



MALTA

**QORTI TAL-APPELL**  
**(Sede Inferjuri)**

**ONOR. IMĦALLEF**  
**LAWRENCE MINTOFF**

Seduta tad-19 ta' Jannar, 2022

Appell Inferjuri Numru 41/2020 LM

**Susan Boyd Monaghan (Passaport nru. 307688553)**  
*(‘L-appellata’)*

VS.

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

**Il-Qorti,**

**Preliminari**

1. Dan huwa appell magħmul mis-soċjetà intimata **Momentum Pensions Malta Limited (C 52627)** [minn issa ‘l quddiem ‘is-soċjetà appellanta’] mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa ‘l quddiem ‘l-Arbitru’] mogħtija fit-28 ta’ Lulju, 2020, [minn issa ‘l quddiem ‘id-deċiżjoni appellata’], li

permezz tagħha ddecieda li jilqa' l-ilment tar-rikorrenti **Susan Boyd Monaghan (Detentriċi tal-Passaport nru. 307688553)** [minn issa 'l quddiem 'l-appellata'] fil-konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinżamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lill-appellata l-kumpens bil-mod kif stabbilit, bl-imghaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effettiv 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 l-appellata tgħid li allegatament sofriet mill-investment li għamlet tal-fondi tal-pensjoni tagħha f'polza ta' assikurazzjoni fuq il-ħajja magħrufa bħala l-*Old Mutual European Executive Bond*. Din imbagħad giet trasferita f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] jew QROPS fis-sena 2015, ġestita mis-soċjetà appellanta fejn il-*premium* ġie nvestit f'diversi prodotti finanzjarji sottoskritti, kollox b'konsultazzjoni u skont il-parir ta' *Continental Wealth Management* [minn issa 'l quddiem 'CWM']. Imma skont l-appellata, il-fondi originali nvestiti fis-somma ta' €379,317.98 sofrew telf, tant hu hekk li ddikjarat li l-investment tagħha fl-Iskema kien fiż-żmien li pprezentat l-ilment tagħha stmat fis-somma ta' €175,000.00, filwaqt li tilfet ukoll id-dħul pretiż.

## Mertu

3. L-appellata għalhekk ipprezentat lment quddiem l-Arbitru fis-26 ta' Frar, 2018 fil-konfront tas-soċjetà appellata fejn sostniet li din kienet naqset meta aċċettat klijenti mingħand konsulenti finanzjarji li ma kellhom l-ebda liċenzja u saħansitra mbagħad naqset milli ssegwi l-azzjonijiet tagħhom. Kompliet tgħid li s-soċjetà appellanta aċċettat struzzjonijiet mingħand CWM mingħajr ma taw każ il-kontenut tal-*fact find* tagħha, fejn kien hemm miktub li l-profil ta' riskju tagħha kien ser ikun rifless fid-diversifikazzjoni tal-investimenti fejn il-kapital kellu jkun protett kollu kemm hu. Għalhekk kienet aċċettat struzzjonijiet għax-xiri ta' noti strutturati biss, u dawn b'riskju għoli kif maħruġa minn RBC, Commerzbank, Nomura u Leonteq u għall-kuntrarju ta' dak permess mil-linji gwida tagħha, liema prodotti kienu ntiżi għal investituri professjonali biss, u li ma kienux permessi skont il-profil ta' riskju tagħha, u lanqas ma kienu kompatibbli mal-iskop ta' skema tal-irtirar. L-appellata ddikjarat li saħansitra wkoll l-imsemmija struzzjonijiet ma kienux ġew iffirmati minnha għaliex il-firem tagħha kienu fotokopji tal-original. Żiedet tgħid ukoll li l-polza tal-assikurazzjoni tal-ħajja kienet iġġorr magħha spejjeż kbar, iżda qatt ma ġiet avzata b'dan. L-appellata qalet li hija għalxejn kienet talbet sabiex l-investimenti jsiru fil-munita tal-Euro u għalhekk dawn sofrew kull bidla tal-munita. Qalet li għalkemm is-soċjetà appellanta kienet taf bil-frodi tal-konsulent finanzjarju, hija ma ssuspendietx in-negozju li kellha mal-istess. Għalhekk allegat li s-soċjetà appellanta kienet naqset milli timxi skont l-aħjar interessi tal-membri tal-iskema billi tinvesti b'mod prudenti.

4. Is-soċjetà appellanta wiegbet fl-20 ta' Marzu, 2018 billi talbet lill-Arbitru sabiex jiċċhad l-ilment tal-appellata. Hija eċċepiet fost affarijiet oħra li (i) l-azzjoni kienet preskritta *ai termini* tal-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555; (ii) il-profil ta' riskju tal-appellata kien gie magħżul minnha flimkien mal-konsulent finanzjarju tagħha u għalhekk kull ilment fir-rigward għandu jitressaq quddiem dan tal-aħħar; (iii) fir-rigward tal-*fact find*, ma kinitx prassi li l-parir mogħti mill-konsulent jgħaddi għand l-amministratur tal-iskema; (iv) kien hemm xi dokumenti li l-appellata naqset milli tippreżenta, u dawn kienu qegħdin jigu annessa mar-risposta; (v) kien ċar li kien il-konsulent finanzjarju tal-appellata li talabha sabiex tiffirma dokument vojta u hija kienet aċċettat b'mod negligenti u s-soċjetà appellanta ma setgħetx tinzamm responsabbli; (vi) l-appellata ndunat xahrejn wara li għamlet l-investment li dan kien qed jagħmel telf, iżda baqgħet ma ħaditx azzjoni u komplet iżzomm lil CWM bħala l-konsulent finanzjarju tagħha mingħajr ma tavża lis-soċjetà appellanta sabiex b'hekk jiġi mitigat it-telf; (vii) Trafalgar kienet liċenzjata bħala intermedjarju u konsulent tal-assigurazzjoni u anki bħala intermedjarju finanzjarju u kellha ftehim mal-aġent tagħha CWM, u l-ilment kellu jitressaq kontribom filwaqt li s-soċjetà appellanta ma kinitx il-legittimu kontradittur; (viii) hija kellha d-dritt li iżzomm dawka id-drittijiet xierqa skont it-termini u l-kondizzjonijiet tagħha stess li l-appellata kienet taf bihom sa mill-bidunett u rrikonoxxiet; (ix) kienet proprju OMI u mhux is-soċjetà appellanta li kienet qiegħda tikkonsidra azzjoni legali kontra wieħed mill-fornituri tan-noti strutturati minħabba t-telf li sofrew id-detenturi tal-investment bħal ma kienet l-appellata; (x) hija la kienet tagħti u lanqas tat pariri dwar investment u lanqas kienet liċenzjata sabiex tagħmel dan; (xi) hija ma kinitx kisret il-linji gwida tagħha stess; (xii) ma kienx minnu li l-appellata sofriet

telf qawwi; (xiii) l-appellata taf u kienet taf sew dwar id-drittijiet applikabbli fir-rigward tal-*Bond* u anki pagabbli lill-konsulent tal-fond; u (ix) hija ma kienet bl-ebda mod wettqet frodi jew imxiet b'negliġenza jew kisret l-obbligi tagħha u t-telf soffert mill-appellata kien attribwibbli lill-konsulent finanzjarju li appuntat hija stess.

### **Id-deċiżjoni appellata**

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

#### ***“Further Considers:***

##### ***Preliminary Pleas***

*In its Reply, MPM submitted that it was ‘aware that the Complainant has joined litigation against various life companies in Spain’. (fn. 3 Pg. 5, para. 24 of MPM’s Reply before the Arbitrator for Financial Services) MPM, however, produced no evidence on this matter in the said Reply nor did it specify that the alleged litigation related to the same subject matter of this Complaint.*

*In point 2 of its additional submissions, MPM stated that:*

*‘Attached is also correspondence sent by complainant in February 2019, clearly stating that proceedings have been initiated in various jurisdictions against entities responsible for losses’. (fn. 4 Point 2 of MPM’s Additional Submissions (A fol. 359) and document titled ‘Doc. SB1’ attached to the said submissions (A fol. 363-364))*

*MPM further stated in its additional submissions that:*

*‘It is clear that complainant and others like her are taking a shot gun approach and filing proceedings wherever possible, in the hope that something will stick. It is submitted with respect that this should clearly show that complainant herself, through her actions, has shown that it is not Momentum who should be held responsible for her losses.’ (fn. 5 Ibid.)*

*First of all, the Arbiter must underline that the final note of submissions should not serve the purpose of including additional defences that were not raised in the Reply. However, for the sake of completeness the Arbiter will consider the above-quoted objection.*

*With respect to the document titled 'Doc. SB1' referred to by MPM in the said additional submissions, it is to be firstly noted that such document, which is actually dated 24 May 2019, is an email sent from Angie Brooks and not by the Complainant. Secondly, the said document does not mention nor makes specific reference to the Complainant. Such document cannot accordingly be considered as 'correspondence sent by complainant in February 2019' as alleged by MPM.*

*The said document attached by MPM to its additional submissions cannot be reasonably construed either as providing any sufficient and reliable evidence of the other claims made by MPM in regard to the Complainant, in point 2 of its additional submissions.*

*In addition, it is particularly noted that MPM has ultimately not demonstrated either that the proceedings claimed to have been 'initiated in various jurisdictions' are on the same subject matter of this Complaint, which deals with the alleged shortcomings of MPM as the Trustee and Retirement Scheme Administrator of the Scheme.*

*Similarly, the statements made by Stewart Davies, Director of MPM, in his affidavit (para. 58, Pg. 15 of the affidavit of Stewart Davies attached to MPM's Additional Submissions) regarding criminal proceedings filed in Spain against inter alia CWM and the press release he attached in this regard, do not mention the Complainant nor do they demonstrate either that they are on the same subject matter of the Complaint. By their very nature criminal proceedings are totally different and independent from civil or commercial procedures.*

*Moreover, when MPM made reference to these 'proceedings' it did not specifically refer to any section of the law on which it is implying a doubt about the competence of the Arbiter, as it did in another plea referring to the competence of the Arbiter. However, even when the Arbiter tried **ex officio** to examine these allegations to establish whether he has competence to deal with the complaint, he did not find enough evidence to satisfy the requisites of the law especially Article 21(2)(a) of Chapter 555 of the Laws of Malta which stipulates that:*

*'An Arbiter shall decline to exercise his powers under this Act where:*

(a) the **conduct complained of** is or has been the subject of a lawsuit before a court or tribunal initiated by the **same complainant on the same subject matter:**' (fn. 7 Emphasis added by the Arbiter)

Moreover, MPM did not prove that 'these proceedings' related to the 'conduct complained of' in this complaint; failed to substantiate by clear and specific evidence that 'the same complainant' initiated proceedings before a Court 'on the same subject matter'.

*For the above-stated reasons, the Arbiter declares that he has the competence to consider this Complaint and cannot refrain from considering the case.*

*However, the Arbiter has to consider the other plea raised by the Service Provider based on Article 21(1)(c) which specifically relates to his competence.*

***Preliminary Plea regarding the Competence of the Arbiter with reference to Article 21(1)(c)***

*The Service Provider also raised the plea that the Arbiter does not have the competence to consider this case because it is time-barred under Article 21(1)(c) of Chapter 555. 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** (fn. 8 Emphasis added by the Arbiter) not later than two years from the day on which **the complainant first had knowledge of the matters complained of.**' (fn. 9 Emphasis added by the Arbiter)*

*The Act came into force on 18 April 2016. As to the 'conduct of a financial service provider' the law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.*

*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 3 March 2015, upon the member's acceptance into the Scheme, and continued to occupy after the coming into force of the Act. It is noted that the*

*Complaint in question also involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the adviser of the Complainant.*

*In terms of Article 21(1)(c), the complainant had two years to complain to the Service Provider 'from the day on which the complainant first had knowledge of the matters complained of'.*

*The Service Provider has not clearly explained in this specific plea on what basis the Complaint cannot be entertained pursuant to this article other than stating that 'more than two years have lapsed since the conduct complained of took place.'*

*However, further on in its formal reply to the Complaint, MPM noted that:*

*'... Complainant has stated in her complaint that, as early as 2015, two months after the investment was made, that the Complainant was aware of losses of £25,000 based on the original portfolio selected - why did Complainant not take any action against CWM, and indeed any action at all, at that point in time. Complainant had clearly challenged CWM at that time. However, despite this, she retained CWM as her appointed Adviser, failed to raise a complaint to MPM regarding the issue, and retained the Investments. Complainant failed in her duty to mitigate potential losses'.*

*Whilst, in this particular case, the Complainant seemingly became aware in 2015 of the structured note investments undertaken in April 2015, it is to be noted that there are various material aspects raised by the Complainant in relation to the contested structured note investments which have not been demonstrated that the Complainant was aware of at the time.*

*The said aspects include, in particular, the allegation relating to the nature of the structured note investments being for 'Professional Investors Only', of high risk and not reflective of her risk profile and the allegation that her funds were not invested prudently. It has not been proven that the Complainant was aware of such aspects in 2015 or before the coming into force of the Act.*

*It is also noted that the loss of £25,000, (which was indicated with reference to the OMI Investment Report dated 18 May 2015 presented by the Complainant with her Complaint Form), was an unrealised loss which was based on the market value of the investments applicable at the time.*

*Certain structured notes comprising part of her portfolio have in the meantime matured or been sold as reflected in the table presented by the Service Provider post the coming into force of the Act. (fn. 10 'Doc. SB2' attached to MPM's Additional Submissions.) Indeed, the claim of losses made by the Complainant in her Complainant Form dated February 2018 is actually much different than the loss of*



*€25,000 reported in May 2015. The alleged losses claimed by the Complainant are now indicated as being over Eur200,000. The Service Provider itself also indicated that the loss on 01/01/2018 was of Eur167,595 as at that date. (fn. 11 Ibid.) The Complainant could not file a complaint on these issues back in 2015.*

*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 either. 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 let alone about their performance.*

*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 the 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 investment and the whole scenario could not have reasonably enabled the Complainant to have knowledge about the matters being complained of.*

*Moreover, the Arbiter makes reference (fn. 12 The Arbiter notes that Chapter 555 of the Laws of Malta gave investigative powers to the Arbiter and the nature of the complaints in this sector necessarily involves research by the Arbiter and also reference to other cases) to Case Number 137/2018 (fn. 13 Decided today) against MPM, whereby it results that the Service Provider itself declared in July 2015, in reply to a member's concern regarding losses, that:*

'... whilst we, as Trustees, will review and assess any losses, **these can only be on the maturity of the note**, (fn. 14 *Emphasis of the Arbiter*) as any valuations can and will be distorted ahead of the expiry'. (fn. 15 *Case Number 137/2018 (a fol. 7 of the file)*)

*The Service Provider did not prove the date of maturity of the structured notes comprising the portfolio of the Complainant.*

**According to a statement presented by the Complainant dated 2 November 2016** (fn. 16 *Attachment 17 to her Additional Submissions*) **and the table of investments presented by the Service Provider**, (fn. 17 *'Doc. SB2' attached to MPM's Additional Submissions*) **various structured notes were still within her portfolio after the coming into force of the Act.**

**In addition, it is also noted that besides the issue of the structured notes, the Complainant raised other material aspects in her Complaint including inter alia in respect of the alleged unlicensed nature of the investment adviser accepted by MPM, lack of actions taken by MPM in respect of the Scheme including in continuing to allow terms of business with CWM until September 2017.**

*The Arbiter has discovered from Case Number 127/2018 (fn. 18 *Decided today*) against MPM that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM. (fn. 19 *Case Number 127/2018 (a fol. 53 of the file)*) In this regard, in September 2017, members were notified by MPM about the suspension of the terms of business that MPM had with CWM. Later, in October 2017, MPM also notified the members of the Scheme about the full withdrawal of such terms of business with CWM.*

*The Service Provider ultimately itself acknowledged, by invoking Article 21(1)(c), that the complaint is 'in relation to the conduct of a financial service provider occurring after the coming into force of this Act', that is, in relation to MPM's conduct occurring after 18 April 2016. MPM did not prove that the Complainant raised the complaint 'later than two years from the day on which the complainant first had knowledge of the matters complained of'.*

*It is true that MPM has made various allegations about the attitude of the Complainant in making representations on early losses with CWM, but a plea to exclude the competence of an adjudicator is a very serious one because if successful it prematurely brings the case to an end. It is an accepted legal principle by our Courts that any plea raised by way of defence has to be substantiated by specific and clear evidence and not by generic statements to a selected few facts. In this particular case the Service Provider had to establish **'the day** on which the complainant first had*

knowledge of matters complained of'. *In cases relating to the exclusion of competence the law has to be applied rigorously and there is no room for interpretation.*

*The Complainant made a formal complaint with the Service Provider on the 2 November 2017, and it has not been proven by MPM that two years had passed from 'the day on which the complainant first had knowledge of the matters complained of'. It is further noted that not even two years had passed from the coming into force of Chapter 555 of the Laws of Malta and the date, 2 November 2017, 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 this 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. 20 Cap. 555, Art. 19(3)(b))***

*The Arbiter is considering all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555 (fn. 21 Art. 19(3)(d)) which stipulates that he should deal with the complaints in 'an economical and expeditious manner'.*

### ***The Complainant***

*The Complainant, born in 1962, is of British nationality and resided in France at the time of application for membership as per the details contained in the Application Form for Membership of the Momentum Malta Retirement Trust ('the Application Form for Membership').*

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

*The Complainant was accepted by MPM as member of the Retirement Scheme on 3 March 2015.*

### ***The Service Provider***

*The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator (fn. 22 <https://www.mfsa.mt/financial-services-register/result/?id=3453>) and acts as the*

*Retirement Scheme Administrator and Trustee of the Scheme. (fn. 23 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. 24 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. 25 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. 26 <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. 27 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. 28 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. 29 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. 30 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. 31 Ibid.)*

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

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

*The life assurance policy acquired for the Complainant was called the European Executive Investment Bond issued by Old Mutual International ('OMI'). (fn. 32 Application Form for OMI bond – A fol. 215)*

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

*The underlying investments in respect of the Complainant comprised substantial investments in structured notes as indicated in the table of investments forming part of the 'Investor Profile' presented by the Service Provider in respect of the Complainant 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).*

*The 'Investor Profile' presented by the Service Provider for the Complainant also included a table with the 'current valuation' as at 01/01/2018. The said table indicated a loss (excluding fees) of Eur167,595 as at that date. The loss experienced by the Complainant is thus higher when taking into account the fees incurred and paid within the Scheme's structure. It is to be noted that the Service Provider does not explain whether the loss indicated in the 'current valuation' for the Complainant relates to realised or paper losses or both.*

#### **Investment Adviser**

*Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainant. (fn. 34 As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant) The role of CWM was to advise the Complainant regarding the assets held within her respective Retirement Scheme.*

*It is noted that in the notices issued to members of the Scheme in September and October 2017, MPM described CWM as 'an authorised representative/agent of Trafalgar International GmbH', where CWM's was Trafalgar's 'authorised representative in Spain and France'.*

*In its reply, MPM explained inter alia that CWM 'is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH'. (fn. 35 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. 36 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. 37 *Ibid.*)

### ***Underlying Investments***

*As indicated above, the investments undertaken within the life assurance policy of the Complainant were summarised in the table of investment transactions included as part of the 'Investor Profile' information sheet provided by the Service Provider. (fn. 38 Attachment to the 'Additional submissions' made by MPM in respect of the Complainant)*

*The extent of investments in structured notes, indicated as 'SN' in the column titled 'Asset Type' in the said table of investment transactions, was substantial as can be seen in the said table.*

*The said table indicates that the portfolio of investments for the Complainant involved substantial investments in structured notes with the portfolio comprising predominantly of structured notes during the tenure of CWM as investment adviser.*

### ***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. 39 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 titled ‘The Legal Framework’ above, the Trusts and Trustees Act (‘TTA’), Chapter 331 of the Laws of Malta is also relevant for MPM*

*considering its capacity as Trustee of the Scheme. This is an important aspect on which not much emphasis on, and reference to, has been made by the Service Provider in its submissions.*

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

*The said article provides that:*

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

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

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

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

*The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property ‘as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality’. (fn. 40 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. 41 Op.cit, p. 178)**

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

**‘In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations**

to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus pater familias in the performance of his obligations**'. (fn. 42 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. 43 Para. 17, page 5 of the affidavit of Stewart Davies)*

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

***'The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed) ...'. (fn. 44 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. 45 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 designated professional adviser may suggest investment preferences to be considered, however, **the Retirement Scheme administrator will retain full power and discretion for all decisions relating to the purchase, retention and sale of the investments** within my Momentum Pensions Retirement Fund' which featured in the 'Declarations' section of the Application Form for Membership signed by the Complainant.*

*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. 46 pg. 7 of the MFSA's Consultation Document dated 16 November 2018 titled 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' (MFSA Ref. 15/2018) – <https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/>)*

*The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment adviser stating that 'the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments'. (fn. 47 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 need to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification ...'** (fn. 48 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 relating to the signature on the dealing instructions

*The Complainant alleged that MPM accepted dealing instructions for investments which were not authorised by her where it was, in essence, claimed that the signatures on the dealing investment instruction forms were photocopied.*

***This is a serious allegation and as has already been stated above in relation to the Service Provider, allegations have to be specifically proven by specific facts and in the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation. However, the Complainant did not provide enough evidence to the Arbiter to accept the allegation.***

*Nonetheless, the Arbiter would like to comment on the practice adopted by the Service Provider.*

*Communications relating to dealing instructions seem to have only occurred between MPM and the investment adviser without the Complainant being in copy or made promptly and adequately aware of the investment instructions given by the investment adviser and executed by MPM. It has indeed not emerged during the proceedings of the case that the Complainant was being adequately and promptly notified by MPM about material developments relating to her portfolio of investments within the Scheme as would reasonably be expected in respect of a consumer of financial services.*

*Not even the statements issued annually by MPM to the Complainant provided details of the underlying investments. The Annual Member Statements were indeed generic*

*in nature and only mentioned the underlying policy. Such statements did not include details of the investment transactions undertaken over the respective period nor details about the composition of the portfolio of investments as at the year end.*

*The procedures used and methods of communications adopted by MPM, could enable a possible situation such as that claimed by the Complainant. The serious allegations about the false signatures on dealing instructions could have been easily avoided and/or at least addressed in a timely manner with simple measures and safeguards adopted by the trustee and scheme administrator.*

*In the context of member-directed schemes such measures could have involved, for example, accepting communications either from the complainant or with the complainant being in copy in certain communications involving dealing instructions/confirmation of execution; and/or the respective member being adequately and promptly informed by MPM of the purchases and redemptions being made within the portfolio of investments.*

***This highlights the apparent lack of adequate controls and administrative procedures implemented by MPM which reasonably put into question MPM's adherence with the requirements to have adequate operational, administrative and controls in place in respect of its business and that of the scheme as it was required to do in terms of Rule 2.6.4 of Part B.2.6 of the Directives under the SFA and Standard Condition 4.1.7, Part B.4.1 of the Pension Rules for Service Providers issued under the RPA as well as Standard Condition 1.2.2, Part B.1.2 of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA during the respective periods when such rules applied as outlined above.***

***The lack of adequate controls and administrative procedures is not just an aspect that features with respect to the handling of dealing instructions and verification of consent by the member of such instructions, but also on other aspects involving the ongoing activities of the Scheme Administrator. This is particularly so with respect to the controls on the verification of compliance with the Investment Guidelines as shall be considered below in this decision.***

Allegations in relation to fees

*The Complainant made certain allegations relating to fees not being disclosed, fully explained and/or being high.*

*In the case reviewed, the Arbiter has not found sufficient evidence to uphold this claim taking also into consideration in particular the explanations made by the Service Provider and documentation presented with respect to the Scheme and the*

*underlying policy's charging structure.*

*With respect to the fees being high, the Arbiter considers that there is also insufficient evidence for him to determine whether, in the particular circumstances, the contested fees were either reflective of, or on the other hand not in line with, market practice.*

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

**Key considerations relating to the principal alleged failures**

*The Arbiter will now focus on key principal alleged failures raised in this Complaint namely that:*

*(i) MPM allegedly accepted business and allowed the appointment of CWM as an unlicensed investment adviser;*

*(ii) MPM allegedly allowed an unsuitable portfolio of underlying investments to be created within the Retirement Scheme which portfolio comprised high risk structured products of a non-retail nature which was not in line with her risk profile.*

**General observations**

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

***This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case 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 directly, or indirectly, its performance.***

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

**A. The appointment of the Investment Adviser**

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

***However, from its part, MPM allowed and/or accepted CWM to provide investment advice to the Complainant within the Scheme's structure. MPM even had itself an introducer agreement with CWM.***

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

**Inappropriate and inadequate material issues involving the Investment Adviser**

i. Inaccurate, incorrect and unclear information relating to the adviser in MPM's Application Form for Membership

***It is considered that MPM accepted and allowed inaccurate, incorrect and unclear information relating to the Adviser to prevail in its own Application Form for Membership in respect of the Complainant. MPM should have been in a position to identify, raise and not accept the material deficiencies included in the Application Form.***

***If inaccurate, unclear and incorrect material information was made in the Application Form for Membership on such a key party it was only appropriate and in the best interests of the Complainant, and reflective of the role as Trustee as a***



***bonus paterfamilias, for MPM to raise and flag such matters to the Complainant and not accept such inadequacies in its form. MPM had ultimately the prerogative whether to accept the application, the selected investment adviser and also decide with whom to enter into terms of business.***

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

*In the same section of the Application Form, the adviser was indicated as having a registered address in Spain and that it had 'Global Net' as regulator. The field for 'Licence Number' in the same section was left unanswered.*

*The Arbiter considers the reference to Global Net as regulator to be inadequate and misleading.*

*With respect to the reference to 'Globalnet' as the regulator of the adviser, it is to be noted that MPM itself had explained that 'Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union'. (fn. 49 Pg. 1 – Reply by MPM to the OAFS) Global Net could have thus not been the regulator of a professional adviser.*

*Global Net is clearly not a regulatory authority and, being an unregulated and connected company itself, could not possibly have provided any comfort that there was some form of regulation nor that there were any adequate controls and/or supervision as one would expect in the field of regulated financial services providers.*

***The reference to Global Net could also 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 relating to the adviser in the Application Form of the Underlying Policy

***It is noted that the lack of clarity and convolution relating to the investment adviser has also prevailed in the Application Form submitted in respect of the acquisition of the underlying policy, that is, the one issued by Old Mutual International.***

*MPM, as Trustee of the Scheme had clear sight of the said application and had indeed signed the application for the acquisition of the policy for the Complainant 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 adviser. The first page of the said application form includes a section titled 'Financial adviser details' and a field for 'Name of financial adviser', with such section including a stamp bearing the name of 'Trafalgar International GmbH' ('Trafalgar') apart from the reference to 'Continental Wealth Trust'. The two entities, both Continental Wealth Trust and Trafalgar are then featured in the section titled 'Financial adviser declaration' of the said form with the same stamp of Trafalgar with a PO Box in Cyprus and another one with a Head Office in Germany, again featuring here in the part titled 'Financial adviser stamp' in the same section.*

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

iii. No proper distinctions between CWM, GlobalNet and/or Trafalgar

*It is unclear why the Annual Member Statement sent by MPM to the Complainant for the years ending December 2015 and 2016 indicated in the same statement 'Continental Wealth Management' as 'Professional Adviser' whilst at the same time indicated another party, 'Trafalgar International GmbH' as the 'Investment Adviser'.*

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

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

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

*Indeed, during the proceedings of this case MPM has not provided evidence of any agency agreement between CWM and GlobalNet nor between CWM and Trafalgar.*

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

***‘Momentum in its capacity as Trustee and RSA, in exercising its duty to you ensured: The full details of the Scheme, including all parties’ roles and responsibilities were clearly outlined to you in the literature provided ensuring no ambiguity,* (fn. 50 *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. 51 *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 Momentum Malta Retirement Trust*)**

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

*iv. No regulatory approval in respect of CWM*

*During the proceedings of this case no evidence has emerged about the regulatory status of CWM. As indicated earlier, MPM only referred to the alleged links between CWM and Trafalgar and only provided a copy of the authorisations issued to Trafalgar International GmbH in Germany which just indicated that Trafalgar (and not CWM) held an authorisation as at 05.02.2016 as ‘Investment intermediary’ and ‘Insurance intermediary and insurance consultant’ from IHK Frankfurt am Main, the Chamber of Commerce and Industry in Frankfurt with the ‘Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53’. (fn. 52 *Copy of authorizations issued to Trafalgar were attached to the Reply of MPM submitted before the Arbiter for Financial Services and/or specifically referred to in para. 39 Section E, titled ‘CWM and Trafalgar International GmbH’ in the affidavit of Stewart Davies*)*

*With respect to authorisations issued by IHK, the Arbiter makes reference to Case Number 068/2018 (fn. 53 *Decided today*) and Case Number 172/2018 (fn. 54 *Decided today*) against MPM in which replies issued by IHK in 2018 to queries made in respect of CWM was produced. 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. 55 *Email from IHK dated 19 April 2018 – A fol. 166/167 of Case Number 068/2018, decided today*)*

*Similarly, in a letter dated 20 April 2018 issued by IHK it was inter alia noted by IHK that 'Trafalgar International GmbH is a German limited company headquartered in Frankfurt am Main. The company currently holds a licence under 34d para.1 German Trade Law (German: Gewerbeordnung, GewO) (insurance intermediation). The German licence as an insurance intermediary cannot be extended to another legal personality and it does not authorize the licence holder to regulate other insurance or financial investment intermediaries.'* (fn. 56 Letter from IHK dated 20 April 2018 – A fol. 12/13 of Case Number 172/2018, decided today)

*MPM's statement that CWM 'was operating under Trafalgar International GmbH licenses' (fn. 57 Para. 39, Section E titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies) has not been backed up by any evidence during the proceedings of this case and has actually been contradicted by communications issued by IHK as indicated above. It is accordingly clear that no comfort can either be taken from the authorisation/s held by Trafalgar.*

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

***In the absence of such, the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM 'was authorised to trade in Spain and in France by Trafalgar International GmbH', (fn. 58 Pg. 1, Section A titled 'Introduction', of the Reply of MPM submitted before the Arbitrator for Financial Services) are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant.***

*This also taking into consideration that:*

- (i) Trafalgar is itself no regulatory authority but a licensed entity itself. Similarly, GlobalNet was not a regulatory authority and as explained by the Service Provider itself this was just 'an unregulated company', being 'an associate company of Trafalgar' offering 'administrative services to entities outside the European Union'. (fn. 58 Page 1, Section A of the Reply filed by MPM to the OAFS)*
- (ii) the lack of clarity as to the regulatory status of the investment adviser included in the Application Form for Membership in respect of the Complainant;*

(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. 60 <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. 61 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 appointed by the Complainant, the investment adviser was however accepted, at MPM’s sole discretion, to act as the Complainant’s investment adviser within the Scheme’s structure.*

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

***MPM allowed and left uncontested incorrect, misleading and unclear key information to feature in its own Application Form for Membership of the Retirement Scheme with respect to the regulatory status of the investment adviser. In so doing, it abetted a fundamentally wrong impression and perception that the investment adviser being selected was regulated when, in reality, no evidence has emerged that CWM was indeed a regulated entity.***

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

***However, the Arbiter believes that MPM as Trustee had in any case the obligation to act with the required diligence of a bonus paterfamilias throughout, and was duty bound to raise with the respective member, and not itself accept, material aspects relating to the investment adviser, which it should have reasonably been in a position to know that were incorrect, misleading and inappropriate.***

***Instead it chose to allow and accept such material incorrect, misleading and inappropriate information relating to the adviser to even prevail in its own application form.***

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

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

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

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

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

*Even in case where under the previous applicable regulatory framework, an unregulated adviser was allowed by the trustee and scheme administrator to provide investment advice to the member of a member-directed scheme **one would, at the very least, reasonably expect the retirement scheme administrator and trustee of such a scheme to exercise even more caution and prudence in its dealings with such a party in such circumstances.***

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

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

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

## **B. The permitted portfolio composition**

Investment into Structured Notes

Preliminary observations

*The sale of, and investment into, structured notes is an area which has attracted various debates internationally including reviews by regulatory authorities over the*

*years. Such debates and reviews have been occurring even way back since the time when the Retirement Scheme was granted registration in 2011.*

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

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

*A typical definition of a structured note provides that:*

*'A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index'. (fn. 62 <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. 63 <https://www.investopedia.com/articles/bonds/10/structured-notes.asp>)*

*The Arbiter notes that various relevant fact sheets of structured notes that featured in the portfolio of the Complainant, as produced by the Complainant in her additional submissions and as also sourced by the Office of the Arbiter for Financial Services ('OAFS'), highlighted a number of risks in respect of the capital invested into these products.*

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

*A particular frequent feature emerging of the type of structured notes invested into, involved the application of capital buffers and barriers. In this regard, the fact sheets of such products 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 percentage specified in the respective fact sheet, 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 specified percentage in the fall in value in the fact sheets sourced in the case of the Complainant was typically 50% of the initial value. The underlying asset to which the structured notes were linked typically comprised stocks or in some cases indices.*

*The said fact sheets further included a warning, on the lines of:*

*'If any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity'. (fn. 64 Example – Fact Sheet of the RBC US Large Cap Income Autocallable Notes – Issue 2 (A fol. 305)*

*Such features and warnings featured, in essence, in the fact sheets of similar structured notes.*

***It is accordingly clear that there were certain specific risks in various structured products invested into and there were material consequences if just one asset, out of a basket of assets to which the note was linked, fell foul of the indicated barrier. The implication of such a feature should have not been overlooked nor discounted. Given the particular features of the structured notes invested into, 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 fully quoted shares.***

*The Arbiter would also like to make reference to a particular communication presented in another separate case made against MPM which is relevant to the case in question. In this regard, it is particularly revealing to note the statements made by Trafalgar itself, in its email communication dated 17 September 2017 to CWM, **wherein MPM was in copy**, and which communication was presented in Case Number 185/2018 against MPM. (fn. 65 Decided today)*

*In the said case, MPM did not contest that such communication was untrue or did not exist, but only challenged the way in which the said email was obtained by the complainant. The email sent by Trafalgar's official inter alia stated the following:*

***'Structured Notes – It is my opinion we need to get as far away from these vehicles as possible. They have no place in an uneducated investor's portfolio and when they breach their barriers untold amounts of damage is done'. (fn. 66 Emphasis added by the Arbiter)***

*Such a statement indeed summarily highlighted the pertinent issues with respect to investments in structured notes which are relevant to the case in question.*

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

*As indicated above, the portfolio of investments in respect of the Complainant comprised 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 for the Complainant.*

*In addition, the said table indicates investments resulting in high exposures to the same single issuer/s, through cumulative purchases in products issued by the same issuer.*

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

***Hence, the maximum exposure limits to single counterparties should have been applied and ensured that they are adhered to across the board. The credit risk of the respective issuer was indeed still one of the risks highlighted in various fact sheets of structured products invested into.***

Portfolio not reflective of the MFSA rules

*The high exposure to structured products (as well as high exposure to single issuer in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio, jars with the regulatory requirements that applied to the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the 'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002', ('the Directives'), which applied from the Scheme's inception in 2011 until the registration of the Scheme under the RPA on 1 January 2016. The applicability and relevance of these conditions to the case in question was highlighted by MPM itself. (fn. 67 Para. 21 & 23 of the Note of Submissions filed by MPM in 2019)*

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

*SOC 2.7.2 in turn required the Scheme to ensure inter alia that, the assets of a scheme are 'invested in order to ensure the security, quality, liquidity and profitability of the*

portfolio as a whole', (fn. 68 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. 69 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. 70 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. 71 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. 72 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/or predominantly of structured products.

In the case of the Complainant it has also emerged that individual exposures to single issuers were at times even higher than 20%, this being the maximum limit applied in the Rules to diversified investment instruments, such as collective investment schemes whose performance was not materially impacted or determined by a single underlying asset. 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 various positions into high risk investments with the high risk being reflected in, for example, the high rate of return of over 7%, 8% p.a., and also 9% p.a. which featured in the name of a number of structured products invested into as indicated in the Complainant's portfolio. (fn. 73 'Doc. SB2' attached to MPM's Additional Submissions refers.)

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 at times solely/ predominantly invested in structured notes for a long period of time. It is unclear how a portfolio composition solely/ 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. 74 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. 75 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/predominantly of structured notes, constituted listed structured notes in respect of the Complainant. The fact sheets in respect of the structured notes forming*

*part of the Complainant's portfolio, actually indicated that the products in question were not listed on an exchange.*

*On its part the Service Provider did not prove either 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 much higher exposures (as will be indicated further below) to structured notes, a debt security, which were themselves 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. 76 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.*

*With reference to the Complainant's portfolio, it is noted that the structured notes invested into typically had a maturity or investment term of 1-2 years as evidenced in the product fact sheets. 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 fact sheets of the said unlisted structured products included reference to the possibility of a secondary market existing for such structured notes. In this regard, a buyer had to be found in the secondary market in case one wanted to redeem a holding into such structured note prior to its maturity.*

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

*There were indeed various risks highlighted in relation to the secondary market as amply reflected in the risk warnings emerging in the said fact sheets.*

*The said risk warnings highlighted the risks related to the availability of such market (as the secondary market had to be in the first place offered by the issuer), as well as the limitations of the said market. They also highlighted the lower price that could be sought on this market.*

***In this regard, there was the risk that the price of the structured note on the secondary market could be well below the initial capital invested.***

*For example, the notes issued by RBC typically included the risk disclaimer that:*

***‘Any secondary market provided by Royal Bank of Canada is subject to change and may be stopped without notice and investors may therefore be unable to sell or redeem the Notes until their maturity. If the Notes are redeemed early, they may be redeemed at a level less than the amount originally invested’.***

*Similar warnings feature in the fact sheets of structured notes issued by other issuers.*

*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, nor that the required prudence was being exercised with respect to the liquidity of the portfolio, when considering the above mentioned aspects and when keeping into context that the portfolio of investments that was allowed to develop within the Retirement Scheme was solely/predominantly invested in the said structured notes.***

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

***Investment Guidelines. This is particularly so with respect to the requirements applicable regarding the proper diversification, avoidance of excessive exposure and permitted maximum exposure to structured notes.***

*The 'Table of Investments' forming part of the 'Investor Profile' produced by MPM as part of its submissions indicates that over 90% of the policy value was invested in 10 structured notes in April 2015. Instances of high exposures (of over 20%) of the policy value at the time of purchase were made to single issuers such as Leonteq, EGM and Commerzbank respectively at the time of purchase of the said structured notes.*

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

*The specified maximum limit of 66% of the portfolio value in structured notes having underlying guarantees which featured in the 'Investment Guidelines' marked 2015 (fn. 77 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. 78 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. 79 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. 80 MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies) and mid-2017, (fn. 81 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%.*

**Indeed, the Arbiter considers that the high exposure to structured products and 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. 82 Emphasis in the mentioned guidelines added by the Arbiter)**

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

*It is particularly noted in this case that investments into structured notes were allowed to occur within the Complainant's portfolio in excess of the limits allowed on the maximum exposure to such products. MPM's Investment Guidelines of 2015*



*specifically mentioned a maximum limit of 66% of the portfolio value to 'products with underlying guarantee ... i.e. structured notes'.*

*In the case reviewed, the Service Provider allowed investments into structured products above the said percentage. Even if, for the sake of the argument, one had to consider all the structured products invested into as having underlying guarantees, (which had not been proven that it was the case for all of said products), (fn. 83 The RBC US Large Cap Income Autocallable Note for example, had no capital protection – A fol. 305) the percentage of over 90% of the policy value invested into structured notes starkly goes against the 66% maximum limit stipulated in the requirement that:*

*'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 ...'.*

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

*In the reply the Service Provider sent in relation to the Complainant's formal complainant, MPM stated that:*

***'In relation to investments, Momentum's role as a RSA and Trustee is to ensure the Scheme's investments are managed in accordance with relevant legislation and regulatory requirements, as well as in accordance with the Trust Deed and Rules and T&C'. (fn. 84 Section 1, 'Background'/'Overview of the Scheme' of MPM's Formal reply to the complainant in relation to the complaint)***

***For the reasons amply explained, the Arbiter has no comfort that the above has been truly achieved generally, and at all times, by MPM in respect of the Complainant's investment portfolio.***

*Portfolio invested into Structured Products **Targeted for Professional Investors***

*Besides the issues mentioned above, there is also the aspect relating to the nature of the structured products and whether the products allowed within the portfolio comprised structured notes aimed solely for professional investors.*

*The Service Provider has not claimed that the Complainant, whose occupation was indicated as 'Auto Entrepreneur', (fn. 85 Application Form for Membership) was a professional investor. No details have either emerged indicating the Complainant, not being a retail investor.*

*With respect to the Complainant's portfolio, the Complainant presented four relevant Fact Sheets and the OAFS also traced a Fact Sheet in respect of another structured product which featured in her portfolio. (fn. 86 Structured Notes with ISIN No: CH0266684593; CH0283709340; XS1211647281 and XS1193042451 (presented by the Complainant as attachments in her additional submissions) and XS1218203823 (where the fact sheet in respect of the latter was sourced from Case 130/2018 against MPM decided today)*

***The fact sheets in question specify that the products were targeted for professional investors only or in the case of the Leonteq structured note indicated for 'qualified investors' where no evidence was produced or emerged that this comprised the typical retail investor.***

*With respect to the structured product issued by RBC for example, the fact sheet clearly indicates that the investment was 'For Professional Investors Only' and 'not suitable for Retail distribution' with the 'Target Audience' for such product being specified as 'Professional Investors Only' as outlined in the 'Key Features' section of the fact sheet.*

*The Service Provider claimed that the references to 'Professional Investors only' in the Fact Sheets referred to the marketed documentation. This is however not really the case as explained above and it is clear that such fact sheets were issued purposely for those investors who were eligible to invest in the product. It is also clear that such products were not aimed for retail investors but only for professional investors. Indeed, the Service Provider presented no fact sheet of structured notes invested into which were targeted for retail investors.*

***It is therefore considered that in the Case of the Complainant's portfolio there is sufficient evidence resulting from multiple instances which show that her portfolio generally included investments not appropriate and suitable for a retail client. It is clear that there was a lack of consideration by the Service Provider with respect to the suitability and target investor of the structured notes.***

***Such lack of consideration is not reflective of the principle of acting with 'due skill, care and diligence' and 'in the best interests of' the member as the relevant laws and rules mentioned above obliged the Service Provider to do.***

*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.*

*The Service Provider's mere indication that it made in its submissions, that the respective portfolio was diversified through '10 structured notes very widely diversified across Sector, Industry and Region', (fn. 87 Doc. SB2 attached to the Additional Submissions) cannot reasonably provide, in itself, sufficient and adequate comfort on the level of diversification/adequacy of such investments.*

*Various other aspects cannot be ignored by the Service Provider. Such aspects include, but are not limited to:*

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

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

*Apart from the fact that no sensible rationale has emerged for limiting the composition of the pension portfolio solely/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 her risk profile.*

***In the circumstance where the portfolio of the Complainant was at times solely/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. 88 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. 89 SOC2.7.2(b) of Part B.2.7 of the Directives)**

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

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

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

#### **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.*

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

*It is also evidently clear that such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced. The actions*

***and inactions that occurred, as explained in this decision, enabled such losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.***

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

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

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

#### ***Final Remarks***

*As indicated earlier, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.*

*Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had clear duties to check and ensure that the portfolio composition recommended by the investment adviser 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 her pension.***

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

***For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly when it came to the dealings and aspects involving the appointed investment adviser and the oversight functions with respect to the Scheme and portfolio structure. 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 Service Provider failed to act with the prudence, diligence and attention of a bonus paterfamilias. (fn. 90 Cap. 331 of the Laws of Malta, Art. 21(1))***

***The Arbiter also considers that the Service Provider did not meet the 'reasonable and legitimate expectations' (fn. 91 Cap. 555, Article 19(3)(c)) of the Complainant who had placed her trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.***

#### ***Conclusion***

***For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case (fn. 92 Cap. 555, Article 19(3)(b)) and is accepting it in so far as it is compatible with this decision.***

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

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

### **Compensation**

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

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

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

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

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

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

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

***(i) For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Member's current investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled),***

***it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised) inclusive of any realised currency gains or losses. Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;***

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

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

***In case where any currency conversion/s is/are required for the purpose of (a) finally netting any realised profits/losses within the portfolio which remain denominated in different currencies, and/or***

***(b) crystallising any remaining currency positions initiated at the time of Continental Wealth Management, such conversion shall, if and where applicable, be made at the spot exchange rate sourced from the European Central Bank and prevailing on the date of this decision.***

***Such a direction on the currency conversion is only being given in the very particular circumstances of such cases for the purposes of providing clarity and enabling the calculation of the compensation formulated in this decision and avoid future unnecessary controversy.***

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

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



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

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

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

## **L-Appell**

6. Is-soċjetà appellanta ħasset ruġha aggravata bid-deċiżjoni appellata tal-Arbitru, u fis-17 ta' Awwissu, 2020 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka u tħassar id-deċiżjoni appellata billi tilqa' l-aggravji tagħha. Tgħid li l-aggravji tagħha huma s-segwent: (i) l-Arbitru applika u nterpreta ħażin il-liġi u r-regoli meta ddecieda li s-soċjetà appellanta naqset mid-dmirijiet tagħha fil-kwalità tagħha ta' *trustee* jew mod ieħor, iżda partikolmarment meta ddecieda fost affarijiet oħra li (a) hija kienet naqset għaliex ippermettiet lil CWM taġixxi bħala *investment adviser* tal-appellata; u (b) il-kompożizzjoni u s-superviżjoni tal-portafoll tal-appellata ma kienx skont il-liġijiet, regoli u linji gwida applikabbli; (ii) ma kienx jeżisti l-ebda ness kawżali u għalhekk l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet infondati; u (iii) l-Arbitru għamel apprezzament ħażin tal-fatti u tal-liġi meta ddecieda dwar il-prassi adottata minnha fir-rigward ta' verifikar ta' firem u dwar dak li kien mistenni mingħandha fir-rigward tal-mizati.

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

### **Konsiderazzjonijiet ta' din il-Qorti**

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

### **L-ewwel aggravju**

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

sabiex turi li CWM kienet liċenzjata tagħti pariri ta' investiment u tispjega kif din il-konklużjoni hija waħda difettuża f'żewġ aspetti. Hija tagħmel riferiment għal dak li xehed Stewart Davies fl-affidavit tiegħu fejn dan stqarr li ma kien hemm l-ebda liġi jew regola dak iż-żmien li kienet titlob li s-soċjetà appellanta tagħmel eżerċizzju ta' *due diligence* jew li tassigura li CWM kienet liċenzjata, u dan fejn wara kollox kienet proprju l-appellata li volontarjament ħatret lil CWM bħala l-konsulent finanzjarju tagħha. Izda is-soċjetà appellanta tgħid li l-Arbitru fid-deċiżjoni appellata tiegħu, mar lil hinn mill-punt kruċjali u straħ fuq obbligu ġenerali ta' *trustee* li jaġixxi fl-aħjar interess tal-benefiċjarji sabiex wasal għall-konklużjoni tiegħu. Tirrileva li hu saħansitra għamel interpretazzjoni tassew wiesgħa ta' dak li kienet tipprovdi l-formola tal-Applikazzjoni għal Sħubija. Filwaqt li tiddikjara li hija ma kinitx qiegħda 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-appellata innifisha. Tikkontendi li kieku l-obbligu kien diġà jeżisti qabel mal-MFSA bidlet ir-regolamenti applikabbli fl-2019, ma kienx ikun hemm proprju l-ħtieġa li ssir il-bidla. Dwar it-tieni parti ta' dan l-ewwel aggravju tas-soċjetà appellanta, tissottometti li d-deċiżjoni appellata hija msejsa fuq il-konklużjoni li kien hemm "*excessive exposure to structured products and to single issuers*", sabiex b'hekk il-portafoll ma kienx jirrifletti r-regoli tal-MFSA u l-*investment guidelines* tagħha stess, u ma kienx hemm diversifikazzjoni xierqa jew "*prudent approach*". Għalhekk l-Arbitru ddecieda 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 ukoll kien naqas milli jieħu in konsiderazzjoni l-profil ta' riskju tal-appellata u jevalwa r-riskju individwali skont il-kompożizzjoni tal-portafoll sħiħ. Filwaqt li tirrileva li hija ssottomettiet l-informazzjoni kollha dwar il-portafoll tal-appellata, anki l-profil ta' riskju tagħha 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 tirrileva hawn li l-MFSA dejjem kienet tippermetti investiment f'dawn il-prodotti, kif kienu wkoll il-linji gwida tagħha, u l-investment għalhekk qatt ma kien ipprojbit iżda kellu jsir fil-parametri permissibbli. Tirrileva mbagħad li kull investiment fih element ta' riskju inerenti, u dan filwaqt li taċċetta li hija kienet obbligata li tassigura li l-portafoll kien f'kull mument fil-parametri tal-profil ta' riskju tal-membru u anki tal-linji gwidi u tar-regoli applikabbli. Filwaqt li tiċċita dak li jirrileva l-Arbitru fir-rigward ta' prodotti strutturati, tgħid li kuntrarjament għal dak li jgħid, il-profil kien juri li l-linji gwida applikabbli kienu ġew osservati meta sar in-negozju, inkluż l-espożizzjoni għall-imsemmija prodotti strutturati u għal emittenti singolari. Tikkontendi li l-Arbitru jagħmel biss riferiment għall-profil li hija kienet ipprezentat fir-rigward tal-allegata espożizzjoni żejda għal prodotti strutturati. Tispjega b'riferiment għal dak li qal l-Arbitru fejn osserva li matul is-snin hija kienet naqset il-limitu permissibbli ta' 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 dinamici. 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 "jars", u lanqas kif wasal għall-konklużjoni li "...the high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio jarred with the regulatory requirements that applied to the Retirement Scheme at the time...". Tgħid li l-Arbitru applika ħażin l-iStandard 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-kuncett ta' diversifikazzjoni fil-livell tal-membru u mhux tal-iskema biss, iżda l-bidla saret biss wara l-2017. Għalhekk peress li l-obbligu ma kienx jeżisti, l-Arbitru ma setax jgħid li hija kellha xi obbligu li tapplika l-prinċipji fil-livell tal-membru. Minn hawn is-soċjetà appellanta tgħaddi sabiex tagħmel is-sottomissjonijiet tagħha fejn hija kienet qiegħda ssostni li l-Arbitru ddecieda ħażin fir-rigward tal-linji gwida dwar l-investment tagħha stess. Filwaqt li tagħmel riferiment għall-affidavit ta' Stewart Davies fuq imsemmi, tikkontendi li dawn huma intiżi sabiex iservu ta' gwida iżda fl-istess ħin iżommu livell ta' flessibilità li jirrikjedi kull każ partikolari, u għalhekk m'għandhomx jigu applikati b'mod tassattiv. Tinsisti li m'hemmx 'one size fits all' fl-applikazzjoni ta' dawn il-linji gwida. Min-naħa tagħha hija kienet ipprezentat il-profil tal-appellata, iżda xorta waħda l-Arbitru ddecieda li hija ma kinitx ressqet evidenza sabiex turi b'mod sodisfaċenti li l-investimenti saru skont il-linji gwida in kwistjoni. Tirrileva li r-regola ġenerali hija li min jallega għandu l-oneru tal-prova, u għalhekk hawn l-appellata kellha l-obbligu li ssostni l-ilment tagħha, u dan filwaqt li tikkontendi li hija fil-fatt kienet gabet prova sodisfaċenti

sabiex turi li l-linji gwida kienu ġew osservati. Is-soċjetà appellanta tgħid li l-Arbitru mbagħad żbalja wkoll meta skarta l-prova tagħha anki meta din ma kinitx ġiet ikkontestata mill-appellata. Tgħid li l-Arbitru għażel żewġ eżempji sabiex jispjega kif hija ma kinitx applikat il-linji gwida tagħha stess. Dwar l-ewwel wieħed li kien li l-investment 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 rinfaccjata b'decizjoni li qatt ma kellha l-opportunità li tikkontestaha. Anki hi ma kinitx taf minn fejn l-Arbitru kien sab l-informazzjoni jew liema kienu l-*fact sheets* li huwa kkonsulta, u dan kien ipogġiha f'pożizzjoni fejn ma setgħetx tikkontesta l-pożizzjoni meħuda minnu. 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, kien fil-fatt '*listed*' jew fuq l-elenku u għalhekk setgħu jiġu negozjati fi swieq li jiffacilitaw u li jiġġestixxu n-negozju fi strumenti finanzjarji. Għalhekk, tkompli tgħid, il-konklużjoni tal-Arbitru li l-linja gwida ma kinitx ġiet osservata fil-kompożizzjoni tal-portafoll, kienet tassew żbaljata. It-tieni eżempju meħud mill-linji gwida, kien jirrigwarda l-konklużjoni tal-Arbitru li huwa ma kienx konvint li l-kondizzjonijiet ta' likwidità kienu qed jiġu osservati adegwatament. Tikkontendi li hija kellha tinstab responsabbli mhux fuq sempliċi nuqqas ta' konvinzjoni u mingħajr ma tingħata raġuni għal tali konvinzjoni. Fil-mertu, tgħid li l-Arbitru huwa żbaljat għaliex il-prodott kien '*realisable*' fl-intier tiegħu f'kull stadju u li s-suq għall-prodott kien pprovdut minn min kien ħareġ in-nota, għaliex dan kien jixtri lura dik in-nota. Ir-raba' punt li tqajjem is-soċjetà appellanta huwa li l-Arbitru naqas milli jikkonsidra l-profil ta' riskju tal-

investitur. Tgħid li skont l-appellata, l-investimenti ma kienux skont il-profil ta' riskju tagħha u hi min-naħa tagħha kienet ikkontestat din l-allegazzjoni. Filwaqt li għal darb'ohra tagħmel riferiment għall-affidavit ta' Stewart Davies, issostni li l-profil ta' riskju kien għaliha jagħmel parti ntegrali mill-konsiderazzjonijiet tagħha bħala Amministratur, u li kieku dan ma kienx il-każ, ma kinitx tistaqsi għalih fil-formola tal-applikazzjoni tagħha stess. Dan filwaqt li tirrileva li x-xhieda ta' Stewart Davies ma kinitx giet ikkontestata, u għalhekk l-Arbitru kellu jistrieħ fuqha.

### *It-tieni aqgravju*

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

### L-aqgravji l-oħra

Is-soċjetà appellanta tiddikjara li għalkemm l-Arbitru jidentifika żewġ “*principal alleged failures*” fil-konfront tagħha, l-allegata falsifikazzjoni ta’ firem ma kinitx waħda minnhom. Tgħid li huwa ddecieda li l-appellata ma kinitx ressqet biżżejjed provi fir-rigward, b’dana li xorta waħda ħass li kellu jagħmel il-kummenti tiegħu dwar il-prassi addottata minnha fir-rigward ta’ verifikar ta’ firem, liema kummenti hija ssostni li ma kienux korretti. L-istess fir-rigward tal-mizati li l-appellata allegat ma kienux ġew żvelati jew spjegati u/jew li kienu għoljin fejn hawn ukoll l-Arbitru ma laqgħax tali allegazzjoni.

10. L-appellata tilqa’ billi tikkontendi li għaladarba hija kienet tikkwalifika bħala ‘*retail client*’, jiġifieri hija ma kinitx investitur professjonali, kien mistenni aktar diligenza min-naħa tas-soċjetà appellanta. Tgħid li kif sewwa osserva l-Arbitru fid-deċiżjoni appellata, għalkemm is-soċjetà appellanta ma ndaħlitx fl-għażla tagħha tal-konsulent finanzjarju, hija kellha ftehim ma’ CWM fejn kienet aċċettat li tintroduci lil din tal-aħħar mal-membri bħala konsulent finanzjarju, u saħansitra kienet imnizzla fl-applikazzjoni tas-soċjetà appellanta. B’hekk il-klijent seta’ kien influwenzat biex jagħżel lil CWM bħala konsulent finanzjarju tiegħu, u tgħid li f’każ ta’ *retail client* aktar kien hemm iċ-ċans li dan jistrieħ fuq ir-rakkomandazzjonijiet mogħtija mis-soċjetà appellanta. Izda bħala *Trustee* u Amministratur tal-Iskema tal-Irtirar, l-appellata tgħid li l-obbligi bażiċi tas-soċjetà appellanta kienu jirrikjedu wkoll diligenza u prudenza fil-ftehim li għamlet ma’ CWM. Izda mill-applikazzjoni stess kien jirrizulta li s-soċjetà appellanta kienet aċċettat u anki ħalliet informazzjoni ineżatta dwar il-konsulent finanzjarju. Tgħid li l-Arbitru anki dwar dan kien irrileva l-punt. L-



appellata irrileva li hemm dubbji dwar x'kienu r-riċerki li saru dwar CWM u Trafalgar, għaliex għalkemm fl-applikazzjoni kien hemm miktub li CWM kienet entità regolata, hija ma ressqet l-ebda prova dwar dan. L-Arbitru dan kollu wkoll ikkostatah fid-deċiżjoni appellata, u sab ukoll illi fl-applikazzjoni ma kienx ċar dwar min fil-fatt kellu r-rwol ta' konsulent finanzjarju, u ma kien hemm l-ebda indikazzjoni jew spjegazzjoni dwar id-differenza bejn it-termini *'Professional Adviser'* u *'Investment Adviser'*. Hawn l-appellata tiċċita is-subartikolu 1(2) tal-Att dwar *Trusts* u *Trustees* jew Kap. 331 tal-Liġijiet ta' Malta, u anki l-para. (ċ) tas-subartikolu 43(6) u l-artikolu 21 tal-istess liġi. Hija tagħmel ukoll riferiment għal pubblikazzjoni tal-MFSA u tiċċita silta minnha, liema dokument tgħid li kien għie ppubblikat fl-2017, iżda kien jittratta prinċipji generali tal-Kap. 331 u tal-Kodiċi Ċivili li kienu diġà fis-sehħ qabel dik is-sena. Għalhekk tiċċita ukoll l-*Investment Guidelines* ta' Jannar 2013. Imbagħad tagħmel riferiment għall-para. 3.1 tas-sezzjoni ntestata *'Terms and Conditions'* fil-formola tal-Applikazzjoni għas-Sħubija tal-Iskema u ssostni li minkejja li s-soċjetà appellanta kellha d-dettalji tat-transazzjonijiet kollha u anki tal-portafoll sħiħ, hija naqset fl-obbligu ta' rapportaġġ u saħansitra ma ressqet l-ebda prova dwar dan. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru dwar il-kompożizzjoni tal-portafoll tagħha, l-appellata tikkontendi li kien irrizulta 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. Tagħmel ukoll riferiment għal *email* ta' Trafalgar lil CWM mibgħuta fis-17 ta' Settembru, 2017 li saħansitra giet ikkuppjata lis-soċjetà appellata, fejn l-istess Trafalgar uriet it-tħassib tagħha dwar l-investment *f'structured notes*. Għal dak li jirrigwarda l-argument tas-soċjetà appellanta

dwar l-*Standard Operational Conditions* 2.7.1 u 2.7.2, hija tibda billi tiċċita l-istess, u anki dak li qal l-Arbitru fir-rigward, filwaqt li tissottometti li s-soċjetà appellanta ma kinitx ħielsa milli tosserva l-obbligi tagħha fil-livell individwali għaliex l-Iskema kienet tirrifletti l-investimenti u l-portafolli individwali. Dwar l-argument tas-soċjetà appellanta li l-Arbitru kien applika u ddecieda ħażin fir-rigward tal-linji gwida magħmulin minnha stess, tirrileva li huwa diffiċli li wieħed jikkontendi għas-soċjetà appellanta li dawn ma kellhomx japplikaw b'mod rigoruż, u li hija setgħet tagħzel li ma ssegwihomx. Filwaqt li tagħmel riferiment għal dak li kienu jipprovdu dwar il-massimu ta' assi li setgħu jinżammu b'likwidità ta' iktar minn 6 xhur jew inqas, tirrileva 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. Tirrileva li kif gie 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. Tkompli fuq il-kwistjoni li l-prodotti strutturati kienu mmirati lejn investituri professjonali, u tiċċita dak li qal l-Arbitru dwar l-investigazzjoni li saret għall-verifika ta' dan il-punt u l-konklużjoni tiegħu. Tissottometti dwar l-ilment tas-soċjetà appellanta fir-rigward tal-investigazzjoni li kien wettaq l-Arbitru, li dan kellu kull dritt li jagħmel riċerka li qies bżonnjuża, u hawn hija tagħmel riferiment għall-artikolu 25 tal-Kap. 555. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru li s-soċjetà appellanta ma kinitx toffri informazzjoni adegwata lill-membri tal-Iskema, tgħid li l-Arbitru tajjeb osserva li ma kien hemm l-ebda raġuni għalfejn is-soċjetà appellanta naqset. Tgħid li l-argument tas-soċjetà appellanta li hija ma kellha l-ebda obbligu speċifiku għaliex id-Direttivi jitkellmu dwar l-Iskema, ma

jregix 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' provvedimenti partikolari tal-liġi.

11. Qabel xejn din il-Qorti ser tindirizza s-sottomissjonijiet magħmulin mis-soċjetà appellanta fil-parti E tar-rikors tal-appell tagħha. F'din il-parti hija qiegħda tqajjem il-kwistjoni dwar l-allegati firem foloz tal-appellata u dwar il-mizati lmentati mill-appellata, imma din il-Qorti tgħid li għaladarba, kif tirrileva s-soċjetà appellanta stess, l-Arbitru m'acċettax l-allegazzjonijiet rispettivi tal-appellata, hija qiegħda tastjeni milli tiegħu konjizzjoni ulterjuri ta' dawn l-aħħar aggravji.

12. Għal dak li jirrigwarda l-aggravji l-oħra tas-soċjetà appellanta, il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. Huwa jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġjonevoli fiċ-ċirkostanzi partikolari, u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad, wara li huwa għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellata mill-Applikazzjoni għas-Sħubija tal-Iskema<sup>1</sup>, innota li ma kienx ġie ndikat jew ippruvat li l-appellata hija investitur professjonali u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti tgħid li dawn kollha huma korretti u f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

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<sup>1</sup> Ara a fol. 185 et seq.

13. Wara li spjega l-qafas legali li kien jirregola l-Iskema u anki lis-soċjetà appellanta, l-Arbitru rrileva li tali Skema kienet tikkonsisti f'*trust* b'domicilju hawn Malta u kif awtorizzata mill-MFSA bħala *Retirement Scheme* f'April 2011 taħt l-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar) u f'Jannar 2016 taħt l-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta). Osserva li l-fondi kollha miżmuma fil-kont tal-appellata fl-Iskema kienu ġew utilizzati fix-xiri ta' polza ta' assikurazzjoni fuq il-ħajja bl-isem *European Executive Investment Bond* maħruġa minn *Old Mutual International* jew OMI. Imbagħad il-*premium* kien ġie nvestit f'portafoll ta' diversi prodotti taħt id-direzzjoni tal-konsulent finanzjarju aċċettat mis-soċjetà appellanta. Qal li bosta minn dawk il-prodotti kienu jikkonsistu f'noti strutturati, kif indikat fl-*Investor Profile* ipprezentat mis-soċjetà appellanta stess waqt il-proċeduri, minn fejn jispjega ukoll li kien jirrizulta telf ta' EUR167,595 fid-data tal-1 ta' Jannar, 2018, fejn però ma kienux ittieħdu in konsiderazzjoni d-drittijiet. Għalhekk qal li t-telf fil-fatt kien akbar meħudin in konsiderazzjoni d-drittijiet imħallsa. Osserva wkoll li s-soċjetà appellanta ma spjegatx jekk it-telf kienx dak attwalment soffert.

14. L-Arbitru kkonsidra li CWM kienet il-konsulent finanzjarju kif maħtura mill-appellata sabiex tagħtiha parir dwar l-assi miżmuma fl-Iskema. Irrileva li s-soċjetà appellanta fl-avviż li bagħtet lill-appellata f'Ottubru 2017, kienet iddeskriviet lil CWM bħala '*an authorised representative/agent of Trafalgar International GMBH*'<sup>2</sup>, fejn CWM kienet '*authorised representative in Spain and France*' ta' Trafalgar, u dan filwaqt li għamel ukoll riferiment għar-risposta tal-imsemmija soċjetà appellanta u għas-sottomissjonijiet tagħha, fejn terġa'

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<sup>2</sup> A fol. 130.

tirrileva dan il-fatt. Irrileva wkoll li s-soċjetà appellanta kienet issottomettiet li CWM kienet agent ta' Trafalgar, u kienet qiegħda topera taħt il-liċenzji ta' din tal-aħħar, li kienet liċenzjata u regolata permezz ta' Deutsche Industrie Handelskammer (IHK) ġewwa l-Ġermanja.

15. Filwaqt li l-Arbitru osserva li l-investimenti magħmulin taħt il-polza ta' assikurazzjoni tal-ħajja tal-appellata kienu ndikati fl-elenku tat-transazzjonijiet esebit mis-soċjetà appellanta stess, qal li mill-istess elenku kien jirrizulta li l-investimenti f'noti strutturati kienu sostanzjali, u saħansitra kien hemm żmien fejn il-portafoll kien magħmul biss jew l-aktar mill-imsemmija noti strutturati matul iż-żmien li CWM kienet il-konsulent finanzjarju.

16. L-Arbitru mbagħad għadda sabiex ikkonsidra li s-soċjetà appellanta bħala *Trustee* u Amministratrici tal-Iskema, kienet sogġetta għall-obbligi, funzjonijiet u responsabbiltajiet applikabbli, kemm dawk legali u anki dawk li kienu stipulati fiċ-Ċertifikat ta' Registrazzjoni tagħha kif maħruġ mill-MFSA fit-28 ta' April, 2011 li jagħmel riferiment għall-*Standard Operational Conditions* [minn issa 'l quddiem "SOC"] tad-Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002 [minn issa 'l quddiem 'id-Direttivi']. Huwa hawn għamel riferiment għall-Att li Jirregola Fondi Speċjali li ġie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar u għar-regoli magħmula taħthom, li għalihom ġiet sogġetta s-soċjetà appellanta mal-ħruġ taċ-Ċertifikat ta' Registrazzjoni tal-1 ta' Jannar, 2016 taħt il-Kap. 514. Sostna li wieħed mill-obbligi ewlenija tagħha bħala Amministratur tal-Iskema skont il-Kap. 450 u l-Kap. 514, kien proprju li taġixxi fl-aħjar interessi tal-Iskema. Il-Qorti hawn iżżid tgħid li m'hemmx dubju li s-soċjetà

appellanta kellha obbligi daqstant ċari hawn li timxi fl-aħjar interess tal-Iskema, anki stante l-applikabbiltà fil-konfront tagħha tad-dispożizzjonijiet tal-Att dwar Pensjonijiet għall-Irtirar, li gie fis-seħħ fis-sena 2015.

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

18. Izda l-Arbitru ma waqafx hawn għaliex ikkonsidra wkoll il-kariga tagħha bħala *Trustee*, u rrileva li hawn kienu applikabbli l-provvedimenti tal-Att dwar *Trusts* u *Trustees* (Kap. 331), li l-Qorti tirrileva li kien gie 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 saħansitra tenuta tamministra l-Iskema u l-assi tagħha skont diligenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa ċċita l-pubblikazzjoni [An Introduction to Maltese Financial Services Law](#)<sup>3</sup> u anki silta mill-pubblikazzjoni riċenti tal-MFSA

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<sup>3</sup> Ed. Max Ganado.

tas-sena 2017 fejn din ittrattat principji diġa' stabbiliti qabel dik id-data permezz tal-Att dwar *Trusts* u *Trustees* u anki permezz tal-Kodiċi Ċivili.

19. L-Arbitru mbagħad aċċenna fuq obbligu ieħor tas-soċjetà appellanta li huwa qies 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<sup>4</sup> fejn dan aċċetta li s-soċjetà appellanta fl-aħħar mill-aħħar kellha s-setgħa li tiddeċiedi jekk l-investment għandux isir, iżda meta kkonsidrat il-portafoll sħiħ, tali investment kien jassigura livell adegwat ta' diversifikazzjoni u kien jirrifletti l-attitudni ta' riskju tal-membri u tal-linji gwidi ta' dak iż-żmien. Dan kollu kif imfisser tgħid il-Qorti, jagħmel ċar li s-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-membri individwali tal-Iskema u taġixxi skont il-każ. L-Arbitru osserva li x-xhieda ta' Stewart Davies kienet saħansitra riflessa fil-Formola tal-Applikazzjoni għal Sħubija ffirmata mill-appellata.<sup>5</sup> Qal li l-MFSA kienet ukoll tqis il-funzjoni ta' sorveljanza bħala obbligu mportanti tal-Amministratur tal-Iskema u huwa ċċita siltiet mill-*Consultation Document* tagħha maħruġ fis-16 ta' Novembru, 2018 filwaqt li nsista li l-istqarrijiet hemm magħmula kienu applikabbli wkoll għaž-żmien li fih sar l-investment in kwistjoni. Għamel ukoll riferiment għall-*Investment Guidelines* li saru 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.

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<sup>4</sup> A fol. 345 para. 17, fol. 348 para. 31 u para. 33.

<sup>5</sup> *Ibid.*

20. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju ż-żewġ punti li fuqhom huwa msejjes l-ewwel aggravju tas-soċjetà appellanta. Huwa aċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi bħal CWM. L-Arbitru ddikjara li kien tal-fehma, kif inhi din il-Qorti, li s-soċjetà appellanta bħala Amministratur ta' Skema għall-Irtirar u *Trustee* kellha ċerti obbligi importanti li setgħu jkollhom rilevanza sostanzjali fuq l-operat u l-attivitajiet tal-Iskema u li jaffettwaw direttament jew indirettament l-andament tagħha. Kien għalhekk li kellu jiġi investigat jekk is-soċjetà appellanta naqset mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura safejn dan kellu effett fuq l-andament tal-Iskema u r-rizultanti telf tal-appellata.

21. L-Arbitru osserva li l-appellata kienet għażlet hija stess li taħtar lil CWM sabiex din tipprovdha b'pariri dwar l-investimenti formanti parti mill-portafoll tagħha fl-Iskema, u min-naħa tagħha s-soċjetà appellanta aċċettat u/jew ħalliet il-konsulent joffri l-parir tiegħu lill-appellata. Osserva li s-soċjetà appellanta saħansitra kellha *introducer agreement* ma' CWM. L-ewwel punt li rrileva hawn hu li s-soċjetà appellanta ppermettiet li l-Formola ta' Applikazzjoni għal Sħubija tħaddan informazzjoni mhux sħiħa u preċiża fir-rigward tal-konsulent finanzjarju, u spjega dawn x'kienu. Jirrileva li fir-rwol tagħha ta' *trustee* u *bonus paterfamilias*, hija kienet tenuta tigbed l-attenzjoni tal-appellata għal dawn in-nuqqasijiet, u qal li fl-aħħar mill-aħħar hija kellha l-prerogattiva li taċċetta jew l-applikazzjoni, lill-konsulent finanzjarju u anki l-persuna ma' min kienet ser tinnegozja. Osserva li fl-Aplikazzjoni għal Sħubija, minflok Continental Wealth Management kien hemm indikat Continental Wealth Trust fir-rigward tal-



konsulent finanzjarju, u li din kellha indirizz registrat ġewwa Spanja fejn Global Net kienet ir-regolatur, b'dana li ma kien hemm l-ebda informazzjoni taħt il-kap '*Licence Number*'. L-Arbitru hawn ikkonsidra li r-riferiment għal Global Net bħala r-regolatur ma kinitx tajba, u saħansitra kienet qarrieqa għaliex is-soċjetà appellanta stess spjegat li din kienet kumpanija mhux regolata li kienet assoċjata ma' Trafalgar. Osserva li l-ebda prova ma tressqet li kienet turi li CWM kienet fil-fatt regolata, u filwaqt li l-Qorti tikkondividi l-fehma tiegħu, tgħid ukoll li f'dan il-kuntest għalhekk hija irrilevanti s-sottomissjoni tas-soċjetà appellanta fir-rigward tal-kummenti tal-Arbitru dwar l-applikazzjoni tal-MiFID I Directive aktar 'il isfel fid-deċiżjoni appellata.

22. It-tieni punt li qajjem l-Arbitru jirrigwarda n-nuqqas ta' kjaressa fil-Formola ta' Sħubija fir-rigward tal-kapaċità li fiha kienet qegħda taġixxi CWM. Il-Qorti hawn iżżid tgħid li s-soċjetà appellanta tonqos li tikkonvinci lil din il-Qorti kif dan seta' ma kienx minnu, anki permezz tas-sottomissjonijiet ulterjuri magħmulin fl-Anness I tar-rikors tal-appell tagħha. Imbagħad it-tielet punt tiegħu jirrigwarda l-kwistjoni li ma kienx hemm distinzjoni ċara bejn CWM u Trafalgar, u ma kienx jirriżulta b'mod inekwivoku jekk CWM kinitx qegħda taġixxi bħala agent in rappreżentanza ta' ditta oħra, meta dan kellu jkun rifless b'mod ċar fid-dokumentazzjoni kollha. Fir-raba' punt tiegħu, l-Arbitru stqarr li ma rriżultat l-ebda evidenza li kienet turi jekk CWM kienet entità regolata. Hawn huwa għamel riferiment għal żewġ deċiżjonijiet oħra tiegħu fejn huwa kien ikkonstata korrispondenza li kienet turi li kienu saru ċertu mistoqsijiet dwar CWM minn IHK, fejn kien saħansitra jirriżulta li CWM ma kinitx qegħda topera taħt il-liċenzji maħruġa lil Trafalgar. Izda min-naħa tagħha qal li s-soċjetà

appellanta ma pproduċiet l-ebda evidenza dwar dak allegat minnha fir-rigward tal-awtorizzazzjoni ta' CWM.

23. 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 težiġi l-ħatra ta' konsulent regolat, l-Arbitru sostna li xorta waħda kien mistenni li l-Amministratur u t-*Trustee* jeżegwixxu l-obbligu tagħhom ta' kura u diligenza professjonali bħal fil-każ ta' *bonus paterfamilias*. L-Arbitru hawn sostna li l-ħatra ta' entità li ma kinitx regolata sabiex isservi ta' konsulent, kienet tfigger li l-appellata kienet tgawdi minn inqas protezzjoni, u s-soċjetà appellanta kienet tenuta tkun konnoxxenti ta' dan il-fatt u li tassigura li l-appellata jkollha l-informazzjoni korretta u adegwata dwar il-konsulent. Qal li mhux biss is-soċjetà appellanta naqset milli tindirizza l-kwistjoni li l-konsulent ma kienx regolat, iżda wkoll hija bl-ebda mod ma qajmet dubju dwar informazzjoni importanti fir-rigward ta' diversi aspetti oħra konċernanti CWM. L-Arbitru rrileva li l-ftehim eżistenti bejn is-soċjetà appellanta u CWM, li diġà sar riferiment għalih aktar 'il fuq f'din is-sentenza, qajjem potenzjal ta' kunflitt ta' interess fejn l-entità li kienet soġġetta għas-sorveljanza partikolari mis-soċjetà appellanta, fl-istess ħin kienet qegħda tgħaddilha n-negozju. Il-Qorti ma tistax ma tikkondividiex din il-fehma u tikkonsidra ċertament minn dak kollu li s'issa ġie rilevat u kkonsidrat, li l-kariga tas-soċjetà appellanta ma setgħetx tkun dik ta' amministrazzjoni sempliċi u bażika meħud kont li hi saħansitra kienet ukoll *Trustee* tal-Iskema.

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

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

26. L-Arbitru mbagħad għadda sabiex irrileva x'kienu dawk ir-riskji li sar aċċenn fuqhom *fil-fact sheets*, fost oħrajn ir-riskju tal-kreditu ta' min kien qed joħroghom u anki ir-riskju tal-likwidità, u twissijiet li n-noti ma kellhomx il-kapital protett. Kollox tgħid il-Qorti ferm indikattiv tal-fatt li l-investment fin-noti strutturati ma kienx wieħed kompatibbli mal-informazzjoni dwar l-appellata. 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' percentwal. 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. Hawn l-Arbitru jagħmel

riferiment għal komunikazzjoni partikolari li kienet ġiet ipprezentata f'każ separat nru. 185/2018 li kien sar kontra s-soċjetà appellanta kif deciż dakinhar stess, u li kienet rilevanti għall-każ odjern. Irrileva li d-dikjarazzjonijiet magħmulin f'*email* tagħha tas-17 ta' Settembru, 2017 li Trafalgar kienet bagħtet lil CWM iżda wkoll ikkuppjata lis-soċjetà appellanta, ma kienux ġew ikkontestati minn din tal-aħħar. Fosthom kien hemm miktub mill-istess Trafalgar li *"Structured Notes – It is my opinion we need to get as far away from these vehicles as possible. They have no place in an uneducated investor's portfolio and when they breach their barriers untold amounts of damage is done"*. Il-Qorti tgħid li ċertament hija ma tistax twarrab legġerment prova daqstant ċara kontra l-investment f'noti strutturati.

27. Imbagħad 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 nextraw prodotti permezz ta' transazzjoni waħedha 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.

28. L-Arbitru minn hawn għadda sabiex iddikjara li l-espożizzjoni qawwija għal prodotti strutturati u għal emittent singolari li tħalliet issir mis-soċjetà appellanta, ma kinitx tirrispetta r-rekwiżiti regolatorji applikabbli għall-Iskema dak iż-żmien, u huwa jagħmel riferiment partikolari għal SOC 2.7.1 u 2.7.2 li kienu applikabbli sa mill-bidunett meta nħolqot l-Iskema fis-sena 2011, sad-data

li din ġiet registrata fl-1 ta' Jannar, 2016 taht il-Kap. 514. Qal li s-soċjetà appellanta stess kienet għamlet aċċenn dwar l-applikabbiltà u r-rilevanza ta' dawn il-kondizzjonijiet għall-każ odjern. L-Arbitru ċċita partijiet minn dawn id-Direttivi u rrileva li minkejja li SOC 2.7.2 kien jeżiġi ċertu livell, is-soċjetà appellanta kienet ippermettiet li l-portafoll tal-appellata xi kultant ikun magħmul biss jew fil-parti l-kbira tiegħu minn prodotti strutturati. Barra minn hekk l-espożizzjoni għal emittent waħdieni kien f'xi drabi viċin il-massimu ta' 20% stabbilit mir-regoli għal investimenti aktar siguri bħal depożiti. 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 kienu indikazzjoni tar-riskju għoli tal-prodotti. Is-soċjetà appellanta tittenta targumenta quddiem din il-Qorti li r-regoli suriferiti jolqtu biss l-Iskema, iżda mhux il-portafoll tal-membru ndividwali, iżda l-Qorti mhijiex tal-istess fehma u għaldaqstant mhijiex qegħda tilqa' dan l-argument. Tgħid li huwa daqstant ċar mid-dicitura 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-kumplement tal-iskema.

29. L-Arbitru mbagħad jaqbad, iżda din id-darba b'mod aktar fil-fond, il-kwistjoni li l-portafoll saħansitra ma kienx jirrifletti l-*Investment Guidelines* tas-soċjetà appellanta. Filwaqt li ha konjizzjoni tal-imsemmija linji gwida għas-snin 2013 sa 2018, li s-soċjetà appellanta annettiet mas-sottomissjonijiet tagħha, irrileva li hija ma kinitx irnexxielha turi b'mod adegwat li dawn kienu ġew

applikati fir-rigward tal-investimenti in kwistjoni. Qal li l-portafoll tal-appellata kien f'xi waqtiet kompost l-aktar jew saħansitra biss min-noti strutturati għal perijodu twil ta' żmien.

30. Wara dawn l-osservazzjonijiet, l-Arbitru għadda sabiex ittratta żewġ istanzi fejn il-kompożizzjoni tal-portafoll ma kienx irrispetta l-linji gwida. L-ewwel rekwizit li kkonsidra huwa li l-assi kellhom jiġu investiti l-aktar fi swieq regolati. Wara li ta t-tifsira tal-frazi '*predominantly invested in regulated markets*' kif din kienet tidher fil-linji gwida, sostna li ma giet sottomessa l-ebda evidenza li kienet turi li l-portafoll kien magħmul kollu kemm hu jew l-aktar min-noti strutturati elenkati. Is-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 qegħda tittenta tagħmel is-soċjetà appellanta huwa li tilgħab bil-kliem. Huwa daqstant ċar mid-deċiżjoni appellata li l-Arbitru qies li suq regolat f'dan il-każ kien '*regulated exchange venue*' fejn il-prodott jista' jiġi negozjat u mhux l-emittent tal-imsemmi prodott. L-Arbitru mbagħad esprima 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 għoli f'noti strutturati li kienu garanzija ta' debitu u li s-soltu ma kienux elenkati.

31. It-tieni rekwizit li jittratta l-Arbitru huwa l-likwidità tal-portafoll. Wara li osserva li l-linji gwida ta' Jannar 2013 u għal nofs is-sena 2014 kienu jirrikjedu li mhux aktar minn 40% tal-fond jew tal-portafoll tal-membri kellu jiġi nvestit

f'assi li kellhom likwidità ta' aktar minn 6 xhur, osserva wkoll li aktar tard fis-snin 2015 sa 2018 it-terminu tnaqqas għal bejn tlieta u sitt xhur. Irrileva li kien jirrizulta li n-noti strutturati fejn sar l-investment tal-portafoll kellhom terminu twil ta' maturità ta' bejn sena u sentejn, kif muri fil-*fact sheets* relattivi. Osserva li l-possibilità ta' suq sekondarju fir-rigward ta' noti strutturati ma kinitx tiggarrantixxi assikurazzjoni adegwata ta' likwidità, u aċċenna fuq il-valuri aktar baxxi li dan is-suq kien joffri tant li l-istess valuri kellhom effett fuq l-iskema sħiħa kif irrizulta mir-rendikonti annwali maħruġa lill-membri mis-soċjetà appellanta. Huwa hawn għamel riferiment ukoll għat-twissija fir-rigward tal-RBC Investment, u qal li twissijiet simili setgħu jinstabu f'*fact sheets* oħra.

32. 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 saħansitra emendat il-linji gwida tagħha sabiex naqset l-espożizzjoni għal noti strutturati u l-emittenti tagħhom, iżda osserva li dawn ma ġewx segwiti fil-każ tal-portafoll tal-appellata u dan mingħajr raġuni li setgħet tiggustifika 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 investment mill-portafoll tal-appellata f'noti strutturati li kien jeċċedi l-massimu tal-espożizzjoni għal dawn il-prodotti.

33. L-Arbitru mbagħad ikkonsidra jekk il-prodotti strutturati permessi fil-portafoll tal-appellata kienux intizi biss għal investituri professjonali, iżda osserva li s-soċjetà appellanta ma kinitx allegat li l-appellata kienet proprju investitur professjonali. Barra minn hekk ma kien hemm xejn li seta' juri li hija ma kinitx *'retail investor'*. Filwaqt li l-Arbitru rrileva li l-appellata kienet ipprezentat erba' *fact sheets* fir-rigward tan-noti strutturati rispettivi u l-OAFS kien sab *fact sheet* oħra fir-rigward ta' nota strutturata oħra, kollha formanti parti mill-portafoll tal-appellata, spjega li dawn il-*fact sheets* kienu jindikaw li l-prodotti kienu ntizi għal investituri professjonali biss. Imbagħad fil-*fact sheet* fir-rigward tan-nota strutturata maħruġa minn Leonteq, kien hemm indikat li din kienet intiza għal *'qualified investors'*, iżda l-ebda prova ma kienet tressqet jew irriżultat, li kienet turi li r-referenza kienet ukoll għar-*retail investor* tipiku. Hawn ukoll il-Qorti tgħid li dan il-fatt kellu mhux biss jiġi osservat mis-soċjetà appellanta, iżda hija kellha saħansitra id-dover li tiegħu d-debita azzjoni billi ma taċċettax li jsir l-investment imsemmi u/jew tigbed l-attenzjoni tal-appellata.

34. Il-Qorti hawn ser tikkonsidra dak li ġie rilevat mis-soċjetà appellanta, li l-Arbitru ddecieda li jagħmel minn jeddu investigazzjoni dwar l-investimenti, billi jissorsja l-*fact sheets* tagħhom. Min-naħa tiegħu l-Arbitru fid-deċiżjoni appellata għamel osservazzjoni aħħarija li s-soċjetà appellanta dgħajfet id-difiża tagħha meta naqset milli tipprezenta informazzjoni dettaljata dwar l-investimenti sottoskritti. Il-Qorti ikkonstatat ukoll dan kollu u tgħid li ċertament dan il-fatt ma għenx id-difiża tas-soċjetà appellanta, fejn saħansitra jibqa' d-dubju jekk b'dan il-mod hija ħalliet 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 jekk u meta ddecieda li jfittex għal aktar informazzjoni, u dan skont kif ċirkoskritt mill-artikolu 25 tal-Kap. 555, u mingħajr dubju sabiex jassigura li huwa kien qed jiddeciedi l-ilment fil-parametri tal-para. (b) tas-subartikolu 19(3) tal-istess liġi. Il-Qorti tirrileva li r-rizultat tat-tfittxija tiegħu jista' biss juri 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-rizultat ta' nuqqas ta' attenzjoni, u b'hekk allura jkun qed jgħin id-difiza tas-soċjetà appellanta. Ma tqisx li b'hekk min-naħa l-oħra huwa kien qed jgħin il-każ imressaq mill-appellata, iktar milli jaċċerta li ssir ġustizzja. Is-soċjetà appellanta tilmenta wkoll li hija qatt ma kellha l-opportunità li tiegħu konjizzjoni tal-informazzjoni meħuda mill-*fact sheets*, iżda jirrizulta minn dak li qal l-Arbitru li l-informazzjoni saħansitra ma kinitx waħda diffiċli sabiex tinkiseb permezz ta' riċerka fuq l-*internet*, u għalhekk din kienet disponibbli wkoll għall-pubbliku, inkluża s-soċjetà appellanta. B'hekk ukoll is-soċjetà appellanta kellha kull opportunità, imma fil-fatt naqset milli tagħmel wara kollox, li tikkontesta dik l-informazzjoni miksuba. Iżda l-Qorti tikkonsidra li jekk hi 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*.

35. Imbagħad l-Arbitru osserva wkoll li fil-fehma tiegħu s-soċjetà appellanta m'għenitx id-difiza tagħha meta naqset milli tipprovi informazzjoni dettaljata dwar l-investimenti sottoskritti. Huwa aċċenna għal darb'oħra fuq dawk l-aspetti li kellhom jiġu kkonsidrati mis-soċjetà appellanta fir-rigward tal-kompożizzjoni tal-portafoll tal-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 seħħ, iddikjara li ma kienx ikun hemm it-telf raġonevolment mhux mistenni f'prodott li kellu l-iskop li jipprovdi għal benefiċċji ta' irtirar.

36. L-Arbitru għadda sabiex jittratta l-kwistjoni tan-ness kawżali tad-danni sofferti mill-appellata. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ minħabba l-andament negattiv tal-investimenti riżultat tas-suq u tar-riskji inerenti u/jew tal-allegat frodi tal-konsulent finanzjarju, kif allegat mis-soċjetà appellanta. Qal li kien hemm evidenza biżżejjed u konvinċenti ta' nuqqasijiet da parti tas-soċjetà appellanta fit-twettiq tal-obbligazzjonijiet, u d-doveri tagħha kemm bħala *Trustee* u anki bħala Amministratur tal-Iskema tal-Irtirar, li kienu juru nuqqas ta' diligenza. Qal li l-istess nuqqasijiet saħansitra ma ħallew l-ebda mod li bih seta' jiġi minimizzat it-telf, u fil-fatt ikkontribwew għall-istess telf u b'hekk l-Iskema ma kinitx laħqet l-għan prinċipali tagħha. Fil-fehma tiegħu, it-telf kien ġie kkawżat mill-azzjonijiet, u min-nuqqas tagħhom, 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-appellata dwarhom. Il-Qorti tikkondividi b'mod sħiħ il-fehma tal-Arbitru. Jirriżulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkonsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-appellata. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà tan-nuqqasijiet tagħha billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tal-appellata li kien mexxiha lejn l-investimenti, li eventwalment fallew mhux biss b'mod reali iżda anki f'aspettattivi tagħha. Dan filwaqt li tgħid ukoll li hi 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-kompattibilita' tal-istruzzjonijiet mal-profil tal-appellata u wkoll l-andament tal-investimenti u żżomm linja ta' komunikazzjoni miftuħa mal-appellata. Iżda kif ġie kkonsidrat minn din il-Qorti, id-difiża tas-soċjetà appellanta ma tistax tirnexxi fid-dawl tal-obbligi legali u regolatorji tagħha, u huwa proprju għalhekk li n-nuqqasijiet tagħha għandhom jitqiesu li kkontribwixxew lejn it-telf soffert mill-appellata mill-investimenti tagħha.

37. 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-appellata u lanqas kellha r-rwol ta' amministratur tal-investimenti, hija kienet tenuta tassigura li l-kompożizzjoni tal-portafoll tal-appellata kien jipprovdni għal diversifikazzjoni adegwata u li kien iħares ir-rekwiziti applikabbli sabiex b'hekk ukoll jintleħaq l-għan prinċipali tal-iskema permezz tal-prudenza;
- (ii) kienet tenuta tikkonsidra l-prodotti in kwistjoni u mill-ewwel u ta' mill-inqas turi it-tħassib tagħha dwar ċerti investimenti f'noti strutturati formanti parti mill-portafoll tal-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-appellata; u

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

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

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

**Decide**

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

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

Moqrija.

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

**Rosemarie Calleja  
Deputat Registratur**