MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tas-26 ta' Novembru, 2021

Appell Inferjuri Numru 1/2021 LM

Jane Coleman (Passaport nru. 522526503)
('l-appellata')

***vs*.**

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

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **STM Malta Pension Services Limited (C 51028)** [minn issa 'l quddiem 'is-soċjetà appellanta'] li ssostitwit lis-**soċjetà STM Malta Trust Company Management Limited**, mid-

deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fil-15 ta' Diċembru, 2020, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti **Jane Coleman (Passaport nru. 522526503)** [minn issa 'l quddiem 'l-appellata'] fil-konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinżamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lill-appellata l-kumpens bil-mod kif stabbilit, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effetiv pagament, filwaqt li kull parti kellha tħallas l-ispejjeż tagħha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf li allegatament tgħid li sofriet l-appellata mill-investiment li hija kienet għamlet tramite s-soċjetà appellanta. Jirriżulta li l-imsemmija appellata kienet avviċinat lill-konsulenti finanzjarji *Continental Wealth Management* [minn issa 'l quddiem "CWM"] għall-ħabta tat-8 ta' Ġunju, 2012, bil-għan li prinċipalment tkabbar il-kapital li hija diġà kellha nvestit f'żewġ pensjonijiet, b'dana li sostniet li l-kapital għandu jibqa' protett.[1] Fl-istess żmien hija kienet qegħda wkoll tieħu l-parir ta' Premier Pension Solutions SL. B'hekk hija kienet iffirmat id-dokumentazzjoni neċessarja u tat l-informazzjoni mitluba minnha sabiex titħejja l-istess dokumentazzjoni[2]

[1] Ara *fact find a fol.* 137 *et seq.*
[2] Ara *fol.* 28-30 tal-atti tal-arbitraġġ u *fact find* 137-140 tal-istess atti.

għall-finijiet li hija ssir membru tal-Iskema tal-Irtirar [minn issa 'l quddiem 'l-Iskema'] amministrata mis-soċjetà appellanta kemm bħala Amministratriċi u anki bħala *Trustee,* u jiġu traferiti l-investimenti tagħha għal dik l-Iskema.

Mertu

3. L-appellata ppreżentat ilment quddiem l-Arbitru fit-18 ta' April, 2018 fejn filwaqt li ppremettiet li l-ilment tagħha kien dirett kontra s-soċjetà STM Malta Trust and Company Management Ltd, li kienet it-*Trustee* tal-*pension fund* tagħha, u li fil-fehma tagħha ma kinitx imxiet bir-responsabbiltà u bil-prudenza skont dak mitlub minn din il-kariga, hija sostniet li kienet sofriet danni u għalhekk talbet li tingħata rimbors tat-telf fl-ammont investit flimkien mad-drittijiet kollha mħallsa u kumpens stante li l-investiment li ma kienx kiber, u dan filwaqt li jitħassru l-penali dovuti fuq iċ-ċessjoni tal-imsemmi nvestiment.

4. Is-soċjetà appellata wieġbet fis-16 ta' Mejju, 2018 billi eċċepiet li (a) l-appellata kienet imxiet fuq il-parir tas-soċjetà CWM; (b) l-investimenti magħżulin kienu jaqblu mal-*fact find;* (ċ) ma setgħetx tinżamm responsabbli għall-aġir tal-appellata fejn din kienet ħalliet formoli vojta bil-firma tagħha mal-*adviser* tagħha.

Id-deċiżjoni appellata

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

"Further Considers:

Basis of the complaint

The Arbiter notes that in her additional submissions the Complainant highlighted new aspects which were not raised in the original complaint filed with the Office of the Arbiter for Financial Services. The Complainant cannot change the basis of her complaint and the Arbiter will accordingly only consider the complaint as originally filed.

Joinder request by the Service Provider

In a written statement sent by the Service Provider, (fn. 13 A fol. *167) STM Malta requested the joinder of Continental Wealth Management in Spain ('CWM') and Generali Worldwide Insurance Company Limited in Guernsey, Channel Islands ('Generali') as parties to the Complaint on the basis of the definition of '*parties' *in Article 2 of the Arbiter for Financial Services Act, Chapter 555. (fn. 14 A fol. 171)*

*STM Malta noted that besides the Complainant and the financial service provider against whom the Complaint is made, the definition of '*parties' *in the said Article also makes reference to '*and any other person who in the opinion of the Arbiter should be treated as a party to the complaint'*. (fn. 15* Ibid.)

The Service Provider argued that, as was immediately evident in the Complaint, the Complainant's membership into the plan was instigated through or by CWM which the Complainant selected and appointed as her investment advisor and portfolio manager in connection with the Generali Bond (fn. 16 The Generali Bond was an underlying insurance policy acquired by the Retirement Scheme through which a portfolio of investments was held, as shall be explained further in this decision). In this regard, STM Malta further noted that as stated in the Complainant's email of the 1 November 2017, dealing instructions were forged and investments were made without her knowledge or consent.

The Service Provider also remarked that in February 2018, the Complainant had submitted a formal complaint to Generali International Limited which it noted was now Generali Worldwide Insurance Company Limited ('Generali'), where the Complainant claimed inter alia *that Generali was negligent and facilitated the* 'financial crime' *perpetrated by CWM. (fn. 17 A fol. 171)*

The Service Provider accordingly argued that it is apparent that the Complaint is also directed towards CWM and Generali.

STM Malta further submitted that:

'Noting the age-old maxim **fraus omnia corrumpit**, it is submitted that in the interest of justice CWM and Generali Worldwide Insurance Company Limited should answer for themselves in these proceedings in respect of the fraud which the Complainant is attributing to them. It would not be fair and equitable on the Respondent to have any responsibility imputable to it if this results from the fraud of a third party'. *(fn. 18 Ibid.)*

This issue was raised by the Service Provider in a written statement which was sent following the hearing of the 12 November 2018, during which the Arbiter granted the Service Provider a period of time to file the affidavits. The request for a joinder should have accordingly been raised in the reply and not in the said written statement. In the same way that the Arbiter did not admit additions to the complaint, he does not consider it fair to admit additions to the reply especially when the complainant had already closed its proofs.

Moreover, the Complainant identified STM Malta as the financial services provider against whom the Complaint is being made in relation to the Retirement Scheme. It is further noted that, as clearly emerged during the proceedings of the case, the Complaint made by the Complainant in essence relates to the alleged shortcomings of the Service Provider as Administrator and Trustee of the Scheme.

Having considered the particularities and nature of this complaint, in the Arbiter's opinion, the entities indicated by the Service Provider should not be treated as a party to the Complaint presented before the Arbiter and, accordingly, the Service Provider's request in this regard cannot be upheld.

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

The Complainant

The Complainant was born on 24 January 1961 and resided in Spain. (fn. 21 A fol. 138 187)

In the Application Form issued by STM Malta for membership into the Retirement Scheme ('the Application Form for Membership')*, the Complainant's marital status was indicated as* 'Widowed' *and her wealth was indicated as accumulated through 'Pension & Work Income from Rental' (fn. 22 A fol. 187)*

Her job description was marked as 'Not Working/Semi Retired'*, in a fact find dated 8/6/12 completed by her financial advisors, CWM. (fn. 23 A fol. 138) As to work experience, the Complainant stated, during the sitting of 11 February 2019, that* 'At the time of this investment, I used to work in a bank and my position was an Accounts Analyst for 14 years' *(fn. 24 A fol. 184)*

In the fact find, the Complainant was indicated as having investments in fixed bonds of Alliance & Leicester and Lloyds Bank in the UK with interest of 3.8% and 4.0% respectively. (fn. 25 A fol. 139) She was further indicated in the same document as having no 'Unitised Investments/Mutual Funds /Equities /Saving Plans'. *(fn. 26 Ibid.)*

The Complainant's financial planning priorities in the fact find were indicated as 'Capital Growth/Income in Future'*;* 'Protection'*;* 'Tax Efficiency'*; and* 'Lump Sum Investment from QROPS'*. (fn. 27 A fol. 140)*

The fact find also indicates inter alia *that the Complainant has decided to transfer her pensions* 'to a Generali International Professional Portfolio Bond for Investment'*, and that* 'The Bond is to provide protection and she wishes this to house structured products with different levels of capital protection to provide growth/income later'*. (fn. 28 Ibid.)*

The attitude to risk of the Complainant was indicated as 'Low to Medium'. *(fn. 29 Ibid.)*

In reply to the question asking how well she understood the risks of investing in financial markets, (section 10 titled 'Attitude to Risk /Investment Objectives/ Financial Position' *of STM Malta's Application Form for Membership), the Complainant's reply was* 'Not well - I consider myself an inexperienced investor'*. (fn. 30 A fol. 191)*

In the same section of the Application Form, her experience in 'direct investments in financial markets' *was indicated just as* 'bank bonds'. *(fn. 31 Ibid.) In reply to the question in the same section of the Application Form for Membership, which asked* 'How would you best describe the approach that should be taken when investing your Plan assets*?', the Complainant's reply was indicated as* 'Cautious - providing an annual income whilst protecting the capital'*. (fn. 32 Ibid.)*

The main reason for establishing the retirement plan given in the Application Form for Membership was indicated as 'Tax Efficiency and Flexibility'. *(fn. 33 A fol. 187)*

The Service Provider

The Retirement Scheme was established by STM Malta. (fn. 34 A fol. 186) STM Malta is licensed as a Retirement Scheme Administrator (fn. 35

https://www.mfsa.mt/financial-services-register/result/?id=204) *and acts as the* ***Retirement Scheme Administrator and Trustee of the Scheme.***

Investment Adviser

The Application Form for membership into the Scheme signed by the Complainant (fn. 36 A fol. 193) and dated 8/6/12 specifies that the Investment Adviser of the Complainant was Continental Wealth Management, with this entity featuring an address in Spain. (fn. 37 A fol. 190)

Particularities of the Case

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

The STM Malta Retirement Plan ('the Retirement Scheme' *or* 'Scheme'*) is a trust domiciled in Malta authorised by the Malta Financial Services Authority ('MFSA') as a Personal Retirement Plan. (fn. 38* 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. 39 A fol. 194)*

The Retirement Scheme was established by STM Malta, which is in turn licensed by the MFSA as a Retirement Scheme Administrator. (fn. 40 https://www.mfsa.com.mt/financial-services-register/result/?id=204) *STM Malta acts as the* ***Retirement Scheme Administrator*** *and* ***Trustee of the Scheme****. (fn. 41 A fol. 25, 29 & 186)*

The Application form for membership of the Retirement Scheme specifies inter alia that 'The Plan has been established to provide a life-time income to its members'*. (fn. 42 A fol. 186)*

The Complainant became a member of the Retirement Scheme on the 8 June 2012. (fn. 43 A fol. 27 & 29) A transfer value of GBP99,858.33 and GBP24,265.17, which together amount to GBP124,123.50, was made into the Scheme on the 13 July 2012 and 7 November 2012 respectively from HBOS and Prudential as indicated in the Scheme's Schedule issued by STM Malta. (fn. 44 A fol. 27)

The assets held into the Retirement Scheme were used to purchase a contract of insurance issued by Generali International Limited ('the Generali Plan'), *indicated as the* 'Professional Portfolio Plan'/'Portfolio Bond'*, with* 'Plan Number PF791428'.

The Generali Plan was described by the Service Provider as:

'a life policy investment wrapper holding underlying financial instruments such as mutual funds and structured notes, in each case selected by the Complainant and or her appointed investment advisor/s ...' *(fn. 45 A fol. 169)*

The Generali Plan in respect of the Complainant commenced on the 9 November 2012. (fn. 46 A fol. 32 & 35) The amount invested into the Generali Plan amounted to GBP119,434.60 this being the 'initial premium contribution' *to the plan. (fn. 47 A fol. 27,32 & 35)*

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

Underlying Investments

The Complainant presented various 'Portfolio Bond Dealing Instruction' *forms, (fn. 48 A fol. 39-56) contract notes (fn. 49 A fol. 57-93) as well as a* 'Cash Account Transaction Report' *statement issued by Generali covering the period from* '01/11/12 to 13/11/17' *in respect of the investment portfolio underlying the Generali Plan. (fn. 50 A fol. 100-136)*

Since the commencement of the Generali Plan in November 2012, the portfolio underlying the said plan constituted various purchases of structured notes which were the only investments undertaken over the period October 2012 till July 2015.

According to the contracts notes and the cash account transaction report, the said investments into structured notes include the following:

- *an investment of GBP20,000 into the* Nomura International 5yr Qtly Phoenix Autocall Note GBP *in October 2012; (fn. 51 A fol. 57, 114)*
- *an investment of GBP80,000 into the* RBC Capital Markets 1yr Reverse Convertible Nt GBP *during November/December 2012; (fn. 52 A fol. 58, 115)*
- *an investment of GBP17,000 into the* Commerzbank AG 5yr Accumulator Auto Indices GBP *during December 2012/January 2013; (fn. 53 A fol. 59,115)*
- *an investment of GBP80,000 into the* Commerzbank 1yr 6m Reverse Convertible Bond GBP *during May/June 2013; (fn. 54 A fol. 60, 117)*
- *an investment of GBP19,000 into the* Commerzbank AG 1yr Autocall Note GBP *in November 2013; (fn. 55 A fol. 63, 118)*
- *an investment of GBP20,000 into the* RBC Capital Markets 2yr Reverse Convertible Note GBP *in November 2013 and a further investment of GBP21,000 into the same instrument in January 2014; (fn. 56 A fol. 65, 68, 118 & 119)*

- *an investment of GBP20,000 into the* Commerzbank AG 1.5yr Reverse Convert Bond GBP *during November/December 2013; (fn. 57 A fol. 67, 119)*
- *an investment of GBP20,000 into the* RBC Capital Markets 4yr Phoenix Autocall Notes GBP *in January 2014; (fn. 58 A fol. 69, 119)*
- *an investment of GBP9,800 into the* Nomura International 1yr Rev Convert Notes GBP *in July 2014 and a further investment of GBP10,000 into the same instrument in August 2014; (fn. 59 A fol. 72, 73, 122)*
- *an investment of GBP3,000 into the* EFG Financial Products 1.5yr Multi Barrier RC 15/4/2016 GBP *in October 2014; (fn. 60 A fol. 76, 123)*
- *an investment of EUR10,000 into the* RBC Capital Markets 2yr Autocall note EUR14/11/16 *in November 2014; (fn. 61 A fol. 80,100)*
- *an investment of EUR10,820 into the* EFG Financial Products 2yr Multi Barrier EUR17/05/16 *during November 2014; (fn. 62 A fol. 81, 82 & 100)*
- *an investment of EUR5,000 into the* EFG Financial Products 2yr Express Cert 28/11/16 EUR *during November/December 2014; (fn. 63 A fol. 83, 101)*
- *an investment of EUR5,000 into the* EFG Financial Products 2yr Discount Cert 28/11/16 EUR *during November/December 2014; (fn. 64 A fol. 84, 101)*
- *an investment of GBP3,000 into the* Commerzbank AG 2yr Autocall Note GBP 31/03/17 *in March 2015. (fn. 65 A fol. 125)*

Some of the structured products indicated above were sold during the period of the Cash Account Transaction Report *mentioned above (that is, from 2013 till November 2017).*

The portfolio also constituted investments into collective investment schemes from August 2015 onwards. A sum of GBP32,000, which equates to 26.79% of the initial premium contribution into the Generali Plan, (fn. 66 GBP32,000 of GBP119,434.60) was invested into collective investment schemes in total over the period from August 2015 to October 2016.

The investments into collective investment schemes constituted the following:

- *an investment of GBP7,000 into the Marlborough Intl Mngt Ltd High Yield Fixed Int F GBP in August 2015; (fn. 67 A fol. 52, 87, 126)*
- *an investment of GBP4,000 into the* Marlborough Intl Mngt Ltd Multi-Cap Income Cell CI F GBP *in September 2015; (fn. 68 A fol. 53, 88, 127)*
- *an investment of GBP6,000 into the* Vam Fund (Lux) Close Brothers Balanced Fd GBP *in October 2016; (fn. 69 A fol. 56, 92 & 131)*
- *an investment of GBP9,000 into the Gemini Investment Funds Principal*

Asset Allocat C GBP in October 2016; (fn. 70 A fol. 93, 131)

- *an investment of GBP6,000 into the* IFSL Brooks MacDonald Balanced Fund CI D Acc GBP *in October 2016. (fn. 71 A fol. 56, 91 & 131)*

The Legal 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. 72 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 …'.

Moreover, the TTA provides that:

'21(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.'

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. 73 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 arange 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 <u>with the prudence, diligence and attention of a</u> <u>bonus paterfamilias</u>**, act in utmost good faith and avoid any conflict of interest'.

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

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

In its role as Trustee, 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. 74 Editor Max Ganado, ' An Introduction to Maltese Financial Services Law', Allied Publications 2009, p. 174*
As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: **to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'**. *(fn. 75 Op.cit.p.178)*

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

'**In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries**. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus pater familias in the performance of his obligations**'. *(fn. 76 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.

Other relevant aspects

One other important duty relevant to the case in question relates to the oversight and monitoring function of the Service Provider with respect to the Scheme and its investments.

Whilst STM Malta's duties did not involve the provision of investment advice, however, it had oversight and monitoring duties in relation to the Scheme in its role of Retirement Scheme Administrator and Trustee of the Scheme.

*The **review function** in respect of investments, was also indicated in STM's Statement of Investment Principles such as that attached to the email issued by the Service provider dated 12/6/2016 which provided inter alia that:*

'Diversification, liquidity and quality of the investment are important factors for the Company to consider when reviewing investments in view of the risk profile of the member. As a result, the Company has put together parameters to ensure, as much as possible, that investment recommendations provide good levels of diversification and liquidity appropriate for a pension scheme.

It is important to note that in no way is the Company deemed to be giving investment advice, but merely taking precautionary measures with the aim of providing the best service to our members'. *(fn. 77 A fol. 143 – Emphasis added by the Arbiter)*

*Although the Statement of Investment Principles presented is the amended one issued in June 2016, effective as from 1 January 2017, (fn. 78 A fol. 141) **the review of investments with reference to general principles of diversification** and **prudence** at the very least, was an aspect which still applied in previous years being part of the duties of the Retirement Scheme Administrator and Trustee of the Scheme.*

Other Observations and Conclusions

Claims relating to the signature on the dealing instructions

The Complainant claimed that STM Malta accepted dealing instructions that had been repeatedly copied using her signature on the dealing instructions. (fn. 79 A fol. 21)

During the hearing of 11 February 2019, the Complainant inter alia stated that

'Being asked if what I am saying is that someone put a photocopied signature on things that I did not agree to, I say yes. Being asked if what I am saying amounts to forgery, I say yes'. *(fn. 80 A fol. 183)*

However, it is noted that in her final submissions, it was pointed out that the Complainant 'is not complaining of forgery in these proceedings'. *(fn. 81 A fol. 203)*

The claim of a forged signature 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 making this allegation did not provide enough evidence for the Arbiter to accept her allegation which, in any case, she later withdrew.

The Arbiter will next consider the remaining principal alleged failures.

Key considerations relating to the principal alleged failures

As emerging during this case, the Complaint in essence revolves around the claim that the Complainant experienced a loss on her Retirement Scheme due to STM Malta not having adequately carried out its duties as administrator and trustee of the Scheme in line with the applicable regulations and requirements.

Two principal alleged failures made against the Retirement Scheme Administrator are that:

(i) it had allowed the appointment of an unregulated investment adviser to provide recommendations in respect of the underlying investments of the member-directed scheme, and

(ii) it allowed the creation of a portfolio of underlying investments within the Scheme which, according to the Complainant, was not in line with her low-medium risk profile; with the portfolio constituting high risk professional investor of only structured notes that should have never been made in her pension fund.

General observations

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

This would reflect on the extent of responsibility that the financial 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 financial instruments, ***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.

(i) Regulatory status of the investment advisor

The Retirement Scheme Administrator, from its part, allowed and/or accepted the investment advisor to provide investment advice to the Complainant within the structure of the Retirement Scheme.

The Complainant explained inter alia that investments 'were accepted from an unlicensed advisory firm using unqualified advisors who received large commissions'. *(fn. 83 A fol. 21) The Complainant also pointed out in her complaint that CWM ceased trading in September 2017. (fn. 83 A fol. 21)*

As to the regulatory status of CWM, during the hearing of the 11 February 2019, the official of the Service Provider under cross examination stated inter alia that:

'at one point in time, Continental Wealth was registered with one particular authority in Spain. However, I don't know the exact criteria of their licensing activities. As far as I know, it was with the insurance authority in Spain'. *(fn. 84 A fol. 179)*

However, the Arbiter has knowledge that CWM was not a regulated entity and, in this respect, makes reference to cases numbers 140/2018, 127/2018, 149/2018, 055/2018 and 094/2018 decided by him on the 28 July 2020. (fn. 85 The Arbiter has the power to investigate as one of his main objectives as clearly stated in Chapter 555 of the Laws of Malta)

The Arbiter also notes that the Service Provider stated that:

'At the time, when the whole local pension regime fell under the Special Funds Act, Retirement Scheme Administrators were not obliged to make certain regulatory checks on the financial advisors'. *(fn. 86 A fol. 179/180)*

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

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

In this respect, the appointment of an unregulated entity to act as investment advisor meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where a regulated advisor is appointed. An adequately regulated financial advisor is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services' regulatory authority. The Retirement Scheme Administrator and Trustee of the Retirement Scheme, a regulated entity itself, should have been duly cognisant of this.

In the scenario where an unregulated advisor was allowed to provide investment advice to the member of a member-directed scheme, ***one would reasonably expect the Service Provider, in its role of Retirement Scheme Administrator and Trustee of the Retirement Scheme, to exercise even more caution and prudence in its dealings with an unregulated party****.*

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 a material bearing on the financial performance of the Scheme and the objective of the retirement scheme to provide for retirement benefits.

It would have accordingly been only reasonable to expect the retirement scheme administrator and trustee to have an even higher level of disposition in the probing and querying of the actions of such unregulated party in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances. This aspect shall be taken into account in this decision.

(ii) <u>The permitted portfolio composition</u>

<u>Claimed Losses</u>

Whilst neither the Complainant nor the Service Provider provided a table of the investment instruments and details of the respective position including capital gains and losses for each, the OAFS was able to construct such table with respect to the positions taken in the Complainant's portfolio. The said table, which is included in Annex 1 to this decision, is based on information extracted from the contract notes (fn. 87 A fol. 57 to 93) and the 'Cash Account Transaction Report' *(fn. 88 A fol. 100-136) issued by Generali and presented by the Complainant during the proceedings of this case.*

It clearly emerges that the Complainant suffered capital losses on most of the structured note investments comprising her portfolio. With respect to the investments into collective investment schemes, which as indicated in the section titled 'Underlying

Investments' *above, comprised only a much lower portion of the portfolio, no realised nor paper losses have overall transpired from the statements or valuations provided.*

Indeed, the 'Investment Fund Valuation' *report dated 31/01/18 indicates that the said funds had, as at the date of the report, an overall market value of GBP32,805 in total in comparison to the overall book value of GBP32,000 invested into the said funds. (fn. 89 A fol. 98 - As at 31/01/18 the market value was indicated as follows: GBP6,660 for 'Marlborough Intl Mngt Ltd High Yield Fixed Int F GBP', GBP6,340 for the 'Vam Fund (Lux) Close Brothers Balanced Fd GBP'; GBP6,760 for the 'IFSL Brooks MacDonald Balanced Fund CI D Acc GBP'; GBP9,049 in respect of the 'GemCap Inv Fd Irl Plc Principal Asset Allocat C GBP'; GBP3,996 in respect of the 'Marlborough Intl Mngt Ltd Multi-Cap Income Cell CI F GBP') The investment position for all of the investments undertaken into collective investment schemes was still open as at the date of the said valuation.*

Hence, the losses claimed by the Complainant in relation to her Retirement Scheme are indeed primarily the result of the structured note investments.

Details regarding the underlying investments

The Complainant has not submitted any factsheets herself in respect of the contested underlying investments. Details of the investments comprising the portfolio were however provided through the various dealing instruction forms, contract notes and Cash Account Transaction Report.

A general search over the internet on the underlying investments yielded fact sheets for the RBC Capital Markets 2yr Reverse Convertible Note GBP (the RBC Biotechnology Income Note) (fn. 90 A fol. 40 & 71 – ISIN XS0979786620 – https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-Income-Note-FACTSHEET.pdf) the RBC Capital Markets 2yr Reverse Convertible Note GBP (the RBC Festive Income Note), (fn. 91 A fol. 45 & 79 - ISIN XS1000868247 - https://www.portman-associates.com/wpcontent/uploads/2013/11/RBC-Festive-Fixed-Income-FACTSHEET.pdf) and the RBC Capital Markets 2yr Autocall Note EUR (the RBC E-Commerce Income Autocallable Notes). (fn. 92 A fol. 46 & 80 - ISIN XS1116370088 - https://www.portman-associates.com/wpcontent/uploads/2014/10/RBC-8pa-E_Commerce-Fixed-Income_Autocallable-FACTSHEET.pdf)

The fact sheets for the said notes indicate the products as being linked to a number of underlying stocks, such as 'biotechnology stocks' *in case of the RBC Biotechnology Income Note or* 'entertainment and retail stocks' *in case of the RBC Festive Income Note or stocks of e-commerce companies in the case of the RBC E-Commerce Income*

Autocallable Notes. (fn. 93 https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-IncomeNote-FACTSHEET.pdf https://www.portman-associates.com/wp-content/uploads/2013/11/RBC-Festive-Fixed-IncomeFACTSHEET.pdf https://www.portman-associates.com/wp-content/uploads/2014/10/RBC-8pa-E_Commerce-FixedIncome_Autocallable-FACTSHEET.pdf) The fact sheets for the said products indicate a fixed income return of 8.5% p.a. for the RBC Biotechnology Income Note and RBC Festive Income Note respectively and a fixed return of 8%p.a. in case of the RBC E-Commerce Income Autocallable Notes.

The fact sheets of the indicated three notes all specify, in the 'Key features' *section, that the target audience for these products were '*Professional Investors Only'*. (fn. 94 Ibid.)*

The high rate of returns indicated on these products in themselves reflect the high level of risk as per the risk-return trade-off. The fact sheets of the said structured notes also highlighted a number of risks in respect of the capital invested into these products.

Apart from inter alia the credit risk of the issuer and the liquidity risk, the indicated fact sheets also highlighted risk warnings about the notes not being capital protected, warning that the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment. (fn. 95 Ibid.)

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

The said fact sheets all included a warning 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. 96 Ibid.)*

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.

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

Such investments also did not reflect the* 'low to medium' *risk attitude of the Complainant nor the objective* 'to provide protection' *referred to in CWM's fact find. *(fn. 97 A fol. 140)* ***Neither did such investments reflect, the* 'cautious' *attitude to risk and level of understanding of investment risks of the Complainant reflected in the Application Form for Membership of STM Malta, nor her previous experience in investment instruments which were only limited to bank bonds as indicated in the section titled* 'The Complainant' *above.*** *(fn. 98 A fol. 191)*

***It is noted that the Service Provider, argued* inter alia *in its reply that '*structured notes may be a suitable investment to be included in pension schemes' noting that 'Structured notes in general are designed so that within certain parameters they have less volatility than the underlying benchmark securities or indices'.** *(fn. A fol. 158)*

Nevertheless, STM Malta has not shown nor provided any details itself on what basis the structured notes which were extensively and at times exclusively invested into, were considered suitable within the Complainant's pension scheme. Nor has the Service Provider demonstrated that the structured notes constituting the Complainant's portfolio carried less volatility or were not of high risk as it implied in its submissions.

The features of the structured notes outlined in the fact sheets sourced as described above, cannot be considered to have less volatility or not being of high risk in view of their particular features as outlined above. In the circumstances of this case, it has clearly transpired that the portfolio actually included investments which cannot be considered to reflect the arguments brought forward by the Service Provider in its reply as justification for the investment into structured notes.

***In its reply, the Service Provider furthermore noted that the MFSA had recognised the possible inclusion of structured notes in the portfolio of pensions schemes noting inter alia that, '...* the MFSA, in its recent draft revised regulations has recognised explicitly that structured notes may be held in pension schemes'.** *(fn. 100 Ibid.)*

Whilst the current pension rules issued by the MFSA indeed do allow a limited exposure to structured notes, it is nevertheless important to keep in mind and consider other relevant and appropriate aspects mentioned in the same MFSA rules. Indeed, the current Pension Rules for Personal Retirement Schemes also provide inter alia for the requirement to ensure that in case of a retail member the chosen investments are of a retail nature as per Standard Licence Condition 9.5(d)(ii)(bb) of the said rules. *(fn. 101 The said condition provides the following: '(bb) unless a Member requests to be classified as a professional member, a Member may only invest in investments which can be classified as suitable for a retail member: Provided that the responsibility of the Retirement Scheme Administrator in assessing the investments chosen shall be limited to carrying out due diligence on the proposed investment, following which the Retirement Scheme Administrator is satisfied on reasonable grounds that the investment can be classified as suitable for a retail member').*

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 clearly established that the Complainant's portfolio included investments not suitable for a retail member. The information found on the said products are indeed indicative of high risks being taken in the Complainant's portfolio and of investments not reflective of the profile, attitude to risk and neither consistent with the details and objectives included in the fact find and Application Form for Membership, and this being in stark contrast to what was claimed by the Service Provider in its reply including that 'the investments selected are within the parameters outlined in the fact find', something which the Service Provider never substantiated during the proceedings of this case.

Excessive exposure to structured notes and single issuers

During the hearing of the 11 February 2019, the Service Provider stated that:

'Being asked what the percentage of the allocation in the structured notes was, I say that the percentage of the allocation in the structured notes was quite high, at around 70%'. *(fn. 102 A fol. 181)*

The Arbiter notes that the allocation in structured notes was not only high but the allocation of the whole portfolio of investments was actually exclusively into structured notes for nearly three years during the period October 2012 till July 2015. *(fn. 103 As indicated in the section titled* 'Underlying Investments' *above.)*

It is also noted that the portfolio comprised at times excessive exposures to not only single issuers, like RBC and Commerzbank, but also to single products (fn. 104 Cf: the

section of this decision titled 'Underlying Investments' *above) where at times there were even investments of GBP80,000 (equivalent to approximately 67% of the original amount transferred into the Scheme of GBP119,434.60) into just one single product. (fn. 105 A fol. 27)*

The Complainant had claimed 'severe' *and* 'catastrophic' *losses on her Retirement Scheme. (fn. 106 A fol. 6 & 21) In her formal complaint to the Service Provider she stated that she suffered* 'severe losses' *indicating her original transfer value into the Generali Plan of GBP119,434.60 dropping to an* 'Approximate Current Value' *of GBP40,021.32 as at 2 October 2017 leading to a* 'Total Known Loss to Date' *of GBP79,413.28. (fn. 107 A fol. 6)*

In a document attached to the Complaint Form filed with the OAFS, she stated that her 'fund has made catastrophic losses and as at 31/1/18 totalled GBP43,493'. *The latter figure seems to relate to the current value of the Generali Plan as at 31/1/18.*

The Arbiter notes that whilst the current value of the Scheme/Generali Plan would reflect both realised as well as unrealised gains/losses, the Complainant is ultimately claiming losses which are equivalent to more than 60% of the total amount invested under her Scheme. (fn. 108 GBP79,413.28 of GBP119,434.60=66.5%); [GBP119,434.60-GBP43,593=GBP75,841.60], GBP75,841.60 of GBP119,434.60=63.5%.)

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 Scheme's primary objective* 'to provide a life-time income to the Member'*, (fn. 109 A fol. 194) and in ensuring adequate diversification and avoidance of excessive exposures in the underlying portfolio of investments. Otherwise, such material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have not occurred.

It is clear that STM Malta permitted investments that cannot be construed as reflecting the principle of prudence or in acting in the best interests of the Complainant as was required in terms of the law as amply explained above.

Other observations

STM Malta did not help its case by not providing information on the underlying investments and not presenting other documentation relating to the Scheme, such as the Trust Instrument and Investment Rules applicable at the time.

The Service Provider did not only fail to present any details on the investment portfolio, including charges, valuations and performance, but it did not even submit copies of other documentation relating to the Scheme, opting instead to discretionally select and quote parts of the Trust Rules in its written statement, namely, indicating various disclaimers and warranties relating to the Scheme, ***without actually presenting the actual and full document referred to.*** *(fn. 110 A fol. 171-172)*

Causal link

The actual cause of the losses experienced by the Complainant on her Retirement Scheme cannot just be attributed to the alleged '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. *(fn. 111 A fol. 168)*

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

Had 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 are 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. The Scheme Administrator and Trustee had to, in practice, promote the scope for which the Scheme was established by allowing a portfolio of investments which reflected the objective of the Scheme.

The principal purpose of a personal retirement scheme is ultimately that to provide retirement benefits. Such purpose is reflected under the primary legislation, the Special Funds (Regulation) Act ('SFA') *(fn. 112 Article 2(1) of the SFA defined a* 'scheme' *to mean* 'a scheme or arrangement which is registered under this Act under which payments are made to beneficiaries for the principal purpose of providing retirement benefits...' ***and the Retirement Pensions Act ('RPA').*** *(fn. 113 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'*)*

It is considered that, had there been a careful consideration of the contested structured products, the Service Provider should have intervened and raised concerns at the very least on certain investments into structured notes forming part of the Complainant's portfolio. It should have not allowed risky investments as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others.

Apart from being its duties as a Retirement Scheme Administrator, the Service Provider was also the Trustee who had to act as a bonus paterfamilias and in the best interests of its client.

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

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

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

The Arbiter also considers that the Service Provider did not meet **the 'reasonable and legitimate expectations'** *(fn. 114 Cap. 555, Art. 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 and is accepting it in so far as it is compatible with this decision. *(fn. 115 Cap. s555, Art. 19(3)(b)).*

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, the Arbiter concludes that the Complainant should be compensated by STM Malta for part of the realised losses on her pension portfolio.

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

The Arbiter notes that the latest valuation and* 'Cash Account Transaction Report' *is not current and during the proceedings no full details emerged of the realised losses (inclusive of dividends) on all investments.

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 advisor, compensation shall be provided solely on the investment portfolio constituted under Continental Wealth Management and allowed by the Service Provider.

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

(i) ***For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Complainant's investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised).***

Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

(ii) ***In case where an investment in (i) above is calculated to have rendered a profit after taking into consideration the amount realised (inclusive of any total interest or other total income received from the respective investment), such realised profit shall be accumulated from all such investments and netted off against the total of all the realised losses from***

the respective investments calculated as per (i) above to reach the figure of the Net Realised Loss within the indicated portfolio.

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

(iii) ***In case of any remaining investments which were constituted at the time of CWM and are still held within the Scheme's portfolio of underlying investments as at, or after, the date of this decision, such investment/s shall not be subject of the compensation stipulated above. This is without prejudice to any legal remedies the Complainant might have in the future with respect to such investment/s***"

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fl-4 ta' Jannar, 2021 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka d-deċiżjoni appellata billi tilqa' l-aggravji tagħha, filwaqt li tilqa' wkoll l-eċċezzjonijiet kollha tagħha, bl-ispejjeż kontra l-appellata. Tgħid li l-aggravji tagħha huma s-segwenti: (i) ma kien hemm l-ebda raġuni ġustifikabbli għaliex l-Arbitru ċaħad it-talba għall-kjamata fil-kawża ta' CWM u ta' Generali Worldwide Insurance Company Limited [minn issa 'l quddiem 'Generali']; (ii) l-Arbitru ma setax raġonevolment jiddeċiedi li (a) l-istess soċjetà appellanta kienet responsabbli għal xi nuqqas stante li ħalliet lil CWM tkun *investment advisor* tal-appellata, meta hija ma kellha l-ebda obbligu regolatorju dak iż-żmien li tagħmel dan; (b) il-kontenut tal-portafoll tal-appellata ma kienx skont il-liġijiet, ir-regoli u l-linji gwida applikabbli dak iż-żmien; (iii) il-kwantum tad-danni kien ikkontestat.

7. L-appellata wieġbet fil-11 ta' Frar, 2021, fejn issottomettiet li d-deċiżjoni appellata hija ġusta, u għaldaqstant timmerita li tiġi kkonfermata.

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

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 magħmula mill-Arbitru fid-deċiżjoni appellata.

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

9. Wara li s-soċjetà appellanta tispjega kif hija ma kinitx tagħti pariri dwar investimenti u dan kif kien jirriżulta 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 jiċħad l-imsemmija talba meta l-ilment kien dirett fil-konfront tagħhom. Is-soċjetà appellanta hawn tgħaddi sabiex tagħmel riferiment għal dak li qalet l-appellata stess fl-ilment tagħha u anki fl-*email* tagħha tal-1 ta' Novembru, 2017 lill-istess soċjetà appellanta. Tgħid li fi Frar 2012 l-appellata kienet bagħtet ilment formali lil Generali fejn sostniet li din kienet negliġenti u assistiet f'reat finanzjarju ipperpetrat minn CWM. B'hekk huwa ċar li l-ilment tal-appellata huwa dirett ukoll fil-konfront ta' CWM u Generali, imma għalkemm il-kwistjoni tqajmet mill-ewwel mis-soċjetà appellanta, l-Arbitru ddeċieda li kien tard wisq fil-proċeduri sabiex tintlaqa' t-talba għall-kjamata fil-kawża. Tikkontendi li l-parametri tal-kwistjoni preżenti

kienu ġew stabbiliti permezz tal-ilment li l-appellata ressqet fil-konfront ta' dawn iż-żewġ entitajiet oħra, u 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 għall-kjamata fil-kawża tista' ssir f'kull stadju tal-proċeduri odjerni. Tgħid li l-CWM u l-Generali għandhom jirrispondu għalihom infushom dwar l-allegat frodi, u ma kienx ġust li tirrispondi hi għar-responsabbiltà mputabbli lil terzi jekk din tirriżulta mill-frodi tat-terzi. Is-soċjetà appellanta fl-aħħar nett issostni l-Arbitru ma setax jiġġustifika d-deċiżjoni tiegħu b'riferiment għal dak li ġie deċiż dwar il-mertu.

10. Min-naħa tagħha l-appellata, filwaqt li tiċċita dak li qal l-Arbitru meta ċaħad it-talba għall-kjamata fil-kawża proposta mis-soċjetà appellanta, issostni 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' CWM u Generali. Irrilevat b'riferiment għad-disposizzjonijiet 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 jidħlu bħala parti fil-proċeduri. Issostni li l-Arbitru l-ewwel għandu jfittex sabiex jara jekk wara kollox CWM u Generali għandhomx interess li jidħlu fil-kawża, filwaqt li għandu d-dritt li jikkonsidra x'risposti dawn setgħu jressqu. L-appellata tagħmel 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-ġurisdizzjoni u l-kompetenza tant li kien ser ikun inutli li CWM u Generali jissejħu 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 permezz ta' *"Written Statement"* li jinstab a *fol.* 167 tal-atti tal-Arbitraġġ sussegwenti għas-seduta tat-12 ta' Novembru, 2018, u ma jidhirx li l-kwistjoni tqajmet darb'oħra waqt il-proċeduri. Fid-deċiżjoni appellata l-Arbitru għaraf li t-talba ma kienetx tressqet aktar kmieni fir-risposta tas-soċjetà appellanta, u hekk kif hu ma kienx qed jippermetti li l-appellata żżid mal-ilment tagħha, huwa ma rax li kien ġust li jippermetti żieda fir-risposta partikolarment meta s-soċjetà appellanta kienet għalqet il-provi tagħha.

12. Il-Qorti tirrileva li ma jirriżultax b'mod ċar meta saret din it-talba, iżda anki jekk it-talba ma tirriżultax li saret tardivament waqt il-proċeduri tal-arbitraġġ kif qiegħda tinsisti s-soċjetà appellanta, tqis li l-Arbitru xorta waħda kien korrett meta ċaħadha, u dan għaliex huwa ħa in konsiderazzjoni wkoll il-fatt li l-appellata kienet indikat fl-ilment tagħha li dan kien qed jiġi dirett proprju kontra s-soċjetà appellanta minħabba n-nuqqasijiet tagħha, kemm bħala amministratur u anki bħala *Trustee* tal-Iskema. Il-Qorti tirrileva li huwa inekwivoku li fl-ilment tagħha l-appellata tiddikjara kategorikament, b'mod li ma jħalli l-ebda dubju, li hija kienet qegħda tħossha offiza bil-mod kif aġixxiet is-soċjetà appellanta fil-konfront tagħha:

> *"My complaint is against STM Malta Trust and Company Management Ltd. I feel that they have not acted accordingly in their role as Trustee and administrator of my pension fund. STM has let me down because as my Trustee I feel that they have not acted in my best interests. They have not acted prudently or responsibly and should be acting in the best interests of the scheme beneficiaries."*

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

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

It-tieni aggravju: *[l-Arbitru ma setax b'mod raġonevoli jikkonkludi li:*

(a) Is-soċjetà appellanta kienet responsabbli għal xi nuqqas meta ħalliet lil CWM tkun investment advisor *tal-appellata; u*

(b) Il-kontenut tal-portafoll tal-appellata ma kienx skont il-liġijiet, regoli u linji gwida applikabbl għal dak iż-żmien.]

15. Meta tfisser it-tieni aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru ma setax b'mod raġonevoli jsib li hija kienet responsabbli minħabba negliġenza meta ħalliet lil CWM tagixxi bħala *investment advisor* tal-appellata, jew li l-kompożizzjoni tal-portafoll tal-investimenti tal-appellata ma kienx skont

il-liġijiet, ir-regoli u l-linji gwida applikabbli. Issostni li l-Arbitru kien skorrett meta sab li hija kienet naqset fl-obbligi tagħha bħala *trustee* u attribwixxa responsabbilità parzjali għat-telf li l-appellata kienet sofriet. Tikkontendi li huwa ma seta' qatt jasal għal din il-konklużjoni bl-applikazzjoni u bl-interpretazzjoni korretta tal-liġi. Tirrileva li CWM ġiet magħżula mill-appellata stess u l-Arbitru saħansitra kkonferma fid-deċiżjoni tiegħu tal-15 ta' Settembru, 2020 fl-ismijiet **Christine Elizabeth Cook *vs.* STM Malta Trust and Company Management Limited as substituted by STM Malta Pension Services Limited (C 51028)**, każ nru. 129/2018, u li llum huwa soġġett għal appell, li hija ma kellha l-ebda obbligu li tivverifika jekk CWM kinitx entità regolata jew jekk kellhiex xi awtorizzazzjoni regolatorja sabiex tipprovdi pariri dwar investimenti. Tgħid li l-obbligu tagħha sabiex tirċievi struzzjonijiet biss mingħand *investment advisors,* daħal fis-seħħ fis-sena 2019, u għalhekk dawn l-obbligi mhumiex applikabbli għall-każ odjern. Tinsisti li dawk l-obbligi prinċipali tagħha fil-konfront tal-appellata, kienu kif imfissra u kontroffirmati fid-dokument sabiex hija ssir membru ta' *pension plan,* u l-istess soċjetà appellanta ma kellha l-ebda obbligu ulterjuri sabiex tivverifika jekk CWM kinitx liċenzjata jew le. Is-soċjetà appellanta tirrileva wkoll li l-oneru tal-prova li hija kienet aġixxiet b'mod illegali, irresponsabbli jew tal-inqas bi ksur tal-obbligi fiduċjarji tagħha, kien jinkombi fuq l-appellata, iżda fil-każ odjern ma tirriżulta l-ebda evidenza. Tkompli tgħid li hija ma kienet bl-ebda mod responsabbli għall-għażla ta' dawk l-investimenti, u mill-atti ma kienx jirriżulta li kien hemm xi ksur tal-obbligi kuntrattwali li hija kellha fil-konfront tal-appellata, jew tar-regoli applikabbli tal-MFSA, tal-gwidi ta' investiment applikabbli, jew li kien hemm nuqqas ta' prudenza min-naħa tagħha, jew li hija ma kinitx ikkonsidrat il-profil ta' riskju tal-appellata. Is-soċjetà appellanta

tissottometti li kienet ir-responsabbiltà tal-*investment advisor* tal-appellata li jassigura li l-portafoll sħiħ, u mhux biss dik il-parti li ġiet ittrasferita fil-*Pension Plan,* ikun adegwatament iddiversifikat. Hija min-naħa tagħha ma kienet qegħda tagħti l-ebda pariri dwar investimenti. Tirrileva li l-istruzzjonijiet li kienet irċeviet dwar l-investimenti kienu kollha ffirmati mill-appellata stess u mill-*investment advisor* tagħha, u għalhekk hija dejjem imxiet fil-parametri tal-gwidi. Għal dak li kien jirrigwarda l-kummenti tal-Arbitru dwar l-i*structured notes,* is-soċjetà appellanta tgħid li ma kien hemm l-ebda prova dwarhom, iżda l-Arbitru ddeċieda bi ksur tal-prinċipju *quod non est in acti non est in mundo,* li jagħmel riċerka u jserraħ il-konklużjoni tiegħu fuqha, jiġifieri l-*fact sheets* li ma kienux parti mill-atti. Dan filwaqt li l-partijiet ma kellhom l-ebda opportunità li jagħmlu eżami ta' dawn il-*fact sheets,* u b'hekk is-soċjetà appellanta titlob sabiex il-konklużjoni tal-Arbitru kif imsejsa fuq din ir-riċerka għandha tiġi skartata fl-intier tagħha. Is-soċjetà appellanta ssostni li l-Arbitru saħansitra naqas milli jikkonsidra li skont il-gwidi ta' investiment applikabbli u r-regolamenti tal-MFSA, huwa permissibbli li jsiru investimenti fi *structured notes,* u jixħet l-oneru ta' prova fuqha fejn isostni li kienet hi li kellha turi kif dawn kienu tajbin fil-parametri ta' skema tal-pensjoni tal-appellata, minflok ma ddikjara li l-appellata stess kellha turi kif dawn ma kienux tajbin f'kuntest ta' skemi tal-pensjoni. Tkompli tgħid li l-Arbitru ma offra l-ebda raġuni għaliex *structured notes* ma kienux tajbin għal *retail member.* Imbagħad kemm l-appellata u anki l-Arbitru mkien ma jindikaw li kien hemm frodi, *wilful default* jew *gross negligence* min-naħa tas-soċjetà appellanta. Hija tiċċita r-regola 12.1 tat-*Trust Rules,* filwaqt li tikkontendi li l-ebda negliġenza ma tista' tiġi attribwita lilha ġaladarba hija kienet straħet fuq struzzjonijiet, garanziji u indemnifikazzjonijiet u

dikjarazzjonijiet iffirmati jew li kienet emmnet in buona fede li kienu ffirmati. Tirrileva li hekk kif l-appellata kienet inkwetata dwar it-telf li kienet qiegħda ssofri fil-portafoll tagħha, din baqgħet minn jeddha tikkonsulta ma' Neil Hathaway ta' CWM u tieħu l-parir tiegħu, u kien biss f'Lulju 2018 li din iddeċidiet li tissostitwixxi lil CWM bħala l-*investment advisor* tagħha. Is-soċjetà appellanta tikkontendi li l-appellata kienet legalment obbligata tonora l-indennizzi magħmulin favur is-soċjetà appellanta skont ir-regolament 12.1, u dan filwaqt li tiċċita wkoll ir-regolament 12.2. u tikkontendi li fl-interpretazzjoni tal-obbligi fiduċjarji tagħha, wieħed ma jistax kif għamel l-Arbitru jwarrab il-pattijiet kuntrattwali ta' bejn il-partijiet, partikolarment il-garanziji u l-indennizzi min-naħa tal-appellata, li mingħajrhom is-soċjetà appellanta ma kienet qatt ser tħalliha tissieħeb fil-pjan. Is-soċjetà appellanta tikkontendi li hija ma setgħet qatt tinżamm responsabbli għal telf li seta' irriżulta minn azzjonijiet li ttieħdu skont *dealing instructions* iffirmati mill-appellata, li possibilment setgħu ġew iffirmati *in blank* u fdati f'idejn CWM. Tikkontendi li hawn l-Arbitru saħansitra injora l-kontribuzzjoni tal-appellata għad-danni allegatament sofferti minnha. Is-soċjetà appellanta tgħid ukoll li l-appellata ma ressqet l-ebda prova dwar l-allegat negliġenza tagħha u għalhekk huwa nieqes in-ness kawżali.

16. L-appellata tilqa' billi tikkontendi li ġaladarba hija kienet tikkwalifika bħala *'retail client',* jiġifieri hija ma kinitx investitriċi professjonali, kienet mistennija aktar diliġenza min-naħa tas-soċjetà appellanta u kif tajjeb osserva l-Arbitru, is-soċjetà appellanta xorta waħda kellha l-obbligi ġenerali fil-kariga tagħha ta' *Trustee* u Amministratriċi tal-Iskema. Hawn l-appellata tiċċita is-subartikolu 1(2) tal-Att dwar *Trusts* u *Trustees* (Kap. 331), u anki l-para. (ċ) tas-

subartikolu 43(6) u l-artikolu 21 tal-istess liġi. Hija tagħmel riferiment ukoll għal pubblikazzjoni tal-MFSA u tiċċita silta minnha, liema dokument tgħid kien ġie ppubblikat fl-2017, iżda kien jittratta prinċipji ġenerali tat-Kap. 331 u tal-Kodiċi Ċivili li kienu diġà fis-seħħ qabel dik is-sena. 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 tali prodotti kienu riżervati għal investituri professjonali biss u li seta' jintilef il-kapital. Hija tiċċita dak li qal l-Arbitru dwar ir-riskji tal-investimenti in kwistjoni. Rigward l-ilment tas-soċjetà appellanta dwar l-allegata investigazzjoni li wettaq minn jeddu l-Arbitru sabiex wasal għad-deċiżjoni tiegħu, tgħid li huwa kellu kull dritt li jagħmel dak li deherlu bżonnjuż sabiex jasal għad-deċiżjoni tiegħu, u hawn hija tiċċita s-subartikolu 25(1) tal-Kap. 555, filwaqt li ssostni li l-Arbitru sabiex jasal għad-deċiżjoni tiegħu għandu setgħat wesgħin, u tiċċita d-disposizzjonijiet tas-subartikoli 25(5), (6) u (7) tal-Kap. 555.

17. 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 f'dak li fil-fehma tiegħu kien ġust, ekwu u raġonevoli fiċ-ċirkostanzi partikolari, u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad, wara li jagħamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellata minn diversi dokumenti esebiti fl-atti[3], partikolarment l-applikazzjoni għal sħubija fl-iskema

[3] Ara *fact find a fol.* 140 fejn it-tieni prijorità tagħha hija ndikata bħala *"PROTECTION"* u aktar 'il isfel hemm imniżżel li *"THE BOND IS TO PROVIDE PROTECTION"* u *"HER ATTITUDE TO RISK IS LOW TO MEDIUM"*. Ara wkoll l-applikazzjoni għal sħubija f'*"The STM Retirement Plan" a fol.* 191, fejn jirriżulta li hija kienet iddikjarat li ma kinitx tifhem ir-riskji tal-investiment fis-swieq finanzjarji, li kienet investitur mingħajr esperjenza, u li riedet tinvesti b'mod kawt.

tal-irtirar [minn issa 'l quddiem 'l-applikazzjoni għal sħubija'] u l-*fact find,* għadda sabiex għamel ukoll diversi osservazzjonijiet dwar is-soċjetà appellanta. Il-Qorti ssib li dawn huma korretti u f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

18. Imbagħad l-Arbitru nnota li l-Iskema kienet ġiet stabbilita hawn Malta mis-soċjetà appellanta, li kienet liċenzjata bħala Amministratriċi tal-Iskema tal-Irtirar, u li kienet taġixxi kemm f'din il-kariga kif ukoll bħala *Trustee* tal-Iskema in kwistjoni. Minn hawn huwa għadda sabiex osserva li l-applikazzjoni għal sħubija kif iffirmata mill-appellata fit-8 ta' Ġunju, 2012[4], tindika li l-konsulent dwar l-investiment tagħha kienet proprju CWM, li kellha indirizz ġewwa Spanja.[5] Irrileva li l-Iskema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta u kif awtorizzata mill-MFSA bħala *"Personal Retirement Plan".* Osserva li l-assi miżmuma mill-Iskema kienu ġew utilizzati għax-xiri ta' kuntratt ta' assikurazzjoni maħruġ minn Generali International Limited jew il-*Generali Plan,* li l-Qorti hawn tara xieraq li hija wkoll tiċċita kif ġie deskritt, jiġifieri *"a life policy investment wrapper holding underlying financial instruments such as mutual funds and structured notes, in each case selected by the Complainant and or her appointed investment advisor/s ...".* Dawn il-fatti ukoll ma jidhirx li hemm kontestazzjoni dwarhom.

19. Minn hawn l-Aribtru għadda sabiex analizza x'kienu l-investimenti sottoskritti, konsistenti f'noti strutturati u investimenti oħra f'skemi ta' investiment kollettiv, kollha formanti parti mill-portafoll tal-*Generali Plan.* L-

[4] *A fol.* 193.
[5] *A fol.* 190.

Arbitru kkonsidra li l-Iskema, u anki s-soċjetà appellanta, kienu regolati mil-liġi tas-servizzi finanzjarji u r-regolamenti maħruġa hawn Malta, inklużi l-kondizzjonijiet u r-regoli tal-pensjonijiet magħmulin mill-MFSA fl-ambitu tar-reġim regolatorju applikabbli għall-iskemi personali tal-irtirar. L-Arbitru hawn għamel riferiment għall-Att li Jirregola Fonda Speċjali, li ssostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514) li ġie fis-seħħ fl-1 ta' Jannar, 2015, u anki l-Att dwar *Trusts* u *Trustees* (Kap. 331) partikolarment applikabbli għas-soċjetà appellanta *ai termini* tas-subartikolu 1(2) u l-para (ċ) tas-subartikolu 43(6) tiegħu, u b'riferiment għal dak li jipprovdi s-subartikolu 21(1) tiegħu fir-rigward tar-responsabbiltà li timxi bil-prudenza, diliġenza u attenzjoni ta' bonus paterfamilias bl-akbar *bona fide,* u billi tevita kull kunflitt ta' interess. Dawn ir-referenzi l-Qorti tgħid li huma mhux biss utli, iżda wkoll rilevantissimi stante l-applikabbiltà tagħhom għall-każ odjern.

20. L-Arbitru mbagħad iddikjara li s-soċjetà appellanta hija soġġetta għall-obbligi, funzjonijiet u responsabbiltajiet applikabbli għal Amministratur ta' Skema tal-Irtirar u għal *Trustee* tal-Iskema. L-obbligi tagħha kienu mfissra fl-Att li Jirregola Fondi Speċjali u fid-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act,2002.* Meta mbagħad ġie mħassar dak l-Att u r-reġistrazzjoni tas-soċjetà appellanta permezz tal-Kap. 514, l-obbligi tagħha bdew jiġu regolati permezz ta' din l-aħħar liġi u anki permezz tal-*Pension Rules for Services Providers issued under the Retirement Pensions Act* u l-*Pension Rules for Personal Retirement Schemes Issued under the Retirement Pensions Act*. L-Arbitru aċċenna għall-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(a) tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514). Il-Qorti iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta hawn kellha obbligi daqstant ċari li timxi fl-aħjar interess tal-Iskema, kemm fiż-żmien li sar l-investiment 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-appellata kienet għadha membru tal-Iskema u ġarrbet it-telf allegat.

21. 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 dovuta, kura u diliġenza fl-aħjar interessi tal-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li diġà minn dan li ngħad, jirriżulta li d-difiża tagħha li hija qatt ma setgħet tinżamm responsabbli għaliex ma kellha l-ebda obbligu fil-konfront tal-appellata, ma tistax tirnexxi.

22. Imma l-Arbitru ma waqafx hawn, għaliex ikkonsidra wkoll il-kariga tas-soċjetà appellanta 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), 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 tamministra l-Iskema u l-assi tagħha skont diliġenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa jagħmel riferiment għall-pubblikazzjoni An Introduction to Maltese Financial Services Law[6] u għall-pubblikazzjoni riċenti tal-MFSA tas-sena 2017 fejn din ittrattat prinċipji diġà stabbiliti permezz tal-Att dwar *Trusts* u *Trustees* (Kap. 331) u anki permezz tal-Kodiċi Ċivili.

23. L-Arbitru mbagħad aċċenna għal obbligu ieħor importanti li kellha s-soċjetà appellanta*,* dak li tissorvelja u tħares l-investimenti u qal li dan l-obbligu huwa saħansitra mniżżel fl-i*Statement of Investment Principles*[7] maħruġ mill-istess soċjetà appellanta, li kien ġie anness ma' *email* tagħha tat-12 ta' Ġunju, 2016. Jirrileva li dan id-dokument kellu jiġi fis-seħħ fl-1 ta' Jannar, 2017, iżda l-eżami tal-investimenti fid-dawl tal-prinċipji ġenerali ta' diversifikazzjoni u prudenza kienu ta' mill-inqas applikabbli fis-snin ta' qabel għaliex kien jagħmel parti mill-obbligi ta' Amministratur tal-Iskema tal-Irtirar u ta' *Trustee* tagħha, kif diġà ġie kkonsidrat aktar 'il fuq f'din is-sentenza. Tirrileva li minn dan id-dokument joħorġu diversi fatturi mportanti li huma msejsa fuq l-obbligi li kellha s-soċjetà appellanta li tamministra l-Iskema fl-aħjar interessi tal-membri u benefiċċjarji, u kif sewwa għaraf l-Arbitru dawn jirriflettu l-prinċipji ta' diversifikazzjoni u prudenza li dejjem kellha timxi magħhom is-soċjetà appellanta anki jekk id-dokument kif emendat ġie fis-seħħ fl-1 ta' Jannar, 2017.

[6] Ed. Dr Max Ganado.
[7] *A fol.* 143 *et seq.*

B'hekk il-Qorti tqis pertinenti li tiċċita partikolarment is-segwenti dikjarazzjonijiet kif magħmula mis-soċjetà appellanta fl-imsemmi dokument:

> *"The main objective of the Schemes is to provide for pension benefits for its members and beneficiaries.*
> *...*
> *Diversification, liquidity and quality of the investment are important factors for the Company to consider when reviewing investments in the view of the risk profile of the member. As a result, the Company has put together parameters to ensure, as much as possible that investment recommendations provide good levels of diversification and liquidity appropriate for a pension scheme.*
> *...*
> *It is important to note that in no way is the Company deemed to be giving investment advice, but merely taking precautionary measures with the aim of providing the best service to our members".*[8]

24. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju ż-żewġ punti li fuqhom huwa msejjes dan it-tieni aggravju tas-soċjetà appellanta. Huwa jaċċetta 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, li kif huwa kien iddikjara fil-każijiet 140/2018, 127/2018, 149/2018, 055/2018 u 094/2018 deċiżi minnu fit-28 ta' Lulju, 2020, ma kinitx regolata. Huwa ħa konjizzjoni tas-sottomissjoni tas-soċjetà appellanta li f'dak iż-żmien meta r-reġim tal-pensjonijiet lokali kien jaqa' taħt l-Att li Jirregola Fondi Speċjali, ma kien hemm l-ebda obbligu li tinżamm għajn miftuħa fuq il-konsulenti finanzjarji, u ddikjara li kien tal-fehma qawwija, kif inhi din il-Qorti, li madankollu l-Amministratur ta' Skema għall-Irtirar u t-*Trustee* kellu l-obbligi relattivi ta' attenzjoni u diliġenza professjonali ta' *bonus paterfamilias,* li ma setgħux jitwarrbu. L-Arbitru qal li fil-

[8] *A fol.* 143.

każ odjern 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 li tkun konoxxenti ta' dan il-fatt u li tkun aktar kawta u prudenti fin-negozju tagħha ma' dik l-entità. Il-Qorti ma tistax ma tikkondividiex din il-fehma u tikkonsidra ċertament minn dak kollu li s'issa ġie rrilevat u kkonsidrat, li l-obbligi li kellha s-soċjetà appellanta ma setgħux ikunu dawk ta' amministrazzjoni sempliċi u bażika, tenut kont li hija kienet ukoll *Trustee* tal-Iskema.

25. L-Arbitru għalhekk sewwa jgħid li s-soċjetà appellanta kellha turi iktar kawtela u prudenza, iktar u iktar meta x-xelta 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 ukoll tikkondividi 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 r-riskji jitnaqqsu.

26. Dwar it-tieni punt sollevat mis-soċjetà appellanta fit-tieni aggravju tagħha, l-Arbitru beda billi osserva li kemm l-appellata u anki s-soċjetà appellanta naqsu milli jagħtu informazzjoni ulterjuri dwar l-investimenti, u għalhekk l-OAFS kienet għamlet eżerċizzju fejn ħejjiet hija stess din l-informazzjoni kif imsejsa fuq il-*contract notes* u l-*Cash Account Transaction Report* maħruġa minn Generali u li ġew ippreżentati mill-appellata waqt il-proċeduri. L-Arbitru qal li mill-informazzjoni li huwa ġabar minn dawn id-dokumenti, kien jirriżulta li l-appellata tassew sofriet telf fuq il-kapital ta' bosta

min-noti strutturati formanti parti mill-portafoll tagħha. Dan b'kuntrast mal-investiment tagħha f'skemi ta' investiment kollettiv, u għalhekk tassew it-telf allegatament soffert mill-appellata kien jirriżulta mill-investiment li sar fin-noti strutturati. Il-Qorti hawn tixtieq tirrileva li s-soċjetà appellanta mhijiex qegħda tikkontesta l-fatt li l-appellata sofriet telf u għaldaqstant mhux ser tidħol fil-mertu tal-allegati danni.

27. L-Arbitru osserva li l-appellata ma kinitx issottomettiet xi *factsheet* dwar dawn l-investimenti, iżda l-informazzjoni dwarhom ħarġet mill-formoli fejn ingħataw l-istruzzjonijiet relattivi, *contract notes* u *Cash Account Transaction Report.* Minn riċerka fuq l-*internet,* l-Arbitru seta' jsib *fact sheets* ta' tlieta minn dawn in-noti, li kienu jindikaw li l-prodotti kienu marbutin ma' numru ta' *stocks* sottoskritti, u kien hemm ukoll indikat r-rati ta' imgħax relattivament għolja ta' 8.5% u 8% fis-sena, li kien juru l-livell għoli ta' riskju li l-investiment kien jinvolvi. Mill-istess *fact sheets* tat-tliet noti in kwistjoni, kien jirriżulta li dawn kienu mmirati lejn *'Professional Investors Only'* u kien hemm elenkati wkoll għadd ta' riskji fir-rigward tal-kapital investit f'dawn il-prodotti.

28. Il-Qorti hawn sejra tikkonsidra dak li ġie rilevat mis-soċjetà appellanta fir-rigward tal-investigazzjoni mwettqa mill-Arbitru, li qegħda tallega li saret bi ksur tal-prinċipju *quod non est in acti non est in mundo.* Tqis li l-Arbitru m'għamel xejn li ma tippermettix l-kompetenza tiegħu skont kif ċirkoskritta mill-artikolu 25 tal-Kap. 555, u mingħajr dubju sabiex jassigura li huwa kien qed jiddeċiedi l-ilment fil-parametri tal-para. (b) tas-subartikolu 19(3) tal-istess liġi. Il-Qorti tirrileva li r-riżultat tat-tfittxija tiegħu juri kemm kien korrett li ma jieqafx fl-investigazzjoni tiegħu minħabba l-informazzjoni limitata a disposizzjoni diretta

tiegħu, u b'hekk allura jkun qed jgħin id-difiża tas-soċjetà appellanta. Min-naħa l-oħra, ma tqisx li b'hekk kif tallega s-soċjetà appellanta, huwa kien qed jgħin il-każ imressaq mill-appellata, aktar milli jaċċerta li ssir ġustizzja. Is-soċjetà appellanta tilmenta wkoll li l-partijiet ma kellhomx l-opportunità li jeżaminaw il-kontenut tal-informazzjoni tal-*fact sheets,* iżda jirriżulta minn dak li qal l-Arbitru li l-informazzjoni ma kinitx waħda diffiċli sabiex tinkiseb permezz ta' riċerka fuq l-*internet,* u għalhekk din kienet disponibbli wkoll għall-pubbliku nkluż is-soċjetà appellanta. B'hekk ukoll is-soċjetà appellanta kellha kull opportunità, kif wara kollox naqqset milli tagħmel, li tikkontesta dik l-informazzjoni miksuba.

29. L-Arbitru għadda sabiex irrileva x'kienu dawk ir-riskji li sar aċċenn fuqhom fil-*fact sheets,* fost oħrajn ir-riskju tal-kreditu ta' min kien qed joħroghom u anki r-riskju tal-likwidità, u twissijiet li n-noti ma kellhomx il-kapital protett. Dan filwaqt li kixef ukoll li fihom kien hemm speċifikat bħala wieħed mill-fatturi prinċipali, li huma kienu ntiżi għall-investituri professjonali biss. Kollox, tgħid il-Qorti, ferm indikattiv tal-fatt li l-investiment fin-noti strutturati ma kienx wieħed kompatibbli mal-informazzjoni dwar l-appellata u dwar dak li kienet tfittex 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' perċentwal. L-Arbitru ċċita s-segwenti twissija*: "[i]f any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity, and capital will be lost".* Għalhekk, qal l-Arbitru, kien hemm konsegwenzi materjali jekk il-valur ta' wieħed biss mill-assi kollha tan-noti strutturati kien jinżel mill-minimu ndikat, u qal li l-implikazzjoni ta' din il-

kundizzjoni ma setgħetx tiġi skartata. Ammetta li l-*fact sheets* tan-noti strutturati l-oħra li fihom kien sar investiment, ma kienux hemm jew ma setgħux jinstabu, iżda ddikjara li kien tassew ċar li l-portafoll tal-appellata kellu noti strutturati li kienu jġorru ċerti riskji li ma kienux jirriflettu l-aspett prudenti kif kien mistenni minn portafoll tal-pensjoni u kif mitlub mir-regolamenti li għalihom kien sar riferiment aktar 'il fuq. Anki dawn ma kienux jirriflettu l-attitudni għar-riskju '*low to medium'* tal-appellata jew l-oġġettiv tagħha *'to provide protection'* kif kien jirriżulta mill-*fact find* ta' CWM.[9] Qal li lanqas ma kienu jirriflettu l-attitudini ta' kawtela u l-livell ta' għarfien tar-riskji tal-investiment tal-appellata kif jirriżultaw mill-Applikazzjoni għall-Sħubija tas-soċjetà appellanta, jew l-esperjenza limitata tagħha fil-*bonds* tal-bank.[10] 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, il-Qorti tistqarr li m'għandha xejn aktar x'iżżid fir-rigward.

30. L-Arbitru rrileva li għalkemm is-soċjetà appellanta kienet qegħda ssostni li *"structured notes may be a suitable investment to be included in pension schemes",* hija ma kinitx uriet jew ipprovdiet dettalji sabiex turi kif dawn kienu kkunsidrati tajbin fl-ambitu tal-iskema tal-pensjoni tal-appellata, jew li dawk in-noti strutturati li kienu jagħmlu parti mill-portafoll tal-appellata ma kellhomx l-istess volatilità jew li ma kienux daqstant ta' riskju għoli kif kienet qegħda

[9] *A fol.* 140.
[10] *A fol.* 191.

tallega. Qal li fir-risposta tagħha s-soċjetà appellanta kienet insistiet li l-MFSA kienet irrikonoxxiet il-possibbiltà li *structured notes* jagħmlu parti mill-portafoll ta' skema tal-pensjonijiet, iżda l-Arbitru sostna li għalkemm dan huwa minnu, wieħed irid jikkonsidra aspetti oħra rilevanti u xierqa li kien hemm fir-regoli maħruġa mill-MFSA. Huwa hawn għamel riferiment għall-*Pension Rules* preżenti *for Personal Retirement Schemes,* li kienu jitolbu li fil-każ ta' *retail member,* l-investimenti magħżula kellhom ikollhom l-istess natura, u dan skont l-i*Standard Licence Condition* 9.5(d)(ii)(bb) ta' dawk ir-regoli, iżda dan ma kienx hekk fil-każ odjern. Għalhekk sewwa għamel, tgħid il-Qorti, meta m'aċċettax dak li kienet qegħda ssostni fuqu s-soċjetà appellanta.

31. Imbagħad l-Arbitru għadda sabiex ikkonsidra l-fatt li l-portafoll sħiħ tal-appellata kien magħmul fil-parti l-kbira tiegħu min-noti strutturati għal perijodu ta' kważi tliet snin minn Ottubru 2012 sa Lulju 2015. Osserva li l-portafoll mhux biss kien espost b'mod eċċessiv għall-emittent (issuer) partikolari, iżda għal prodotti partikolari u qal li kien hemm saħanistra każ fejn madwar 67% tal-ammont oriġinali trasferit fl-iskema ġie investit f'prodott wieħed. Il-Qorti tirrileva li hawn ukoll il-*Pension Rules for Personal Retirement Schemes* jindikaw almenu l-limitazzjonijiet applikabbli sa mis-7 ta' Jannar, 2015, fejn ċertament dawn laqtu lis-soċjetà appellanta, u għaldaqstant hija kellha tirrevedi l-pożizzjoni tagħha fir-rigward tal-appellata.

32. Il-Qorti tikkonsidra x-xhieda in kontro-eżami ta' **Graham Sciberras**, fejn huwa kkontenda li fiż-żmien li l-appellata kienet għamlet l-investimenti tagħha:

"At that time the parameters were very wide, if there were any, so what I can understand is that the investment recommendations from the advisor Mrs Coleman had appointed, were received by STM which STM executed without referring to parameters because there were no parameters in the first place. There were no strict guidelines which say in which and what not to invest in.

Being asked what the percentage of the allocation in the structured notes was, I say that the percentage of the allocation in the structured notes was quite high, at around 70%. At the time, there were no strict percentage allocations either for structured notes or for any other asset. The Statement of Investment Principles was a very broad document which was not even applicable in 2012"

33. Din fil-fatt baqgħet id-difiża tas-soċjetà appellanta, li dejjem sostniet li hija bl-ebda mod ma kienet naqset lejn l-appellata għaliex ma kellha l-ebda obbligi lejha, u kien proprju l-konsulent finanzjarju li kien responsabbli għall-mod kif sar l-investiment. B'hekk hija ma qalet xejn għaliex l-investiment fin-noti strutturati kien eċċeda l-massimu ta' 65%, kif suġġerit mill-parametri stabbiliti minnha stess fl-I*statement of Investment Principles*.[11] Barra minn hekk ma qalet xejn dwar il-parametri l-oħra li jsegwu[12], inkluż il-massimu tal-investiment stabbilit fir-rigward tad-diversi noti strutturati, u kif u jekk hija kienet segwit l-istess prinċipji stabbiliti minnha li kellhom jassiguraw lill-membri fl-investiment tagħhom. Il-Qorti tgħid li mhijiex konċepibbli sitwazzjoni fejn amministratur ta' skema tal-irtirar jgħaddi minn reġim assolutament mhux kontrollat għal wieħed kontrollat, għaliex fl-assenza ta' liġi u regoli speċifiċi, kif rajna aktar 'il fuq, għandha tapplika l-liġi ġenerali.

34. Filwaqt li l-Arbitru ħa in konsiderazzjoni l-allegat telf li l-appellata sostniet li batiet, osserva li dawn kienu ekwivalenti għal aktar minn 60% tal-ammont sħiħ

[11] A *fol.* 144.
[12] A *fol.* 145.

li hija kienet investiet fl-Iskema, u dan ma ġie bl-ebda mod ikkontestat mis-soċjetà appellanta. Qal li dan it-telf kien juri li l-Iskema ma kinitx laħqet l-għan prinċipali tagħha *"to provide a life-time income to the Member"*[13]*,* billi tassigura diversifikazzjoni adegwata, filwaqt li l-portafoll ta' investimenti sottoskritti ma jiġix espost eċċessivament. B'hekk it-telf materjali soffert u li ma kienx mistenni minn prodott għal pensjoni fejn l-iskop kien li jiġu pprovduti benefiċċji ta' irtirar, ma kienx iseħħ. Iddikjara li kien jirriżulta biċ-ċar, kif ukoll jirriżulta ampjament lil din il-Qorti, li s-soċjetà appellanta ppermettiet li jsiru investimenti b'mod li ma kienx rifless il-prinċipju ta' prudenza jew li seta' jingħad li hija kienet qegħda timxi fl-aħjar interessi tal-appellata kif rikjest mil-liġi u kif ikkonstatat aktar 'il fuq fid-deċiżjoni tiegħu.

35. 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) kienet dovuta tfittex u tassigura li l-mod kif kien magħmul il-portafoll kif rakkommandat mill-konsulent tal-investiment, kien fost affarijiet oħra jirrifletti kemm r-rekwiżiti relattivi u l-profil u l-oġġettiv tal-appellata għall-aħjar protezzjoni tal-interessi tagħha;

(ii) kienet ukoll dovuta tassigura li l-kompożizzjoni msemmija tal-portafoll kien jagħti lok għall-għan tal-Pjan ta' Irtirar, filwaqt li jassigura wkoll il-prudenza kif mistenni b'mod raġonevoli minn pjan ta' irtirar intiż li

[13] A *fol.* 186.

jipprovdi għal benefiċċji ta' irtirar, kif jipprovdu għalihom l-Att li Jirregola Fondi Speċjali u l-Att għall-Pensjonijiet tal-Irtirar;

(iii) kienet dovuta tikkonsidra l-prodotti in kwistjoni mill-ewwel, u ta' mill-inqas turi it-tħassib tagħha dwar ċertu investimenti f'noti strutturati formanti parti mill-portafoll tal-appellata, u ma kellhiex tħalli li jsiru investimenti riskjużi, għaliex dawn kienu kontra l-oġġettivi tal-Iskema tal-Irtirar, u fost affarijiet oħra ma kienux fl-aħjar interess tal-appellata;

(iv) kienet mhux biss l-Amministratur tal-Iskema tal-Irtirar, imma anki t-*Trustee,* u għalhekk kellha timxi bħala *bonus paterfamilias* fl-aħjar interessi tal-klijenta tagħha;

(v) kienet straħet fuqha l-appellata, u anki terzi nvoluti fl-istruttura tal-Iskema, sabiex jintlaħaq l-għan tagħhom li jirċievu benefiċċji tal-irtirar, filwaqt li tiġi assigurata l-pensjoni.

36. Għalhekk l-Arbitru esprima l-fehma, li din il-Qorti tikkondividi pjenament, li filwaqt li jista' dejjem isir telf fuq investimenti f'portafoll, dawn jistgħu jitnaqqsu u jinżamm il-kapital oriġinali kif investit, permezz ta' diversifikazzjoni tajba, bilanċjata u prudenti tal-investimenti. Imma fil-każ odjern kien jirriżulta pjenament li tal-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. Qal li fil-fatt is-soċjetà appellanta ma kinitx leħqet 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-konsiderazzjonijiet kollha li għamel l-

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

37. Għaldaqstant dan it-tieni aggravju wkoll mhux ġustifikat, u l-Qorti qegħda tiċħdu.

It-tielet aggravju: [il-kwantum tad-danni kkwantifikat huwa kkontestat]

38. Is-soċjetà appellanta tikkontendi li l-Arbitru naqas milli jindika għaliex hija għandha tinżamm responsabbli għad-danni sofferti mill-appellata fil-perċentwal ta' 70% tat-telf tagħha, aktar u aktar meta huwa kien irrikonoxxa li hija ma kinitx konsulent tal-investiment u ma tat l-ebda parir ta' investiment. Tinsisti li jekk jirriżulta xi nuqqas min-naħa tagħha, ċertament hija ma setgħetx tkun responsabbli għat-telf soffert, meta kien ċar li kienu terzi l-kawża tiegħu.

39. L-appellata tilqa' billi tissottometti li għall-kuntrarju, l-Arbitru kien spjega sew fid-dettal ir-rabta bejn l-aġir tas-soċjetà appellanta u t-telf soffert minnha.

40. Il-Qorti tgħid li fit-tielet aggravju tagħha, is-soċjetà appellanta qegħda ttenni l-istess argumenti miġjuba minnha fit-tieni aggravju. Għalhekk filwaqt li tagħmel riferiment għal dak kollu li ġie kkonsidrat minnha fl-eżami tal-imsemmi tieni aggravju, il-Qorti tgħid li anki l-aħħar aggravju tas-soċjetà appellanta mhux ġustifikat u tiċħdu.

Decide

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

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

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur