y AC RCB Worst of TLW JCP BBRY TWTR</i>	24/04/15	EUR	12,000	24/04/17	EUR	3,470.16	-8,529.84	-71.08 %
<i>EFG Red April 6</i>	08/05/15	EUR	6,000	08/05/17	EUR	222.63	-5,777.37	-96.29 %
<i>RBC GBP Notes Linked to P UN, Yelp UN, CTRP UQ, Expe UQ</i>	13/09/16	GBP	2,425	13/09/17	GBP	1,499.63	-925.37	-38.16 %
Total capital loss (excl. div.) on GBP & EUR denominated structured note investments							(GBP53,807.86) & (-EUR22,287.37)	

It is clear that the investment portfolio underlying the Skandia Plan constituted solely of structured notes.

The above table further indicates substantial realised capital losses (exclusive of dividends) arising from such investments.

It is also noted that, as indicated in Table B below, even when taking into consideration the dividends received (which result from the information in the Historical Cash Account Transactions statement), substantial **realised** losses still arise on the overall portfolio.

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

Investment Name (as indicated in the 'Historical Cash Account Transactions' statement)	CCY	Capital Loss/ Profit (excl. div.)	Total Dividends Received	Total Loss/Profit (inclusive of dividends)	% of Total loss/ profit (incl. of div.) on capital invested
Nomura 5Y East to West 5	GBP	190	0	190	0.5 %
Commerzbank 1Y Pharma Inc NT	GBP	0	4,250 (fn.61 4 dividend payments of GBP1062.50 each)	4,250	8.5 %
Commerzbank AG GBLB Pharma Note	GBP	0	2,600 (fn. 62 4 dividend payments of GBP650 each)	2,600	10 %
RBC Large Tech Inc 8% 25/03/16	GBP	- 21,022.10	4,160 (fn. 63 8 dividend payments of GBP520each)	-16,862.10	-64.85 %
RBC Online Large Caps Inc Note	GBP	-2,575	875.01 (fn. 64 7 dividend payments of GBP125 each)	-1,699.99	-33.99 %

<i>Leonteq 1.5Y Multi Barrier</i>	<i>GBP</i>	-100	<i>225 (fn. 65 2 dividend payments of GBP112.5 each)</i>	125	<i>2.5 %</i>
<i>Nomura Inc NT US Diversified ST</i>	<i>GBP</i>	-27,535.09	<i>2,800 (fn. 66 4 dividend payments of GBP700 each)</i>	-24,735.09	<i>-88.34 %</i>

<i>EFG EY MB Exp Cert Red March 1</i>	<i>GBP</i>	-1,840.30	<i>358.4 (fn. 67 8 dividend payments of GBP44.8 each)</i>	-1,481.90	<i>-75.50 %</i>
<i>Leonteq TCM Blue 2Y Multi Barr Bitauto Navios Maritime WW</i>	<i>EUR</i>	-7,980.16	<i>3,900 (fn. 68 8 dividend payments of EUR487.50 each)</i>	-4,080.16	<i>-32.62 %</i>
<i>Commerzbank 2Y AC RCB Worst of TLW JCP BBRY TWTR</i>	<i>EUR</i>	-8,529.84	<i>1,824 (fn. 69 8 dividend payments of EUR228 each)</i>	-6,705.84	<i>-55.88 %</i>
<i>EFG Red April 6</i>	<i>EUR</i>	-5,777.37	<i>0</i>	-5,777.37	<i>-96.29 %</i>
<i>RBC GBP Notes Linked to P UN, Yelp UN, CTRP UQ, Expe UQ</i>	<i>GBP</i>	-925.37	<i>0</i>	-925.37	<i>-38.16 %</i>
Total capital loss (incl. div.) on GBP & EUR denominated structured note investments				(-GBP38,539.45) & (-EUR16,563.37)	

According to the Historical Cash Account Transactions statement provided, the Complainant is calculated to have experienced a material total realised capital loss (inclusive of dividends) of (-GBP38,539.45) on the portfolio of GBP denominated

structured note investments and of (-EUR16,563.37) on the EUR denominated structured notes.

It is clear, that the Complainant has accordingly experienced a material loss overall on his investment portfolio which solely constituted of structured notes as indicated above.

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

It is noted that the above losses are calculated strictly on the portfolio of investments. The said losses do not take into account fees charged to the Scheme. The total losses actually experienced on the Scheme would accordingly be higher when taking into account all the various fees paid out of the Scheme's assets.

The Legal Framework

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

The Retirement Scheme and STM Malta are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta). The Retirement Pensions Act ('RPA') was published in August 2011 and came into force on the 1 January 2015. (fn. 70 Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA -

<https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/>)

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions

(Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by the MFSA under the RPA.

The Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider as per Article 1(2) and Article 43(6)(c) of the TTA, in light of STM Malta's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

Article 1(2) of the TTA provides that:

'The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A', with Article 43(6)(c) in turn providing that:

'A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes ...'.

Responsibilities of the Service Provider

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

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

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

Following the repeal of the SFA and eventual registration under the RPA, STM Malta became subject to the provisions relating to the services of a retirement scheme administrator under the RPA. As a Retirement Scheme Administrator under the RPA, STM Malta became subject to the conditions outlined in the 'Pension Rules for Service Providers issued under the Retirement Pensions Act' ('the Pension Rules for Service Providers') and the 'Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' ('the Pension Rules for Personal Retirement Schemes').

One key duty of the Retirement Scheme Administrator emerging from the primary legislation itself is the duty to 'act in the best interests of the scheme' as outlined in Article 19(2) of the SFA and Article 13(1) of the RPA.

From the various general conduct of business rules/standard licence conditions applicable to STM Malta in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively, it is pertinent to note the following general principles: (fn. 71 Emphasis added by the Arbiter)

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

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

The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled 'Conduct of Business Rules' of the Pension Rules for Service Providers dated 1 January 2015, issued in terms of the RPA, and which applied to STM Malta as a Scheme Administrator under the RPA, provided that:

'The Service Provider shall act with due skill, care and diligence ...'.

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

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

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

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

Duties as a Trustee

As highlighted above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is also relevant for STM Malta considering its capacity as Trustee of the Scheme.

Article 21(1) of the TTA which deals with the 'Duties of trustees', stipulates that:

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

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

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

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

The Trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property 'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'. (fn. 72 Editor Max Ganado, 'An Introduction to Maltese Financial Services Law', Allied Publications 2009, p. 174)

As has been authoritatively stated:

‘Trustees have many duties relating to the property vested in them. These can be summarized as follows: **to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust**’. (*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. 74 Pg. 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017*)

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

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

Observations and Conclusions

Allegations in relation to fees

The Complainant also made certain allegations relating to the fees and charges.

The Arbiter has, however, not found sufficient evidence to uphold the Complainant's claim on fees.

With respect to fees and charges, the Arbiter would like to make a general observation. The Arbiter considers that the trustee and scheme administrator of a retirement scheme, in acting in the best interests of the member as duty bound by law and rules to which it is subject to, is required to be sensitive to, and mindful of, the implications and level of fees applicable within the whole structure of the retirement scheme and not just limit consideration to its own fees.

In its role of a bonus paterfamilias, the trustee of a retirement scheme is reasonably expected to ensure that the extent of fees applicable within the whole structure of a retirement scheme is reasonable, justified and adequate overall when considering the purpose of the scheme. Where there are issues or concerns these should be reasonably raised with the prospective member or member as appropriate.

Consideration would in this regard need to be given to a number of aspects including: the extent of fees vis-à-vis the size of the respective pension pot of the member; that the extent of fees are not such as to inhibit or make the attainment of the objective of the Scheme difficult to be actually reached without taking excessive risks; neither that the level of fees motivate investment in risky instruments and/or the construction of risky portfolios.

Key consideration

The Complaint, in essence, revolves around the claim that the Complainant experienced a loss on his Retirement Scheme due to STM Malta not having adequately carried out its duties as administrator and trustee of the Scheme with the Complainant raising various aspects. (fn. 75 a fol. 5-9)

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

This principal alleged failure relates, in this case, to the claim that STM Malta failed to ensure that the investments were in line with his 'Low to Medium' risk profile and in his best interest as the Complainant claimed massive risks were allowed to be taken on his portfolio with his capital being invested in totally unsuitable structured notes which were not aimed for retail investors but for professional investors only, and with the constituted portfolio being 'unsuitable for the purpose of building a secure pension fund for [his] future retirement'. (fn. 76 A fol. 5 & 6)

The Arbiter shall consider this aspect based on the information resulting from this case.

General observation

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

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

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

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

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

Permitted portfolio composition

The Arbiter refers to the composition of the permitted investment portfolio and the realised losses as indicated in the section of this decision titled 'Underlying Investments' above and notes that the Complainant's portfolio had been allowed to comprise solely of structured note investments with considerable exposure to individual structured note products also prevailing in multiple instances.

The portfolio of investments indeed commenced with around 98% of the Complainant's capital being allowed to be invested into just two structured notes at the time. (fn. 77 A fol. 44 - A material investment of GBP38,000 into one single

product, the Nomura 5Y East to West 5, and another substantial investment of GBP50,000 into the Commerzbank 1Y Pharma Inc NT together amounting to GBP88,000 and constituting at the time 98.17% of the total premium of GBP89,644.93.) The Complainant's underlying investment portfolio continued to remain solely exposed to structured notes investments in subsequent years with various material exposures in a few structured note investments as can be seen in Table A in the section titled 'Underlying Investments' above.

The said table also indicates that there were various instances of high exposures to single structured note investments as well as high exposure to single issuers (such as RBC, Nomura, and Commerzbank) where in the case of high exposures to single issuers this occurred at the time of purchase of the respective product and/or through cumulative purchases of structured notes issued by the same issuer.

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

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 2010 (fn. 78 A fol. 200) until the registration of the Scheme under the RPA after this came into force into 2015, stipulated various benchmarks with respect to investment portfolios of retirement schemes by providing conduct of business rules related to a scheme's assets.

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 Administrator 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. 79 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. 80 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. 81 SOC 2.7.2 (e)) to be 'properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings', (fn. 82 SOC 2.7.2 (e)) where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme. (fn. 83 SOC 2.7.2 (h)(iii) & (v))

Despite the said standards STM Malta allowed the portfolio to comprise solely of structured products with individual exposures to single issuers at times being seemingly in excess of 20% of the portfolio (this being the maximum limit applied in the Rules to diversified investment instruments, such as collective investment schemes whose performance was not materially impacted or determined by a single underlying asset); and, in certain cases, even higher than 30%, the latter being the maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above.

As Trustee and Retirement Scheme Administrator of the Scheme, STM Malta should have indeed intervened and not allow such portfolio composition. Whilst STM Malta was not the investment advisor, however, in its capacity of Trustee of the Scheme and Retirement Scheme Administrator it had the power and authority, besides the duty, not to permit such portfolio composition to be undertaken within its Scheme, given that the portfolio was not reflective of the requirement, which it had to ensure, that assets were to be invested in a prudent manner and also reflective of the scope for which the Scheme was created - that is, to provide for retirement benefits rather than being a speculative investment vehicle.

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

In its reply and submissions, the Service Provider chose to omit and not delve into any details of the actual investment portfolio and neither did it submit any

justifications and explanations of how the investment portfolio of the Complainant was in line with the applicable requirements and followed the prudence principle. This despite the material nature of the claim made by the Complainant including that the investments were outside of his risk profile.

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

Fact Sheets

The Complainant submitted fact sheets in respect of the following structured notes (fn. 84 (Name of structured note as reflected in the Historical Cash Account Transactions.) which featured in his investment portfolio:

- *the Nomura 5Y East to West 5 with ISIN no. XS0875788878; (fn. 85 A fol. 55 & 56)*
- *the Commerzbank AG GLBL Pharma Note with ISIN no. XS1035007969; (fn. 86 A fol. 60 & 61)*
- *the RBC Large Tech Inc 8% 25/03/16 with ISIN no. XS1015512533; (fn. 87 A fol. 64 & 83) and*
- *the RBC Online Large Caps Inc. Note with ISIN no. XS1092556452. (fn. 88 A fol. 70 & 71)*

The fact sheets for the said notes indicated the products as being linked to a number of underlying stocks (equity) or financial indices. Fixed income returns were indicated in the said fact sheets as 10% p.a. for the above-mentioned structured notes with the exception of the RBC Large Tech Income Note whose fixed level of income was 8% p.a.

It is noted that the high rate of returns indicated on these products in themselves reflect the high level of risk being taken as per the risk-return trade-off.

It is further noted that the fact sheets of the said structured notes highlighted a number of risks in respect of the capital invested into these products. Apart from the credit risk of the issuer and the liquidity risk, the indicated fact sheets further highlighted risk warnings about the notes not being capital protected, warning that

the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment.

A particular feature emerging in the indicated structured notes involved the application of capital buffers and barriers. In this regard, the fact sheets described and included warnings that the invested capital was at risk in case of a particular event occurring. Such event comprised a fall, observed on a specific date of more than a percentage (specified as 50% of the initial value in the respective fact sheets), in the value of any underlying asset to which the structured note was linked.

The said fact sheets also included a warning on the lines that if any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity, and capital will be lost. (fn. 89 E.g. Fact sheets in respect of the RBC Large Tech Income Note (A fol. 65) and the RBC Online Large Caps Income Note (A fol. 71) with similar disclosure featuring in the other fact sheets provided)

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

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

Such investments also did not reflect the low/medium risk attitude of the Complainant and, even more, when one considers that his investment portfolio was solely constituted of structured products and also material positions were being taken into single products.

For example, there were on various occasions material positions being taken into a single-structured product some of which constituted between approximately 30 – 55% (fn. 90 E.g. GBP28,000 of GBP89,644.93 = 31.23%; GBP50,000 of GBP89,644.93=55.78%.) of the original transfer value respectively.

The Arbiter does not have figures of the value of the portfolio at the respective time of purchase of the products, where the respective percentages into a single product could have been even higher in case where the value of the other existing investments had dropped in value.

The Arbiter considers that an objective assessment of the investment portfolio would indicate that the investments chosen were, in the context of a pension scheme, not even suitable for an investor with a higher attitude to risk, let alone for the Complainant, who had a low/medium risk attitude, who looked for 'protection' as one of his first financial planning priorities and whose investment experience was limited to low risk investments such as 'UK Gov. Premium Bonds' and deposits with UK Banks. (fn. 91 A fol. 158 & 159)

The Arbiter is of the view that not only was the investment portfolio not of 'low risk', but rather one involving substantial high risks as reflected in the extent of realised losses experienced by the Complainant, where many of the structured notes invested into yielded a capital loss, some of which on nearly all or substantial parts of the capital invested, (fn. 92 As detailed in the section titled 'Underlying Investments' above) even when taking into consideration dividend payments.

By its very nature, a pension scheme is not a speculative investment account/vehicle.

Moreover, it is also noted that the fact sheets presented all specify, that the target audience for these products were 'Professional Investors Only', (fn. 93 Fact sheets refer - for example, section titled 'Key Features' and 'Target Audience' in the fact sheets issued by RBC refer) and accordingly such products were not aimed for retail investors, as the Complainant was. The structured notes cannot accordingly be deemed to have somehow either been in his best interests as they did not reflect inter alia his profile of a retail investor nor a low/medium attitude to risk.

Other aspects

Alleged 'Limited' role of STM Malta

The Service Provider submitted in its reply that its role was 'limited' where it inter alia argued that the Complainant 'signed the various forms confirming the investments were his choice and acknowledged the Respondent's (limited) role that did not include advising on investments'.

The Service Provider also stated in its reply that:

'... under the provisions governing the Respondent's appointment, given the Respondent's limited role, the Respondent had the benefit of various indemnities and warranties ...'. (fn. 94 A fol. 180)

Furthermore, STM Malta also submitted that:

'the role of the trustee was to hold the Executive Bond as trustee of the Complainant being a member of the Plan, and not to step into the shoes or duties of the investment advisor selected by the Complainant himself who had advised the selection of the Executive Bond by the Complainant and who would advise any further purchases or disposals of the pool of investments structured via the Executive Bond'. (fn. 1 A fol. 183)

Whilst it is true that STM Malta's role in respect of the Scheme did not involve the provision of investment advice, however, STM Malta's role in respect of the Scheme is far from 'limited' as indicated above, and such comments by the Service Provider rather demonstrate a lack of appreciation and understanding of the significance of the role of a trustee and retirement scheme administrator in respect of a retirement scheme; besides, a possible disregard of the regulatory requirements applicable thereto.

The Service Provider is ultimately responsible to answer in respect of its duties and role in relation to the Retirement Scheme.

Reference to various disclaimers

*In its submissions, the Service Provider also based its defence by quoting various disclaimers and provisos included in its own forms. Apart that a service provider should not hide behind such disclaimers or use them to avoid answering for reasonable and justified complaints made against it in relation to its responsibilities, in the circumstances of the case, **where a lack of diligence on the part of the Service Provider has been determined as described in this decision, not much weighting can be attributed to the said disclaimers.***

No comfort relating to the underlying portfolio

As already indicated, no adequate comfort has emerged that the investments were suitable for inclusion in a pension portfolio, something which the Service Provider

has not even contested during the proceedings of this case, other than pointing out that structured notes 'were a permitted pension investment'. (fn. 96 A fol. 180)

Whilst structured notes could have possibly been allowed, there is no apparent justification for allowing all the portfolio to be invested into such instruments, nor for the excessive exposures being taken cumulatively and even at times on single investments individually.

Hence, the general statements made by the Service Provider do not provide any comfort whatsoever in the circumstances of this case, even more so, when it has been determined that the Complainant's portfolio included investments not suitable for a retail member and of a high risk.

The Complainant is ultimately claiming losses which are equivalent to nearly 70% of the total amount invested into his Retirement Scheme. (fn. 97 GBP61,712.54 of sum invested in the Executive Investment Bond of GBP89,644.93 (A fol. 180) = 68.8%.)

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

The material losses claimed are indeed in themselves indicative of the failure in achieving the Retirement Scheme's primary objective 'to provide a life-time income to the Member', (fn. 98 A fol. 189) and in the failure to ensure an adequate level of diversification and assets being invested in a prudent manner. Such material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have otherwise not occurred.

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

Causal link

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

There is sufficient and convincing evidence of deficiencies on the part of STM Malta in the undertaking of its obligations and duties as Trustee and Retirement Scheme

Administrator of the Scheme as amply highlighted above. At the very least, such deficiencies impinge on the diligence STM Malta was required and reasonably expected to exercise in such roles.

It is also sufficiently clear that such deficiencies prevented the losses from being minimised and, in a way, contributed in part to the losses experienced. The actions and inactions that occurred, as explained in this decision, enabled such losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.

Had STM Malta undertaken its role adequately and as duly expected from it in terms of the obligations resulting from the law, regulations and rules stipulated thereunder, as explained above, such losses would have been avoided or mitigated accordingly.

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with STM Malta being one of such parties.

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

Final remarks

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

It should have also ensured that the portfolio composition was one enabling the aim of the Retirement Plan to be achieved with the necessary prudence as one would reasonably expect from a retirement plan, promoting in the process the scope for which the Scheme was established.

The principal purpose of a personal retirement scheme is ultimately that to provide retirement benefits. Such purpose is so important that it has been ingrained and reflected in the primary legislation, the Special Funds (Regulation) Act ('SFA') (fn. 99

GBP61,712.54 of sum invested in the Executive Investment Bond of GBP89,644.93 (A fol. 180) = 68.8%.) and the Retirement Pensions Act ('RPA'), itself. (fn. 100 Article 2 of the RPA defines a 'personal retirement scheme' as: 'a retirement scheme which is not an occupational retirement scheme and to which contributions are made for the benefit of an individual'. A 'retirement scheme' is, in turn, defined under Article 2 of the RPA, as 'a scheme or arrangement as defined in article 3', where Article 3(1) stipulates that 'A retirement scheme means a scheme or arrangement with the principal purpose of providing retirement benefits'. Article 2 of the RPA also defines 'retirement benefit' as meaning: 'benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death'.)

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

Moreover, with respect to the portfolio composition, the Arbiter considers that whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

For the reasons amply explained above, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee with respect to the permitted investment portfolio.

The Arbiter also considers that the Service Provider did not meet the 'reasonable and legitimate expectations' (fn. 101 Cap. 555, Article 19(3)©) of the Complainant who had placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

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

However, cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment advisor to the member of the Scheme.

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

Compensation

Being mindful of the key role of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of the STM Malta Retirement Plan and, in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by STM Malta for part of the realised losses experienced on his investment portfolio.

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

In this regard, the amount of compensation is being calculated on the total cumulative realised losses (after deducting any realised gains and dividend payments received) arising on the underlying investment portfolio constituted by CWM.

The Net Realised Loss calculated accordingly on such portfolio amounts to (GBP38,539.45) on the GBP denominated investments and (-EUR16,563.37) on the EUR denominated investments as per calculations included in the section titled 'Underlying Investments' above.

The compensation being awarded in this decision shall accordingly amount to seventy per cent of (-GBP38,539.45) on the GBP denominated investments and seventy per

cent of (-EUR16,563.37) on the EUR denominated investments which total GBP26,977.62 and EUR11,594.36 respectively.

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the sum of GBP26,977.62 and EUR11,594.36 respectively as compensation to the Complainant.

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

The expenses of this case are to be borne by the Service Provider.”

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fl-24 ta' Mejju, 2021 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka d-deċiżjoni appellata billi tilqa' l-aggravji tagħha filwaqt li tilqa' wkoll l-eċċezzjonijiet kollha tagħha, bl-ispejjeż kontra l-appellat. Tgħid li l-aggravji tagħha huma s-segwent: (a) ma kien hemm l-ebda raġuni ġustifikabbli għaliex l-Arbitru ċaħad it-talba tagħha għall-kjamata fil-kawża; (b) l-Arbitru ma setax jikkonkludi b'mod raġonevoli li (i) hija kienet responsabbli għal xi nuqqas meta ppermettiet lil CWM taġixxi bħala konsulent finanzjarju tal-appellat; (ii) il-kompożizzjoni tal-portafoll ma kienx jirrispetta l-ligijiet, regoli u linji gwida applikabbli; (iii) STM ma pprovditx informazzjoni adegwata u suffiċjenti lill-appellat; u (ċ) mingħajr preġudizzju, il-kwantum tad-danni kkwantifikat qed jiġi kkontestat.

7. L-appellat wieġeb fl-24 ta' Ġunju, 2021 fejn issottometta li l-appell interpost mis-soċjetà appellanta kellu jiġi miċċud għal dawk ir-raġunijiet li huwa jfisser fir-risposta tiegħu.

Konsiderazzjonijiet ta' din il-Qorti

8. Din il-Qorti ser tgħaddi sabiex tikkonsidra l-aggravji tas-soċjetà appellanta, u dan fid-dawl tal-konsiderazzjonijiet magħmulin mill-Arbitru fid-deċiżjoni appellata, u s-sottomissjonijiet magħmula mill-appellat fit-tweġiba tiegħu.

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

9. Wara li s-soċjetà appellanta tispjega kif hija ma kinitx tagħti pariri dwar investimenti u dan kif kien jirrizulta wkoll mill-atti, hija tgħaddi sabiex tagħmel is-sottomissjonijiet tagħha dwar dan l-ewwel aggravju tagħha. Tgħid li l-Arbitru ma kellu l-ebda raġuni ġustifikabbli sabiex jiċċad l-imsemmija talba meta l-ilment kien dirett fil-konfront tal-imsemmija terzi. Is-soċjetà appellanta hawn tgħaddi sabiex tagħmel riferiment għal dak li qal l-appellat stess fl-ilment, filwaqt li tirrileva li huwa kien saħansitra fil-bidunett inkariga lil Premier Solutions SL sabiex dawn jagħtuh pariri fuq il-pensjoni tiegħu kif fil-fatt għamlu fejn issuggerew li jissieheb fl-Iskema. Tirrileva wkoll li l-appellat imbagħad kien qal ukoll li l-investimenti tiegħu fil-fatt “were channeled by Continental Wealth Management” għall-Executive Bond, u li “the Client Profile Questionnaire and Application Form”, u kif ukoll id-dealing instructions kellhom “a copied

signature". B'hekk huwa ċar li l-ilment tal-appellat huwa dirett ukoll fil-konfront ta' CWM, Premier Solutions, Stephen Ward, Anthony Pool u Anthony Downs jew "it-terzi interessati", iżda l-Arbitru ddecieda li jiċċad it-talba għall-kjamata fil-kawża stante li l-appellat kien naqas milli jipprova l-allegazzjoni tiegħu ta' firem foloz jew ikkupjati, permezz ta' fatti partikolari. Tirrileva li l-Arbitru sostna wkoll li għadarba l-frodi hi offiża kriminali, huwa ma kellu l-ebda ġurisdizzjoni. Tikkontendi li l-parametri tal-kwistjoni preżenti kienu ġew stabbiliti permezz tal-ilment meta l-appellat ressaq l-aggravji tiegħu fil-konfront tal-konsulenti tiegħu, u għalhekk dawn kellhom jiġu kjamati fil-kawża *ai termini* tal-artikolu 2 tal-Kap. 555. Hija tagħmel ukoll riferiment għall-artikoli 961 u 962 tal-Kap. 12, u tikkontendi li t-talba tal-kjamat fil-kawża tista' ssir f'kull stadju tal-proċeduri odjerni. Tgħid li t-"terzi interessati" għandhom jirrispondu għalihom infushom dwar l-allegat frodi u ma kienx ġust li tirrispondi hi għar-responsabbiltà imputabbli lil terzi, jekk din tirriżulta mill-frodi tat-terzi. Is-soċjetà appellanta fl-aħħarnett issostni l-Arbitru ma setax jiġġustifika d-deċiżjoni tiegħu b'riferiment għal dak li ġie deċiż dwar il-mertu.

10. Min-naħa tiegħu l-appellat filwaqt li jiċċita dak li qal l-Arbitru meta ċaħad it-talba għall-kjamata fil-kawża proposta mis-soċjetà appellanta, isostni li mill-proċeduri quddiem l-Arbitru u kif huwa stess irrikonoxxa, l-ilment sar fil-konfront tas-soċjetà appellanta dwar in-nuqqasijiet tagħha bħala Amministratur u *Trustee* tal-Iskema, u mhux dwar nuqqasijiet oħra min-naħa ta' terzi. Irrileva b'riferiment għad-dispożizzjonijiet tal-artikolu 2 tal-Kap. 555, li l-Arbitru wasal għal din il-konklużjoni hekk kif għamel l-evalwazzjoni tiegħu li dawn ma kellhomx interess li jidhlu bħala parti fil-proċeduri. Isostni li l-Arbitru

l-ewwel għandu jfittex sabiex jara jekk il-kjamati fil-kawża għandhomx interess wara kollox li jidhlu, filwaqt li għandu d-dritt li jikkonsidra x'risposti dawn setgħu jressqu. L-appellat jagħmel riferiment għall-provvedimenti tal-artikoli 19 *et seq.* tal-Kap. 555 u tiċċita l-artikolu 2 tal-istess liġi fejn tenfażizza l-fatt li d-definizzjoni ta' "*provditur tas-servizzi finanzjarji*" tillimita l-gurisdizzjoni u l-kompetenza tant li kien ser ikun inutli li t-terzi persuni jissejġu fil-kawża.

11. Il-Qorti tikkonsidra li d-deċiżjoni tal-Arbitru fejn ċaħad it-talba għall-kjamata fil-kawża ta' dawn iż-żewġ entitajiet hija waħda tajba. Tosserva li t-talba kienet saret mis-soċjetà appellanta fir-risposta tagħha li tinstab *a fol. 179 et seq.* tal-atti tal-proċeduri quddiem l-Arbitru, fejn rabtet it-talba tagħha mal-allegazzjoni ta' frodi mressqa mill-appellat. Fid-deċiżjoni appellata l-Arbitru għaraf li l-imsemmija talba meta tressqet, saret fir-rigward tal-allegazzjoni ta' frodi magħmula mill-appellat. Qal li għaladarba huwa ma kienx qed jikkonsidra din l-allegazzjoni stante li l-appellat ma kienx għab evidenza biżżejjed tal-aġir frawdolenti, huwa kien qed jiċċad it-talba għall-kjamata fil-kawża ta' terzi. Osserva wkoll li fl-ilment tiegħu l-appellat kien identifika lis-soċjetà appellanta bħala l-provditur tas-servizzi finanzjarji kontra minn huwa kien qed jintavola l-imsemmi lment, u li l-ilment tal-appellat kien jrrigwarda l-allegati nuqqasijiet tal-provditur tas-servizz bħala Amministratriċi u bħala *Trustee* tal-Iskema. B'hekk ċaħad it-talba tal-kjamata fil-kawża ta' terzi.

12. Il-Qorti tqis li l-Arbitru kien korrett meta ċaħad l-imsemmija talba, u dan għaliex huwa ħa in konsiderazzjoni wkoll tall-fatt li l-appellat kien indika fl-ilment tiegħu li dan kien qed jiġi dirett proprju kontra s-soċjetà appellanta

minħabba n-nuqqasijiet tagħha, kemm bħala Amministratrici u wkoll bħala *Trustee* tal-Iskema. Il-Qorti tirrileva li l-ilment tal-appellat ma jhalli l-ebda dubju li huwa kien qed iħossu ppreġudikat bil-mod kif aġixxiet is-soċjetà appellanta fil-konfront tiegħu.

13. Rilevanti hawn ukoll hija s-sottomissjoni tal-appellat li tenut kont id-definizzjoni li jagħti l-artikolu 2 tal-Kap. 555, l-Arbitru m'għandux ġurisdizzjoni u kompetenza li jiddeciedi xi lment magħmul kontra l-imsemmija terzi għal dik ir-raġuni li l-Qorti tifhem tirrigwarda l-fatt kif rilevat mill-Arbitru wkoll, li dawn mhumiex liċenzjati jew awtorizzati mod ieħor mill-Awtorità għas-Servizzi Finanzjari ta' Malta. Il-Qorti tirrileva li lanqas ma jirriżulta li CWM jew Premier Pensions Solutions SL kienu joffru s-servizzi finanzjarji tagħhom hawn Malta jew minn Malta u għaladarba huma ma jistgħux jitqiesu bħala provdituri ta' servizzi finanzjarji *ai termini* tad-definizzjoni kif mogħtija fl-Artikolu 2 tal-Kap. 555, l-ilment tal-appellat ma jistax jaqa' fl-ambitu tal-kompetenza tal-Arbitru kif stabbilita permezz tal-artikolu 21 tal-imsemmi Att.

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

It-tieni aggravju: [is-soċjetà appellanta mhijjex responsabbli]

15. Il-Qorti tagħraf li dan l-aggravju huwa maqsum fi tliet ilmenti. Fl-ewwel parti ta' dan it-tieni aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru ma setax b'mod raġonevoli jikkonkludi li hija kienet negligenti fil-

konfront tal-appellat, meta ddecieda li hija ppermettiet lil *CWM* taġixxi bħala konsulent finanzjarju tiegħu. Tgħid li l-ligi u/jew regoli kif applikati mill-Arbitru kienu daħlu fis-seħħ wara l-imġiba allegatament ħażina tagħha. Tirrileva li l-ħatra tal-konsulent finanzjarju kienet saret mill-appellat stess, u dak iż-żmien ma kien hemm l-ebda obbligu li joħroġ minn ligi/regolament/gwida fejn hija kellha tivverifika jekk *CWM* kinitx entità regolata sabiex tipprovi pariri finanzjarji, u dan l-Arbitru stess għarfu. Tgħid li l-obbligu tagħha li tirċievi struzzjonijiet biss mingħand konsulenti tal-investment daħal fis-seħħ fis-sena 2019. Għalhekk ir-regolamenti ma kienux applikabbli għall-każ odjern, iżda xorta waħda l-Arbitru rnexxielu jasal biex jgħid li hija kienet kisret l-obbligi tagħha taħt dawn ir-regolamenti. Tikkontendi li l-obbligi tagħha kienu dawk imfissra u kontroffirmati mill-appellat bil-għan ta' sħubija fl-Iskema. It-*tieni parti tat-tieni aggravju* mressaq mis-soċjetà appellanta, huwa li l-Arbitru sab li hija kienet naqset milli taġixxi bħala *bonus paterfamilias* stante li ppermettiet li fil-portafoll tal-ilmentatur jiġu ammessi noti strutturati u partikolarment noti strutturati individwali. Tgħid li l-Arbitru madankollu naqas li jieħu in konsiderazzjoni li hija ma kellha l-ebda obbligu li tqis, tistħarreg jew tindaga dwar il-pariri li l-appellat kien qed jingħata minn *CWM* dwar investment u anki li huwa kien minn jeddu daħal f'relazzjoni ma' *CWM*. Is-soċjetà appellanta tistaqsi b'liema tiġbid tal-interpretazzjoni tista' obligazzjoni partikolari li ma kinitx hemm dak iż-żmien, tiġi mibdula għall-obbligazzjoni ġenerali ta' *trustee* fil-konfront tal-benefiċjarju tat-*trust*. Għalhekk ukoll tgħid li hija ma kinitx responsabbli għall-għażla tal-investimenti tal-portafoll tal-appellat. Tikkontendi li mill-atti tal-proċeduri odjerni, ma kien hemm xejn x'juri li kien hemm ksur ta' obbligi kuntrattwali min-naħa tagħha fil-konfront tal-appellat, jew li kien hemm

xi ksur tar-regoli tal-MFSA, jew tal-linji gwida applikabbli, jew saħansitra li wriet nuqqas ta' prudenza jew li ma ħaditx in konsiderazzjoni *r-risk profile* tiegħu. Is-soċjetà appellanta ssostni li hija ma kinitx qegħda tagħti parir dwar investimenti lill-appellat, iżda min-naħa l-oħra kien il-konsulent finanzjarju li kellu jassigura li l-portafoll sħiħ tal-appellat, jiġifieri mhux biss dik il-parti li giet ittrasferita fl-iskema, li kien adegwament diversifikat. Tispjega kif l-istruzzjonijiet dwar l-investimenti kienu kollha ffirmati mill-appellat u mill-konsulent finanzjarju tiegħu, u hija għalhekk dejjem imxiet skont il-linji gwida applikabbli. Is-soċjetà appellanta tkompli tispjega kif skont hi l-Arbitru naqas milli jikkonsidra li skont l-imsemmija linji gwida u anki skont ir-regolamenti tal-MFSA, kien permissibbli li jsir investiment f'noti strutturati. Madankollu xorta waħda tgħid li l-Arbitru xeġet l-oneru tal-prova fuqha sabiex turi li n-noti strutturati kienu kompatibbli mal-iskema, meta fil-fatt kellu jkun l-ilmentatur li juri l-investment ma kienx wieħed permissibbli. Is-soċjetà appellanta tirrileva li l-Arbitru meta ddeċieda li bħala *trustee* hija kellha tagixxi bħala *bonus paterfamilias*, bħallikieku hija kienet responsabbli b'mod awtomatiku għat-tnaqqis fil-valur tal-investimenti tal-appellat. B'hekk tgħid li huwa ħoloq pożizzjoni ta' incertezza dwar l-obbligi tagħha. Tgħid li kemm l-appellat u anki l-Arbitru ma ndikawx li kien hemm frodi, imġiba ħażina intenzjonata jew negliġenza kbira da parti tagħha. Filwaqt li tiċċita r-regola 12.1 tat-*Trust Rules* u ssostni li l-appellat huwa b'hekk obligat legalment li jonora l-indennizz li taha, tissottometti li b'żieda mad-difiża għal *fraus omnia corrumpit*, il-fatt li hija straġet fuq struzzjonijiet, garanziji, indemnifikazzjonijiet u dikjarazzjonijiet iffirmati mill-appellat sabiex tinvesti s-sottofond tiegħu kollu fir-*Royal Skandia Bond*, l-ebda negliġenza ma setgħet tiġi attribwita lilha. Barra minn hekk l-ebda ksur tal-obbligi fiduċjarji jew nuqqas ta'

azzjoni prudenti fir-rigward tal-interessi tal-appellat ma seta' jiġi mputat lilha. Is-soċjetà appellanta tagħmel ukoll riferiment għar-regola 12.2 tat-*Trust Rules*, u tgħid li l-appellat ma ressaq l-ebda prova tan-negliġenza li tista' tiġi attribwita lilha. Tgħid li jidher li l-Arbitru kien inferixxa nuqqas min-naħa tagħha stante l-andament tal-portafoll ta' investimenti tal-appellat kif magħżul minnu, fuq parir ta' terzi. B'hekk kien nieqes in-ness kawżali bejn l-allegati atti jew ommissjonijiet tagħha u t-telf soffert mill-appellat. Fl-aħħarnet hawn ukoll tikkontendi, u dan b'riferiment għat-*tielet ilment tagħha taħt dan l-aqgravju*, li l-Arbitru għalhekk ma setax b'mod raġonevoli jasal sabiex isib li hija ma kinitx ipprovdiet informazzjoni adegwata u suffiċjenti lill-appellat.

16. L-appellat jilqa' billi jikkontendi li għaladarba huwa kien jikkwalifika bħala '*retail client*', jiġifieri mhuwiex investitur professjonali, kien mistenni aktar diliġenza min-naħa tas-soċjetà appellanta, u kif tajjeb osserva l-Arbitru, is-soċjetà appellanta xorta waħda kellha l-obbligi generali fil-kariga tagħha ta' *Trustee* u Amministratriċi tal-Iskema. Hawn l-appellata tiċċita is-subartikolu 1(2) tal-Att dwar *Trusts* u *Trustees* jew Kap. 331 tal-Liġijiet ta' Malta, u anki l-para. (ċ) tas-subartikolu 43(6) u l-artikolu 21 tal-istess liġi. Hija tagħmel ukoll riferiment għal pubblikazzjoni tal-MFSA u tiċċita silta minnha, liema dokument tgħid kien ġie ppubblikat fl-2017, iżda kien jittratta prinċipji generali tal-Kap. 331 u tal-Kodiċi Ċivili li kienu diġà fis-seħħ qabel dik is-sena. L-appellat jikkontesta l-argument tas-soċjetà appellanta li huwa ma kien ressaq l-ebda prova tan-negliġenza allegata lilha, u filwaqt li jiċċita dak li qal l-Arbitru, huwa jikkontendi li kien irriżulta li huwa kien sofra telf riżultat tal-investimenti f'noti strutturati, u li 98% tal-kapital tiegħu ġie nvestit f'zewġ noti strutturati fl-istess żmien. Jgħid li

s-soċjetà appellanta saħansitra ppermettiet li l-investimenti jsiru bi ksur tal-*Standard Operational Conditions* applikabbli għall-fond fejn l-Arbitru sab li kien hemm espożizzjoni 'l hemm mil-limitu massimu permess. L-appellat jirrileva li mill-*fact sheets* tal-investimenti, jirriżulta li r-riskju relattiv kien wieħed għoli fejn il-kapital ma kienx protett u saħansitra seta' jintilef. B'hekk dawn ma kienux jirriflettu r-riskju baxx/medju li kellu jkollu l-portafoll. Iżda aktar preokkupanti minn hekk, jissottometti l-appellat, huwa l-fatt li l-Arbitru sab ukoll li dan il-portafoll ma kienx adattat f'kuntast ta' skema ta' pensjoni fejn persuna kellha profil ta' riskju aktar għoli. Għal dak li jirrigwarda l-argument tas-soċjetà appellanta li kien hemm nuqqas ta' ness kawżali, jgħid li l-Arbitru sab li r-rwol tagħha kien ferm ikbar, għalkemm ma kinitx tagħti pariri ta' investiment u n-nuqqasijiet tagħha kienu proprju waslu għat-telf li huwa sofra.

17. Il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hi waħda tajba. Hu jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jgħid li hu kien ser jiddeciedi l-ilment skont dak li fil-fehma tiegħu kien għust, ekwu u raġjonevoli fic-cirkostanzi partikolari u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Irrileva li l-iskema kienet tikkonsisti f'*trust* b'domicilju hawn Malta u kif awtorizzata mill-MFSA bħala "*Personal Retirement Scheme*". Imbagħad, wara li hu għamel diversi kostatazzjonijiet fir-rigward tal-informazzjoni li hu seta' jieħu dwar l-appellat mill-Applikazzjoni għas-*Shubija* esebita fl-atti¹ u wkoll mill-*Confidential Client Fact Find* ta' CWM ukoll esebita², għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà

¹ Ara a fol. 189 et seq.

² A fol. 156 et seq.

appellanta u wkoll fir-rigward tal-konsulent finanzjarju CWM. L-istess għamel fir-rigward tal-investimenti sottoskritti l-Iskema li kienu ġew akkwistati permezz tal-fondi nvestiti f'polza ta' assikurazzjoni fuq il-ħajja magħrufa bħala l-*Executive Investment Bond* maħruġa minn *Royal Skandia Life Assurance Limited* fil-11 ta' Jannar, 2013 fejn il-*premium* kien ta' GBP89,644.93.³ L-Arbitru hawn elenka d-diversi transazzjonijiet li saru fil-portafoll tal-appellat kif dawn kienu rriżultawlu mir-rendikont tal-*Historical Cash Account Transactions* esebit mill-appellat għall-perjodu bejn 11.01.13 u 20.08.19. Osserva li dan il-portafoll kien ġie kkostitwit permezz ta' noti strutturati u kien jirriżulta telf mill-investimenti magħmula, jiġifieri telf fil-kapital u wkoll fid-dividendi fis-somma ta' GBP38,539,45 fuq il-portafoll tan-noti strutturati tal-GBP u fis-somma ta' EUR16,563.37 fuq il-portafoll tan-noti strutturati tal-EUR. Il-Qorti tinnotta li m'hemm l-ebda kontestazzjoni dwar dawn il-fatti, ukoll mis-soċjetà appellanta.

18. L-Arbitru mbagħad għadda sabiex ikkonsidra li s-soċjetà appellanta bħala Amministratriċi u *Trustee* tal-Iskema kienet soġġetta għall-obbligi, funzjonijiet u responsabbiltajiet applikabbli. Huwa hawn għamel riferiment għall-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar), li ġie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta) li ġie fis-seħħ fl-1 ta' Jannar, 2015, u għad-direttivi/regoli magħmula taħthom, u anki għall-Att dwar Trusts u Trustees (Kap. 331 tal-Liġijiet ta' Malta) partikolarment applikabbli lis-soċjetà appellanta. Dawn ir-referenzi l-Qorti tgħid li huma mhux biss utli, iżda wkoll rilevanti ħafna stante l-applikabbiltà tagħhom għall-każ odjern.

³ Ara fol. 122 et seq.

19. L-Arbitru spjega li l-obbligi tas-soċjetà appellanta kienu mfissra fl-Att li Jirregola Fondi Speċjali u anki fid-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*. Meta mbagħad ġie mħassar dak l-Att u anki r-registrazzjoni tas-soċjetà appellanta taħt il-Kap. 514, l-obbligi tagħha bdew jiġu regolati permezz ta' dik l-istess liġi u anki permezz tal-*Pension Rules for Service Providers issued under the Retirement Pensions Act* u l-*Pension Rules for Personal Retirement Schemes Issued under the Retirement Pensions Act*. L-Arbitru aċċenna fuq l-obbligu tal-Amministratur tal-Iskema tal-Irtirar sabiex dan jaġixxi fl-aħjar interessi tal-Iskema u dan kif jirrikjedi s-subartikolu 19(2) tal-Att li Jirregola Fondi Speċjali (Kap. 450) u s-subartikolu 13(1) tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514). Ċertament għalhekk tgħid il-Qorti, anki fid-dawl tal-konstatazzjonijiet ulterjuri tal-Arbitru, ma tistax taċċetta s-sottomissjoni tas-soċjetà appellanta li hija ma kellha l-ebda obbligu lejn l-appellat. Iżżid tgħid li għall-kuntrarju ta' dak li qegħda tinsisti fuqu bil-qawwa kollha s-soċjetà appellanta, m'hemmx dubju dwar x'kienu l-obbligi tagħha, u li dawn l-obbligi daqstant ċari kif imfissra fil-liġi, kienu jirrikjedu li hija timxi fl-aħjar interess tal-Iskema, kemm fiż-żmien li sar l-investment fis-sena 2012 meta kienu applikabbli d-disposizzjonijiet tal-Kap. 450, u anki sussegwentement meta ġie fis-seħħ l-Att dwar Pensjonijiet għall-Irtirar fis-sena 2015, u l-appellat kien għadu membru tal-Iskema u ġarrab it-telf allegat. Tgħid li jekk kien hemm żmien li ma kienx hemm obbligi speċifiċi li jirregolaw l-imġiba tagħha, dan ma kienx jeżonerha mill-obbligi ġenerali tagħha.

20. 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 Amministratriċi tal-Iskema kienet tenuta li timxi b'kull ħila, kura u diligenza dovuta fl-aħjar interessi tal-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li diġà minn dan li ngħad, jirriżulta li d-difiza tagħha li hija qatt ma setgħet tinzamm responsabbli stante li ma kellha l-ebda obbligu speċifiku fil-konfront tal-appellat, ma tistax tirnexxi.

21. Iżda l-Arbitru ma waqafx hawn għaliex ikkonsidra wkoll il-kariga tagħha bħala *Trustee* u rrileva li hawn kienu applikabbli l-provvedimenti tal-Att dwar *Trusts and Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-30 ta' Ġunju, 1989 kif sussegwentement emendat, u jagħmel riferiment partikolari għas-subartikolu 21(1), il-para. (a) tas-subartikolu 21(2). Hawn il-Qorti tgħid li għal darb'oħra d-difiza tas-soċjetà appellanta ma tista' issib l-ebda sostenn għaliex hija kienet soġġetta għall-obbligi kollha ta' *trustee*, anki dawk aktar speċifiċi li permezz tagħhom l-obbligu ġenerali jista' jieħu sura. Għalhekk l-Arbitru sewwa rrileva li fil-kariga tagħha ta' *Trustee*, is-soċjetà appellanta kienet tenuta saħansitra tamministra l-Iskema u l-assi tagħha skont diligenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa jiċċita l-pubblikazzjoni An Introduction to Maltese Financial Services Law⁴, u mill-pubblikazzjoni riċenti tal-MFSA tas-sena 2017, fejn din ittrattat prinċipji diġà stabbiliti qabel dik id-data

⁴ Ed. Max Ganado.

permezz tal-Att dwar *Trusts* u *Trustees* (Kap. 331) u anki permezz tal-Kodiċi Ċivili.

22. L-Arbitru aċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi, li fil-każ odjern kienet CWM. L-Arbitru ddikjara li kien tal-fehma, kif inhi din il-Qorti, li s-soċjetà appellanta bħala Amministratur ta' Skema għall-Irtirar u t-*Trustee*, kellha ċertu obbligi mportanti li setgħu jkollhom rilevanza sostanzjali fuq l-operat u l-attivitajiet tal-Iskema u li jaffettwa direttament jew indirettament l-andament tagħha. Kien għalhekk li kellu jiġi nvestigat jekk is-soċjetà appellanta naqsitx mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura safejn dan kellu effett fuq l-andament tal-Iskema u r-rizultanti telf.

23. L-Arbitru hawn għadda sabiex ikkonsidra l-kompożizzjoni tal-portafoll tal-appellat. Fl-ewwel lok ikkonstata li l-investimenti sottoskritti kienu kollha magħmulin f'noti strutturati anki b'mod konsiderevoli f'noti strutturati individwali. Osserva li fil-bidu madwar 98% tal-kapital tal-appellat kien ġie investit f'żewġ noti strutturati biss, u seta' jinnota wkoll li sussegwentement kien hemm espożizzjoni qawwija għal noti strutturati singolari u anki għal immittenti singolari. Dan l-Arbitru qal ma kienx joffri serħan tal-moħħ li kienet ġiet użata l-prudenza neċessarja fir-rigward tal-portafoll ta' investiment u li kienet saret diversifikazzjoni adegwata, jew li l-kompożizzjoni tal-portafoll kien juri u kien kompatibbli ma' portafoll ta' skema tal-irtirar li l-iskop tagħha kien li tipprovidi għal benefiċċji tal-irtirar. Wara li kkonsidra dak li jipprovdu l-*Standard Operational Conditions tad-Directives for Occupational Retirement Schemes*,

Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002, stqarr li minkejja l-*standards* stabbiliti permezz ta' dawn ir-regoli, is-soċjetà appellanta kienet ippermettiet li l-portafoll ikun kostitwit biss permezz ta' noti strutturati, fejn l-espożizzjoni għal immittenti singolari kienet tidher li f'ċertu mumentu kienet taqbeż il-massimu stabbilit mir-regoli ta' 20% tal-portafoll sħiħ fir-rigward ta' strumenti diversifikati ta' investiment, u saħansitra f'ċerti każijiet kien jeċċedi t-30% stabbilit għar-rigward ta' investimenti aktar sikuri bħal depożiti. L-Arbitru b'mod ġustifikat iddikjara li bħala Amministratur tal-Iskema s-soċjetà appellanta kellha tintervjeni u ma tippermettix din il-kompożizzjoni fil-portafoll tal-appellat. Tajjeb ferm irrileva li għalkemm is-soċjetà appellanta ma kinitx il-konsulent tal-investment tal-appellat, fil-kapaċità tagħha ta' *Trustee* u Amministratriċi tal-Iskema hija kellha s-setgħa u l-awtorità, kif ukoll l-obbligu, li ma tippermettix tali kompożizzjoni fl-Iskema, għaladarba din ma kinitx tirrifletti l-iskop għalfejn giet stabbilita tali Skema, jiġifieri sabiex tipprovdi għal benefiċċji tal-irtirar aktar milli titħaddem b'mod spekulattiv. Il-Qorti tgħid li r-raġunar tal-Arbitru ma jista' jsib l-ebda kuntrarju hawnhekk.

24. Imbagħad l-Arbitru sewwa kkonsidra li s-soċjetà appellanta ma pprovdiet l-ebda evidenza li l-investimenti permessi fl-Iskema kienu prudenti u kienu jirriflettu r-regoli li għalihom hija kienet soġġetta kif spjegat. Ċertament tgħid din il-Qorti li dan il-fatt ma jistax jiġi faċilment skartat għaliex tassew ukoll f'dawn il-proċeduri s-soċjetà appellanta ma kkonvinċitx lil din il-Qorti li l-portafoll tal-appellat kien addattat għall-iskop u l-interessi tiegħu u anki għal dawk tal-Iskema.

25. Minn hawn l-Arbitru għadda sabiex għamel diversi konstatazzjonijiet fir-rigward tal-*fact sheets* li ġew esebiti mill-appellat. Stqarr li d-dhul għoli ndikat fuq il-prodotti kien jirrifletti r-riskju għoli tagħhom, u dan ukoll fejn l-imsemmija *fact sheets* innifishom kienu jaċċennaw għal diversi riskji fir-rigward tal-kapital investit f'dawk il-prodotti. Irrileva li minbarra r-riskju tal-kreditu tal-immittent u tal-likwidità, il-*fact sheets* kien jagħtu twissija dwar il-fatt li l-kapital ma kienx wieħed protett u li l-investitur seta' jirċievi inqas mill-ammont originali nvestit, jew forsi wkoll jitlef l-ammont investit kollu. Kollox tgħid il-Qorti ferm indikattiv tal-fatt li l-investment fin-noti strutturati ma kienx wieħed kompatibbli mal-informazzjoni dwar l-appellat u dwar dak li kien ifittex kif muri fil-*fact find*. L-Arbitru qal li kien hemm aspett partikolari li ħareġ minn dawn in-noti, fejn kien hemm twissija f'kull waħda mill-*fact sheets* dwar l-eventwalità ta' tnaqqis fil-valur tal-kapital kif marbut ma' percentwali. Huwa ċċita s-segweni twissija: "*If any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity, and capital will be lost*". Għalhekk, qal l-Arbitru, kien hemm konsegwenzi materjali jekk il-valur ta' wieħed biss mill-assi kollha tan-noti strutturati kien jinzel mill-minimu ndikat, u qal li l-implikazzjoni ta' din il-kundizzjoni ma setgħetx tiġi skartata. Filwaqt li osserva li l-*fact sheets* ta' noti strutturati oħrajn li fihom kien sar investment ma kienux ġew ipprezentati, iddikjara li kien tassew ċar li l-portafoll tal-appellat kellu noti strutturati li kienu jgħorru ċerti riskji li ma kienux jirriflettu l-aspett prudenti kif kien mistenni minn portafoll tal-pensjoni, u barra minn hekk dawn ma kienux jirriflettu l-attitudni għar-riskju '*low to medium*' tal-appellat, anki kif indikat fil-*client fact find* tiegħu, aktar u aktar meta wieħed jikkonsidra li l-

portafoll tal-investimenti kien ġie ikkostitwit biss min-noti strutturati u anki saru investimenti f'prodotti singolari. Osserva li l-investimenti saħansitra ma kienux adattati għal investitur b'attitudni għar-riskju aktar għoli minn dik tal-appellat, u li dawn kienu mmirati lejn '*Professional Investors Only*'. Għalhekk qal li ma kienux tajbin għall-appellat li kien '*retail investor*', b'attitudni baxxa/medja għar-riskju u b'esperjenza limitata għal investimenti ta' riskju baxx fejn kien ifittex il-protezzjoni. Il-Qorti diġà kellha l-opportunità li tesprimi dawn il-fehmiet fil-qosor iktar 'il fuq f'din is-sentenza, u għalhekk tikkonsidra li l-Arbitru kien tassew korrett fl-evalwazzjoni tiegħu tal-investimenti fid-dawl tal-għarfien, esperjenza, attitudni għar-riskju u aspettattivi tal-appellata. Filwaqt li tagħmel tagħha l-konstatazzjonijiet u l-osservazzjonijiet kollha magħmula minnu, tistqarr li m'għandha xejn aktar x'izzid f'dan ir-rigward.

26. L-Arbitru hawn ħa in konsiderazzjoni l-argument tas-soċjetà appellanta li r-rwol tagħha kien wieħed limitat, għaliex fost affarijiet oħra l-appellat kien iffirma diversi dokumenti xhieda ta' dan. Għal darb'oħra l-Arbitru aċċetta li kien minnu li r-rwol tagħha ma kienx li tagħti konsulenza dwar investimenti, iżda bħal ma hija din il-Qorti, hu kien tal-fehma li ċertament ma setax jitqies li r-rwol tagħha kien limitat kif allegat minnha u l-kummenti tagħha saħansitra kienu juru nuqqas ta' apprezzament u nuqqas ta' fehim tas-sinifikat tar-rwol tagħha bħala *Trustee* u Amministratriċi ta' skema tal-irtirar, u possibilment l-iskartar tar-rekwiziti regolatorji applikabbli. Imbagħad dwar id-difiża tas-soċjetà appellanta kif imsejsa fuq id-diversi ċaħdiet u *provisos* fil-formoli tagħha, l-Arbitru ddikjara li dawn ma jistgħux jingħataw wisq piż fejn hemm stabbilit nuqqas ta' diliġenza min-naħa tal-provvditur tas-servizz. Kif sewwa qal, is-soċjetà appellanta ma

tistax tinheba warajhom fejn fil-każ partikolari kien gie determinat nuqqas ta' diligenza min-naħa tagħha. Għal darb'oħra jishaq li ma kien hemm l-ebda konfort adegwat li l-investimenti kienu adegwati għal portafoll tal-pensjoni, fejn saħansitra s-soċjetà appellanta qalet biss li dawn kienu permissibbli mingħajr ma offriet l-ebda ġustifikazzjoni għall-fatt li l-portafoll sħiħ kien gie nvestit f'noti strutturati. L-Arbitru kompli billi sewwa qal li ma kienx irrizulta li l-portafoll kien jirrifletti l-prudenza li wieħed kien jistenna minn portafoll li kellu l-iskop li jipprovdi *'a life-time income to its members'*, u li kien intiż sabiex jipprovdi għal benefiċċji tal-irtirar skont l-kondizzjoni fuq imsemmija.

27. Dwar in-ness kawżali, l-Arbitru ddikjara li t-telf attwali esperjenzat mill-appellat, ma setgħax jiġi attribwit lill-allegat aġir/frodi tal-konsulenti tal-investment kif kienet qegħda tikkontendi s-soċjetà appellanta, u/jew lill-kambju fil-valur fis-suq tal-investimenti. Qal li hemm evidenza suffiċjenti u konvinċenti dwar in-nuqqasijiet tas-soċjetà appellanta kif diġà mfiesser aktar 'il fuq, liema nuqqasijiet ma mminimizzawx it-telf, iżda saħansitra kkontribwew in parti għalih, tant li l-iskema ma laħqitx l-oġġettiv tagħha.

28. L-Arbitru kompli billi tajjeb għaraf, kif ukoll qegħda taċċetta din il-Qorti, li s-soċjetà appellanta, li għalkemm tassew ma kinitx responsabbli sabiex tipprovdi parir finanzjarju lill-appellat u li tagħzel l-investimenti sottoskritti, hija kellha d-dover li tassigura li l-kompożizzjoni tal-portafoll kif rakkommandat mill-konsulent finanzjarju kien fl-aħjar interessi tal-appellat u li l-kompożizzjoni kienet tippermetti li jitwettaq l-għan tal-pjan tal-irtirar skont il-prudenza neċessarja li wieħed kien jispetta. Iddikjara li l-appellat fl-aħħar mill-aħħar kien

straħ fuq is-soċjetà appellanta bħala Amministratriċi u *Trustee*, u wkoll fuq diversi terzi oħra nvoluti fl-istruttura tal-Iskema, sabiex jiksbu l-iskop li għalih l-Iskema kienet giet stabbilita, jiġifieri li tipprovdi għal benefiċċji tal-irtirar u wkoll dħul sabiex tiġi ssalvagwardjata l-pensjoni. L-Arbitru sostna li għal dak li jirrigwarda l-kompożizzjoni tal-portafoll, filwaqt li dejjem jista' jkun hemm it-telf, id-diversifikazzjoni, il-bilanċ u l-prudenza kif mistenni f'portafoll tal-pensjoni, kellhom inaqqsu mit-telf soffert u ta' mill-inqas jibqa' sħiħ il-kapital oriġinali nvestit. Għalhekk, huwa kkonsidra li s-soċjetà appellata kient uriet nuqqas ta' diligenza fl-amministrazzjoni ġenerali tal-Iskema fil-konfront tal-appellat u fit-twettiq tal-obbligi tagħha bħala *Trustee* fejn l-appellat kien straħ fuqha u fuq it-terzi oħrajn għaliex emmen fil-professjonalità tagħhom u fl-obbligu tagħhom ta' ħsieb u diligenza.

29. Il-Qorti tikkondividi l-fehma sħiħa tal-Arbitru. Jirriżulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkonsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-appellat u għalhekk ukoll lanqas ma jista' jintlaqa' l-argument tagħha li jonqos in-ness kawżali bejn it-telf u l-allegat aġir tagħha u l-applikabbiltà tar-regoli 12.1 u 12.2 tat-*Trust Rules*, stante li l-ebda negligenza ma tista' tiġi attribwita lilha. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà tan-nuqqasijiet tagħha billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tal-appellat li kien mexxih lejn l-investimenti li eventwalment fallew. Dan filwaqt ukoll li tgħid 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. Iżda kif gie kkonsidrat minn din il-Qorti, id-difiża tas-soċjetà appellanta ma tistax tirnexxi fid-dawl tal-obbligi legali u regulatorji

tagħha u huwa proprju għalhekk li n-nuqqasijiet tagħha għandhom jitqiesu li kkontribwew lejn it-telf soffert mill-appellat mill-investimenti tiegħu.

30. Għaldaqstant din il-Qorti ma ssibx it-tieni aggravju tas-soċjetà appellanta ġustifikat, u tiċċdu.

It-tielet aggravju: [il-kwantum tad-danni]

31. Dwar it-tielet aggravju tagħha, is-soċjetà appellanta tissottometti li l-Arbitru naqas milli jispjega kif wasal għall-perċentwali ta' 70% tat-telf fir-rigward tad-danni pagabbli minnha lill-appellat. Tikkontendi li anki jekk jirrizulta xi nuqqas min-naħa tagħha, ir-responsabbiltà tagħha għad-danni ma setgħetx titqies f'dak il-perċentwali.

32. L-appellat iwieġeb għal dan l-aggravju billi jissottometti li l-Arbitru spjega b'mod dettaljat ir-rabta bejn l-aġir tagħha u t-telf li huwa kien sofra.

33. Il-Qorti tgħid li hawn ukoll id-deċiżjoni tal-Arbitru hija waħda tajba *ai termini* tal-para. (b) tas-subartikolu 19(3) tal-Kap. 555, li jagħti lill-Arbitru s-setgħa li jiddeċiedi l-każ skont id-diskrezzjoni tiegħu. Tgħid li l-Arbitru kien intitolat *ai termini* tal-liġi li jiddeċiedi li s-soċjetà appellanta għandha ġgħorr 70% tar-responsabbiltà għat-telf li ġarrab l-appellat, u l-Qorti ma tistax ssib li huwa naqas b'xi mod lis-soċjetà appellanta, aktar u aktar meta l-ebda argument tas-soċjetà appellanta ma rnexxa sabiex jeżoneraha mqarr xi ftit mir-responsabbiltà tagħha.

34. Għalhekk, l-Qorti filwaqt li tiddikjara li hija qegħda tagħmel tagħha l-konklużjonijiet kollha tal-Arbitru, tgħid li m'għandhiex aktar x'izzid mad-deċiżjoni appellata tassew mirquma u studjata.

Decide

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

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

Moqrija.

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

**Rosemarie Calleja
Deputat Registratur**