MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta 19 ta' Jannar, 2022

Appell Inferjuri Numru: 46/2020 LM

Tracey Deborah Bayley (Passaport nru. 551860686)
('l-appellata')

vs.

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

Il-Qorti,

<u>Preliminari</u>

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

permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti **Tracey Deborah Bayley (Detentriċi tal-Passaport nru. 551860686)** [minn issa 'l quddiem 'l-appellata'] fil-konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinżamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555 hija għandha tħallas lill-appellata l-kumpens bil-mod kif stabbilit, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-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 allegatament tgħid li sofriet l-appellata mill-investiment tagħha f'polza ta' assikurazzjoni fuq il-ħajja bl-isem *European Executive Investment Bond Policy* maħruġa minn Skandia Life Ireland Limited [minn issa 'l quddiem 'Skandia'], li sussegwentement ħadet l-isem ta' Old Mutual International jew 'OMI'[1], f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] jew QROPS fis-sena 2014, kif ġestita mis-soċjetà appellanta, u wara li l-appellata kienet ikkonsultat lil *Premier Pension Solutions SL.* L-investimenti sottoskritti l-polza ta' assikurazzjoni kienu ġestiti mill-konsulent finanzjarju Continental Wealth Management [minn issa 'l quddiem 'CWM'] fuq għażla tal-appellata stess.[2] Iżda sussegwentement l-investiment tal-appellata fil-polza ta' assikurazzjoni fuq il-ħajja allegatament sofra telf sostanzjali.

[1] Ara ittra ta' Skandia fejn ġiet milqugħa l-applikazzjoni tal-appellata *a fol.* 60.
[2] Ara il-profil ta' riskju *a fol.* 88.

Mertu

3. L-appellata għalhekk ippreżentat lment quddiem l-Arbitru fit-18 ta' Settembru, 2018 fil-konfront tas-soċjetà appellanta, fejn allegat li din kienet ippermettiet li l-appellata timxi fuq pariri ħżiena u li konsegwentement l-valur tal-investiment tagħha naqas sew mill-ammont oriġinali, u dan mingħajr ma ħadet azzjoni. Għalhekk l-appellata talbet rifużjoni tat-telf kollu li sofriet, inklużi d-drittijiet li hija kienet ħallset, fuq l-investiment tagħha f'somma li kienet teċċedi STG60,000.

4. Is-soċjetà appellanta wieġbet fl-10 ta' Ottubru 2018 billi talbet lill-Arbitru sabiex jiċħad l-ilment tal-appellata. Hija eċċepiet fost affarijiet oħra li (i) l-azzjoni kienet preskritta ai termini tal-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555; (ii) safejn kienet taf hi, l-appellata ma kinitx istitwiet proċeduri fil-konfront ta' CWM jew l-uffiċjali tagħha jew/u fil-konfront ta' Trafalgar u/jew Global Net li kienu tawha l-parir sabiex tinvesti f'prodotti li wasslu għat-telf tagħha u wara kollox hija ma setgħetx tirrispondi għall-parir mogħti minn CWM; (iii) l-investimenti saru skont il-profil ta' riskju tal-appellata u skont il-linji gwida applikabbli fiż-żmien li ġiet ippreżentata l-applikazzjoni li ġiet iffirmata mill-appellata, anki fir-rigward ta' dak li kien indikat bħala l-profil ta' riskju tagħha; (iv) hija ma setgħetx tirrispondi għall-korrispondenza tal-appellata ma' CWM fejn uriet it-tħassib tagħha; (v) ir-rendikonti annwali kienu ntbagħtu lill-appellata għas-snin 2014 sa 2016; (vi) hija kienet dejjem ottemporat ruħha mal-obbligi tagħha fil-konfront tal-appellata u anki osservat il-linji gwida dwar dak l-investiment; u (vii) hija ma kellhiex liċenzja sabiex tipprovdi parir finanzjarju u lanqas ma kienet għamlet

dan lill-appellata, kif kien ċar mill-ammissjoni tal-appellata stess u mill-applikazzjoni għas-sħubija u t-*terms and conditions of business.*

Id-deċiżjoni appellata

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

> ***"Further Considers:***
>
> ***Preliminary Pleas:***
>
> ***Preliminary Plea regarding the Competence of the Arbiter***
>
> *The Service Provider raised the preliminary plea that the Arbiter has no competence to consider this case based on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta.*
>
> ***Plea relating to Article 21(1)(b) of Chapter 555 of the Laws of Malta***
>
> *Article 21(1)(b) stipulates that:*
>
> 'An Arbiter shall have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider which occurred on or after the first of May 2004:
>
> Provided that a complaint about conduct which occurred before the entry into force of this Act shall be made by not later than two years from the date when this paragraph comes into force.'
>
> *Firstly, the Arbiter notes that it took four months for the Service Provider to send the Complainant a reply to her formal complaint. (fn. 2 The Complainant's formal complaint dated 5 April 2018 was answered by the Service Provider on 10 August 2018)*
>
> *The Arbiter does not see a valid reason why the Service Provider took so long to send a reply and related documents, even if it had to deal with various other complaints around the same time.*

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

Secondly, with respect to its plea relating to Article 21(1)(b), the Service Provider in its additional submissions noted that:

'The complainant also states in her complaint that the conduct complained of took place during 2013/2014/2015'.

Besides not being clear as to what the Service Provider is exactly referring to here, as no such statement was found in the Complainant's complaint, such an aspect was not even raised by MPM in its original reply before the Arbiter for Financial Services in respect of the Complainant's complaint.

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

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

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

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

In this case, the conduct complained of involves the conduct of the Service Provider ***as trustee and retirement scheme administrator of the Scheme****, which role MPM occupied since the Complainant became member of the Scheme and* ***continued to occupy beyond the coming into force of Chapter 555 of the Laws of Malta.***

Even if for argument's sake only, the Arbiter had to limit himself to the question of the investment portfolio, (which is not the case because the Complainant raised other issues and the Service Provider had other obligations apart from the oversight of the portfolio as explained later in this decision), the Service Provider did not prove in this particular case that the products invested into no longer formed part of the portfolio ***after*** *the coming into force of Chapter 555 of the Laws of Malta. The onus of proof for such evidence rests with the Service Provider. (fn. 3 Furthermore, the Arbiter notes that there is actually clear evidence from the Investor Profile presented in respect of the Complainant that structured notes, being the main type of products invested into as will be considered later in this decision, still formed part of the Complainant's portfolio after 18 April 2016)*

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

It is also noted that the complaint in question involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the adviser of the Complainant in relation to the Scheme. The Service Provider itself declares that it no longer accepted business from CWM ***as from September 2017****. CWM was, therefore, still accepted by the Service Provider and acting as the investment adviser to the Complainant after the coming into force of Chapter 555 of the Laws of Malta. It has emerged that CWM was only replaced in September 2017 when MPM no longer accepted business from CWM. The responsibility of MPM in this regard is explained later on in this decision.*

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

Article 21(1)(c)

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

Article 21(1)(c) stipulates:

'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring

after the coming into force of this Act, if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'

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

The fact that the Complainant was sent an Annual Member Statement, as stated by the Service Provider in its notes of submissions, could not be considered as enabling the Complainant to have knowledge about the matters complained of. This taking into consideration a number of factors including that the said Annual Member Statement was a highly generic report which only listed the underlying life assurance policy. The Annual Member Statement issued to the Complainant by MPM included no details of the specific underlying investments held within the said policy, which investments contributed to the losses and are being disputed by the Complainant. Hence, the Complainant was not in a position to know, from the Annual Member Statement what investment transactions were actually being carried out within her portfolio of investments.

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

The disclaimer read as follows:

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

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

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

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

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

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

The Arbiter has also discovered from Case Number 127/2018 against MPM, that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM. (fn. 7 Case Number 127/2018 (a fol. 53 of the file) decided today) In this regard, in September 2017, members were notified by MPM about the suspension of the terms of business that MPM had with CWM. Later, in October 2017, MPM also notified the members of the Scheme about the full withdrawal of such terms of business with CWM.

The Complainant in this case made a formal complaint with the Service Provider on 5 April 2018 and thus within the two-year period established by Art. 21(1)(c) of Chapter 555.

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

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

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

The plea regarding the request to expunge documents

MPM requested the Arbiter to expunge from the record of the proceedings certain documentation filed in the additional submissions made by the Complainant in 2019 and not to take cognisance of any new allegations raised by the Complainant against MPM as it was inter alia submitted that the Complainant cannot change the basis of her complaint.

The Arbiter accepts the submission that no new allegations could be raised by the Complainant and will only consider the complaint as originally filed.

Plea regarding the policy of the Complainant's late husband

In its reply, MPM argued that although the Complainant requests payment also in relation to her late husband's policy, it is not clear whether the substance of the Complaint also relates to the policy of the Complainant's husband given that it was claimed that the Complaint and the allegations therein appear to be directed solely towards the Complainant's own policy. MPM reserved the right to file a further reply in relation to the policy of the Complainant's late husband following clarification on this aspect.

In her additional submissions marked 'June 2019' received by the Office of the Arbiter for Financial Services ('OAFS') on 1 July 2019, the Complainant just stated that 'I feel have been quite clear that I am seeking on both policies'.

In its additional submissions, MPM acknowledged that the Complainant has stated in her submissions that she is 'seeking on both policies', *but MPM submitted that this does not emerge from her original complaint. MPM further submitted that:*

'What is clear is that from her original complaint, it does not result that she was complaining with respect to her husband's policy (of which she is now the sole remaining life assured). Furthermore, the type of allegations raised by complainant cannot be raised with respect to a policy which was in her husband's name, and which her husband signed up for and approved'.

At the outset, the Arbiter would like to highlight that this is a Complaint filed by a retail consumer of financial services within the structure of Chapter 555 of the Laws of Malta. The Service Provider should accordingly consider the complaint made by the Complainant into such context and not expect the client, who chose to file the complaint herself as allowed within the parameters of such structure, to reply in a legalistic manner or with the knowledge and expertise of a professional in the field.

Having reviewed the Complaint, it is considered that whilst the Complainant could have structured and explained her Complaint in a more articulate manner, the Complainant attempted to cover both her Retirement Scheme and the Retirement Scheme of her late husband in the Complaint filed against the Service Provider. This attempt was seemingly, however, done without the required details in hand. The information produced by the Complainant during the proceedings of this case in relation to her husband's policy was indeed very limited. (fn. 8 To a generic Valuation Summary issued by the policy provider Old Mutual International as at October 2017 as well as an Annual Member Statement for the year ended 31 December 2015.)

It is also noted that, in the letter sent by MPM dated 10 August 2018, in relation to the Complainant's formal complaint with the Service Provider, MPM itself stated inter alia that:

'In your complaint, you have referred to your late husband's Retirement Scheme. Whilst we appreciate that you are the sole beneficiary named on this Retirement Scheme, the claim is still on-going in this regard and has not been finalised. Momentum is therefore not in a position, at present to provide you with any information or documentation related to your late husband's Retirement Scheme. However, once the claim has completed and the Retirement Scheme is in your name, we will be in a position to address your complaint fully at that point. We would therefore appreciate your patience with this part of the complaint'.

On the basis of the lack of documentation produced in relation to her husband's policy, the Arbiter does not consider that, in the particular circumstances, he is in a position to decide ***on the merits*** *of her husband's policy.*

This decision is being made without prejudice to the Complainant's rights in terms of law to take any action in respect of her husband's policy. Such decision is also made without prejudice to any other legal remedies that the Complainant might have in relation to her husband's policy.

As has already been stated, the Arbiter does not have enough information to deal with the Complainant's late husband's policy and will limit himself to dealing solely with the Complaint relating solely to the Complainant's own policy.

Furthermore, having considered the details included in the Complaint Form and its attachments, the substance of the Complaint can be considered to, in essence, relate to the alleged shortcomings of MPM in the carrying out of its duties as Trustee and Retirement Scheme Administrator of the Retirement Scheme. In this case, the principal alleged shortcomings can be construed to relate to the suitability of the investment portfolio allowed by MPM within the Scheme's structure and MPM's alleged failure to act or intervene to safeguard her interests given the risks taken on such portfolio at the time of CWM.

The Arbiter shall accordingly take the above aspects into consideration for the purposes of deciding this case.

The Merits of the Case

The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case. (fn. 9 Cap. 555, Art. 19(3)(b))

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

The Complainant

The Complainant, born in 1967, is of British nationality and resided in Spain 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 'bar person' in the said Application Form. It was not proven, during the case, that the Complainant was a professional investor. The Complainant can accordingly be deemed as a retail client.
The Complainant was accepted by MPM as member of the Retirement Scheme in April 2014.

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator (fn. 11

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

The Legal Framework

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

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015. (fn. 13 Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - https *://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/)*

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

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

As confirmed by the Service Provider, registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and hence the framework under the RPA became applicable as from such date. (fn. 14 As per pg. 1 of the affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 January 2016 attached to his affidavit)

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

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

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

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

Particularities of the Case

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

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA (fn. 15 https://www.mfsa.com.mt/financial-services-register/result/?id=3454) as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 (fn. 16 Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme *(attached to Stewart Davies's affidavit)) and under the Retirement Pensions Act in January 2016. (fn. 17 Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit))*

*As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme '*was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap. 331) on the 23 March 2011*' (fn. 18 Important Information setion, pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit). and is* 'an approved Personal Retirement Scheme under the Retirement Pensions Act 2011' *(fn. 19 Regulatory Status, Pg 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).*

The Scheme Particulars specify that:

'The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and

outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death'. *(fn. 20 Ibid.)*

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

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

The life assurance policy acquired for the Complainant was called the European Executive Investment Bond issued by Skandia International (fn. 21 Skandia International eventually rebranded to Old Mutual Intenrational – https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandia-international-rebrands-to-old-mutual-international/)/Old Mutual International ('OMI') (fn. 22 Welcome Letter dated 9 June 2014 issued by Skandia International in respect of her policy no. 50047085 refers)

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

The underlying investments in respect of the Complainant comprised substantial investments in structured notes as indicated in the table of investments forming part of the 'Investor Profile' presented by the Service Provider during the proceedings of the case (fn. 23 The 'Investor Profile' is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant)

*The 'Investor Profile' presented by the Service Provider in respect of the Complainant included a table with the '*current valuation' *as at 09/08/2018. The said table indicated a loss (excluding fees) of GBP43,162 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 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 Advisor

Continental Wealth Management ('CWM') was the investment advisor appointed by the Complainant. (fn. 24 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. 25 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. 26 Para. 39, Section E titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies) and that Trafalgar 'i*s authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53' *(fn. 27 Ibid.)*

Underlying Investments

As indicated above, the investments undertaken within the life assurance policy of the Complainant were summarised in the table of investment transactions included as part of the 'Investor Profile' information sheet provided by the Service Provider. (fn. 28 Attachment to the 'Additional submissions' made by MPM in respect of the Complainant)

The 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 at times solely, or predominately, of structured notes during the tenure of CWM as investment adviser.

Further Considerations

Responsibilities of the Service Provider

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

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

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

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

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

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

under the Retirement Pensions Act' ('the Pension Rules for Personal Retirement Schemes').

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

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

From the various general conduct of business rules/standard licence conditions applicable to MPM in its role as Retirement Scheme Administrator under the SFA/ RPA regime respectively, it is pertinent to note the following general principles: (fn. 29 Emphasis added by the Arbiter)

a) *Rule 2.6.2 of Part B.2.6 titled 'General Conduct of Business Rules applicable to the Scheme Administrator' of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that 'The Scheme Administrator* ***shall act with due skill, care and diligence – in the best interests of the Beneficiaries*** *…'.*

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

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

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

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

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

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

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

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

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

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

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

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

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

Trustee and Fiduciary obligations

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

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

The said article provides that:

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

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

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

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

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property 'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'. (fn. 30 Pg. 174, 'An Introduction to Maltese Financial Services Law', Editor Dr Max Ganado, Allied Publications 2009)

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. 31 Op. Cit, p 178)*

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

'**In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries.** It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations'**. *(fn. 32 Page 9 - Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 December 2017))*

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

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

Other relevant aspects

*One other important duty relevant to the case in question relates to the o**versight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments.** As acknowledged by the Service Provider, whilst MPM's duties did not involve the provision of investment advice, however, MPM did '… **retain the power to ultimately decide whether to proceed with an investment or otherwise'.** (fn. 33 Para. 17, page 5 of the affidavit of Stewart Davies)*

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

'The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed) …'. *(fn. 34 Para. 31, page 8 of the affidavit of Stewart Davies)*

*M**PM 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. 35 Para. 33, Page 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers)*

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

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

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

'… is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'. *(fn. 36 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. 37 Pg. 9 of MFSA's Consultation Document dated 16 November 2018 titled 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' (MFSA Ref. 15/2018))*

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

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

'The Trustee needs to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification …', *(fn. 38 Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies. The same statement is also included in page 9 of the scheme Particulars of May 2018 (also attached to the same affidavit)*

Whilst para. 3.1 of the section titled 'Terms and Conditions' *of the Application Form for Membership into the Scheme also provided inter alia that:*

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

Other Observations and Conclusions

Key considerations relating to the principal alleged failures

The Arbiter will now consider the principal alleged failures. As indicated above, the principal alleged failures of the Service Provider can, in essence, be construed to relate to:

(i) The suitability of the investment portfolio allowed by MPM within the Scheme's structure; and

(ii) MPM's alleged failure to act or intervene to safeguard the interests of the Complainant with respect to her investment portfolio and the risks taken in such portfolio at the time of CWM.

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 other relevant obligations and duties, and if so, to what extent any such failures are considered to have had a bearing or otherwise on the financial performance of the Scheme and the resulting losses for the Complainant.

A. The appointment of the Investment Adviser

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

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

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

Inappropriate and inadequate material issues involving the Investment Adviser

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

It is considered that ***MPM accepted and allowed inaccurate and incomplete material information relating to the Adviser to prevail in its own Application Form for Membership*** *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 and incomplete material information was made in the Application Form for Membership on such a key party it was only appropriate and in the best interests of the Complainant, and reflective of the role as Trustee as a bonus paterfamilias, for MPM to raise and flag such matters to the Complainant and not accept such inadequacies in its form. MPM had ultimately the prerogative whether to accept the application, the selected investment adviser and, also, decide with whom to enter into terms of business.

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

In the same section of the Applicatioin Form, CWM was indicated as having a registered address in Spain and that it was regulated. In the same section 'ICCS' was identified as being the regulator of the professional adviser.

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

With respect to the reference to 'ICCS' such reference was not defined or explained in the Application Form. Neither were such reference ever explained or referred to during the comprehensive submissions made by the Service Provider during the proceedings of the case. It has not emerged either that ICCS are, or were, a regulatory authority for investment advisers in Spain or in any other jurisdiction.

It appears that 'ICCS' could be an acronym for the 'Cypriot Insurance Companies Control Service'. The Cypriot Insurance Companies Control Service is involved in the insurance sector in Cyprus. (fn. 39 http://mof.gov.cy/en/directorates-units/insurance-companies-control-Service) No evidence of any authorisation or any form of approval issued by such to CWM has, however, been ever mentioned by the Service Provider and even more, neither produced by it during the proceedings of the case.

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

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

ii. Lack of clarity convoluted information relating to the adviser in the Application Form of the Underlying Policy

It is also noted that the lack of clarity and convoluted information 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 on issued by Skanda International/ 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 referring to and/or including a stamp hearing the name of 'Inter-Alliance Worldnet Insurance Agents & Advisers Ltd' ('Inter-Alliance') name apart from reference to CWM. The two entities, both CWM and Inter-Alliance are then featured in the section titled 'Financial adviser declaration' of the said form with the same stamp of Inter-Alliance with a PO Box in Cyprus, again featuring here in the part titled 'Financial adviser stamp' in the same section.

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

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

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

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

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

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

Indeed, during the proceedings of this case MPM has not provided evidence of any agency agreement between CWM and Inter-Alliance 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

<u>no ambiguity</u> *(fn. 40 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. 41 Section 3, titled 'Overview of Momentum Controls in place in exercising a duty to all members' in MPM's reply to the Complainant 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 either emerged about the regulatory status of CWM. As indicated earlier, MPM provided no details about Inter-Alliance and in its submissions only referred to the alleged links between CWM and Trafalgar. MPM 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. 42 Copy of authorisations issued to Trafalgar were attached to the Reply of MPM submitted before the Arbiter for Financial Services and/or specifically referred to in para.39 Section E, titled 'CWM and Trafalgar International GmbH' in the affidavit of Stewart Davies)

With respect to authorisations issued by IHK, the Arbiter makes reference to Case 068/2018 and Case 172/2018 against MPM. (fn. 43 Decided today) in which correspondence was produced involving replies issued by IHK in 2018 to queries made in respect of CWM.

In this regard, it is noted that in an email from IHK dated 19 April 2018, IHK indicated inter alia that it was not aware of an official affiliation between CWM and Trafalgar and that Trafalgar held the financial investment intermediation licence (34f para. 1 GewO) from June 2013 until March 2016 where the licence was 'not extendable' *and* 'even back then it did not cover the activities of another legal personality'. *(fn. 44 Email from IHK dated 19 April 2018 – A fol. 166/167 of Case Number 068/2018 against MPM decided today)*

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

*'*Trafalgar International GmbH is a German limited company headquartered in Frankfurt am Main. The company currently holds a licence under 34d para.1 German Trade Law (German: Gewerbeordnung, GewO) (insurance intermediation). The German licence as an insurance intermediary cannot be extended to another legal personality and it does not authorize the licence holder to regulate other insurance or financial investment intermediaries.*' (fn. 45 Letter from IHK dated 20 April 2018 – A fol. 12/13 of Case Number 172/2018 against MPM decided today)*

MPM's statement that CWM 'was operating under Trafalgar International GmbH licenses' *(fn. 46 Para. 39, Section E, titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies) has not been backed up by any evidence during the proceedings of this case and has actually been contradicted by communications issued by IHK as indicated above. It is accordingly clear that no comfort can be taken from the authorisation/s held by Trafalgar.*

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

In the absence of such, ***the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM* 'was authorised to trade in Spain and in France by Trafalgar International GmbH'** *(fn. 47 Pg. 1, Section A titled 'Introduction', of the Reply of MPM submitted before the Arbiter for Financial Services)****, are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant****.***

This also taking into consideration that:

(i) *Trafalgar is itself no regulatory authority but a licensed entity itself. Similarly, Inter-Alliance appears as a service provider itself in Cyprus, but clearly it was not a regulatory authority. (fn. 48 https://international-adviser.com/iaw-fined-cypriot-regulator/)*

(ii) *the lack of clarity as to the regulatory status of the investment adviser 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. 49 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. 50 Para. 39, Section E, titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies)

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

Other observations & synopsis

As explained above, albeit being selected by the Complainant, the investment adviser was however accepted, at MPM's sole discretion, to act as the Complainant's investment adviser within the Scheme's structure or not.

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, but no evidence has transpired that this was so, as amply explained above.

MPM allowed and left uncontested incorrect, misleading and unclear key information 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 Complainant, and not itself accept, material aspects relating to the investment adviser, which it should have reasonably been in a position to knwo that were incorrect, misleading and in appropriate. 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 is was only in the best interests of the Complainant for MPM to ensure that the Complainant had correct and adequate key information about the investment adviser.

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

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

- ***the entity actually taking responsibility for the investment advice given to the Complainant as more than one entity was at times being mentioned with respect to investment advice;***

- ***the distinctions between CWM and Inter Alliance/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 ***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.***

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.

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

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

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

Investment into Structured Notes

Preliminary observations

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

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

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

A typical definition of a structured note provides that:

'A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index'. *(fn. 51 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. 52 https://www.investopedia.com/articles/bonds/10/structured-notes.asp)*

The Arbiter notes that various fact sheets of structured notes that featured in the portfolio of the Complainant, as 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.

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. 53 Example – Fact Sheet of the RBC Diversified Blue Chip Income Nots – Series 1- https://www/yumpu.com/en/document/read/38731551/rbc-diversified-blue-chip-income-notes-series-1-fund-platform)*

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. 54 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 breech their barriers untold amounts of damage is done**'*. (fn. 55 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 solely and/or predominantly of structured products. Such excessive exposure to structured products occurred over a long period of time. This clearly emerges from the Table of Investments forming part of the 'Investor Profile' provided by the Service Provider for the Complainant.

In addition, the said table indicates investments resulting in high exposures to the same single issuer/s, either through a singular purchase and/or 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, as presented to and sourced by the OAFS, 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 issuers, which was allowed to occur by the Service Provider in the Complainant's portfolio, jars with the regulatory requirements that applied to the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the 'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002', ('the Directives') which applied from the Scheme's inception in 2011 until the registration of the Scheme under the RPA on 1 January 2016. The applicability and relevance of these conditions to the case in question was highlighted by MPM itself. (fn. 56 Para. 21 & 23 of the Note of Subissions filed by MPM in 2019)

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

*SOC 2.7.2 in turn required the Scheme to ensure inter alia that, the assets of a scheme are '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole' *(fn. 56 SOC 2.7.2 (a)) and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'. (fn. 58 SOC 2.7.2 (b))*

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be 'predominantly invested in regulated markets'; *(fn. 58 SOC 2.7.2. (c)) to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*, (fn. 59 SOC 2.7.2 (3)) where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme. (fn. 61 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 clearly emerged that individual exposures to single issuers were at times even higher than 30%, this being the maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above. 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, individually and on a cumulative basis, material positions into high risk investments. The high risk being reflected in the high rate of returns of 8% 9% and 10% p.a. which featured in the name of a number of structured products invested into as indicated in the Complainant's portfolio.

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 and/or predominantly invested in structured notes for a long period of time. It is unclear how a portfolio composition solely and/or predominantly invested in structured notes truly satisfied certain conditions specified in MPM's own Investment Guidelines such as:

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

This was a condition which prevailed in all of the presented MPM's Investment Guidelines since January 2013 till that of 2018. (fn. 62 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. 63 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 or predominantly of structured notes, constituted listed structured notes in respect of the Complainant. The fact sheets sourced by the OAFS of 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. 64 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.

The bulk of the assets within the policy was, at times, invested into just one or very few structured notes. 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 single issuers.

Table A below shows just one example of excessive single exposures allowed within the portfolio of the Complainant. Other instances of excessive exposures exist within the portfolio as clearly emerging from the respective 'Table of Investments' forming part of the 'Investor Profile' produced by MPM as part of its submissions

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

Exposure to single issuer in % terms of the policy value at time of purchase	*Issuer*	*Description*
44%	EFG	*2SNs issued by EFG both purchased in June 2015 respectively comprised 11.01%, and 33.03% of the policy value at the time of purchase thus resulting in an overall exposure to the same issuer of 44.04% of the policy value at the time of purchase*

Irrespective of whether or not the particular investments indicated had actually yielded a profit ***the fact that such high exposure to a single counterparty was allowed in the first place indicates, the lack of prudence and excessive ewxposure and risk to single couterparties that were allowed to be taken on a general level.***

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

and their issuers was indeed progressively and substantially reduced over the years in the said Investment Guidelines.

The specified maximum limit of 66% of the portfolio value in structured notes having underlying guarantees which featured in the 'Investment Guidelines' marked 2015 (fn. 65 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. 66 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. 67 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. 68 MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies) and mid-2017, (fn. 69 MPM's Investment Guidelines 'Mid-2017' as attached to the affidavit of Stewart Davies) reduced further to 20% in the 'Investment Guidelines' marked December 2017 and subsequently to 12.5% in the 'Investment Guidelines' for 2018. Even before the Investment Guidelines of Mid-2014, MPM's Investment Guidelines of January 2013 still limited exposure to individual investments (aside from collective investment schemes) to 20%.

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

Indeed, the Arbiter considers that the high exposure to structured products 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. 70 Emphasis in the mentioned guidelines added by the Arbiter)*

Investment Guidelines marked 'Mid-2014':
• *Where products with underlying guarantees are chosen,* ***no more than one third of the overall portfolio to be subject to the same issuer default risk****.*

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

• *In addition to the above, the portfolio must be constructed in such a way as to **avoid exposure**:* • *...* • ***To any single credit risk**.*

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

Besides the mentioned excessive exposure to single issuers it is also noted that additional investments into structured notes were observed (fn. 71 'Table of

Investments' in the 'Investor Profile' provided by MPM refers) to have been allowed to occur within the Complainant's portfolio in excess of the limits allowed on the overall maximum exposure to such products. MPM's Investment Guidelines of 2015, 2016 and mid-2017 specifically mentioned a maximum limit of 66% of the portfolio value to structured notes.

In the case reviewed the Service Provider still continued to allow further investments into structured products at one or more instances when the said limits should have applied. The additional investments also occurred despite the portfolio being already exposed to structured notes more than the said percentage at the time when the additional purchase was being made.

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. 72 Section 1, 'Background'/'Overview of the Scheme' of MPM's formal reply to the complainants 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 Complainant's portfolio comprised structured notes aimed solely for professional investors.

The Service Provider has not claimed that the Complainant 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 OAFS traced a number of Fact Sheets in respect of several structured products which featured in her portfolio. The fact sheets in question were sourced by the OAFS through research undertaken over the internet with the specific ISIN number of the respective structured note featuring in the portfolio. The ISIN number for each structured product was obtained from the 'Table of Investments' forming part of the 'Investor Profile' provided by the Service Provider.

Multiple fact sheets of different structured products featuring in the Complainant's portfolio have been sourced accordingly. (fn. 73 From the site https://www.portman-associates.com/)

The OAFS traced four fact sheets of strucured products issued by RBC, Nomura, or Commerzbank. (fn. 74X Structured Notes with ISIN No: XS1064020271; XS1066900819; XS1068540175; XS1400190465)

The fact sheets sourced from such parties specify that the products were all targeted for professional investors only.

With respect to the structured products issued by RBC, for example, the fact sheets clearly indicate that such investments were 'For Professional Investors Only' and 'not suitable for Retail distribution' with the 'Target Audience' for these products being specified as 'Professional Investors Only' as outlined in the 'Key Features' section of the respective fact sheet.
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.

The Service Provider has not produced any fact sheets of the structured notes that were invested into in the respective portfolio.

Whilst the OAFS could not verify that all the investments within the Complainant's portfolio were all targeted for professional investors, the various fact sheets traced by the OAFS in the portfolio is, in itself, indicative of a trend taken by the Service Provider in allowing products aimed solely for professional investors to be included in the portfolio of a retail client.

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 members 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.

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

Such aspects include, but are not limited to:

- *the nature of the structured products being invested into and the effects any events or barriers that may form part of the key features of such products, would have on the investment if and when such events occur as already detailed above;*

- *the potential rate of returns as indicative of the level of risk being taken;*

- *the level of risks ultimately exposed to in the respective product and in the overall portfolio composition; and*

- *not the least, the issuer/counterparty risk being taken.*

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 and/or predominantly to structured products, no adequate and sufficient comfort has either emerged that such composition reflected the prudence expected in the structuring and composition of a pension portfolio. Neither that the allocations were in the best interests of the Complainant despite his selected risk profile.

In the circumstance, where the portfolio of the Complainant was at times, solely and/or predominantly invested in structured products with a high level of exposure to single issuer/s, and for the reasons amply explained above, the Arbiter does not consider that there was proper diversification nor that the portfolio was at all times '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole*' (fn. 75 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. 76 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.

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

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

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

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

'a record of all transactions (purchases and sales) occurring in the member's account during the relevant reporting period should be provided by the Retirement Scheme Administrator to the Member at least once a year and upon request …'. *(fn. 77 the said condition was further revised and updated as per condition 9.5(3) of Part B.9 of the Pension Rules for Personal Retirement Schemes indicated as 'Issued" 7 January 2015/ Last updated: 28 December 2018')*

It is noted that the Pension Rules for Personal Retirement Schemes under the RPA became applicable to MPM on 1 January 2016 and that, as per the MFSA's communications presented by MPM, (fn. 78 MFSA's letter dated 11 Decemebr 2017, attached to the Note of Submissions filed by MPM in 2019) Part B.9 of the said rules did not become effective until the revised rules issued in 2018.

Nevertheless, it is considered that even where such condition could have not strictly applied to the Service Provider from a regulatory point of view, the Service Provider as a Trustee, obliged by the TTA to act as a bonus paterfamilias and in the best interests of the members of the Scheme, should have felt it its duty to provide members with detailed statements and information on the underlying investments.

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

- *Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002 (fn. 79 Condition 2.2 of the Certificate of Registratration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives) respectively already provided that:*

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

…

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

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

…

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

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

The general principles of acting in the best interests of the member and those relating to the duties of trustee as already outlined in this decision and to which MPM was subject to, should have prevailed and should have guided the Service Provider in its actions to ensure that the Member was provided with an adequate account of the underlying investments within her portolio.

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

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainant ***cannot*** *just be attributed to the underperformance of the investments as a result of general market and investment risks and/or the issues alleged against one of the structured note providers, as MPM has inter alia suggested in these proceedings.*

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 has emerged as amply highlighted above which, at the very least, impinge on the diligence it was required and reasonably expected to be exercised in such roles.

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 with the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had however clear duties to check and ensure that the portfolio composition recommended by the investment 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 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; the oversight functions with respect to the Scheme and portfolio structure; as well as the reporting to the Complainant on the underlying portfolios.

***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. 80 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. 81 Cap. 555, Article 19(3)(c))* ***of the Complainant who had placed her trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

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

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

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

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

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

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

(i) ***For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Member's current investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised) inclusive of any realised currency gains or losses. Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;***

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

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

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

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

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

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

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fis-17 ta' Awwissu 2020 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka u tħassar id-deċiżjoni appellata billi tilqa' l-aggravji tagħha. Tgħid li l-aggravji tagħha huma s-segwenti: (i) l-Arbitru applika u nterpreta ħażin il-liġi meta ddeċieda li s-soċjetà appellanta naqset mid-dmirijiet tagħha fil-kwalità tagħha ta' *trustee* jew mod ieħor, iżda partikolarment meta ddeċieda fost affarijiet oħra li (a) hija kienet naqset għaliex ippermettiet lil CWM taġixxi bħala *investment adviser* tal-appellata; u (b) il-kompożizzjoni u s-superviżjoni tal-portafoll tal-appellata ma kienx skont il-liġijiet, regoli u linji gwida applikabbli; (ii) ma kienx jeżisti l-ebda ness kawżali u għalhekk l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet infondati; u (iii) ma kien hemm l-ebda mala fede min-naħa tagħha kif iddeċieda l-Arbitru.

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

Konsiderazzjonijiet ta' din il-Qorti

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

L-ewwel aggravju

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

minflok nuqqasijiet oħra sabiex jiġġustifika l-konklużjoni tiegħu li hija kienet naqset fl-obbligi tagħha. Issostni li l-punt ċentrali kien jekk hija kellhiex obbligu tivverifika jekk CWM kinitx liċenzjata u mhux jekk fil-fatt din kinitx liċenzjata, iżda l-Arbitru ddeċieda li hija min-naħa tagħha ma kinitx ressqet l-ebda prova sabiex turi li CWM kienet liċenzjata sabiex tagħti pariri ta' investiment u tispjega kif din il-konklużjoni hija waħda difettuża f'żewġ aspetti. Hija tagħmel riferiment għal dak li xehed Stewart Davies fl-affidavit tiegħu fejn dan stqarr li ma kien hemm l-ebda liġi jew regola dak iż-żmien li kienet titlob li s-soċjetà appellanta tagħmel eżerċizzju ta' *due diligence* jew li tassigura li CWM kienet liċenzjata, u dan fejn wara kollox kienet proprju l-appellata li volontarjament ħatret lil CWM bħala l-konsulent finanzjarju tagħha. Iżda fid-deċiżjoni appellata tiegħu, is-soċjetà appellanta tgħid li l-Arbitru 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 huwa saħansitra għamel interpretazzjoni tassew wiesgħa ta' dak li kienet tipprovdi l-formola tal-Applikazzjoni għal Sħubija. Filwaqt li tiddikjara li hija ma kinitx qegħda tikkontesta l-obbligu ġenerali ta' *trustee* li jaġixxi f'kull każ fl-aħjar interess tal-benefiċjarji u bl-attenzjoni ta' *bonus paterfamilias,* is-soċjetà appellanta tikkontendi li dan l-obbligu ta' *trustee* ma kienx iħaddan ukoll l-obbligu speċifiku li ssir verifika dwar jekk il-konsulent finanzjarju kienx liċenzjat jew le, u dan meta l-imsemmi konsulent finanzjarju kien magħżul mill-appellata innifisha. Tikkontendi li kieku l-obbligu kien diġà jeżisti qabel ma l-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 ddeċieda li hija kienet naqset mill-obbligu tagħha li timxi bl-attenzjoni ta' *bonus paterfamilias* bħal ma kienet dovuta tagħmel fil-kwalità tagħha ta' *trustee.* Tgħid li madankollu d-deċiżjoni appellata hija żbaljata u l-Arbitru hawn kien naqas ukoll milli jieħu in konsiderazzjoni l-profil ta' riskju tal-appellata u jevalwa r-riskju individwali skont il-kompożizzjoni tal-portafoll sħiħ. Filwaqt li tirrileva li hija ssottomettiet l-informazzjoni kollha dwar il-portafoll tal-appellata, anki l-profil ta' riskju tagħha u l-istruzzjonijiet li kienu ngħataw lilha, tgħid li hija aġixxiet fil-parametri tal-linji gwida applikabbli u ttenni li ma kien sar l-ebda telf. Tgħid li jidher li l-Arbitru kellu l-impressjoni li l-prodotti strutturati kellhom riskju ogħla minn dak li fil-fatt intrinsikament kellhom. Is-soċjetà appellanta hawn tirrileva li l-MFSA dejjem kienet tippermetti investiment f'dawn il-prodotti, kif kienu wkoll il-linji gwida tagħha, u l-investiment għalhekk qatt ma kien ipprojbit iżda kellu jsir fil-parametri permissibbli. Tirrileva mbagħad li kull investiment fih element ta' riskju inerenti, u dan filwaqt li taċċetta li hija kienet obbligata li tassigura li l-portafoll kien f'kull mument fil-parametri tal-profil ta' riskju tal-membru u anki tal-linji gwidi u tar-regoli applikabbli. Filwaqt li tiċċita dak li jirrileva l-Arbitru fir-rigward ta' prodotti strutturati, tgħid li kuntrarjament għal dak li jgħid, il-profil kien juri li l-linji gwida applikabbli kienu ġew osservati meta sar in-negozju, inkluż l-espożizzjoni għall-imsemmija prodotti strutturati u għal emittenti singolari. Minn hawn is-soċjetà appellanta tgħaddi sabiex tissottometti kif l-Arbitru applika ħażin ir-regoli tal-MFSA. Tikkontendi li mhux ċar x'ried ifisser biha l-kelma "*jars*", u lanqas kif wasal għall-

konklużjoni li *"...The high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio jarred with the regulatory requirements that applied to the Retirement Scheme at the time..."*. Tgħid li l-Arbitru applika ħażin l-i*Standard Operational Conditions* 2.7.1 u 2.7.2 għaliex dawn kienu applikabbli fir-rigward ta' skema fit-totalità tagħha u mhux fir-rigward ta' portafoll. Tirrileva li sussegwentement ir-regola kienet tbiddlet u sar applikabbli l-kunċett ta' diversifikazzjoni fil-livell tal-membru u mhux tal-Iskema biss, iżda l-bidla saret biss wara 2017. Għalhekk peress li l-obbligu ma kienx jeżisti, l-Arbitru ma setax jgħid li hija kellha xi obbligu li tapplika l-prinċipji fil-livell tal-membru. Minn hawn is-soċjetà appellanta tgħaddi sabiex tagħmel is-sottomissjonijiet tagħha fejn hija kienet qegħda ssostni li l-Arbitru ddeċieda ħażin fir-rigwad tal-linji gwida dwar l-investiment 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 jiġu applikati b'mod tassattiv. Tinsisti li m'hemmx *'one size fits all'* fl-applikazzjoni ta' dawn il-linji gwida. Min-naħa tagħha hija kienet ippreżentat il-profil tal-appellata, iżda xorta waħda l-Arbitru ddeċieda li hija ma kinitx ressqet evidenza sabiex turi b'mod sodisfaċenti li l-investimenti saru skont il-linji gwida in kwistjoni. Tirrileva li r-regola ġenerali hija li min jallega għandu l-oneru tal-prova, u għalhekk hawn l-appellata kellha l-obbligu li ssostni l-ilment tagħha, u dan filwaqt li tikkontendi li hija fil-fatt kienet ġabet prova sodisfaċenti sabiex turi li l-linji gwida kienu ġew osservati. Is-soċjetà appellanta tgħid li l-Arbitru mbagħad żbalja wkoll meta skarta l-prova tagħha meta din ma kinitx ġiet ikkontestata mill-appellata. Tgħid

li l-Arbitru għażel żewġ eżempji sabiex jispjega kif hi ma kinitx applikat il-linji gwida tagħha stess. Dwar l-ewwel wieħed li kien l-investiment kellu jsir l-aktar f'swieq regolati, hija tgħid li ma ngħatatx l-opportunità sabiex tispjega kif hija kienet applikat din il-linja gwida u għalhekk illum hija rinfaċċjata b'deċiżjoni li qatt ma kellha l-opportunità li tikkontestaha. Barra minn hekk hija ma kinitx taf minn fejn l-Arbitru kien sab l-informazzjoni jew liema kienu l-*fact sheets* li huwa kkonsulta, u dan kien ipoġġiha f'pożizzjoni fejn ma setgħetx tikkontesta l-pożizzjoni meħuda minnu. Issostni li anki din il-Qorti issa kienet ser issib li ma setgħetx tieħu pożizzjoni għaliex ma kienx ċar jekk din l-informazzjoni li straħ fuqha l-Arbitru kinitx tagħmel parti mill-proċess. Dwar dak li kien iddikjara l-Arbitru, is-soċjetà appellanta tgħid li l-investimenti kollha, anki n-noti strutturati, kienu fil-fatt *'listed'* jew fuq l-elenku, u għalhekk setgħu jiġu negozjati fi swieq li jiffaċilitaw u li jiġġestixxu n-negozju fi strumenti finanzjarji. Għalhekk, tkompli tgħid, il-konklużjoni tal-Arbitru li l-linja gwida ma kinitx ġiet osservata fil-kompożizzjoni tal-portafoll, kienet tassew żbaljata. It-tieni eżempju meħud mil-linji gwida kien jirrigwarda l-konklużjoni tal-Arbitru li huwa ma kienx konvint li l-kondizzjonijiet ta' likwidità kienu qed jiġu osservati adegwatament. Tikkontendi li hija ma kellhiex tinstab responsabbli 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 jixtru 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'oħra tagħmel riferiment għall-affidavit ta' Stewart Davies, issostni li l-profil ta' riskju kien għaliha jagħmel parti integrali mill-konsiderazzjonijiet tagħha bħala Amministratur, u li kieku dan ma kienx il-każ, ma kinitx tistaqsi għalih fil-formola tal-applikazzjoni tagħha stess. Dan filwaqt li tirrileva li x-xhieda ta' Stewart Davies ma kinitx ġiet ikkontestata, u għalhekk l-Arbitru kellu jistrieħ fuqha. Għal dak li kien jirrigwarda d-deċiżjoni appellata fejn l-Arbitru ddikjara li ma kien hemm l-ebda raġuni ġustifikata għaliex is-soċjetà appellanta kienet naqset milli tagħti nformazzjoni dwar l-investimenti sottoskritti, tgħid li hawn l-Arbitru jirrepeti l-iżball tiegħu meta filwaqt li jirrikonoxxi li hija ma kellha l-ebda obbligu speċifiku, huwa ddikjara li bħala *trustee* bl-obbligu li timxi bħala *bonus paterfamilias,* hija kienet tenuta li tipprovdi rendikont aktar dettaljat. B'hekk huwa kien saħansitra nferixxa obbligi fir-rigward tal-kwalità u l-estent ta' dik l-informazzjoni u ħoloq inċertezza dwar x'kienu l-obbligi tagħha taħt il-liġi billi silet obbligi mill-obbligi ġenerali li jirregolaw lit-*trustees*. Issostni li SOC 2.6.2 u 2.6.3 jirreferu għall-iskema fit-totalità tagħha meta l-appellata ma kinitx qed tilmenta li hija ma ngħatatx informazzjoni dwar l-Iskema fejn ukoll ma kienx il-punt li kien qed jiġi deċiż.

<u>It-tieni aggravju</u>

Is-soċjetà appellanta tgħid li hija tħossha aggravata wkoll għaliex l-Arbitru ddikjara li hija kienet parzjalment responsabbli għal 70% tat-telf soffert mill-appellata. Tgħid li fl-ewwel lok l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet li hija kienet diġà fissret li kienu nfondati, iżda jekk imbagħad wieħed kellu jaċċetta li huwa kellu raġun, tgħid li huwa naqas milli jispjega kif attribwixxa lilha r-responsabbiltà ta' 70% tat-telf. Dan filwaqt li tgħid li sabiex

jiddikjara responsabbiltà, huwa kellu qabel xejn isib li hemm ness kawżali bejn in-nuqqasijiet tagħha u t-telf soffert mill-appellata. Hawn is-soċjetà appellanta tikkontendi li ċertament ir-responsabbiltà tagħha qatt ma setgħet tkun akbar minn ta' min ta l-parir, jiġifieri CWM jew tal-appellata li ħadet id-deċiżjoni. Tagħmel ukoll riferiment għar-riskji naturali tas-suq u tisħaqq li meħud dan kollu in konsiderazzjoni, ir-responsabbiltà tagħha kellha tkun inqas minn 70%.

L-aħħar aggravju

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

10. L-appellata tilqa' billi tikkontendi li ġaladarba hija kienet tikkwalifika bħala *'retail client',* jiġifieri hija ma kinitx investitur professjonali, kienet mistennija aktar diliġenza min-naħa tas-soċjetà appellanta. Tgħid li kif sewwa osserva l-Arbitru fid-deċiżjoni appellata, għalkemm is-soċjetà appellanta ma ndaħlitx fl-għażla tagħha tal-konsulent finanzjarju, hija kellha ftehim ma' CWM fejn kienet aċċettat li tintroduċi lil din tal-aħħar mal-membri bħala konsulent finanzjarju, u saħansitra kienet imniżżla fl-applikazzjoni tas-soċjetà appellanta. B'hekk il-klijent seta' kien influwenzat biex jagħżel lil CWM bħala konsulent finanzjarju tiegħu u tgħid li fil-każ ta' *retail client* aktar kien hemm ċans li dan jistrieħ fuq ir-rakkomandazzjonijiet mogħtija mis-soċjetà appellanta. Imma bħala *trustee* u Amministratur tal-Iskema tal-Irtirar, l-appellata tgħid li l-obbligi bażiċi tas-soċjetà appellanta kienu jirrikjedu wkoll diliġenza u prudenza fil-ftehim li għamlet ma' CWM. Iżda mill-applikazzjoni stess kien jirriżulta li s-

soċjetà appellanta kienet aċċettat u anki ħalliet informazzjoni ineżatta dwar il-konsulent finanzjarju. Tgħid li l-Arbitru anki dan kien irrileva l-punt. Tirrileva 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 ikkonstatah ukoll fid-deċiżjoni appellata, kif ukoll sab illi fl-applikazzjoni ma kienx ċar dwar min fil-fatt kellu r-rwol ta' konsulent finanzjarju, u ma kien hemm l-ebda indikazzjoni jew spjegazzjoni dwar id-differenza bejn it-termini *'Professional 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 ġie ppubblikat fl-2017 iżda kien jittratta prinċipji ġenerali tat-Kap. 331 u tal-Kodiċi Ċivili, li kienu diġà fis-seħħ qabel dik is-sena. Għalhekk jiċċita wkoll 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' rappurtaġġ u saħansitra ma ressqet l-ebda prova dwar dan. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru dwar il-kompożizzjoni tal-portafoll tagħha, l-appellata tikkontendi li kien irriżulta tassew ċar li kien hemm għadd ta' riskji assoċjati mal-kapital investit f'dan it-tip ta' prodotti u kien hemm saħansitra noti li seta' jintilef il-kapital. Għal dak li jirrigwarda l-argument tas-soċjetà appellanta dwar l-i*Standard Operational Conditions* 2.7.1 u 2.7.2, hija tibda billi tiċċita l-istess u anki dak li qal l-Arbitru fir-rigward, filwaqt li tissottometti li s-soċjetà

appellanta ma kinitx ħielsa milli tosserva l-obbligi tagħha fuq livell individwali, għaliex l-Iskema kienet tirrifletti l-investimenti u l-portafolli individwali. Dwar l-argument tas-soċjetà appellanta li l-Arbitru kien applika u ddeċieda 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 tagħżel 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 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 tipprovdi informazzjoni adegwata lill-membri tal-Iskema, tgħid li l-Arbitru tajjeb osserva li ma kien hemm l-ebda raġuni għaliex is-soċjetà appellanta naqset li tagħmel dan. Tgħid li l-argument tas-soċjetà appellanta li hija ma kellha l-ebda obbligu speċifiku għaliex id-Direttivi jitkellmu dwar l-iskema, ma jreġix għaliex hija ma setgħetx tinjora l-obbligi tagħha fir-rigward tal-Iskema b'mod ġenerali, u l-obbligi ta' *bonus paterfamilias* kienu jservu sabiex

jirregolaw sitwazzjonijiet li forsi ma kienux regolati permezz ta' provvediment partikolari tal-liġi.

11. Il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. Huwa jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġjonevoli fic-cirkostanzi partikolari u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad, wara li jagħmel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellata mill-Applikazzjoni għas-Sħubija tal-Iskema[3], innota li ma kienx ġie ndikat jew ippruvat li l-appellata hija nvestitur professjonali u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti dawn kollha ssib kemm korretti u wkoll f'lokhom u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

12. Wara li spjega l-qafas legali li kien jirregola l-Iskema u anki lis-soċjetà appellanta, l-Arbitru rrileva li tali Skema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta u kif awtorizzata mill-MFSA bħala *Retirement Scheme* f'April 2011 taħt l-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar) u f'Jannar 2016 taħt l-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta). Osserva li l-fondi li ġew trasferiti fl-Iskema kienu ntużaw sabiex inxtrat polza ta' assikurazzjoni fuq il-ħajja magħrufa bħala *European Executive Investment Bond* li kienet inħarġet minn Skandia/OMI, u sussegwentement il-*premium* ta' dik il-polza ġie nvestit f'portafoll ta' prodotti bid-direzzjoni tal-konsulent finanzjarju tal-appellata u li ġie aċċettat mis-soċjetà appellanta. Fost dawk l-investimenti, jirrileva li kien hemm għadd kbir ta' noti strutturati kif kien

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

jirriżulta mill-*Investor Profile* esebit mis-soċjetà appellanta stess, minn fejn ukoll kien jirriżulta l-valur fid-9 ta' Awwissu, 2018 u t-telf (eklużi d-drittijiet) ta' GBP43,162 fl-istess data. Meħuda in konsiderazzjoni d-drittijiet imħallsa, l-Arbitru qal li t-telf soffert mill-appellata kien fil-fatt ikbar. L-Arbitru rrileva wkoll li s-soċjetà appellanta kienet naqset milli tindika jekk it-telf indikat kif fuq ingħad kienx wieħed reali.

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

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

15. L-Arbitru mbagħad għadda sabiex ikkonsidra li s-soċjetà appellanta bħala Amministratriċi u *Trustee* tal-Iskema kienet soġġetta għall-obbligi, funzjonijiet u responsabbiltajiet applikabbli, kemm dawk legali u anki dawk li kienu stipulati fiċ-Ċertifikat ta' Registrazzjoni tagħha kif maħruġ mill-MFSA fit-28 ta' April, 2011, li jagħmel riferiment għall-i*Standard Operational Conditions* [minn issa 'l quddiem "SOC"]] tad-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002* [minn issa 'l quddiem 'id-Direttivi']. Huwa hawn għamel riferiment għall-Att li Jirregola Fondi Speċjali, li ġie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar, u għar-regoli magħmula taħthom li għalihom ġiet soġġetta s-soċjetà appellanta mal-ħruġ taċ-Ċertifikat ta' Reġistrazzjoni tal-1 ta' Jannar, 2016 taħt il-Kap. 514. Sostna li wieħed mill-obbligi ewlenija tagħha bħala Amministratur tal-Iskema skont il-Kap. 450 u l-Kap. 514, kien proprju li taġixxi fl-aħjar interessi tal-Iskema. Il-Qorti hawn iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta hawn kellha obbligi daqstant ċari li timxi fl-aħjar interess tal-Iskema, kemm fiż-żmien li saret l-assenjazzjoni tal-polza lis-soċjetà appellanta fis-sena 2013 meta kienu applikabbli d-dispożizzjonijiet tal-Kap. 450, u anki sussegwentement meta ġie fis-seħħ l-Att dwar Pensjonijiet għall-Irtirar fis-sena 2015 u l-appellata kienet għadha membru tal-Iskema u ġarrbet it-telf allegat.

16. Minn hawn l-Arbitru għadda sabiex elenka diversi prinċipji li kienu applikabbli fil-konfront tas-soċjetà appellanta skont il-*General Conduct of Business Rules/Standard Licence Conditions* applikabbli taħt ir-reġim tal-Kap. 450 kif imħassar, u tal-Kap. 514 li ssostitwih. Għal darb'oħra l-Qorti tirrileva li jirriżulta li s-soċjetà appellanta bħala Amministratur tal-Iskema kienet tenuta li

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

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

18. L-Arbitru mbagħad aċċenna fuq obbligu ieħor tas-soċjetà appellanta li hu qies importanti u rilevanti għall-każ in kwistjoni, dak ta' sorveljanza u monitoraġġ tal-Iskema, inkluż l-investimenti magħmula. Hu għamel riferiment għall-affidavit ta' Stewart Davies[5] fejn dan aċċetta li s-soċjetà appellanta fl-aħħar mill-aħħar kellha s-setgħa li tiddeċiedi jekk l-investiment għandux isir, u li

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

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

19. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju ż-żewġ punti li fuqhom huwa msejjes l-ewwel aggravju tas-soċjetà appellanta. Huwa aċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi bħal CWM. L-Arbitru ddikjara li kien tal-fehma, kif inhi din il-Qorti, li s-soċjetà appellanta bħala 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

[6] *Ibid.*

kellu jiġi nvestigat jekk is-soċjetà appellanta naqsitx mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura safejn dan kellu effett fuq l-andament tal-Iskema u t-telf riżultanti tal-appellata.

20. L-Arbitru osserva li l-appellata kienet għażlet hija stess li taħtar lil CWM sabiex din tipprovdiha b'pariri dwar l-investimenti formanti parti mill-portafoll tagħha fl-Iskema, u min-naħa tagħha s-soċjetà appellanta aċċettat u/jew ħalliet il-konsulent joffri l-parir tiegħu lill-appellata. Osserva li s-soċjetà appellanta saħansitra kellha *introducer agreement* ma' CWM. L-ewwel punt li rrileva hawn huwa li s-soċjetà appellanta ppermettiet li l-Formola ta' Applikazzjoni għal Sħubija tħaddan informazzjoni mhux sħiħa u preċiża fir-rigward tal-konsulent finanzjarju, u spjega din x'kienet. Jirrileva li fir-rwol tagħha ta' *Trustee* u *bonus paterfamilias,* hija kienet tenuta tiġbed l-attenzjoni tal-appellata għal dawn in-nuqqasijiet, u qal li fl-aħħar mill-aħħar hija kellha l-prerogattiva li taċċetta jew le l-applikazzjoni, lill-konsulent finanzjarju u anki l-persuna ma' min kienet ser tinnegozja. Il-Qorti hawn tgħid li f'dan il-kuntest hija għalhekk irrilevanti s-sottomissjoni tas-soċjetà appellanta fir-rigward tal-kummenti tal-Arbitru dwar l-applikazzjoni tal-MiFID I Directive, meta jirriżultaw nuqqasijiet daqstant ċari min-naħa tagħha. It-tieni punt li qajjem l-Arbitru jirrigwarda n-nuqqas ta' kjarezza fil-Formola ta' Sħubija fir-rigward tal-kapaċità li fiha kienet qegħda taġixxi CWM. Il-Qorti hawn iżżid tgħid li s-soċjetà appellanta tonqos li tikkonvinċi lil din il-Qorti kif dan seta' ma kienx minnu, anki permezz tas-sottomissjonijiet ulterjuri magħmulin fl-Anness I tar-rikors tal-appell tagħha. Imbagħad it-tielet punt tiegħu jirrigwarda l-kwistjoni li ma kienx hemm distinzjoni ċara bejn CWM, Inter-Alliance u Trafalgar, u ma kienx jirriżulta b'mod

inekwivoku jekk CWM kinitx qegħda taġixxi bħala aġent in rappreżentanza ta' ditta oħra, meta dan kellu jkun rifless b'mod ċar fid-dokumentazzjoni kollha. Fir-raba' punt tiegħu, l-Arbitru stqarr li ma rriżultat l-ebda evidenza li kienet turi jekk CWM kienx 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 jirriżulta saħansitra li CWM ma kinitx qegħda topera taħt il-liċenzji maħruġa lil Trafalgar. Iżda min-naħa tagħha qal li s-soċjetà appellanta ma pproduċiet l-ebda evidenza dwar dak allegat minnha fir-rigward tal-awtorizzazzjoni ta' CWM.

21. Fir-rigward tal-argument miġjub mis-soċjetà appellanta li bejn 2013 u 2015 taħt il-qafas regolatorju tal-Kap. 450, u sakemm ġew implimentati l-*Pension Rules for Personal Retirement Schemes* taħt il-Kap. 514, hija ma kellha l-ebda obbligu li teżiġi l-ħatra ta' konsulent regolat, l-Arbitru sostna li xorta waħda kien mistenni li l-Amministratur u t-*Trustee* jeżegwixxu l-obbligu tagħhom ta' kura u diliġenza professjonali bħal fil-każ ta' *bonus paterfamilias.* L-Arbitru hawn sostna li l-ħatra ta' entità li ma kinitx regolata sabiex isservi ta' konsulent, kienet tfisser li l-appellata kienet tgawdi minn inqas protezzjoni u s-soċjetà appellanta kienet tenuta tkun konoxxenti ta' dan il-fatt u li tassigura li l-appellata jkollha l-informazzjoni korretta u adegwata dwar il-konsulent. Qal li mhux biss is-soċjetà appellanta naqset milli tindirizza l-kwistjoni li l-konsulent ma kienx regolat, imma 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 saret riferiment għalih aktar 'il fuq f'din is-sentenza, qajjem potenzjal ta' kunflitt ta' interess fejn l-entità li kienet soġġetta għal 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 kienet saħansitra ukoll *Trustee* tal-Iskema.

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

23. Dwar it-tieni punt sollevat mis-soċjetà appellanta fl-ewwel aggravju tagħha, l-Arbitru osserva li l-investimenti li kienu sottoskritti l-polza ta' assikurazzjoni taħt l-Iskema, kienu magħmula l-aktar f'noti strutturati. L-Arbitru seta' jikkostata li l-portafoll kien ġie espost b'mod estensiv għal dawn il-prodotti strutturati, kif diġà ndikat minnu aktar 'il fuq.

24. 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 wkoll ir-riskju tal-likwidità, u twissijiet li n-noti ma kellhomx il-kapital protett. Dan kollu tgħid il-Qorti, kien ferm indikattiv tal-fatt li l-investiment 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' perċentwal. Għalhekk, qal l-Arbitru, kien hemm konsegwenzi materjali jekk il-valur ta' wieħed biss mill-assi kollha tan-noti strutturati kien inżel mill-minimu ndikat. Hawn l-Arbitru jagħmel riferiment għal komunikazzjoni partikolari li kienet ġiet ippreżentata f'każ separat nru. 185/2018 li kien sar kontra s-soċjetà appellanta, kif deċiż 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 u kkuppjata wkoll 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 breech their barriers untold amounts of damage is done".* Il-Qorti tgħid li ċertament hija ma tistax twarrab leġġerment prova daqstant ċara kontra l-investiment f'noti strutturati.

25. L-Arbitru minn hawn għadda sabiex iddikjara li l-espożizzjoni qawwija għal prodotti strutturati u għal emittent singolari li tħalliet issir mis-soċjetà appellanta, ma kinitx tirrispetta r-rekwiżiti regolatorji applikabbli għall-Iskema dak iż-żmien, u huwa jagħmel riferiment partikolari għal SOC 2.7.1 u 2.7.2 li kienu applikabbli sa mill-bidunett meta nħolqot l-Iskema fis-sena 2011, sad-data li din ġiet reġistrata fl-1 ta' Jannar, 2016 taħt il-Kap. 514. Qal li s-soċjetà appellanta stess kienet għamlet aċċenn dwar l-applikabbilità u r-rilevanza ta' dawn il-kondizzjonijiet għall-każ odjern. L-Arbitru ċċita partijiet minn dawn id-Direttivi, u rrileva li minkejja li SOC 2.7.2 kien jeżiġi ċertu livell, is-soċjetà

appellanta kienet ippermettiet li l-portafoll tal-appellata xi kultant ikun magħmul biss jew fil-parti l-kbira tiegħu minn prodotti strutturati. Barra minn hekk l-espożizzjoni għal emittent waħdieni kien f'xi drabi viċin il-massimu ta' 30% stabbilit mir-regoli għal investimenti aktar siguri bħal depożiti. Osserva li matul il-proċeduri ma kienx ġie ndikat jekk il-prodotti strutturati kienux ġew negozjati f'suq regolat. Is-soċjetà appellanta tittenta targumenta quddiem din il-Qorti li r-regoli suriferiti jolqtu biss l-Iskema iżda mhux il-portafoll tal-membru ndividwali, imma l-Qorti mhijiex tal-istess fehma u għaldaqstant mhijiex qegħda tilqa' dan l-argument. Tgħid li huwa daqstant ċar mid-diċitura ta' dawn ir-regoli li l-intendiment huwa li jiġu regolati l-investimenti kollha li jaqgħu fl-iskema, u dan mingħajr distinzjoni bejn l-iskema nnifisha u l-portafoll ta' kull membru. Il-Qorti żżid tgħid li l-argument tas-soċjetà appellanta lanqas jista' jitqies li huwa wieħed loġiku, meħud in konsiderazzjoni l-fatt li jekk ifalli portafoll ta' membru dan jista' ċertament ikollu effett fuq il-kumplament tal-iskema. Wara dawn l-osservazzjonijiet, l-Arbitru għadda sabiex osserva wkoll li ma kienx ġie ndikat matul il-proċeduri jekk il-prodotti strutturati li fihom kien sar l-investiment, kienux ġew negozjati f'suq regolat.

26. 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 ħa konjizzjoni tal-imsemmija linji gwida għas-snin 2013 sa 2018, li s-soċjetà appellanta annettiet mas-sottomissjonijiet tagħha, irrileva li hija ma kienx 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 perjodu twil ta' żmien.

27. Wara dawn l-osservazzjonijiet, l-Arbitru għadda sabiex ittratta żewġ istanzi fejn il-kompożizzjoni tal-portafoll ma kienx irrispetta l-linji gwida. L-ewwel rekwiżit li kkonsidra huwa li l-assi kellhom jiġu investiti l-aktar fi swieq regolati. Wara li ta t-tifsira tal-frażi *"predominantly invested in regulated markets"* kif din kienet tidher fil-linji gwida, sostna li ma ġiet sottomessa l-ebda evidenza li kienet turi li l-portafoll kien magħmul kollu kemm hu jew l-aktar min-noti strutturati elenkati. 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. Qal 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 Amministratur tal-Iskema ippermetta investiment b'espożizzjoni aktar għoli f'noti strutturati li kienu garanzija ta' debitu u li s-soltu ma kienux elenkati.

28. It-tieni rekwiżit li jittratta l-Arbitru huwa l-likwidità tal-portafoll. Wara li osserva li l-linji gwida ta' Jannar 2013 u għal nofs is-sena 2014 kienu jirrikjedu li mhux aktar minn 40% tal-fond jew tal-portafoll tal-membru kellu jiġi nvestit f'assi li kellhom likwidità ta' aktar minn 6 xhur, osserva wkoll li aktar tard fis-snin 2015 sa 2018 it-terminu tnaqqas għal bejn tlieta u sitt xhur. Irrileva li kien

jirriżulta li n-noti strutturati fejn sar l-investiment tal-portafoll kellhom terminu twil ta' maturità ta' bejn sena u sentejn, kif muri fil-*fact sheets* relattivi. Osserva li l-possibilità ta' suq sekondarju fir-rigward ta' noti strutturati, ma kienx jiggarantixxi 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 irriżulta mir-rendikonti annwali maħruġa lill-membri mis-soċjetà appellanta. Hu hawn ukoll għamel riferiment għat-twissija fir-rigward tal-RBC Investment, u qal li twissijiet simili setgħu jinstabu f'*fact sheets* oħra.

29. L-Arbitru qal li kien hemm diversi aspetti oħra fejn il-kompożizzjoni tal-portafoll ma kienx jirrispetta 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 eżempji ta' dan. Irrileva li matul is-snin, is-soċjetà appellanta kienet saħansitra emendat il-linji gwida tagħha sabiex naqqset l-espożizzjoni għal noti strutturati u l-emittenti tagħhom, iżda osserva li dawn ma ġewx segwiti fil-każ tal-portafoll tal-appellata, u dan mingħajr raġuni li setgħet tiġġustifika espożizzjoni tant għolja għal emittenti singolari. L-Arbitru hawn silet ir-rekwiżiti partikolari fil-linji gwida, li kienet ħarġet is-soċjetà appellanta matul is-snin bil-għan li tiġi evitata l-espożizzjoni eċċessiva tal-investimenti. Innota wkoll li kien sar investiment mill-portafoll tal-appellata f'noti strutturati li kien jeċċedi l-massimu tal-espożizzjoni għal dawn il-prodotti.

30. L-Arbitru mbagħad ikkonsidra jekk il-prodotti strutturati permessi fil-portafoll tal-appellata kienux intiżi biss għal investituri professjonali, imma 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 huwa kien sab numru ta' *fact sheets* relattivi għal bosta min-noti strutturati li kienu jagħmlu parti mill-portafoll tal-appellata, u dan permezz ta' riċerka fuq l-*internet,* spjega li dawn il-*fact sheets* kienu jindikaw li l-prodotti kienu ntiżi għal investituri professjonali biss. Hawn ukoll il-Qorti tgħid li dan il-fatt kellu mhux biss jiġi osservat mis-soċjetà appellanta, iżda saħansitra hija kellha d-dover li tieħu d-debita azzjoni billi taċċettax li jsir l-investiment imsemmi, u/jew tiġbed l-attenzjoni tal-appellata.

31. Il-Qorti hawn ser tikkonsidra dak li ġie rilevat mis-soċjetà appellanta, li l-Arbitru ddeċieda 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 saħansitra dgħajfet id-difiża tagħha meta naqset milli tippreżenta informazzjoni dettaljata dwar l-investimenti sottoskritti. Anki l-Qorti ikkonstatat 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 ddeċieda 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 jiddeċiedi l-ilment fil-parametri tal-para. (b) tas-subartikolu 19(3) tal-istess liġi. Il-Qorti tirrileva li r-riżultat tat-tfittxija tiegħu tista' biss turi kemm kien korrett li ma jieqafx fl-investigazzjoni tiegħu minħabba l-informazzjoni limitata a dispożizzjoni diretta tiegħu, li l-Qorti tqis li

ma kinitx ir-riżultat ta' nuqqas ta' attenzjoni, u b'hekk allura jkun qed igħin id-difiża tas-soċjetà appellanta. Il-Qorti min-naħa l-oħra, b'hekk ma tqisx li huwa kien qed jgħin il-każ imressaq mill-appellat, aktar milli jaċċerta li ssir ġustizzja. Is-soċjetà appellanta tilmenta wkoll li hija qatt ma kellha l-opportunità li tieħu konjizzjoni tal-informazzjoni meħuda mill-*fact sheets,* iżda jirriżulta minn dak li qal l-Arbitru li l-informazzjoni ma kinitx waħda diffiċli sabiex tinkiseb permezz ta' riċerka fuq l-*internet,* u għalhekk din kienet disponibbli wkoll għall-pubbliku, inkluża s-soċjetà appellanta. B'hekk ukoll is-soċjetà appellanta kellha kull opportunità, imma fil-fatt naqqset milli tagħmel dan, li tikkontesta dik l-informazzjoni miksuba. Imma l-Qorti tikkonsidra li jekk hija għandha temmen li s-soċjetà appellanta qatt ma kellha din l-informazzjoni a dispożizzjoni tagħha, tassew din kienet qegħda tonqos minn kull obbligu ta' *bonus paterfamilias.*

32. Imbagħad l-Arbitru osserva wkoll li fil-fehma tiegħu s-soċjetà appellanta m'għenitx id-difiża tagħha meta naqset milli tipprovdi informazzjoni dettaljata dwar l-investimenti sottoskritti. Huwa aċċenna għal darb'oħra fuq dawk l-aspetti li kellhom jiġu kkonsidrati mis-soċjetà appellanta fir-rigward tal-kompożizzjoni tal-portafoll tal-appellata. Tajjeb osserva li ma kienet tirriżulta l-ebda raġuni valida sabiex il-portafoll tal-pensjoni tal-appellata kien ġie espost estensivament għall-prodotti strutturati, u ddikjara li huwa ma kien qed isib l-ebda serħan tal-moħħ adegwat u suffiċjenti li l-kompożizzjoni tal-portafoll kien jirrifletti l-prudenza mistennija minn portafoll tal-pensjoni, minkejja l-profil ta' riskju tal-appellata. Għalhekk huwa kkonsidra li l-investiment tal-portafoll f'kull ħin ma kienx jirrispetta SOC 2.7.2(a) u (b) tal-Parti B.2.7 tad-Direttivi, u lanqas ma kien konvint li dan kien jirrifletti l-kondizzjonijiet u l-limiti tal-investiment

tar-regolamenti tal-MFSA. Stqarr li l-Amministratur u t-*Trustee* tal-Iskema kellu jimxi mal-ispirtu u mal-prinċipji li fuqhom kien magħmul il-qafas regolatorju u fil-prattika kellu wkoll jippromwovi l-iskop li għalih saret l-Iskema. Il-Qorti tikkondividi pjenament dan il-ħsieb, u tgħid li hekk biss is-soċjetà appellanta setgħet tiġi kkonsidrata li wriet il-*bona fide* u li osservat dan l-obbligu inerenti fir-rwol tagħha ta' *Trustee* u ta' Amministratriċi tal-Iskema, li kif sewwa jgħid l-Arbitru, l-għan tagħha huwa dak li tipprovdi għal benefiċċji tal-irtirar, li wara kollox huwa l-qofol tal-liġi u l-qafas regolatorju li għalih hi u s-soċjetà appellanta huma soġġetti.

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

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

34. Imbagħad l-Arbitru għadda sabiex jittratta l-kwistjoni tan-ness kawżali tad-danni sofferti mill-appellata. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ minħabba l-andament negattiv tal-investimenti riżultat tas-suq u tar-riskji inerenti u/jew tal-allegat frodi tal-konsulent finanzjarju, kif allegat mis-soċjetà appellanta. Qal li kien hemm evidenza biżżejjed u konvinċenti ta' nuqqasijiet da parti tas-soċjetà appellanta fit-twettiq tal-obbligazzjonijiet u d-doveri tagħha kemm bħala *Trustee* u anki bħala Amministratur tal-Iskema tal-Irtirar li kienu juru nuqqas ta' diliġenza. Qal li l-istess nuqqasijiet saħansitra ma ħallew l-ebda mod li bih seta' jiġi minimizzat it-telf u fil-fatt ikkontribwew għall-istess telf, u b'hekk l-Iskema ma kinitx laħqet l-għan prinċipali tagħha. Fil-fehma

tal-Arbitru, 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 l-fehma sħiħa tal-Arbitru. Jirriżulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkonsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-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 fallew ukoll l-aspettattivi tagħha. Dan filwaqt li tgħid ukoll li hija bl-ebda mod ma kienet tenuta taċċerta l-identità tal-imsemmi konsulent finanzjarju, u fl-istess ħin tħares dak kollu li kien qed isir, inkluż il-kompattibilità tal-istruzzjonijiet mal-profil tal-appellata, u anki l-andament tal-investimenti u żżomm linja ta' komunikazzjoni miftuħa mal-appellata. Iżda kif ġie kkonsidrat minn din il-Qorti, id-difiża tas-soċjetà appellanta ma tistax tirnexxi fid-dawl tal-obbligi legali u regolatorji tagħha, u huwa proprju għalhekk li n-nuqqasijiet tagħha għandhom jitqiesu li kkontribwew lejn it-telf soffert mill-appellata mill-investimenti tagħha.

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

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

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

36. 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 oriġinali kif investit, permezz ta' diversifikazzjoni tajba tal-investimenti, bilanċjata u prudenti. Iżda fil-każ odjern kien jirriżulta pjenament li seta' jingħad li mill-inqas kien hemm nuqqas ċar ta' diliġenza min-naħa tas-soċjetà appellanta fl-amministrazzjoni ġenerali tal-Iskema, u anki fl-esekuzzjoni tal-obbligi tagħha bħala *Trustee,* partikolarment meta wieħed iqis l-obbligu ta' sorveljanza tal-Iskema u l-istruttura tal-portafoll fejn kellu x'jaqsam il-konsulent finanzjarju. Qal li fil-fatt is-soċjetà appellanta ma kinitx laħqet ir-*'reasonable and legitimate expectations'* tal-appellata skont il-para. (ċ) tas-subartikolu 19(3) tal-Kap. 555. Il-Qorti filwaqt li tiddikjara li hija qegħda tagħmel tagħha l-ħsibijiet kollha tiegħu, tgħid li m'għandhiex aktar x'iżżid mad-deċiżjoni appellata tassew mirquma u studjata.

37. L-aħħar aggravju tas-soċjetà appellanta huwa fir-rigward tal-kumment tal-Arbitru fir-rigward ta' dak li huwa kkonsidra bħala tnikkir min-naħa tas-soċjetà appellanta sabiex tgħaddi lill-appellata d-dokumenti rikjesta minnha, iżda mbagħad irrilevat il-preskrizzjoni tal-azzjoni kontriha. Fil-fehma tal-Arbitru

huwa kkonsidra li dan kien aġir tassew nieqes mill-professjonalità, u qal li l-prinċipju legali aċċettat żmien ilu, huwa li ħadd ma jista' jistrieħ fuq il-mala fede tiegħu stess. Tikkontendi li dan l-Arbitru qalu mingħajr ma tressqet l-ebda prova li hija kienet aġixxiet in mala fede, u kien inaċċettabbli li deċiżjoni bħal din saħansitra kienet laħqet id-dominju pubbliku. Il-Qorti hawn ukoll tikkondividi l-ħsieb tal-Arbitru u ma tara l-ebda raġuni għaliex is-soċjetà appellanta kienet tardiva fir-risposti tagħha, u saħansitra hija stess ma toffri l-ebda spjegazzjoni. Hawn ukoll l-obbligu tagħha li tagħti informazzjoni f'waqtha lill-appellata, għandha rilevanza qawwija f'sitwazzjoni fejn l-investimenti allegatament kienu qegħdin jesperjenzaw telf qawwi.

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

<u>Decide</u>

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

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

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur