MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-3 ta' Diċembru, 2021

Appell Inferjuri Numru 37/2021LM

Robert Allum (Passaport nru. 521455781)
('l-appellat')

***vs*.**

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

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **Momentum Pensions Malta Limited (C 52627)** [minn issa 'l quddiem 'is-soċjetà appellanta'] mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fis-6 ta' April, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li

permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrent **Robert Allum (Detentur tal-Passaport nru. 521455781)** [minn issa 'l quddiem 'l-appellat'] fil-konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinżamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555 hija għandha tħallas lill-appellat l-kumpens bil-mod kif stabbilit, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effetiv pagament filwaqt li kull parti kellha tħallas l-ispejjeż tagħha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament jgħid li sofra l-appellat mill-investiment li huwa kien għamel tramite s-soċjetà appellanta fi skema tal-irtirar [minn issa 'l quddiem 'l-Iskema']. Jirriżulta li l-imsemmi appellat kien iltaqa' mal-konsulenti finanzjarji *Continental Wealth Management* [minn issa 'l quddiem "CWM"] għall-ħabta tas-sena 2014 stante li huwa u l-*partner* tiegħu kienu qegħdin ifittxu li l-pensjoni tiegħu kellha tintuża sabiex tiġġenera introjtu ulterjuri permezz ta' investiment *f'A Qualifying Recognised Overseas Pension Scheme* [QROPS]. Fl-istess sena huwa kien ġie ntrodott lis-soċjeta appellanta u skont l-istruzzjonijiet li din tal-aħħar irċeviet mingħand l-appellat tramite CWM, il-fondi tal-pensjoni tiegħu ġew trasferiti lis-soċjetà appellata li kienet Amministratriċi u anki *Trustee* tal-Iskema. Iżda huwa beda jinnota li l-valur tal-portafoll tiegħu kien qed jonqos sew u mbagħad f'Settembru 2017 huwa sar jaf li CWM ma kinitx baqgħet topera aktar. Huwa

għalhekk kien kiteb direttament lis-soċjetà appellanta fejn sar jaf li l-valur imsemmi minn EUR81,500 kien niżel għal EUR17,000.

Mertu

3. L-appellat ippreżenta lment quddiem l-Arbitru fis-6 ta' Settembru, 2019 fil-konfront tas-soċjetà appellata, li fil-fehma tiegħu kienet naqset milli timxi skont l-aħjar interess tiegħu billi (1) ma pprovditlux fil-ħin informazzjoni dwar kif flusu kienu qegħdin jiġu nvestiti u naqset milli tissorvelja t-transazzjonijiet sabiex tassigura li dawn kienu tajbin fir-rigward tal-Iskema; (2) ma nfurmatux bit-tnaqqis fil-valur tal-portafoll tiegħu, kif ukoll dwar l-ispejjeż jew id-drittijiet relatati mal-ħruġ mill-investiment; (3) naqset milli tinfurmah li flusu kienu qegħdin jiġu nvestiti f'noti strutturati u prodotti oħra mhux kompatibbli ma' QROPS jew tajbin għal *retail investor;* (4) kien hemm nuqqas ta' *due diligence* fir-rigward ta' CWM sabiex jiġi assigurat li huma setgħu jagħmluha ta' konsulenti finanzjarji; u (5) naqset milli tinnotifikah bid-dati tal-*'cooling off period'* jew l-għażla li jikkanċella d-dokumenti. Għaldaqstant huwa sostna li s-soċjetà appellanta kienet kompliċi fit-telf li huwa sofra fis-somma ta' GBP68,698.00 u li hija kienet responsabbli sabiex tassigura li din tintradd lura lilu, filwaqt li talab għal rifużjoni tal-introjtu stmat fil-perċentwal ta' 9% fuq il-kapital investit ta' GBP81,514.

4. Is-soċjetà appellanta wieġbet fis-26 ta' Settembru, 2019 billi talbet lill-Arbitru sabiex jiċħad l-ilment tal-appellat. Hija eċċepiet li (i) l-Arbitru ma kellux il-kompetenza li jisma' u jiddeċiedi l-ilment għaliex dan jirrigwarda aġir li seħħ

qabel ma daħal fis-seħħ il-Kap. 555 u kienu għaddew aktar minn sentejn mid-data li din il-liġi ġiet fis-seħħ; (ii) hija ma setgħetx twieġeb għal kwalunkwe informazzjoni, parir u assikurazzjoni mogħtija minn CWM; (iii) ir-rendikonti annwali dejjem jintbagħtu fis-sena ta' wara; (iv) l-appellat kellu jkun jaf li huwa ffirma dokument vojt u kellu jbati għan-negliġenza tiegħu; (v) hija kienet tibgħat rendikont lill-membri kull sena; (vi) ma kienx minnu li hija riedet tikkomunika miegħu biss permezz tat-telefon; (vii) l-appellat kien indika li huwa xtaq li jinvesti wkoll f'noti strutturati permezz tal-portafoll tiegħu; (viii) hija kienet imxiet skont il-linji gwida tagħha u dawk tal-investiment; (ix) kien l-appellat li għażel lil CWM bħala l-konsulent finanzjarju tiegħu; (x) ma kienx minnu li l-appellat ma kienx ġie nfurmat bil-*cooling off period*; (xi) hija ma kinitx liċenzjata li tagħti parir finanzjarju u fil-fatt hi ma kinitx tat parir lill-appellat; u (xii) l-appellat kellu jġib prova li l-azzjoni jew nuqqas ta' azzjoni tagħha kienu l-kawża tat-telf tiegħu.

Id-deċiżjoni appellata

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

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

Article 21 (1)(b) states that:

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

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

Firstly, the Arbiter notes that it took over four months for the Service Provider to send the Complainant a reply to his formal complaint. (fn. 11 The Complainant's formal complaint dated 1 November 2019 was answered by the Service Provider on 26 January 2018) The Arbiter does not see a valid reason why the Service Provider took so long to send a reply and related documents, even if it had to deal with various other complaints around the same time.

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

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

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

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

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

In this case, the conduct complained of involves the conduct of the Service Provider ***as trustee and retirement scheme administrator of the Scheme****, which role MPM occupied since the time the Complainant became member of the Scheme and*

continued to occupy beyond the coming into force of Chapter 555 of the Laws of Malta.

It is considered that the Service Provider's arguments with respect to Article 21(1)(b) have certain validity only with respect to the alleged failures raised by the Complainant on the right of withdrawal, that is the cooling off period. This is in view that the right of withdrawal is a distinct right which applied and existed at the time of purchase of the policy in March 2014. (fn. 12 A fol. 87)

The alleged misconduct of the Service Provider in this regard, of not providing the Complainant with the cooling off period at the time of purchase of the policy in 2014, could have thus only been raised with the Arbiter by 18 April 2018. The complaint filed with the Office of the Arbiter for Financial Services ('OAFS') is dated 15 August 2019. Accordingly, for the reasons explained, the Arbiter is rejecting and not considering the part of the complaint relating to the alleged failure of the Service Provider to provide the Complainant with the indicated cooling off period.

In addition to the complaint made with respect to the right of withdrawal, the Complainant however raised other key aspects in his Complaint. Even if for argument's sake only, the Arbiter had to limit himself to the question of the investment portfolio, (which is not the case because the Complainant raised other issues and the Service Provider had other obligations apart from the oversight of the portfolio as explained later in this decision), the Service Provider did not prove in this particular case that the products invested into no longer formed part of the portfolio ***after*** *the coming into force of Chapter 555 of the Laws of Malta. The onus of proof for such evidence rests with the Service Provider. (fn. 13 Furthermore, the Arbiter notes that there is actually clear evidence from the* 'Historical Cash Account Transactions' *statement that the structured notes - being the products predominantly constituting his portfolio of investments as will be considered later in this decision - still formed part of the Complainant's portfolio after 18 April 2016 - A fol. 34)*

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

It is also noted that the complaint in question involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the advisor of the Complainant in relation to the Scheme.

The Service Provider itself declares that it no longer accepted business from CWM ***as from September 2017*** *(fn. 14 Para. 44, Section E of the affidavit of Stewart Davies, Director of MPM – A fol. 128) and that:*

'Momentum Pensions decided to suspend activities with CWM on Sunday 10th September 2017 on the basis that we were unsatisfied with communications being issued to Members, and also, investments selected by them on behalf of members have performed poorly'. *(fn. 15 Email dated 27 September 2017 from Stewart Davies to Robert Allum – A fol. 8) CWM was therefore still accepted by the Service Provider and acting as the investment advisor to the Complainant after the coming into force of Chapter 555 of the Laws of Malta. It has thus emerged that CWM was only replaced in September 2017 when MPM no longer accepted business from CWM. The responsibility of MPM in this regard is explained later on in this decision.*

The Arbiter considers that the actions related to the Retirement Scheme complained about cannot accordingly be considered to have all occurred before 18 April 2016 and therefore the plea as based on Article 21(1)(b) cannot be upheld

Article 21(1)(c)

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

Article 21(1)(c) stipulates:

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

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

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

In its additional submissions, MPM noted that without prejudice to its plea relating to Article 21(1)(b), 'the complaint is also prescribed on the basis of [article 21(1)(c)]'*, submitting that:*

'The complainant received annual member statements from the start of his investment (Appendix 5 attached to the reply filed by Momentum), and yet he only filed a complaint with Momentum in November 2017 (as emerges from the documentation filed with the original complaint)'. *(fn. 16 A fol. 194)*

*First of all, the Arbiter wants to underline the fact that the timeframes established under Article 21(1)(b)(c)(d) of Chapter 555 of the Laws of Malta are not '*prescriptive' *periods but periods of decadence and, therefore, different rules apply. However, it is not necessary to enter into these legal distinctions in this particular case.*

Even considering the only point raised by the Service Provider (which just covers one of the number of aspects complained about by the Complainant), it is noted that the fact that the Complainant was sent an Annual Member Statement, as stated by the Service Provider in its notes of submissions, could not be considered as enabling the Complainant to have knowledge about the matters complained of. This, taking into consideration a number of factors including that the said Annual Member Statement was a highly generic report which only listed the underlying life assurance policy. The Annual Member Statement issued to the Complainant by MPM included no details of the specific underlying investments held within the policy. Hence, the Complainant was not in a position to know, from the Annual Member Statement he received, what investment transactions were actually being carried out within his portfolio of investments.

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

The disclaimer read as follows:

'Investment values are provided to Momentum Pensions Malta Limited by Investment Platforms, who are responsible for the accuracy of this information. Every effort has been made to ensure that this statement is correct but please accept this statement on this understanding.

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

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

*It is noted from the '*Historical Cash Account Transactions' *statement dated 27/09/2017, that five of the twelve structured notes invested into were sold in May*

2017 with another two structured notes still not having matured or redeemed by the date of this statement.

The Arbiter has also discovered from numerous cases he has decided on the same subject matter that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM. (fn. 17 Example, Case Number 127/2018 decided on 28 July 2020) In this regard, in September 2017, members were notified by MPM about the suspension of the terms of business that MPM had with CWM. Later, in October 2017, MPM also notified the members of the Scheme about the full withdrawal of such terms of business with CWM.

The Complainant in this case made a formal complaint with the Service Provider through a formal complaint dated 1 November 2017 and, thus, within the twoyear period established by Art. 21(1)(c) of Chapter 555.

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

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

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

The Merits of the Case

The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case. *(fn. 18 Cap. 555, Art. 19(3)(b))*

The Complainant

The Complainant, born in 1954, is of British nationality and resided in Portugal at the time of application for membership as per the details contained in the Application for Membership of the Momentum Malta Retirement Trust ('the Application Form for Membership'*). (fn. 19 A fol. 60)*

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

It was not indicated, nor has it emerged during the case, that the Complainant was a professional investor and, accordingly, the Complainant can be regarded as a retail client.

The Complainant was accepted by MPM as member of the Retirement Scheme on 19 February 2014. (fn. 20 A fol. 104)

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator (fn. 21 https://www.mfsa.mt/financial-services-register/result/?id=3453) and acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 22 A fol. 151 – Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

The Legal Framework

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

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015. (fn. 23 Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - https *://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/)*

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

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

As confirmed by the Service Provider, registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and hence the framework under the RPA became applicable as from such date. (fn. 24 As per pg. 1 of the affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 January 2016 attached to his affidavit)

Despite not being much mentioned by MPM in its submissions, the Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA, in light of MPM's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

Indeed, Article 1(2) of the TTA provides that:

'The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A',

with Article 43(6)(c) in turn providing that:

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

Particularities of the Case

The Retirement Scheme in respect of which the Complaint is being made

The Momentum Malta Retirement Trust ('the Retirement Scheme' *or* 'the Scheme'*) is a trust domiciled in Malta. It was granted a registration by the MFSA (fn. 25 https://www.mfsa.com.mt/financial-services-register/result/?id=3454) as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 (fn. 26* Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme *(attached to Stewart Davies's affidavit) and under the Retirement Pensions Act in January 2016. (fn. 27 Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit))*

As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme

*'*was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap. 331) on the 23 March 2011*' (fn. 28 Important Information section, pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit). and is* 'an approved Personal Retirement Scheme under the Retirement Pensions Act 2011' *(fn. 29 Regulatory Status, Pg 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).*

The Scheme Particulars specify that:

'The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death'. *(fn. 30 Ibid.)*

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

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

The life assurance policy acquired for the Complainant was called the European Executive Investment Bond issued by Skandia International (fn. 31 Skandia International eventually rebranded to Old Mutual International – https://www/oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandia-international-rebrands-to-old-mutual-international/)/Old Mutual International ('OMI'). (fn. 32 A fol. 70)

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

The underlying investments comprised substantial investments in structured notes as indicated in the table of investments forming part of the 'Investor Profile' *presented by the Service Provider during the proceedings of the case. (fn. 33 The* 'Investor Profile' *is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant – A fol. 197) and as also emerging from the '*Historical Cash Account Transactions' *statement dated 27/09/2017 presented by the Complainant. (fn. 34 A fol. 34-43)*

*The '*Investor Profile' *presented by the Service Provider for the Complainant also included a table with a loss of EUR57,044 as at 20/06/2018 following surrender of the Scheme. (fn. 35 A fol. 197)*

Investment Advisor

Continental Wealth Management ('CWM') was the investment advisor appointed by the Complainant. (fn. 36 As per pg. 1 / 2 of MPM's reply to the OAFS in respect of the Complainant) The role of CWM was to advise the Complainant regarding the assets held within his Retirement Scheme.

*It is noted that in the notice issued to members of the Scheme in September and October 2017 as referred to above in the '*Preliminary Plea' *section, MPM described*

CWM as 'an authorised representative/agent of Trafalgar International GMBH'*, where CWM's was Trafalgar's* 'authorised representative in Spain and France'.

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

'is a company registered in Spain. Before it ceased to trade, CWM acted as advisor and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH'. *(fn. 37 Pg. 1 of MPM's reply to the OAFS)*

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

*'*CWM was appointed agent of Trafalgar International GmbH ('Trafalgar') and was operating under Trafalgar International GmbH licenses'*, (fn. 38 Para. 39, Section E titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies) and that Trafalgar*

*'*is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'.*(fn. 39 Ibid.)*

Underlying Investments

As indicated above, the investments undertaken within the life assurance policy of the Complainant were summarised in the table of investment transactions included as part of the 'Investor Profile' provided by the Service Provider. (fn. 40 Attachment to the 'Additional submissions' *made by MPM in respect of the Complainant - A fol. 197)*

*The transactions undertaken within his portfolio also emerge from the '*Historical Cash Account Transactions' *statement dated 27/09/17 issued by OMI presented by the Complainant. (fn. 41 A fol. 34-43)*

The investment transactions undertaken within the Complainant's portfolio from commencement of the underlying policy as per the information from the said statement/'Investor Profile' are as follows:

Table A

ISIN NO.	***Investment***	***Date bought***	***CCY***	***Purchase Amt.***	***Date sold***	***Maturity / Sale price***	***Capital Loss/ Profit (excluding dividends)***
XS1015498360	*RBC Energy Note*	*17/04/2014*	*EUR*	*32,000*	*12/04/2016*	*1,030.40*	*-30,969.60*
XS1048446428	*Nomura 9% US Technology Inc*	*29/04/2014*	*EUR*	*32,000*	*29/04/2015*	*32,000*	*0.00*
XS1057778505	*Commerzbank 9% Future Pioneers*	*13/05/2014*	*EUR*	*16,000*	*23/09/2014*	*8,572.50* *7,000*	*-427.50*
CH0245656522	*Leonteq Mul Barrier Pharma Note*	*23/09/2014*	*EUR*	*9,000*	*23/04/2015*	*9,000*	*0.00*
CH0256091668	*Leonteq November COSI Blue 1*	*05/12/2014*	*EUR*	*1,887*	*09/10/2015*	*1,840*	*-46.60*
CH0273397270	*EFG Red April 5*	*08/05/2015*	*EUR*	*5,000*	*08/05/2017*	*662.89*	*-4,337.11*
DE000CB0FM50	*Commerzbank 2Y AC Phoenix Note*	*08/05/2015*	*EUR*	*16,000*	*11/05/2017*	*3,890.56*	*-12,109.44*
CH0273397429	*EFG Red April 6*	*08/05/2015*	*EUR*	*5,000*	*08/05/2017*	*185.53*	*-4,814.47*
CH0273395795	*EFG Red April 2 8.12 % Note*	*15/05/2015*	*EUR*	*17,000*	*15/05/2017*	*1,034.00*	*-15,966.00*
CH0279920281	*EFG 2Y Red May 17% Inc Note*	*29/05/2015*	*EUR*	*7,000*	*29/05/2017*	*336.63*	*-6,663.37*

MT7000012753	*Dominion Global TR Luxury Consumer*	*20/11/2015*	*EUR*	*3,000*	*2018*	*2,916.78*	*-83.22*
CH0266688792	*Leonteq 5Y Credit Linked Note on Standard Chart*	*24/12/2015*	*EUR*	*2,000*	*2018*	*1,756.80*	*-243.20*
XS1388700491	*RBC Notes Linked to SPX*	*18/04/2016*	*EUR*	*1,030*			

During the tenure of CWM, twelve structured notes were purchased in total between 2014-2016 and one small investment (of EUR3,000) into a collective investment schemes made in 2015.

It is noted that, as indicated in Table B below, even when taking into consideration the dividends received from the respective investments (based on the information available from the Historical Cash Account Transactions *statement), various structured notes still experienced substantial losses.*

Table B

Investment	***Capital Loss/ Profit (excluding dividends)***	***Total Dividends***	***Total Loss/Profit (inclusive of dividends)***	***% of Total Loss/ Profit (incl.of div) on capital invested***
RBC Energy Note	*-30,969.60*	*5,600.00*	*-25,369.60*	*-79.28%*
Nomura 9% US Technology Inc	*0.00*	*2,880.00*	*2,880.00*	*9%*
Commerzbank 9% Future Pioneers	*-427.50*	*832.50*	*405.00*	*2.53%*
Leonteq Mul Barrier Pharma Note	*0.00*	*405.00*	*405.00*	*4.50%*
Leonteq November COSI Blue 1	*-46.60*	*135.00*	*88.40*	*4.69%*

EFG Red April 5	*-4,337.11*	*1,000.00*	*-3,337.11*	*-66.74%*
Commerzbank 2Y AC Phoenix Note	*-12,109.44*	*2,688.00*	*-9,421.44*	*-58.88%*
EFG Red April 6	*-4,814.47*	*0.00*	*-4,814.47*	*-96.29%*
EFG Red April 2 8.12 % Note	*-15,966.00*	*2,842.40*	*-13,123.60*	*-77.20%*
EFG 2Y Red May 1-7% Inc Note	*-6,663.37*	*980.00*	*-5,683.37*	*-81.19%*
*Dominion Global TR Luxury Consumer**	*-83.22*			
*Leonteq 5Y Credit Linked Note on Standard Chart**	*-243.20*			
*RBC Notes Linked to SPX**				

** Info. not available from the Historical Cash Account Transactions statement/the* 'Investor Profile' *table*

Further Considerations

Responsibilities of the Service Provider

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

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

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

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

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

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

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

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

From the various general conduct of business rules/standard licence conditions applicable to MPM in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively, it is pertinent to note the following general principles: (fn. 42 Emphasis added by the Arbiter).

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

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

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

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

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

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

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

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

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

The same principle continued to apply under the rules issued under the RPA.

Standard Condition 4.1.7, Part B.4.1 titled 'Conduct of Business Rules' *of the Pension Rules for Service Providers dated 1 January 2015, issued in terms of the RPA, provided that:*

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

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

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

Trustee and Fiduciary obligations

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

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

The said article provides that:

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

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

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

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

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property 'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'. *(fn. 43 Ganado Max (editor), 'An Introduction to Maltese Financial Services Law'.) Allied Publications 2009) p.174.)*

As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: **to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to**

apply the trust property in accordance with the terms of the trust'. *(fn. 44 Op.cit., p.178)*

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

'**In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries**. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations**'. *(fn. 45 Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 December 2017) p.9)*

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

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

Other relevant aspects

*One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments**. As acknowledged by the Service Provider, whilst MPM's duties did not involve the provision of investment advice, however, MPM did* '… **retain the power to ultimately decide whether to proceed with an investment or otherwise**'. *(fn. 46 Para. 17, page 5 of the affidavit of Stewart Davies)*

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

'**The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed)** …'. *(fn. 47 Para. 31, page 8 of the affidavit of Stewart Davies)*

MPM had accordingly the final say prior to the placement of a dealing instruction*, in that, if MPM was satisfied that the level of diversification is suitable and in order, and the member's portfolio as a whole is in line with his attitude to risk and investment guidelines,* 'the dealing instruction will be placed with the insurance company and the trade will be executed. **If the RSA is not so satisfied, then the trade will not be proceeded with**'. *(fn. 48 Para. 33, Page 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers)*

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

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

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

The MFSA explained that it:

'… is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'. *(fn. 49 Pg. 7 of the MFSA's Consultation Document dated 16 November 2018 titled 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions act' (MFSA Ref. 15/2018) - https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/)*

The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment advisor stating that: 'the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire

information and assess such investments'. *(fn. 50 Pg. 9 of MFSA's Consultation Document dated 16 November 2018 titled* 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' *(MFSA Ref. 15/2018))*

Despite that the above quoted MFSA statements were made in 2018, an oversight function applied during the period relating to the case in question as explained earlier on.

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

'**The Trustee needs to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification** …', *(fn. 51 Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies. The same statement is also included in page 9 of the scheme Particulars of May 2018 (also attached to the same affidavit) whilst para. 3.1 of the section titled* 'Terms and Conditions' *of the Application Form for Membership into the Scheme also provided inter alia that:*

'… **in its role as Retirement Scheme Administrator [MPM] will exercise judgement as to the merits or suitability of any transaction** …'.

Other Observations and Conclusions

Allegations in relation to fees

In his complaint to the OAFS, the Complainant complained that the Service Provider failed to ensure disclosure of the associated costs and exit fees within his Scheme and also claimed that the costs incurred within the Scheme were excessive.

The Complainant has however not provided any further basis and explanation for such allegation nor any evidence about such claim.

In the circumstances, the Arbiter considers that there is insufficient basis and evidence regarding the allegations made in respect of fees.

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

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

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

Key considerations relating to the principal alleged failures

The Arbiter will now consider the principal alleged failures.

As indicated above, the Complainant raised a number of main aspects in his Complaint where, in essence, he alleged that MPM has not acted in his best interests claiming that:

(i) *MPM failed to undertake adequate due diligence and vet CWM;*

(ii) *MPM allowed his money to be gambled in high-risk structured notes which were unsuitable for a retirement scheme and for retail investors despite that it should have been monitoring all transactions;*

(iii) *MPM failed to adequately inform him about the investment transactions (purchases and sales) being made within his Scheme.*

General observations

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

This would reflect on the extent of responsibility that the financial 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, ***MPM had nevertheless certain obligations to undertake in its role of Trustee and Scheme Administrator. The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial***

bearing on the operations and activities of the scheme and affect direct, or indirectly, its performance*.*

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

A. <u>The appointment of the Investment Advisor</u>

It is noted that the Complainant chose the appointment of CWM to provide him with investment advice in relation to the selection of the underlying investments and composition of the portfolio within the member-directed Scheme.

However, from its part, MPM allowed and/or accepted CWM to provide investment advice to the Complainant within the Scheme's structure*.*

The Arbiter has also knowledge that ***MPM even had itself an introducer agreement with CWM and makes reference to the cases against MPM decided by him on the 28 July 2020****.*

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

<u>Inappropriate and inadequate material issues involving the Investment Advisor</u>

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

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

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

*The section titled '*Professional Advisor's Details' *in the Application Form for Membership in respect of the Complainant indicated 'CWM' as the company's name of the professional advisor.*

In the same section of the Application Form, CWM was indicated as having a registered address in Spain and that it was regulated, where 'ICCS' was mentioned as being the regulator of the professional advisor.

The Arbiter considers the reference to ICCS as regulator of CWM to be inadequate and misleading.

*With respect to the reference to 'ICCS' such reference was not defined or explained in the Application Form. Neither were such reference ever explained or referred to during the comprehensive submissions made by the Service Provider during the proceedings of the case. It has not emerged either that ICCS are, or were, a regulatory authority for investment advisors in Spain or in any other jurisdiction. It appears that 'ICCS' could be an acronym for the '*Cypriot Insurance Companies Control Service'*. The Cypriot Insurance Companies Control Service is involved in the insurance sector in Cyprus. (fn. 52* http://mof.gov.cy/en/directorates-units/insurance-companies-control-service)*. No evidence of any authorisation or any form of approval issued by such to CWM has however ever been mentioned by the Service Provider and, even more, neither produced by it during the proceedings of the case.*

Indeed, no evidence was actually submitted by MPM of CWM being truly regulated.

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

ii. Lack of clarity/convoluted information

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

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

It is noted that the Application Form of the policy provider refers to, and includes, the stamp of another party as financial advisor. The first page of the said application form includes a section titled 'Financial advisor details' *and a field for* 'Name of financial advisor'*, with such section including a stamp bearing the name of* 'Inter-Alliance

Worldnet Insurance Agents & Advisors Ltd' *('InterAlliance') apart from reference to CWM. The two entities, both CWM and InterAlliance, are then featured in the section titled* 'Financial advisor declaration' *of the said form with the same stamp of Inter-Alliance with a PO Box in Cyprus, again featuring here in the part titled* 'Financial advisor stamp' *in the same section.*

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

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

It is also unclear why the Annual Member Statements sent by MPM to the Complainant for the years ending December 2014 and 2015, indicated in the same statement 'Continental Wealth Management' *as* 'Professional Advisor' *whilst at the same time indicated another party,* 'Trafalgar International GmbH' *as the* 'Investment Advisor'. *(fn. 53 Attachments to the Reply submitted by MPM before the Arbiter for Financial Services)*

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

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

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

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

In the reply that MPM sent directly to the Complainant in respect of his formal complaint, MPM itself explained that:

'Momentum in its capacity as Trustee and RSA, in exercising its duty to you ensured: The full details of the Scheme, <u>including all parties' roles and responsibilities</u> <u>were clearly outlined to you in the literature provided ensuring no ambiguity</u> *(fn. 54 Emphasis added by the Arbiter)***, including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules'.** *(fn. 55 Section 3, titled 'Overview of Momentum Controls in place in exercising a duty to all members' in MPM's reply to the Complainant in relation to the complaint made in respect of the Scheme - A fol. 16)*

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

iv. No regulatory approval in respect of CWM

During the proceedings of this case, no evidence has emerged about the regulatory status of CWM. As indicated earlier, MPM provided no details about Inter-Alliance, and in its submissions only referred to the alleged links between CWM and Trafalgar.

In the affidavit of Stewart Davies, reference was made to the authorisations issued to Trafalgar International GmbH in Germany where reference was made that Trafalgar (and not CWM) was authorised and regulated by IHK, the Chamber of Commerce and Industry in Germany with the 'Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'. *(fn. 56 para. 39, Section E, titled* 'CWM and Trafalgar International GmbH' *in the affidavit of Stewart Davies – A fol. 126/127.)*

The Arbiter exercising his investigative powers given by law, with respect to authorisations issued by IHK, has learnt from Case 068/2018 (fn. 57 Decided on 28 July 2020) and Case 172/2018 (fn. 58 Decided on 28 July 2020) that correspondence involved replies issued by IHK in 2018 to queries made in respect of CWM.

In this regard, it is noted that in an email from IHK dated 19 April 2018, IHK indicated inter alia that it was not aware of an official affiliation between CWM and Trafalgar and that Trafalgar held the financial investment intermediation licence (34f para. 1 GewO) from June 2013 until March 2016 where the licence was 'not extendable' *and* 'even back then it did not cover the activities of another legal personality'. *(fn. 59 Case 068/2018, a fol. 166/167)*

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

'Trafalgar International GmbH is a German limited company headquartered in Frankfurt am Main. The company currently holds a licence under 34d para.1 German

Trade Law (German: Gewerbeordnung, GewO) (insurance intermediation). The German licence as an insurance intermediary cannot be extended to another legal personality and it does not authorize the licence holder to regulate other insurance or financial investment intermediaries.' *(fn. 60 Case 172/2018, a fol. 12/13)*

MPM's statement that CWM 'was operating under Trafalgar International GmbH licenses'*, (fn. 61 Para. 39, Section E, titled* 'CWM and Trafalgar International GmbH' *of the affidavit of Stewart Davies – A fol. 126) has not been backed up by any evidence during the proceedings of this case. No comfort can be thus taken from the authorisation/s held by Trafalgar.*

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

In the absence of such, ***the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM* 'was authorised to trade in Spain and in France by Trafalgar International GmbH'** *(fn. 72 Pg.1, Section A, titled* 'Introduction'*, of the Reply of MPM submitted before the Arbiter for Financial Services)****, are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant****.***

This also taking into consideration that:

(i) *Trafalgar is itself no regulatory authority;*

(ii) *the lack of clarity/incomplete information as to the regulatory status of the investment advisor in the Application Form for Membership as well as the confusing and unclear references in the sections relating to the investment advisor in other documentation as indicated above;*

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

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

Article 23(3) of the MiFID I Directive, which applied at the time, indeed provided specific requirements on the registration of tied agents. (fn. 63 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN)

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

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

The Service Provider noted inter alia that 'CWM was appointed agent of Trafalgar International GmbH'*. (fn.* 64 *Para. 39, Section E, titled* 'CWM and Trafalgar International GmbH' *of the affidavit of Stewart Davies*)

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

Other observations & synopsis

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

The responsibility of MPM in accepting and allowing CWM to act in the role of investment advisor takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM. As indicated above, MPM accepted CWM when, as verified in the Complainant's Application Form for Membership, it was being stated in MPM's own application form that CWM was a regulated entity but no evidence has transpired that this was so, as amply explained above.

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

The Service Provider argued inter alia *in its submissions that it was not required, in terms of the rules, to require the appointment of a regulated advisor during the years 2013-2015 under the SFA regime and until the implementation of Part B.9 titled*

*'*Supplementary Conditions in the case of entirely Member Directed Schemes' *of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA updated in December 2018, where the latter clearly introduced the requirement for the investment advisor to be regulated. (fn. 65 A fol. 127)*

The Arbiter notes in this regard that in his affidavit, Steward Davies highlighted that:

'There was no law or rule requiring Momentum to carry out any due diligence or ensure that CWM/ Trafalgar was licensed'. *(fn. 66 Ibid.)*

However, the Arbiter strongly believes that the aspect of scrutinising an investment advisor known to the RSA and Trustee to be operating in relation to a retirement scheme, impinges on the RSA and Trustee 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.

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

It is was only in the best interests of the Complainant for MPM to ensure that the Complainant had correct and adequate key information about the investment advisor.

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

CWM's alleged role as agent of another party, and the respective responsibilities of CWM and its alleged principal;

- ***the entity actually taking responsibility for the investment advice given to the Complainant as more than one entity was at times mentioned with respect to investment advice;***
- ***the distinctions between CWM, Inter-Alliance and Trafalgar.***

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

Even in case where, under the previous applicable regulatory framework, an unregulated advisor could have been allowed by the trustee and scheme administrator to provide investment advice to the member of a memberdirected scheme (on the basis of clear understanding by the member of such unregulated status and implications of such, and the member's subsequent clear consent for such type of advisor), ***one would, at the very least, reasonably expect the retirement scheme administrator and trustee of such a scheme to exercise even more caution and prudence in its dealings with such a party in such circumstances.***

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

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

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

B. <u>The permitted portfolio composition</u>

Investment into Structured Notes

Preliminary observations

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

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

Nevertheless, the exposure to structured notes allowed within the Complainant's portfolio was extensive, with the insurance policy underlying the Scheme being at times solely invested into such products and such instruments being the predominant investments within his portfolio as detailed in the section of this decision titled 'Underlying Investments' above.

A typical definition of a structured note provides that:

'A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index'. *(fn. 67* https://www.investopedia.com/terms/s/structurednote.asp)

A structured note is further described as:

'a debt obligation – basically like an IOU from the issuing investment bank – with an embedded derivative component; in other words, it invests in assets via derivative instruments'. *(fn. 68* https://www.investopedia.com/articles/bonds/10/structured-notes.asp)

Whilst the Complainant has presented no fact sheets in respect of his underlying investments, as part of the investigatory powers granted under Cap. 555, the Office of the Arbiter for Financial Services managed to source facts sheets in respect of two structured notes with ISIN XS1048446428 (fn. 69 Sourced from a general search over the internet with the ISIN number of the product: https://www.portman-assocaites.com/wp-content/uploads/2014/03/Nomura-9-1Y-US-Technology - Income-FACTSHEET.pdf) and ISIN XS1057778505 (fn. 70 Sourced from a general search over the internet with the ISIN number of the product: https://www.portman-associates.com/wp-content/uploads/2014/05/Commerzbank-9-Fixed-Future-

Pioneers-FACTSHEET.pdf) which formed part of the Complainant's portfolio. (fn. 71 A fol. 197)

Apart from inter alia the credit risk of the issuer and the liquidity risk, other risks that are typically highlighted, (for structured notes with no guarantees on the return of the original capital invested), include the risk that the investor could possibly receive less than the original amount invested or potentially even losing all of the investment.

The underlying asset to which the structured notes were linked to typically comprised stocks. A particular feature emerging of the type of structured notes invested into, involved the application of capital buffers and barriers. For example, the fact sheets sourced described and included warnings that the invested capital was at risk in case of a particular event occurring. Such event typically comprised a fall, observed on a specific date of more than a specified percentage, in the value of any underlying asset to which the structured note was linked. The fall in value would typically be observed on maturity/final valuation of the note.

The fact sheets indeed highlighted the risk that where the performance of the worst performing underlying measured a fall of a percentage 50% or more, investors would receive a capital amount equivalent to the performance of the worst performing asset.

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

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

The portfolio of investments in respect of the Complainant comprised at times solely or predominantly of structured products. Such excessive exposure to structured products occurred over a long period of time. This clearly emerges from the Table of Investments forming part of the 'Investor Profile' *provided by the Service Provider, the '*Historical Cash Account Transactions' *statement and as detailed in the section titled* 'Underlying Investments' *above.*

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

Even in case where the issuer of the structured product was a large institution, the Arbiter does not consider this to justify or make the high exposure to single issuers acceptable even more so in the Scheme's context. The maximum limits relating to exposures to single issuers outlined in the MFSA rules and MPM's own Investment Guidelines did not make any distinctions according to the standing of the issuer.

Hence, the maximum exposure limits to single counterparties should have been applied and ensured that they are adhered to across the board. The credit risk of the respective issuer was indeed still one of the applicable risks.

Moreover, one cannot have comfort that the structured notes were in themselves diversified through the exposure to their underlying as remarked by the Service Provider in its **'Investment Guidelines Commentary'** ***provided with its submissions,*** *(fn. 72 A fol. 197)* ***given that as emerging from the risks highlighted in the fact sheets of the structured notes, the risk of loss was similar to an investment in the worst performing underlying. Accordingly, the maximum exposures applicable to single securities (stock) would have been more sensibly applied for such type of structured products.***

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

For the avoidance of doubt, and with reference to the emphasis made by the Service Provider for investments to be seen in the context of the entire portfolio, (fn. 73 affidavit of Steward Davies – A fol. 125) the Arbiter would like to point out that consideration has indeed been duly made of the entire investment portfolio held in the Complainant's individual account within the Scheme including how such portfolio was constituted at inception and (to the extent possible on the basis of the information provided), how the constitution of the portfolio progressed over the years.

Furthermore, the Arbiter has also considered what percentage of the policy value each respective underlying investment constituted at the time of their respective purchase, on the basis of the information provided by the Service Provider itself in the table of 'Investor Profile' *attached to its submissions. (fn. 74 A fol. 197) Consideration was then further made of how the said percentage allocation, reflected the maximum limits outlined in the investment restrictions and diversification requirements in the*

MFSA Rules as well as MPM's own Investment Guidelines that were applicable at the time of purchase.

It is to be pointed out that in the case of a member directed scheme, each member would have his/her own individual account within the retirement scheme, with such account having its own specific and distinct investment portfolio. Hence, it is only reasonable and correct for the principles, including the investment restrictions specified for the Retirement Scheme to have been applied and adhered to at the level of the individual account. Failure to do so would have meant that the safeguards emanating from the investment conditions and diversification requirements would have not been adopted and ensured in practice in respect of the individual member's portfolio, defeating the aim of such requirements in the first place.

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

An analogy can be made in this regard to the market practice long adopted in the context of collective investment schemes, namely in respect of stand-alone schemes (fn. 75 i.e. a collective investment scheme without sub-funds) and umbrella schemes. (fn. 76 i.*e. a collective investment scheme with sub-funds, where each sub-fund would typically have its own distinct investment policies and separate and distinct investment portfolios) Whilst investment restrictions would be applied at scheme level in the case of a stand-alone scheme (given that the investors into such scheme would be participating, according to their respective share in the scheme, in the performance of the same underlying investment portfolio), in the case of an umbrella fund, the investment restrictions are not applied at scheme level but at the sub-fund level and would indeed be tailored for each individual sub-fund given that each sub-fund would have its own distinct and separate investment portfolio and investment policy.*

As to the substance of MPM's Investment Guidelines, it is noted that the Service Provider seemed to somehow downplay the importance and weighting of its own Investment Guidelines by stating that these were just to provide guidance 'but should not be applied so strictly so as to stultify the ultimate objective, that the investment is placed in the best interests of the member'. *(fn. 77 A fol. 125 - Para. 32 of the affidavit of Stewart Davies)*

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

It is further to be noted that the specific parameters and limits outlined in MPM's Investment Guidelines were themselves stipulated in MPM's key documentation and, as specified in the same documentation, MPM itself had to ensure adherence with the specified limits and conditions in its role of Trustee of the Retirement Scheme. (fn. 78 For example, as clearly outlined in the Investment Guidelines marked 'January 2013' *and* 'Mid-2014' *in the Scheme's Application Form)*

Furthermore, no qualifications or any disclaimers regarding the compliance or otherwise with such guidelines have emerged in this case. Neither has it emerged in what circumstances, divergences could possibly be permitted, if at all. Hence, the stipulated Investment Guidelines were binding and should have been followed accordingly. Even if one had to, for the sake of the argument only (which was not the case as outlined above), somehow construe that these were 'just' guidelines and not strict rules, as the Service Provider tried to argue, (fn. 79 A fol. 125 – Para. 32 of the affidavit of Stewart Davies) one would in any case reasonably not expect any major departure from the limits and maximum exposures specified in the stipulated guidelines.

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

Portfolio not reflective of the MFSA rules

*The high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio, jarred with the regulatory requirements that applied to the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*', ('the Directives') which applied from the Scheme's inception in 2011 until the*

registration of the Scheme under the RPA on 1 January 2016. The applicability and relevance of these conditions to the case in question was highlighted by MPM itself. (fn. 80 Para. 21 & 23 of the Note of Submissions filed by MPM – A fol. 181)

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

SOC 2.7.2 in turn required the Scheme to ensure inter alia that, the assets of a scheme are 'invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole', *(fn. 81 SOC 2.7.2 (a)) and that such assets are* 'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'*. (fn. 82 SOC 2.7.2.(b))*

*SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets'*; (fn. 83 SOC 2.7.2 (c)) to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*, (fn. 84 SOC 2.7.2 (e)) where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme. (fn. 85 SOC 2.7.2 (h)(iii) & (v))*

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

In the case of the Complainant it has also clearly emerged that individual exposures to single issuers were at times close to 30%, this being the maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above. As also mentioned above, it would have been more sensible for the maximum limit of 10% applicable to single issuers in case of securities, to have been similarly applied for those structured products which featured barrier events and provided risk of loss similar to an investment in the worst performing underlying. Instead, there were exposure as high as 39% of the policy value at the time of purchase in the case for example of the investment into the RBC Energy Note and the Nomura 9% US Technology Inc, respectively. (fn. 86 A fol. 197)

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

portfolio also included material positions into high risk investments where the high risk is reflected in, for example, the high rate of return of 9% p.a. which featured in the fact sheets sourced and name of the structured products themselves. (fn. 87 Ibid.)

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

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

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

The investment portfolio in the case reviewed was ultimately at times solely or predominantly invested in structured notes for a long period of time.

It is also to be noted that over 98% of the underlying policy was invested into just three structured notes at the time of the the purchase of such products in March 2014. *(fn. 88 A fol. 197 – 39.26% in respect of the RBC Energy Note; 39.26% in the Nomura 9% US Technology Inc and 19.63% in Commerzbank 9% Future Pioneers all purchased at the same time in March 2014)*

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

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

This was a condition which prevailed in all of the presented MPM's Investment Guidelines since January 2013 till that of 2018. (fn. 89 Investment Guidelines attached to the affidavit of Stewart Davies)

*The said requirement of being '*predominantly invested in regulated markets*' meant, and should have been construed to mean, that investments had to be predominantly invested in listed instruments, that is, financial instruments that were admitted to trading. With reference to industry practice, the terminology of '*regulated markets*' is referring to a regulated exchange venue (such as a stock exchange or other regulated exchange).*

*The term '*regulated markets' *is in fact commonly referred to, defined and applied in various EU Directives relating to financial services, including diversification rules applicable on other regulated financial products. (fn. 90* Such as UCITS schemes - the Undertakings for Collective Investments in Transferable Securities (UCITS) Directive (Directive 2009/65/EC as updated). The Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EC as repealed by Directive 2014/65/EU) also includes a definition as to what constitutes a 'regulated market'*) Hence, the interpretation of* 'regulated markets' *has to be seen in such context.*

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

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

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

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

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

*The Investment Guidelines of MPM, marked January 2013, required no more than a '*maximum of 40% of the fund *(fn. 91 The reference to 'fund' is construed to refer to the member's portfolio) in assets with liquidity of greater than 6 months'. This requirement remained, in essence, also reflected in the Investment Guidelines marked 'Mid-2014' which read:*

*'*Has a maximum of 40% of the fund in assets with expected liquidity of greater than 6 months'

as well as in the subsequent Investment Guidelines marked 2015 till 2018 which were updated by MPM and tightened further to read a

*'*maximum of 40% of the fund in assets with expected liquidity of greater than 3 months but not greater than 6 months'*.*

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

It is noted that the structured notes invested into typically do not have a maturity of a few months but a longer term of one or more years. The bulk of the assets within the policy was, at times, invested into a few structured notes as already mentioned. It is unclear how the 40% maximum limit referred to above could have been satisfied in such circumstances where the portfolio was predominantly invested into structured notes which themselves had long investment terms.

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

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

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

MPM should have been well aware about the risks associated with the secondary market. It has indeed itself seen the material lower value that could be sought on such market in respect of the structured notes invested into. The lower values of the structured notes on the secondary market was indeed affecting the value of the Scheme as can be deduced from the respective Annual Member Statements that MPM itself produced.

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

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

prudence was being exercised with respect to the liquidity of the portfolio, when considering the above mentioned aspects and when keeping into context that the portfolio of investments that was allowed to develop within the Retirement Scheme was, at times, solely/ predominantly invested into the said structured notes.

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

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

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

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

Exposure to single issuer in % terms of the policy value at time of purchase	*Issuer*	*Date of purchase*	*Description*
39.26%	RBC	March 2014	1 SN issued by RBC constituted 39.26% of the policy value at the time of purchase in March 2014.
39.26%	Nomura	March 2014	1 SN issued by Nomura constituted 39.26% of the policy value at the time of purchase in March 2014.

Approx. 56%	EFG	April/ May 2015	4 SNs issued by EFG respectively constituted 8.16%, 8.16%, 27.75%, 12.01% at the time of purchase in April/May 2015.

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

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

*The specified maximum limit of 66% of the portfolio value in structured notes having underlying guarantees which featured in the '*Investment Guidelines' *marked 2015 (fn. 92 MPM's Investment Guidelines '2015' as attached to the affidavit of Stewart Davies) was reduced to 40% of the portfolio's value in the '*Investment Guidelines' *marked December 2017, (fn. 93 MPM's Investment Guidelines 'Dec-2017' as attached to the affidavit of Stewart Davies) and, subsequently, reduced further to 25% in the '*Investment Guidelines' *for 2018. (fn. 94 MPM's Investment Guidelines '2018' as attached to the affidavit of Stewart Davies)*

*Similarly, the maximum exposure to single issuers for '*products with underlying guarantees*', that is, structured products as referred to by MPM itself, in the* 'Investment Guidelines' *marked Mid-2014 and 2015 specifically limited maximum exposure to the same issuer default risk to no more than (33.33%), one third of the portfolio. The maximum limit to such products was subsequently reduced to 25%, one quarter of the portfolio, in the '*Investment Guidelines' *marked 2016 (fn. 95 MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies) and mid-2017 (fn. 96 MPM's Investment Guidelines '*Mid-2017' *as attached to the affidavit of Stewart Davies), reduced further to 20% in the '*Investment Guidelines' *marked December 2017 and, subsequently, to 12.5% in the '*Investment Guidelines' *for 2018.*

Even before the Investment Guidelines of Mid-2014, MPM's Investment Guidelines of January 2013 still limited exposure to individual investments (aside from collective investment schemes) to 20%.

In the case reviewed, there were instances where the extent of exposure to single issuers was even higher than one-third of the policy value as amply indicated in the above table. There is clearly no apparent reason, from a prudence point of view, justifying such high exposure to single issuers.

Indeed, the Arbiter considers that the high exposure to structured products as well as to single issuers in the Complainant's portfolio jarred, and did not reflect to varying degrees, with one or more of MPM's own investment guidelines applicable at the time when the investments were made, most particularly with respect to the following guidelines: *(fn. 97 Emphasis in the mentioned guidelines added by the Arbiter.)*

Investment Guidelines marked 'January 2013':
o **Properly diversified** in such a way as to **avoid excessive exposure**:
▪ If **individual investments** or equities are considered then **not more than 20% in any singular asset**, aside from collective investments.
▪ …
▪ **Singular structured products should be avoided due to the counterparty risk** but are acceptable as part of an overall portfolio.
nvestment Guidelines marked 'Mid-2014':
• Where products with underlying guarantees are chosen, **no more than one third of the overall portfolio to be subject to the same issuer default risk**.

In addition, **further consideration needs to be given to** the following factors: • … • **Credit risk of underlying investment** • …
• In addition to the above, the portfolio must be constructed in such a way as to **avoid excessive exposure**: • ... • **To any single credit risk**
<u>vestment Guidelines marked '2015':</u>
• Where products with underlying guarantees are chosen, i.e. **Structured Notes**, these will be **permitted up to a maximum of 66% of the portfolio's values**,
with **no more than one third** of the portfolio to be **subject to** the **same issuer default risk**.
In addition, **further consideration needs to be given to** the following factors: • … • **Credit risk of underlying investment** • …
• In addition to the above, the portfolio must be constructed in such a way as to **avoid exposure**: • ... • **To any single credit risk**.

Investment Guidelines marked '2016' & 'Mid-2017':
• Where **products with underlying Capital guarantees** are chosen, **i.e. Structured Notes**, these will be **permitted up to a maximum of 66% of the portfolio's values**,
with **no more than one quarter** of the portfolio to be **subject to** the **same issuer/ guarantor default risk**.
• **Where no such Capital guarantee exists**, investment will be **permitted up to a maximum of 50% of the portfolio's value**.
• In addition, **further consideration needs to be given to** the following factors: • … • **Credit risk of underlying investment**; …
• In addition to the above, the portfolio must be constructed in such a way as to **avoid exposure**: • ... • **To any single credit risk**.

Besides the mentioned excessive exposure to single issuers it is noted that additional investments into structured notes were observed *(fn. 98* 'Table of Investments' *in the* 'Investor Profile' *provided by MPM refers – A fol. 197)* ***to have been allowed to occur within the Complainant's portfolio, in excess of the limits allowed on the overall maximum exposure to such products. MPM's Investment***

Guidelines of 2015, 2016 and mid-2017 specifically mentioned a maximum limit of 66% of the portfolio value to structured notes.

In the case reviewed the Service Provider still continued to allow further investments into structured products at one or more instances when the said limits should have applied.

The additional investments also occurred despite the portfolio being already exposed to structured notes more than the said percentage at the time when the additional purchase was being made.

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

Other observations & synopsis

The Service Provider did not help its case by not providing detailed information on the underlying investments as already stated in this decision.

Although the Service Provider filed a Table of Investments, it did not provide adequate information to explain the portfolio composition and justify its claim that the portfolio was diversified. It did not provide fact sheets in respect of the investments comprising the portfolio of the Complainant and it did not demonstrate the features and the risks attached to the investments.

Various aspects had to be taken into consideration by the Service Provider with respect to the portfolio composition.

Such aspects include, but are not limited to:

- *the nature of the structured products being invested into and the effects any events or barriers that may form part of the key features of such products, would have on the investment if and when such events occur as already detailed above;*
- *the potential rate of returns as indicative of the level of risk being taken;*
- *the level of risks ultimately exposed to in the respective product and in the overall portfolio composition; and*
- *not the least, the issuer/counterparty risk being taken.*

It is also to be noted that in its* 'Investment Guidelines Commentary' *that was provided with its submissions, the Service Provider stated that:

'Most of the loss was incurred on the first signed Structured Note Trade Instruction signed by Mr Allum'. ***(fn. 99 A fol. 197)***

This is incorrect as substantial losses have occurred not just on the first structured note investment, but also cumulatively on various other structured notes as outlined in the tables under the section titled* 'Underlying Investments' *above.

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

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

***In the circumstance where the portfolio of the Complainant was at times, solely or predominantly invested in structured products with a high level of exposure to single issuer/s, and for the reasons amply explained above, the Arbiter does not consider that there was proper diversification nor that the portfolio was at all times* 'invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole'** *(fn. 100 SOC2.7.2(a) of Part B.2.7 of the Directives)* ***and* 'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'.** *(fn. 121 SOC2.7.2(b) of Part B.2.7 of the Directives)*

Apart from the fact that the Arbiter does not have comfort that the portfolio was reflective of the conditions and investment limits outlined in the MFSA's Rules and MPM's own Investment Guidelines, ***he is also convinced that over and above the duty to observe specific maximum limits relating to diversification as may have been specified by rules, directives or guidelines applicable at the time, the behaviour and judgement of the Retirement Scheme Administrator and Trustee of the Scheme is expected to, and should have gone beyond compliance with maximum percentages and was to, in practice, reflect the spirit and principles***

behind the regulatory framework <u>and</u> <u>in practice promote the scope for which the Scheme was established</u>.

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

This is even more so when considering the crucial aim of a retirement scheme being that to provide for retirement benefits – an aspect which forms the whole basis for the pension legislation and regulatory framework to which the Retirement Scheme and MPM were subject to. The provision of retirement benefits was indeed the Scheme's sole purpose as reflected in the Scheme Particulars.

C. <u>The Provision of information</u>

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

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

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

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

It is noted that the Pension Rules for Personal Retirement Schemes under the RPA became applicable to MPM on 1 January 2016 and that, as per the MFSA's communications presented by MPM, (fn. 102 MFSA's letter dated 11 Decemebr 2017, attached to the Note of Submissions filed by MPM in 2019) Part B.9 of the said rules did not become effective until the revised rules issued in 2018.

Nevertheless, it is considered that even where such condition could have not strictly applied to the Service Provider from a regulatory point of view, the Service Provider

as a Trustee, obliged by the TTA to act as a bonus paterfamilias and in the best interests of the members of the Scheme, should have felt it its duty to provide and report fully to members adequate information on the underlying investment transactions.

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

- *Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002 (fn. 103 Condition 2.2 of the Certificate of Registratration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives) respectively already provided that:*

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

  …

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

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

  …

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

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

The general principles of acting in the best interests of the member and those relating to the duties of trustee as already outlined in this decision (fn. F104 The section titled 'Responsibilities of the Service Provider'*) and to which MPM was subject to, should have prevailed and should have guided the Service Provider in its*

actions to ensure that the Member was provided with an adequate account of the underlying investments within his portfolio.

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

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainant ***cannot*** *just be attributed to the under-performance of the investments as a result of general market and investment risks and/or the issues alleged against one of the structured note providers, as MPM has inter alia suggested in these proceedings. (fn. 105 For example, in the reference to litigation filed against Leonteq – A fol. 129)*

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

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

Had MPM undertaken its role adequately and as duly expected from it, in terms of the obligations resulting from the law, regulations and rules stipulated thereunder and the conditions to which it was subject to in terms of its own Retirement Scheme documentation as explained above, such losses would have been avoided or mitigated accordingly.

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

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

Final remarks

As indicated earlier in this decision, the role of a retirement scheme administrator and trustee does not end, nor is just strictly and solely limited, to the compliance of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had however clear duties to check and ensure that the portfolio composition recommended by the investment advisor provided a suitable level of diversification and was inter alia in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme.

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

It is considered that, had there been a careful consideration of the contested structured products and extent of exposure to such products and their issuers, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others.

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

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

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

Scheme and portfolio structure; as well as the reporting to the Complainant on the underlying portfolio.

It is also considered that there are various instances which indicate non-compliance by the Service Provider with applicable requirements and obligations as amply explained above in this decision.

The Arbiter also considers that the Service Provider did not meet the **'reasonable and legitimate expectations'** *(fn. 106 Cap. 555, Article 19(3)(c))* ***of the Complainant who had placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.***

Conclusion

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

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

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

Compensation

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

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited, to be held responsible for seventy per cent of the net realised losses sustained by the Complainant on his investment portfolio.

The Arbiter notes that the Historical Cash Account Transactions statement was at 27/09/17 and there were still open investment positions within the portfolio constituted by CWM at the time of such statement and hence the position (inclusive of dividends) on some of the investments is incomplete as indicated in Table B in the section titled* 'Underlying Investments' *above.

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

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

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

(i) ***For every such investment it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised).***

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

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

The computation of the Net Realised Loss shall accordingly take into consideration any realised gains or realised losses arising within the portfolio.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Momentum Pensions Malta Limited to pay the indicated amount of compensation to the Complainant.

A full and transparent breakdown of the calculations made by the Service Provider in respect of the compensation as decided in this decision, should be provided to the Complainant.

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

Because of the novelty of this case each party is to bear its own legal costs of these proceedings"

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fis-26 ta' April, 2021 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka u tħassar id-deċiżjoni appellata, billi tilqa' l-aggravji tagħha. Tgħid li l-aggravji tagħha huma s-segwenti: (i) l-Arbitru applika u nterpreta ħażin il-liġi meta ddeċieda li s-soċjetà appellanta naqset mid-dmirijiet tagħha fil-kwalità tagħha ta' *trustee* jew mod ieħor, iżda partikolmarment meta ddeċieda fost affarijiet oħra li (a) hija kienet naqset għaliex ippermettiet lil CWM taġixxi bħala *investment advisor* tal-appellat; u (b) il-kompożizzjoni tal-portafoll tal-appellat ma kienx skont il-liġijiet, regoli u linji gwida applikabbli; (ii) ma kienx jeżisti l-ebda ness kawżali, u għalhekk l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet infondati; u (iii) l-Arbitru għamel apprezzament ħażin tal-fatti u tal-liġi dwar il-miżati, u dak li kien mistenni mingħand is-soċjetà appellanta.

7. L-appellat wieġeb fit-2 ta' Ġunju, 2021 fejn issottometta li d-deċiżjoni appellata hija ġusta, u għaldaqstant timmerita li tiġi kkonfermata.

Konsiderazzjonijiet ta' din il-Qorti

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

L-ewwel aggravju

9. Meta tfisser l-ewwel aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru ddeċieda ħażin meta qal li hija kienet responsabbli għaliex naqset mill-obbligi tagħha meta ħalliet lil CWM taġixxi bħala *investment advisor* hekk kif din kienet ġiet maħtura mill-appellat stess. Tirrileva li l-Arbitru kien osserva li CWM ġiet magħżula mill-appellat stess u li s-soċjetà appellanta ma kellha l-ebda obbligu li tivverifika jekk din kinitx entità regolata jew jekk kinitx awtorizzata taħt sistema regolatorja sabiex tipprovdi pariri dwar investimenti. Tgħid li l-obbligu tagħha sabiex tivverifika jekk CWM kellhiex awtorizzazzjoni regolatorja sabiex tagħti pariri ta' investiment jew jekk kinitx entità regolatorja, daħal fis-seħħ fis-sena 2019 meta nbidlu r-regoli mill-MFSA, u għalhekk dawn l-obbligi mhumiex applikabbli għall-każ odjern. Madankollu l-Arbitru xorta waħda sostna li hija kienet naqset fl-obbligi tagħha. Tirrileva li l-Arbitru semma tliet aspetti fejn naqset is-soċjetà appellanta, imma hija tinsisti li ma kien hemm l-ebda obbligu, u għaldaqstant ma seta' jkun hemm l-ebda nuqqas. Iżda l-Arbitru fittex minflok nuqqasijiet oħra sabiex jiġġustifika l-konklużjoni tiegħu li hija kienet naqset fl-obbligi tagħha. Is-soċjetà appellanta ssostni li l-punt ċentrali kien jekk hija kellhiex obbligu tivverifika jekk CWM kinitx liċenzjata u mhux jekk fil-fatt din

kinitx liċenzjata, iżda l-Arbitru ddeċieda li hija min-naħa tagħha ma kinitx ressqet l-ebda prova sabiex turi li CWM kienet liċenzjata biex tagħti pariri ta' investiment, u tispjega kif din il-konklużjoni hija waħda difettuża f'żewġ aspetti. Hija tagħmel riferiment għal dak li xehed Stewart Davies fl-affidavit tiegħu, fejn dan stqarr li ma kien hemm l-ebda liġi jew regola dak iż-żmien li kienet titlob li s-soċjetà appellanta tagħmel eżerċizzju ta' *due diligence* jew li tassigura li CWM kienet liċenzjata, u dan fejn wara kollox kien proprju l-appellat li volontarjament ħatar lil CWM bħala l-konsulent finanzjarju tiegħu. Is-soċjetà appellanta tgħid illi fid-deċiżjoni appellata tiegħu, l-Arbitru mar lil hinn mill-punt kruċjali u strah fuq obbligu ġenerali ta' *trustee* li jaġixxi fl-aħjar interess tal-benefiċjarji, sabiex wasal għall-konklużjoni tiegħu. Is-soċjetà appellanta tirrileva li l-Arbitru saħansitra għamel interpretazzjoni tassew wiesgħa ta' dak li kienet tipprovdi l-formola tal-Applikazzjoni għal Sħubija. Filwaqt li tiddikjara li hija ma kinitx qegħda tikkontesta l-obbligu ġenerali ta' *trustee* li jaġixxi f'kull każ fl-aħjar interess tal-benefiċjarji u bl-attenzjoni ta' *bonus paterfamilias,* is-soċjetà appellanta tikkontendi li dan l-obbligu ta' *trustee* ma kienx iħaddan ukoll l-obbligu speċifiku li ssir verifika dwar jekk il-konsulent finanzjarju kienx liċenzjat jew le, u dan meta l-imsemmi konsulent finanzjarju kien magħżul mill-appellat innifsu. Tikkontendi li kieku l-obbligu kien diġà jeżisti qabel ma l-MFSA bidlet ir-regolamenti applikabbli fl-2019, ma kienx hemm proprju l-ħtieġa li ssir il-bidla fir-regolamenti. Dwar it-tieni parti ta' dan l-ewwel aggravju, is-soċjetà appellanta tissottometti li d-deċiżjoni appellata hija msejsa fuq il-konklużjoni li kien hemm *"excessive exposure to structured products and to single issuers"* sabiex b'hekk il-portafoll ma kienx jirrifletti r-regoli tal-MFSA u l-*investment guidelines* tagħha stess, u ma kienx hemm diversifikazzjoni xierqa jew *"prudent*

approach". Għalhekk l-Arbitru ddeċieda li hija kienet naqset mill-obbligu tagħha li timxi bl-attenzjoni ta' *bonus paterfamilias* bħal ma kienet tenuta tagħmel fil-kwalità tagħha ta' *trustee.* Tgħid li madankollu d-deċiżjoni appellata hija żbaljata u l-Arbitru hawn kien naqas ukoll milli jieħu in konsiderazzjoni l-profil tar-riskju tal-appellat u jevalwa r-riskju individwali skont il-kompożizzjoni tal-portafoll sħiħ. Is-soċjetà appellanta, filwaqt li tirrileva li hija ssottomettiet l-informazzjoni kollha dwar il-portafoll tal-appellat, anki l-profil tar-riskju tiegħu u l-istruzzjonijiet li kienu ngħataw lilha, tgħid li hija aġixxiet fil-parametri tal-linji gwida applikabbli. Tgħid li jidher li l-Arbitru kellu l-impressjoni li l-prodotti strutturati kellhom riskju ogħla minn dak li fil-fatt intrinsikament kellhom. Is-soċjetà appellanta hawn tirrileva li l-MFSA dejjem kienet tippermetti investiment f'dawn il-prodotti, kif kienu jagħmlu wkoll il-linji gwida tagħha, u l-intestiment għalhekk qatt ma kien ipprojbit, iżda kellu jsir fil-parametri permissibbli. Tirrileva mbagħad li kull investiment fih element ta' riskju inerenti, u dan filwaqt li taċċetta li hija kienet obbligata li tassigura li l-portafoll kien f'kull mument fil-parametri tal-profil tar-riskju tal-membru u anki tal-linji gwida u tar-regoli applikabbli. Filwaqt li tiċċita dak li jirrileva l-Arbitru fir-rigward ta' prodotti strutturati, tgħid li kuntrarjament għal dak li jgħid l-Arbitru, il-profil kien juri li l-linji gwida applikabbli kienu ġew osservati meta sar in-negozju, inkluż l-espożizzjoni għal prodotti strutturati u għal emittenti singolari. B'riferiment għal dak li qal l-Arbitru f'paġna 46 tad-deċiżjoni appellata, tikkontendi li huwa ma kellux jistrieħ fuq dak li huwa 'issorsja'. Tikkontendi wkoll b'riferiment għal Table A f'paġna 54 tad-deċiżjoni appellata, li l-Arbitru jagħmel biss riferiment għall-profil li hija kienet ippreżentat fir-rigward tal-allegata espożizzjoni żejda għal prodotti strutturati. Tgħid li wieħed ukoll kellu jikkonsidra l-*capital*

protection barriers fejn l-prestazzjoni kienet dipendenti *"on the worst peforming stock".* Tispjega b'riferiment għal dak li qal l-Arbitru, fejn osserva li matul is-snin hija kienet naqset il-limitu permissibbli ta' investiment f'noti strutturati, li dawn dejjem baqgħu permissibbli fil-limiti identifikati u li l-limiti, bħal fil-każ ta' kull prodott ieħor, dejjem kienu dinamiċi. Madankollu anki fejn l-Arbitru rrileva li 98% tal-polza sottoskritta kienet ġiet investita f'tliet noti strutturati, dan kien sar skont il-linji gwida, iżda fakkret li qabel l-aħħar tal-2015 ma kien hemm l-ebda linji gwida u qabel l-2019 ma kien l-ebda regola fil-livell tal-portafoll tal-membru, iżda biss għall-Iskema nnifisha. Is-soċjetà appellanta tgħid li anki fir-rigward tal-allegat *excessive exposure to single issuers,* l-Arbitru għalhekk kien ukoll żbaljat fattwalment. Minn hawn is-soċjetà appellanta tgħaddi sabiex tissottometti kif l-Arbitru applika ħażin ir-regoli tal-MFSA. Tikkontendi li mhux ċar x'ried ifisser biha l-kelma *"jarred"* u lanqas kif wasal għall-konklużjoni li *"...[t]he high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio jarred with the regulatory requirements that applied to the Retirement Scheme at the time..."*. Tgħid li l-Arbitru applika ħażin l-i*Standard Operational Conditions* 2.7.1 u 2.7.2 għaliex dawn kienu applikabbli fir-rigward ta' skema fit-totalità tagħha u mhux fir-rigward ta' portafoll. Tirrileva li sussegwentement ir-regola kienet inbidlet u sar applikabbli l-kunċett ta' diversifikazzjoni f'livell tal-membru u mhux tal-Iskema biss, iżda l-bidla saret biss wara l-2017. Għalhekk stante li l-obbligu ma kienx jeżisti, l-Arbitru ma setax jgħid li hija kellha xi obbligu li tapplika l-prinċipji f'livell tal-membru. Minn hawn is-soċjetà appellanta tgħaddi sabiex tagħmel is-sottomissjonijiet tagħha fejn hija kienet qegħda ssostni li l-Arbitru ddeċieda

ħażin fir-rigward tal-linji gwida dwar l-investiment tagħha stess. Filwaqt li tagħmel riferiment għall-affidavit ta' Stewart Davies fuq imsemmi, tikkontendi li l-linji gwida huma intiżi sabiex iservu ta' gwida, iżda fl-istess ħin iżommu livell ta' flessibilità li jirrikjedi kull każ partikolari, u għalhekk m'għandhomx jiġu applikati b'mod tassattiv. Tinsisti li m'hemmx *'one size fits all'* fl-applikazzjoni ta' dawn il-linji gwida. Min-naħa tagħha hija kienet ippreżentat il-profil tal-appellat, iżda xorta waħda l-Arbitru ddeċieda li hija ma kinitx ressqet evidenza sabiex turi b'mod sodisfaċenti li l-investimenti saru skont il-linji gwida in kwistjoni. Tirrileva li r-regola ġenerali hija li min jallega, għandu l-oneru tal-prova u għalhekk hawn l-appellat kellu l-obbligu li jsostni l-ilment tiegħu, u dan filwaqt li tikkontendi li hija fil-fatt kienet ġabet prova sodisfaċenti sabiex turi li l-linji gwida kienu ġew osservati. Is-soċjetà appellanta tgħid li l-Arbitru mbagħad żbalja wkoll meta skarta l-prova tagħha meta din ma kinitx ġiet ikkontestata mill-appellat. Tgħid li l-Arbitru għażel żewġ eżempji sabiex jispjega kif hija ma kinitx applikat il-linji gwida tagħha stess. Dwar l-ewwel eżempju li kien li l-investiment kellu jsir l-aktar f'swieq regolati, hija tgħid li ma ngħatatx l-opportunità sabiex tispjega kif hija kienet applikat din il-linja gwida, u għalhekk illum hija rinfaċċjata b'deċiżjoni li qatt ma kellha l-opportunità li tikkontestaha. Barra minn hekk hija ma kinitx taf minn fejn l-Arbitru kien sab l-informazzjoni jew liema kienu l-*fact sheets* li huwa kkonsulta, u dan kien ipoġġiha f'pożizzjoni fejn ma setgħetx tikkontesta l-pożizzjoni meħuda minnu. Issostni li anki din il-Qorti issa kienet ser issib li ma setgħetx tieħu pożizzjoni, għaliex ma kienx ċar jekk din l-informazzjoni li straħ fuqha l-Arbitru kinitx tagħmel parti mill-proċess. Dwar dak li kien iddikjara l-Arbitru, is-soċjetà appellanta tgħid li l-investimenti kollha, anki n-noti strutturati, kienu fil-fatt *'listed'* jew fuq l-elenku, u għalhekk

setgħu jiġu negozjati fi swieq li jiffaċilitaw u li jiġġestixxu n-negozju fi strumenti finanzjarji. Għalhekk, tkompli tgħid, il-konklużjoni tal-Arbitru li l-linja gwida ma kinitx ġiet osservata fil-kompożizzjoni tal-portafoll, kienet tassew żbaljata. It-tieni eżempju meħud mil-linji gwida kien jirrigwarda l-konklużjoni tal-Arbitru li huwa ma kienx konvint li l-kundizzjonijiet dwar likwidità kienu qed jiġu osservati adegwatament. Is-soċjetà appellanta tikkontendi li hija kellha tinstab responsabbli mhux fuq sempliċi nuqqas ta' konvinzjoni u mingħajr ma tingħata raġuni għal tali konvinzjoni. Fil-mertu, is-soċjetà appellanta tgħid li l-Arbitru huwa żbaljat għaliex il-prodott kien *'realisable'* fl-intier tiegħu f'kull stadju, u s-suq għall-prodott kien pprovdut minn min kien ħareġ in-nota, għaliex dan kien jixtri lura dik in-nota. Ir-raba' punt li tqajjem is-soċjetà appellanta huwa li l-Arbitru naqas milli jikkonsidra l-profil tar-riskju tal-investitur. Tgħid li skont l-appellat, l-investimenti ma kienux skont il-profil tar-riskju tiegħu u hija kienet ikkontestat din l-allegazzjoni. Filwaqt li għal darb'oħra tagħmel riferiment għall-affidavit ta' Stewart Davies, issostni li l-profil tar-riskju kien għaliha jagħmel parti integrali mill-konsiderazzjonijiet tagħha bħala Amministratur, u li kieku dan ma kienx il-każ, ma kinitx issaqsi għalih fil-formola tal-applikazzjoni tagħha stess. Dan filwaqt li tirrileva li x-xhieda ta' Stewart Davies ma kinitx ġiet ikkontestata u għalhekk l-Arbitru kellu jistrieħ fuqha. Għal dak li kien jirrigwarda d-deċiżjoni appellata fejn l-Arbitru ddikjara li ma kien hemm l-ebda raġuni ġustifikata għaliex is-soċjetà appellanta kienet naqset milli tagħti informazzjoni dwar l-investimenti sottoskritti, tgħid li hawn l-Arbitru jirrepeti l-iżball tiegħu meta filwaqt li jirrikonoxxi li hija ma kellha l-ebda obbligu speċifiku, huwa ddikjara li bħala *trustee* bl-obbligu li timxi bħala *bonus paterfamilias,* hija kienet tenuta tipprovdi rendikont iktar dettaljat. B'hekk huwa kien saħansitra nferixxa obbligi

fir-rigward tal-kwalità u l-estent ta' dik l-informazzjoni, u ħoloq inċertezza dwar x'kienu l-obbligi tagħha taħt il-liġi, billi silet obbligi mill-obbligi ġenerali li jirregolaw it-*trustees*. Is-soċjetà appellanta ssostni li SOC 2.6.2 u 2.6.3 jirreferu għall-iskema fit-totalità tagħha, meta l-appellat ma kienx qed jilmenta li huwa ma ngħatax informazzjoni dwar l-Iskema, fejn ukoll ma kienx il-punt li kien qed jiġi deċiż.

10. L-appellat jilqa' billi jikkontendi li ġaladarba huwa kien jikkwalifika bħala *'retail client',* jiġifieri huwa ma kienx investitur professjonali, kienet mistennija aktar diliġenza min-naħa tas-soċjetà appellanta. Jgħid li kif sewwa osserva l-Arbitru fid-deċiżjoni appellata, għalkemm is-soċjetà appellanta ma ndaħlitx fl-għażla tal-appellat tal-konsulent finanzjarju tiegħu, hija kellha ftehim ma' CWM fejn kienet aċċettat li tintroduċi lil din tal-aħħar mal-membri bħala konsulent finanzjarju, u saħansitra kienet imniżżla fl-applikazzjoni tas-soċjetà appellanta. B'hekk il-klijent seta' kien influwenzat biex jagħżel lil CWM bħala konsulent finanzjarju tiegħu, u jgħid li stante li f'każ ta' *retail client* aktar kien il-każ li dan jistrieħ fuq ir-rakkomandazzjonijiet mogħtija mis-soċjetà appellanta. Iżda bħala *trustee* u l-Amministratur tal-Iskema tal-Irtirar, l-appellat jgħid li l-obbligi bażiċi tas-soċjetà appellanta kienu jirrikjedu wkoll diliġenza u prudenza fil-ftehim li għamlet ma' CWM. Iżda mill-applikazzjoni stess kien jirriżulta li s-soċjetà appellanta kienet aċċettat u anki ħalliet informazzjoni ineżatta dwar il-konsulent finanzjarju. Jgħid li anki dwar dan kien irrileva. Jgħid li hemm dubbji dwar x'kienu r-riċerki li saru dwar CWM u Trafalgar, għaliex għalkemm fl-applikazzjoni kien hemm miktub li CWM kienet entità regolata, is-soċjetà appellanta ma ressqet l-ebda prova dwar dan. L-Arbitru dan kollu ikkonstatah

ukoll fid-deċiżjoni appellata, kif ukoll sab illi fl-applikazzjoni ma kienx ċar dwar min fil-fatt kellu r-rwol ta' konsulent finanzjarju, u ma kien hemm l-ebda indikazzjoni jew spjegazzjoni dwar id-differenza bejn it-termini *"Professional Advisor"* u *"Investment Advisor"*. Hawn l-appellat jiċċita is-subartikolu 1(2) tal-Att dwar *Trusts* u *Trustees* jew Kap. 331 tal-Liġijiet ta' Malta, u anki l-para. (ċ) tas-subartikolu 43(6) u l-artikolu 21 tal-istess liġi. Huwa jagħmel ukoll riferiment għal pubblikazzjoni tal-MFSA u jiċċita silta minnha, liema dokument jgħid li kien ġie ppubblikat fl-2017, iżda kien jittratta prinċipji ġenerali tal-Kap. 331 u tal-Kodiċi Ċivili li kienu diġà fis-seħħ qabel dik is-sena. Għalhekk jiċċita ukoll l-*Investment Guidelines* ta' Jannar 2013. Imbagħad jagħmel riferiment għall-para. 3.1 tas-sezzjoni ntestata *'Terms and Conditions'* fil-formola tal-Applikazzjoni għas-Sħubija tal-Iskema, u jsostni li minkejja li s-soċjetà appellanta kellha d-dettalji tat-transazzjonijiet kollha u anki tal-portafoll sħiħ, hija naqset fl-obbligu ta' rappurtaġġ u saħansitra ma ressqet l-ebda prova dwar dan. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru dwar il-kompożizzjoni tal-portafoll tiegħu, l-appellat jikkontendi li kien irriżulta tassew ċar li kien hemm numru ta' riskji assoċjati mal-kapital investit f'dan it-tip ta' prodotti, u kien hemm saħansitra noti li tali prodotti kienu riżervati għal investituri professjonali biss u li seta' jintilef il-kapital. Għal dak li jirrigwarda l-argument tas-soċjetà appellanta dwar l-i*Standard Operational Conditions* 2.7.1 u 2.7.2, huwa jibda billi jiċċita l-istess u anki dak li qal l-Arbitru fir-rigward, filwaqt li jissottometti li s-soċjetà appellanta ma kinitx ħielsa milli tosserva l-obbligi tagħha fuq livell individwali, għaliex l-Iskema kienet tirrifletti l-investimenti u l-portafolli individwali. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru li s-soċjetà appellanta ma kinitx toffri informazzjoni adegwata lill-membri tal-Iskema, l-appellat jgħid li l-Arbitru tajjeb

osserva li ma kien hemm l-ebda raġuni għaliex is-soċjetà appellanta naqset. Jgħid li l-argument tas-soċjetà appellanta li hija ma kellha l-ebda obbligu speċifiku għaliex id-Direttivi jitkellmu dwar l-iskema, ma jreġix għaliex hija ma setgħetx tinjora l-obbligi tagħha fir-rigward tal-Iskema b'mod ġenerali u l-obbligi ta' *bonus paterfamilias* kienu jservu sabiex jirregolaw sitwazzjonijiet li forsi ma kienux regolati permezz ta' provvediment partikolari tal-liġi. Dwar l-argument tas-soċjetà appellanta li l-Arbitru kien applika u ddeċieda ħażin fir-rigward tal-linji gwida magħmulin minnha stess, jirrileva li huwa diffiċli li s-soċjetà appellanta tikkontendi li dawn ma kellhomx japplikaw b'mod rigoruż u li hija setgħet tagħżel li ma ssegwihomx. Filwaqt li jagħmel riferiment għal dak li kienu jipprovdu l-linji gwida dwar il-massimu ta' assi li setgħu jinżammu b'likwidità ta' aktar minn 6 xhur jew inqas, jirrileva li mill-proċeduri quddiem l-Arbitru kien irriżulta li l-investimenti f'noti strutturati kellhom tipikament maturità jew terminu ta' investiment ta' madwar sena jew sentejn jew saħansitra ta' ħames snin. Jirrileva li kif osservat mill-Arbitru, kien hemm ukoll f'ċerti każijiet l-possibilità ta' suq sekondarju għal dawn in-noti strutturati, iżda dan ma setax jipprovdi livell ta' kumdità adegwata dwar il-likwidità. Ikompli fuq il-kwistjoni li l-prodotti strutturati kienu mmirati lejn investituri professjonali u jiċċita dak li qal l-Arbitru dwar l-investigazzjoni li saret għall-verifika ta' dan il-punt u l-konklużjoni tiegħu.

<u>It-tieni aggravju</u>

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

appellat. Tgħid li fl-ewwel lok l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet li hija kienet diġà fissret li kienu nfondati, iżda jekk imbagħad wieħed kellu jaċċetta li l-Arbitru kellu raġun, tgħid li huwa naqas milli jispjega kif attribwixxa lilha r-responsabbiltà ta' 70% tat-telf. Dan filwaqt li tgħid li sabiex jiddikjara responsabbiltà, huwa kellu qabel xejn isib li hemm ness kawżali bejn in-nuqqasijiet tagħha u t-telf soffert mill-appellat. Tgħid li l-Arbitru ma qal xejn dwar il-fatt li l-appellat ammetta li huwa kien iffirma *in blank,* u b'hekk ikkontribwixxa għat-telf tiegħu stess. Hawnhekk is-soċjetà appellanta tikkontendi li r-responsabbiltà tagħha ċertament qatt ma setgħet tkun akbar minn ta' min ta l-parir, jiġifieri CWM jew tal-appellat li ħa d-deċiżjoni. Tagħmel ukoll riferiment għar-riskji naturali tas-suq u tisħaqq li meħud dan kollu in konsiderazzjoni, ir-responsabbiltà tagħha kellha tkun inqas minn 70%.

12. L-appellat jikkontendi li għall-kuntrarju l-Arbitru ma naqasx milli jagħraf in-ness kawżali u n-nuqqasijiet tas-soċjetà appellanta fir-rigward tat-telf soffert minnu, u ċċita silta mid-deċiżjoni appellata sabiex jissostanzja l-argument tiegħu. Jgħid li għall-kuntrarju wkoll ta' dak li kienet qegħda tikkontendi s-soċjetà appellanta, l-Arbitru ddikjara kif it-telf tiegħu għandu jiġi maħdum u hawn ukoll huwa jiċċita s-silta rilevanti mid-deċiżjoni appellata.

L-aggravji l-oħra

13. Is-soċjetà appellata tirrileva li l-Arbitru ma kienx aċċetta l-allegazzjonijiet tal-appellat li l-miżati ma kienux ġew żvelati jew spjegati u/jew li dawn kienu għoljin. Tgħid li hawn ukoll ma kien hemm l-ebda obbligu speċifiku, iżda l-Arbitru kkonsidrah taħt il-kappa ta' *bonus paterfamilias.* Issostni li l-obbligu tagħha li

taġixxi bħala *bonus paterfamilias* ma setax jiġi nvokat sakemm mhux fil-konfront tal-parametri stabbiliti mil-liġi.

14. L-appellat jirrileva li mhux ċar dak li qegħda tilmenta minnu s-soċjetà appellanta fis-sezzjoni E.2 *Il-Kummenti/Osservazzjoni tal-Arbitru fuq il-Miżati.* Isostni li l-aggravju huwa rritu u null stante li l-Arbitru ma kienx laqa' l-ilmenti tiegħu u kien jidher li s-soċjetà appellanta irrilevathom biss għaliex ma kinitx qegħda taqbel mal-kummenti tal-Arbitru.

15. Il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. Huwa jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġonevoli fiċ-ċirkostanzi partikolari u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad, wara li huwa għamel diversi konstat-azzjonijiet fir-rigward tal-informazzjoni limitata li huwa seta' jieħu dwar l-appellat minn diversi dokumenti esebiti fl-atti[1], innota li ma kienx ġie ndikat jew ippruvat li l-appellat huwa investitur professjonali, u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti ssib li dawn kollha huma korretti u anki f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

16. Imbagħad l-Arbitru rrileva li l-Iskema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta, u kif awtorizzata mill-MFSA bħala *Retirement Scheme* f'April 2011 taħt l-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar) u f'Jannar 2016 taħt l-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta'

[1] Ara *a fol.* 60.

Malta). Osserva li l-appellat kien investa fl-Iskema somma li kienet ġiet utilizzata għax-xiri ta' polza tal-assikurazzjoni fuq il-ħajja hekk imsejħa *European Executive Investment Bond* maħruġa minn *Skadnia International,* li aktar tard biddlet l-isem għal *Old Mutual International* [minn issa 'l quddiem 'OMI']. L-appellat kien ħatar lil CWM bħala l-konsulent finanzjarju tiegħu, fejn l-inkarigu tagħha kien sabiex tagħtih parir dwar l-investiment tal-assi miżmuma f'din il-polza, li ġew investiti f'prodotti finanzjarji sottoskritti kif elenkati mill-istess Arbitru, inklużi f'tnax-il nota strutturata u f'investiment zgħir ieħor f'skema ta' investment kollettiv.[2] Ikkonsidra li fid-data taċ-ċessjoni tal-Iskema fit-20 ta' Ġunju, 2018, fl-*Investor Profile* kien hemm indikat telf ta' EUR57,044.

17. L-Arbitru kkunsidra li CWM kienet il-konsulent finanzjarju kif maħtura mill-appellat sabiex tagħtih parir dwar l-assi miżmuma fl-Iskema. Irrileva li s-soċjetà appellanta fl-avviż li bagħtet lill-appellat f'Ottubru 2017, kienet iddeskriviet lil CWM bħala *'an authorised representative/agent of Trafalgar International GMBH'*[3]*,* u dan filwaqt li għamel ukoll riferiment għar-risposta tal-imsemmija soċjetà appellanta u għas-sottomissjonijiet tagħha fejn terġa' tirrileva dan il-fatt.

18. L-Arbitru mbagħad għadda sabiex ikkonsidra li s-soċjetà appellanta bħala Amministratriċi u *Trustee* tal-Iskema kienet soġġetta għall-obbligi, funzjonijiet u responsabbiltajiet applikabbli, kemm dawk legali u anki dawk li kienu stipulati fiċ-Ċertifikat ta' Registrazzjoni tagħha kif maħruġ mill-MFSA fit-28 ta' April, 2011, li jagħmel riferiment għall-i*Standard Operational Conditions* [minn issa 'l

[2] *A fol.* 227.
[3] *A fol.* 130.

quddiem "SOC"] tad-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002* [minn issa 'l quddiem 'id-Direttivi']. Huwa hawn għamel riferiment għall-Att li Jirregola Fondi Speċjali li ġie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar u għar-regoli magħmula taħthom, li għalihom ġiet soġġetta s-soċjetà appellanta mal-ħruġ taċ-Ċertifikat ta' Reġistrazzjoni tal-1 ta' Jannar, 2016 taħt il-Kap. 514. Sostna li wieħed mill-obbligi ewlenija tagħha bħala Amministratur tal-Iskema skont il-Kap. 450 u l-Kap. 514, kien proprju li taġixxi fl-aħjar interessi tal-Iskema.

19. Il-Qorti hawn iżżid tgħid li m'hemmx dubju li hawn is-soċjetà appellanta 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-appellat kien għadu membru tal-Iskema u ġarrab it-telf allegat.

20. Minn hawn l-Arbitru għadda sabiex elenka diversi prinċipji li kienu applikabbli fil-konfront tas-soċjetà appellanta skont il-*general conduct of business rules/standard licence conditions* applikabbli taħt ir-reġim tal-Kap. 450 kif imħassar, u tal-Kap. 514 li ssostitwixxa dan tal-aħħar. Għal darb'oħra l-Qorti tirrileva li jirriżulta li s-soċjetà appellanta bħala Amministratur tal-Iskema kienet tenuta li timxi b'kull ħila dovuta, kura u diliġenza fl-aħjar interessi tal-benefiċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li minn dan li ngħad diġà, jirriżulta li d-difiża tagħha li hija qatt ma

setgħet tinżamm responsabbli għaliex ma kellha l-ebda obbligu fil-konfront tal-appellat, ma tistax tirnexxi.

21. Iżda 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* u *Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-30 ta' Ġunju, 1989 kif sussegwentement emendat, u l-Arbitru għamel riferiment partikolari għas-subartikolu 21(1), u l-para. (a) tas-subartikolu 21(2). Hawn il-Qorti tgħid li għal darb'oħra d-difiża tas-soċjetà appellanta ma ssib l-ebda sostenn. L-Arbitru rrileva li fil-kariga tagħha ta' *Trustee,* is-soċjetà appellanta kienet tenuta tamministra l-Iskema u l-assi tagħha skont diliġenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa ċċita An Introduction to Maltese Financial Services Law[4] u anki silta mill-pubblikazzjoni riċenti tal-MFSA tas-sena 2017, fejn din ittrattat prinċipji diġà stabbiliti qabel dik id-data permezz tal-Att dwar *Trusts* u *Trustees* u anki permezz tal-Kodiċi Ċivili.

22. L-Arbitru mbagħad aċċenna għal obbligu ieħor tas-soċjetà appellanta li huwa qies importanti u rilevanti għall-każ in kwistjoni, dak ta' sorveljanza u monitoraġġ tal-Iskema, inkluż l-investimenti magħmula. Huwa għamel riferiment għall-affidavit ta' Stewart Davies[5] fejn dan aċċetta li s-soċjetà appellanta fl-aħħar mill-aħħar kellha s-setgħa li tiddeċiedi jekk l-investiment għandux isir, u meta kkonsidrat il-portafoll sħiħ, jekk tali investiment kienx jassigura livell adegwat ta' diversifikazzjoni u kienx jirrifletti l-attitudni ta' riskju tal-membru u tal-linji gwida ta' dak iż-żmien. Dan kollu kif imfisser, tgħid il-Qorti,

[4] Ed. Max Ganado.
[5] *A fol.* 157 para. 17, *fol.* 160 para. 31 u *fol.* 161 para. 33.

jagħmel ċar li s-soċjetà appellanta kienet taf sew x'inhuma l-obbligi tagħha lejn il-membri tal-Iskema u li dawn kienu saħansitra obbligi pożittivi fejn hija kienet tenuta tħares il-portafoll tal-membru individwali tal-Iskema u taġixxi skont il-każ. L-Arbitru osserva li x-xhieda ta' Stewart Davies kienet saħansitra riflessa fil-Formola tal-Applikazzjoni għal Sħubija ffirmata mill-appellat.[6] L-Arbitru qal li anki l-MFSA kienet tqis il-funzjoni ta' sorveljanza bħala obbligu importanti tal-Amministratur tal-Iskema u huwa ċċita siltiet mill-*Consultation Document* tagħha maħruġ fis-16 ta' Novembru, 2018, filwaqt li nsista li l-istqarrijiet hemm magħmula kienu applikabbli wkoll għaż-żmien li fih sar l-investiment in kwistjoni. Għamel ukoll riferiment għall-*Investment Guidelines* magħmulin mis-soċjetà appellanta fis-sena 2013, u għal darb'oħra għal dak li kien jipprovdi l-para. 3.1 tas-sezzjoni ntestata *'Terms and Conditions'* fil-Formola tal-Applikazzjoni għal Sħubija.

23. L-Arbitru hawn ikkonsidra l-ilment tal-appellat li s-soċjetà appellanta naqset milli tgħidlu x'kienu l-ispejjeż u d-drittijiet relattivi, u li l-ispejjeż saħansitra kienu wisq. Peress li l-appellat naqas milli jispjega ulterjorment dan l-ilment u ma ressaq l-ebda prova fir-rigward, l-Arbitru ma laqgħax dan l-ilment tiegħu.

24. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju ż-żewġ punti li fuqhom huwa msejjes l-ewwel aggravju tas-soċjetà appellanta. Huwa aċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi bħal CWM. L-Arbitru

[6] *A fol.* 54.

ddikjara li kien tal-fehma, kif inhi din il-Qorti, li s-soċjetà appellanta bħala Amministratur ta' Skema għall-Irtirar u t-*Trustee* kellha ċerti obbligi importanti li setgħu jkollhom rilevanza sostanzjali fuq l-operat u l-attivitajiet tal-Iskema u li jaffettwa direttament jew indirettament l-andament tagħha. Kien għalhekk li kellu jiġi investigat jekk is-soċjetà appellanta naqsitx mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura safejn dan kellu effett fuq l-andament tal-Iskema u r-riżultanti telf tal-appellat.

25. L-Arbitru osserva li l-appellat kien għażel huwa stess li jaħtar lil CWM sabiex din tipprovdih b'pariri dwar l-investimenti formanti parti mill-portafoll tiegħu fl-Iskema, u min-naħa tagħha s-soċjetà appellanta aċċettat u/jew ħalliet il-konsulent joffri l-parir tiegħu lill-appellat. Osserva li s-soċjetà appellanta kellha saħansitra *introducer agreement* ma' CWM, u dwar din il-kwistjoni huwa għamel riferiment għad-deċiżjonijiet l-oħra tiegħu tat-28 ta' Lulju, 2020. L-ewwel punt li rrileva hawn huwa li s-soċjetà appellanta ppermettiet li l-Formola ta' Applikazzjoni għal Sħubija tħaddan informazzjoni mhux kompluta u preċiża fir-rigward tal-konsulent finanzjarju, u spjega dawn x'kienu. Jirrileva li fir-rwol tagħha ta' *Trustee* u *bonus paterfamilias,* hija kienet tenuta tiġbed l-attenzjoni tal-appellat għal dawn in-nuqqasijiet, u qal li fl-aħħar mill-aħħar hija kellha l-prerogattiva li taċċetta jew le l-applikazzjoni, lill-konsulent finanzjarju u anki l-persuna ma' min kienet ser tinnegozja. Osserva li l-ebda prova ma tressqet li kienet turi li CWM kienet fil-fatt regolata. It-tieni punt li qajjem l-Arbitru jirrigwarda n-nuqqas ta' kjarezza u n-nuqqas ta' distinzjoni li rriżultat fir-rigward tal-konsulent finanzjarju, sabiex b'hekk ma kienx ċar min fl-aħħar mill-aħħar kien ser ikun responsabbli għall-parir mogħti lill-appellat. Imbagħad it-tielet

punt tiegħu jirrigwarda l-kwistjoni li ma kienx hemm distinzjoni ċara bejn CWM, Inter-Alliance u Trafalgar, u ma kienx jirriżulta b'mod inekwivoku jekk CWM kinitx qegħda taġixxi bħala aġent in rappreżentanza ta' ditta oħra, meta dan kellu jkun rifless b'mod ċar fid-dokumentazzjoni kollha. Fir-raba' punt tiegħu, l-Arbitru stqarr li ma rriżultat l-ebda evidenza li kienet turi jekk CWM kinitx entità regolata, iżda fl-affidavit tiegħu Stewart Davies għamel riferiment għall-awtorizzazzjonijiet li kienu nħarġu lil Trafalgar. Hawn huwa għamel riferiment għal tliet deċiżjonijiet oħra tiegħu fejn huwa kien ikkonstata korrispondenza li kienet turi li kienu saru ċertu mistoqsijiet dwar CWM minn IHK, fejn saħansitra kien jirriżulta li CWM ma kinitx qegħda topera taħt il-liċenzji maħruġa lil Trafalgar. Iżda qal li min-naħa tagħha s-soċjetà appellanta ma pproduċiet l-ebda evidenza dwar dak allegat minnha fir-rigward tal-awtorizzazzjoni ta' CWM.

26. Fir-rigward tal-argument miġjub mis-soċjetà appellanta li bejn 2013 u 2015 taħt il-qafas regolatorju tal-Kap. 450 u sakemm ġew implimentati l-*Pension Rules for Personal Retirement Schemes* taħt il-Kap. 514, hija ma kellha l-ebda obbligu li teżiġi l-ħatra ta' konsulent regolat, l-Arbitru sostna li xorta waħda kien mistenni li l-Amministratur u t-*Trustee* jeżegwixxu l-obbligu tagħhom ta' kura u diliġenza professjonali bħal fil-każ ta' *bonus paterfamilias.* L-Arbitru hawn sostna li l-ħatra ta' entità li ma kinitx regolata sabiex isservi ta' konsulent, kienet tfisser li l-appellata kienet tgawdi minn inqas protezzjoni, u s-soċjetà appellanta kienet tenuta li tkun konoxxenti ta' dan il-fatt u li tassigura li l-appellat ikollu l-informazzjoni korretta u adegwata dwar il-konsulent. Qal li mhux biss is-soċjetà appellanta naqset milli tindirizza l-kwistjoni li l-konsulent ma kienx regolat, iżda anki hija bl-ebda mod ma qajmet dubju dwar

informazzjoni importanti fir-rigward ta' diversi aspetti oħra konċernanti CWM. L-Arbitru rrileva li l-ftehim eżistenti bejn is-soċjetà appellanta u CWM, li diġà sar riferiment għalih aktar 'il fuq f'din is-sentenza, qajjem potenzjal ta' kunflitt ta' interess fejn l-entità li kienet soġġetta għas-sorveljanza partikolari mis-soċjetà appellanta, fl-istess ħin kienet qegħda tgħaddilha n-negozju. Il-Qorti ma tistax ma tikkondividix din il-fehma u tikkonsidra ċertament minn dak kollu li s'issa ġie rilevat u kkonsidrat, li l-kariga tas-soċjetà appellanta ma setgħetx tkun dik ta' amministrazzjoni sempliċi u bażika, tenut kont li hija saħansitra kienet ukoll *Trustee* tal-Iskema.

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

28. Dwar it-tieni punt sollevat mis-soċjetà appellanta fl-ewwel aggravju tagħha, l-Arbitru osserva li kien hemm żmien fejn saħansitra l-investimenti sottoskritti l-polza ta' assikurazzjoni taħt l-Iskema, kienu jikkonsistu f'noti strutturati waħedhom u li l-portafoll fil-fatt kien l-aktar imsejjes fuq il-prodott partikolari. Filwaqt li rrileva li l-appellat ma kienx ippreżenta l-*fact sheets* relattivi għall-investimenti sottoskritti, spjega li permezz ta' eżerċizzju ta' tfittxija fuq l-*internet,* kienu ġew akkwistati l-*fact sheets* relattivi. Irrileva li fl-

imsemmija *fact sheets* ta' dawk in-noti strutturati kien hemm indikati numru ta' riskji fir-rigward tal-kapital investit f'dawn il-prodotti.

29. Il-Qorti hawn ser tikkonsidra dak li ġie rilevat mis-soċjetà appellanta fir-rigward tal-investigazzjoni mwettqa mill-Arbitru. Min-naħa tiegħu l-Arbitru fid-deċiżjoni appellata għamel osservazzjoni aħħarija li s-soċjetà appellanta saħansitra dgħajfet id-difiża tagħha meta naqset milli tippreżenta informazzjoni u anki prova dokumentarja dwar l-investimenti sottoskritti jew dwar l-Iskema nnifisha. Il-Qorti ikkonstatat ukoll dan kollu, u tgħid li ċertament dan il-fatt ma għenx id-difiża tas-soċjetà appellanta fejn jibqa' d-dubju jekk b'dan il-mod hija ħallitx mistura dettalji jew informazzjoni li ma kienux favur id-difiża tagħha. Tqis għalhekk li l-Arbitru m'għamel xejn li ma tippermettix l-kompetenza tiegħu skont kif hija 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 turi saħansitra kemm kien korrett li ma jieqafx fl-investigazzjoni tiegħu minħabba l-informazzjoni limitata a dispożizzjoni diretta tiegħu, li l-Qorti tqis li ma kinitx ir-riżultat ta' nuqqas ta' attenzjoni, u b'hekk allura jkun qed jgħin id-difiża tas-soċjetà appellanta. Min-naħa l-oħra ma tqisx li b'hekk huwa kien qed jgħin il-każ imressaq mill-appellat, aktar milli jaċċerta li ruħhu li ssir ġustizzja. Is-soċjetà appellanta tilmenta wkoll li hija qatt ma kellha l-opportunità li tieħu konjizzjoni tal-informazzjoni meħuda mill-*fact sheets,* iżda jirriżulta minn dak li qal l-Arbitru li l-informazzjoni ma kinitx waħda diffiċli sabiex tinkiseb permezz ta' riċerka fuq l-*internet,* u għalhekk din kienet disponibbli wkoll għall-pubbliku, inkluż is-soċjetà appellanta. B'hekk ukoll is-soċjetà appellanta kellha kull opportunità li

tikkontesta dik l-informazzjoni miksuba, imma fil-fatt naqqset milli tagħmel dan. Iżda l-Qorti tikkonsidra li jekk hija għandha temmen li s-soċjetà appellanta qatt ma kellha din l-informazzjoni a dispożizzjoni tagħha, tassew din kienet qegħda tonqos minn kull obbligu ta' *bonus paterfamilias.*

30. L-Arbitru mbagħad għadda sabiex irrileva x'kienu dawk ir-riskji li sar aċċenn għalihom fil-*fact sheets,* fost oħrajn ir-riskju tal-kreditu ta' min kien qed joħroghom u anki r-riskju tal-likwidità, u twissijiet li n-noti ma kellhomx il-kapital protett. Kollox, tgħid il-Qorti, ferm indikattiv tal-fatt li l-investiment fin-noti strutturati ma kienx wieħed kompatibbli mal-informazzjoni dwar l-appellat. L-Arbitru qal li kien hemm aspett partikolari li ħareġ minn dawn in-noti, fejn kien hemm twissija f'kull waħda mill-*fact sheets* dwar l-eventwalità ta' tnaqqis fil-valur tal-kapital kif marbut ma' perċentwal. 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.

31. Imbagħad l-Arbitru osserva wkoll li l-portafoll tal-appellant kien ġie espost b'mod eċċessiv għal prodotti strutturati, u dan għal żmien twil u kif kien jirriżulta mit-*Table of Investments* li kienet tagħmel parti mill-*Investor Profile* li esebiet is-soċjetà appellanta. Osserva wkoll li kien hemm espożizzjoni għolja għar-riskju għaliex kienu nxtraw prodotti permezz ta' transazzjoni waħda jew permezz ta' diversi transazzjonijiet mingħand emittent wieħed, meta fil-fehma tiegħu kellhom jiġu applikati l-limiti massimi kif imfissra fir-regoli tal-MFSA u tal-*Investment Guidelines* tas-soċjetà appellanta stess. L-Arbitru qal ukoll li kien ikun aktar xieraq jekk il-limitu ta' espożizzjoni għal titoli singolari bħal *stock,* ġie applikat fir-rigward ta' dawn il-prodotti strutturati.

32. Hawnhekk l-Arbitru għadda sabiex indirizza punt li s-soċjetà appellanta għal darb'oħra tirrileva quddiem din il-Qorti. Qal li għal dak li kien jirrigwarda l-enfażi tagħha li l-investimenti għandhom jiġu kkunsidrati fil-kuntest tal-portafoll sħiħ, huwa kien ħa konsiderazzjoni tiegħu sa minn meta ġie kostruwit u kif żviluppa maż-żmien sussegwenti. L-Arbitru qal li huwa ħa in konsiderazzjoni wkoll il-perċentwal li kull investiment sottoskritt kien jikkostitwixxi mill-valur sħiħ tal-polza fil-ħin li nxtara, u dan skont l-informazzjoni li forniet is-soċjetà appellanta fl-*'Investor Profile'* annessa mas-sottomissjonijiet tagħha, filwaqt li kkonsidra jekk il-perċentwal in kwistjoni kienx jirrifletti l-limiti massimi stabbiliti permezz tar-regoli tal-MFSA u tal-*Investment Guidelines* tas-soċjetà appellanta stess. Qal li l-prinċipji u r-restrizzjonijiet applikabbli fir-rigward tal-Iskema tal-Irtirar kellhom jiġu applikati għall-kontijiet individwali tal-membri, għaliex altrimenti l-għan ta' dawk il-prinċiji u restrizzjonijiet kien jintilef. Irrileva li l-kwistjoni kienet tkun mod ieħor fejn il-portafoll ta' kull membru kien l-istess. Għalhekk is-sottomissjoni tas-soċjetà appellanta hawn ma tirriżultax li hija waħda korretta.

33. L-Arbitru mbagħad għadda sabiex indirizza l-insistenza tas-soċjetà appellanta li l-*Investment Guidelines* tagħha kienu ntiżi bħala sempliċi gwida, u li ma kellhomx jiġu applikati b'mod strett li b'hekk l-għan tagħhom jintilef. Isostni li fl-ewwel lok kien kontradittorju li jingħad li kien fl-aħjar interessi tal-membru li l-linji gwidi ma jiġux segwiti, u dan filwaqt li fit-tieni lok is-soċjetà appellanta ma wrietx f'liema ċirkostanzi dan kellu jkun il-każ. Għalhekk qal li l-*Investment Guidelines* kienu jorbtuha u konsegwentement kellhom jiġu segwiti, iżda jekk wieħed kellu jaċċetta l-argument tas-soċjetà appellanta li dawn kienu

biss linji gwida u mhux regoli stretti, ma kienx mistenni li wieħed imur wisq lilhinn mil-limiti u l-massimi ta' espożizzjoni hemm imniżżla.

34. L-Arbitru ddikjara li l-espożizzjoni qawwija għal prodotti strutturati u għal emittent singolari, li tħalliet issir mis-soċjetà appellanta, ma kinitx tirrispetta r-rekwiżiti regolatorji applikabbli għall-Iskema dak iż-żmien, u huwa jagħmel riferiment partikolari għal SOC 2.7.1 u 2.7.2, li kienu applikabbli sa mill-bidunett meta nħolqot l-Iskema fis-sena 2011, sad-data li din ġiet reġistrata fl-1 ta' Jannar, 2016 taħt il-Kap. 514. Qal li s-soċjetà appellanta stess kienet għamlet aċċenn għall-applikabbilità u r-rilevanza ta' dawn il-kondizzjonijiet għall-każ odjern. L-Arbitru ċċita partijiet minn dawn id-Direttivi u rrileva li minkejja li SOC 2.7.2 kien jeżiġi ċertu livell, is-soċjetà appellanta kienet ippermettiet li l-portafoll tal-appellat xi kultant ikun magħmul biss jew fil-parti l-kbira tiegħu minn prodotti strutturati. Anki l-espożizzjoni għal emittent waħdani kien f'xi drabi viċin il-massimu ta' 30% stabbilit mir-regoli għal investimenti aktar siguri, meta kien ikun iktar għaqli skont l-Arbitru li jiġi applikat il-massimu ta' 10% kif intqal qabel għal dawk il-prodotti strutturati soġġetti għal xi eventwalità. L-Arbitru osserva li ma kienx ġie ndikat matul il-proċeduri jekk il-prodotti strutturati kienux ġew negozjati f'suq regolat, u anki r-rati għolja ta' imgħax kienet indikazzjoni tar-riskju għoli tal-prodotti. Is-soċjetà appellanta tittenta targumenta quddiem din il-Qorti li r-regoli suriferiti jolqtu biss l-Iskema imma mhux il-portafoll tal-membru ndividwali, iżda l-Qorti mhijiex tal-istess fehma, u għaldaqstant mhijiex qegħda tilqa' dan l-argument. Tgħid li huwa daqstant ċar mid-diċitura ta' dawn ir-regoli, li l-intendiment huwa li jiġu regolati l-investimenti kollha li jaqgħu fl-iskema, u dan mingħajr distinzjoni bejn l-Iskema

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

35. L-Arbitru mbagħad jaqbad, iżda din id-darba iktar fil-fond, il-kwistjoni li l-portafoll saħansitra ma kienx jirrifletti l-*Investment Guidelines* tas-soċjetà appellanta. Filwaqt li ħa konjizzjoni tal-imsemmija linji gwida għas-snin 2013 sa 2018 li s-soċjetà appellanta annettiet mas-sottomissjonijiet tagħha, irrileva li din ma kienx irnexxielha turi b'mod adegwat li dawn kienu ġew applikati fir-rigward tal-investimenti in kwistjoni. Qal li l-portafoll tal-appellat kien f'xi waqtiet kompost l-aktar jew saħansitra biss min-noti strutturati għal perijodu twil ta' żmien. Irrileva li fil-bidu tal-polza kien hemm 98% tagħha investit f'ħames noti strutturati.

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

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

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

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

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

39. L-Arbitru mbagħad ikkonsidra kwistjoni oħra li qajjem l-appellat, dik ta' nuqqas ta' rappurtaġġ u notifika dwar it-transazzjonijiet. Filwaqt li ħa konjizzjoni tal-fatt imressaq mis-soċjetà appellanta li hija kienet tibgħat rendikonti annwali lill-membri tal-Iskema, osserva li dawn kienu ġeneriċi fin-natura tagħhom, fejn kien hemm biss indikat il-polza tal-ħajja mingħajr dettalji fir-rigward tal-investimenti sottoskritti li kienu jikkonsistu fin-noti strutturati. Għaldaqstant sewwa kkonsidra l-Arbitru li din l-informazzjoni mibgħuta lill-appellat bħala membru tal-Iskema ma kinitx biżżejjed u suffiċjenti. Huwa hawnhekk jagħmel riferiment għal SOC 9.3(e) tal-Parti B.9 tal-*Pension Rules for Personal Retirement Schemes,* li kienu applikabbli fir-rigward tas-soċjetà appellanta sa mill-1 ta' Jannar, 2016, b'dana li rrileva li l-Parti B.9 saret biss applikabbli fis-sena 2018. Iżda esprima l-fehma, u hawn għal darb'oħra l-Qorti tgħid li qegħda taqbel, li madankollu bħala *bonus paterfamilias* li kellu jimxi fl-aħjar interessi tal-membri tal-Iskema, is-soċjetà appellanta kellha l-obbligu li tagħti rappurtaġġ sħiħ lill-membri dwar it-transazzjonijiet tal-investimenti sottoskritti. Is-soċjetà appellanta hawn tikkontendi għal darb'oħra li hija ma kellha l-ebda obbligu speċifiku, u l-Arbitru ddeċieda ħażin meta silet l-obbligu mill-prinċipju ġenerali

li hija kienet tenuta timxi skont id-doveri tagħha ta' *bonus paterfamilias.* Imma l-Qorti hawn ukoll mhijiex qiegħda taċċetta l-argument tas-soċjetà appellanta, u dan mhux biss fid-dawl tal-obbligi tagħha ta' *bonus paterfamilias,* li kif diġà ngħad ma jistgħu qatt jitwarrbu fl-assenza ta' obbligi speċifiċi, iżda anki għar-raġuni oħra li ta l-Arbitru. Huwa qal li qabel ma ġie fis-seħħ il-Kap. 514, is-soċjetà appellanta kienet diġà soġġetta għad-disposizzjonijiet tar-regolamenti li kienu saru taħt il-Kap. 450, u hawn huwa jiċċita SOC 2.6.2 u 2.6.3 tal-Parti B.2 tad-Direttivi. L-Arbitru jiddikjara li ma kienet tirriżulta l-ebda raġuni għaliex is-soċjetà appellanta ma kinitx għaddiet informazzjoni importanti, u tgħid il-Qorti ċertament li hawn is-soċjetà appellanta wriet nuqqas kbir min-naħa tagħha li ġabet l-inkarigu tagħha fix-xejn għal dak ta' amministrazzjoni sempliċi tal-Iskema.

40. Imbagħad l-Arbitru osserva wkoll li fil-fehma tiegħu s-soċjetà appellanta m'għenitx id-difiża tagħha meta naqset milli tipprovdi informazzjoni dettaljata dwar l-investimenti sottoskritti. Huwa aċċenna għal darb'oħra għal dawk l-aspetti li kellhom jiġu kkonsidrati mis-soċjetà appellanta fir-rigward tal-kompożizzjoni tal-portafoll tal-appellat, u qal li t-telf tal-kapital soffert mill-appellat kien juri n-nuqqas min-naħa tas-soċjetà appellanta li tassigura d-diversifikazzjoni u li tiġi evitata espożizzjoni eċċessiva. Kieku dan in-nuqqas ma seħħx, iddikjara li ma kienx ikun hemm it-telf li raġonevolment mhuwiex mistenni f'prodott li kellu l-iskop li jipprovdi għal benefiċċji ta' irtirar.

41. L-Arbitru għadda sabiex jittratta l-kwistjoni tan-ness kawżali tad-danni sofferti mill-appellat. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ riżultat tal-andament negattiv tal-investimenti fis-suq u tar-riskji inerenti u/jew

tal-allegat frodi tal-konsulent finanzjarju, kif allegat mis-soċjetà appellanta. Qal li kien hemm evidenza biżżejjed u konvinċenti ta' nuqqasijiet da parti tas-soċjetà appellanta fit-twettiq tal-obbligazzjonijiet u d-doveri tagħha, kemm bħala *Trustee* u anki bħala Amministratur tal-Iskema tal-Irtirar li kienu juru nuqqas ta' diliġenza. Qal li l-istess nuqqasijiet saħansitra ma ħallew l-ebda mod li bih seta' jiġi minimizzat it-telf, u fil-fatt ikkontribwew għall-istess telf u b'hekk l-Iskema ma kinitx laħqet l-għan prinċipali tagħha. Fil-fehma tal-Arbitru, it-telf kien ġie kkawżat mill-azzjonijiet u min-nuqqas ta' azzjonijiet tal-partijiet prinċipali nvoluti fl-Iskema, fosthom is-soċjetà appellanta. Qal li seħħew diversi avvenimenti li din tal-aħħar kienet obbligata u saħansitra setgħet twaqqaf u tinforma lill-appellat dwarhom. Il-Qorti tikkondividi l-fehma tal-Arbitru b'mod sħiħ. Jirriżulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkonsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-appellat. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà tan-nuqqasijiet tagħha billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tal-appellat li kien mexxih lejn l-investimenti li eventwalment fallew mhux biss b'mod reali, iżda anki fallew l-aspettattivi tagħha. Dan filwaqt li tgħid ukoll li hija bl-ebda mod ma kienet tenuta taċċerta l-identità tal-imsemmi konsulent finanzjarju u fl-istess ħin tħares dak kollu li kien qed isir, inkluż il-kompattibilità tal-istruzzjonijiet mal-profil tal-appellat u anki l-andament tal-investimenti, u żżomm linja ta' komunikazzjoni miftuħa mal-appellat. Iżda kif ġie kkonsidrat minn din il-Qorti, id-difiża tas-soċjetà appellanta ma tistax tirnexxi fid-dawl tal-obbligi legali u regolatorji tagħha, u huwa proprju għalhekk li n-nuqqasijiet tagħha għandhom jitqiesu li kkontribwew lejn it-telf soffert mill-appellat mill-investimenti tiegħu.

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

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

(ii) kienet tenuta tikkonsidra l-prodotti in kwistjoni, u mill-ewwel u ta' mill-inqas turi t-tħassib tagħha dwar ċertu investimenti f'noti strutturati formanti parti mill-portafoll tal-appellata, u saħansitra 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-appellat; u

(iii) kien straħ fuqha l-appellat, u anki terzi nvoluti fl-istruttura tal-Iskema, sabiex jintlaħaq l-għan tagħhom li jirċievu benefiċċji tal-irtirar filwaqt li tiġi assigurata l-pensjoni.

43. Għalhekk l-Arbitru esprima l-fehma, li din il-Qorti tikkondividi pjenament, li filwaqt li kien mifhum li t-telf dejjem jista' jsir fuq investimenti f'portafoll, dawn jistgħu jitnaqqsu u saħansitra jinżamm il-kapital oriġinali kif investit, permezz ta' diversifikazzjoni tajba, bilanċjata u prudenti tal-investimenti. Iżda fil-każ odjern jirriżulta pjenament li seta' jingħad 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 fejn kellu x'jaqsam il-konsulent finanzjarju. L-Arbitru 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-konklużjonijiet kollha tal-Arbitru, tgħid li m'għandhiex aktar x'iżżid mad-deċiżjoni appellata tassew mirquma u studjata.

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

<u>Decide</u>

Għar-raġunijiet premessi l-Qorti tiddeċiedi dwar l-appell tas-soċjetà appellanta, billi tastjeni milli tieħu konjizzjoni tat-tielet (iii) aggravju tagħha, u tiċħad l-appell fil-kumplament tiegħu, 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