



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-15 ta' Ġunju, 2022

Appell Inferjuri Numru: 76/2021LM

L-Avv Damien Degiorgio (K.I. nru. 103075(M))
fil-kapaċità tiegħu ta' mandatarju speċjali ta'

- 1. Alexander William Carmichael (ID/Passport No. 532610443)**
- 2. Alison Jane Proctor (ID/Passport No. 509409974)**
- 3. Carl Denham (ID/Passport No. DENHA607132C99AJ 80)**
- 4. Caroline Ranger (ID/Passport No. 514696546)**
- 5. Craig Murdoch (ID/Passport No. 652262619)**
- 6. Darren Michael Catherall (ID/Passport No. CATHE711110DM9DJ 07)**
- 7. Darrin Paul Mewis (ID/Passport No. 537281448)**
- 8. David Alan Lockwood (ID/Passport No. 524449401)**
- 9. David Michael Anthony Waite (ID/Passport No. 504848176)**
- 10. David Robert Cowley (ID/Passport No. COWLE604165DR9KH 78)**
- 11. David Thomas Bennett (ID/Passport No. 522868523)**
- 12. Dawn Patricia Thomas (ID/Passport No. 507763611)**
- 13. Deborah Taylor (ID/Passport No. 533609554)**
- 14. Debra Jean Wells (ID/Passport No. 11143228)**
- 15. Del Cockerill (ID/Passport No. 530524241)**
- 16. Derek John Blythe (ID/Passport No. 505833989)**

17. Garry Neil Veevers (ID/Passport No. VEEVE604175GN9PE)
18. Gillian Elizabeth Tootill (ID/Passport No. 532845306)
19. Glenis June Jones (ID/Passport No. JONES556246GJ9JZ 97)
20. Graham Robert Figg (ID/Passport No. 553416745)
21. Graham Thomas Sanderson (ID/Passport No. 466403739)
22. Jane Elizabeth Ward (ID/Passport No. 505836983)
23. Jeanette Yeomans (ID/Passport No. 42182)
24. John Charles Barlow (ID/Passport No. BARLO511157JC9PY92)
25. John Stephen Czolacz (ID/Passport No. CZOLA511248JS9AE)
26. Julie Anne Cunliffe (ID/Passport No. 509562395)
27. Karl Hiroz (ID/Passport No. HIR0Z608151K99MT58)
28. Keith Alder (ID/Passport No. 553757516)
29. Lorraine Stephanie Stevenage (ID/Passport No. 543212495)
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32. Marian Ann Wilde (ID/Passport No. 534044799)
33. Mark Boone (ID/Passport No. 515333748)
34. Mark Wakefield (ID/Passport No. 533173918)
35. Matthew Jon Annett (ID/Passport No. 538448057)
36. Melvyn Miles (ID/Passport No. MILES502248M98FC 83)
37. Merrick Jones (ID/Passport No. 557946706)
38. Michael Bodinnar (ID/Passport No. CJ 236874)
39. Michael Roffe (ID/Passport No. 536087527)
40. Nigel John Fairbairn (ID/Passport No. 508196132)
41. Nigel Roberts (ID/Passport No. 466499282)
42. Norman Andrew King (ID Passport No. 532436749)
43. Paul Anthony Beisty (ID/Passport No. BEISTY702150PA9BR25)
44. Paul Jonathan Hunt (ID/Passport No. 517038045)
45. Peter Nigel Lambert (ID/Passport no. 539460137)
46. Richard Paul Messenger (ID/Passport No. MESSE511058RP9LY 16)
47. Robert Hector Edwards (ID/Passport No. 110613844)
48. Robert John Etheridge (ID/Passport No. 538844000)
49. Robin Kenneth Crosby (ID/Passport No. 55240334)
50. Roslyn Frances Anne Mair (ID/Passport No. 652366483)
51. Seamus Monahan (ID/Passport No. MONAH312303S99EG 54)
52. Stephen Andrew Smith (ID/Passport No. 514236000)
53. Stewart Alan Newton (ID/Passport No. 523939611)

- 54. Tracy Miranda Beisty (ID/Passport No. 531391493)**
55. Hughette Lorraine Shillingford (ID/Passport No. SHILL654075HL9PD42)
56. Andrew Robb Harding (ID/Passport No. 504592178)
57. Stuart Anthony Barr (ID/Passport No. 538467598)
58. Toni Margaret Woolridge (ID/Passport No. 547259918)
59. Andrew Pavier (ID/Passport No. 509504742)
60. David Michael Blackburn (ID/Passport No. 519766708)
(‘ir-rikorrenti’)

vs.

Integrated-Capabilities (Malta) Ltd (C 50348) hekk kif sostitwiti minn
Optimus Fiduciaries (Malta) Ltd (C 90147)
(‘l-intimata’)

Il-Qorti,

Preliminari

1. Dawn huma żewġ appelli, wieħed prinċipali magħmul mir-rikorrent **Avv Damien Degiorgio (K.I. nru. 103075(M))** fil-kapaċità tiegħu ta’ mandatarju speċjali ta’ **Alexander William Carmichael (ID/Passport No. 532610443)**, **Alison Jane Proctor (ID/Passport No. 509409974)**, **Carl Denham (ID/Passport No. DENHA607132C99AJ 80)**, **Caroline Ranger (ID/Passport No. 514696546)**, **Craig Murdoch (ID/Passport No. 652262619)**, **Darren Michael Catherall (ID/Passport No. CATHE711110DM9DJ 07)**, **Darrin Paul Mewis (ID/Passport No. 537281448)**, **David Alan Lockwood (ID/Passport No. 524449401)**, **David Michael Anthony Waite (ID/Passport No. 504848176)**, **David Robert Cowley (ID/Passport No. COWLE604165DR9KH 78)**, **David Thomas Bennett (ID/Passport No. 522868523)**, **Dawn Patricia Thomas (ID/Passport No. 507763611)**, **Deborah Taylor (ID/Passport No. 533609554)**, **Debra Jean Wells**

(ID/Passport No. 11143228), Del Cockerill (ID/Passport No. 530524241), Derek John Blythe (ID/Passport No. 505833989), Garry Neil Veevers (ID/Passport No. VEEVE604175GN9PE), Gillian Elizabeth Tootill (ID/Passport No. 532845306), Glenis June Jones (ID/Passport No. JONES556246GJ9JZ 97), Graham Robert Figg (ID/Passport No. 553416745), Graham Thomas Sanderson (ID/Passport No. 466403739), Jane Elizabeth Ward (ID/Passport No. 505836983), Jeanette Yeomans (ID/Passport No. 42182), John Charles Barlow (ID/Passport No. BARLO511157JC9PY92), John Stephen Czolacz (ID/Passport No. CZOLA511248JS9AE), Julie Anne Cunliffe (ID/Passport No. 509562395), Karl Hiroz (ID/Passport No. HIR0Z608151K99MT58), Keith Alder (ID/Passport No. 553757516), Lorraine Stephanie Stevenage (ID/Passport No. 543212495), Louise Knight (ID/Passport No. 500619816), Lynn Susan Bell (ID/Passport No. BELL9651281LS9JZ), Marian Ann Wilde (ID/Passport No. 534044799), Mark Boone (ID/Passport No. 515333748), Mark Wakefield (ID/Passport No. 533173918), Matthew Jon Annett (ID/Passport No. 538448057), Melvyn Miles (ID/Passport No. MILES502248M98FC 83), Merrick Jones (ID/Passport No. 557946706), Michael Bodinnar (ID/Passport No. CJ 236874), Michael Roffe (ID/Passport No. 536087527), Nigel John Fairbairn (ID/Passport No. 508196132), Nigel Roberts (ID/Passport No. 466499282), Norman Andrew King (ID Passport No. 532436749), Paul Anthony Beisty (ID/Passport No. BEISTY702150PA9BR25), Paul Jonathan Hunt (ID/Passport No. 517038045), Peter Nigel Lambert (ID/Passport no. 539460137), Richard Paul Messenger (ID/Passport No. MESSE511058RP9LY 16), Robert Hector Edwards (ID/Passport No. 110613844), Robert John Etheridge (ID/Passport No. 538844000), Robin Kenneth Crosby (ID/Passport No. 55240334), Roslyn

Frances Anne Mair (ID/Passport No. 652366483), Seamus Monahan (ID/Passport No. MONAH312303S99EG 54), Stephen Andrew Smith (ID/Passport No. 514236000), Stewart Alan Newton (ID/Passport No. 523939611), Tracy Miranda Beisty (ID/Passport No. 531391493), Hughette Lorraine Shillingford (ID/Passport No. SHILL654075HL9PD42), Andrew Robb Harding (ID/Passport No. 504592178), Stuart Anthony Barr (ID/Passport No. 538467598), Toni Margaret Woolridge (ID/Passport No. 547259918), Andrew Pavier (ID/Passport No. 509504742) u David Michael Blackburn (ID/Passport No. 519766708) [minn issa 'l quddiem 'ir-rikorrenti'] u l-ieħor incidentalment mis-soċjetà intimata **Integrated-Capabilities (Malta) Ltd (C 50348)** [minn issa 'il quddiem 'ICML'] hekk kif sostitwiti minn **Optimus Fiduciaries (Malta) Ltd (C90147)** [minn issa 'l quddiem 'is-soċjetà intimata'], mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fis-6 ta' Lulju, 2021, dwar il-każ 107/2019 li jinkludi wkoll il-każijiet 009/2020, 022/2020, 041/2020 u 042/2020 [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddecieda li jiċċad l-ilment tar-rikorrenti filwaqt li kull parti giet ordnata tħallas l-ispejjeż tagħha ta' dawk il-proċeduri.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw l-investment tar-rikorrenti fi skema tal-irtirar magħrufa bl-isem '*The Optimus Retirement Benefit Scheme No. 1*' [minn issa 'l quddiem 'l-Iskema'] stabbilita bħala *trust* u amministrata minn ICML, u aktar tard mis-soċjetà intimata fil-kariga ta' *Trustee* u anki ta' Amministratrici, kif liċenzjata mill-MFSA.

Mertu

3. Ir-rikorreni pprezentaw id-diversi lmenti tagħhom quddiem l-Arbitru, li fis-suċċint jgħid li huma s-segwent:

“Where, in summary and in essence, the Complainants claimed inter alia that the Service Provider: allowed, and failed to disclose, conflicts of interests involving the investments into The Resort Group (‘TRG’); had a conflict of interest throughout the TRG investment process; failed to ensure consideration of the Complainant's circumstances, aims and investment objectives/strategy; and failed to ensure the appointment of adequately qualified financial advisors in relation to the transfer of their UK pension and the investments into TRG.

Various Complainants also highlighted another additional aspect in their Complaint Form to the Arbiter, namely, that the Service Provider was refusing to transfer their pension back into the UK, to a UK company of their choice, despite their repeated requests to the Trustee to undertake such transfer”,

u fisser it-talbiet tagħhom fil-qasir kif ġej:

“Request made by the Complainants

All of the Complainants requested the trustee of the Scheme to purchase any illiquid assets from their Scheme and place the money into their pension fund.

Some of the Complainants also requested the entire sum of money received from the Service Provider, together with interest, to be placed into a UK pension provider of their choice.

One of the Complainant’s worded his request slightly different where, in his Complaint Form, he requested the purchase by the Service Provider of ‘any illiquid assets at full market value’, the placement of the proceeds into his pension fund as well as to ‘encash my pension and transfer it to the company of my choice.’”

4. Is-soċjetà intimata wiegħbet billi sottomettiet li t-talbiet tar-rikorreni huma nfondati fil-fatt u fid-dritt, u dan għar-raġunijiet li hija spjegat fir-risposta tagħha.

Id-deċiżjoni appellata

5. It-Tribunal ikkonsidra dan li ġej bħala rilevanti għall-appell odjern:

“Further Considers:

Delay by the Service Provider in replying to the formal complaint

Firstly, the Arbiter notes that the formal complaint dated 17 July 2019 sent by the Representative was only replied to by ICML, nearly 6 months thereafter, through its letter of 9 January 2020.

The Arbiter deems it highly inappropriate for ICML to have taken so long to issue its formal reply to the formal complaint sent to it by the Complainants through their Representative. It is indeed considered that there is no reasonable excuse for such excessive and unnecessary lengthy delay and procrastination in replying to the formal complaint.

The Arbiter would like to highlight the importance that a financial services provider is duty bound to reply promptly and expeditiously to complaints filed by consumers of financial services, besides ensuring that complainants are provided with a reply which is comprehensive, clear and easy to understand.

Preliminary Plea - Request made by the Complainants for the Trustee to purchase illiquid assets

Since the Service Provider raised the plea that the remedy requested by the Complainants, that is, for the Trustee to purchase any illiquid assets held within their Retirement Scheme, went contrary to the Pensions Rules applicable in Malta, the Arbiter will deal with this plea first.

The consideration of such aspect first and foremost is also in view that the Arbiter may not grant a remedy which goes beyond that being requested by the Complainants and, also, given that the Arbiter's adjudication is limited to that permitted within the provisions of the Arbiter for Financial Services Act, Chapter 555 of the Laws of Malta ('the Act'), Article 26(3) of the said Act.

The Arbiter further notes that during the hearing of 1 December 2020, during which an official from the Insurance and Pensions Supervision Unit of MFSA testified, the said official made reference to Standard Licence Condition B.3.2.1, condition 4 of the Pension Rules for Personal Retirement Schemes. (fn. 31 A fol. 899)

The MFSA's official testified that the said condition states that a retirement scheme shall not engage directly or indirectly in transactions with any of its members and added that,

'The purchase of any illiquid assets would be tantamount to a transaction and as such it would run counter to the rules' (fn. 32 A fol. 900)

During the said sitting it was also inter alia noted that:

'The rules say that the Scheme which is administered by the RSA cannot engage directly with the Members, and so, the RSA cannot purchase from the Members'. (fn. 33 Ibid.)

The Arbiter notes that Standard Licence Condition 3.2.1 of Part B.3.2 titled 'Investment Restrictions of a Personal Retirement Scheme ("the Scheme")', of the Pension Rules for Personal Retirement Schemes states the following:

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

...

- iv. subject to paragraph (vi), a Scheme shall not engage, directly or indirectly, (fn. 34 Emphasis added by the Arbiter) in transactions with, or grant loans to, any of its Members or connected persons thereto.*

Considering the facts and particular circumstances of this case, the Arbiter agrees with the testimony of the MFSA's official quoted above that the RSA cannot purchase from the Members any assets or engage with them directly or indirectly as the above-mentioned Rules provide.

Moreover, the Arbiter considers that he does not have the powers, in terms of the Act, to order the Trustee to purchase any illiquid assets from the members as the requested remedy does not fall within any such powers available to the Arbiter under the Act, particularly, Article 26(3)(c).

Hence, the Arbiter considers that those Complainants (fn. 35 XX (A fol. 47); XX (A fol. 53); XX (A fol. 59); XX (A fol. 65); XX (A fol. 77); XX (A fol. 89); XX (A fol. 95); XX (A fol. 101); XX (A fol. 107); XX (A fol. 113); XX (A fol. 131); XX (A fol. 143); XX (A fol. 155); XX (A fol. 167); XX (A fol. 173); XX (A fol. 254); XX (A fol. 260); XX (A fol. 272); XX (A fol. 278); XX (A fol. 284); XX (A fol. 296); XX (A fol. 302); XX (A fol. 314); XX (A fol. 363); XX (A fol. 375); XX (A fol. 387); XX (A fol. 393); XX (A fol. 399); XX (A fol. 405); XX (A fol. 423); XX (A fol. 429); XX (A fol. 435); XX (A fol. 4 of Case 009/2020); XX (A fol. 16 of Case 009/2020); XX (A fol. 4 of Case 022/2020); XX (A fol. 4 of Case 041/2020), whose

request for remedy in the Complaint Form was only limited to a request for the Trustee to 'Purchase any illiquid assets from me and put the money into my pension fund', (fn. 36 Section D of the Complaint Form, section titled 'Describe clearly the remedy you are seeking') cannot be considered further by the Arbiter.

Furthermore, for the avoidance of doubt, had the Complainants' request involved a request for payment of 'an amount of compensation for any loss of capital or income or damages suffered by the complainant as a result of the conduct complained of ...', as permitted in terms of Article 26(3)(c)(iv) of the Act, the Arbiter still considers that no loss of capital or income or claim of damages has been clearly, adequately and sufficiently substantiated by the Complainants in this case.

It is further considered that:

- *no valuations were provided in respect of the contested assets which, is noted, are still held within the portfolio as confirmed by the Service Provider; (fn. 37 A fol. 461)*
- *apart from the aspects already raised, not even the price (such as whether at cost, market price or other lower or higher benchmark) at which the illiquid asset was requested to be bought was specified by the Complainants (with the exception of one) (fn. 33 XX who requested the purchase of illiquid assets at full market value (A fol. 10 of Case 009/2020), in their Complaint. The extent of any requested monetary compensation is accordingly unclear.*

Specific requests by certain Complainants requesting the transfer out of the Retirement Scheme

The Arbiter shall proceed next to consider the other specific request made by those Complainants who requested a transfer out of the Retirement Scheme to their identified UK scheme.

Request to Transfer Out

A number of Complainants (fn. 34 XX (A fol. 71); XX (A fol. 83); XX (A fol. 119); XX (A fol. 125); XX (A fol. 137); XX (A fol. 149); XX (A fol. 161); XX (A fol. 179); XX (A fol. 185); XX (A fol. 191); XX (A fol. 197); XX (A fol. 203); XX (A fol. 209); Lynn XX (A fol. 266); XX (A fol. 290); XX (A fol. 308); XX (A fol. 369); XX (A fol. 381); XX (A fol. 411); XX (A fol. 417); XX (A fol. 441); XX (A fol. 447); XX (A fol. 4 of Case 42/2020)) requested, in their Complaint Form for the Trustee to transfer out their Retirement Scheme to a UK pension provider of their choice.

The said transfer out was requested to be made into the Bushido Capital Pensions Community Interest Company ('the Bushido Scheme'). (fn. 35 According to the records of the UK's Companies House this changed its name to Bushido Support Services Community Interest Company in May 2020: <https://find-and-update.company-information.service.gov.uk/company/08891797>)

The Arbiter notes that the Trustee of the Scheme is required to inter alia adhere to condition 4.1.16 of 'Part B.4.1 Conduct of Business Rules' of the Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011 by the MFSA.

The said condition stipulates the following:

*'4.1.16 The Service Provider shall co-operate fully with any duly appointed replacement Service Provider to ensure a proper, orderly and complete transfer of duties, **and to take all reasonable and practical measures to preserve and safeguard the interests of the Scheme and its Members and Beneficiaries and/or the Retirement Fund and its unitholders/ Investors as applicable.**' (fn. 36 Emphasis added by the Arbiter)*

The Arbiter further notes that the Service Provider had certain concerns, following its due diligence exercise in relation to the Bushido Scheme.

Having considered the submissions made by the Service Provider on this specific matter, the Arbiter considers that there is validity to certain issues identified as stalling the satisfactory conclusion of the Service Provider's due diligence process. This is also when taking into consideration recent information publicly available with respect to the financial standing, common links, regulatory status and track record of parties mentioned in this case relevant to the Bushido Scheme as follows:

(i) Financial status & common links - Details of the common links and financial status of the respective entities mentioned in this case, namely of:

- Tynebank Claims Ltd (Co. no. SC574884);*
- Assured Trustees Limited (Co. no. 08987364).*
- Bushido Support Services Community Interest Company (Co. no. 08891797) previously known as Bushido Capital Pensions Community Interest Company; (fn. 37 <https://find-and-update.company-information.service.gov.uk/company/08891797>)*
- Premier Mortgage Club Ltd (Co. no. SC325607);*
- Financial Claims Support Services Ltd (Co. no. SC572219)*

are publicly available from the UK's Companies House.

It is noted that Premier Mortgage Club Ltd and Financial Claims Support Services Ltd were dissolved via voluntary strike-off on 22 September 2020 and 17 September 2019 respectively. Prior to them being dissolved, Premier Mortgage Club Ltd had a deficit 'Capital and reserves' of (£9,562) for the year 2019 according to its latest available Micro-entity Balance Sheet as at 30 June 2019, (fn. 38 <https://find-and-update.company-information.service.gov.uk/company/SC325607/filing-history>) whilst Financial Claims Support Services Ltd had 'Total Shareholders funds' of £1 according to its latest Balance Sheet as at 31 July 2018 as detailed in its 'Dormant Accounts' as at that date. (fn. 39 <https://find-and-update.company-information.service.gov.uk/company/SC572219/filing-history>)

The latest 'Micro-entity Accounts' of Tynebank Claims Ltd as at 28 February 2021, available from the UK's Companies House, indicated inter alia that the said entity had Total net (liabilities) or negative Capital & Reserves of (£116,106) as at 31/08/2019 and of (£2,912) as at 28/02/2021. (fn. 40 <https://find-and-update.company-information.service.gov.uk/company/SC574884/filing-history>)

The latest 'Micro-entity Accounts' of Assured Trustees Ltd as at 5 April 2020, available from the UK's Companies House, indicated inter alia that the said entity had Total net (liabilities) or negative Capital & Reserves of (£3,837) as at 2019 and of (£4,451) as at 2020. (fn. 41 <https://find-and-update.company-information.service.gov.uk/company/08987364/filing-history>)

The latest 'Financial Statements And Accounts For The Year Ended 5 April 2020', of Bushido Support Services Community Interest Company, available from the UK's Companies House, indicated inter alia net liabilities of (£22,465) represented by a negative Profit & Loss Account of (£22,465) as at the date of the said statement. (fn. 47 <https://find-and-update.company-information.service.gov.uk/company/08987364/filing-history>)

Hence, all of the indicated existing companies had a net deficit position according to the indicated statements.

The Complainants' Representative featured in all of the said companies as evidenced from the information available from the UK's Companies House, hence, confirming the common links highlighted by the Service Provider and potential conflict of interest arising from having a common party involved in the claims management company, the pension scheme into which the transfer is being requested and the trustee of such scheme. (fn. 43 <https://find-and-update.company->)

(ii) Regulatory Status - The letterhead of Tynebank Claims Ltd, which was described as a claims management company incorporated in UK, stated that:

'Tynebank Claims Limited has permissions to carry out Claims Management Activities under the Financial Conduct Authority Reference Number: FRN829745'. (fn. 44 A fol. 3)

In answering to the question posed by the Service Provider as to what qualifications and licences the Representative had to act in the capacity of Professional Advisor for the Complainants, the Representative itself placed emphasis on the regulatory status held with the FCA, just stating in its reply that 'Tynebank Claims Ltd is regulated by the FCA for claims management activities'. (fn. 45 A fol. 815)

It is noted that, as at end May 2021, The Financial Services Register of the Financial Conduct Authority ('FCA') in UK, however, indicated the status of Tynebank Claims Ltd as 'Lapsed Since 18/05/2021'. (fn. 46 <https://register.fca.org.uk/s/firm?id=0010X00004KSqDkQAL>)

The term 'Lapsed' was explained as follows in the FCA's website:

'This firm no longer has temporary permission to undertake claims management business'. (fn. 47 <https://register.fca.org.uk/s/search?q=829745&type=Companies>)

The Arbiter further notes that the Representative had advised the OAFS, through a letter dated 17 March 2021, that Bushido Support Services CIC, (that is, the Bushido Scheme) had purchased Tynebank Claims Ltd and that as of 1 February 2021, Bushido Support Services CIC will represent all Tynebank Claims Ltd's clients. (fn. 53 A fol. 936)

The letterhead of Bushido Support Services CIC (fn. 48 Bushido Support Services Community Interest Company is a UK registered company (with Company Registration No. 08891797) and whose previous name up till 19 May 2020 was 'Bushido Capital Pensions Community Interest Company' <https://find-and-update.company-information.service.gov.uk/company/08891797>) states inter alia that:

'Bushido Support Services 100% not-for-profit CIC is exempt from regulation by the Financial Conduct Authority but adheres to its principles'.

Hence, it appears that, as at end of May 2021, no comfort can be derived that there are regulated companies involved with the claims/transfer, as none of the entities featuring in the claims/transfer seem to be regulated as at that date.

It is further noted that, in replying to the questions posed by the Service Provider to the Representative about the experience and qualifications of Assured Trustees Ltd, the Representative just noted that The Pensions Regulator in the UK ('TPR'), 'considers Assured Trustees to be a professional organisation ...'. (fn. 49 A fol. 815)

No further basis and/or supporting evidence was however provided.

It is also noted that in a letter dated 26 March 2020, issued by the lawyers of Tynebank Claims Ltd, Assured Trustees Ltd and Bushido Capital Pensions Community Interest Company, it was inter alia noted that 'Bushido's scheme is an Occupational Pension Scheme' and that 'Bushido's scheme is regulated by the Pension Regulator, not the FCA ...'. (fn. 50 A fol. 824)

During the proceedings of this case no supporting evidence of the regulatory status with the Pension Regulator (TPR) and type of permission or authorisation held with the Pensions Regulator (TPR) has however been produced despite the extensive documentation presented by the Representative.

The Arbiter accepts the arguments made by the Service Provider that it needs to be adequately satisfied of its due diligence exercise prior to proceeding with the transfer in order 'to preserve and safeguard the interests of the Scheme' and act in the best interests of its members.

Taking into consideration the submissions made and other information as described above, the Arbiter furthermore considers that there is validity to the probing and additional comfort required by the Service Provider in relation to the pension scheme identified by the Complainants prior to it being in a position to proceed with the requested transfer.

The Arbiter also notes that in its submissions, the Service Provider confirmed that members were informed that it 'would consider transferring to an alternative pension provider if they still wished to proceed with a transfer out of the Scheme. To date, none of the Members provided us with an alternative'. (fn. 51 A fol. 461)

Such a statement, which was not contested by the Complainants, indicates that the Complainants are not being precluded by the Service Provider to transfer out to a Scheme of their choice as long as adequate due diligence is carried out to the reasonable satisfaction of the Service Provider which is inter alia bound 'to preserve and safeguard the interests of the Scheme,' and, thus, of its individual members and act in their best interests.

In the particular circumstances of this case, and for the reasons amply explained, the Arbiter considers that the actions taken by the trustee to require further comfort and request its due diligence exercise to be satisfactorily satisfied prior to transferring to the Bushido Scheme, do not appear frivolous, unjustified or unreasonable in the circumstances.

Whilst the Complainants can request a transfer out in terms of the applicable rules and requirements, the Trustee and Retirement Scheme Administrator is also duty

bound to act within, and adhere to, the provisions of the laws, rules and requirements applicable in respect of his roles. The Trustee and Retirement Scheme Administrator is ultimately required to act in the best interests of the Complainants in relation to a request to transfer out and fully co-operate in the context of a favourable outcome of a reasonable due diligence exercise. (fn. 52 Such as in line with Condition 4.1.16 of 'Part B.4.1 Conduct of Business Rules' of the Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011 and the provisions outlined in the section titled 'B.5.3 Transfer out of the Retirement Scheme' of section B.5 'Conditions relating to information for Scheme Members and Beneficiaries' of Part B of the Pension Rules for Personal Retirement Schemes issued by MFSA.) It has not been adequately and sufficiently proven that this was not the case".

L-Appell Principali u l-Appell Incidentali

6. Ir-rikorrenti ħassew ruħhom aggravati bid-deċiżjoni appellata tal-Arbitru, u fis-26 ta' Lulju, 2021 intavolaw appell fejn qegħdin jitolbu lil din il-Qorti sabiex:

"...jogħgobha tilqa' dan l-Appell u tħassar u tirrevoka d-deċiżjoni tal-Arbitru datata 6 ta' Lulju 2021 fl-interità tagħha u tilqa' u tikkonferma t-talbiet tal-appellanti billi

1. Fil-każ tal-appellanti kollha tordna lit-Trustees tal-Iskema jixtru l-assi kollha mhux likwidi mill-Iskema u jiddepożitaw il-fondi fil-Pension Fund tal-appellanti;

2. Fil-każ tal-appellanti Craig Murodch (A fol. 71); Darrin Paul Mewis (A fol. 83); Deborah Taylor (A fol. 119); Debra Jean Wells (A fol. 125); Derek John Blythe (A fol. 137); Gillian Elizabeth Tootill (A fol. 149); Graham Robert Figg (A fol. 161); Jeanette Yeomans (A fol. 179); John Charles Barlow (A fol. 185); John Stephen Czolacz (A fol. 191); Julie Anne Cunliffe (A fol. 197); Karl Hiroz (A fol. 203); Keith Alder (A fol. 209); Lynn Susan Bell (A fol. 266); Matthew Jon Annett (A fol. 290); Michael Bodinnar (A fol. 308); Nigel Roberts (A fol. 369); Paul Anthony Beisty (A fol. 381); Robert John Etheridge (A fol. 411); Robin Kenneth Crosby (A fol. 417); Stewart Alan Newton (A fol. 441); Tracy Miranda Beisty (A fol. 447); David Michael Blackburn (A fol. 4 tal-kaz 42/2020), minbarra dak mitlub fl-ewwel talba, li tordna li s-somma kollha riċevuta mis-Service Provider, u l-imgħax relattiv, jiġi depożitat f'Pension Fund stabbilita fir-Renju Unit magħzula mill-appellanti riferiti.

3. Fil-kaz tal-appellant Andrew Robb Harding (A fol. 10 tal-kaz 009/2020) tordna l-iService Provider jixtri l-assi mhux likwidi kollha skont il-valur fuq is-suq, jiddepożita l-flus fil-pension fund tiegħu u tordna li hu jingħata l-fond dovuti lilu bħala pensjoni u li dawn jiġu trasferiti f'kumpanija indikata mill-istess appellant;

Bl-ispejjeż kollha taż-żewġ istanzi kontra l-appellata;"

Jgħidu li l-aggravji tagħhom huma dawn: (i) l-Arbitru żbalja meta ddecieda li 'jilqa' l-parir' ta' xhud mill-MFSA, u jgħid li mhuwiex kompetenti biex jilqa' t-talba tar-rikorrenti sabiex jixtri l-assi mhux likwidi mingħandhom; (ii) l-Arbitru naqas milli jikkonsidra jew jittratta u jiddeciedi dwar l-obbligu fiduċjarju tas-soċjetà intimata lejn ir-rikorrenti *ai termini* tal-artikolu 1124A tal-Kap. 16 u tas-subartikolu 21(1) tal-Kap. 331; (iii) l-artikolu 1124A tal-Kap. 16 jipprovdi li l-fiduċjarji għandhom jevitaw kull kunflitt ta' interess jew ta' fiduċja jew obligazzjonijiet fiduċjarji; (iv) is-soċjetà intimata mhijiex ikkwalfikata; (v) l-Arbitru injora l-argument li s-soċjetà intimata ma ressqet l-ebda prova jew argument dwar it-titolu li TRG setgħet kellha fil-proprjetà li kienet tipprovdi qua investment; u (vi) l-Arbitru ċaħad ukoll it-talba ta' uħud mir-rikorrenti sabiex l-investment tagħhom jiġi trasferit lil entità oħra tal-għażla tagħhom.

7. Is-soċjetà intimata wiegħbet fis-16 ta' Awwissu, 2021 fejn issottomettiet li s-sitt aggravji pprezentati mill-appellanti huma frivoli u vessatorji, stante li digà ġew ittrattati sew fl-ewwel istanza, u ma joffru l-ebda bażi legali soda sabiex titħassar is-sentenza appellata. Dan filwaqt li pprevaliet ruħha mill-appell principali sabiex intavolat appell incidental għat-tħassir tad-digriet interlokutorju tal-Arbitru tal-4 ta' Jannar, 2021, fejn ċaħad it-talba tagħha kif magħmula permezz tar-rikors tagħha tat-23 ta' Dicembru, 2020. Tgħid li l-aggravji tagħha huma: (i) l-Arbitru naqas milli jsegwi l-proċedura legali għall-

ammissjoni ta' terza persuna fil-proċeduri; u (ii) l-Arbitru żbalja meta ddecieda li s-soċjetà intimata kellha tissostitwixxi lil ICML.

Konsiderazzjonijiet ta' din il-Qorti

8. Din il-Qorti ser tgħaddi sabiex tikkunsidra l-aggravji rispettivi tal-partijiet, u dan fid-dawl tal-konsiderazzjonijiet magħmula mill-Arbitru fid-deċiżjoni appellata, u meqjusin ukoll is-sottomissjonijiet u l-provi ulterjuri tagħhom.

9. Permezz tal-ewwel aggravju tagħhom, ir-rikorrenti qegħdin jilmentaw mid-deċiżjoni allegatament żbaljata tal-Arbitru fejn dan iddikjara li kien qed jilqa' il-parir ta' xhud mill-MFSA, u b'hekk iddecieda li m'għandux kompetenza biex jilqa' t-talba tagħhom sabiex is-soċjetà intimata tixtri l-assi illikwidi tagħhom. Huma jiċċitaw id-disposizzjonijiet tas-subinciz (i) tal-para (ċ) tas-subartikolu 26(3) tal-Kap. 555 in sostenn tal-argument tagħhom, fejn l-Arbitru għandu s-setgħa li "*jirrevedi, jirrettifika, jimmitiga jew ibiddel l-imġiba li fuqha jkun sar l-ilment jew il-konsegwenzi tagħha*". It-tieni aggravju tar-rikorrenti jirrigwarda l-allegat nuqqas tal-Arbitru li jikkonsidra jew jittratta u jiddeciedi dwar l-obbligu fiduċjarju tas-soċjetà intimata lejhom *ai termini* tal-artikolu 1124A tal-Kap. 16 u tas-subartikolu 21(1) tal-Kap. 331. Jikkontendu li fil-każ odjern kien hemm nuqqas f'diversi ċirkostanzi min-naħa tas-soċjetà intimata li taġixxi fl-aħjar interess tagħhom u anki bħala *bonus paterfamilias*, billi naqset milli tinkariga esperti finanzjarji kompetenti għall-fini li jagħtuha parir dwar l-investment f'*The Resort Group*. Jikkontendu li s-soċjetà intimata naqset ukoll meta rrifjutat li tittrasferixxi l-pensjoni tagħhom lura fir-Renju Unit lill-

kumpannija tal-għażla tagħhom. Jgħidu li din naqset ukoll li twieġeb lir-rappreżentant tagħhom billi tagħti informazzjoni dwar “*Data Subject Access Requests*”, billi tagħti dettalji dwar il-proċeduri addotati minnha fil-kuntest ta’ diliġenza dovuta jew kontrolli ta’ adegwatezza dwar l-investimenti fejn qalet li dawn ma kienux jeżistu, billi tgħaddi l-informazzjoni dwar dak li kien jagħmel parti mill-*investment bonds*, billi tagħti rendikont annwali u li tindaga dwar kunflitti ta’ interess ċari. It-tielet aggravju tagħhom jirrigwarda għal darb’oħra d-disposizzjonijiet tal-imsemmi artikolu 1124A tal-Kap. 16, li jipprovdi li l-fiduċjari għandhom jevitaw kull kunflitt ta’ interess jew ta’ fiduċja jew obligazzjonijiet fiduċjarji. Jissottomettu li l-istess obbligu joħroġ ukoll mis-subartikolu 21(1) tal-Kap. 331. Jgħidu li mill-provi għandu jirrizulta li s-soċjetà intimata ma osservatx b’mod inekwivoku l-obbligi tagħha, meta naqset li tikkonsidra bis-serjetà dovuta l-kunflitt ta’ interess ċar meta l-entità mhux regolata *First Review Pension Services* introduċiet lilhom il-kumpannija proprjetarja tagħha *The Resort Group*, u dan mingħajr m’għarfithom bl-imsemmi kunflitt. Kien ċar li l-investimenti tagħhom kollha f’din l-entità tal-aħħar kienu nfluwenzati mill-introdottriċi *First Review Pension Services*. Ir-raba’ aggravju tar-rikorrenti huwa li s-soċjetà intimata appuntat lil *Strategic Wealth Ltd* li ma kinitx kwalifikata sabiex tagħtihom parir, u kienet awtorizzata biss li tagħti pariri dwar prodotti ta’ *life assurance* f’Malta u fir-Renju Unit. Jikkontendu li mill-provi prodotti, l-Arbitru kellu jasal għall-konklużjoni li din l-entità ma kinitx kompetenti jew saħansitra awtorizzata għall-għan li għalih giet appuntata. Jgħidu li dan kellu jiġi meqjus mill-Arbitru bħala nuqqas serju ferm tas-soċjetà intimata. Il-ħames aggravju tar-rikorrenti jirrigwarda l-fatt li l-Arbitru injora kull argument li s-soċjetà intimata ma ressqet l-ebda prova jew argument

dwar it-titolu li *The Resort Group* setgħet kellha fil-proprjetà li hija kienet tipprovdi bħala investment. Jikkontendu li kien hemm biss prova ta' wegħda ta' bejgħ ta' din il-proprjetà, u l-kumpanniji mixtrija huma kollha *non-trading* mingħajr l-ebda assi. B'hekk ma kienet teżisti l-ebda prova li s-soċjetà intimata kienet sid ta' proprjetà għewwa Cape Verde. Is-sitt aggravju huwa li l-Arbitru fost affarijiet oħra ċaħad it-talba ta' uħud mir-rikorrenti sabiex l-investment tagħhom jiġi trasferit lil entità oħra tal-għażla tagħhom, u dan għaliex is-soċjetà intimata kienet għamlet ricerka superficjali u waslet għall-konklużjoni li kien hemm kunflitt ta' interess fl-għażla tagħhom. Jgħidu li kieku d-diliġenza dovuta kienet saret sew, kien jiġi faċilment stabbilit li l-*Bushido Pension Scheme* kienet entità idoneja għall-iskop tar-rikorrenti, u għalhekk it-trasferiment kien jiġi faċilment awtorizzat.

10. Is-soċjetà intimata wiegħbet li l-aggravji tar-rikorrenti huma frivoli u vessatorji. Għal dak li jirrigwarda l-ewwel aggravju, hija tagħmel riferiment għas-subinċiż (iv) tas-sezzjoni 3.2.1 tal-*Part B.3.2* tal-*Standard Licence Conditions of the Pension Rules for Personal Retirement Schemes* tal-MFSA, u tissottometti mingħajr preġudizzju għall-appell incidental tagħha, li huwa sew stabbilit fil-ġurisprudenza li deċiżjoni ta' qorti jew ta' kwalunkwe foro ieħor rikonoxxut mil-liġi, inkluż l-Uffiċċju tal-Arbitru tas-Servizzi Finanzjarji, għandha tingħata skont il-liġi vigenti. Tgħid li jekk il-legislatur kellu l-intenzjoni li jħalli diskrezzjoni lill-ġudikant jew jissugġetta l-liġi għas-supremazija ta' xi artikolu ieħor tal-liġi, dan kien isir b'mod esplicitu. Għalhekk tikkontendi li l-interpretazzjoni wiesgħa li qegħda tingħata mir-rikorrenti lis-subinċiż imsemmi hija waħda skorretta. Is-soċjetà intimata tkompli ssostni li m'hemm l-ebda

disposizzjoni fil-liġi jew fir-regoli tal-MFSA li jitolbuha tixtri lura l-assi mingħand ir-rikorrenti. Barra minn hekk, l-imsemmi subinċiż jagħti diskrezzjoni lill-Arbitru biss fejn “...l-ilment jinstab totalment jew parzjalment sostanzjat”, u fil-każ odjern l-Arbitru fl-ebda punt ma sab li l-ilment kien wieħed totalment jew parzjalment sostanzjat. Dwar it-tieni aggravju, is-soċjetà intimata tirrileva li l-maġġoranza tan-nuqqasijiet allegati mir-rikorrenti fil-konfront tagħha jirrigwardaw perijodu meta hija ma kinitx *trustee*, u saħansitra lanqas kienet teżisti bħala entità. B’hekk hija ma kinitx il-legittimu kontradittur. Barra minn hekk, skont ix-xhieda tat-*trustee* preċedenti li kienet ġiet inkarigata twettaq l-investimenti għan-nom tar-rikorrenti, l-Iskema hija regolata bħala “*Member Directed Scheme*”, fejn fost affarijiet oħra r-rikorrenti jkunu jistgħu skont il-parir tal-konsulent finanzjarju tagħhom, jagħtu struzzjonijiet lit-*trustee*, kif huma fil-fatt għamli lil ICML, sabiex din teżegwixxi l-investimenti tal-għażla tagħhom u liema nvestimenti illum huma qed jikkontestaw. Tispjega li meta r-rikorrenti għaddew l-istruzzjonijiet lil ICML, huma kienu esebew parir ta’ investiment bil-miktub li rċevew mingħand il-konsulent finanzjarju appuntat minnhom, u li dak iż-żmien kienet *Strategic Wealth Ltd* liċenzjata sabiex tagħti parir ta’ investiment minn *Gibraltar Financial Services Commission*, liema parir kien iffirmit minn SW Gibraltar u anki mir-rikorrenti. Imbagħad kif spjegat ICML, l-investimenti li l-Iskema kienet tippermetti skont ir-regoli tagħha, kienu jippermettu wkoll l-investimenti ordnati mir-rikorrenti skont il-pariri li huma kienu rċevew mingħand SW Gibraltar. Għal dak li jirrigwarda r-rifjut tat-talba tar-rikorrenti sabiex hija tittrasferixxi l-pensjoni tagħhom lura fir-Renju Unit lill-kumpanija tal-għażla tagħhom, tinsisti li din kienet deċiżjoni għaqlija li ttieħdet meta ICML kienet *trustee* li ġiet ikkonfermata minnha meta ġiet appuntata hi bħala *trustee*

tal-Iskema. Dwar it-tielet aggravju, is-soċjetà intimata tišhaq li hija ma kinitx it-*trustee* fiż-żmien li ġew eżegwiti l-investimenti f'*The Resort Group* u lanqas biss kienet teżisti bħala entità dak iż-żmien. Mingħajr preġudizzju għall-appell incidentali tagħha, kif diġà spjegat, is-soċjetà intimata tgħid li r-rikorrenti hawn qegħdin jinjoraw il-fatt li l-Iskema hija '*Member Directed Scheme*', u l-fatt li l-parir tal-investment ingħata bil-miktub minn *SW Gibraltar* u mhux minn *First Review Pension Services* jew TRG, u dan meta huma kienu membri u r-regoli kienu jippermettu li dawn l-investimenti jsiru. Tirrileva li fix-xhieda tagħha ICML stqarret li bħala *trustee* hija qatt ma kellha rabta ma' *First Review Pension Services*, *The Resort Group* jew *SW Gibraltar*, u sallum l-ebda evidenza ma kienet ġiet ipprezentata sabiex turi li kien hemm kunflitt ta' interess min-naħa ta' ICML jew tas-soċjetà intimata. Hawn is-soċjetà intimata żżid tgħid li huwa tassew stramb kif ir-rikorrenti qatt ma vwantaw id-drittijiet tagħhom ma' *SW Gibraltar* jew ma' *The Resort Group* jew *First Review Pension Services*, u tissuggerixxi li b'hekk hemm element ta' opportuniżmu, stante li huwa aktar faċli li wieħed jagħmel tilwima fil-konfront tagħha. Dwar ir-raba' aggravju, tibda sabiex għal darb'oħra tišhaq li fiż-żmien li *SW Gibraltar* tat il-parir dwar l-investment, hija saħansitra ma kinitx teżisti bħala entità, u ma kienx minnu li hija kienet appuntat lil *SW Gibraltar*. Saħansitra ma kienx hemm prova li ICML kienet inkarigat lil *SW Gibraltar*, li fil-fatt kienet ġiet inkarigata mir-rikorrenti qabel dawn issieħbu fl-Iskema, kif jirriżulta mill-*Letter of Authority* iffirmata minnhom, u anki mis-*Suitability Report* u/jew *Risk Profiler* imħejjija minn *SW Gibraltar*, u ffirmit mir-rikorrenti. Tirrileva li l-istess *SW Gibraltar* kellha liċenzja maħruġa mill-*Gibraltar Financial Services Commission* sabiex tagħti pariri ta' investment, u dan kienu jafuh ir-rikorrenti. Dan kien proprju fi żmien meta r-regoli kienu jippermettu lil

SW Gibraltar sabiex tagħti pariri ta' investment lir-rikorrenti. Għal dak li jirrigwarda l-ħames aggravju, is-soċjetà intimata tispjega r-raġunijiet għalfejn it-titoli ta' *fractional ownerships* fil-proprjetà f' *Cape Verde* għadhom mhux trasferiti. Tgħid li l-kwistjoni hija waħda purament amministrattiva li qed tirisolvi ruħha bil-mod. Tikkontendi li din m'għandha l-ebda impatt fuq id-drittijiet tar-rikorrenti, u dan huma jafuh sew. Dwar is-sitt aggravju, is-soċjetà intimata tgħid li anki kif gie osservat mill-Arbitru fid-deċiżjoni appellata, hija għandha riżervi dwar l-operat ta' *Bushido Pension Scheme*, li fiha r-rikorrenti xtaqu jittrasferixxu l-investimenti tagħhom, u tgħaddi sabiex tispjega r-raġunijiet tagħha li wassluha għal dawn ir-riżervi. Tikkontendi li huwa d-dmir tagħha bħala *bonus paterfamilias* li tiċhad it-talba tar-rikorrenti, iżda jekk huma jindikaw skema oħra ġewwa l-Ingilterra li tista' tagħtiha s-serħan tal-moħħ li huma kienu ser jaġixxu fl-aqwa interess tagħhom, hija ma jkollha l-ebda oġġezzjoni li tittrasferixxi l-assi tagħhom kif indikat lilha.

L-ewwel aggravju

11. Il-Qorti tagħraf li kif sewwa tirrileva s-soċjetà intimata, kwalunkwe rimedju li l-Arbitru għandu s-setgħa li jagħti *ai termini* tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, jista' jingħata biss fil-parametri stabbiliti permezz tal-istess disposizzjonijiet tal-liġi. Għalhekk ir-rimedju jispetta biss lill-ilmentatur jekk "... l-ilment jinstab totalment jew parzjalment sostanzjat". Fil-każ odjern, il-Qorti mhijiex qegħda tagħraf li l-Arbitru ddeċieda xi lment hekk marbut mar-rimedju mitlub, u għalhekk ir-rikorrenti ma jistgħux jippretendu li l-Arbitru kien

tenut li jimxi *ai termini* tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555. Għaldaqstant l-ewwel aggravju tagħhom mhuwiex ġustifikat, u l-Qorti tiċċdu.

It-tieni aggravju

12. Dwar it-tieni aggravju tar-rikorrenti, il-Qorti tikkonsidra li jekk l-Arbitru naqas li jittratta u jiddeċiedi dwar l-obbligu fiduċjarju li huma qegħdin jippretendu li s-soċjetà intimata għandha lejhom skont l-artikolu 1124A tal-Kap. 16 u tas-subartikolu 21(1) tal-Kap. 331, dan mhux minħabba xi nuqqas ta' attenzjoni dovuta min-naħa tiegħu, iżda proprju għaliex huwa kellu jiċċad mill-ewwel ir-rimedju mitlub minħabba kwistjonijiet oħra li ma kienux marbutin mal-aġir tas-soċjetà intimata. Il-Qorti tgħid li hija saħansitra wkoll tonqos li tagħraf ir-rilevanza tal-obbligi fiduċjarji tas-soċjetà intimata, jew fi kwalunkwe każ ta' ICML qabilha, fejn l-Arbitru kellu jinvestiga jekk ir-rimedju mitlub wara kollox setax jingħata skont il-liġi. Tirrileva li dawn il-konsiderazzjonijiet huma wkoll rilevanti fir-rigward tat-tielet, tar-raba' u tal-ħames aggravji. Għaldaqstant il-Qorti tiddikjara li t-tieni, it-tielet, ir-raba' u l-ħames aggravji tar-rikorrenti mhumiex ġustifikati, u tiċċadhom.

13. Is-sitt aggravju tar-rikorrenti mbagħad jirrigwarda t-talba ta' uħud minnhom sabiex l-investment tagħhom fl-Iskema jiġi ttrasferit f'skema oħra tal-għażla tagħhom. L-Arbitru hawn għaraf il-preokkupazzjonijiet imfissra mis-soċjetà intimata wara li hija kienet wettqet eżerċizzju ta' diligenza dovuta fir-rigward tal-Iskema Bushido magħżula mir-rikorrenti. L-Arbitru kkonsidra li kien hemm kwistjonijiet validi li kienu ġew identifikati mis-soċjetà intimata f'dan l-eżerċizzju tagħha. Huwa stess għadda sabiex għamel eżerċizzju ieħor fejn wara

li kkonsidra l-informazzjoni disponibbli għall-pubbliku fir-rigward tal-qagħda finanzjarja, ir-rabtiet komuni, l-istat regolatorju u t-track record tal-partijiet imsemmija u nvoluti, li kellhom x'jaqsmu mal-Iskema Bushido, għadda sabiex aċċetta l-argumenti miġjuba mis-soċjetà intimata li hija kellha tkun adegwatament sodisfatta mill-eżercizzju tagħha ta' diligenza dovuta qabel ma tagħmel it-trasferiment mitlub, u dan "...to preserve and safeguard the interests of the Scheme' and act in the best interests of its members". Filwaqt li rrileva li s-soċjetà intimata kienet iddikjarat fis-sottomissjonijiet tagħha li hija kienet lesta li tikkonsidra t-trasferiment mitlub mir-rikorrenti għal fornitur tal-pensjoni alternattiv, l-Arbitru ddikjara li fiċ-ċirkostanzi partikolari tal-każ, u meħudin in konsiderazzjoni r-raġunijiet imfissra, id-deċiżjoni tas-soċjetà intimata li tirrikjedi qabel xejn li hija kellha tkun sodisfatta mill-eżercizzju tagħha ta' diligenza dovuta, ma kinitx tirrizulta waħda frivola, mhux ġustifikata jew irragonevoli. Fid-dawl ta' dak kollu li ġie eżaminat u mfisser mill-Arbitru f'dan il-kuntest, il-Qorti ma ssibx raġuni għaliex hija għandha tmur kontra d-deċiżjoni tiegħu. Wara kollox, anki quddiem din il-Qorti, ir-rikorrenti naqsu milli jressqu sottomissjonijiet jew provi ulterjuri sabiex jikkontradixxu s-sejbien tas-soċjetà intimata u anki il-konstatazzjonijiet tal-Arbitru. Imbagħad fil-kumment aħħari tiegħu, l-Arbitru ddikjara li ma kienx ġie wkoll adegwatament u suffiċjentement ippruvat li s-soċjetà intimata ma kinitx imxiet fl-aħjar interessi tar-rikorrenti fir-rigward tar-rikjesta tagħhom għat-trasferiment tal-investment tagħhom, u li tikkopera f'każ li l-eżercizzju ta' diligenza dovuta jkun wieħed ta' eżitu favorevoli. Għaldaqstant il-Qorti ma ssibx dan l-aħħar aggravju ġustifikat, u tiċċdu wkoll.

14. Il-Qorti issa ser tgħaddi sabiex tikkonsidra l-aggravji mressqa mis-soċjetà intimata permezz tal-appell incidentali magħmul minnha fir-rigward tad-digriet interlokutorju mogħti mill-Arbitru fl-4 ta' Jannar, 2021. Is-soċjetà intimata tgħid li l-ewwel aggravju tagħha huwa li l-Arbitru naqas milli jsegwi l-proċedura skont il-liġi sabiex terza persuna tiġi ammessa fil-proċeduri skont id-disposizzjonijiet tal-artikolu 960 tal-Kap. 12 jew dawk tal-artikolu 810A tal-istess liġi. Tirrileva li fil-każ odjern, hija ma kienet intavolat l-ebda rikors sabiex tintervjeni fil-kawża jew sabiex tassumi l-atti tal-istess kawża minflok ICML. Tgħid li lanqas jirriżulta wkoll li kienet saret xi talba min-naħa tar-rikorrenti jew minn ICML matul il-proċeduri, jew li saħansitra kienet ingħatat xi ordni jew deċiżjoni mill-Arbitru stess sabiex hija tiġi kjamata fil-kawża skont l-artikolu 961 tal-Kap. 16. B'hekk hija qatt ma ngħatat l-opportunità li tippreżenta risposta u *“tagħti kull eċċezzjoni, u li tinqeda b’kull benefiċċju ieħor illi l-liġi tagħti lill-konvenut”* ai termini tal-artikolu 962. Is-soċjetà intimata tgħaddi mbagħad sabiex tfisser it-tieni aggravju tagħha, u tgħid li dan jikkonsisti fid-deċiżjoni tal-Arbitru li hija kellha tissostitwixxi lil ICML. Tispjega li hija kienet giet sempliċement appuntata bħala t-trustee u amministratriċi tal-Iskema wara li ICML irtirat mill-kariga tagħha, u għalhekk hija ma setgħet bl-ebda mod tassumi l-konsegwenzi ta' xi ksur o meno tal-obbligi fiduċjarji li kellha ICML fir-rigward tar-rikorrenti. Hija ttenni għal darb'oħra l-istess argument magħmul fl-aggravju ta' qabel, kif imsejjes fuq id-disposizzjonijiet tal-artikoli 961 u 962 tal-Kap. 12. Dan tgħid sabiex ikun hemm distinzjoni bejn it-talbiet li hija kienet responsabbli li twieġeb, u dawk l-oħra li kienet tenuta twieġeb ICML. Hija tagħmel riferiment u anki tiċċita d-disposizzjonijiet tas-subartikolu 30(3) tal-Kap. 331, kif ukoll dawk tas-subartikolu 34(2) tal-istess liġi in sostenn tal-argument tagħha. Ir-rikorrenti min-

naħa tagħhom iwiegħbu, billi jikkontendu li d-digriet huwa wieħed ġust, u għalhekk jimmerita konferma. Jikkontendu li jekk is-soċjetà intimata qegħda tilmenta li hija ma ngħatatx l-opportunità li tippreżenta risposta, jissottomettu li din kienet preżenti għas-seduti quddiem l-Arbitru, u billi ssostitwiet lill-predeċessur tagħha, hija ma kellha l-ebda dritt tippreżenta eċċezzjonijiet/risposta ulterjuri stante li dan kien diġà sar. Dwar it-tieni aggravju, jgħidu li l-argument hawn huwa wieħed żbaljat, u jekk is-soċjetà intimata kienet xtrat l-ishma ta' ICML, ma kien ikun hemm l-ebda tibdil fil-persuna li tamministra l-Iskema. Izda stante li kien hemm bidla fil-persuna responsabbli, din kellha tiġi nvoluta fil-proċess, stante li hija kellha r-rappreżentanza ġuridika tat-*Trust* u kienet responsabbli għall-amministrazzjoni tal-azzjonijiet tagħha.

15. Il-Qorti tikkonsidra li għaladarba hija ser tgħaddi sabiex tiċhad l-appell tar-rikorrenti għat-tħassir tad-deċiżjoni appellata, fejn ma ntlagħhux it-talbiet tagħhom, ma tarax li jkun siewi li tittratta l-appell inċidentali ppreżentat mis-soċjetà intimata.

Decide

Għar-raġunijiet premessi l-Qorti tiddeċiedi dwar l-appell tar-rikorrenti billi tiċħdu, filwaqt li tastjeni milli tieħu konjizzjoni tal-appell inċidentali tas-soċjetà intimata, u tikkonferma d-deċiżjoni appellata fl-intier tagħha.

L-ispejjeż tal-proċedura quddiem l-Arbitru jibqgħu kif deċizi. Dawk tal-appell prinċipali għandhom ikunu a karigu tar-rikorrenti, u l-ispejjeż tal-appell inċidentali għandhom ikunu a karigu tas-soċjetà intimata.

Moqrija.

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Imħallef**

**Rosemarie Calleja
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