



MALTA

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

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

Seduta tat-2 ta' Marzu, 2022

Appell Inferjuri Numru 62/2020 LM

**Jonathan Barrett (Detentur tal-Passaport numru 519538701)**  
*(‘l-appellat’)*

**vs.**

**STM Malta Pension Services Limited (C 51028)**  
**għa STM Malta Trust and Company Management Limited**  
*(‘l-appellanta’)*

**Il-Qorti,**

**Preliminari**

1. Dan huwa appell magħmul mis-soċjetà intimata **STM Malta Pension Services Limited (C 50128)** [minn issa ‘l quddiem ‘is-soċjetà appellanta’] li ssostitwit lis-soċjetà **STM Malta Trust and Company Management Limited**, mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa ‘l quddiem ‘l-

Arbitru'] mogħtija fil-15 ta' Settembru, 2020, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddecieda li jilqa' l-ilment tar-rikorrent **Jonathan Barrett (Detentur tal-Passaport nru. 520191868)** [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 tinzamm 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 bil-mod kif stabbilit, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effettiv pagament, filwaqt li s-soċjetà appellanta kellha tħallas l-ispejjeż kollha konnessi ma' dik il-proċedura.

## **Fatti**

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament jgħid li sofra l-appellat mill-investment li huwa kien għamel fis-sena 2012 permezz tal-*premium* imħallas fuq il-polza ta' assikurazzjoni tal-ħajja maħruġa minn Friends Provident International, f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] bl-isem *STM Malta (US Qualified) Retirement Plan*, kif amministrata mis-soċjetà appellanta, u dan permezz tal-konsulent finanzjarju tiegħu *Waterstone Investment Associates* [minn issa 'l quddiem 'Waterstone'].

## **Mertu**

3. L-appellat għalhekk ipprezenta ilment quddiem l-Arbitru fl-4 ta' Jannar, 2017 fil-konfront tas-soċjetà STM Malta Trust and Company Management Ltd.,

għaliex fil-fehma tiegħu l-għażla tal-investimenti magħmula ma kinitx tirrifletti riskju moderat u bilanċjat, u lanqas ma kienu ġew segwiti r-regoli maħruġa mill-MFSA. L-appellat qal li perċentwali kbir tal-investimenti kienu saru f'prodotti li ma kienux likwidi u/jew li kellhom riskju għoli. Għaldaqstant huwa kien qed jippretendi li jithallas id-differenza bejn il-valur originali tal-investment tiegħu, iżda meħud ukoll in konsiderazzjoni żieda li huwa kien ipproġetta bir-rata ta' 6% fis-sena mifruxa fuq erba' snin, jiġifieri b'kollox GBP281,000, u l-valur attwali tal-investment li kien niżel għal GBP190,000.

4. L-imsemmija soċjetà kif aktar tard sostitwita mis-soċjetà appellanta, wiegħbet fil-25 ta' Jannar, 2017 billi eċċepiet qabel xejn b'mod ġeneriku li l-ilment kien infondat fil-fatt u fid-dritt u għalhekk kellu jiġi mwarrab. Imbagħad eċċepiet is-segwent, fost affarijiet oħra: (a) preliminarjament il-preskrizzjoni *ai termini* tal-artikolu 2153 tal-Kodiċi Ċivili; (b) ir-relazzjoni bejnha u l-appellat kienet bdiet u kienet imsejsa fuq kwestjonarju fir-rigward tal-profil tal-klijent, u anki applikazzjoni tal-4 ta' Frar, 2012 li kienet ġiet iffirmata mill-appellat stess; (ċ) l-appellat kien għażel hu stess il-konsulent finanzjarju tiegħu, u hija kienet imxiet skont l-istruzzjonijiet ta' *Waterstone*; (d) l-appellat kellu aċċess għall-portafoll sa mis-sena 2012; (e) il-liġi ma kinitx tipprovdi speċifikament kif għandu jsir l-investment; u (f) fit-30 ta' Ġunju, 2016 l-appellat kien talab sabiex *Waterstone* tibqa' taġixxi bħala l-konsulent finanzjarju tiegħu.

### **Id-deċiżjoni appellata**

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

**“Considers:**

**Preliminary Plea**

*The Service Provider submitted that:*

*‘although the claims of the Complainant are not clear from the Complaint itself, any claims for the payment of damages are prescribed in terms of article 2153 of the Civil Code (Chapter 16 of the Laws of Malta)’ (fn. 28 A fol.201)*

*The Arbiter notes that the Complaint is clear enough, so much so, that the Service Provider filed both a detailed reply to it and also submitted a detailed final note of submissions.*

*As to the plea of prescription, in terms of Article 2153 of Chapter 16 of the Laws of Malta, the Arbiter has noted that apart from mentioning this plea in its reply, the Service Provider did not prove it as it is obliged to do. The party that raises the plea must prove that plea.*

*Moreover, as has been repeatedly decided by the Arbiter in previous decisions, the plea of prescription in terms of Article 2153 of Chapter 16 of the Laws of Malta, is not relevant to these cases which are basically of a contractual nature. As has been held by our Courts, the plea of prescription based on Article 2153 of the Civil Code, is of a tortious nature (fn. 29 For example, GO p.l.c. vs Charles Dimech, PA, 28/07/2011; Roland Darmanin Kissaun vs GlobalCapital Financial Management Ltd, PA, 1/06/2017) as it is independent of any contractual relationship entered into by the parties.*

*This was also repeated by the Courts, (fn. 30 Improved Design Ltd vs Dr Michael Gialanze, PA, 19/05/2005: ‘Illi, għalhekk, il-preskrizzjoni ta’ sentejn imsemmija fl-artikolu 2153 tal-Kodiċi Ċivili, minbarra li ma tapplikax għall-ħsara maħluqa minn għemil li jikkostitwixxi reat, lanqas ma tapplika fejn l-allegata ħsara titnissel minn ksur ta’ patt kuntrattwali jew obbligazzjoni li tixbaħha.’ Cf also *Salvu Fenech vs GlobalCapital Financial Management, QA (inf), 21/10/2019*) where the Court stated that:*

*‘The prescriptive period of two years mentioned in Article 2153 of the Civil Code, apart from the fact that it does not apply to the damage caused by a criminal offence, it does not apply where the alleged damage arises from a contractual relationship or another similar obligation’.*

*The relationship established between the parties was of a contractual nature and, therefore, the Arbiter is rejecting this plea.*

*The other pleas raised by the Service Provider will be dealt with under the merits of the case.*

### ***The Merits of the Case***

***The Arbitrator 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. 31 Cap. 555, Art 19(3)(b))***

### **The Product in respect of which the Complaint is being made**

*The STM Malta (US Qualified) Retirement Plan ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta registered with the Malta Financial Services Authority ('MFSA'). It was initially registered as a Personal Retirement Plan, under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta). (fn. 32 A fol. 68)*

*The Retirement Scheme was established by STM Malta, which is in turn licensed by the MFSA and registered as a Retirement Scheme Administrator. (fn. 33 <https://www.mfsa.com.mt/financial-services-register/result/?id=204>) STM Malta acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 34 A fol. 68)*

*As described by STM Malta, the Scheme:*

*'is a member directed plan in that the member (in this case the complainant) directs which investments he wishes to make after advice has been duly taken and the duty of the administrator of that plan (the Company) is solely to ensure that the choice of investments made satisfies the pension rules that are in force at the time of acceptance of the pension transfer (in this case 2012)'. (fn. 35 A fol. 332)*

*The Application form for membership of the Retirement Scheme specifies inter alia that:*

*'The Plan has been established to provide a life-time income to its members'. (fn. 36 A fol. 28)*

### **The Legal Framework**

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

*The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was eventually*

*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. 37 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.*

*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 STM Malta's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme. (fn. 38 The TTA also applies to a party which is acting in the capacity of a Trustee and as a Retirement Scheme Administrator under the RPA, even where such party may not have a specific trustee authorisation under the TTA.*

*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 ...'.*

### **Profile of the Complainant**

*The Complainant, who was born in December 1965, is of British Nationality and was resident in the USA at the time of membership of the Scheme. (fn. 39 A fol. 31)*

*As indicated in the Application Form for Membership into the Scheme dated 04/02/2012, the Complainant worked as an Associate VP Marketing in the BioPharma sector in the USA. (fn. 40 A fol. 32)*

*In reply to question (A), Section 10 of the Application Form for Membership, which asked 'How well do you understand the risks of investing in financial markets?', the box 'Reasonably well – I consider myself an informed investor', was selected by the Complainant from the other available options of 'sophisticated investor' or 'inexperienced investor'. (fn. 41 A fol. 35)*

*In the same section 10 of the said Application Form, which dealt with the 'Attitude to Risk/Investment Objectives/Financial Position', it was indicated that the Complainant had \$800,000 in investments and a total net worth of \$1,025,000 with liabilities of \$600,000. (fn. 42 Ibid.)*

*In reply to question (E), Section 10 of the same Application Form, which asked how would the applicant 'best describe the approach that should be taken when investing' (fn. 43 Ibid.) the Plan's assets, the Complainant indicated 'Balanced – moderate risk investments within a balanced and diversified portfolio'. (fn. 44 Ibid.)*

*The Complainant did not opt in this regard for the other available options of either 'Aggressive – high risk investments aimed at achieving superior returns' or 'Cautious – providing an annual income whilst protecting the capital'. (fn. 45 Ibid.)*

### **Investment Adviser**

*The Application Form for membership into the Scheme signed by the Complainant and dated 04/02/2012 specifies that the pension adviser of the Complainant was Waterstone Investment Associates, which featured an address in Italy. (fn. 46 A fol. 32)*

*Waterstone Investment Associates was unregulated, as confirmed in the email communication of 7 July 2016, that the adviser itself exchanged with the Complainant. (fn. 47 A fol. 24)*

### **Underlying Investments**

*The Complainant became a member of the Scheme in 2012. Following the acceptance of the Complainant's application dated 4/02/2012, (fn. 48 A fol. 30) by STM Malta as trustee of the Scheme, the Complainant transferred funds from his previous overseas plan/s into the Retirement Scheme. (fn. 49 A fol. 36)*

*The money held into the account of the Complainant, as a member of the Retirement Scheme, was used to purchase a Reserve Whole of Life Policy issued by Friends*

*Provident International. The said policy commenced on the 12 July 2012 and had an investible premium of GBP222,541.29. (fn. 50 A fol. 134)*

*The investible premium of the said policy was, in turn, invested on the advice of Waterstone Investment Associates into various collective investment schemes. The value of the Complainant's account with the Retirement Scheme is linked to the value of the policy offered by Friends Provident International which is, in turn, linked to the performance of the underlying assets undertaken within the said policy.*

*The Application Form for membership into the Scheme signed by the Complainant and dated 04/02/2012 specifies inter alia that the main reason for the Complainant applying for membership of the Retirement Scheme was 'to obtain a higher level of return from the QROPS than that afforded by my current UK pension provision'. (fn. 51 A fol. 31)*

*In reply to one of the questions in Section 10 of the said Application Form, it was also indicated that the Scheme 'will supplement additional retirement funds' where this would represent 30% of the Complainant's total retirement income. (fn. 52 A fol. 31)*

*STM Malta submitted email communications exchanged between the Complainant and his financial adviser in August 2012.*

*The said communications indicated that the initial allocation suggested by the financial adviser and, subsequently agreed to by the Complainant, in respect of the investible premium of GBP222,541, constituted of the following allocation:*

'Platinum Gold Advantage Fund	£25,000.00
Coral Student Accommodation portfolio	£15,000.00
Prestige Alternative Finance Fund	£15,000.00
Mansion Student Accommodation Fund	£20,000.00
Rudolf Wolff Building Society Income Fund	£20,000.00
Lucent Strategic Land Fund	£25,000.00
New Earth Solutions Recycling Fund	£25,000.00
LM Australian Income Fund	£15,000.00
Global Forestry Growth Fund	£20,000.00
Axiom Legal Financing Portfolio	£15,000.00



TCA Global Credit Master Fund	£25,000.00
Cash	£2,541.29'

*(fn. 53 A fol. 337)*

*The allocation indicated above reflected the one that was also indicated by the Complainant during the proceedings of the case. (fn. 54 A fol. 286-287)*

*It is noted that only 9 investments (out of the 11 indicated in the above list), were, however, mentioned by the Complainant in his Complaint Form. The Complainant did not make any reference to the Rudolf Wolff Building Society Income Fund and the TCA Global Credit Master Fund in his Complaint Form.*

*During the proceedings of the case, the Complainant explained that the Rudolf Wolff Building Society Income Fund was still an active investment whilst the TCA Global Credit Master Fund was redeemed by him following advice that this will be suspended. (fn. 55 A fol. 121)*

### **Overview of underlying investments**

*The following is an overview of the nine underlying investments mentioned by the Complainant in his Complaint Form (which investments constituted 78.63% of his investible premium): (GBP175,000 out of GBP222,541.29 - (A fol. 134))*

- 1) The New Earth Solutions Recycling Facilities Fund was a sub-fund of the Premier Investment Opportunities Fund Protected Cell Company, a Qualifying-Type Experienced Investor Fund (fn. 57 A fol. 38 & Information found on <http://www.premiernewearthfund.com/>) which 'meant that the fund could only be promoted to certain types of sophisticated investors'. (fn. 58 <https://www.financial-ombudsman.org.uk/files/176513/DRN7199965.pdf> - Ref: DRN7199965)*

*This fund was a non-retail registered fund not regulated, but registered with the Isle of Man Authority. (fn. 59 A fol. 40) The New Earth Solutions Recycling Facilities Fund 'invested in industrial facilities that specialised in recycling waste management systems'. (fn. 60*

*<https://www.financial-ombudsman.org.uk/files/176513/DRN7199965.pdf> & <https://www.morningstar.co.uk/uk/news/63255/fund-documents-why-you-should-read-the-fine-print.aspx>) This fund was suspended and put into liquidation (fn 61 A fol. 45 and a fol. 286-287) The investment into the New Earth*

*Solutions Fund comprised 11.23% of the investible assets within the Retirement Scheme. (fn. 62 GBP25,000 of GBP222,541.29 (A fol. 11 & 337/286-287).*

- 2) *According to information found over the internet, the Axiom Legal Financing Portfolio constituted a 'segregated portfolio' of 'a segregated portfolio company in the Cayman Islands'. (fn. 63 [http://hintonpi.com/pdfs/axiom\\_brochure.pdf](http://hintonpi.com/pdfs/axiom_brochure.pdf))*

*As detailed in its Offering Memorandum, this fund invested substantially all of its assets in a Master Segregated Portfolio which provided 'short term fixed interest loans to law firms in the United Kingdom (excluding Scotland) to pursue legal claims on a no-win, no-fee basis for the misselling of financial services products on behalf of claimants'. (fn. 64 Pg.8/9 of the Offering Memorandum of the Axiom Legal Financing Fund, Segregated Portfolio dated August 2010 - [http://hintonpi.com/pdfs/axiom\\_supplement\\_memo.pdf](http://hintonpi.com/pdfs/axiom_supplement_memo.pdf))*

*This fund had a targeted rate of return of 11% (fn. 65 Ibid.) and was only available to certain types of investors.*

*Page 15 of the Offering Memorandum of the Axiom Legal Financing Fund, Segregated Portfolio dated August 2010 inter alia specified that:*

*'Investment in Participating Shares is strictly limited to Eligible Investors as defined in the Offering Memorandum. Prospective applicants must represent and warrant in the subscription application form that they are Eligible Investors and that they have the knowledge, expertise and experience in financial investment and business matters to evaluate the risks of investing in the Segregated Portfolio, are aware that the Participating Shares are an investment involving risk, that they are aware of the risks inherent in investing in assets in which the Segregated Portfolio will invest and the method by which these assets may be held and/or traded, that they are not dependent upon current cash returns with respect to the investment in the Segregated Portfolio and that they can bear the loss of their entire investment in the Segregated Portfolio'.*

*The Axiom Legal Financing Fund was eventually placed into receivership. (fn. 66 A fol. 286-287/<http://www.axiomlff.com/>) As indicated in one of the articles about this fund 'It cannot realistically have been considered to be a low-risk investment'. (fn. 67 <https://wards.uk.com/news/uk-investors-lose-out-as-axiom-legal-financing-fund-collapses/>) The investment into the Axiom Legal Financing Portfolio comprised 6.74% of the Scheme's assets. (fn. 68 GBP15,000 of GBP222,541.29 (A fol. 11, 286-287, 337))*

- 3) *The Platinum Gold Advantage Fund was a fund of hedge funds domiciled in Luxembourg aimed for institutional investors. (fn. 69 Bloomberg Terminal – Security information for Platinum Funds SICAV – Platinum Gold Advantage Fund)*

*The aim of the Platinum Gold Advantage Fund was to achieve ‘long term, attractive risk adjusted returns through actively managed investments in a diversified portfolio focused on gold and precious metals’. (fn. 70 Ibid.)*

*The Complainant stated that the Platinum Gold Advantage Fund ‘was eventually liquidated after it lost nearly 50% of value’. (fn. 71 A fol. 11) The investment into the Platinum Gold Advantage Fund comprised 11.23% of the assets that the Complainant had into his account with the Scheme. (fn. 72 GBP25,000 of GBP222,541.29 (A fol. 11, 286-287, 337))*

- 4) *The Mansion Student Accommodation Fund was a cell of the International Mutual Fund PCC Ltd which, according to its brochure, was an ‘open ended Protected Cell Company (PCC) approved by the Guernsey Financial Services Commission and listed on the Channel Islands Stock Exchange’. (fn. 73 Pg. 4 of the Fund Brochure titled ‘Mansion Student Accomodation Funds’.)*

*This fund aimed for a target rate of return of 10-12% p.a. before tax and had the objective ‘to achieve capital growth through the careful acquisition and management of suitable properties and will reinvest surplus rental income after allowances for costs’, with the fund investing in ‘existing private halls of residence which are subdivided into cluster flats with communal kitchen, lounge and bathroom facilities’. (fn. 74 Ibid.)*

*The fund was suspended and eventually put into liquidation. (fn. 75 A fol. 286-287/ <https://www.ft.com/content/5114ff24-966d-11e4-922f-00144feabdc0> <https://www.rl360.com/row/news/fund-update-mansion-student-accommodation-feb18.htm>) The investment into the Mansion Student Accommodation Fund comprised 8.99% of the assets that the Complainant had into his account with the Scheme. (fn. 76 A fol. 286-287, 337)*

*The objective of the LM Australian Income Fund was ‘To provide investors with a competitive return by benefiting from the Fund’s investment in Australian registered first mortgages (debt instruments) secured against real estate assets in Australia’. (fn. 77 Pg. 4 of the Product Disclosure Statement dated November 2012 issued in respect of the LM Australian Income Fund - <https://www.yumpu.com/en/document/read/44087064/lm-australian-income-fund-lminvestment-management>)*

*This fund provided 'senior debt across the Australian property market' (fn. 78 Pg. 9 of the Product Disclosure Statement dated November 2012 issued in respect of the LM Australian Income Fund - <https://www.yumpu.com/en/document/read/44087064/lm-australian-income-fund-lminvestment-management>) and invested 'in a diversified portfolio of Australian first registered mortgages over commercial, residential, industrial, retail and vacant land, and interest bearing cash investments'.*

*Whilst this fund was open to inter alia individual investors, the fund had various investment terms of up to 5 years maturity and the redemption policy provided inter alia that:*

*'Generally, the Manager is required by the constitution to satisfy withdrawal requests within 180 days. In certain circumstances, that period may be extended to 365 days or the Manager may be entitled to suspend withdrawals in order to protect all investments'. (fn. 79 Pg. 58 of the Product Disclosure Statement dated November 2012 issued in respect of the LM Australian Income Fund - <https://www.yumpu.com/en/document/read/44087064/lm-australian-income-fund-lminvestment-management>)*

*The fund also had certain particular risks given that it also involved related party transactions. (fn. 80 Pg. 58 of the Product Disclosure Statement dated November 2012 issued in respect of the LM Australian Income Fund - <https://www.yumpu.com/en/document/read/44087064/lm-australian-income-fund-lminvestment-management>) The fund was put into liquidation and made certain distributions along the past years during the winding up process. (fn. 81 A fol. 286-287/<https://www.lminvestmentadministration.com/aif/https://0i.b5z.net/i/u/10199052/f/8976r3.pdf>) investment into the LM Australian Income Fund comprised 6.74% of the assets that the Complainant had into his account with the Scheme. (fn. 82 GBP15,000 of GBP222,541.29 (A fol. 11, 286-287, 337))*

- 6) *The Global Forestry Growth Fund is an open-ended fund domiciled in Luxembourg and regulated by the CSSF. The objective of this fund, was:*

*'to maximise returns to its investors via direct and indirect investments in the forestry asset class, whilst focusing its investment objective towards stable and consistent returns based on prime acquisitions and participations in promising forestry assets, developments and projects linked to the timber industry' (fn. 83 <http://www.globalforestry.com/sites/default/files/pdf/Global%20Forestry%20-%20Factsheet.pdf>)*

*The Complainant indicated that the Global Forestry Fund 'is suspended and no information is available on this fund'. (fn. 84 a fol. 11) According to public information available over the internet, the Board of Directors of the Global Forestry Fund had suspended 'all redemption, subscription, conversion requests received and of the computation of the NAV; (fn. 85 <http://www.globalforestry.com/sites/default/files/pdf/Letter%20to%20Shareholders%20March%202015.pdf>) in respect of this fund since March 2015, (fn. 86 <http://www.globalforestry.com/sites/default/files/pdf/Letter%20to%20Shareholders%20March%202015.pdf>) with the financial statements on this fund for the fiscal year of 2013 not being completed due to 'a disagreement between the Board and the current auditors of the Fund', (fn. 87 Ibid.) which disagreement 'is linked to the valuation of the assets held by the Fund'. (fn. 88 Ibid.)*

*The Complainant indicated that this fund remains in suspension. (fn. 89 A fol. 286-287) The Global Forestry Fund targeted 'above average returns with minimal correlation to traditional asset classes such as bonds and stocks'. (fn. 90 <http://www.globalforestry.com/sites/default/files/pdf/Press%20Release%20-%2011-04-11%20%20Fund%20launch.pdf>) investment into the Global Forestry Growth Fund comprised 8.99% of the assets that the Complainant had into his account with the Scheme. (fn. 91 GBP20,000 of GBP222,541.29 (A fol. 11, 286-287, 337)*

7) *The Prestige Alternative Finance Fund is:*

*'an experienced investor Fund focusing on asset-based direct lending, investing in a diversified portfolio consisting of rural, commercial and industrial loans, leases and finance agreements in the United Kingdom'. (fn. 92 <https://www.trustnetoffshore.com/Factsheets/Factsheet.aspx?fundCode=EEFC5&univ=DC>)*

*The fund is based in the Cayman Islands and regulated by the Cayman Islands Monetary Authority. (fn. 93 <https://www.prestigefunds.com/wp-content/uploads/PALTF-USD-Factsheet-English-01-2018.pdf>) The investment into the Prestige Alternative Finance Fund comprised 6.74% of the assets that the Complainant had into his account with the Scheme. (fn. 94 GBP15,000 of GBP222,541.29 (A fol. 337/A fol. 286-287) The Complainant indicated that he redeemed the investment into this fund. (fn. 95 A fol. 11)*

8) *The Lucent Strategic Land Fund is a fund domiciled in Luxembourg and regulated by the CSSF. (fn. 96 [http://www.gbstrategiclandfund.com/wpcontent/uploads/2016/11/Lucent\\_Fac](http://www.gbstrategiclandfund.com/wpcontent/uploads/2016/11/Lucent_Fac)*

[tsheet July 2016.pdf](#)) This fund 'commenced operations in September 2010 with the investment objective of providing capital gains in excess of 12% p.a. through a targeted program of investment into land sites in high growth areas throughout England'.

*This fund is a dedicated fund of a Luxembourg scheme and 'qualifies as an Alternative Investment Fund ('AIF') of the specialised investment funds type'. (fn. 97 Ibid) The investment into the Lucent Strategic Land Fund comprised 11.23% of the assets that the Complainant had into his account with the Scheme. (fn. 98 GBP25,000 of GBP222,541.29 (A fol. 337/A fol. 286-287) The Complainant indicated that he redeemed the investment into this fund. (fn. 99 A fol. 11)*

- 9) *The Coral Student Accommodation Fund is a specialised investment fund incorporated and regulated in Luxembourg which invests in the student accommodation sector. (fn. 100 <http://gsa-coral.com/wp-content/uploads/2016/09/20161013studentGSA-coral-brochure-a4super-compressed.pdf>) The investment into the Coral Student Accommodation Fund comprised 6.74% of the assets that the Complainant had into his account with the Scheme. (fn. 101 GBP15,000 of GBP222,541.29 (A fol. 337/A fol. 286-287) The Complainant indicated that he redeemed the investment into this fund. (fn. 102 A fol. 11)*

### **Responsibilities of the Service Provider**

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

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

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

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

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

*From the various general conduct of business rules/standard licence conditions applicable to STM Malta in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively, it is pertinent to note the following general principles: (fn. 103 Emphasis added by the Arbiter)*

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

*The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled ‘Conduct of Business Rules’ of the Pension Rules for Service Providers dated 1 January 2015, issued in terms of the RPA, and which applied to 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 STM Malta 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 ‘The Legal Framework’ above, the Trusts and Trustees Act (‘TTA’), Chapter 331 of the Laws of Malta is also relevant for STM Malta considering its capacity as Trustee of the Scheme.*

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

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, STM Malta was accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.***

*The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property 'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'. (fn. 104 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. 105 Pg. 178, 'An Introduction to Maltese Financial Services Law', Editor Dr Max Ganado, Allied Publications 2009.)**

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

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



trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus pater familias in the performance of his obligations**'. (fn. 106 Pg. 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.)

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

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

Other relevant aspects

One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments**. As acknowledged by the Service Provider, whilst STM Malta's duties did not involve the provision of investment advice, however, STM Malta did '**... monitor pension rules compliance in relation to such investments**'. (fn. 107 A fol. 334)

As also explained by the Retirement Scheme Administrator itself:

'From our end, when we receive the advice which is given to and agreed by the client of the financial adviser, ..., **we only have the duty to ensure that the advice does not run counter to the pension rules (so for example that there is sufficient diversification) ...**'. (fn. 108 A fol. 248)

### **Other Observations and Conclusions**

*In essence, the complaint revolves around the claim that the Complainant experienced a loss on his Retirement Scheme due to STM Malta not having adequately carried out its duties as administrator and trustee of the Scheme in line with the applicable regulations and requirements.*

*Two principal alleged failures made against the Retirement Scheme Administrator are that (i) it had allowed the appointment of an unregulated investment adviser to provide recommendations in respect of the underlying investments of the member-directed scheme and (ii) it allowed the creation of a portfolio of underlying investments within the Scheme which, according to the Complainant, was considered to be of high risk and not reflective of a moderate risk within a balanced and diversified portfolio.*

*The following are considered to be the key considerations relevant to the case in question:*

- a) *It is clear that the Retirement Scheme Administrator was not responsible for the provision of the investment advice provided to the Complainant in relation to the underlying investments of his member-directed scheme. The role of the investment adviser was the duty of Waterstone Investment Associates Inc which was appointed by the Complainant.*

***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.***

- b) *Although the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the financial instruments which suffered the losses, **the Retirement Scheme Administrator had nevertheless certain obligations to undertake in its role of Trustee and scheme administrator of the Retirement Scheme.***

***The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial bearing on the operations and activities of the Scheme and affect direct, or indirectly, its performance.***

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

- c) *The appointment of an unregulated adviser:*

*The Complainant chose himself the appointment of Waterstone Investment Associates Inc to provide him with investment advice in relation to the selection of the underlying investments and composition of the portfolio within his member-directed account held with the Scheme.*

*The Retirement Scheme Administrator, from his part, allowed and/or accepted the unregulated investment adviser to provide investment advice to the Complainant within the structure of the Retirement Scheme.*

*No clear evidence has emerged in this case indicating that the regulatory framework, which applied at the time the Complainant became member of the Scheme in 2012, did not permit the appointment of an unregulated investment adviser in relation to the member-directed personal retirement scheme.*

*The regulatory framework which has been updated over the years seems to have allowed certain scenarios when it came to the appointment of an investment adviser until the coming into force and application of relevant provisions in section B9 of Part B of the Pension Rules for Retirement Schemes issued in terms of the Retirement Pensions Act, 2011, which deals with member-directed schemes. (fn. 109 A fol. 249 & 254 as well as: Pages 4/5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017 15-2018) issued in relation to the 'Consultation on Amendments to Pension Rules for Personal Retirement Schemes' - <https://www.mfsa.com.mt/publications/policy-and-guidelines/feedback-andstatements/>; Page 9 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) also refers - <https://www.mfsa.com.mt/publications/policy-andguidelines/consultation-documents-archive/>.)*

*The said section of the rules includes inter alia the criteria that need to be satisfied in respect of the investment advisers of member directed schemes, which include the requirement for the investment adviser to be subject to inter alia authorisation and regulation as is specified in standard licence condition 9.6 (b) of the said rules. (fn. 110 Last updated 28 December 2018 - <https://www.mfsa.com.mt/firms/regulation/pensions/pensionrules-applicable-as-from-1-january-2015/#Pension%20Rules>)*

*The MFSA allowed a transitional period, until 1 July 2019, for compliance with the said condition 9.6 (b). (fn. 111 Page 5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017 / 15-2018) issued in relation to the 'Consultation on Amendments to Pension Rules for Personal Retirement Schemes')*

***However, the appointment of an unregulated entity to act as investment adviser meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where a 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. The Retirement Scheme Administrator and Trustee of the Retirement Scheme, a regulated entity itself, should have been duly cognisant of this.***

*In the scenario where an unregulated adviser was allowed to provide investment advice to the member of a member-directed scheme, **one would reasonably***

***expect the Service Provider, in its role of Retirement Scheme Administrator and Trustee of the Retirement Scheme, to exercise even more caution and prudence in its dealings with an unregulated party.***

*This is even more so, when the activity in question, that is, one involving the recommendations on the choice and allocation of underlying investments, has a material bearing on the financial performance of the Scheme and the objective of the retirement scheme to provide for retirement benefits. It would have accordingly been only reasonable to expect the retirement scheme administrator and trustee to have an even higher level of disposition in the probing and querying of the actions of such unregulated party in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances.*

d) *The permitted portfolio composition:*

i. *Despite that the underlying investments were all collective investment schemes, where such type of investment typically but not necessarily includes a level of diversification, one notes that the nine underlying products chosen were ultimately all exposed to very particular asset classes/industries. The portfolio of underlying investments was predominantly invested or exposed to alternative asset classes ranging from real estate, lending, timber, gold/precious metals and recycling waste facilities as further indicated in the 'Overview of underlying investments' detailed above.*

*Besides the peculiarities of the alternative industry sectors to which the portfolio was predominantly exposed to, one also notes that some of the chosen underlying collective investment schemes were also unregulated products and non-retail investments.*

ii. *The fact that the underlying investments constituted nine funds cannot be considered, on its own, to justify and provide sufficient comfort that there was an adequate level of diversification and a balanced portfolio with moderate risks. This is even more so when one considers the nature and risk profile of such funds.*

iii. *The Complainant ultimately ended up having over 50% of his assets, with 6 out of the 9 funds invested into, all experiencing substantial difficulties and/or losses which is, in itself, indicative of the high exposure to the speculative nature and risks of the selected underlying investments which were allowed to occur within the Retirement Scheme by the Retirement Scheme Administrator.*

iv. *It is considered that there was no such 'low risk spread of investments within your portfolio' as claimed by the investment adviser of the Complainant in his email of 1 August 2012, wherein it was stated, that the proposal for the initial investment 'looks to produce a high rate of return but from a low risk spread of investments within your portfolio'. (fn. 112 A fol. 337)*

*Besides that, it is somewhat contradictory to achieve a high rate of return from low risk investments, no evidence of a spread of low risks investments has in reality emerged from the portfolio composition that was ultimately allowed by STM Malta to be constituted within the Scheme.*

v. *One accordingly is justified in questioning the Retirement Scheme Administrator in permitting such an allocation given that the portfolio of underlying investments allowed for the Complainant cannot reasonably be considered as reflective of moderate risk investments within a balanced and diversified portfolio.*

*In addition, it is unclear on what basis one can reasonably conclude that the portfolio composition was an adequate one for the purposes of retirement provision, this being the scope for which the Scheme was set up.*

e) *One notes that a personal retirement scheme is ultimately 'established with the principal purpose of providing Retirement Benefits to Members and/or Beneficiaries' as per condition 1.1.3 of the Pension Rules for Personal Retirement Schemes'. Such purpose of provision of retirement benefits is indeed reflected under the primary legislation, the Special Funds (Regulation) Act ('SFA') (fn. 113 Page 5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017 / 15-2018) issued in relation to the 'Consultation on Amendments to Pension Rules for Personal Retirement Schemes') and the Retirement Pensions Act ('RPA'). (fn. 114 Page 5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017 / 15-2018) issued in relation to the 'Consultation on Amendments to Pension Rules for Personal Retirement Schemes')*

*The documentation used in respect of the Retirement Scheme, itself specified that:*

*'The Plan has been established to provide a life-time income to its members'. (fn. 115 A fol. 28)*

f) *It is deemed, in the circumstances, that no convincing nor sufficient evidence was provided by STM Malta 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 a 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 provide 'a life-time income to its members' (fn. 116 Ibid.) and having 'the principal purpose of providing Retirement Benefits'. (fn. 117 Condition 1.1.3 of the Pension Rules for Personal Retirement Schemes; Article 3(1) of the Retirement Pensions Act; Article 2(1) of the Special Funds (Regulation) Act.)*

- g) Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant and to select the underlying investments of the Retirement Scheme, the Retirement Scheme Administrator had a duty to check and ensure that the portfolio composition recommended by the investment adviser was in the interests of the Complainant and should have ensured that the portfolio composition was one enabling the aim of the Retirement Plan to be achieved with the necessary prudence as one would reasonably expect from a retirement plan.**

***The Scheme Administrator and Trustee had to, in practice, promote the scope for which the Scheme was established with the choice of investments reflecting such scope.***

*It is considered that 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 approach and a suitable level of diversification to achieve the scope of the Scheme.*

*The portfolio composition was ultimately exposed to very particular and specialised industries and was more skewed and reflective of an aggressive portfolio overall aimed at achieving superior returns and of high risk (fn. 118 Contrary to what was selected in the Application Form for membership of the Scheme – A fol. 35) and this also in a scenario where the Complainant was not a sophisticated investor. (fn. 119 A fol. 35)*

*It is thus considered that, at the least, there was a lack of diligence by STM Malta in allowing such composition of portfolio within the Scheme, which composition resulted in the losses experienced on his member-directed account with the Scheme.*

### **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.***

***However, cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment 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 STM Malta Pension Services Ltd as Trustee and Retirement Scheme Administrator of the STM Malta (US Qualified) Retirement Plan 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 STM Malta for part of the realised losses on his pension portfolio.***

***In the particular circumstances of this case, considering the role of STM Malta as Trustee and Retirement Scheme Administrator of the Scheme and extent of deficiencies of the Service Provider, the Arbiter considers it fair, equitable and reasonable for STM Malta, to be held responsible for seventy per cent of the losses sustained by the Complainant on his overall investment portfolio indicated above in this decision.***

***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.***

***The Net Realised Loss on such portfolio shall be calculated by netting the total of the realised losses and realised profits arising from the portfolio based on the actual realisable values from the said investments, inclusive of any income received from the respective investments.***

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

***In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbitrator orders STM Malta Pension Services Limited to pay the indicated amount of compensation as mentioned in this decision.***

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

***Because of the novelty of these cases, each party is to bear its own legal costs of these proceedings”.***

## **L-Appell**

6. Is-soċjetà appellanta ħasset ruġha aggravata bid-deċiżjoni appellata tal-Arbitru, u fil-5 ta' Ottubru, 2020 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka d-deċiżjoni appellata billi tilqa' l-aggravji tagħha, filwaqt li tilqa' wkoll l-eċċezzjonijiet kollha tagħha, bl-ispejjeż kontra l-appellata. Tgħid li l-aggravji tagħha huma s-segwent: (a) l-Arbitru applika u nterpreta l-liġi ħażin meta ddeċieda li s-soċjetà appellanta kienet naqset mid-doveri tagħha lejn l-appellat meta ddeċieda li (i) hija kienet ippermettiet lil *Waterstone* taġixxi bħala konsulent finanzjarju tal-appellat; (ii) il-kompożizzjoni tal-portafoll ma kienx jirrispetta l-profil tar-riskju u l-oġġettivi tal-appellat; (b) ma kien hemm l-ebda ness kawżali; u (ċ) id-deċiżjoni appellata mhijiex ekwa, raġonevoli u ġusta billi (i) il-perċentwali ta' dak dovut ma kienx likwidu, ċert u lanqas aċċertabbli u lanqas ma kien indikat il-perijodu li għandu jittieħed in konsiderazzjoni fil-komputazzjoni tal-kumpens; (ii) il-perċentwali tal-kumpens ġie komputat fuq il-valur oriġinali investit, meta l-ilment kien limitat għal disgħa minn ħdax-il prodott finanzjarju, u għalhekk matematikament żbaljat u nfondat; u (d) l-Arbitru skarta għal kollox il-fatt li l-appellat baqa' titolarju tal-investimenti u dawn għad irendu dħul, jekk u meta jġu mifdija u/jew likwidati.



7. L-appellat wieġeb fit-28 ta' Lulju, 2021, fejn issottometta li l-appell interpost mis-soċjetà appellanta kellu jiġi miċċud għal dawk ir-raġunijiet li huwa jfisser fir-risposta tiegħu.

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

8. Din il-Qorti ser tgħaddi sabiex tikkonsidra l-aggravji tas-soċjetà appellanta, u dan fid-dawl tal-konsiderazzjonijiet magħmulin mill-Arbitru fid-deċiżjoni appellata, u s-sottomissjonijiet magħmula mill-appellata fit-tweġiba tiegħu. Tgħid li l-ewwel żewġ aggravji tas-soċjetà appellanta ser tittrattahom flimkien, għaliex il-qofol tagħhom huwa proprju l-aġir tagħha, u għalhekk bosta mill-konsiderazzjonijiet ta' din il-Qorti għandhom ikunu l-istess.

9. Fl-ewwel aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru applika u interpreta l-liġi ħażin meta ddecieda li hija kienet naqset mill-obbligi tagħha fil-konfront tal-appellat, meta qies li hija ppermettiet lil *Waterstone* taġixxi bħala konsulent finanzjarju tiegħu. Tgħid li l-liġi u/jew regoli kif applikati mill-Arbitru kienu daħlu fis-seħh wara l-imġiba allegatament ħażina tagħha. Tirrileva li l-ħatra tal-konsulent finanzjarju kienet saret mill-appellat stess, u dak iż-żmien ma kien hemm l-ebda obbligu li joħroġ minn liġi/regolament/gwida li hija kellha tivverifika jekk *Waterstone* kinitx entità regolata sabiex tipprovdi pariri finanzjarji, u dan l-Arbitru stess għarf. Tgħid ukoll li lanqas kien hemm obbligu dak iż-żmien li l-appellat sar membru tal-Iskema, fejn hija kellha taċċerta ruħha li l-parir mogħti u aċċettat mill-membru kien idoneju għal tali membru fir-rigward tal-investimenti magħżula. Tgħid li madankollu hija xorta waħda kienet għamlet eżercizzju ta' diligenza sabiex taċċerta ruħha li l-konsulent finanzjarju

kellu l-esperjenza neċessarja, u fil-fatt kien irriżultalha li *Waterstone* kienet ditta reġistrata mal-*Chartered Insurance Institute* għewwa r-Renju Unit, u anki kellha *Financial Planning Certificate – Level 3*. Is-soċjetà appellanta tissottometti li l-Arbitru ttenta li jsib xi nuqqas min-naħa tagħha, iżda xorta waħda mkien ma jgħid x'kienu l-obbligi li jsemmi, jew minn fejn kien jirriżulta l-obbligu tagħha li jitlob li hija taċċerta li *Waterstone* kienet entità regolata jew awtorizzata. Tgħid li finalment l-Arbitru straħ fuq l-obbligu ġenerali ta' *trustee* li għandu jimxi skont l-aħjar interess tal-benefiċċjarju. B'hekk tgħid li huwa ħoloq pożizzjoni ta' incertezza fuq skorta ta' interpretazzjoni pjuttost wiesgħa, li kienet żbaljata. Issostni li hija ma setgħetx tagħti parir finanzjarju lill-appellat, għaliex hawn kienet limitata mill-kundizzjonijiet tar-regolamentazzjoni tagħha bħala RSA maħruġa mill-MFSA. Is-soċjetà appellanta tiddikjara li hija ma kinitx qegħda tikkontesta l-obbligu ġenerali ta' *trustee*, fejn dan kellu jaġixxi fl-aħjar interess tal-benefiċċjarju u bħala *bonus paterfamilias*, iżda d-dinamika u l-iskop ta' skemi tal-irtirar huwa differenti sew minn dak ta' *trust* fil-kuntest ġenerali, u l-iskop li dawn huma maħsuba li jwettqu. Għalhekk hija kienet qegħda tikkontesta l-inferenza illi l-obbligu ġenerali ta' *trustee* kien iħaddan ukoll l-obbligu speċifiku li għandha ssir verifika dwar l-*istatus* tal-konsulent finanzjarju u/jew revizjoni tal-pariri finanzjarji tiegħu. Is-soċjetà appellanta ssostni li sabiex ikun hemm ksur ta' regola ġenerali kif ċitat mill-Arbitru, il-ksur irid ikun wieħed lampanti u dan ma ntwera qatt matul il-proċeduri quddiem l-Arbitru jew fl-appell odjern. Tgħid li fil-fatt wieħed kien jippretendi li l-appellat iressaq il-prova ta' dak allegat minnu, u wara kollox il-kwistjoni qatt ma kienet jekk *Waterstone* kinitx liċenzjata, iżda jekk is-soċjetà appellanta kellhiex l-obbligu li tivverifika jekk din kellhiex awtorizzazzjoni regulatorja sabiex tipprovdi pariri finanzjarji.

Għaldaqstant hija ma kienet taħt l-ebda obbligu li tressaq tali prova u l-Arbitru b'hekk kien qed jaqleb l-oneru tal-prova, u kull deċiżjoni hekk meħuda għandha tigi revokata. Skont is-soċjetà appellanta, l-istess aggravju jolqot ukoll il-kwistjoni ta' kif kien magħmul il-portafoll tal-appellat, li allegatament ma kienx jirrifletti il-profil tar-riskju u l-oġġettivi tiegħu. Wara li ċċitat dak li qal l-Arbitru dwar il-portafoll in kwistjoni, tissottometti li hawn ukoll huwa ma semmiex minn fejn jirriżulta li hija kellha d-dover “...to check and ensure that the portfolio composition recommended by the investment adviser was in the interests of the Complainant”. Tissottometti li l-Arbitru għalkemm hawn għamel diversi stqarrijiet peżanti, huwa ma jiċċita l-ebda regola u saħansitra wkoll ma jimmotivax il-konklużjonijiet tiegħu. Is-soċjetà appellanta hawn tagħmel riferiment għall-investigazzjoni li wettaq l-Arbitru u tgħid li l-appellat qatt ma ressaq prova fir-rigward ta' dawn il-konsiderazzjonijiet, u għalhekk hija llum tinstab rinfaccjata b'deċiżjoni mingħajr qatt kellha l-opportunità li tirribatti dak li ġie kkonsidrat, stante li ma kienx jagħmel parti mill-atti. Tgħid li meta mbagħad l-Arbitru jsostni diversi drabi li l-portafoll ma kienx “*balanced and diversified*” u li ma kienx hemm “*a suitable level of diversification to achieve the scope of the Scheme*”, huwa sejjes il-konklużjoni tiegħu fuq disgħa minn ħdax-il investment, u warrab l-element ta' flus kontanti.

10. *It-tieni aggravju* tas-soċjetà appellanta jsegwi mill-ewwel aggravju u jittratta wkoll l-aġir tagħha, iżda din id-darba kif dan jolqot it-telf allegatament soffert mill-appellat. Hija tissottometti li dan it-telf allegat mhux ir-riżultat ta' xi komportament negligenti tagħha u/jew ta' xi aġir abuziv min-naħa tagħha jew ta' xi komportament ieħor tagħha. Tikkontendi li fil-fatt hemm nuqqas ta' ness

kawżali bejn it-telf lamentat u n-nuqqasijiet attribwiti lilha, anzi id-deċiżjoni appellata hija siekta għal kollox fuq dan il-punt u l-appellat saħansitra naqas li jressaq prova fir-rigward. Hija tikkontendi li ma kinitx naqset fl-obbligi legali tagħha, iżda *dato ma non concesso* li hija ppermettiet lill-appellat jinvesti fil-prodotti in kwistjoni, tgħid li dan jista' biss iwassal għal sanzjoni regolatorja, li wara kollox lanqas biss kien hemm, iżda qatt għal kundanna għad-danni għaliex kien nieqes in-ness kawżali. Jekk kellu jiġi meqjus li hija kienet responsabbli lejn l-appellat għad-danni, dan kien ser iwassal sabiex hija tkun f'pożizzjoni ta' garanti fid-doluż biss, u dan kien ser ikun fatali għall-industrija finanzjarja. Tagħlaq billi tgħid li fil-fatt għal dan wassalha l-Arbitru permezz tad-deċiżjoni appellata.

11. L-appellat wara li esprima l-fehma tiegħu li s-soċjetà appellanta fir-rikors tal-appell intavolat minnha uriet nuqqas ta' rispettt kbir lejn l-Arbitru fil-kummenti li din għamlet dwar il-ħruġ tar-regolamenti l-ġodda, jissottometti li t-tħaris tad-drittijiet ta' individwi bħall-appellat min-naħa tal-Arbitru, kien qed joħloq ċertu skumdità lill-imsemmija soċjetà appellanta. L-appellat jikkontendi li għall-kuntrarju ta' dak li kienet qegħda ssostni s-soċjetà appellanta, l-Arbitru indirizza l-kwistjoni tal-obbligi tagħha, u għaladarba l-imsemmi Arbitru sab sostenn sostantiv u fattwali għad-deċiżjoni tiegħu, issottometta li dik id-deċiżjoni m'għandhiex tiġi disturbata ħlief għal raġunijiet serji, li ma kienux jirrizultaw fil-każ odjern. Dwar it-tieni aggravju tas-soċjetà appellanta, l-appellat jissottometti li dan huwa marbut mal-ewwel wieħed. Jikkontendi li għaladarba għie stabbilit li s-soċjetà appellanta kellha fost oħrajn obbligi fiduċjarji lejn l-appellat, u għie stabbilit li hija kienet naqset minn dawk l-obbligi, isegwi li t-telf

soffert minnu huwa konsegwenza ta' dak in-nuqqas. Jgħid li min-naħa tagħha s-soċjetà appellanta ma ressqet l-ebda prova sabiex tirribatti dan.

12. Il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. Huwa jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġonevoli fiċ-ċirkostanzi partikolari, u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Irrileva li l-Iskema kienet tikkonsisti f'*trust* b'domicilju hawn Malta, u kif awtorizzata mill-MFSA bħala '*Personal Retirement Scheme*'. Imbagħad, wara li huwa għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellat mill-Applikazzjoni għas-Sħubija esebita fl-atti<sup>1</sup>, għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta u anki fir-rigward tal-konsulent finanzjarju *Waterstone*. L-istess għamel fir-rigward tal-investimenti sottoskritti l-Iskema li kienu ġew akkwistati permezz tal-*premium* imħallsa fuq il-polza ta' assikurazzjoni tal-ħajja maħruġa minn Friends Provident International, liema *premium* setgħet tiġi nvestita sal-ammont ta' GBP222,541.29. Il-Qorti tirrileva li m'hemm l-ebda kontestazzjoni dwar dawn il-fatti, anki mis-soċjetà appellanta.

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. Huwa hawn għamel riferiment għall-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar), li ġie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta) li ġie fis-seħħ fl-1 ta' Jannar, 2015, u għad-direttivi/regoli magħmula

---

<sup>1</sup> Ara a fol. 32 et seq.

taħthom, u anki għall-Att dwar Trusts u Trustees (Kap. 331 tal-Liġijiet ta' Malta) partikolarment applikabbli għas-soċjetà appellanta. Dawn ir-referenzi l-Qorti tgħid li huma mhux biss utli, iżda anki rilevanti ħafna stante l-applikabbiltà tagħhom għall-każ odjern.

14. L-Arbitru spjega li l-obbligi tas-soċjetà appellanta kienu mfissra fl-Att li Jirregola Fondi Speċjali u anki fid-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*. Meta mbagħad gie mħassar dak l-Att u r-reġistrazzjoni tas-soċjetà appellanta taħt il-Kap. 514, l-obbligi tagħha bdew jiġu regolati permezz ta' dik l-istess liġi u anki permezz tal-*Pension Rules for Service Providers issued under the Retirement Pensions Act* u l-*Pension Rules for Personal Retirement Schemes Issued under the Retirement Pensions Act*. L-Arbitru aċċenna għall-obbligu tal-Amministratur tal-Iskema tal-Irtirar sabiex dan jaġixxi fl-aħjar interessi tal-Iskema, u dan kif jirrikjedi s-subartikolu 19(2) tal-Att li Jirregola Fondi Speċjali (Kap. 450), u s-subartikolu 13(1) tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514). Ĉertament għalhekk tgħid il-Qorti, anki fid-dawl tal-konstatazzjonijiet ulterjuri tal-Arbitru, ma tistax taċċetta s-sottomissjoni tas-soċjetà appellanta li l-Arbitru naqas milli jindika x'kienu l-obbligi tagħha. Iżżid tgħid li għall-kuntrarju ta' dak li qegħda tinsisti fuqu bil-qawwa kollha s-soċjetà appellanta, m'hemmx dubju dwar x'kienu l-obbligi tagħha u li dawn l-obbligi daqstant ċari kif imfissra fil-liġi, kienu jirrikjedu li hija timxi fl-aħjar interess tal-Iskema, kemm fiż-żmien li sar l-investment fis-sena 2012 meta kienu applikabbli d-disposizzjonijiet tal-Kap. 450, u anki sussegwentement meta gie fis-seħħ fis-sena 2015 l-Att dwar Pensjonijiet għall-Irtirar, u l-appellat kien għadu membru

tal-Iskema u garrab it-telf allegat. Tgħid li jekk kien hemm żmien li ma kienx hemm obbligi speċifiċi li jirregolaw l-imġiba tagħha, dan ma kienx jeżoneraha mill-obbligi ġenerali tagħha.

15. 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 jirrizulta li s-soċjetà appellanta bħala Amministratriċi tal-Iskema kienet tenuta li timxi b'kull ħila, kura u diligenza dovuta fl-aħjar interessi tal-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirrizultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li digà minn dan li ngħad, jirrizulta li d-difiża tagħha li hija qatt ma setgħet tinzamm responsabbli għaliex ma kellha l-ebda obbligu speċifiku fil-konfront tal-appellat, ma tistax tirnexxi.

16. 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 and Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-30 ta' Gunju, 1989 kif sussegwentement emendat, u jagħmel riferiment partikolari għas-subartikolu 21(1), u l-para. (a) tas-subartikolu 21(2). Il-Qorti tgħid li hawn għal darb'oħra d-difiża tas-soċjetà appellanta ma tista' issib l-ebda sostenn għaliex hija kienet soġġetta għall-obbligi kollha ta' *trustee*, anki dawk aktar speċifiċi li permezz tagħhom l-obbligu ġenerali jista' jieħu sura. Tgħid li ftit li xejn ukoll tista' taċċetta l-argument tas-soċjetà appellanta li d-dinamika u l-iskop ta' skemi tal-irtirar huma tassew differenti minn dawk ta' *trust* fil-kuntest ġenerali, u dan għaliex tagħraf li l-Iskema in kwistjoni giet maħluqa fuq il-qafas ta' *trust*

kif regolat mill-Kap. 331, u li għalhekk huwa applikabbli fir-rigward ta' dik l-Iskema. Għalhekk l-Arbitru sewwa rrileva li fil-kariga tagħha ta' *Trustee*, is-soċjetà appellanta kienet saħansitra tenuta tamministra l-Iskema u l-assi tagħha skont diligenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa jiccita il-pubblikazzjoni An Introduction to Maltese Financial Services Law<sup>2</sup> u l-pubblikazzjoni riċenti tal-MFSA tas-sena 2017, fejn din ittrattat prinċipji diġà stabbiliti qabel dik id-data permezz tal-Att dwar *Trusts* u *Trustees* (Kap. 331) u anki permezz tal-Kodiċi Ċivili.

17. L-Arbitru hawn għadda sabiex aċċenna fuq obbligu ieħor importanti li kellha s-soċjetà appellanta, dak fejn hija kienet tenuta tissorvelja u tħares l-investimenti, u qal li fin-nota ta' sottomissjonijiet tagħha s-soċjetà appellanta kienet saħansitra aċċettat li hija tissorvelja l-applikazzjoni tar-regoli fir-rigward ta' dawk l-investimenti. Qal li din ukoll kienet aċċettat f'kommunikazzjoni partikolari li kellha mal-Uffiċċju tal-Arbitru, li hija kellha l-obbligu li tassigura li l-parir finanzjarju ma kienx imur kontra r-regoli, bħal per eżempju li kien hemm biżżejjed diversifikazzjoni.

18. L-Arbitru aċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi, li fil-każ odjern kienet *Waterstone*. L-Arbitru ddikjara li kien tal-fehma, kif inhi din il-Qorti, li s-soċjetà appellanta bħala Amministratur ta' Skema għall-Irtirar u t-*Trustee* tagħha, kellha ċerti obbligi importanti li setgħu jkollhom rilevanza sostanzjali fuq l-operat u l-attivitajiet tal-Iskema u li jaffettwa direttament jew indirettament l-andament tagħha. Kien għalhekk li kellu jiġi investigat jekk is-

---

<sup>2</sup> Ed. Max Ganado.



soċjetà appellanta naqsitx mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura dan safejn kellu effett fuq l-andament tal-Iskema u r-rizultanti telf.

19. L-Arbitru aċċetta li kien l-appellat li għażel lill-konsulent finanzjarju tiegħu sabiex dan jagħtih parir dwar l-għażla tal-investimenti sottoskritti u l-kompożizzjoni tal-portafoll tiegħu fl-Iskema. Min-naħa tagħha s-soċjetà appellanta kienet ippermettiet u/jew aċċettat lil dan il-konsulent finanzjarju li ma kienx regolat, sabiex jipprovdi parir finanzjarju lill-appellat għal dak li kien jirrigwarda l-istruttura tal-Iskema.

20. Imma għandu jingħad li l-Arbitru saħansitra ħa konjizzjoni tal-fatt li ma kienx irrizulta b'mod inekwivoku li f'dak iż-żmien il-qafas regulatorju ma kienx jippermetti l-ħatra ta' konsulent finanzjarju mhux regolat fejn kien hemm skema tal-irtirar li kienet immexxija mill-membri (*member-directed*). Izda qal li sussegwentement ġew *in vigore* d-disposizzjonijiet relattivi tas-sezzjoni B9 tal-Parti B tal-*Pension Rules for Retirement Schemes* li saru taħt il-Kap. 514. Irrileva li l-MFSA kienet ippermettiet perijodu tranzizzjonali sal-1 ta' Lulju, 2019 sabiex jiġu segwiti d-disposizzjonijiet tal-kondizzjoni 9.6(b) ta' dawk ir-regoli, li kienet tirrikjedi li l-konsulent finanzjarju kellu jkun awtorizzat u regolat. Qal li fil-każ odjern il-ħatra ta' entità li ma kinitx regolata sabiex isservi ta' konsulent, kienet tfisser li l-appellat kien igawdi minn inqas protezzjoni, u s-soċjetà appellanta kienet tenuta tkun konnoxxenti ta' dan il-fatt u li tkun aktar kawta u prudenti fin-negozju tagħha ma' dik l-entità. Il-Qorti ma tistax ma tikkondividix din il-fehma, u ċertament tikkonsidra 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 hija saħansitra kienet ukoll *trustee* tal-Iskema.

21. L-Arbitru hawn għadda sabiex ikkonsidra l-kompożizzjoni tal-portafoll tal-appellat. Fl-ewwel lok ikkonstata li l-investimenti sottoskritti kienu kollha magħmulin f'skemi ta' investiment kollettiv, li s-soltu kienu jipprovdu għal livell ta' diversifikazzjoni. Izda qal li f'dan il-każ wieħed seta' jinnota li d-disa' prodotti sottoskritti kienu kollha esposti għal klassijiet ta' assi/industriji partikolari ħafna. Dan b'mod predominanti jew esposti għal proprjetà immobbli, self, injam, deheb/metalli prezzjużi u faċilitajiet ta' riċiklar ta' skart, kif indikat fl-*overview of underlying investments* aktar 'il fuq fid-deċiżjoni appellata. Osserva wkoll li uħud mill-iskemi ta' investiment kollettiv ma kienux regolati u ma kellhomx in-natura ta' *retail*. It-tieni punt tiegħu kien li l-fatt waħdu li l-investimenti sottoskritti kienu jikkonsistu f'disa' fondi, ma setax jiġġustifika u joffri biżżejjed serħan tal-moħħ li kien hemm livell adegwat ta' diversifikazzjoni u portafoll b'riskji moderati. Dan aktar u aktar meta wieħed kien jikkonsidra n-natura u l-profil ta' riskju ta' dawn il-fondi. It-tielet osservazzjoni li għamel l-Arbitru kienet li aktar minn 50% tal-assi tal-appellat, jiġifieri sitta minn disa' fondi fejn sar l-investiment, ġarbu diffikultajiet sostanzjali u/jew telf, u dan kien juri l-espożizzjoni għolja għan-natura spekulattiva u għar-riskju ta' dawn l-investimenti, li ġew aċċettati fl-iskema mill-Amministratur tagħha. Ir-raba' punt li għamel l-Arbitru huwa li ma kien hemm l-ebda firxa ta' riskju baxx fost l-investimenti tal-portafoll tal-appellat kif iddikjara l-konsulent finanzjarju tiegħu fl-*email* lill-imsemmi appellat tal-1 ta' Awwissu, 2012. L-Arbitru hawn ukoll osserva li kien kontradittorju li jkun hemm rata għolja ta' qligħ minn investimenti li kienu joffru riskju baxx. Ikkonstata wkoll li ma kien hemm l-ebda evidenza li kien hemm firxa ta' investimenti b'riskju baxx. L-aħħar punt li għamel l-Arbitru kien li wieħed għalhekk kien ġustifikat li jsaqsi għaliex l-Amministratur

tal-Iskema ppermetta dan l-investment, u li ma setax b'mod ragonevoli jaċċetta li l-kompożizzjoni tal-portafoll kien adegwat sabiex jipprovdi għall-irtirar, li kien proprju l-iskop tal-Iskema. Il-Qorti tagħraf li dawn l-osservazzjonijiet magħmulin mill-Arbitru huma inekwivoċi, tant li ma ssib li hemm l-ebda dubju dwar it-tifsira tagħhom, u huma wkoll ferm siewja fil-kuntest tal-portafoll magħżul. Tgħid li soċjetà appellanta min-naħa tagħha tikkontendi li l-Arbitru ma kien xejn ċar fejn ikkonstata nuqqasijiet, u ma mmotivax l-konklużjonijiet tiegħu. Imma l-Qorti tgħid li min-naħa tagħha l-istess soċjetà appellanta tonqos li tiddefendi l-pożizzjoni tagħha billi tirribatti b'mod speċifiku l-konstatazzjonijiet tal-Arbitru u l-konklużjonijiet milħuqa minnu, u tippretendi saħansitra li kellu jkun l-Arbitru li jiggwidaha dwar dak li kellu jkun prudenti fiċ-ċirkostanzi tal-każ partikolari. Is-soċjetà appellanta tilmenta wkoll li l-Arbitru naqas milli jieħu in konsiderazzjoni l-portafoll kollu, u dan tagħmlu b'riferiment għall-fatt li huwa sejjes il-konklużjoni tiegħu fuq disgħa minn ħdax-il investment, filwaqt li huwa njora l-element ta' flus kontanti. Il-Qorti tirrileva li filwaqt li meta l-Arbitru spjega kif il-*premium* ta' GBP222,541 kien ġie investit, huwa ħa in konsiderazzjoni li GBP2,541.29, ammont li tgħid huwa tassew negligibbli meqjus it-total, kien '*cash*', u li l-appellat kien naqas li jindika żewġ investimenti fl-ilment tiegħu, u li wieħed minn dawn kien għadu attiv, iżda l-ieħor kien ġie mifdi fuq parir li dan kien ser jġi sospiż. Filwaqt li l-Qorti tagħraf li bejniethom dawn iż-żewġ investimenti in kwistjoni kienu ta' GBP45,000, u għalhekk madwar 20% mill-portafoll sħiħ, tikkonsidra li ftit li xejn tista' tiswa s-sottomissjoni tas-soċjetà appellanta, meta kif irrileva l-Arbitru b'mod inkontestat li "*[t]he Complainant ultimately ended up having over 50% of his assets, with 6 out of the 9 funds invested into, all experiencing substantial difficulties and/or losses ...*".

22. Aspett ieħor li jikkonsidra l-Arbitru huwa li skema għall-irtirar personali skont il-kundizzjoni 1.1.3 tal-*Pension Rules for Personal Retirement Schemes*, tiġi stabbilita bl-għan prinċipali li tipprovdi għal benefiċċji tal-irtirar lill-membri tagħha u/jew il-benefiċċjarji, kif rifless fil-Kap. 450 u anki fil-Kap. 514. Id-dokumentazzjoni relattiva għall-Iskema saħansitra kienet tipprovdi li *'[t]he Plan has been established to provide a life-time income to its members'*.

23. L-Arbitru sewwa kkonsidra li s-soċjetà appellanta ma pprovdiet l-ebda evidenza konvinċenti jew suffiċjenti li l-portafoll kien wieħed bilanċjat u diversifikat, b'riskji moderati kif kellu jkun f'każ ta' skema tal-irtirar. Ċertament tgħid din il-Qorti, li dan il-punt ma jistax jiġi faċilment skartat, għaliex f'dawn il-proċeduri s-soċjetà appellanta tassew ukoll ma kkonvincitx lil din il-Qorti li l-portafoll tal-appellat kien addattat għall-iskop u l-interessi tiegħu, u anki għal dawk tal-Iskema. L-Arbitru kompli billi qal li ma kienx irriżulta li l-portafoll kien jirrifletti l-prudenza li wieħed kien jistenna minn portafoll li kellu l-iskop li jipprovdi *'a life-time income to its members'*, u li kien intiż sabiex jipprovdi għal benefiċċji tal-irtirar skont il-kundizzjoni fuq imsemmija.

24. L-Arbitru kompli billi tajjeb għaraf li s-soċjetà appellanta, li għalkemm hija tassew ma kinitx responsabbli sabiex tipprovdi parir finanzjarju lill-appellat u li tagħzel l-investimenti sottoskritti, hija kellha d-dover li tassigura li l-kompożizzjoni tal-portafoll kif rakkommandat mill-konsulent finanzjarju, kienet fl-aħjar interessi tal-appellat, u li l-kompożizzjoni kienet tippermetti li jitwettaq l-għan tal-pjan tal-irtirar skont il-prudenza neċessarja li wieħed kien jispetta. L-Arbitru ddikjara li l-Amministratur u t-*Trustee* kien tenut li jipromwovi l-iskop li għalih l-Iskema kienet giet stabbilita, fejn l-għażla tal-investimenti kellha

tirrifletti dak l-iskop. L-Arbitru sostna li l-kompożizzjoni tal-portafoll kif rakkommandata kellha tiġi meqjusa b'attenzjoni, u s-soċjetà appellanta kienet tenuta tintervjeni, tistaqsi, tikkonfronta u turi t-tħassib tagħha fir-rigward tal-kompożizzjoni tal-portafoll. Stqarr li minflok is-soċjetà appellanta kienet ippermettiet portafoll li b'mod ġenerali kien wieħed li offra riskju, meta dan kien imur kontra l-oġġettivi tal-Iskema, u lanqas kien jirrifletti l-aħjar interessi tal-appellat, jew jirrifletti prudenza u livell addatat ta' diversifikazzjoni sabiex jintlehaq l-iskop tal-Iskema. Dwar il-kompożizzjoni tal-portafoll, l-Arbitru qal li dan kien espost għal industriji partikolari u speċjalizzati, u kien aktar jixbaħ portafoll aggressiv b'riskju għoli, li l-iskop tiegħu kien ta' qligħ akbar, meta l-appellat ma kienx investitur soffistikat. Għalhekk huwa kkonsidra li s-soċjetà appellata kient uriet nuqqas ta' diliġenza meta ppermettiet fl-Iskema l-kompożizzjoni tal-portafoll kif magħmul, liema portafoll wasal sabiex għamel it-telf.

25. Il-Qorti tikkondividi b'mod sħiħ l-fehma tal-Arbitru. Jirriżulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkonsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-appellat, u għalhekk ukoll lanqas ma jista' jiġi milqugħ l-argument tagħha li jonqos in-ness kawżali bejn it-telf u l-allegat aġir tagħha. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà tan-nuqqasijiet tagħha billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tal-appellat li kien mexxih lejn l-investimenti li eventwalment fallew. 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. Iżda kif ġie kkonsidrat minn din il-Qorti, id-difiża tas-soċjetà appellanta ma tistax tirnexxi

fid-dawl tal-obbligi legali u regulatorji tagħha, u huwa proprju għalhekk li n-nuqqasijiet tagħha għandhom jitqiesu li kkontribwew lejn it-telf soffert mill-appellat mill-investimenti tiegħu.

26. Is-soċjetà appellanta tittenta targumenta wkoll quddiem din il-Qorti li l-*Standard Operational Conditions 2.7.1* u *2.7.2* 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.

27. Dwar *it-tielet aqgravju* tagħha, is-soċjetà appellanta tissottometti li d-deċiżjoni appellata tmur oltre dak mitlub mill-appellat, għaliex huwa kien għadu detentur tal-investment. Barra minn hekk id-deċiżjoni li hija kellha tagħmel tajjeb għal 70% mit-telf allegatament soffert mill-appellat, kienet waħda arbitrarja, għaliex l-Arbitru naqas milli jispjega kif wasal għal dan il-perċentwali. Tikkontendi li anki jekk jirriżulta xi nuqqas min-naħa tagħha, ir-responsabbiltà tagħha kienet ferm inqas minn dik stabbilita mill-Arbitru, u għalhekk qegħda titlob lil din il-Qorti sabiex tnaqqas is-somma tal-kumpens. Is-soċjetà appellanta tirrileva wkoll li meta l-Arbitru ordna sabiex hija tħallas "*compensation equivalent to 70% of the sum of the Net Realised Loss incurred within the whole portfolio of underlying investments*", dan kien qed jirreferi għal dawk id-disa'

investimenti li kienu jikkostitwixxu l-mertu tal-ilment tal-appellat. Tkompli tgħid li hija ma setgħetx tifhem dak li ried ifiehem l-Arbitru dwar kif għandu jiġi kkalkolat in-*'Net Realised Loss'*. Tgħid li fl-ewwel lok kien għad hemm investimenti miżmuma mill-appellat, u għalhekk ma setgħux jitqiesu bħala *"realised losses"* jew wisq inqas *"realised profits"*. Is-soċjetà appellanta tkompli tissottometti li l-Arbitru uża wkoll il-kliem *"realisable values"* sabiex forsi jfisser dak il-valur tal-investment fil-ħin tal-bejgħ tiegħu, u b'hekk hija kienet marbuta għal perijodu mhux definit jew magħruf, iżda sadanittant tgħid li l-imgħaxijiet legali ordnati mill-Arbitru jkunu qegħdin jiddekorru. Is-soċjetà appellanta tinsisti li b'hekk id-deċiżjoni appellata kienet ħalliet lok għall-interpetazzjoni u bl-ebda mod ma kienet waħda ekwa, ġusta jew raġonevoli.

28. L-appellat iwieġeb għal dan l-aggravju billi jissottometti li hawn is-soċjetà appellanta qegħda tiftaħ l-argument dwar ir-responsabbiltà tagħha. Jikkontendi li l-Arbitru kien ċar fil-konklużjoni tiegħu li hija kienet responsabbli għat-telf soffert mill-appellat, u dan kif diġà gie ttrattat fl-ewwel u fit-tieni aggravju. Imbagħad għal dak li jirrigwarda l-likwidazzjoni ta' danni, l-appellat jissottometti li s-soċjetà appellanta fil-verità mhux ma fehmitx dak li qal l-Arbitru, iżda m'għogobiex dak li qal. Jikkontendi li d-deċiżjoni appellata hija waħda ġusta u ekwa fiċ-ċirkostanzi. Dwar l-imgħaxijiet huwa jgħid li dawn dejjem jiddekorru waqt l-istadju tal-appell. Għal dak li jirrigwarda *'net realised losses'* kif ipprovda l-Arbitru, jgħid li din kienet l-aktar waħda idonea sabiex it-telf jiġi kkristalizzat fid-data tad-deċiżjoni finali.

29. Il-Qorti tgħid li hawn ukoll id-deċiżjoni tal-Arbitru hija waħda tajba *ai termini* tal-para. (b) tas-subartikolu 19(3) tal-Kap. 555, li jagħtih is-setgħa li

jiddeċiedi l-każ skont id-diskrezzjoni tiegħu. Tgħid li l-Arbitru kien intitolat *ai termini* tal-liġi li jiddeċiedi li s-soċjetà appellanta għandha għorr 70% tar-responsabbiltà għat-telf li garrab l-appellat, u l-Qorti ma tistax ssib li huwa naqas b'xi mod lis-soċjetà appellanta, aktar u aktar meta l-ebda argument tas-soċjetà appellanta ma rnexxa sabiex jeżoneraha mqarr xi ftit mir-responsabbiltà tagħha. Meta mbagħad l-Arbitru għażel li dan il-perċentwal għandu japplika fir-rigward tal-portafoll sħiħ tal-appellat, huwa kien għust kemm mal-istess appellat u anki mas-soċjetà appellanta, għaliex b'hekk huwa ikkonsidra ukoll dawk l-investimenti li dwarhom ma kien hemm l-ebda lment, u għalhekk l-ebda telf qawwi kif esperjenzat fl-investimenti l-oħra. Finalment il-Qorti tikkonsidra li ma tistax taċċetta wkoll l-argument tas-soċjetà appellanta li l-Arbitru kkonċeda lill-appellat aktar minn dak li talab. Dan għaliex l-Arbitru kkonsidra biss it-telf tal-appellat fid-data tad-deċiżjoni appellata, jgħifieri b'riferiment għal data partikolari, u jekk f'dik id-data ma jirriżultax telf, lanqas tista' is-soċjetà appellanta tiġi mitluba tagħmel tajjeb.

30. Għalhekk, l-Qorti filwaqt li tiddikjara li hija qegħda tagħmel tagħha l-konklużjonijiet kollha tal-Arbitru, tgħid li m'għandhiex aktar x'izzid mad-deċiżjoni appellata tassew mirquma u studjata.

## **Decide**

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



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

Moqrija.

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

**Rosemarie Calleja  
Deputat Registratur**