MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-22 ta' April, 2022

Appell Inferjuri Numru 26/2021 LM

James Raynor (Detentur tal-Passaport nru. 510382289) u
Helen Raynor (Detentriċi tal-Passaport nru. 508926008)
('l-appellati')

vs.

STM Malta Trust and Company Management Limited kif sostitwita minn
STM Malta Pension Services Limited (C 51028)
('l-appellanta')

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **STM Malta Pension Services Limited (C 51028)** [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 fit-22 ta' Frar, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti **James Raynor (Detentur tal-Passaport nru. 510382289)** u **Helen Raynor (Detentriċi tal-Passaport nru. 508926008)** [minn issa 'l quddiem 'l-appellati'] 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-appellati l-kumpens bil-mod kif stabbilit, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-pagament effettiv, filwaqt li kull parti kellha tħallas l-ispejjeż tagħha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament jgħidu li sofrew l-appellati mill-investiment li huma kienu għamlu tramite s-soċjetà appellanta f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema']. Jirriżulta li l-imsemmija appellati kienu avviċinaw lill-konsulent finanzjarju tagħhom Justin Harris ta' *Chase Belgrave* [minn issa 'l quddiem 'CB'] għall-ħabta tas-sena 2014, bil-għan li l-iskemi tal-irtirar miżmuma fir-Renju Unit jiġġeneraw introjtu ulterjuri permezz ta' investiment f'QROPS. Fl-istess sena huma ġew introdotti lis-soċjeta appellanta u skont l-istruzzjonijiet tagħhom, l-investimenti fl-iskemi tal-irtirar fuq imsemmija ġew trasferiti lis-soċjetà appellanta li kienet Amministratriċi u anki *Trustee* tal-Iskema.

Mertu

3. L-appellati ppreżentaw ilment quddiem l-Arbitru fit-18 ta' Frar, 2019 fil-konfront tas-soċjetà STM Malta Trust and Company Management Ltd, li fil-fehma tagħhom kienet uriet inkompetenza assoluta meta ppermettiet lill-konsulent finanzjarju Justin Harris, li ma kienx regolat, sabiex jikkonduċi negozju finanzjarju skont il-profil ta' riskju indikat fl-applikazzjoni għal sħubija tagħhom stess. Huma sostnew li ma kellhomx jitilfu daqstant mill-investiment tagħhom, meħud in konsiderazzjoni l-imsemmi profil ta' riskju tagħhom.

4. L-imsemmija soċjetà kif aktar tard sostitwita mis-soċjetà appellanta, wieġbet fit-12 ta' Marzu, 2019 billi eċċepiet li (a) hija ma kinitx responsabbli għall-għażla tal-konsulent finanzjarju tal-appellati u r-relazzjoni li huma kellhom miegħu kienet regolata mill-ftehim li huma għamlu bejniethom; (b) il-konsulent finanzjarju magħżul ma kellux x'jaqsam magħha u lanqas ma kien jaħdem taħt is-superviżjoni tagħha; (ċ) hija ma kinitx tagħti parir dwar investimenti u kienet tistrieħ fuq il-konsulent finanzjarju magħżul mill-appellati sabiex jirrakkomanda l-investimenti addattati; (d) oġġettivament ma kienx jidher li l-investimenti magħżula mill-konsulent finanzjarju tagħhom dak iż-żmien ma kienux addattati skont il-profil ta' riskju tagħhom; (e) it-telf soffert mill-appellati kien jew seta' kien r-riżultat ta' bidla fil-valur tal-investimenti fis-suq; (f) hija ma setgħetx tinżamm responsabbli għan-nuqqasijiet tal-konsulenti finanzjarji magħżula mill-appellati; u (ġ) fl-applikazzjoni għas-sħubija tal-Iskema kien hemm spjegat sew l-informazzjoni li ngħatat, u l-appellati kienu ffirmaw għal numru ta' dikjarazzjonijiet, garanziji u indennizzi.

Id-deċiżjoni appellata

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

Further Considers:

Preliminary

The Arbiter notes that in their additional submissions the Complainants mentioned money laundering, in addition to compliance and risk management, as one of the key areas of their concerns within STM Malta.

However, apart from the fact that that the Complainants provided no explanations nor basis for their concern on this area, such an aspect was not raised in the original complaint filed with the Office of the Arbiter for Financial Services. (fn. 35 A fol. 112) The Complainants cannot change the basis of their complaint and the Arbiter will only consider the basis of the complaint as originally filed.

Moreover, if the Complainants have proofs that the Service Provider is acting contrary to law, they should report the case to the appropriate authorities; however, no such proofs were provided in this case.

Request for sanctions against Justin Harris and Chase Belgrave

The Arbiter notes that in their covering letter to the Complaint Form dated 15 January 2019, the Complainants requested sanctions to be taken against Justin Harris and Chase Belgrave. (fn. 36 A fol. 6 & 79)

It is noted that Chase Belgrave was indicated, in STM's Malta Application Form for Membership, as being based in Switzerland. It is also further noted that as advised by the Complainants themselves in their additional submissions, Chase Belgrave in Switzerland, (referred to as Chase Belgrave GmbH), was liquidated. (fn. 37 A fol. 120)

The definition of a 'financial services provider', *against whom a complaint can be made and considered by the Arbiter under Cap. 555, Arbiter for Financial Services Act ('the Act'), is stipulated under Article 2 of the Act.*

The said article provides that:

'"financial services provider" means a provider of financial services which is or has been licensed or otherwise authorized by the Malta Financial Services Authority in

terms of the Malta Financial Services Authority Act or any other financial services law, including but not restricted to investment services, banking, financial institutions, credit cards, pensions and insurance, which is or has been resident in Malta or is or has been resident in another EU/EEA Member State and which offers or has offered its financial services in and, or from Malta.

A provider of financial services which has had its licence suspended or withdrawn by the competent authority, but which was licensed during the period in relation to which a complaint by an eligible customer is made to the Arbiter, shall be considered as falling within the definition of a financial services provider ...'

In this respect, the Arbiter considers that neither Justin Harris nor Chase Belgrave (Switzerland) fall under the definition of a 'financial services provider' *under the Act and, accordingly, the Arbiter has no jurisdiction in their regard.*

Joinder request by the Service Provider

The Arbiter notes that in the submissions and response of the 18 July 2019, STM Malta requested the joinder, as party to the complaint, of Justin Harris. The Service Provider made such request on the basis of the definition of 'parties' *in Article 2 of the Arbiter for Financial Services Act, Chapter 555, where it noted that the definition of* 'parties' *in the said Article also makes reference to '*and any other person who in the opinion of the Arbiter should be treated as a party to the complaint'. *(fn. 38 A fol. 170)*

The Service Provider further stated in its submissions that:

'Noting the age-old maxim **fraus omnia corrumpit**, it is submitted that in the interest of justice Mr Harris should answer for himself in these proceedings in respect of the fraud which the Complainants are attributing to him. It would not be fair and equitable on the Respondent to have any responsibility imputable to it if this results from the fraud of a third party'. *(fn. 39 A fol. 170-171)*

It is firstly noted that this issue was raised by the Service Provider in the submissions and response which it sent following the hearing of the 24 June 2019, during which hearing the Arbiter granted the Service Provider a period of time to present its submissions and response to any new submissions and proofs made by the Complainants. (fn. 40 A fol. 111)

The request for a joinder should have accordingly been raised in the Service Provider's original reply and not in the said written submissions. In the same way that the Arbiter did not admit additions to the Complaint, he does not consider it appropriate to admit additions to the reply especially when the Complainants had already closed their proofs.

It is further noted that in Section C of the Complaint Form, the Complainants identified STM Malta as the financial services provider against whom their Complaint is being made in relation to the Scheme. (fn. 41 A fol. 3)

The complaint that is being considered by the Arbiter under the Act is indeed one relating solely to the alleged shortcomings of the Service Provider as Administrator and Trustee of the Retirement Scheme.

In addition, not only are claims relating to fraud outside the jurisdiction of the Arbiter, as any such claims are to be referred to and handled by the police, but also no action can be taken by the Arbiter on Justin Harris under the provisions of the Act for the reasons already outlined above given that the Arbiter has no jurisdiction in his regard. Having considered the particularities of this complaint and the various aspects raised above, it is in the Arbiter's opinion that Justin Harris should not be treated as a party to the Complaint presented before him and the Service Provider's request in this regard is accordingly being rejected.

Request for certain actions to be taken in terms of the Retirement Pensions Act

In their submissions of July 2019, the Complainants requested inter alia certain actions to be taken by the Arbiter in terms of Chapter 514, Retirement Pensions Act ('RPA'). The Complainants inter alia requested the Arbiter to:

(i) *appoint an officer to investigate any business conducted between STM Malta and Chase Belgrave from January 2013 to-date with reference to article 40(1) of the RPA;*

(ii) *contact HMRC in the UK and recommend the removal of STM Malta's ability to conduct QROPS pension transfers as per article 43(1) of the RPA. (fn. 42 A fol. 113)*

The provisions referred to by the Complainants, Articles 40(1) and 43(1) of the RPA, respectively deal with the 'Appointment of Inspectors' *and the* 'Cooperation with overseas regulatory authorities and EIOPA' *by the competent authority under the RPA. (fn. 43 Article 40(1) of the RPA provides that,* 'The competent authority may, whenever it deems it necessary or expedient, appoint an inspector or inspectors to investigate and report on the affairs of any retirement scheme, retirement fund, service provider, overseas retirement scheme or person, referred to in article 39(1)(a) to (c) and to report thereon to it.'

Article 43(1) of the RPA provides that, 'The competent authority may exercise the following powers at the request of or for the purposes of assisting an overseas regulatory authority:

(a) the power to impose, revoke or vary conditions on the license or recognition granted pursuant to the provisions of article 9(3);
(b) the power to cancel or suspend a license or recognition under article 10(1);
(c) the power to require information and documentation under article 39;
(d) the power to appoint inspectors under article 40;
(e) the powers of intervention under article 41;
(f) the powers of entry under article 42;
(g) the power to communicate to the overseas regulatory authority information which is in the possession of the competent authority, whether or not as a result of the exercise of any of the above powers.')

In its submissions, the Service Provider inter alia *noted that:*

'the Complainants cannot seek from the Arbiter any order or remedy which would be ultra vires the powers of the Arbiter as set out in Article 26(3) of the Arbiter for Financial Services Act, Chapter 555 of the Laws of Malta' *and that* 'the Arbiter has no competence to take any action which is reserved to the competent authority under the Retirement Pensions Act, Chapter 514 of the Laws of Malta'.

The Arbiter remarks that, apart that the indicated requests made by the Complainants were not raised in their original complaint, the respective articles of the RPA referred to by the Complainants relate to the powers of the 'competent authority' *designated under the RPA, where such designated authority is actually the Malta Financial Services Authority as stipulated under Article 2 of the RPA.*

The requests made by the Complainants as indicated in this section cannot accordingly be upheld and the Arbiter is accepting the Service Provider's submissions on this matter.

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. 44 Cap. 555, Article 19(3)(b))

The Complainants

The Complainants, born on March 1969 and October 1972 respectively, were indicated as both residing in the USA in the Service Provider's form titled 'Application for Retirement Benefits'. *(fn. 45 A fol. 97 & 102)*

An extract from an Application Form of the Service Provider with respect to the Retirement Scheme, presented by the Complainants during the case, indicates that

the attitude to financial risk of the Complainants was one indicated as 'Cautious' *with such category described as '(*accepting lower growth and income to protect capital)'. (fn. 46 *A fol. 32, 34 & 124). This was the lowest category of risk from the other available options of 'Balanced (*accepting moderate risk within a balanced and diversified portfolio)' and 'Aggressive (aiming to achieve high returns and accepting risk of high losses*)'. (fn. 47 Ibid.)*

The level of understanding of financial risk was indicated, in the same form, as 'Reasonably well. I consider myself well informed' *from the other options* of 'Not well. I have little or no knowledge' *or* 'Very well. I fully understand the pros and cons, risk and rewards'. *(fn. 48 Ibid.)*

The 'Application for Retirement Benefits' *submitted by the Service Provider for each of the Complainants were respectively signed by the Complainants - one dated 25 March 2014 and the other one undated. (fn. 49 A fol. 98 & 103)*

The Service Provider

STM Malta is licensed as a Retirement Scheme Administrator (fn. 50 https://www.mfsa.mt/financial-services-register/result/?id=204) *by the Malta Financial Services Authority and acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 51 A fol. 91). The Service Provider established the trust instrument and rules in respect of the Scheme on 2 December 2011. (fn. 52 A fol. 88).*

Investment Adviser

The extracts from the Application Form for membership into the Scheme and from STM Malta's Investment Advisory Agreement that were presented by the Complainants specify that the Investment Adviser was Chase Belgrave, an entity based in Switzerland with Justin Harris indicated as contact person. (fn. 53 A fol. 34 & 131)

An extract from the application form in respect of the underlying policy held by the respective Scheme, the RL360, indicates Chase Belgrave GmbH ('Chase Belgrave' *or* 'the Investment Adviser'*) as financial adviser. The extract in question, titled* 'Section 9 Adviser's declaration'*, is dated 4 July 2014 and signed by the adviser. In the said section the adviser declares that* 'Polyreg' *is the* 'regulatory or authorising body' *in respect of Chase Belgrave. (fn. 54 A fol. 132)*

Particularities of the Case

The Product in respect of which the Complaint is being made and other background information

The STM Malta (US) Retirement Plan ('the Retirement Scheme' *or* 'Scheme'*) is a trust domiciled in Malta and authorised by the Malta Financial Services Authority ('MFSA') as a Personal Retirement Scheme. (fn. 55* https://www.mfsa.mt/financial-services-register/result/?id=4139) *The Scheme was initially registered with MFSA under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta). (fn. 56 A fol. 182) The scope of the Scheme is to provide for retirement benefits. (fn. 57 A fol. 92)*

The Complainants respectively signed the Scheme's Instrument of Adherence to be admitted as members of the Retirement Scheme on 11 April 2014. (fn. 58 A fol. 88)

The assets held into their individual Retirement Scheme account were used to respectively purchase a contract of insurance ('the RL360') issued by RL360 Insurance Company Limited in the Isle of Man. The policy number of the respective RL360 policies are 'PM10003346' for YM and 'PM10003324' (fn. 59 A fol. 54, 57 & 58) for MM as also confirmed by the Service Provider in its reply. (fn. 60 A fol. 80)

The RL360 Plans in respect of the Complainants commenced on the 22 July 2014 and 23 July 2014 respectively. (fn. 61 A fol. 63 & 67) An amount of GBP206,628 and GBP61,607 was respectively invested in the RL360 Plan. The said amounts reflect the respective premiums paid into each individual plan as emerging from the valuations as at 27 November 2018 and 14 January 2019 presented by the Complainants in respect of their respective RL360 plan. 55, 59, 64 & 68)

The value of each of the Complainants account with the Retirement Scheme is linked to the value of the respective underlying RL360 Plan which is, in turn, linked to the performance of the respective portfolio of underlying investments held within the said policy.

Underlying Investments and Value of Policy - PM10003346

In their Complaint, the Complainants explained that a new financial adviser was appointed in November 2018. (fn. 63 A fol. 8) As part of the attachments to their Complaint, the Complainants presented a valuation statement as at 27 November 2018.

The value of Policy PM10003346 was of GBP122,389.06 as at the date of the said valuation statement with the policy just comprising one investment as at that date - the 'Fundsmith Equity R Acc GBP' for the current value of GBP50,702.73 (the latter comprising an unrealised gain of GBP1,702.73). The remaining value in the policy was made up of cash of GBP71,623.55, and income due (from a previous investment called 'Kempen & Co 6 Year Range Accrual Note on 3 Indices GBP' which was sold on 1 November 2018), of GBP62.78. (fn. 64 A fol. 64 & 65)

The difference in the amount of the premium invested of GBP206,628 in this policy and the policy value of GBP122,389.06 as at 27 November 2018, equates to a loss of GBP77,778.94 (37.64% of the premium paid), after accounting for withdrawals of GBP6,460, as also indicated in the same statement. (fn 65 A fol. 64)

The statement dated 27 November 2018 (which only covered the transaction history that took place between 27 August 2018 and 27 November 2018), (fn 66 A fol. 65) only indicates four investment transactions as follows:

- *a purchase of GBP40,000 undertaken on 7 November 2018 into the 'Fundsmith Equity R Acc GBP' and,*
- *the sale of three investments in early November 2018:- the 'Kempen & Co 6 Year Range Accrual Note on 3 Indices GBP' which was sold on 1 November 2018 for GBP46,328.40; the 'Gemini Principal Asset Allocation Fund C GBP' which was sold on 5 November 2018 for GBP58,356.65; and the 'Rudolf Wolff Systematic Fund Ltd A GBP' which was sold on 8 November 2018 for GBP8,218.38. (fn. 67 Ibid.)*

The above four transactions seem to have been undertaken following the appointment of the new adviser in November 2018.

The other statement provided by the Complainants of 14 January 2019 does not include any additional details as to the underlying investments and transactions that were undertaken at the time of Chase Belgrave in respect of this policy. (fn. 68 A fol. 55-57)

Underlying Investments and Value of Policy - PM10003324

The valuation statement as at 27 November 2018, in respect of Policy PM10003324 indicates that the policy value was of GBP34,240.83, with the policy just comprising one investment as at that date - the 'Fundsmith Equity R Acc GBP' for the current value of GBP31,436.91 (the latter comprising an unrealised gain of GBP436.91).

The remaining value of the policy comprised of cash for the amount of GBP2,786.69, and income due (from a previous investment called 'Kempen & Co 6 Year Range Accrual Note on 3 Indices GBP' which was sold on 1 November 2018), of GBP17.23. (fn. 69 A fol. 68 & 69)

The difference in the amount of the premium invested of GBP61,607 in this policy and the policy value of GBP34,240.83 as at 27 November 2018, equates to a loss of GBP20,906.17 (33.93% of the premium paid), after accounting for withdrawals of GBP6,460, as also indicated in the same statement. (fn. 70 A fol. 68)

The statement dated 27 November 2018 (which only covered the transaction history that took place between 27 August 2018 and 27 November 2018), (fn. 71 A fol. 69) in respect of this policy only indicates four investment transactions as follows:

- *a purchase of GBP30,000 undertaken on 7 November 2018 into the 'Fundsmith Equity R Acc GBP' and,*
- *the sale of three investments in early November 2018:- the 'Kempen & Co 6 Year Range Accrual Note on 3 Indices GBP' which was sold on 1 November 2018 for GBP12,717.60; the 'Gemini Principal Asset Allocation Fund C GBP' which was sold on 5 November 2018 for GBP16,125.45; and the 'Rudolf Wolff Systematic Fund Ltd A GBP' which was sold on 8 November 2018 for GBP2,371.30. (fn. 72 Ibid.)*

The above four transactions seem to have been undertaken following the appointment of the new adviser in November 2018.

The other statement provided by the Complainants of 14 January 2019 does not include any additional details as to the underlying investments and transactions that were undertaken at the time of Chase Belgrave in respect of this policy. (fn. 73 A fol. 58-61)

Investment Report issued by Chase Belgrave

As part of the documents attached to their Complaint, the Complainants presented the investment recommendations report that was issued to them by Chase Belgrave dated 13 March 2014. (fn. 74 A fol. 35)

The said report indicates inter alia that the portfolio recommended by Chase Belgrave had the following allocation:

- *2% in cash,*
- *38% in mutual funds - (28% of the portfolio in the 'Rudolf Wolff Income Fund' and 10% of the portfolio in 'Darwin Leisure Property Fund') and;*
- *60% in structured products, (25% of the portfolio into the 'Global Indices Income Plan', 20% of the portfolio into the 'Technology stocks plan'; and 15% of the portfolio into the 'Gold Miners plan'). (fn. 75 A fol. 37)*

The recommended allocation of 60% of the portfolio into structured products is further confirmed in an email dated 13 March 2014 sent by Justin Harris of Chase Belgrave. (fn. 76 A fol. 12)

The Legal Framework

As part of the consideration of this Complaint, it is pertinent to refer to the legal framework applicable to STM Malta and the Retirement Scheme and the responsibilities, duties and obligations emerging under such 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 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.77 Retirement Pensions Act, Cap 514/Circular letter issued by the MFSA - https://www.mfsa.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 the MFSA under the RPA.

The Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider as per Article 1(2) and Article 43(6)(c) of the TTA, in light of STM Malta's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

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 …'.

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. 78 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 STM Malta 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'.

Duties as a Trustee

As highlighted 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 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, 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. 79 Editor 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. 80 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. 81 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**.*

Observations and Conclusions

Key considerations relating to the principal alleged failures

The Complaint, in essence, revolves around the claim that the Complainants experienced a loss on their Retirement Scheme due to STM Malta not having adequately carried out its duties as administrator and trustee of the Scheme with the Complainants claiming inter alia that STM Malta had 'demonstrated a complete lack of competence' *(fn. 82 A fol. 4) and* 'its conduct constituted negligence'. *(fn. 83 A fol. 112)*

Two principal alleged failures made by the Complainants against STM Malta are that:

(i) *STM Malta allowed the appointment of, and accepted instructions from, an unregulated investment adviser in respect of the underlying investments of the Retirement Schemes, and this when it was wrongly stated to them that the adviser was regulated;*

(ii) *STM Malta allowed the creation of a portfolio of underlying investments within their Schemes which was outside their cautious risk profile, further claiming that the Retirement Schemes should have not been allowed to experience such extent of loss considering their profile.*

General observations

On a general note, it is clear that STM Malta did not provide itself investment advice in relation to the underlying investments of the Retirement Scheme. The role of the investment adviser was the duty of other parties, such as, Chase Belgrave.

This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case as will be later seen in this decision.

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested investment portfolio, ***STM Malta had nevertheless certain obligations to undertake in its role of Trustee and Scheme Administrator.***

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

Consideration thus needs to be made as to whether STM Malta 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 Schemes and the resulting loss for the Complainants.

It is also pertinent to consider any particular arrangements that STM Malta had with the investment adviser as shall be considered in the next section.

Role of STM Malta in relation to the Investment Advice provided by the Adviser

In its reply, the Service Provider argued and emphasised inter alia that the investment adviser was an adviser to the Complainants and that STM Malta:

'cannot be held responsible for the actions of a third-party adviser selected by the Complainants themselves'. *(fn. 84 A fol. 79)*

Even in its submissions, the Service Provider tried to attribute responsibility onto the Complainants, claiming inter alia *that:*

'... it would not be equitable to find the Respondent responsible for losses suffered by the Complainants as a result of underlying investments selected by the Complainants themselves ...'. *(fn. 85 A fol. 170)*

The Arbiter cannot however ignore the role of STM Malta as a Retirement Scheme Administrator and Trustee and even more the particular arrangement that has emerged in this case which, in practice, reflects a higher degree of involvement on the part of STM Malta both in the appointment of the investment adviser and the investment decision process.

It is in this regard noted that in one of the Service Provider's documents in respect of the Scheme, marked as 'Documents to Establish a Plan' (bearing date '10/2013'), there is a particular relevant disclosure under the section titled 'Investment advice' *which explains the particular arrangement that was put in place and existed in relation to the Retirement Scheme in respect of which the Complainants were members of and which targeted US based members.*

The said section provided as follows:

'Please note that US regulatory requirements prevent the Client from being involved in **the choice of investments to be held by the Plan**, which **must be entirely under the control of the pension trustee**. **In the case of the STM Plan, the trustees make investment decisions in accordance with advice given directly to them by qualified independent financial advisers. Such decisions are made with consideration to factors including the risk profile provided by the Client in the Application Form (Section 4)**.

It is possible for the trustees to have the same Adviser as the Client, however there must be a contractually separate relationship and the Adviser's investment recommendations must be made directly to the trustees in writing referring to the client risk profile and an investment profile suited to the assets and the Plan. **Please note that Advisers to STM Malta need to be pre-approved by us and authorised in their jurisdiction to give investment advice**'. *(fn. 86 A fol. 105 – Emphasis added by the Arbiter)*

Indeed, it has transpired that an 'Investment Advisory Agreement' *dated 10 April 2014 was specifically entered into between the Service Provider and the Investment Adviser as confirmed by the Service Provider itself in its submissions. (fn. 87 a* fol. *168)*

The said agreement, extracts of which were both provided by the Complainants and the Service Provider, specifies inter alia that:

'STM wishes to appoint an independent, qualified and suitably regulated investment adviser to advise it on the nature and composition of the underlying assets of one or a number of Member's funds ...'.

The parties to the said agreement, that is, STM Malta and the Investment Adviser further agreed inter alia in terms of the said investment advisory agreement that:

'STM hereby appoints the Investment Adviser to advise it in writing on the initial and on-going nature and composition of the underlying assets of the Advised Fund, including making recommendations to purchase, sell, transfer or otherwise deal with such assets ...'. (fn. *88 A fol. 182)*

It is accordingly clear that in this case, the Service Provider's role and involvement in the appointment of the investment adviser cannot be minimised and downplayed nor can one try to displace responsibility onto the Complainants by arguing that the Complainants had themselves selected the adviser and the underlying investments.

This is particularly so in the context and particular circumstances outlined above where it has actually transpired that STM Malta itself had such an active part in the appointment of the investment adviser and the investment advice was being provided directly to the trustee with the choice of investments being ultimately **'entirely under the control of the trustee'** ***as outlined in STM Malta's own documentation.***

(i) Regulatory status of the investment adviser

The extract of the Application Form in respect of the acquisition of the underlying policies, the RL360 (referred to as the 'PIMS Application'), clearly demonstrates that the investment adviser, Chase Belgrave GmbH, had declared that PolyReg was its regulatory body. (fn. 89 A fol. 132)

Although such declaration dated 4 July 2014 was made by the investment adviser, the declaration formed an integral part of the application form for the acquisition of the underlying policies. The said form has been sighted and processed/consented to by STM Malta, as the Retirement Scheme Administrator and Trustee of the Scheme.

The Complainants demonstrated that further to their enquiry to Polyreg of the 15 August 2018, Polyreg confirmed to them that:

'Chase Belgrave GmbH is not regulated anymore by the SRO PolyReg since January 2013'. *(fn. 90 A fol. 136)*

The Service Provider has ultimately itself acknowledged in its submissions of 18 July 2019, that the declaration that the investment adviser was regulated by PolyReg was false, when it stated inter alia that:

'Mr Justin Harris/the Investment Adviser lied to the Respondent and to the Complainants when Mr Harris claimed that the Investment Adviser was authorised and/or regulated by a competent authority at the time when the Complainants became members of the Plan administered by the Respondent'. (*fn. 91 A fol. 168)*

In its defence, the Service Provider inter alia referred to the warranties and declarations, with respect to the authorisation and the maintenance of such authorisation to provide investment advice, provided by the investment adviser in the Investment Advisory Agreement entered into between the Service Provider and Chase Belgrave.

STM Malta further submitted that:

'Because of these statements, warranties and declaration by Mr Harris, the Respondent had no reason to suspect that the Investment Adviser was no longer regulated by Polyreg at the time'. *(fn. 92 Ibid.)*

The Arbiter considers, however, that in the circumstances of this case, there is no justification whatsoever on the part of the Service Provider for overlooking such a material factor regarding the actual regulatory status of the investment adviser that applied during the time when the Complainants were members of the Scheme and Chase Belgrave was involved in their respective investment portfolio. This is particularly so for various reasons.

Firstly, the Service Provider was duty bound to undertake due diligence on the investment adviser to verify inter alia that the claim made by the adviser, that it was regulated by PolyReg, was indeed truthful. Such due diligence had to be undertaken, not only as it was in the best interests of the Complainants to verify that what was being claimed to them by the investment adviser regarding its regulatory status in the application forms related to the Scheme was indeed correct, but also as a basic due diligence check before the Service Provider itself entered into a contractual agreement with the investment adviser.

Indeed, as indicated above, STM Malta entered into the Investment Advisory Agreement *with Chase Belgrave. It was accordingly not only natural and logical to undertake such basic checks, but also part of its obligations as a regulated entity for STM Malta to undertake relevant due diligence enquiries on the other party with whom it entered into a contractual agreement.*

As considered above, such agreement was ultimately entered into in respect of the appointment by the trustee of the investment adviser and for the provision of such a key service, that of investment advice, which can materially affect the performance of a Retirement Scheme and thus the scope of the Scheme itself.

Part of the basic due diligence requirements reasonably expected from STM Malta would have involved undertaking an enquiry (similar to that done by the Complainants themselves), with PolyReg to confirm inter alia that the investment adviser's claimed status with PolyReg was indeed valid.

No evidence has emerged or been submitted during this case that STM Malta has indeed undertaken such an enquiry with PolyReg, not only at the time of the Complainants application, but neither at any other point in time. It is noted that even in the case where an enquiry was done at a time before the Complainants became members (which has not been mentioned and/or demonstrated by the Service Provider to be the case), it is clear that no regular updates and follow up due diligence enquiries were ever made by the Service Provider on Chase Belgrave.

It is noted in this regard that PolyReg confirmed that Chase Belgrave GmbH had had not been regulated by them since January 2013, this being more than a year prior to the application for membership done by the Complainants in March/April 2014.

Not only has no proof emerged that the Service Provider undertook any recent due diligence checks/updates on the investment adviser at the time of the Complainants membership, as it was duty bound and reasonably expected to do, but even subsequent to the Complainants membership in April 2014, no due diligence checks/updates were it seems ever done by the Service Provider thereafter. Indeed, the process for the replacement of Chase Belgrave as investment adviser was only triggered in 2018 and at the request of the Complainants in February 2018, (fn. 93 A fol. 177-178) this being nearly four years after its appointment in respect of the Complainants Retirement Scheme.

Should there have been regular due diligence updates, as expected from a regulated professional party, such as the scheme administrator and trustee of a Retirement Scheme, the 'false' declarations of the Investment Adviser would have been determined by STM Malta itself, and the Service Provider would have itself intervened into the matter rather than taking action at the prompt of the Complainants in 2018. This after that Chase Belgrave GmbH was already months before in the process of liquidation since August 2017, as demonstrated by the Complainants and also confirmed by the Service Provider. (fn. 94 A fol. 138 & 170)

There is accordingly a clear lack of adequate due diligence undertaken by the Service Provider in respect of the investment adviser, Chase Belgrave GmbH. This clearly impinges on the Service Provider's duties and responsibilities as outlined in the sections titled **'Responsibilities of the Service Provider'** ***and the*** **'Duties as a Trustee'** ***above, particularly the duty*** **to 'act with due skill, care and diligence – in the best interests of the Beneficiaries' and to 'act with the prudence, diligence and attention of a bonus paterfamilias'.**

(ii) The alleged loss and permitted portfolio composition

Alleged Loss

In their Complaint, the Complainants claimed that all the investments, except for one, that were done by Chase Belgrave, were cashed in at a loss. (fn. 95 A fol. 8)

*Whilst this could not be determined in the case in question as no specific and complete details have been presented of the underlying investments undertaken at the time of Chase Belgrave and the respective gains/losses arising from each such investment including any income received therefrom, it is however sufficiently clear that the Complainants realised substantial losses on their respective overall investment portfolio constituted under Chase Belgrave as emerging from the valuation statements as at 27 November 2018 and as considered in detail under the sections titled '*Underlying Investments' *in respect of* 'Policy PM10003346' *and* 'Policy PM10003324' *above.*

The Arbiter would however like to comment on the alleged amount of loss claimed by the Complainants in their Complaint.

It is noted that in their additional submissions, the Complainants claimed that the lost capital amounted to GBP111,605.11. With reference to the valuations of November 2018, the loss in capital is however actually calculated to amount to a total of GBP98,685.11 on both Schemes, that is (GBP77,778.94 on policy PM10003346 and GBP20,906.17 on policy PM10003324), as described in the section titled 'Underlying Investments and Value of Policy' *above given that total withdrawals on both policies of GBP12,920 (GBP6,460 on each of the RL360 policy) are not considered as a capital loss, as also pointed out in the same statements of November 2018.*

Furthermore, the indicated total loss of GBP98,685.11 comprises not just the loss on investments, on which the Complainant is specifically complaining about, but also would include various fees that were incurred and charged to the policies along the years. Hence, if one had to consider the extent of losses actually on the investments selected by the investment adviser, the figure of actual total loss on the underlying

investment portfolio would be lower in practice than that quoted by the Complainants.

The Arbiter is however not in a position to arrive at the specific figure of the realised cumulative loss on the respective investment portfolio for the reasons already indicated and, also, in the absence of figures relating to the fees charged.

It has nevertheless clearly emerged that the Complainants have suffered a substantial loss on their investment portfolio constructed by Chase Belgrave as otherwise, the indicated losses in their valuation statements of November 2018 as further considered in the sections above titled **'Underlying Investments and Value of Policy'** ***would not have emerged.***

The Arbiter will provide for losses later on in this decision.

The Arbiter shall now proceed to consider the other key aspect relating to this case involving the permitted portfolio of underlying investments.

Permitted portfolio composition

The Arbiter notes that other than the information described in the sections titled 'Underlying Investments and Value of Policy ...' *and the section titled* 'Investment Report issued by Chase Belgrave' *above, no other specific details have emerged of the exact investment instruments constituting the investment portfolio at the time of Chase Belgrave acting as investment advisers.*

The Arbiter does not have specific details on the underlying investments and any factsheets on the respective products, however, it has clearly emerged and been demonstrated that there were material realised losses that the Complainants experienced on their respective Retirement Schemes. The extent of losses are in themselves indicative of high risks and lack of adequate diversification within the investment portfolio which does not reflect the cautious attitude to risk clearly selected in the Application Form nor possibly reflective of any prudent investment approach.

It is also noted that the 60% exposure to structured products mentioned in the Investment Report issued by Chase Belgrave to the Complainants, and referred to also in the email dated 13 March 2014 sent by Justin Harris, as outlined in the section titled 'Investment Report issued by Chase Belgrave' *above, exceeds and does not comply with the* 'Diversification Parameters' *in the* 'Investment Principles' *stipulated by the Service Provider in respect of the Retirement Scheme that were provided by the*

Complainants in Appendix 14 of their submissions, (fn. 96 a fol. 128) and which were not contested or alleged not to have been applicable by the Service Provider.

The section marked as 'Diversification Parameter'' *in the document issued by STM Malta titled* 'Investment Principles' *stipulated inter alia that as a general principle, the parameters that STM Malta has developed and expects all IFAs to abide by with respect to structured products, involved a maximum of 50% exposure to such products. (fn. 97 Ibid.) Hence, the 60% recommended exposure to structured notes as emerging from the Investment Report and communication by the investment adviser, is in breach and not reflective of the said parameter. No evidence has emerged, nor has it been contested or intimated by the Service Provider that the allocation of investments was a different one in practice to that recommended by Chase Belgrave.*

Indeed, the Service Provider itself chose not to demonstrate and submit any proof whatsoever that the investments allowed within the Retirement Scheme were done in a prudent manner as was required in terms of the rules to which it was subject as mentioned in the section titled 'Responsibilities of the Service Provider' *above.*

*The Service Provider chose to omit and not delve into, in its reply and any of its submissions, any details and breakdowns of the actual investment portfolio and neither did it submit any justifications and explanations of how the respective investment portfolio of the Complainants was in line with the applicable requirements. This despite the material nature of the claim made by the Complainants that the investments were outside their risk profile and also, notwithstanding, that ultimately the choice of investments was '*entirely under the control of the pension trustee' *and the adviser's investment recommendations being made directly to the trustees as already considered in the section titled 'Role* of STM Malta in relation to the Investment Advice provided by the Adviser' in this decision.

In the circumstances and for the reasons mentioned, the Arbiter is accordingly more amenable to accept the Complainants version of events and the claim that the investments made within the Scheme were outside of their risk profile rather than the version and claim put forward by the Service Provider that the:

'losses suffered by Complainants are or may have been the result of market movements in the value of investments selected by the Complainants' adviser and not as a result of any fraud, wilful default, negligence or unjustifiable failure of and on the part of the Respondent to perform in whole or in part any of its obligations'. *(fn. 98 A fol. 79,80)*

The Service Provider did not prove in any manner that the losses were the result of such market movements.

Other observations

STM Malta did not help its case by not providing information on the underlying investments and not presenting other relevant and complete documentation in relation to the Scheme.

It is also to be noted that despite the fact that one of the Complainants was a former bank manager for Lloyds TSB, this does not in itself automatically make him a competent person with respect to investment portfolios, and neither is it considered, in the particular circumstances of this case, as being a sufficient valid reason to shift the onus of responsibility for the losses on the Complainants as the Service Provider led to in its submissions. (fn. 99 A fol. 169)

Apart that it has not been determined when and the extent of time the Complainant in question acted as a bank manager, no details have either emerged of the nature and particular areas of responsibilities of his prior activities as a bank manager and relevance of such thereto.

Moreover, the Complainant had himself indicated that he 'never dealt with this type of investment' *when referring to his previous experience as bank manager and the nature of his enquiries at the time with the investment adviser mainly related to him understanding the fee structure and implications of such, which fees are being excluded by the Arbiter from the scope of this Complaint. (fn. 100 A fol. 13)*

Causal link

The actual cause of the losses experienced by the Complainants on their Retirement Schemes cannot just be attributed to the alleged 'fraud' by the investment adviser as argued by the Service Provider in its submissions and/or losses of market movements in the value of the investments selected by the adviser.

There is sufficient and convincing evidence of deficiencies on the part of STM Malta in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above. At the very least, such deficiencies impinge on the diligence STM Malta was required and reasonably expected to exercise in such roles.

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

Had STM Malta undertaken its role adequately and as duly expected from it in terms of the obligations resulting from the law, regulations and rules stipulated thereunder, as explained above, such losses would have been avoided or mitigated accordingly.

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with STM Malta being one of such parties.
The losses experienced on the Retirement Scheme is, in the case in question, ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which STM Malta was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainants.

Final remarks

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainants, the Retirement Scheme Administrator had a duty to check and ensure that the portfolio composition recommended by the investment adviser was inter alia in line with the applicable requirements and reflected the profile and objective of the Complainants in order to ensure that the interests of the Complainants were duly safeguarded.

It should have also 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 and, in practice, promote the scope for which the Scheme was established.

The principal purpose of a personal retirement scheme is ultimately that to provide retirement benefits. Such purpose is reflected under the primary legislation, the Special Funds (Regulation) Act ('SFA') *(fn. 101 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 Retirement Pensions Act ('RPA').*** *(fn. 102 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'.*)*

It is considered that, had there been adequate due diligence on the investment adviser, the Service Provider would have intervened and raised concerns and not proceed with the appointment of Chase Belgrave as investment advisers in respect of the Complainants' Scheme and in the process not allow it to undertake any investment decisions and structure the investment portfolio composition which led to the losses experienced by the Complainants. The Service Provider had to act as a **bonus paterfamilias** ***and in the best interests of its clients.***

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

Moreover, with respect to the portfolio composition, the Arbiter considers that whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainants and in carrying out its duties as Trustee.

The Arbiter also considers that the Service Provider did not meet the **'reasonable and legitimate expectations'** *(fn. 103 Cap. 555, Article 19(3)(c))* ***of the Complainants who had placed their trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.***

Conclusion

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

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 members 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 Limited as Trustee and Retirement Scheme Administrator of The STM Malta (US) 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 respective Retirement Scheme, the Arbiter concludes that the Complainants should be compensated by STM Malta for part of the realised losses on their 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 the extent of deficiencies determined, the Arbiter considers it fair, equitable and reasonable for STM Malta to be held responsible for seventy per cent of the realised losses sustained by the Complainants on their overall investment portfolio as calculated below, subject to also deduction of GBP15,000 of the settlement agreement reached with the investment adviser.

Given that the Arbiter has no sufficient detail with respect to the respective underlying investments comprising the portfolios including the respective amount of gains/losses on each investment as well as any income such as dividends, derived therefrom, the Arbiter shall explain how the amount of compensation shall be calculated.

Given that the Complaint made by the Complainants principally relates to the losses suffered on the Scheme at the time of Chase Belgrave acting as adviser, compensation shall be provided solely on the investment portfolio constituted under Chase Belgrave and allowed by the Service Provider.

In this regard, the amount of compensation shall be calculated on the total cumulative realised losses (after deducting any realised gains) arising on the underlying investment portfolio constituted by Chase Belgrave GmbH, taking also into consideration any dividends or other income received from such investments.

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

(i) *For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Complainants investment portfolio (given that such investment has matured, been terminated or*

redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised).

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

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

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

(iii) *In case of any remaining investment which was constituted at the time of Chase Belgrave and is still held within the Schemes' respective portfolio of underlying investments as at, or after, the date of this decision, such investment shall not be subject of the compensation stipulated above.*

Given the settlement agreement that the Complainants themselves reached with the investment adviser, which agreement it is noted, was honoured, in light of the Complainants statement that 'Mr Justin Harris did not honour his agreement until over a month later', *(fn. 104 a fol. 7) the amount of GBP15,000 referred to in the said settlement agreement shall be deducted from the total amount of compensation that the Service Provider is required to calculate as per the above under this decision.*

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the indicated amount of compensation to the Complainants.

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

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

Given that the Arbiter has refuted certain pleas raised by both parties to this Complaint, each party is to bear its own costs of these proceedings."

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fil-15 ta' Marzu, 2021 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-appellati. Tgħid li l-aggravji tagħha huma s-segwenti: (i) l-Arbitru ma setax raġonevolment jiddeċiedi li (a) l-istess soċjetà appellanta kienet responsabbli għal xi nuqqas stante li ħalliet lil CB u/jew Justin Harris taġixxi/jaġixxi bħala konsulent finanzjarja/u tal-appellati, meta hija ma kellha l-ebda obbligu regolatorju dak iż-żmien li ma tagħmilx dan; (b) il-kontenut tal-portafoll tal-appellata ma kienx skont il-liġijiet, ir-regoli u l-linji gwida applikabbli dak iż-żmien; (ċ) CB kienet ġiet magħżula mill-appellati qabel ma s-soċjetà appellata kienet saret tafhom; u (ii) il-kwantum tad-danni kif kwantifikat huwa kkontestat.

Konsiderazzjonijiet ta' din il-Qorti

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

L-ewwel aggravju: [l-Arbitru ma setax b'mod raġonevoli jikkonkludi li:

(a) Is-soċjetà appellanta kienet responsabbli għal xi negliġenza meta ħalliet lil CB u/jew Justin Harris taġixxi/jaġixxi bħala konsulent finanzjarju tal-appellati;

(b) Il-kontenut tal-portafoll tal-appellata ma kienx skont il-liġijiet, regoli u linji gwida applikabbli għal dak iż-żmien;

(c) CB kienet ġiet magħżula mill-appellati]

8. Meta tfisser l-ewwel aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru ma setax b'mod raġonevoli jsib li hija kienet responsabbli minħabba negliġenza meta ħalliet lil CB taġixxi bħala konsulent finanzjarju tal-appellati, jew li l-kompożizzjoni tal-portafoll tal-investimenti tal-appellata ma kienx skont il-liġijiet, ir-regoli u l-linji gwida applikabbli. Issostni li l-Arbitru kien skorrett meta sab li hija kienet naqset fl-obbligi tagħha bħala *trustee* u attribwielha responsabbilità parzjali għat-telf li l-appellati kienu sofrew. Tikkontendi li l-Arbitru ma seta' qatt jasal għal din il-konklużjoni bl-applikazzjoni u bl-interpretazzjoni korretta tal-liġi. Tirrileva li l-Arbitru stess kien osserva li CB ġiet magħżula mill-appellati stess, u li s-soċjetà appellanta ma kellha l-ebda obbligu li tivverifika jekk din kinitx entità regolata jew jekk kinitx awtorizzata taħt sistema regolatorja sabiex tipprovdi pariri dwar investimenti. Tgħid li l-obbligu tagħha sabiex tirċievi struzzjonijiet biss mingħand konsulenti finanzjarji, daħal fis-seħħ fis-sena 2019, u għalhekk dawn l-obbligi mhumiex applikabbli għall-każ odjern. Madankollu l-Arbitru xorta waħda sostna li hija kienet kisret l-imsemmija obbligi. Tinsisti li dawk l-obbligi prinċipali tagħha fil-konfront tal-appellati kienu kif imfissra u kontroffirmati fid-dokument sabiex huma jissieħbu

fl-Iskema, u l-istess soċjetà appellanta ma kellha l-ebda obbligu ulterjuri sabiex tivverifika jekk CB kinitx liċenzjata jew le. Is-soċjetà appellanta tirrileva wkoll li l-oneru tal-prova li hija kienet aġixxiet b'mod illegali, irresponsabbli jew mill-inqas bi ksur tal-obbligi fiduċjarji tagħha, kien jinkombi fuq l-appellati, iżda fil-każ odjern ma tirriżulta l-ebda evidenza. Tkompli tgħid li hija ma kienet bl-ebda mod responsabbli għall-għażla ta' dawk l-investimenti u ma kienx jirriżulta mill-atti li kien hemm xi ksur tal-obbligi kuntrattwali li hija kellha fil-konfront tal-appellati jew tar-regoli applikabbli tal-MFSA, tal-gwidi ta' investiment applikabbli, jew li kien hemm nuqqas ta' prudenza min-naħa tagħha jew li hija ma kinitx ikkonsidrat il-profil ta' riskju tal-appellati. Is-soċjetà appellanta tissottometti li kienet ir-responsabbiltà tal-konsulent finanzjarju tal-appellati li jassigura li l-portafoll sħiħ, u mhux biss dik il-parti li ġiet ittrasferita fl-Iskema, kien adegwatament iddiversifikat. Hija min-naħa tagħha ma kienet qegħda tagħti l-ebda pariri dwar investimenti u kienet taf biss b'dawk l-assi li l-appellati nvestew fl-Iskema. Tikkontendi li l-ebda negliġenza ma tista' tiġi attribwita lilha, ġaladarba hija kienet straħet fuq struzzjonijiet, garanziji u indemnifikazzjonijiet u dikjarazzjonijiet iffirmati. Il-pattijiet kuntrattwali ta' bejn il-partijiet ma setgħux jitwarrbu, kif għamel l-Arbitru, partikolarment dawn l-istess garanziji u indennizzi. Lanqas ma setgħet tinżamm responsabbli s-soċjetà appellanta għan-nuqqas ta' osservazzjoni tal-obbligi fiduċjarji min-naħa tal-imsemmija CB, jew li din naqset milli taġixxi b'mod prudenti. Wara kollox, tkompli tgħid is-soċjetà appellanta, l-appellati ma ressqu l-ebda prova ta' negliġenza min-naħa tagħha, u għalhekk ma kien hemm l-ebda ness kawżali bejn il-konsiderazzjonijiet tal-Arbitru fuq l-aġir jew l-ommissjoni tagħha u t-telf soffert mill-appellati. Għalhekk l-Arbitru ma setax raġonevolment jasal biex jgħid li hija kienet

responsabbli jew negliġenti meta ħalliet lil CB taġixxi bħala konsulent finanzjarju tal-appellati, jew li l-kompożizzjoni tal-portafoll ta' investimenti ma kienx skont il-liġi, regoli jew linji gwida applikabbli.

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

10. Imbagħad l-Arbitru rrileva li l-Iskema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta u kif awtorizzata mill-MFSA bħala *"Personal Retirement Scheme".* Osserva li l-appellati kienet saru membri tal-Iskema fil-11 ta' April, 2014 u li l-fond rispettivi tagħhom fl-ammonti ta' GBP206,628 u GBP61,607 kif depożitati fil-kontijiet separati tagħhom, kienu ġew utilizzati fix-xiri ta' polza ta' assikurazzjoni maħruġa minn RL360 Insurance Company Limited ġewwa l-Isle of Man. Ikkonsidra li kien f'Novembru 2018 skont l-appellati, li kien ġie maħtur konsulent finanzjarju ġdid. F'dik id-data il-valur tal-polza tal-appellat kien ta'

[1] Ara *a fol.* 28 u *fol.* 58.

GBP122,389.06, fejn kien hemm investiment wieħed *Fundsmith Equity R Acc GBP* b'valur ta' GBP50,702.73, u dak tal-polza tal-appellata kien ta' GBP34,240.83, fejn anki kien sar l-istess investiment uniku b'valur ta' GBP31,436.91. Huwa b'hekk li filwaqt li ħa in konsiderazzjoni l-iżbanki li kienu saru mill-investimenti rispettivi, ikkonstata telf fil-valur tal-investimenti magħmula mill-appellati fl-ammonti rispettivi ta' GBP77,778.94 u ta' GBP20,906.17. Fl-aħħarnett l-Arbitru kkonstata dak li ġie suġġerit minn CB fir-rapport tagħha dwar il-kompożizzjoni tal-portafoll rispettiv tal-appellati. Il-Qorti hawn tosserva li ma jidhirx li hemm kontestazzjoni bejn il-partijiet dwar dan kollu.

11. 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 taħthom, u anki għall-Att dwar *Trusts* u *Trustees* (Kap. 331 tal-Liġijiet ta' Malta) partikolarment applikabbli għas-soċjetà appellanta, fejn għamel riferiment għal dak li jipprovdu s-subartikoli 21(1) u 21(2) tiegħu fir-rigward tar-responsabbiltà li timxi bil-prudenza, diliġenza u attenzjoni ta' *bonus paterfamilias* bl-akbar *bona fide,* u billi tevita kull kunflitt ta' interess u bl-akbar diliġenza u responsabbiltà. Dawn ir-referenzi l-Qorti tgħid li huma mhux biss utli, iżda wkoll rilevanti ħafna stante l-applikabbiltà tagħhom għall-każ odjern.

12. 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 ġie 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 fuq l-obbligu tal-Amministratur tal-Iskema tal-Irtirar sabiex din taġixxi 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). Il-Qorti hawn iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta hawn kellha obbligi daqstant ċari li timxi fl-aħjar interess tal-Iskema, kemm fiż-żmien li sar l-investiment fis-sena 2012 meta kienu applikabbli d-disposizzjonijiet tal-Kap. 450, u anki sussegwentement meta ġie fis-seħħ l-Att dwar Pensjonijiet għall-Irtirar fis-sena 2015, u l-appellati kienu għadhom membri tal-Iskema u ġarrbu t-telf allegat.

13. 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 dovuta, kura u diliġenza fl-aħjar interessi tal-benefiċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti

tirrileva li diġà minn dan li ngħad, jirriżulta li d-difiża tagħha li hija qatt ma setgħet tinżamm responsabbli stante li ma kellha l-ebda obbligu fil-konfront tal-appellati, ma tistax tirnexxi.

14. Iżda l-Arbitru ma waqafx hawn għaliex ikkonsidra wkoll il-kariga tas-soċjetà appellanta bħala *Trustee,* u rrileva li hawn kienu applikabbli l-provvedimenti tal-Att dwar *Trusts* and *Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-30 ta' Ġunju, 1989 kif sussegwentement emendat, u jagħmel riferiment partikolari għas-subartikolu 21(1), il-para. (a) tas-subartikolu 21(2). Hawn il-Qorti tgħid li għal darb'oħra d-difiża tas-soċjetà appellanta ma ssib l-ebda sostenn. L-Arbitru rrileva li fil-kariga tagħha ta' *Trustee,* is-soċjetà appellanta kienet tenuta tamministra l-Iskema u l-assi tagħha skont diliġenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa jiċċita mill-pubblikazzjoni bl-isem An Introduction to Maltese Financial Services Law[2] u 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* (Kap. 331) u anki permezz tal-Kodiċi Ċivili.

15. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju ż-żewġ punti li fuqhom huwa msejjes dan l-aggravju tas-soċjetà appellanta. Huwa jaċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi bħal CB. 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,* kellha ċerti obbligi importanti

[2] Ed. Max Ganado.

li setgħu jkollhom rilevanza sostanzjali fuq l-operat u l-attivitajiet tal-Iskema, u li jaffettwaw direttament jew indirettament l-andament tagħha. Kien għalhekk li kellu jiġi nvestigat jekk is-soċjetà appellanta naqsitx mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura safejn dan kellu effett fuq l-andament tal-Iskema u r-riżultanti telf tal-appellati.

16. L-Arbitru osserva li kien hemm arranġament partikolari fil-każ odjern bejn is-soċjetà appellanta u l-konsulent finanzjarju, u dan kien jindika inolvimenti aktar qawwi min-naħa tagħha fil-ħatra ta' dan tal-aħħar u fid-deċiżjonijiet dwar l-investiment li kellu jsir. Dan l-Arbitru rrileva li sar permezz ta' ftehim iffirmat fl-10 ta' April, 2014, filwaqt li osserva wkoll li f'wieħed mid-dokumenti tas-soċjetà appellanta ntestat 'Documents to Establish a Plan' u li kellu d-data ta' 10/2013, kien hemm dikjarazzjoni partikolarment rilevanti fis-sezzjoni '*Investment Advice',* li kienet tispjega r-raġuni għaliex sar dan il-ftehim.

17. L-Arbitru irrileva wkoll li mill-applikazzjoni ntiża għax-xiri tal-poloz sottoskritti rispettivi tal-appellati, kien hemm indikat b'mod ċar li l-konsulent finanzjarju CB kienet iddikjarat li hija kienet regolata permezz tal-korp regolatorju *PolyReg*. Qal li din l-istess applikazzjoni kienet taf biha s-soċjetà appellanta bħala l-Amministratriċi u t-*Trustee* tal-Iskema, u saħansitra kienet taf ukoll kif irriżulta mis-sottomissjonijiet tagħha stess tat-18 ta' Lulju, 2019 li tali dikjarazzjoni kienet falza. Filwaqt li spjega r-raġunijiet tiegħu, iddikjara li ma kien hemm l-ebda ġustifikazzjoni għaliex is-soċjetà appellanta ma kinitx tat każ l-istat regolatorju proprju tal-konsulent finanzjarju. Fost dawn ir-raġunijiet li huwa pprovda, l-Arbitru elenka n-neċessità ta' *due diligence,* anki jekk waħda

bażika, qabel ma hija daħlet f'arranġament kuntrattwali ma' konsulent finanzjarju, iżda anki billi din kellha ssir b'mod regolari.

18. Dwar it-tieni punt sollevat mis-soċjetà appellanta fit-tieni aggravju tagħha, l-Arbitru ddikjara li huwa ma kellux quddiemu dettalji dwar l-investimenti sottoskritti u l-*factsheets* dwarhom, iżda xorta waħda kien irriżulta li l-appellati kienu sofrew telf mill-Iskema. L-Arbitru qal li t-telf stess kien jindika riskju għoli u nuqqas ta' diversifikazzjoni adegwata tal-investimenti miżmuma fil-portafoll. Qal li dawn ma jirriflettux l-attitudini kawta tal-appellati ndikata fl-applikazzjoni u saħansitra wkoll dan lanqas m'huwa indikattiv ta' prudenza. Osserva li l-espożizzjoni fil-perċentwali ta' 60% għal prodotti strutturati kif indikat fir-rapport maħruġ minn CB lill-appellati, kienet teċċedi u ma kinitx tirrispetta d-*'Diversification Parameters'* fl-*'Investment Principles'* stabbiliti mis-soċjetà appellanta fir-rigward tal-Iskema. Min-naħa tagħha s-soċjetà appellanta għażlet li ma tagħti l-ebda dettal jew *breakdown* tal-portafoll, u naqset milli tiġġustifika u tispjega kif l-imsemmi portafoll kien magħmul skont ir-rekwiżiti applikabbli. Għalhekk l-Arbitru ddikjara li huwa kien aktar propens li jilqa' l-ilment tal-appellati li l-investimenti in kwistjoni ma sarux skont il-profil ta' riskju tagħhom, milli dak li kienet qegħda tisħaq fuqu s-soċjetà appellanta li *'losses suffered by Complainants are or may have been the result of market movements in the value of investments selected by the Complainants' adviser and not as a result of any fraud, wilful default, negligence or unjustifiable failure of and on the part of the Respondent to perform in whole or in part any of its obligations',* fejn wara kollox hija naqset milli turi li t-telf kien riżultat ta' ċaqliq fis-suq.

19. L-Arbitru stqarr li min-naħa tagħha s-soċjetà appellanta ma kinitx għenet il-każ tagħha meta ma ppreżentatx l-informazzjoni dwar l-investimenti sottoskritti u d-dokumentazzjoni sħiħa dwar l-Iskema. Il-Qorti hawn diġà osservat in-nuqqas ta' prova suffiċjenti u adegwata min-naħa tas-soċjetà appellanta dwar dak kollu li hija qegħda tallega, u saħansitra wkoll is-sottomissjonijiet magħmula fir-rikors tal-appell tagħha ma jistgħux għalhekk jiġu milqugħa.

20. L-Arbitru osserva li l-appellat kien fil-passat impjegat bħala *manager* ta' Lloyds TSB, iżda dan fil-fehma tiegħu ma setax jikkwalifikah bħala persuna kompetenti fir-rigward ta' portafolli ta' investimenti, u b'hekk lanqas ma setgħu l-appellati jiġu mgħobbija bir-responsabbiltà għat-telf soffert minnhom, kif kienet issottomettiet is-soċjetà appellanta. Wara kollox, kompla jgħid l-Arbitru, l-ebda dettalji ma ngħataw dwar l-impjieg imsemmi tal-appellat, u kif dak kien rilevanti għall-każ odjern. L-Arbitru irrileva għall-kuntrarju, li l-appellat kien indika lill-konsulent finanzjarju li huwa qatt ma kellu x'jaqsam ma' dan it-tip ta' investiment.

21. L-Arbitru mbagħad għadda sabiex jittratta l-kwistjoni tan-ness kawżali tad-danni sofferti mill-appellati. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ b'konsegwenza tal-andament negattiv tal-investimenti fis-suq u tar-riskji inerenti u/jew tal-allegat frodi tal-konsulent finanzjarju, kif allegat mis-soċjetà appellanta. Qal li kien hemm evidenza biżżejjed u konvinċenti ta' nuqqasijiet da parti tas-soċjetà appellanta fit-twettiq tal-obbligazzjonijiet u d-doveri tagħha kemm bħala *Trustee* u wkoll bħala Amministratur tal-Iskema tal-Irtirar, li kienu juru nuqqas ta' diliġenza. Qal li l-istess nuqqasijiet saħansitra ma

ħallew l-ebda mod li bih seta' jiġi minimizzat it-telf, u fil-fatt ikkontribwew għall-istess telf, u b'hekk l-Iskema ma kinitx laħqet l-għan prinċipali tagħha. Fil-fehma tiegħu, it-telf kien ġie kkawżat mill-azzjonijiet u min-nuqqas ta' azzjonijiet tal-partijiet prinċipali nvoluti fl-Iskema, fosthom is-soċjetà appellanta. Qal li seħħew diversi avvenimenti li din tal-aħħar kienet obbligata u saħansitra setgħet twaqqaf u tinforma lill-appellata dwarhom. Il-Qorti tikkondividi din il-fehma tal-Arbitru b'mod sħiħ. Jirriżulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkonsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-appellati. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà tan-nuqqasijiet tagħha, billi tirrileva li ma kinitx hi imma l-konsulent finanzjarju tal-appellati li kien mexxihom lejn l-investimenti li eventwalment fallew, mhux biss b'mod reali iżda anki fallew l-aspettattivi tagħhom. Dan filwaqt li tgħid ukoll li huma bl-ebda mod ma kienu tenuta jaċċertaw l-identità tal-imsemmi konsulent finanzjarju u fl-istess ħin iħarsu dak kollu li kien qed isir, inkluż il-kompattibilità tal-istruzzjonijiet mal-profil tal-appellati u anki l-andament tal-investimenti. Iżda kif ġie kkonsidrat minn din il-Qorti, id-difiża tas-soċjetà appellanta ma tistax tirnexxi fid-dawl tal-obbligi legali u regolatorji tagħha, u huwa proprju għalhekk li n-nuqqasijiet tagħha għandhom jitqiesu li kkontribwew lejn it-telf soffert mill-appellati mill-investimenti tagħhom.

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

(i) kienet tenuta tfittex u tassigura li l-mod kif kien magħmul il-portafoll, kif rakkommandat mill-konsulent tal-investiment, kien fost affarijiet oħra jirrifletti kemm r-rekwiżiti relattivi u l-profil u l-oġġettiv tal-appellati għall-aħjar protezzjoni tal-interessi tagħhom;

(ii) kienet ukoll tenuta tassigura li l-kompożizzjoni msemmija tal-portafoll kienet tagħti lok għall-għan tal-Pjan ta' Irtirar, filwaqt li tassigura wkoll il-prudenza kif mistenni b'mod raġonevoli minn pjan ta' irtirar intiż li jipprovdi għal benefiċċji ta' irtirar, kif jipprovdu għalih l-Att li Jirregola Fondi Speċjali u l-Att għall-Pensjonijiet tal-Irtirar;

(iii) kienet tenuta li żżomm diliġenza dovuta adegwata fir-rigward tal-konsulent finanzjarju, u mill-ewwel tintervjeni u turi t-tħassib tagħha, minflok ma tħalli fil-kariga lil CB bħala l-konsulent finanzjarju fir-rigward tal-investiment tal-appellati, u saħansitra ma kellhiex tħalli li jsiru deċiżjonijiet dwar l-investiment u l-istruttura tal-portafoll li wasslu għat-telf soffert mill-appellati, u li timxi bħala *bonus paterfamilias* fl-aħjar interessi tal-klijenti tagħha; u

(iv) kienu straħu fuqha l-appellati, u anki terzi nvoluti fl-istruttura tal-Iskema, sabiex jintlaħaq l-għan tagħhom li jirċievu benefiċċji tal-irtirar, filwaqt li tiġi assigurata l-pensjoni.

23. Għalhekk l-Arbitru esprima l-fehma, li din il-Qorti tikkondividi pjenament, li filwaqt li kien magħruf li dejjem jista' jsir t-telf fuq investimenti f'portafoll, dawn jistgħu jitnaqqsu, u saħansitra jinżamm il-kapital oriġinali kif investit, permezz ta' diversifikazzjoni tajba, bilanċjata u prudenti tal-investimenti. Iżda

fil-każ odjern kien jirriżulta pjenament li seta' jingħad li mill-inqas kien hemm nuqqas ċar ta' diliġenza min-naħa tas-soċjetà appellanta fl-amministrazzjoni ġenerali tal-Iskema u anki fl-esekuzzjoni tal-obbligi tagħha bħala *Trustee*. Qal li fil-fatt is-soċjetà appellanta ma kinitx laħqet ir-*'reasonable and legitimate expectations'* tal-appellati. Il-Qorti filwaqt li tiddikjara li hija qegħda tagħmel tagħha l-ħsibijiet kollha tal-Arbitru, tgħid li m'għandhiex aktar x'iżżid mad-deċiżjoni appellata tassew mirquma u studjata.

24. Għaldaqstant dan l-ewwel aggravju mhux ġustifikat, u l-Qorti qegħda tiċħdu.

It-tieni aggravju: [il-kwantum tad-danni kkwantifikat huwa kkontestat]

25. Is-soċjetà appellanta tikkontendi li l-Arbitru naqas milli jindika għaliex hija għandha tinżamm responsabbli għad-danni sofferti mill-appellata mit-telf tagħha, fil-perċentwali ta' 70%, aktar u aktar meta huwa kien irrikonoxxa li hija ma kinitx konsulent tal-investiment u ma tat l-ebda parir ta' investiment. Tinsisti li jekk jirriżulta xi nuqqas min-naħa tagħha, ċertament hija ma setgħetx tinżamm responsabbli għat-telf soffert, meta kien ċar li kienu terzi l-kawża tiegħu.

26. Il-Qorti tgħid li fit-tieni aggravju tagħha, is-soċjetà appellanta qegħda ttenni l-istess argumenti miġjuba minnha fl-aggravju ta' qablu. Għalhekk filwaqt li tagħmel riferiment għal dak kollu li ġie kkonsidrat minnha fl-eżami tal-imsemmi l-ewwel aggravju, il-Qorti tgħid li anki dan l-aggravju tas-soċjetà appellanta mhux ġustifikat, u tiċħdu.

Decide

Għar-raġunijiet premessi l-Qorti tiddeċiedi dwar l-appell tas-soċjetà appellanta billi tiċħdu, filwaqt li tikkonferma d-deċiżjoni appellata fl-intier tagħha, salv għal dak li ġie deċiż illum stess minn din il-Qorti fl-appell fl-ismijiet fuq premessi, rikors numru 25/2021.

L-ispejjeż marbuta mad-deċiżjoni appellata għandhom jibqgħu kif deċiżi, filwaqt li l-ispejjeż ta' dan l-appell għandhom ikunu a karigu tas-soċjetà appellanta.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur