MALTA

QORTI TAL-APPELL
(Kompetenza Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-2 ta' Frar, 2022

Appell Inferjuri Numru 15/21 LM

Kuraturi Deputati sabiex jirrapreżentaw l-assenti Kevin Whoriskey (Detentur tal-passaport numru: 510939830) u b'digriet tal-20 ta' Mejju 2021 ġiet ordnata l-estromissjoni tal-kuraturi deputati wara li assumiet l-atti Dr. Maria Attard bħala prokuratur speċjali għall-assenti Kevin Whoriskey
('l-appellat')

***vs*.**

Sovereign Pension Services Limited (C 56627)
('l-appellanta')

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **Sovereign Pension Services Limited (C 56627)** [minn issa 'l quddiem 'is-soċjetà appellanta'] mid-

deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fl-1 ta' Frar, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti **Kevin Whoriskey (Detentur tal-Passaport nru. 501939830)** [minn issa 'l quddiem 'l-appellat'] fil-konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinżamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lill-appellat il-kumpens ta' GBP20,748.42 (għoxrin elf seba' mija tmienja u erbgħin Lira Sterlina u tnejn u għoxrin pence) bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effetiv pagament, filwaqt li kull parti kellha tħallas l-ispejjeż tagħha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwarda t-telf eventwali li allegatament jgħid li sofra l-appellat mill-investiment f'*Reserve Bond* bl-isem *Friends Provident International* [minn issa 'l quddiem 'FPI Bond'], li mbagħad ġie investit f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] jew QROPS bl-isem *Centaurus Retirement Benefit Scheme,* kif ġestita mis-soċjetà appellanta. Il-*premium* ta' dik il-polza ġie investit f'diversi noti strutturati sottoskritti skont il-parir ta' ċertu David Humphreys minn *Offshore Investor,* wara li l-appellat fittex parir dwar l-investiment ta' żewġ fondi tal-pensjoni li huwa kellu mill-impjieg preċedenti tiegħu mal-RAF u ma' BAE Systems rispettivament. Sentejn wara, jiġifieri fis-sena 2016, huwa kien ġie nfurmat li l-investiment tiegħu kien sofra telf.

Sussegwentement sar jaf ukoll li Paul Macbeth, li kien il-*manager* ta' *Offshore Investor,* kien sparixxa u li dan qatt ma kellu liċenzja li kienet tippermettilu jagħmel dawn it-transazzjonijiet finanzjarji.

Mertu

3. L-appellat għalhekk ippreżenta lment quddiem l-Arbitru fil-konfront tas-soċjetà appellanta, fejn filwaqt li allega li din kienet naqset mill-wegħda tagħha li tieħu ħsieb il-portafoll tal-klijenti b'mod li jiġu assigurati investimenti xierqa u ddiversifikati u li kellhom maturità fit-tul, allega wkoll li din kienet amministrat ħażin l-fondi tiegħu b'mod grossolan u fejn saħansitra wriet negliġenza qawwija u nuqqas ta' kura għal kollox lejh bħala klijent. Għalhekk huwa kien qed jippretendi kumpens fis-somma ta' GBP72,000 għat-telf indikat.

4. Is-soċjetà appellanta wieġbet billi talbet lill-Arbitru sabiex jiċħad l-ilment tal-appellat. Hija eċċepiet fost affarijiet oħra li: (i) fl-ebda ħin hija kienet tat xi parir dwar investiment fir-rigward tan-noti strutturati jew mod ieħor; (ii) in-noti ġew magħżulin mill-appellat u mill-konsulent finanzjarju tiegħu skont il-portafoll sħiħ tiegħu, u kull xiri ta' investiment kien skont il-profil ta' riskju tiegħu; (iii) ma kienx korrett l-ammont ta' telf allegat mill-appellat; (iv) il-fond tal-appellat kien soġġett għall-investiment skont il-Parti B.3.2 tal-*Pension Rules for Personal Retirement Schemes* tal-MFSA; (v) hija ma kinitx tipprovdi u lanqas ma kienet awtorizzata tipprovdi parir dwar investiment, iżda hija xorta waħda kienet ħolqot diversi restrizzjonijiet fuq l-investimenti sottoskritti u l-investimenti sottoskritti l-FPI Bond kienu saru fil-parametri stabbiliti; (vi) hija ma kienet qatt

għamlet negozju jew kellha x'taqsam ma' Paul Macbeth ta' *Offshore Investor;* (vii) fl-applikazzjoni tiegħu l-appellat kien identifika *Offshore Investor* bħala l-konsulent finanzjarju tiegħu u niżżel lil David Humphreys bħala l-konsulent personali tiegħu, u hi min-naħa tagħha kienet wettqet *due diligence* fir-rigward ta' *Offshore Investor* u ġabbret id-dokumentazzjoni fir-rigward tagħha u tal-impjegati tagħha; (viii) kien irriżulta li David Humphreys kien ikkwalifikat fl-ippjanar finanzjarju, u dan kien f'pożizzjoni aħjar minnha sabiex jagħti parir lill-appellat fir-rigward ta' *Offshore Investor;* (ix) l-istruzzjonijiet fir-rigward tat-transazzjonijiet dehru jew kienu ġew direttament mingħand *Offshore Investor,* u l-imsemmija transazzjonijiet kienu jaqgħu fil-parametri tar-restrizzjonijiet imposti fuq l-investimenti tal-Iskema u jħarsu l-profil ta' riskju tal-appellat kif indikat fl-Applikazzjoni ta' Sħubija; (x) kien biss wara li hija rċeviet struzzjonijiet mingħand rappreżentant tal-konsulent finanzjarju tal-appellat għal *draw-down* tal-fond kollu li l-istess appellat ilmenta dwar l-andament tan-noti strutturati sottoskritti il-FPI Bond, u dan filwaqt li qalet li ma kien hemm l-ebda lmenti negattivi anki fl-istampa fir-rigward ta' Paul Macbeth u *Offshore Investor*; u (xi) kien legalment neċessarju li l-istruzzjonijiet għall-investiment tal-fond jiġu ffirmati minn impjegati jew rappreżentanti tagħha.

Id-deċiżjoni appellata

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

"Considers:

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

By way of preliminary comment the Arbiter deems it fit to refer to the reply of the service provider, (fn. 5 paragraph 11 of the reply) where it states that it was not until after the complainant had drawn down the Fund in its entirety that the complainant, assisted by Mr Humphreys, first complained about the performance of the structured notes within his investments under the FPI Bond.

This is true. However, from the chronology of events, it results that the complainant immediately took this issue with the service provider as soon as he realised that the service provider had allowed in the scheme the structured notes complained of. (fn. 6 Following the request made by the complainant for copies of dealing instructions and a full transaction history on 17 February 2018 – A fol. 110) Furthermore, the service provider did not prove that the draw-down was made in full and final settlement of the complainant's pretences.

Investments in financial services are different from other areas of economic activity because very often the investors, especially small investors and retail clients do not have the expertise to query the conduct of a financial service provider until they realize that they had made a loss or were not getting what they had been promised. Very often this takes place at the time of the sale of the investment or, in the case of pension schemes, when they start receiving the pension or when they fail to receive it because of investment failures. It is at this juncture that small investors normally query the conduct of the service provider.

The case would have been different had the service provider proven that the draw-down had been made by the complainant in full and final settlement of all his claims and pretences. However, the service provider did not prove this, and it did not even file the surrender form during these proceedings.

Unless it is clear that the complainant had specifically renounced to his right of action or his action is barred by prescription or by the lapse of any period of decadence as stipulated in Chapter 555 of the Laws of Malta, a complainant can file a complaint even referring to the past conduct of a service provider.

To be fair, the Arbiter has to state that the service provider raised this issue not because it is alleging that the complainant had no right to file this complaint but raised it to highlight that the complainant did not question the issue of structured

notes during the duration of the investment but after the drawdown. After clarifying this issue, the Arbiter will now deal with the other merits of the case and will analyse the complaint while taking into consideration all the pleas raised by the service provider.

The Product in respect of which the Complaint is being made

The Centaurus Retirement Benefit Scheme ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta registered with the Malta Financial Services Authority ('MFSA'), as a Personal Retirement Plan. (fn. 7 https://www.mfsa.mt/financial-services-register/result/?id=4458) The Scheme was originally registered under the Special Funds (Regulation) Act 2002 (Chapter 450 of the Laws of Malta). (fn. 8 A fol. 92)

The Retirement Scheme was established through a trust deed dated 13 July 2014 by SPSL which acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 9 A fol. 94) SPSL is licensed by the MFSA as a Retirement Scheme Administrator. (fn. 10 https://www.mfsa.mt/financial-services-register/result/?id=4459) The Application Form for membership into the Retirement Scheme specifies inter alia that:

'The investment objective of The Centaurus Retirement Benefit Scheme is to accumulate a trust fund from which to provide benefits in retirement'. *(fn. 11 A fol. 91)*

The Scheme's underlying investment consisted of the Friends Provident Reserve Bond ('the FPI Bond'), this being a whole of life policy issued by Friends Provident International. The underlying policy commenced on 23 December 2014. (fn. 12 A fol. 167) The Application Form indicates that the complainant was to transfer funds into his Scheme from his two previously held pensions, the BAE Systems *pension scheme and the* Armed Forces Pension Scheme *(which had an approximate value of GBP76,000 and GBP61,000 respectively, together amounting to GBP136,714). (fn. 13 A fol. 27 & 88)*

A copy of an Illustration issued by Friends Provident International dated 17 July 2014 was indeed provided reflecting an initial premium of GBP136,714. (fn. 14 A fol. 61)

The legal framework

The Retirement Scheme and SPSL are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the

MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta). The Retirement Pensions Act ('RPA') was published in August 2011 and came into force on the 1 January 2015. (fn. 15 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 a licence by the MFSA under the RPA.
*The Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA, given that SPSL is the Trustee of the Retirement Scheme. (fn. 16 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'. *Article 43(6)(c) in turn provides 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 authorsiation in terms of this Act provided that such trustee services are limited to retirement schemes...'.)

Profile of the Complainant

The complainant, born on 7 February 1963, is of British Nationality, and was resident in Saudi Arabia at the time of application for membership into the Scheme in July 2014. (fn. 17 A fol. 23) His occupation was indicated as 'Mechanical Supervisor' *(fn. 18 Ibid.) in the Scheme's Application Form for Membership. Such form is dated 13 July 2014 and is signed by the complainant. (fn. 19 A fol. 32)*

In the section titled, 'Investment Objectives' of the Scheme's Application Form for Membership, the complainant indicated that 'I am prepared to take a small amount

of risk to provide for the potential for growth over the medium to longer term'*, as his preferred investment strategy. (fn. 20 A fol. 30)*

The complainant's Risk Profile was indicated in the Scheme's Application Form as 'Medium Risk' *(category 3), from a risk classification ranging from* 'Lower Risk' *(category 1) to* 'High Risk' *(category 5).*

During the proceedings of the case, the complainant presented a signed Client Declaration form of Offshore Investor, the investment adviser. In the said form, the complainant's attitude to investment risk and the level of investment knowledge were indicated as both 'Low'. *(fn. 21 A fol. 42) It is, however, noted that such declaration form is undated, (fn. 22 Ibid.) and that the service provider claimed that such form had not been previously submitted to SPSL. (fn. 23 A fol. 72)*

Investment Adviser

The Scheme's Application Form for Membership dated 13 July 2014 indicates David Humphreys of Offshore Investor, as financial adviser (fn. 24 A fol. 23) The Application Form in respect of the FPI Bond signed by the complainant and dated 13 July 2014, indicates 'David Humphreys' *of* 'Offshore Investor, 2304, B1 Falcon Towers, Ajman UAE' *as the* 'Investment Adviser' *of the complainant. (fn. 25 A fol. 56)*

Section E of the FPI Bond's Application Form also includes a declaration signed by Paul Macbeth of Offshore Investor whereby he is confirming that the adviser was regulated by the 'Central Bank' in 'UAE'. (fn. 26 A fol. 58)

Underlying investments

The investment transactions undertaken within the FPI Bond emerge from the transaction history of Friends Provident. Such statement, which was provided by the service provider during the proceedings of the case, indicates the following investment transactions:

(i) *an investment of GBP48,000 undertaken in January 2015 in* Capita Financial Managers Woodford Eqty *(a collective investment fund) (fn. 27 A fol. 167) which was sold in January 2018 for GBP56,208 yielding a realised capital gain of GBP8,208; (fn. 28 A fol. 75 & 80b)*

(ii) *an investment of GBP24,000 undertaken in January 2015 into a structured note indicated as Leonteq 18mnth Trio Perf AC Nt which was sold shortly after in February 2015 for GBP24,480 yielding a realised capital gain of GBP480; (fn. 29 A fol. 75)*

(iii) *an investment of GBP24,000 undertaken in January 2015 into a structured note indicated as EFG Intl 2.5Y Express Cert on 4 Stks which was sold a few months after in April 2015 for GBP24,000 yielding no realised capital gains or losses on this investment. (fn. A fol. 75 & 76) This investment yielded dividends of GBP494.4 (fn. 31 A fol. 76)*

(iv) *an investment of GBP24,000 undertaken into a structured note indicated as the Leonteq 18mnth Trio Perf AC Nt on 3 Stk, in March 2015, which was sold for GBP24,000 in May 2015 yielding no realised gains or losses on the same investment. (fn. 32 A fol. 75 & 76) This investment yielded a dividend of GBP480. (fn. 33 A fol. 76)*

(v) an investment of GBP12,000 undertaken into a structured note indicated as the EFG Intl 2.5Y Express Cert in April 2015, which was sold for GBP3,633 in October 2016 resulting in a realised capital loss of (GBP8,367). (fn. 34 A fol. 76 & 79) This investment yielded a dividend of GBP480. (fn. 35 A fol. 78)

(vi) an investment of GBP12,000 in another issue of the EFG Intl 2.5Y Express Cert undertaken in April 2015 and sold in October 2017 for GBP515, resulting in a realised capital loss of (GBP11,485). (fn. 36 A fol. 76 & 80b)

(vii) an investment of GBP12,000 undertaken into a structured note indicated as the Leonteq 18mnth Trio Perf in June 2015. (fn. 37 A fol. 77) No details of the realised value of such investment emerged from the transaction history statement. A Valuation Report printed in July 2016 indicates however that as at 30 June 2016, this investment had a 99.38% drop in value where its market value was just GBP74; (fn. 38 A ol. 167 & 168)

(iv) an investment of GBP12,000 undertaken in June 2015 into a structured note indicated as Leonteq 2.5Y Multi Barrier *which was sold in December 2017 for GBP4,069 resulting in a realised capital loss of (GBP7,931). (fn. 39 A fol. 77 & 80b)*

The complainant surrendered his FPI Bond in January 2018, for the amount of GBP57,184.82. (fn. 40 A fol. 80b) The difference between the indicative initial premium that was to be transferred into the FPI Bond as indicated above for the amount of GBP136,714 and the surrender value of GBP57,185 equates to GBP79,529. A total of GBP55,318.15 was paid to the member on 25 January 2018 following deduction of SPSL's termination fees. (fn. 41 A fol. 112)

Responsibilities of the Service Provider

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

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

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

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

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

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

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

Trustee and Fiduciary obligations

*As highlighted in the section titled '*Regulatory Framework' *above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is also relevant for SPSL in view of its capacity as Trustee of the Scheme.*

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 SPSL.*

The said article provides that:

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

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

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

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

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

As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: **to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'**. *(fn. 44 Op.Cit., p. 178)*

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

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

In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations**'. *(fn. 45 Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017), dated 6 December 2017, p.9)*

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

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

Other relevant aspects

*One other important duty relevant to the case in question relates to **the oversight and monitoring function of the service provider in respect of the Scheme including with respect to investments**.*

Whilst SPSL's duties did not involve the provision of investment advice, however, as explained by SPSL itself in its communication of 25 June 2018 with the complainant, it was noted that:

'On behalf of SPSL dealing instructions are reviewed and approved by Sovereign Asset Management Limited ('SAM')...', *(fn. 46 A fol. 17)* where 'SAM as SPSL's appointed investment adviser simply reviewed the dealing instructions received from Mr Humphreys and verified that the proposed investment satisfied the Scheme's investment restrictions and was in accordance with your risk profile as specified by you'. *(fn. 47 fol. 18)*

Observations and Conclusions

In essence, the complainant alleged the following main shortcomings in respect of the service provider:

(i) that SPSL allowed the entity named Offshore Investor, who it was claimed did not hold the appropriate license, to act as his investment adviser in respect of the Scheme. The complainant questioned the due diligence undertaken by SPSL in respect of the investment adviser to ensure that such adviser was properly licensed;

*(ii) that SPSL allowed the investment adviser to make deals in structured notes within his pension scheme which investments, it was alleged, were not appropriate for pension schemes and should have not been allowed by SPSL to be undertaken within his Scheme. The Complainant claimed that SPSL did not ensure '*good and diversified long term investments' *(fn. 48 A fol. 4)*

The complainant claimed losses arising on the structured note investments allowed by SPSL within his Retirement Scheme.

Compensation was requested by the complainant for the 'Total Losses £72,000' *as indicated in his Complaint Form, which losses were indicated as being due to the following structured notes as indicated above:*

'(1) 05/01/2015 Leon Cars £24000

(2) 05/01/2015 Leon Energy £24000

(3) 21/04/2015 Leonteq £12000

(4) 21/04/2015 Leonteq Euro Comps £12000' (fn. 49 Ibid.)

Alleged loss

Whilst the complainant has not indicated the full and proper name of the structured note investments on which he alleged a loss, the four structured notes mentioned specifically by the complainant can be identified as the following:

- *GBP24,000 purchase of the Leonteq 18month Trio Perf AC Nt (fn. 50 Bullet point (ii) under the section titled 'Underlying investments' above) (ISIN No. CH0259241435) (fn. 51 A fol. 63 & 75) undertaken in January 2015 referred to by the complainant as 'Leon Cars';*

- *the GBP24,000 purchase of the EFG Intl 2.5Y Express Cert on 4 Stks (fn. 52 Bullet point (iii) under the section titled 'Underlying investments' above.) (ISIN No. CH0259241245) (fn. 53 Ibid.) undertaken in January 2015 referred to by the complainant as 'Leon Energy';*

- *the GBP12,000 purchase of the EFG Intl 2.5Y Express Cert on 3 Stks 28/10/16 (fn. 54 Bullet point (v) under the section titled* 'Underlying investments' *above) (ISIN No. CH0273397031) (fn. 55 A fol. 62, 76 & 168) undertaken in April 2015 referred to by the Complainant as 'Leonteq'; and*

- *the GBP12,000 purchase of the EFG Intl 2.5Y Express Cert on 4 Stks 30/10/17 (fn. 56 Bullet point (vi) under the section titled 'Underlying investments' above) (ISIN No. CH0273396355) (fn. 57 A fol. 62, 76 & 168) undertaken in April 2015 referred to by the complainant as 'Leonteq Euro Comps'.*

In his reply, the service provider submitted that the complainant did not suffer a loss on the 'Leon Cars' and 'Leon Energy', pointing out that one of the notes actually made a gain of GBP480. This was not eventually contested by the complainant during the proceedings of the case. The position outlined by the service provider on these two investments is indeed confirmed in the transaction history statement that was attached to SPSL's reply.

The service provider also indicated that in respect of the other two investments identified by the complainant as 'Leonteq' and the 'Leonteq Euro Comps', these investments were redeemed for GBP4,148.16 in total. Indeed, as explained in the section titled 'Underlying investments' above, these two other investments of GBP12,000 were each sold for GBP3,633 and GBP515 respectively which in total tally to GBP4,148. The realised loss (exclusive of dividends) on these two investments actually amounts to (GBP8,367) and (GBP11,485) respectively as indicated in the section titled 'Underlying investments' above.

In the circumstances, the alleged GBP72,000 loss claimed by the complainant in respect of the four structured notes mentioned by the complainant is not correct.

This notwithstanding, it is nevertheless clear that the complainant did experience a loss overall on his investment portfolio.

The realised loss (exclusive of dividends) on the four structured notes identified by the complainant is calculated to actually amount in total to (GBP19,372). *(fn. 58 GBP480 [on the Leonteq 18mnth Trio Perf AC Nt]+0+(8,367)+(11,485) [[on the three respective investments into the EFG Intl 2.5Y Express Cert]=GBP19,372)*

The Arbiter, who is tasked by Chapter 555 of the Laws of Malta to decide and ultimately give compensation by reference to what in his opinion is fair, equitable and reasonable, (fn. 59 Cap 555 of the Laws of Malta, Art. 19(3)(b)) has also been given the authority to investigate (fn. 60 For example: The Act's title; Art. 19(1), 25(1), 26(1)) the case under examination to give effect to fairness, equity and reasonableness in his decision.

As has been stated above, the estimate made by the complainant is not correct and it is the Arbiter's role to investigate what is the real loss sustained by the complainant.

From the examination of the acts of the case, the Arbiter has found that the complainant has effectively made a loss as described hereunder.

A net loss has ultimately not only emerged with respect to the four structured notes indicated by the complainant, but also on all structured notes investments altogether undertaken within his portfolio. Apart from this, a loss has also clearly emerged even when taking the overall position within his whole investment portfolio, that is, inclusive of the realised gain made on the collective investment fund.

On the basis of the information resulting from the transaction history statement, the loss on all the seven purchases of structured notes undertaken within his FPI bond is overall calculated to amount to not more than (GBP39,303) (fn. 61 GBP480 [on the Leonteq 18mnth Trio Perf AC Nt] +0+(8,367)+(11,485) [on the three respective investments into the EFG Intl 2.5Y Express Cert]=GBP19,372) in total, (exclusive of total dividends of GBP1,454 received on such products). (fn. 62 GBP480 on one of the Leonteq 18mnth Trio Perf AC Nt, and a further GBP494.4+GBP480 on the EFG Intl 2.5Y Express Cert investments)

More importantly, however, for the purposes of this complaint, the net realised loss on the investment portfolio as a whole, taking into account all capital gains and losses arising on <u>all</u> investments within the portfolio inclusive of dividends, is calculated as not exceeding GBP29,640.60. (fn. 63 Realised Gains (GBP8,208 + GBP480) = GBP8,688; Total Dividend received = GBP480+494.4+480=GBP1,454.4; Maximum Realised Losses (GBP8,367+GBP11,485+GBP7,931 and possible complete write off of GBP12,000 on the Leonteq 18mnth Trio Perf AC Nt bought in June 2015) = GBP39,783; ***Total Net Realised Loss calculation:*** *[Realised Gains of GBP8,688 plus*

Total dividends received of GBP1,454.4 less Maximum Realised Losses of GBP39,783 = GBP29,640.6] Such figure is quite lower than the GBP72,000 loss claimed by the complainant in his complaint.

Having determined that the complainant has indeed suffered a loss on his Retirement Scheme overall, and considered his claim and extent of losses first, the Arbiter shall next consider the substance of the shortfalls alleged by the complainant.

In this regard, the Arbiter shall consider whether, on the basis of the facts arising in this case, the loss which has been determined on the complainant's investment portfolio can be linked and attributed, wholly or partly, to any failings of the service provider in its duties as Trustee and Administrator of the Retirement Scheme.

Alleged shortfalls

Regulatory status of Offshore Investor

The complainant claimed that the investment adviser did not hold the appropriate license in respect of its activities and alleged that SPSL was doing business with an unlicensed party.

The investment adviser was indicated in the FPI Bond's Application Form as being regulated, by the Central Bank in UAE, to provide financial advice. (fn. 64 A fol. 58)

In its reply, the service provider did not comment on the regulatory status of Offshore Investor, but only chose to explain the qualification of David Humphreys where it was submitted that Humphreys held a certificate issued by the Chartered Insurance Institute in London. SPSL further submitted that it carried out its own due diligence on Offshore Investor, collected documentation on such entity and also conducted checks which led to no bad press or negative claims.

Despite the material claim made by the complainant that Offshore Investor *was unlicensed, the service provider did not present, from its part, any proof of the checks it claimed to have made on such entity. Nor did the service provider submit any evidence of the verification it made of the licence that* Offshore Investor *claimed in FPI's Application Form to have. Irrespective that there was* 'no requirement in Malta for financial advisers to be licensed' *at the time of the Scheme's Application for Membership, (fn. 65 A fol. 15) as submitted by the service provider in its communication of 10 April 2018, the Arbiter considers that the status of the adviser should have been reasonably checked and verified by the Trustee as part of its general due diligence, when accepting to deal with parties occupying key roles such*

as that of investment adviser to the member of the Retirement Scheme, which role and regulatory statements were ultimately reflected in the official forms reviewed by SPSL.

It is noted that the FPI's Application Form was completed at the same date of the Scheme's Application and would have been sighted and considered by SPSL in its role as Trustee of the Scheme. It is indeed only reasonable and justified to expect the trustee, as part of its duties towards the member and the Retirement Scheme, to have verified any claimed licence of the investment adviser and undertaken basic checks in this regard on such a party.

The Arbiter considers that, in its role as Trustee and Retirement Scheme Administrator, SPSL should have tangibly and convincingly substantiated its claims that it had done appropriate due diligence on the investment adviser, which due diligence should have included verification of the licence to provide financial advice as declared by Offshore Investor in FPI's Application Form. It is considered that SPSL failed to provide such comfort in the case in question.

Portfolio Composition

Diversification

As part of its duties, the Service Provider was required to ensure that investments undertaken within the Retirement Scheme satisfied the applicable investment and diversification requirements.

SPSL submitted in its reply that 'the Fund was expressly subject to the investment rules stipulated in part B.3.2 of the Pension Rules for Personal Retirement Schemes as laid down by the Malta Financial Services Authority'. *(fn. 66 A fol. 70/71)*

It is to be noted, however, that prior to becoming registered under the RPA, the Scheme was still subject to the investment rules specified under the SFA regime. No mention or reference was made by the Service Provider in this regard to the SFA regime nor did SPSL indicate when it obtained registration under the RPA during the one-year transition period which commenced in 2015 as described in the section titled 'Regulatory Framework' above.

The Arbiter shall accordingly consider the investment conditions that applied at the time under both regimes:

a) SFA - The regulatory requirements that applied to the Retirement Scheme at the time it was registered under the SFA regime were detailed in 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 and continued to apply during the transition period under the SFA in 2015 until the registration of the Scheme under the RPA. Two particular conditions, namely Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the Directives, are worth noting.

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. 67 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. 68 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. 69 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. 70 SOC 2.7.2 (e)) where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme. (fn. 71 SOC 2.7.2 (h)(iii) & (iv))*

b) *RPA - The Service Provider referred to* 'part B.3.2 of the Pension Rules for Personal Retirement Schemes'. *Extract of relevant parts of Condition 3.2.1 of section B.3.2 titled 'Investment Restrictions of a Personal Retirement Scheme' of the original Pension Rules dated 1st January 2015 are included below:*

'3.2.1 Personal Retirement Schemes shall comply with the following investment restrictions:

i. *the Retirement Scheme Administrator or the Investment Manager, as applicable, shall invest the assets of the Scheme in the best interest of Beneficiaries. In the case of a potential conflict of interest, the Scheme Administrator, or the Investment Manager that may appointed to manage the Scheme's assets shall ensure that investment activity is carried out in the sole interest of the Beneficiaries;*

ii. *the Retirement Scheme Administrator or the Investment Manager, as applicable shall ensure that the assets of a Scheme are properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole;*

iii. *the Retirement Scheme Administrator or the Investment Manager, as applicable, shall ensure that the assets of the scheme are sufficiently liquid and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits; ...'*

As detailed in the section titled 'Responsibilities of the Service Provider' above, another relevant important condition stipulated in the Pension Rules for Personal Retirement Schemes of January 2015, is Standard Condition 3.1.2 of Part B.3 which required that:

'The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries'.

In its reply the service provider explained that 'in addition to the MFSA investment restrictions, SPSL devised its own investment restrictions for the SPSL Scheme' *(fn. 72 A fol. 71)*

The service provider further stated in its reply that:

'Those restrictions included not more than 66% of funds being invested in structured notes and not more than 33% being invested in structured notes with one issuer'. *(fn. 73 Ibid.) SPSl also declared that:* 'The Fund's investments in structured notes under the FPI Bond were within these paramaters'. *(fn. 74 Ibid.)*

The service provider did not provide any evidence of the restrictions referred to in its reply which, is noted, are quite different to those that were actually specified in its own Application Form and the standards reflected in the MFSA's rules under both regulatory regimes as outlined above.

Neither did SPSL provide any indication that at the time of the Scheme's investments undertaken between January 2015 and June 2015, it had different investment restrictions to those specified in the Scheme's Application Form signed a few months earlier in July 2014.

In the circumstances, the Arbiter cannot give much weighting to SPSL's claim of the maximum limit of 66% in structured notes and 33% maximum limit to any one issuer as indicated in its reply.

The Scheme's Application Form for Membership signed by the complainant on 13 July 2014, itself clearly specified a number of investment restrictions which had to be satisfied. Apart from the general principles that were required to be adhered to such as, that 'investments must be diversified' *and* 'assets must be invested in the best interests of the member'*, it is noted that one of the requirements detailed in the said form also stipulated that* **'not more than 10% of funds may be invested in structured notes with any one company and not more than 40% in structured notes generally'**. *(fn. 75 A fol. 92 – Emphasis added by the Arbiter)*

*Whilst no details were produced during the proceedings of the case as to what percentage the respective structured notes comprised of the portfolio at the time of investment of the note, it is observed that even as a percentage of the indicated initial premium into the FPI Bond, the structured notes respectively comprised high percentages of 9% or 18% each. (fn. 76 E.g. 24000*100/136714=17.55%; 12000*100/136714=8.78%)*

It is also noted that two separate purchases undertaken in April 2015 into the EFG Intl 2.5Y Express Cert of GBP12,000 each, resulted in a high exposure, (18% of the indicated initial premium), to the same product/issuer.

Indeed, the Arbiter has no reasonable comfort that the requirement that* 'not more than 10% of funds may be invested in structured notes with any one company' *that was specified in the Scheme's Application Form was actually adhered to in practice considering the high exposure individually and cumulatively to any one product/issuer that transpired from the investment portfolio.

Accordingly, in the circumstances of this case, the Arbiter cannot reach the conclusion that the structured notes that were allowed by SPSL were actually in line with the diversification requirements, namely the maximum exposure limit specified in the Application Form nor that they reflected the limits and standards referred to in the Directives and Rules, such as the maximum limit in exposure to any one single issuer/product and/or the concept of investments being invested in a prudent manner.

Risk factor

With respect to the portfolio composition, the Arbiter notes that the portfolio consisted of substantial investments into structured notes, some of which were sold within just a few weeks or months as further detailed in the section titled 'Underlying investments' above.

*It is also noted that the majority of the structured note investments, that is four out of the seven structured notes invested into, resulted in substantial losses of 66% to 95% (or more) of the original investment value. (fn. 77 A loss of 66.09% on the Leonteq 2.5Y Multi Barrier note (GBP7931*100/12000); A loss of 69.7% on the EFG Intl 2.5Y Express Cert purchased in April 2015 (GBP8367*100/12000); A loss of 95.7% on another EFG Intl 2.5Y Express Cert purchased in April 2015 (GBP11485*100/12000); A drop of 99.38% on the value of the Leonteq 18 mnth Trio Perf AC Nt purchased in June 2015 (A fol. 168).) In addition, out of the remaining three structured notes, two were sold for the same amount that they were purchased, with only minimal dividends received, and the other one only yielded a minimal profit of GBP480 (just 2% of the invested amount).*

Whilst in this case no fact sheets of the structured notes invested into was produced or could be sourced, it is nevertheless sufficiently clear that such structured notes included features which enabled substantial losses to be made, or even the possibility of the investment to be completely or nearly completely lost. This indeed has transpired to be the case for some of the structured notes that were allowed within the portfolio as explained above.

In its communication of 1 March 2018, the Service Provider explained inter alia that 'our dealings team have always scored structured notes as medium risk'. *(fn. 78 A fol. 130)*

In another communication of 25 June 2018, the Service Provider remarked that:

'The scoring of structured notes was determined by a team of qualified staff employed by SAM. The score of 50/100 was given to all structured notes based on a number of variables (such as time frame, underlying ETF, indices, issuing bank credit rating, etc.) and this scoring was discussed with our regulator from the outset)'. *(fn. 79 A fol. 156)*

In its reply, SPSL submitted that:

'the notes selected by the Complainant and his investment adviser were scored in relation to the overall portfolio and every purchase was well within the Complainant's stated risk appetite'. *(fn. 80 A fol. 70)*

During the proceedings of this case, the service provider, however, did not substantiate nor provided any tangible basis on which the structured notes were considered as being of medium risk, nor how the structured note investments 'was well within the Complainant's risk appetite'.

It is indeed unclear how in this case, SPSL can reasonably justify that the structured notes were always of medium risk and this when the majority of such products invested into actually resulted in substantial or near total loss of the investment.

It is sufficiently clear that in classifying all structured notes as 'medium risk', the service provider has not given adequate attention to the specific features of the structured notes invested into, including the effects that the particular characteristics of such products had or could lead to on the performance of the investment.

When considering the overall portfolio, it seems that the cumulative and ongoing exposure to structured notes was not given sufficient attention and consideration by the service provider either, otherwise the extent of overall losses experienced on the investment portfolio would have not occurred in the first place.

Whilst there could be varying types of structured notes, the Arbiter has no comfort that the structured notes invested into, which were ultimately allowed by SPSL, could have possibly been of medium risk, nor that the underlying portfolio of investments constituted a balanced one and ultimately reflective of the principles of prudence as required in terms of the directives/rules. This when considering the scale and extent of the losses experienced on the investment portfolio overall as a direct result of the losses incurred on the structured note investments.

In the circumstances, it cannot be reasonably determined either that the portfolio of investments was reflective of the complainant's preferred investment strategy of 'a small amount of risk' *and neither of the 'medium risk' profile selected in the Scheme's Application Form.*

The failure to achieve the Scheme's scope, that is to provide for retirement benefits, is indeed in itself indicative of the higher risks being taken within the investment portfolio overall.

Synopsis

The loss realised by the complainant on his whole investment portfolio as calculated above, is considered by the Arbiter as a material loss which justifiably and reasonably one does not expect to occur in a Retirement Scheme whose scope is to provide for retirement.

Such a loss is not expected to occur in a properly diversified, balanced investment portfolio with a prudent investment approach as was required under the applicable regulatory framework*.*

It is further considered that:

a) A personal retirement scheme is ultimately established with the principal purpose of providing Retirement Benefits to Members and/or Beneficiaries with such purpose being indeed ingrained in the primary legislation, the SFA (fn. 81 Article 2(1) of the SFA defined a 'scheme' to mean 'a scheme or arrangement which is registered under this Act under which payments are made to beneficiaries for the principal purpose of providing retirement benefits ...'. *) and the RPA itself. (fn. 82 Article 2 of the RPA defines a* 'personal retirement scheme' *as:* 'a retirement scheme which is not an occupational retirement scheme and to which contributions are made for the benefit of an individual'. *A* 'retirement scheme' *is, in turn, defined under Article 2 of the RPA, as* 'a scheme or arrangement as defined in article 3'*, where Article 3 (1) stipulates that* 'A retirement scheme means a scheme or arrangement with the principal purpose of providing retirement benefits'. *Article 2 of the RPA also defines* 'retirement benefit' *as meaning:* 'benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death;'*)*

b) It is deemed, in the circumstances, that no convincing nor sufficient evidence was provided by SPSL that the portfolio was reflective of a balanced and diversified portfolio with moderate risks, in line with the approach that should have been taken in the investments of the Retirement Scheme. Neither has it emerged that the portfolio constituted within the Retirement Scheme was reflective of the prudence one would reasonably expect in a portfolio whose scope is to 'accumulate a trust fund from which to provide benefits in retirement'.

c) Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant nor to select the underlying investments of the Retirement Scheme, ***the Retirement Scheme Administrator, however, had a duty to check and ensure that the portfolio composition recommended by the investment adviser was a prudent one as reasonably expected from a retirement plan, whilst also reflective of the risk profile and objectives of the Scheme as outlined in the Scheme's Application form and ultimately one which enables the aim of the Retirement Plan to be achieved.***

The Scheme Administrator and Trustee had to, in practice, promote the scope for which the Scheme was established where the choice of underlying investments allowed within the Scheme's structured had to essentially reflect such scope.

Should there have been a careful consideration of the recommended portfolio composition, the service provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky portfolio of underlying investments to develop within the complainant's member directed scheme as this ran inter alia counter to the objectives of the retirement scheme and was not in the complainant's best interests, nor reflective of a prudent investment approach.

The portfolio composition ultimately had high exposure to structured notes with features that enabled significant losses to result in the investment portfolio as determined in this case.

Having considered the responsibilities of SPSL as outlined in the section titled 'Responsibilities of the Service Provider above', **the** ***Arbiter concludes that there was, at the least, a lack of diligence by SPSL in the administration of the Scheme, particularly in allowing such composition of investment portfolio to prevail within the Scheme involving the said investments into structured notes and the extent of exposure to such products.***

Conclusion

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

Cognisance needs to, however, be taken of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment adviser. 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 Sovereign Pension Services Limited as Trustee and Retirement Scheme Administrator of The Centaurus Retirement Benefit Scheme, and in view of the deficiencies identified in the obligations emanating from such roles as 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 SPSL for part of the realised losses arising on his pension portfolio.

In the particular circumstances of this case, the Arbiter considers it fair, equitable and reasonable for SPSL to be held responsible for seventy per cent of the losses sustained by the complainant on his overall investment portfolio.

The service provider is accordingly being directed to pay the complainant compensation for the amount of GBP20,748.42. This is calculated as 70% of the actual loss, which was GBP29,640.60, as amply explained above in this decision.

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Sovereign Pension Services Limited to pay the complainant the sum of twenty thousand, seven hundred and forty-eight pounds sterling and forty-two pence (GBP20,748.42).

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

Given the particular circumstances of the case, especially that the complaint was only partially met, 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 fid-19 ta' Frar, 2021 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka u tħassar id-deċiżjoni appellata billi tilqa' l-aggravji tagħha. Tgħid li l-aggravji tagħha huma s-segwenti: (i) l-Arbitru applika u interpreta ħażin il-liġi meta ddeċieda li s-soċjetà appellanta naqset mid-dmirijiet tagħha fil-kwalità tagħha lejn l-appellat, partikolarment meta ddeċieda li (a) hija kienet ippermettiet lil *Offshore Investment* taġixxi bħala konsulent finanzjarju tal-appellat; u (b) il-kompożizzjoni tal-portafoll tal-appellata ma kinitx idonea għall-Iskema; (ii) ma kienx jeżisti ness kawżali bejn it-telf lamentat mill-appellat u l-kawża kif attribwita lilha; (iii) id-deċiżjoni hija *ultra petita*.

7. L-appellat wieġeb fil-15 ta' Ġunju, 2021 fejn issottometta li d-deċiżjoni appellata hija ġusta, u għaldaqstant timmerita li tiġi kkonfermata għal dawk ir-raġunijiet li huwa jispjega fit-tweġiba tiegħu.

Konsiderazzjonijiet ta' din il-Qorti

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

L-ewwel aggravju

9. Meta tfisser l-ewwel aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru applika u nterpreta ħażin ir-regoli, il-liġi u l-prinċipji meta ddeċieda li hija kienet naqset mill-obbligi tagħha meta ħalliet lil David Humphreys minn *Offshore Investment* jaġixxi bħala *investment advisor* tiegħu hekk kif dan kien ġie maħtur mill-appellat stess. Tgħid li l-Arbitru hawn naqas serjament milli jimmotiva l-konklużjoni tiegħu u qal biss li *"despite the material claim made by the complainant that Offshore Investor was unlicensed, the service provider did not present, from its part, any proof of the checks it claimed to have made on such entity",* mingħajr ma jispjega minn fejn kien jirriżulta l-obbligu li hija kellha tirrikjedi li l-konsulent finanzjarju kellu jkun regolat jew awtorizzat. Dan tgħid aktar u aktar għaliex l-għażla kienet tispetta lill-appellat u fil-fatt huwa stess kien ħatar il-konsulent finanzjarju tiegħu. Tikkontendi li fid-dawl tal-fatt li kien l-

appellat li kien għamel l-allegazzjoni, kien proprju l-istess appellat, u mhux hi, li kellu jsostni l-allegazzjoni, iżda l-Arbitru qeleb l-oneru tal-prova. Imma minflok l-Arbitru straħ fuq id-dikjarazzjoni tal-appellat li l-konsulent finanzjarju ma kinitx entità regolata sabiex tagħti parir finanzjarju, u għalhekk iddeċieda li hija kienet tenuta tkun 'prudenti' jew raġonevoli billi tivverifika jekk il-konsulent finanzjarju kienx liċenzjat jew regolat jew le. B'hekk is-soċjetà appellanta tirrileva li d-deċiżjoni tal-Arbitru kienet difettuża mhux biss għaliex kien jispetta l-appellat li jressaq id-debita prova, iżda għaliex il-kwistjoni qatt ma kienet jekk il-konsulent finanzjarju kienx liċenzjat jew le, iżda jekk hija kellhiex l-obbligu li tagħmel il-verifika, u fil-fatt hija ma kellha l-ebda obbligu bħal dan, u kien impossibbli li tressaq prova ta' fatt negattiv jew ta' obbligu li ma jeżistix. Tinsisti li l-Arbitru naqas milli jikkonsidra li ġaladarba l-appellat huwa residenti fl-Arabja Sawdija u appunta l-konsulent finanzjarju fl-Emirati Għarab Magħquda, ma kkonsidrax jekk kienx hemm bżonn ta' liċenzja f'dawn il-pajjiżi sabiex jingħata il-parir opportun. Is-soċjetà appellanta tilmenta mill-fatt li l-Arbitru żamm seduta waħda biss sabiex jisma' l-ilment, u hija ma ngħatatx l-opportunità li tressaq il-provi, salv dawk annessi mar-risposta tagħha u lanqas ukoll ma ngħatat l-opportunità li tagħmel sottomissjonijiet, kemm *viva voce* kif ukoll bil-miktub. Tikkontendi wkoll li filwaqt li l-Arbitru spjega l-qafas legali applikabbli, huwa naqas milli jorbot ir-regoli u l-liġijiet ċitati minnu mal-konklużjoni tiegħu, u saħansitra kien legalment żbaljat fid-deċiżjoni tiegħu għaliex dawn il-liġijiet daħlu fis-seħħ fis-sena 2019, wara l-allegata mġiba ħażina, kif saħansitra rrikonoxxa l-Arbitru stess. Tirrileva li madankollu hija xorta waħda kienet għamlet eżerċizzju ta' diliġenza sabiex tara jekk il-konsulent finanzjarju kellux l-esperjenza neċessarja sabiex jagħti l-parir tiegħu, u fil-fatt kien irriżultalha li

David Humphreys kien iċċertifikat minn *Chartered Insurance Institute* ġewwa r-Renju Unit. Is-soċjetà appellanta tgħid li hija ma setgħetx tagħti pariri finanzjarji, u tispjega li kienet limitata milli tagħmel dan skont il-kundizzjonijiet fil-ħruġ tal-liċenzja mill-MFSA bħala Amministratriċi tal-Iskema. Filwaqt li tiċċita silta mid-deċiżjoni appellata fejn l-Arbitru qal *"whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant nor to select the underlying investments of the Retirement Scheme, the Retirement Scheme Administrator, however, had a duty to check and ensure that the portfolio composition recommended by the investment adviser was a prudent one as reasonably expected from a retirement plan, whilst also reflective of the risk profile and objectives of the Scheme as outlined in the Scheme's Application form and ultimately one which enables the aim of the Retirement Plan to be achieved",* tirrileva li l-Arbitru skarta l-fatt li hija hekk għamlet bil-ħatra ta' Sovereign Asset Management Limited [minn issa 'l quddiem "SAM"], għalkemm dan ma kienx rikjest mil-liġi dak iż-żmien, u dan proprju għall-aħjar interess tal-membri u bl-awtorizazzjoni tal-MFSA, u skont kif regolata mill-Kummissjoni għas-Servizzi Finanzjarji ta' Ġibiltà. Tissottometti li minflok l-Arbitru straħ fuq l-obbligi ġenerali ta' *trustee* li għandu jimxi skont l-aħjar interess tal-benefiċjarju, għalkemm hija wara kollox ma kinitx qegħda tikkontesta dan l-obbligu ġenerali li kull *trustee* għandu l-obbligu li jaġixxi bħala *bonus paterfamilias.* Hawn hija tikkontendi li hemm differenza fid-dinamika u fl-iskop ta' skema tal-irtirar u dawk ta' *trust,* u in sostenn ta' dan tiċċita silta minn dak li qal Lord Browne-Wilkinson fil-każ **Target Holdings Ltd v. Redferns** fil-House of Lords. Għal dak li jirrigwarda t-tieni parti tal-ewwel aggravju, jiġifieri li l-Arbitru applika b'mod skorrett ir-regoli taħt l-RPA fir-rigward tal-allokazzjoni

u l-kompożizzjoni tal-portafoll tal-appellat, tissottometti li r-regoli tal-RPA daħlu wara li sar l-investiment fil-FPI Bond, għaliex l-iskemi kienu ġew reġistrati taħt il-RPA b'effett mill-1 ta' Jannar, 2016. Tirrieva li l-Arbitru ċċita biss siltiet mill-i*Standard Operational Conditions* 2.7.1 u 2.7.2. u applikahom b'mod żbaljat. Is-soċjetà appellanta tinsisti li hija kienet saħansitra imponiet fuqha stess restrizzjonijiet fir-rigward tal-portafoll fuq livell ta' membru fl-Applikazzjoni għal Sħubija, u tiċċita s-segwenti *"not more than 10% of funds may be invested in structured notes with any one company and not more than 40% in structured notes generally",* li ġie emendat għal *"66% in structured notes and 33% in maximum limit to any one issuer".* Tikkontendi li l-portafoll tal-appellat fil-fatt kien jissodisfa r-restrizzjonijiet fir-rigward tad-diversifikazzjoni, iżda l-Arbitru minflok qal li *"no details were produced during the proceedings of the case as to what percentage the respective structured notes comprised of the portfolio at the time of investment of the note",* meta hija ma kellha l-ebda opportunità li tagħmel dan f'seduta waħda, u għalhekk bi preġudizzju għad-dritt ta' smigħ xieraq tagħha.

<u>It-tieni aggravju</u>

10. Is-soċjetà appellanta tinsisti li qabel ma l-Arbitru seta' jasal sabiex isib li hija kellha 70% tar-responsabbiltà tat-telf li sofra l-appellat, huwa kellu qabel xejn isib li kien hemm ness kawżali bejn in-nuqqasijiet tagħha u t-telf tiegħu. Iżda d-deċiżjoni appellata kienet mankanti f'dan ir-rigward, kif ukoll kienu mankanti l-provi tal-appellat. Tgħid li jekk *dato ma non concesso* hija kienet tenuta ma tippermettiex lill-appellat jinvesti fil-prodotti, dan forsi jista' jwassal

għal sanzjoni regolatorja fejn wara kollox ma kienx hemm, iżda qatt għall-kundanna għad-danni. Tgħid li t-telf saħansitra lanqas ma kien ikkristalizzat għaliex għad irid jitħallas ir-rikavat fuq il-prodott in kwistjoni. Tinsisti li jekk l-appellat ġarrab telf, ma kienx isegwi li hija responsabbli għad-danni allegatament sofferti minnu, altrimenti hija ser tiġi f'pożizzjoni ta' garanti fid-doluż biss. Is-soċjetà appellanta tinsisti wkoll li d-deċiżjoni tal-Arbitru li jattribwixxi lilha responsabbiltà għal 70% tat-telf soffert, hija waħda arbitrarja u mingħajr proporzjon għaliex saħansitra ma kienx hemm l-ebda ness bejn it-telf fil-valur tan-noti strutturati u l-aġir tagħha.

<u>It-tielet aggravju</u>

11. Is-soċjetà appellanta tirrileva li l-Arbitru mar oltre t-talba tal-appellat, għaliex dan kien talab kumpens fuq erba' investimenti, iżda fid-deċiżjoni appellata ngħad illi *"[a] net loss has ultimately not only emerged with respect to the four structured notes indicated by the complainant, but also on all structured notes investments altogether undertaken within his portfolio...all the seven purchases of structured notes undertaken within his FPI Bond".* Is-soċjetà appellanta tallega nuqqas ta' ekwità u raġonevolezza da parti tal-Arbitru, prinċipji li huwa stess qal li kien qed jadotta, meta ħa in konsiderazzjoni fatturi li qatt ma kienu jagħmlu parti mill-mertu tal-proċeduri, u għalhekk hija rinfaċċjata b'deċiżjoni li qatt ma kellha l-opportunità li tieħu konjizzjoni tagħha u saħansitra wkoll tirribatti. Imbagħad tgħid li ġaladarba l-Arbitru kkonkluda li *"the realised loss (exclusive of dividends) on the* four structured notes *identified by the complainant is calculated to actually amount in total to* ***GBP19,372"****,*

huwa kien tenut japplika l-perċentwali fuq din is-somma, iżda mhux fuq l-allegat telf kif soffert fuq investimenti oħrajn li qatt ma ffurmaw parti mill-ilment tal-appellat. Is-soċjetà appellanta irrilevat wkoll li l-Arbitru skarta l-fatt li l-appellat kien feda l-portafoll tiegħu fuq deċiżjoni tiegħu stess, deċiżjoni li setgħet kienet bikrija. Tagħlaq billi tilmenta mill-fatt li l-Arbitru għoġbu wkoll jakkorda imgħax legali fuq is-somma likwidata minnu, li kellu jiġi kkomputat mid-data tad-deċiżjoni appellata sad-data tal-pagament effettiv.

12. L-appellat jilqa' billi fl-ewwel lok jirrileva li l-aggravji tas-soċjetà appellanta huma kollha nfondati fil-fatt u fid-dritt, u għalhekk għandhom jiġu miċħuda bl-ispejjeż. Ikompli billi jagħmel riferiment għall-prinċipju li qorti ta' reviżjoni ma tiddisturbax l-apprezzament tal-provi kif magħmul mill-Ewwel Qorti, sakemm ma tirriżultax raġuni ġustifikabbli. Dwar dak li kien jikkostitwixxi din ir-raġuni hekk ġustifikabbli, l-appellat jagħmel riferiment għall-pronunċjament tal-Qorti tal-Appell (Sede Superjuri) f'żewġ sentenzi rispettivi tagħha[1], filwaqt li jissottometti li hawn huwa ċar li m'hawnx lok għal ri-eżami.

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 fir-rigward tas-sottomissjoni tas-soċjetà appellanta li l-appellat ma kien ressaq l-ebda ilment sakemm huwa kien għamel *draw-down* tal-investiment tiegħu kollu, osserva li fil-fatt huwa mill-ewwel kien

[1] Brigitte Vella pro et *vs.* Richard Vella, 05.10.2001; Laura Seguna et *vs.* Francis Mallia et, 27.04.2001.

ressaq ilment hekk kif induna li s-soċjetà appellanta kienet ippermettiet li jsir investiment sottoskritt f'noti strutturati. Irrileva ukoll li s-soċjetà appellanta kienet wara kollox naqset milli turi li d-*draw-down* kien seħħ a saldu tal-pretensjonijiet kollha tal-appellat. Imbagħad l-Arbitru kkonstata li tali Skema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta u kif awtorizzata mill-MFSA bħala *Personal Retirement Plan* taħt l-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar) u dan permezz ta' *trust deed* tat-13 ta' Lulju, 2014, fejn is-soċjetà appellanta kienet l-Amministratriċi, kif liċenzjata mill-MFSA, u anki t-*Trustee* tal-Iskema. Irrileva li skont l-Applikazzjoni għal Sħubija tal-Iskema, *'[t]he investment objective of the Centaurus Retirement Benefit Scheme is to accumulate a trust fund from which to provide benefits in retirement'.* Qal li l-investiment tal-appellat sottoskritt dik l-Iskema, kien l-*FPI Bond* li kien jikkonsisti f'polza ta' assikurazzjoni fuq il-ħajja maħruġa minn *Friends Provident International* fit-23 ta' Diċembru, 2014. Skont l-Applikazzjoni suriferita l-appellat kien iddeċieda li jittrasferixxi f'dak l-investiment il-fondi kollha tiegħu minn żewġ pensjonijiet riċevuti mingħand BAE Systems *u* l-*Armed Forces Pension Scheme,* b'valur komplessiv ta' GBP136,714. L-Arbitru minn hawn għadda sabiex spjega dak li huwa kien jikkonsidra bħala l-qafas legali li jirregola l-Iskema u anki lis-soċjetà appellanta.

12. L-Arbitru mbagħad għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellat mill-Applikazzjoni għas-Sħubija tal-Iskema, u anki oħrajn fir-rigward tas-soċjetà appellanta u fir-rigward tal-investimenti sottoskritti il-*FPI Bond*. Hawn innota li l-*premium* oriġinali li kellu jiġi trasferita fil-*FPI Bond,* kien fl-ammont ta' GBP136,714, iżda l-appellat

eventwalment tħallas is-somma ta' GBP55,318.15 fil-25 ta' Jannar, 2018, wara li tnaqqsu d-drittijiet tas-soċjetà appellanta. Il-Qorti hawn tinnota li m'hemm l-ebda kontestazzjoni dwar dan kollu.

13. L-Arbitru mbagħad għadda sabiex ikkonsidra li s-soċjetà appellanta bħala Amministratriċi u *Trustee* tal-Iskema kienet soġġetta għall-obbligi, funzjonijiet u responsabbiltajiet applikabbli għall-kariga tagħha, u għamel riferiment għad-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002* [minn issa 'l quddiem 'id-Direttivi"]. Għamel ukoll riferiment għall-Att li Jirregola Fondi Speċjali, li ġie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta), u għar-regoli magħmula taħthom, u li għalihom ġiet soġġetta s-soċjetà appellanta. Sostna li wieħed mill-obbligi ewlenin tagħha bħala Amministratur tal-Iskema skont il-Kap. 450 u l-Kap. 514, kien proprju li taġixxi fl-aħjar interessi tal-Iskema. Il-Qorti hawn iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta kellha obbligi daqstant ċari hawn li timxi fl-aħjar interess tal-Iskema, hekk kif saħansitra kien għadu kif ġie fis-seħħ ukoll l-Att dwar Pensjonijiet għall-Irtirar fl-1 ta' Jannar fis-sena 2015.

14. Minn hawn l-Arbitru għadda sabiex elenka diversi prinċipji li kienu applikabbli fil-konfront tas-soċjetà appellanta skont il-*General Conduct of Business Rules/Standard Licence Conditions* applikabbli taħt ir-reġim tal-Kap. 450 kif imħassar, u tal Kap. 514 li ssostitwih. Għal darb'oħra l-Qorti tirrileva li jirriżulta li s-soċjetà appellanta bħala Amministratriċi tal-Iskema kienet tenuta li timxi b'kull ħila, kura u diliġenza dovuta fl-aħjar interessi tal-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva

li diġà minn dan li ngħad, jirriżulta li d-difiża tagħha li hija qatt ma setgħet tinżamm responsabbli għaliex ma kellha l-ebda obbligi fil-konfront tal-appellati, ma tistax tirnexxi. Ma tistax tirnexxi lanqas id-difiża tagħha li hija kienet inkarigat lil Sovereign Asset Management Limited għall-fini ta' sorveljanza, verifiki u moniteraġġ fuq l-investimenti tal-membri, għaliex il-membri ma kellhom l-ebda relazzjoni ġuridika ma' din is-soċjetà, u jekk din ma kinitx wettqet id-doveri tagħha kif mistenni, kienet is-soċjetà appellanta li kellha tirrispondi lill-membri għall-konsegwenzi. Barra minn hekk lanqas ma tista' teħles mid-doveri tant ċari tagħha billi tgħid li ġaladarba l-appellat kien qed jallega li l-konsulent finanzjarju ma kienx regolat, huwa kellu jressaq prova ta' dan u mhux kif ippretenda l-Arbitru li kellha tkun hi li turi x'verifiki kienet wettqet sabiex tistabbilixxi jekk il-konsulent finanzjarju kienx liċenzjat jew regolat. Is-soċjetà appellanta tittenta targumenta li l-kwistjoni kollha fil-fatt kienet jekk hija kellhiex obbligu li tagħmel tali verifika, iżda l-Qorti tgħid li mill-eżerċizzju sħiħ li wettaq l-Arbitru fir-rigward tad-doveri tagħha, ma hemm l-ebda dubju dwar l-imsemmi obbligu, anki jekk il-konsulent finanzjarju kien qiegħed jopera minn pajjiż barrani. Is-soċjetà appellanta tittenta wkoll targumenta li hija ma ngħatatx opportunità li tressaq provi, u lanqas li tagħmel sottomissjonijiet kemm *viva voce* jew bil-miktub. Iżda l-Qorti tagħraf li l-verbal tas-seduta tat-13 ta' Mejju, 2019 juri li s-soċjetà appellanta dakinhar iddikjarat li hija ma kellha xejn aktar x'iżżid, u li kien hemm qbil bejn il-partijiet li l-Arbitru seta' jgħaddi għad-deċiżjoni tiegħu.

15. Il-Qorti tkompli tgħid li l-Arbitru ma waqafx hawn għaliex ikkonsidra wkoll il-kariga tagħha bħala *Trustee,* u rrileva li hawn kienu applikabbli d-

disposizzjonijiet 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, u dan tagħrfu sew is-soċjetà appellanta fir-rikors tal-appell tagħha, minkejja li targumenta wkoll li d-dinamika u l-iskop ta' skema tal-irtirar li hija *member directed,* huma differenti minn dawk ta' *trust* tradizzjonali. In sostenn ta' dan kollu, l-Arbitru għamel riferiment għall-pubblikazzjoni An Introduction to Maltese Financial Services Law[2] u anki għal 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.

16. L-Arbitru mbagħad aċċenna fuq obbligu ieħor tas-soċjetà appellanta, li huwa qies importanti u rilevanti għall-każ in kwistjoni, dak ta' sorveljanza u monitoraġġ tal-Iskema, inkluż l-investimenti magħmula. Filwaqt li jaċċetta li r-responsabbiltajiet tagħha ma kienux ikopru l-provvista ta' parir fuq investiment, iżda kif hija stess spjegat fil-kommunikazzjoni tagħha tal-25 ta' Ġunju, 2018 mal-appellat *"on behalf of SPSL dealing instructions are reviewed and approved by Sovereign Asset Management Limited ('SAM')..."*[3]*,* fejn *'SAM as SPSL's appointed investment adviser simply reviewed the dealing instructions received from Mr Humphreys and verified that the proposed investment satisfied the Scheme's*

[2] Ed. Max Ganado.
[3] *A fol.* 17.

investment restrictions and was in accordance with your risk profile as specified by you'.[4] 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.

17. L-Arbitru mbagħad ikkonstata li l-appellat kien prinċipalment qed jilmenta li s-soċjetà appellanta ppermettiet lil *Offshore Investor* li allegatament ma kelliex liċenzja, tagħmilha ta' konsulent finanzjarju tiegħu fir-rigward tal-Iskema u li tinnegozja f'noti strutturati fl-ambitu tal-Iskema. Osserva li l-appellat kien qed jitlob kumpens għal telf ta' GBP72,000 minn erba' noti strutturati kif elenkat minnu fl-ilment tiegħu. Irrileva li s-soċjetà appellanta ma kinitx indikat l-isem sħiħ ta' dawn l-investimenti u minflok l-Arbitru kien għalhekk għamel eżerċizzju fejn iddentifika huwa stess dawn l-erba' noti strutturati. L-Arbitru kkonsidra s-sottomissjoni tas-soċjetà appellanta li l-appellat ma kienx sofra telf fuq żewġ noti partikolari, fejn fil-fatt tgħid li huwa kien għamel qligħ. Osserva li l-appellat kien saħansitra naqas milli jikkontesta din l-allegazzjoni u wara kollox din kienet tirriżulta mir-rendikont anness mar-risposta tas-soċjetà appellanta.

18. Imbagħad fejn is-soċjetà appellanta kienet irrilevat li l-appellat kien feda ż-żewġ investimenti l-oħra, l-Arbitru sab li t-telf kien rispettivament ta' GBP8,367 u GBP11,485 u għalhekk ġustament iddikjara li t-telf allegat mill-appellat fis-somma ta' GBP72,000, ma kienx korrett u dan kien attwalment GBP19,372. Filwaqt li kkonsidra d-dispożizzjonijiet tal-para (b) tas-subartikolu 19(3) tal-Kap. 555 tal-Liġijiet ta' Malta, u anki li skont id-dispożizzjonijiet l-oħra

[4] *A fol.* 18.

ta' dik il-liġi huwa kellu l-awtorità li jinvestiga l-każ quddiemu sabiex jassigura deċiżjoni ġusta, ekwa u raġjonevoli, huwa għadda sabiex għamel eżerċizzju fejn ikkonstata t-telf attwalment soffert mill-appellat. Filwaqt li kkonsidra li l-appellat sofra telf mill-portafoll tiegħu kollu, u mhux minn dawk l-erba' investimenti li huwa kien indika, sab li mill-informazzjoni riżultanti mir-rendikont kien hemm telf *net* ta' mhux iktar minn GBP29,640.60. Hawn il-Qorti ser tgħaddi sabiex tikkonsidra t-tielet aggravju tas-soċjetà appellanta. Din tal-aħħar qiegħda tikkontendi li d-deċiżjoni tal-Arbitru hija *ultra petita,* għaliex għalkemm l-appellat allega telf u talab għal kumpens fuq erba' investimenti, l-Arbitru ordna kumpens ta' 70% fuq it-telf kif stabbilit minnu ta' GBP29,640.60 u li għalhekk kien jirrappreżenta t-telf kif komputat fuq il-portafoll kollu. Iżda l-Qorti tgħid li d-deċiżjoni tal-Arbitru hija waħda ġusta *ai termini* tal-para. (b) tas-subartikolu 19(3) tal-Kap. 555 fil-konfront tal-appellat, imma anki fil-konfront tas-soċjetà appellanta, għaliex ittieħed il-portafoll sħiħ in konsiderazzjoni, anki fejn l-appellat ma kien sofra l-ebda telf, anzi kien għamel qligħ, u dan tnaqqas mit-telf. Tgħid ukoll li ma kienx altrimenti jkun ġust li l-Arbitru jikkonsidra biss it-telf allegat fuq l-erba' noti strutturati ndikati mill-appellat, ġaladarba l-ilment tiegħu kien wieħed aktar ġeneriku u jittratta n-nuqqasijiet tas-soċjetà appellanta fir-rigward tal-portafoll sħiħ tiegħu, fejn din ma ppermettiet l-ebda diversifikazzjoni u anki ħalliet li jsir investiment f'noti strutturati.

19. Minn hawn l-Arbitru għadda sabiex investiga jekk it-telf fuq il-portafoll tal-appellat setax jiġi marbut u attribwit in parti jew kollu għal xi nuqqas min-naħa tas-soċjetà appellanta fil-kwalità tagħha ta' *Trustee* u Amministratriċi tal-Iskema. Ikkonsidra li l-appellat kien qed jilmenta mill-fatt li l-konsulent

finanzjarju ma kellux id-debita liċenzja għall-attività tiegħu u allega wkoll li minkejja dan, is-soċjetà appellanta kienet qegħda tagħmel negozju miegħu. Osserva li l-konsulent finanzjarju kien indikat fl-Applikazzjoni għal Sħubija bħala entità regolata mill-Bank Ċentrali tal-Emirati Arab Magħquda sabiex tipprovdi pariri finanzjarji. Qal li min-naħa tagħha s-soċjetà appellanta ma kienet qalet xejn fir-rigward, iżda minflok għażlet li tikkummenta li David Humphreys kellu ċertifikat maħruġ lilu miċ-*Chartered Insurance Institute in London,* kif għamlet fir-rikors tal-appell tagħha, iżda mingħajr l-ebda spjegazzjoni dwar x'kienet tkopri din il-liċenzja. L-Arbitru rrileva wkoll li skont is-soċjetà appellanta, mill-eżerċizzju ta' *due diligence* fuq *Offshore Investor,* kien irriżulta li ma kien hemm l-ebda stampa jew ilment negattiv fil-konfront tagħha, iżda mingħajr ma ġabet prova tal-istħarriġ allegat tagħha. L-Arbitru sostna li minkejja li hawn Malta fiż-żmien tal-Applikazzjoni għal Sħubija, ma kienx hemm bżonn li konsulent finanzjarju jkollu liċenzja, kif kienet sostniet is-soċjetà appellanta fil-korrispondenza tagħha tal-10 ta' April, 2018, l-Arbitru kkonsidra li s-soċjetà appellanta bħala *Trustee* u bħala *due diligence* ġenerali li kellha twettaq, kienet tenuta tikkonferma l-i*status* tal-konsulent hekk kif hija kienet qegħda taċċetta li tinnegozja ma' terzi li kellhom rwol ewlieni bħal dak ta' konsulent finanzjarju ta' membru tal-Iskema, liema rwol u informazzjoni regolatorja wara kollox kienu riflessi fil-formoli uffiċjali riveduti mis-soċjetà appellanta.

20. L-Arbitru mbagħad għadda sabiex ikkonsidra l-mod li kien kompost il-portafoll. Irrileva li fost id-dmirijiet tas-soċjetà appellanta, din kienet tenuta tassigura li l-investimenti magħżulin kienu jissodisfaw ir-rekwiżiti applikabbli fir-rigward tal-investiment u d-diversifikazzjoni. Osserva li s-soċjetà appellanta

stess kienet issottomettiet fir-risposta tagħha li *'the Fund was expressly subject to the investment rules stipulated in part B.3.2 of the Pension Rules for Personal Retirement Schemes as laid down by the Malta Financial Services Authority",* iżda naqset milli tagħmel riferiment għall-fatt li qabel ir-reġistrazzjoni taħt il-Kap. 514, l-Iskema kienet soġġetta għar-regoli tal-Kap. 450, u lanqas indikat meta hija kienet ottjeniet ir-reġistrazzjoni taħt il-Kap. 514 fis-sena ta' transizzjoni li bdiet fl-2015. L-Arbitru kkonsidra dak li sejjaħ il-kundizzjonijiet applikabbli dak iż-żmien taħt il-Kap. 450, u anki taħt il-Kap. 514, u għal dak li jirrigwarda l-ewwel wieħed huwa għamel riferiment għad-*'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002',* in partikolari *Standard Operational Condition* [minn issa 'l quddiem 'SOC'] 2.7.1 u 2.7.2, li kienu applikabbli mill-bidunett meta nħolqot l-Iskema matul il-perijodu kollu ta' transizzjoni taħt il-Kap. 450 fis-sena 2015, sa meta din ġiet reġistrata taħt il-Kap. 514. Għal dak li jirrigwarda l-applikabbilità tal-Kap. 514, l-Arbitru qal li s-soċjetà appellanta stess kienet għamlet riferiment għar-rilevanza tal-Parti B.3.2 tal-*Pension Rules for Personal Retirement Schemes,* u huwa ċċita l-estratti rilevanti mill-kundizzjoni 3.2.1., filwaqt li għamel ukoll riferiment għall-kundizzjoni 3.1.2 tal-Parti B.3.

21. L-Arbitru rrileva li s-soċjetà appellanta kienet issottomettiet li hija stess kienet ħolqot ir-restrizzjonijiet fuq l-investiment li seta' jsir taħt l-Iskema, u ssottomettiet ukoll li l-investimenti tal-appellat kienu saru fil-parametri applikabbli. Iżda l-Arbitru rrileva li s-soċjetà appellanta kienet naqset milli ġġib evidenza ta' dak allegat minnha, u osserva li r-restrizzjonijiet li għamlet riferiment għalihom kienu differenti għal dawk li kienu jidhru fl-Applikazzjoni

għal Sħubija u fl-i*standards* skont ir-regoli magħmula mill-MFSA taħt il-qafas legali tal-Kap. 450 u l-Kap. 514. Għalhekk huwa ma setax jagħti daqstant konsiderazzjoni lis-sottomissjonijiet tas-soċjetà appellanta. Huwa għamel ukoll riferiment għar-restrizzjonijiet fuq l-investiment li seta' jsir kif dawn kienu mniżżla fl-Applikazzjoni għal Sħubija li ffirma l-appellat fit-13 ta' Lulju, 2014, u ċċita waħda minnhom li kienet tgħid *'not more than 10% of funds may be invested in structured notes with any one company and not more than 40% in structured notes generally".*[5] Osserva li l-ebda informazzjoni ma kienet ġiet ippreżentata fir-rigward tal-perċentwali li kienu jirrappreżentaw in-noti strutturati rispettivi mill-portafoll sħiħ fiż-żmien li sar l-investiment tagħhom. Iżda l-Arbitru seta' josserva li l-perċentwali kienu bejn 9% u 18% fir-rigward ta' kull nota strutturata rispettiva, u dan meħud in konsiderazzjoni l-*premium* tal-FPI Bond. Irrileva wkoll li ix-xiri ta' żewġ noti strutturati għal GBP12,000 kull waħda minnhom fl-EFG Intl 2.5Y Express Cert f'April 2015, kienet saħansitra ħolqot espożizzjoni qawwija ta' 18% tal-*premium* oriġinali lejn l-istess prodott/emittent. Għalhekk huwa sewwa kkonluda li ma setax iqis li r-restrizzjoni mposta mis-soċjetà appellanta stess kienet ġiet imħarsa. Magħmulin dawn l-osservazzjonijiet kollha, l-Arbitru ddikjara li huwa ma setax jasal għall-konklużjoni li n-noti strutturati in kwistjoni kif ammessi mis-soċjetà appellanta fl-Iskema, kienu skont ir-rekwiżit ta' diversifikazzjoni kif imfisser fl-Applikazzjoni għal Sħubija u anki fid-Direttivi u r-Regoli.

22. L-Arbitru hawn ikkonsidra r-riskju li kien espost għalih il-portafoll. Osserva li bosta mill-investimenti kienu saru f'noti strutturati li wħud minnhom

[5] *A fol.* 92.

reġgħu nbiegħu ftit ġimgħat jew xhur wara. Qal li kien hemm erba' minn seba' minnhom li għamlu telf sostanzjali ta' bejn 66% sa 95% jew aktar mill-valur oriġinali tal-investiment, tnejn oħra inbiegħu bil-prezz tal-valur oriġinali bi ftit dividendi, u l-aħħar nota strutturata kienet irrendiet profitt minimu ta' GBP480 li kien 2% tal-ammont investit. Filwaqt li osserva li l-ebda *fact sheet* ma kienet ġiet esebita, l-Arbitru seta' xorta waħda jikkonstata li n-noti strutturati kellhom diversi aspetti li kienu jesponuhom għal telf sostanzjali jew saħansitra totali. L-Arbitru rrileva li min-naħa tagħha s-soċjetà appellanta ma kienet ressqet l-ebda prova sabiex turi għaliex in-noti strutturati fil-portafoll tal-appellat kienu ġew ikkonsidrati li jġorru riskju medju u li kienu *"well within the Complainant's risk appetite".* Il-fatt li l-prodotti sofrew telf sostanzjali jew kważi totali, kien jagħmilha diffiċli għas-soċjetà appellanta li tiġġustifika li dawn kienu ta' riskju medju, u għaldaqstant huwa kkonsidra li s-soċjetà appellanta ma kinitx uriet biżżejjed ħsieb u konsiderazzjoni. L-Arbitru kkonsidra li l-Iskema b'hekk kienet naqset milli tilħaq l-iskop tagħha li tipprovdi għal benefiċċji tal-irtirar, li bla ebda dubju tgħid il-Qorti, wassal għal telf lill-appellat, u għal darb'oħra l-Arbitru saħaq li dan kien jindika r-riskji għolja li kienu ttieħdu meta sar l-investiment tal-portafoll tal-appellat. L-Arbitru jagħlaq id-deċiżjoni tiegħu billi jagħti riassunt tal-konstatazzjonijiet kollha tiegħu. Il-Qorti tqis li għandha tirrileva s-segwenti punti prinċipali minn dan ir-riassunt li huma deċiżivi fil-kwistjoni odjerna, u li jikkontradixxu s-sottomissjoni tas-soċjetà appellanta li l-Arbitru naqas li jorbot l-import tar-regoli u tal-liġi mal-konklużjoni tiegħu, u naqas ukoll li jsib in-ness kawżali bejn in-nuqqas allegat tagħha u t-telf allegatament soffert mill-appellat, jiġifieri is-soċjetà appellanta:

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

(ii) kienet tenuta tikkonsidra l-prodotti in kwistjoni u ta' mill-inqas turi t-tħassib tagħha dwar ċerti investimenti f'noti strutturati formanti parti mill-portafoll tal-appellata, u saħansitra ma kellhiex tħalli li jsiru investimenti riskjużi, għaliex dawn kienu kontra l-oġġettivi tal-Iskema tal-Irtirar u fost affarijiet oħra ma kienux fl-aħjar interess tal-appellati.

23. Għalhekk l-Arbitru esprima l-fehma, liema fehma din il-Qorti tikkondividi pjenament, li fil-każ odjern kien jirriżulta nuqqas ċar ta' diliġenza min-naħa tas-soċjetà appellanta fl-amministrazzjoni tal-Iskema, partikolarment meta wieħed iqis l-istruttura tal-portafoll u l-estent tal-espożizzjoni tal-prodotti konċernati. Il-Qorti filwaqt li tiddikjara li hija qegħda tagħmel tagħha l-konklużjonijiet kollha tal-Arbitru, tgħid li m'għandhiex aktar x'iżżid mad-deċiżjoni appellata tassew mirquma u studjata.

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

Decide

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

L-ispejjeż 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