MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-1 ta' Lulju, 2022

Appell Inferjuri Numru 148/2021 LM

Marcus Alan Brewster
(detentur tal-karta tal-Identità bin-numru 0165017A)
('ir-rikorrent')

vs.

Calamatta Cuschieri Investment Services Limited (C 13729)
('is-soċjetà intimata')

Il-Qorti,

<u>Preliminari</u>

1. Dawn huma żewġ appelli magħmulin, wieħed l-appell prinċipali tas-soċjetà intimata **Calamatta Cuschieri Investment Services Limited (C 13729)** [minn issa 'l quddiem 'is-soċjetà intimata'], u l-ieħor appell inċidentali tar-rikorrent **Marcus Alan Brewster (K.I. nru. 0165017(A))** [minn issa 'l quddiem

'ir-rikorrent'], mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fid-9 ta' Novembru, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' parzjalment l-ilment tar-rikorrent u *ai termini* tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555 tal-Liġijiet ta' Malta ordna lis-soċjetà intimata sabiex tħallas lir-rikorrent is-somma li kellha tiġi kkalkolata kif hemm indikat, bl-imgħax legali mid-data tad-deċiżjoni appellata, filwaqt li kull parti kellha tbati l-ispejjeż tagħha ta' dawk il-proċeduri.

Fatti

2. Il-fatti tal-każ odjern jirrigwarda l-portafoll ta' investimenti kif suġġerit mis-soċjetà intimata lir-rikorrent fil-laqgħa ta' bejniethom tal-21 ta' Mejju, 2018, fejn skont ir-rikorrent, tlieta mill-*bonds* formanti parti mill-portafoll aċċettat minnu, issarrfu f'telf kbir għalih stante telf fil-kapital riżultat tal-allegat aġir negliġenti min-naħa tas-soċjetà intimata.

Mertu

3. Ir-rikorrent għalhekk ippreżenta lment quddiem l-Arbitru fl-20 ta' Jannar, 2020, fejn filwaqt li allega aġir negliġenti da parti tas-soċjetà intimata, iddikjara li dan kien wassal għal telf kbir tassew fl-investimenti tiegħu, partikolarment is-*7% Garfunkelux 2022* [minn issa 'l quddiem '*Garfunkelux*'], is-*6.5% Lecta 2019/2023* [minn issa 'l quddiem '*Lecta*'] u *s*-

6.5% CMA CGM 2019/2022 [minn issa 'l quddiem '*CMA CGM*'], u għalhekk talab lill-Arbitru sabiex *ai termini* tas-subartikolu 19(3) tal-Kap. 555:

i. To Declare that the Complaint submitted is fair, reasonable and equitable;

ii. To Declare that the Respondent Firm has not acted in the best interests of its client (MFSA Conduct of Business Rulebook Rule 4.1.5 and has failed its fiduciary obligations towards the client, including those emanating from Articles 1124A of the Civil Code;

*iii. To Declare that as a result of its failure to act with due skill, care and diligence, and the failure to abide by the applicable regulatory regime, the Respondent Firm did not perform its contractual obligations towards the Complainant. Furthermore, due to the lack of suitability of the investments recommended, Respondent Firm has caused the Complainant losses of capital and income on (i) 7.5% Garfunkelux 01/08/22, Nominal €100,000; (ii) 6.5% Lecta 2019/2023, Nominal €100,000; and (iii) 6.5% CMA CGM 2019/2022, Nominal €100,000. Consequently, the Arbiter is being requested to Declare and Order that the Respondent Firm compensates Complainant and reinstates him in his former financial position (*status quo ante*) in respect of the losses arising on the aforementioned debt securities. In view of the fact that the relative securities have not yet matured and are still held by the Respondent Firm for account of Complainant, in line with the procedure prescribed by the Court of Appeal, the Arbiter is requested to determine the market value and the capital losses arising as at the date of the Arbiter's decision;*

iv. To Declare and Order the Respondent Firm to pay legal interest from the date of the Arbiter's decision to the date of effective payment;

v. To condemn the Respondent Firm to all costs of this action."

4. Is-soċjetà intimata wieġbet fit-12 ta' Frar, 2020, fejn talbet lill-Arbitru sabiex jiddikjara l-ilment bħala wieħed frivolu jew vessatorju minħabba d-diversi inkonsistenzi riżultanti mill-każ, u minħabba n-nuqqas tal-preżentata ta' dokumenti li kienu fil-pussess tar-rappreżentant tar-rikorrent magħmul bl-intenzjoni li jiġi żvijjat il-każ.

Id-deċiżjoni appellata

5. L-Arbitru kkonsidra dan li ġej rilevanti għall-appell odjern:

"Having heard the parties and seen all the documents, affidavits and submissions made, considers:

The Merits of the Case

The Arbiter will decide the Complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case. *(fn. 40 Cap. 555, Art 19(3)(b))*

Facts of the Case and other pertinent matters

The following is a summary of the pertinent facts of the case and other important matters as emerging from the documents provided, hearings and submissions made:

(i) The Complainant

The Complainant was described in the Investment Proposal dated 21 May 2018 prepared by CCISL as a South African national and Maltese resident born on 14 June 1964 who previously owned a PR Agency in South Africa. He was classified as a Retail Investor and was indicated as being financial stable with no financial liabilities. (fn. 41 A fol. 10 – 14)

In CCISL's 'Opening of Account Form' dated 25/05/2018, the Complainant's nationality was described as 'British'. In the said form he was indicated as a self-employed acting as a director of a local company, with his level of education up to a Masters level and his area of study in 'Drama & Film'. (fn. 42 A fol. 17 & 21)

*As to his investment experience, CCISL's '*Opening of Account Form' *indicates the Complainant as not being familiar with Government bonds; as having '*Invested Rarely' *in Corporate bonds in the range of 10,000-25,000; as having 'Invested Regularly' in Shares (in the range of 25,000-50,000); as having invested rarely in funds (in the range of 10,000-25,000); and also as having invested rarely in complex instruments (in the range of 0-10,000). (fn. 43 A fol. 21)*

*With respect to his financial situation, the Complainant was indicated as having no loans, savings of '*450000'*, a substantial property investment of '*12000000' *apart from his home with a value of '*550000'*. (fn. 44 A fol. 22)*

(ii) Investment Objective & Risk Classification

*CCISL's Opening of Account Form indicates the Investment objectives/strategy of the Complainant as being '*Income' *(out of the other options of '*Capital Growth'/Balanced Approach'), *with a '*Moderate' *Risk Profile and a '*Short (up to 5 years)*' Investment timeframe. (fn. 45 A fol. 24)*

In the Investment Proposal, it is specified that the Complainant had 'an amount of around €450,000 at BOV which is earmarked for the renovation of your Maltese property in around 18 months' time'*, where it was stated that the Complainant was '*not happy to leave this amount of cash idle with the current interest rate climate and would like to actively invest this sum until it is required'*. (fn. 46 A fol. 11)*
The Investment Proposal specifies inter alia the following with respect to the Complainant's Investment Objectives & Risk Profile:

'You would like to invest over the short term (around 18 months) to generate an income which is more than that currently available from cash deposits.

You consider yourself a 'moderate' risk investor. In fact, on a risk scale of '1' to '7', where '1' is the lowest risk possible and '7' the highest, I would classify you as a '4'. This means that you are willing to accept a degree of risk in return for higher returns than those available from cash deposits but you value reducing risk and enhancing returns equally.

During our meeting I stressed the risk associated with market timing and therefore short term investing in particular and you confirmed that you understand this and are willing to accept fluctuations of capital of around 15%.' *(fn. 47 Ibid.)*

*In the '*Investment Recommendations' *section of CCISL's Investment Proposal, the adviser states inter alia that* 'I would usually recommend that you retain the funds in cash deposits, as there is no investment I can offer you that would guarantee any return'. *(fn. 48 A fol. 13) The adviser, however, still offered a recommendation for an investment portfolio highlighting inter alia that due to the investment term of the Complainant, investments in collective investment schemes were being excluded and that this meant less diversification. Furthermore, the adviser noted that '*We agreed to exclude investment into equities due to the more volatile nature of the price fluctuations and therefore, my recommendations are for a portfolio of individual, investment grade and high yield bonds*'. (fn. 49 Ibid)*

(iii) Investments Transactions undertaken during the relationship with CCISL

The Complainant made the following deposits into his investment account with CCISL:

- *EUR350,000 on 29/05/2018; (fn. 50 A fol. 131)*
- *EUR200,000 on 13/04/2019; (fn. 51 A fol. 130)*
- *EUR200,000 on 23/04/2019. (fn. 52 Ibid.)*

A substantial withdrawal of EUR208,837.42 was made by the Complainant on 29/05/2019, a month after his last deposit. (fn. 53 Ibid.)

Table B below provides a summary of the investments purchased on an Investment Advisory basis *and the performance thereof as emerging from CISL's Portfolio Statement for the period 01/04/2018 to 11/02/2020 (fn. 54 A fol. 130 – 133) and the purchase/sale contract notes. (fn. 55 A fol. 35-40 & 163-164)*

Table B - Portfolio of investments bought on an Investment Advisory Basis

Investment Name	***Date bought***	***Units purchased***	***CCY***	***Purchase Settlement Value***	***Date sold***	***Units Sold***	***CCY***	***Sale Settlement Value***	***Capital Loss/ Profit (excl. div.)***	***% of Capital loss (excl. div) on purchase value***
4.4% Von der Heyden Group 2024	29 *May 2018* 30 *May 2018*	*20,000* *30,000*	*EUR*	*20,564.37* *30,998.35*	*29 Nov 2019*	*50,000*	*EUR*	*51,482.90*	***(79.82)***	*-0.16%*
7.5% Garfunkelx 01/08/22	***30 May 2018***	***100,000***	***EUR***	***105539.17***	***25 June 2020***	***100,000***	***EUR***	***94,816.33***	***-10,722.84***	***-10.16%***
6.5% Lecta 2019/2023	***30 May 2018***	***100,000***	***EUR***	***103188.61***						
Apple 3% 2027	*May 2018*	***	*USD*	***	*29 Nov 2019*	*50,000*	*USD*	*52,421.15*	***	

Ford 4.346% 2026	*Jun 2018*	*50,000*	*USD*	*51,262.83*	*29 Nov 2019*	*50,000*	*USD*	*50,768.80*	***(494.03)***	***-0.96%***
SP Finance 4% 2029	*17 April 2019*	*40,800*	*EUR*	*40,800*	*29 Nov 2019* *2 Dec 2019*	*26,100* *14,700*	*EUR*	*26,637.39* *15,002.31*	***839.70***	***+2.06%***
4.4% Von der Heyden Group 2024	*26 April 2019*	*50,000*	*EUR*	*51,466.75*	*2 Dec 2019*	*50,000*	*EUR*	*51,488.91*	***22.16***	*+0.04%*
6.5% Cma Cgm 2019/22	***29 April 2019***	***100,000***	***EUR***	***98,895.8 3***	***24 June 2020***	***100,000***	***EUR***	***94,511.24***	***-4,384.59***	***-4.434%***

* Details not available from the Portfolio Statement and/or purchase/sale contract notes. An investment of USD50,000 into the Apple 3% 2027 bond at a cost of USD51,000 (EUR46,364) was however indicated during the proceedings of the case *(fn. 56 A fol. 156)*

(iv) Performance of disputed bond investments

*As detailed under the section titled '*Request for Compensation' *above, the Complainant requested compensation in respect of three particular debt securities which comprised part of the portfolio of investments indicated above, with these securities being the Garfunkelux, Lecta and CMA CGM bonds.*

Table C below provides a summary of the performance of the three disputed investments taking into consideration the capital losses inclusive of any realised income arising from the respective investments as emerging from the information contained in CCISL's Portfolio Statement for the period 01/04/2018 to 11/02/2020. (fn. 57 A fol. 130-133)

Table C - Performance of disputed bond investments (inclusive of dividends)

Investment Name	***CCY***	***Capital Loss/ Profit (excl. div.)***	***Total Dividends Received (Net of tax & Adm fee)***	***Total Loss/Profit (inclusive of dividends)***
7.5% Garfunkelux 01/08/22	*EUR*	*-10,722.84*	*EUR 12,730 (four payments of Eur3,182.50 - each calculated as div. received of Eur3,750 less tax on dividends of 562.50 and admin. fee of 5)*	*+2,007.16*
6.5% Lecta 2019/2023	*EUR*	*	*EUR 8,272.50 (three payments of Eur2,757.50 - each calculated as div. received of Eur3,250 less tax on dividends of 487.50 and admin. fee of 5)*	*
6.5% Cma Cgm 2019/22	*EUR*	*-4,384.59*	*EUR 5,515 (two payments of Eur2,757.50 - each calculated as div. received of Eur3,250 less tax on dividends of 487.50 and admin. fee of 5)*	*+1,130.41*

** Investment not yet matured/redeemed*

(v) Other pertinent matters relating to the Lecta bond

i. *Current status - The Lecta bond is the last remaining disputed investment. In its email of the 30 June 2020, the Service Provider noted inter alia that* 'this instrument has been restructured as per our previous correspondence

dated 16/01/2020 hence it can no longer be sold on the market.' *(fn. 58 A fol;. 162 & 159) CCISL further noted in the same email that* 'There is still the option for clients to elect to restructure and be given the new notes'. *(fn. 59 A fol. 162) The option to restructure included a note that* 'your holdings will be locked under the lock up agreement scheme as per the announcement'. *(fn. 60 Ibid)*

ii. *Recommendation to Sell - It is noted that on the 26 September 2019, the Complainant was informed that CCISL had issued a 'Sell' recommendation on the Lecta bond. In his affidavit of 17 July 2020, CCISL's advisor stated inter alia that:*

'…on the 26th September, client was informed on the latest developments on Lecta. It was made clear that the company issued a stance to 'SELL' due to a downturn in the company's performance and poor prospects. At this point, I advised the client to close the position at 40 and avoid going through potential defaults or restructuring procedures'. *(fn. 61 A fol. 179)*

The said advisor further stated in his affidavit that:

'On the 27th of September, I called the client to confirm whether he had received the email and to make sure he would be informed, for him to be able to take a decision and not miss out on potential opportunities to exit the position. My call log notes read the following: "called client and explained the situation in detail. He said he is aware of the email and will not be taking a decision today. I explained the potential of getting a worse price if we wait and he has stated that 'he is aware, but because of the irregularities of changeover between advisors he was not *informed of the price change of Lecta in the 70s and that this situation is the companies fault'" (fn. 62 A fol. 179-180)*

iii. Change in value - Table D Portfolio Valuation statements produced during the case. below provides an overview of the change in value of the Lecta bond as reflected in the respective

<u>Table D – Change in value of the Lecta bond investment</u> (fn. 63 A fol. 41, 124, 138-144, 161)

Bond	***Change in Value as reflected in the Portfolio Valuation Statement respectively issued as at the following dates:***									
	30/6/18	***30/9/18***	***31/12/18***	***31/3/19***	***27/5/19***	***30/6/19***	***30/9/19***	***31/10/19***	***31/12/19***	***09/4/20***
6.5% Lecta	*-1.09%*	*+3.37%*	*-7.23%*	*-6.69%*	*-27.35%*	*-23.02%*	*-56.93%*	*-58.87%*	*-52.16%*	*-53.52%*

Considerations - The Suitability Assessment

The Conduct of Business Rulebook (issued by the MFSA in December 2017 as subsequently updated) ('the COB Rulebook') includes various requirements relating to the provision of investment advisory services and the required suitability assessment.

The COB Rulebook, which applied to the Service Provider at the time of the disputed transactions, (fn. 64 The first version of the COB Rulebook issued 20 December 2017 applied at the time of the transactions undertaken in May and June 2018, and the COB Rulebook 'Last Revised on 2 April 2019' *applied at the time of the transactions undertaken within the Complainant's portfolio in April 2019) transposes inter alia the MiFID Directive and its Implementing Measures and* 'contains the Conduct of Business *Obligations' to which regulated entities are* 'required to adhere in their day-to-day operations'. *(fn. 65 Introductory Part of the Conduct of Business Rulebook issued by the MFSA)*

Hence, reference shall be made to the requirements contained in this Rulebook as part of the considerations of this Case, particularly the sections of the COB Rulebook on the assessment of suitability, record keeping obligations and assessment tools.

As outlined in the COB Rulebook, there are three key criteria that need to be taken into consideration to determine whether an investment instrument is suitable for a client. The following criteria need to be satisfied as detailed in the COB Rulebook: (fn. 66 Reflected in R.4.4.21 (just after G.4.4.23) in the first version of the Rulebook issued 20 December 2017, and in R.4.4.30 in the version of the Rulebook 'Last Revised: 2nd April 2019'.)

'(a) it meets the investment objectives of the Client in question, including Client's risk tolerance;

(b) it is such that the Client is able financially to bear any related investment risks consistent with his investment objectives;

(c) is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio'

Following consideration of the various issues raised and extensive submissions made by the parties throughout the proceedings of the case, as well as the indicated criteria, the Arbiter would like to make the following observations and conclusions:

a) Structure of the portfolio

The Arbiter shall first analyse the composition of the portfolio. As can be seen from Table E below, ***nearly 60% of the investment portfolio comprised just two assets, the 7.5% Garfunkelux and the 6.5% Lecta, at the time of the commencement of the portfolio and during the initial months. Hence, individual exposure to the said investments was indeed quite considerable and stands out in the portfolio composition****.*

Table E – Allocation of disputed investments as a % of the whole portfolio *(fn. 67 A fol. 41, 124, 138-144, 161)*

Bond	***Allocation as reflected in the Portfolio Valuation Statements respectively issued as at the following dates:***									
	30/6/18	***30/9/18***	***31/12/18***	***31/3/19***	***27/5/19***	***30/6/19***	***30/9/19***	***31/10/19***	***31/12/19***	***09/4/20***
7.5% Garfunkelux	*29.32%*	*28.78%*	*27.61%*	*27.85%*	*12.87%*	*18.85%*	*21.05%*	*21.4%*	*41.92%*	*40.17%*
6.5% Lecta	*29.66%*	*30.14%*	*28.75%*	*28.25%*	*10.48%*	*15.74%*	*9.48%*	*9.23%*	*20%*	*23.20%*
6.5% Cma Cgm	*-*	*-*	*-*	*-*	*13.46%*	*17.86%*	*17.36%*	*16.60%*	*38.08%*	*35.06%*

From the documentation produced during the case, it is also evident that ***a high percentage of the portfolio was invested into non-investment grade****. In its email of 25 May 2018, CCISL itself indicated that the allocation of investment grade ('IG') and high yield ('HY') investments, (the latter being in this case the non-investment-grade bonds), was initially between '36% IG, 64% HY' on a portfolio of EUR250,000. (fn. 68 A fol. 109(b)) As indicated in the same email the allocation was to increase to '25% IG, 75% HY' with the reinstatement of the EUR100,000 investment in the Lecta bond. (fn. 69 A fol. 109 (b) & 110)*

The basis for the high exposures to non-investment grade instruments <u>both individually and collectively</u> within the whole portfolio is however not clearly and thoroughly documented in CCISL's Investment Report and other forms used in respect of the investment advisory service.

It is noted that in his affidavit of 16 July 2020, the advisor of CCISL explained inter alia that '... I was the one pushing him towards IG names like Apple, Heineken and Ford. In fact, in my initial conversations with IT, I recommended a much high weighting towards these IG names, however, IT was not happy with the overall interest rate that would have resulted if we had allocated more to safer bonds. He understood clearly that going for higher coupons meant higher investment risk'*. (fn. 70 A fol. 172)*

The said advisor further stated that 'It would have made no difference to me at all (financially or otherwise) to allocate low return investments to stay at a low risk/low return strategy but this was never IT's objective, in fact it was the reason why he wanted to move out of the bank accounts and kept topping up the investment portfolio looking for a higher yield'*. (fn. 71 Ibid.)*

The Arbiter notes that whilst the Complainant's objective was not* 'a low risk/low return strategy' *it was, however, neither a* 'high-risk strategy' *but rather one of 'moderate risk' where he was* 'willing to accept fluctuations of capital of around 15%' *as disclosed in the Investment Report. *(fn. 72 A fol. 11)*

It is noted that as indicated in Table D above, and also reproduced in Table F below, the Lecta bond experienced nearly a 30% drop in value within less than a year and it kept reducing further in value for around 50% of its original value in subsequent months.

Given the high individual exposure to the Lecta bond and the other disputed investments and the drop in value on such, *as summarised in Table F below,* ***it is clear that the fluctuations of capital experienced by the Complainant went beyond the 15% threshold he was willing to take as disclosed in the Investment Report****.*

Table F – Change in value of other disputed investments (fn. 73 A fol. 41, 124, 138-144, 161)

Bond	***Change in Value as reflected in the Portfolio Valuation Statement respectively issued as at the following dates:***									
	30/6/18	***30/9/18***	***31/12/18***	***31/3/19***	***27/5/19***	***30/6/19***	***30/9/19***	***31/10/19***	***31/12/19***	***09/4/20***
6.5% Lecta	*-1.09%*	*+3.37%*	*-7.23%*	*-6.69%*	*-27.35%*	*-23.02%*	*-56.93%*	*-58.87%*	*-52.16%*	*-53.52%*
7.5% Garfunkelux	*-4.14%*	*-3.23%*	*-12.65%*	*-9.80%*	*-12.49%*	*-9.63%*	*-6.23%*	*-6.51%*	*-1.71%*	*-20.26%*
6.5% Cma Cgm	*N/A*	*N/A*	*N/A*	*N/A*	*-2.77%*	*-9.02%*	*-17.80%*	*-22.94%*	*-5.11%*	*-26.07%*

b) Riskiness of the disputed investments

It is noted that the Service Provider never contested the claim that the non-investment grade instruments were unsecured and had a very low credit quality at the time of purchase of between 4 to 6 notches below the best credit rating in the speculative/non-investment grade credit ratings as alleged by the Complainant in his submissions. *(fn. 74 A fol. 6 & 42)*

Such credit ratings would indeed indicate a prevalence of high risk attached to the said investments.

c) Complainant's Risk Tolerance

The risk that the Complainant was ready to take was documented as follows in the Investment Report:

> 'You consider yourselve a 'moderate' risk investor. In fact, on a risk scale of '1' to '7', where '1' is the lowest risk possible and '7' the highest, I would classify you as a '4'. This means that you are willing to accept a degree of risk in return for higher returns than those available from cash deposits but you value reducing risk and enhancing returns equally.

> During our meeting I stressed the risk associated with market timing and therefore short term investing in particular and you confirmed that you understand this and are willing to accept fluctuations of capital of around 15%' *(fn. 75 A fol. 69)*

The risk that the Complainant was exposed to in his portfolio was ultimately higher in view of the high exposure to non-investment grade instruments both individually and collectively within the portfolio and given the nature of the said instruments as described in the preceding sections above.

If the Complainant was willing to sustain a greater capital loss for higher returns as alleged by the Service Provider, then this should have been adequately and clearly documented as required in terms of the COB Rulebook which provided as follows: *(fn. 4 G.4.4.16 in the first version of the Rulebook issued 20 December 2017, and in G.4.4.27 in the version of the Rulebook 'Last Revised: 2nd April 2019'.)*

> 'If the Client is able to sustain greater capital losses and is willing, following discussion, to tolerate a higher level of risk to potentially generate the desired level of return, the Regulated Person should document that this is the risk that the Client is willing and able to take, along with the reasons for this.'

The risks of poor assessments of the risk tolerance are also highlighted in COB Rulebook which provides the following*: (fn. 77 G.4.4.16 in the first version of the Rulebook issued 20 December 2017, and in G.4.4.27 in the version of the Rulebook 'Last Revised: 2nd April 2019'.)*

> 'Poor outcomes in assessing the risk a Client is willing and able to take can occur if Regulated Persons, in particular:
>
> a) fail to collect and account for all the information relevant to assessing the risk a Client is willing and able to take as part of suitability considerations, for example because they:
>
> - fail to assess a Client's capacity for loss;
> - do not have a robust process to identify Clients that are best suited to placing their money in cash deposits because they are unwilling or unable to accept the risk of loss of capital;
> - use poor questions and answers to establish the risk a Client is willing and able to take;

- inappropriately interpret the Client's responses to questions (particularly where Regulated Persons rely on tools with sensitive scoring or attribute inappropriate weighting to answers); or

b) use vague, unclear or misleading descriptions or illustrations to check the risk that a Client is willing and able to take.'

It is further noted that during the hearing of 29 July 2020, the Complainant stated inter alia that 'I did know that shares in the stock market are very volatile and that if there is a specific timeframe, then maybe shares were not the right instruments to be using for my requirements'. (fn. 78 A fol. 185)

The Complainant further stated, during the same sitting, that 'Mr Calleja told me that at a certain point a bond will always get redeemed at a hundred and that was the explanation ...'.

This further substantiates the notion that the Complainant does not seem to have had a clear understanding of the risks of the instruments he was being exposed to when investing in the non-investment grade bonds, and may have rather had a false sense of security that he won't experience much volatility or risk in the recommended bonds as compared to equity investments. The fact that the Complainant avoided equity investments altogether in his portfolio points further towards his wish to have a more stable and secure investments, also in light of his short term investment horizon.

Ultimately, the Arbiter has not seen adequate and clear documentation which backs or justifies the higher risks being taken in the recommended portfolio.

d) *Other shortfalls* - 'Suitability Test' *in the Market Order Forms*

i. *Wrong timeframe* - ***The* 'Suitability Test' *section in the Market Order Form in respect of the EUR100,000 invested into the '7.5% Garfunkelux 01/08/2022' and '6.5% Lecta 2019/2023' both purchased in May 2018 indicates the* 'Investment Objective' *of the Complainant as being of* 'Long Term'** *(fn. 79 A fol. 26)* ***in clear contradiction of the short-term investment timeframe indicated in CCISL's Investment Profile and the Opening of Account Form.*** *(fn. 80 A fol. 11 & 24)*

(The short-term investment timeframe was only reflected in the Market Order Form in respect of the EUR100,000 invested into '6.5% CMA CGM 2019/22' which was purchased in April 2019 where the

'Investment Objective' *of the Complainant under the* 'Suitability Test' *was this time correctly indicated as* 'Short Term'*). (fn. 81 A fol. 98)*

ii. *Inaccurate details - **The part on* 'Knowledge & Experience' *in the same section of the Market Order Form indicates inter alia that the Complainant had* 'Previously invested in assets that are similar to the proposed investments'.** *(fn. 82 A fol. 93 & 94)*

This is not really reflective of the disclosure included in CCISL's Opening of Account Form - which had indicated the previous investment experience in Corporate Bonds as **'Invested Rarely'** ***- as indicated in the section titled*** **'The Complainant'** ***above under*** **'Facts of the Case and other relevant matters'.** ***Nor is such disclosure reflective and in agreement with the statement made by the Complainant during the hearing of this case*** *where in reply to the question posed during the sitting of 29 July 2020 as to whether he had ever invested in bonds, the Complainant confirmed that:*

'As far as I'm aware, I don't think I had actually ever in South Africa through Investec, had any bonds in my portfolios. So the answer is that probably never, no familiarity, no experience; they have never been part of my portfolio'. *(fn. 83 A fol. 183)*

e) Asset Allocation Model

Furthermore, the Arbiter considers that the reasons why the Service Provider has materially departed from its own **'typical'** ***asset allocation model reflected in the Investment Report for moderate risk investors whose financial objective was income*** *- which suggested a minimum of 50% in investment grade bonds and a maximum of 30% in non-investment grade instruments -* ***has not been clearly and adequately documented and justified in the Investment Report nor in any other document relating to the suitability assessment****.*

(f) Request for re-instatement of the Lecta & CCISL's Responsibility

Whilst the Complainant had suggested re-instating the proposed EUR100,000 investment into the Lecta bond (as per his email of 25 May 2018) (fn. 84 A fol. 110) after this was removed by CCISL's advisor who, in his email of 24 May 2018, (fn. 85 fol. 74) recommended to the Complainant to leave EUR200,000 at the bank following the Complainant's notification that he was going to require EUR200,000 by October 2018, (fn. 86 A fol. 75) ***the Arbiter considers***

that nevertheless this does not diminish the responsibility of CCISL in the circumstances in question*.*
This is considered so in view that CCISL was not providing an execution only service but an investment advisory service. CCISL ultimately itself endorsed the transaction on an investment advisory basis, in the process making it as its own advice*.*

CCISL's advisor confirmed, in his email of 25 May 2018, that 'I don't mind your suggestion at all' *(fn. 87 A fol. 109(b)) and the transaction to purchase the* Lecta *bond was proceeded with on an investment advisory basis. (fn. 88* 'Advisory Order' *as reflected in the Market Order Form – A fol. 94)*

The Arbiter considers that CCISL cannot abdicate from or reduce its responsibility in respect of the transaction made on an investment advisory basis on the claim that the Lecta bond was requested to be reinstated by the Complainant himself.

If CCISL was not in agreement, then such matter should have been raised accordingly and CCISL should have not proceeded with the transaction in its capacity as investment advisor of the Complainant. CCISL was ultimately duty bound, as investment advisor, to only proceed with suitable investments*.*

Moreover, with respect to the recommendation to sell the Lecta investment in September 2019, as indicated under part (ii) of the section titled '(v) Other pertinent matters relating to the Lecta bond' *above, it is noted that the fact that the Complainant has not sold the bond at the time, does not diminish CCISL's responsibility or the Complainant's claim for compensation against it, given the nature of the issues being raised relating to the suitability of the investment in the first place and also that at the time the Lecta bond had already experienced a reduction of over 50% in value as indicated in the portfolio valuation statement issued at the time (Table D above refers).*

g) Other matters – the type of warning

CCISL submits that its advisor warned the Complainant when stating that 'I don't mind your suggestion at all'*, as he followed such statement with the warning that,*

'However, I would mention that this would entail a slightly more risky approach as it would mean increasing the High Yield (HY) bond allocation in

> comparison to the Investment Grade (IG) bond allocation ...'. *(fn. 89 A fol. 109(b))*

In this respect, ***the Arbiter however considers that even here the warning provided by CCISL was not adequate and sufficient. The advisor only mentioned*** **'a slightly more risky approach'** ***but the additional material exposure into the Lecta bond, another non-investment grade instrument, is considered to have rather brought a much higher risky approach and not just a slightly higher one.***

The Arbiter notes that during the hearing of 16 September 2020, CCISL's adviser stated the following in respect of the risks associated with the high yield bonds:

> '... I reply that I do not have the report in front of me, but I specifically remember that in terms of risk, I said, and I reiterate, that:
>
> (1) there was no investment that can guarantee such a return in the time span he was stipulating; and
>
> (2) when I went on to recommend specific investments and the risks associated with them, I also specifically mentioned the risk rating, the X and P rating in a table form of each individual bond that I was recommending.
>
> I also have in that report a risk section specifically which goes into the general risks of investing in bonds.
>
> In the Investment Recommendation Section there is a table with the name of the bond, the coupon it is providing, the credit rating it has and all the relevant information.' *(fn. 90 A fol. 189-190)*

The Arbiter notes that the Investment Recommendations section in CCISL's Investment Report, however, includes no details of the credit rating <u>contrary to what was claimed</u>. *(fn. 91 A fol. 13-14)* ***Furthermore, no evidence has either emerged of the table of a risk rating in respect of each individual bond that may have been provided to or discussed by CCISL with the Complainant.***

It is further noted that during the hearing of 29 July 2020, the Complainant testified that 'Being asked if Mr Calleja explained in some detail the credit ratings of the instruments and the fact that some of the instruments, the Maltese securities in particular, had no credit rating whatsoever, I say that the answer is definitely no ....'*. (fn. 92 A fol. 186)*

As also indicated above, the Arbiter does not have the comfort that the applicable risks were really highlighted and adequately explained. The risks may have rather

been downplayed with the Complainant ending up with a wrong or inaccurate perception as to the real risks being taken and exposed to. This conflicts with the requirements of the COB Rulebook:

'When providing Products, Services and/or, where appropriate, Ancillary Services to Clients, a Regulated Person shall:

a) Act honestly, fairly and professionally in accordance with the best interests of its Clients;

b) At all times carry out the regulated activities with utmost good faith, integrity, due skill, care and diligence;

c) Do everything which is reasonably possible to satisfy the needs and requirements of its Clients and shall place the interests of those Clients before all other considerations. Subject to these requirements and interests, a Regulated Person shall have proper regard for other*s; ...' (fn. 93 R.4.1.4 in the first version of the Rulebook issued 20 December 2017 and in R.4.1.5 in the version of the Rulebook* 'Last Revised: 2nd April 2019'*)*

During the proceedings of this case, the Arbiter has not seen documentation which clearly and sufficiently highlights and explains the risks to the Complainant, providing him with relevant details on the investments, particularly on the following three aspects:

(i) ***the risks between the non-investment grade as compared to investment grade;***

(ii) ***the respective credit rating of each recommended instrument; how such rating compared in the credit rating classification; and what the respective rating meant in practice as to the risk of the instrument;***

(iii) ***the risks associated with high individual allocation to respective investments and the risks associated with the high allocation overall within the portfolio to non-investment grade instruments.***

It has not emerged either, during the proceedings of the case, that the Service Provider has provided information to the Complainant to ensure that he clearly understands the risks involved as indicated in the COB Rulebook:

<u>First Version of the COB Rulebook issued 20 December 2017:</u>

'G.4.4.5 Regulated Persons should take steps to ensure that the client understands the notion of investment risk as well as the relationship

between risk and return on investments. To enable the client's understanding of investment risk, Regulated Persons should consider using indicative, comprehensible examples of the levels of loss that may arise depending on the level of risk taken, and should assess the client's response to such scenarios. The client should be made aware that the purpose of such examples, and their responses to them, is to help determine the client's attitude to risk (their risk profile), and therefore the types of Products (and risks attached to them) that are suitable.

Version of the COB Rulebook 'Last Revised: 2nd April 2019':

'G.4.4.13 Regulated Persons should take reasonable steps to ensure that the Client understands the notion of investment risk as well as the relationship between risk and return on investments. When presenting questions in this regard, Regulated Persons should explain clearly and simply that the purpose of answering them is to help assess Clients' attitude to risk (risk profile) and therefore the types of Products (and risks attached to them) that are suitable.

G.4.4.14 Regulated Persons should appraise the Client's understanding of investment risk (including concentration risk) and risk-return trade off. To this end Regulated Persons should consider using indicative, comprehensible examples of the levels of loss/return that may arise depending on the level of risk taken, and should assess the Client's response to such scenarios.'

Other relevant provisions reflected exactly (apart from numbering) in the COB Rulebook issued 20 December 2017 and the COB Rulebook *'Last Revised: 2nd April 2019':*

'Regulated Persons should consider the knowledge and experience of a Client and properly discuss with the Client the nature of the assessment of the risk they are willing and able to take. This should enable the Regulated Persons to secure the Client's engagement and check understanding. Where a Regulated Person does not adequately communicate and check understanding of the level of risk a Client is agreeing to take, this can lead to unsuitable recommendations.' *(fn. 94 G.4.4.7 in the first version of the Rulebook issued 20 December 2017 and in G.4.4.16 in the version of the Rulebook* 'Last Revised: 2nd April 2019'.*)*

...

'The level of information gathered by a Regulated Person should be appropriate to the nature and complexity of the Product or Service being sought by the Client, but shall be to a level that allows the Regulated Person to provide a professional Service and include details (where applicable) of the Client's:

...

(d) Attitude to risk, in particular, the importance of capital security to the Client.' *(fn. 95 G.4.4.9(d) in the first version of the Rulebook issued 20 December 2017 and G.4.4.18(d) in the version of the Rulebook* 'Last Revised: 2nd April 2019'*)*

Moreover, the suitability assessment tools used by the Service Provider particularly with respect to the risk classification and the risk of capital loss are considered to be lacking as no sufficient and adequate information has emerged, such as, the following aspects covered in the COB Rulebook: *(fn. 96 G.4.4.52 in the first version of the Rulebook issued 20 December 2017 and in G.4.4.86 in the version of the Rulebook 'Last Revised: 2nd April 2019'.)*

'Establishing risk categories with relatively broad definitions supported by brief sub-sections within each definition that in combination aided understanding. This may include:

a) a short summary description that is fair and balanced;

b) bullet points that provide more detail of the risk of capital loss and the nature of typical investments in each category; and

c) a simple chart showing the 'shape' and variability of annual returns over a period that helps the Client to understand that they need to be comfortable to accept the gains and losses associated with a particular level of risk.

The above-mentioned examples are **'considered as a good practice because it attempts to explain the risk in a number of different ways'** ***in order to ultimately aid the client to understand the risks.***

h) Other matters - Frequent changes

In its submissions the Service Provider highlighted that there were frequent changes being made by the Complainant in his circumstances and investment/liquidity requirements.

However, it is considered that this does not reduce or change CCISL's responsibility. The focus should remain on the composition of the portfolio as structured in the initial period when the disputed investments were made and the circumstances applicable at the time. Updating of the client's profile and circumstances during the relationship that a financial services provider has with his client is duly considered as being part of the process of the service provided, where the frequency of updating of the profile and circumstances is needed, as outlined inter alia in the COB Rulebook as follows:

<u>First Version of the COB Rulebook issued 20 December 2017</u>:

'G.4.4.22 Frequency of updating might vary depending on, for example, Clients' risk profiles: based on the information collected about a Client under the suitability requirements, a firm will often determine the Client's risk profile, i.e. what type of Services or Products can in general be suitable for him taking into account his knowledge and experience, his financial situation and his investment objectives. A higher risk profile is likely to require more frequent updating than a lower risk profile.

Certain events might also trigger an updating process; this could be so, for example, for clients reaching the age of retirement.'

G.4.4.23 Updating may, be carried out during periodic meetings with Clients or by sending an updating questionnaire to Clients. Relevant actions might include changing the Client's profile based on the updated information collected.'

<u>Version of the COB Rulebook 'Last Revised: 2nd April 2019'</u>:

'G.4.4.52 Frequency of updating might vary depending on, for example, Clients' risk profiles and taking into account the type of Financial Instrument recommended. Based on the information collected about a Client under the suitability requirements, a Regulated Person will often determine the Client's risk profile, i.e. what type of Services or Financial Instruments can in general be suitable for him taking into account his knowledge and experience, his financial situation (including his ability to bear losses) and his investment objectives (including his risk tolerance). For instance, a risk profile giving to the Client access to a wider range of riskier Financial Instruments is an element that is likely to require more frequent updating. Certain events might also trigger

an updating process; this could be so, for example, for Clients reaching the age of retirement.

G.4.4.53 Updating may, be carried out during periodic meetings with Clients or by sending an updating questionnaire to Clients. Relevant actions might include changing the Client's profile based on the updated information collected.'

i) Statement of suitability

The COB Rules includes various requirements with respect to the provision of a suitability statement. In the case in question, the documents presented, which may be considered relevant to the suitability statement, are the Investment Report dated 21 May 2018, the Market Order Forms (which included a tick-box 'Suitability Test'*) and also the exchange of emails between CCISL's advisors and the Complainant.*

The Arbiter has not convincingly seen a proper statement on suitability describing how the investment advice provided by CCISL met the preferences, objectives and other characteristics of the Complainant. Considering all the evidence submitted, the Service Provider did not prove that it had adequately adhered with the relevant provisions of the COB Rulebook, e.g.:

'... When providing Advice, the Regulated Person shall, before the transaction is made or prior to the conclusion of the contract, provide the retail Client with a statement on suitability in a durable medium specifying the advice given and how that Advice meets the preferences, objectives and other characteristics of that Client. ...' *(fn. 97 R.1.4.19 in both the first version of the Rulebook issued 20 December 2017 and the version of the Rulebook* 'Last Revised: 2nd April 2019'*. See also R.4.3.15 (2017 version); R.1.4.18(c) (2019 Version);*

Other relevant provisions reflected exactly (apart from numbering) in the COB Rulebook issued 20 December 2017 and the COB Rulebook 'Last Revised: 2nd April 2019'*:*

'The suitability statement shall, as a minimum:

...

c. explain why the Regulated Person has concluded that the recommended transaction is suitable for the Client, including how it meets the Client's objectives and personal circumstances with reference to the investment term required, Client's knowledge and experience and client's attitude to risk and capacity for loss. ...' *(fn. 98 R.1.4.19 in both the first version of the Rulebook issued 20 December 2017 and the version of the Rulebook* 'Last Revised: 2nd April 2019'. *See also R.4.3.15 (2017 version); R.1.4.18(c) (2019 Version);*

'A Regulated Person is required to record all relevant information about the suitability assessment, such as information about the Client (including how that information is used and interpreted to define the Client's risk profile), and information about the Products [Financial Instruments] recommended to the Client or purchased on the client's behalf. Those records should include:

a) Any changes made by the Regulated Person regarding the suitability assessment, in particular any change to the Client's investment risk profile;

b) The types of Products [Financial Instruments] that fit that profile and the rationale for such an assessment, as well as any changes and the reasons for them.' (fn. 99 R.4.4.31 in the first version of the Rulebook issued 20 December 2017 and in R.4.4.42 in the version of the Rulebook 'Last Revised: 2nd April 2019'.)

'The Regulated Person should retain copies of:

...

b) All suitability statements provided to Clients in terms of these Rules. ...' (fn. 100 R.4.4.34(b) in the first version of the Rulebook issued 20 December 2017 and in R.4.4.45 (b) in the version of the Rulebook 'Last Revised: 2nd April 2019'.

Neither have any adequate periodic assessments emerged as per the following provisions of the COB Rulebook:

'Where a Regulated Person provides a Service that involves periodic suitabilty assessements and reports, the subsequent reports after the initial Service is established may only cover changes in the Services or Financial Instruments invovled and/or the circmstnaces of the Client and may not need to repeat all the details of the first report.' *(fn. 101 R.4.4.28 in the first version of the Rulebook issued 20 December 2017 and in R.4.4.39 in the version of the Rulebook 'Last Revised: 2nd April 2019')*

'A Regulated Person providing a periodic assessment of the suitability of the recommendations provided pursuant to R.[...] shall disclose all of the following:

a) The frequency and extent of the periodic suitability assessment and where relevant, the conditions that trigger that assessment;

b) The extent to which the information preiviosusly collected will be subject to reassessment;

c) The way in which an updated recommendation will be communicated to the Client.' (fn. 102 R.4.4.29 in the first version of the Rulebook issued 20 December 2017 and in R.4.4.40 in the version of the Rulebook 'Last Revised: 2nd April 2019'.)

'Regulated Persons providing a periodic suitability assessment shall review, in order to enhance the Service, the suitability of the recommendations given at least annually.

The frequency of this assessment shall be increased depending on the risk profile of the Client and the type of Product [Financial Instrument] recommended.' *(fn. 103 R.4.4.30 in the first version of the Rulebook issued 20 December 2017 and in R.4.4.40 in the version of the Rulebook 'Last Revised: 2nd April 2019'.)*

Despite that it is up to the Service Provider to determine how to undertake the statement of suitability, it is provided in the COB Rulebook that, **'The format used should however enable a posteriori controls to check if the information was provided'** *(fn. 104 R.4.4.30 in the first version of the Rulebook issued 20 December 2017 and in R.4.4.40 in the version of the Rulebook* 'Last Revised: 2nd April 2019'.*)* ***and adequate record-keeping arrangements should be in place to clearly demonstrate the quality of the suitability process as also indicated in the COB Rulebook.*** *(fn. 105 See also G 4.4.32 (2017 Version); G.4.4.66 (2019 Version))*

As also indicated in the COB Rulebook, a **'tick-box'** ***approach*** **'should not be used either ... to assess suitability'.** *(fn. 106 G.4.4.41 in the first version of the Rulebook issued 20 December 2017 and in G.4.4.75 in the version of the Rulebook 'Last Revised: 2nd April 2019')* ***Furthermore,*** **'a Regulated Person needs to be able to demonstrate how any recommendation or transaction is suitable for a particular Client given each of the constituent parts of the suitability assessment', as per the provisions of the COB Rulebook.** (fn. *107* G.4.4.41 in the first version of the Rulebook issued 20 December 2017 and in G.4.4.75 in the version of the Rulebook *'Last Revised: 2nd April 2019')*

The Arbiter considers that the Service Provider did not prove that it adhered to such requirements and to satisfy the required statement of suitability.

Concluding remarks

Whilst the Complainant is a well-read person, as can be evidenced from his exchange of communications with CCISL and the publicly available articles authored by him, and was financially stable, the Arbiter however considers that this still does not justify the high individual as well as collective exposure to non-investment grade instruments that

was in the first place recommended by CCISL to the Complainant taking into consideration his circumstances, objectives and risk profile as outlined above.

As clearly emerging from the COB Rules, there are onerous obligations on an investment service provider to properly assess and document inter alia the risk a client is willing to take and his investment objective. The onus on the investment service provider is quite high in this regard and such a provider should be able to clearly and unequivocally demonstrate that such obligations have been properly undertaken.

As clearly stated above in this decision, the Arbiter considers that the Service Provider did not meet the relevant obligations emanating from the COB Rulebook. This is particularly so with respect to the aspects involving the Complainant's **'investment objectives including risk tolerance'.**

Accordingly, and for the various reasons amply explained above, the Arbiter considers that the investments recommended by CCISL were not suitable for the Complainant in his circumstances, primarily, given that the recommended portfolio did not meet and reflect his objectives and risk tolerance.

The Arbiter accordingly considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case and is <u>partially</u> accepting it in so far as it is compatible with this decision and as explained below.

Compensation

The Arbiter notes that two of the three disputed investments have ultimately not resulted in a net loss when taking into consideration the dividends received as indicated in Table C above. Hence, the Arbiter is not accepting the Complainant's request for compensation in respect of the* 7.5% Garfunkelux 01/08/22 *bond and the* 6.5% CMA CGM 2019/2022 *bond.

With respect to the compensation in respect of the 6.5% Lecta 2019/2023 bond, the Arbiter considers the compensation arrangement described below to be a fair, equitable and reasonable compensation taking into consideration the particular circumstances of this Case:

The Service Provider is to pay the Complainant the amount resulting from the following calculation:

- ***From the settlement value of EUR103,188.61 (which was incurred in respect of the purchase of the 6.5% Lecta 2019/2023 bond), it is to be deducted the net income received from the said bond throughout its holding period as well as the amount of any net profit (inclusive of dividends and any realised currency gains/***

losses) resulting on the overall portfolio of remaining investments that were made on an investment advisory basis.

The amount so remaining shall be the amount of compensation.
In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Calamatta Cuschieri Investment Services Limited to pay the indicated amount of compensation to the Complainant.

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

Since the Arbiter has partially upheld this complaint, each party is to bear its own costs of these proceedings".

L-Appell u l-Appell Inċidentali

6. Is-soċjetà intimata ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fid-29 ta' Novembru, 2021 intavolat appell fejn qegħda titlob lil din il-Qorti sabiex:

"*1. Tħassar u tirrevoka d-Deċiżjoni appellata mogħtija mill-Arbitru għas-Servizzji Finanzjarji fil-każ numru 007/2020 fl-ismijiet premessi prevja kull ordni li din l-istess Qorti jidhrilha xieraq u opportun, tilqa' l-aggravji tal-appellanti u tiċħad it-talbiet tal-appellat; u*

2. Fl-alternattiv u biss jekk din l-Onorabbli Qorti ma tilqax l-ewwel talba, f'każ li din il-Qorti tiddeċiedi li l-appellat xorta jistħoqqlu riżarċiment, tirriforma l-istess Deċiżjoni tal-Arbitru billi tordna li filwaqt li l-appellat għandu jingħata riżarċiment, minn tali riżarċiment li jrid jiġi hekk likwidat irid jitnaqqas il-valur ta' 43% fuq il-valur nominali tal-investiment (ekwivalenti għal EUR 43,000), in kwantu ċertament kieku l-appellat Brewster imminimizza d-danni kif kien obbligat fil-liġi li hekk jagħmel billi jbiegħ u jillikwida l-investiment dakinhar, kien ċertament mill-anqas jiġbor dak l-ammont u għal dawk il-43% tal-valur huwa esklussivament l-appellat li huwa responsabbli u ħadd aktar, irrispettivament mill-mertu tal-appell dwar l-idoneità tiegħu għall-investiment magħmul.

Bl-ispejjeż taż-żewġ istanzi kontra l-appellat."

Tgħid li l-aggravji tagħha huma dawn: (a) l-Arbitru għażel li ma jieħux in konsiderazzjoni l-prinċipju tal-mitigazzjoni tad-danni; (b) l-Arbitru għażel li jinjora għal kollox ir-retroxena tal-investiment; u (ċ) la ma kienx irriżulta li t-telf lamentat mir-rikorrent kien konsegwenza ta' xi komportament negliġenti u/jew aġir abużiv jew ta' *misselling,* u lanqas ta' xi komportament ieħor, hemm nuqqas ta' ness bejn it-telf lamentat mir-rikorrent u l-kawża għal dan it-telf attribwibbli lis-soċjetà intimata.

7. Ir-rikorrent wieġeb fil-21 ta' Diċembru, 2021, fejn issottometta li dik il-parti tad-deċiżjoni appellata fejn l-Arbitru laqa' il-mertu tal-ilment, hija waħda ġusta fil-fatt u fid-dritt, u timmerita konferma, iżda huwa mhux qed jaqbel mal-mod kif ingħata l-kumpens meta ġie deċiż li jitnaqqas kwalunkwe imgħax li kien hemm fuq il-*Lecta,* u anki fuq investiment oħra. Jgħid li ma kienx qed jaqbel ukoll li kull parti kellha tħallas l-ispejjeż tagħha. Għalhekk jiddikjara li huwa qed jipprevalixxi ruħhu mill-appell prinċipali sabiex jintavola appell inċidentali mid-deċiżjoni appellata fejn jippreżenta tliet aggravji, tnejn minnhom fir-rigward tal-komputazzjoni tal-kumpens, u l-aħħar wieħed dwar il-kap tal-ispejjeż deċiż mill-Arbitru.

8. Is-soċjetà intimata wieġbet fil-11 ta' Jannar, 2022 fejn issottomettiet li l-appell inċidentali mressaq mir-rikorrent ma kellux jintlaqa', iżda kellu minflok jintlaqa' l-appell prinċipali tagħha.

Konsiderazzjonijiet ta' din il-Qorti

9. 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 tar-risposti tagħhom stess.

10. Wara li s-soċjetà intimata spjegat l-isfond tal-każ odjern, hija telenka t-tliet aggravji tagħha. *L-ewwel aggravju* jirrigwarda l-allegat nuqqas min-naħa tal-Arbitru li jikkunsidra l-prinċipju tal-mitigazzjoni tad-danni. Tikkontendi li wieħed ma jistax juża n-nuqqas tiegħu sabiex jirreklama danni li setgħu jiġu evitati minnu. Is-soċjetà intimata tispjega li r-rikorrent kien ingħata parir minnha bħala *advisory* permezz ta' *email* tas-26 ta' Settembru, 2019[1], li jkun aħjar li jbiegħ l-investiment fil-Lecta sabiex ma jitlifx iktar flus. Madankollu r-rikorrent għażel li ma jbiegħx, u eventwalment sofra telf ferm ikbar, u għalhekk m'hemmx lok għal riżarċiment. Tgħid li dan huwa skont il-prinċipju li d-danneġġjat għandu d-dmir li jagħmel dak li huwa raġonevoli sabiex inaqqas il-ħsara, u ma jistax konsegwentement jirreklama danni riżultanti min-negliġenza tiegħu. Dan filwaqt li hija tagħmel riferiment għal diversi sentenzi tal-Qrati tagħna. *It-tieni aggravju* tas-soċjetà intimata huwa li l-Arbitru skont hi, kompletament warrab ir-retroxena tal-investiment, biex b'hekk wasal għall-konklużjoni żbaljata li dan ma kienx idoneju, u l-preżunt *misselling* kien il-kawża tat-telf allegat. Filwaqt li tirrileva dak li qal l-Arbitru dwar l-oġġettivi li xtaq jilħaq ir-rikorrent permezz tal-investiment tiegħu, u anki li hija permezz tat-tweġiba, sottomissjonijiet u xhieda u provi tagħha, saħansitra wriet kif dawn l-istess oġġettivi u r-rekwiżiti l-oħra

[1] Dok. CC16.

regolatorji, ġew sodisfatti. Iżda din il-Qorti tgħid li l-Arbitru la qies it-tweġiba tagħha u lanqas in-nota ta' sottomissjonijiet tagħha. Is-soċjetà intimata tgħid li l-Arbitru fid-deċiżjoni appellata, elenka r-rekwiżiti li għandhom jiġu sodisfatti minn investituri prospettivi sabiex huma jkunu eliġibbli biex jinvestu f'ċerti prodotti. Filwaqt li tagħmel riferiment għal dan bħala s-*"Suitability Assessment"*, tgħid li fejn meħtieġ ir-rappreżentant tagħha kien eżegwih. Is-soċjetà intimata filwaqt li tgħid li dan huwa kunċett regolatorju, tispjega dak li jirrikjedi. Issostni li meħud in konsiderazzjoni li r-rikorrent huwa bniedem edukat u "well-versed", u anki kien f'xi żmien qabel investa tramite intermedjarji oħrajn, u kellu l-kapaċità li jifhem u li jagħraf l-element ta' riskju fis-swieq finanzjarji. Dwar il-profil tar-riskju tiegħu, tirrileva li huwa kien iddikjara fl-affidavit tiegħu li dan kien ta' *15% fluctuations in capital threshold.* Is-soċjetà intimata tinsisti li ġaladarba r-rikorrent kellu ħafna assi oħrajn u l-*Lecta* kien jaqbel mal-oġġettivi finanzjarji tiegħu, dan kien jinkwadra fl-apptit għar-riskju tiegħu. Is-soċjetà intimata tirrileva li kien proprju r-rikorrent li kien qal li huwa xtaq introjtu ogħla, u li xtaq jinvesti fil-*Lecta* hekk kif ir-rappreżentant tagħha poġġielu quddiemu għażla ta' investimenti b'esklużjoni tal-*Lecta.* Is-soċjetà intimata tgħid li madankollu l-Arbitru mingħajr ma ndika x'kien ikun "biżżejjed" sabiex jintleħaq l-oġġettiv li jitnaqqas ir-riskju, qal li *"whilst the Complainant's objective was not 'a low risk/low return strategy, it was, however neither a 'high risk strategy' but rather a 'moderate risk' where he was 'willing to accept fluctuations of capital of around 15% as dislcosed in the Investment Report".* Din il-Qorti tgħid ukoll li l-Arbitru skarta l-fatt li kien ir-rikorrent li ried l-investiment fil-*Lecta,* u għalhekk kien hu li ħa r-responsabbiltà għat-telf jew il-gwadann tal-għażla tiegħu. Tikkontendi li skont il-provi, kien jirriżulta li hija

kienet għamlet dak kollu meħtieġ skont il-liġi applikabbli, u hawn hija tagħmel riferiment għall-affidavit ta' David Calleja. Is-soċjetà intimata tkompli billi ssostni li l-Arbitru mbagħad naqas milli jikkonsidra u jagħti d-debitu piż lill-fatt li r-rikorrent kellu ċertu għarfien dwar kif jaħdmu l-investimenti, u ma kinitx l-ewwel darba li huwa kien investa f'prodotti finanzjarji ferm iktar riskjużi mill-investiment in kwistjoni. Tgħid li l-Arbitru naqas ukoll milli jieħu in konsiderazzjoni l-fatt li l-investiment kien jagħmel parti minn portafoll sħiħ. *It-tielet aggravju* tas-soċjetà intimata huwa li ma kienx hemm ness bejn it-telf allegatament imġarrab u l-kawża allegatament attribwibbli lill-aġir tagħha. Is-soċjetà intimata tgħid li hija ma taħti xejn għall-imsemmi telf, li ma kellux ukoll x'jaqsam man-natura jew il-livell tar-riskju tal-investiment skont it-tagħrif eżistenti fil-ħin li r-rikorrent kien akkwista l-investiment. Tgħid li t-telf ma seta' qatt jiġi previst minnha, kif ukoll ma kienx previst mir-regolaturi. Għalhekk ukoll jekk ir-rikorrent ġarrab telf, dan mhux neċessarjament u awtomatikament kien ifisser li hija kienet responsabbli, altrimenti dan kien ipoġġi r-rikorrent f'pożizzjoni fejn huwa għandu garanzija assoluta li l-qligħ huwa tiegħu, iżda t-telf huwa tal-provditur tas-servizz, sitwazzjoni li kienet fatali għall-industrija finanzjarja. Tikkontendi li fl-imsemmija industrija wieħed jista' isofri telf mingħajr ma jkun responsabbli għalih il-provditur tas-servizz bħal fil-każ tal-eżempju klassiku ta' *downturn* fis-swieq kapitali. Tgħid li fil-każ odjern, dawn it-tip ta' *bonds* kienu mfassla għal investituri bi profil ta' riskju moderat u b'portafoll diversifikat, u dan kien jidher ċar mill-fatt li l-Arbitru ċaħad it-talba għal kumpens fuq *Garfunkelux* u *CMA/CGM*. Is-soċjetà intimata tgħid li wara kollox l-obbligu li jiġi ppruvat in-ness sħiħ ta' kawża u effett jaqa' fuq ir-rikorrent, iżda fil-każ odjern dan ma seħħx, tant hu hekk ma kienx ekwitabbli jew

raġonevoli li r-rikorrent jibbenifika għas-skapitu tagħha. Fl-aħħarnett tirrileva li l-ammont li għandu jitħallas lir-rikorrent lanqas jista' jiġi determinat, għaliex minħabba d-deċiżjonijiet tiegħu il-*bonds* ma jistgħux jinfdew, u għalhekk il-valur ma jistax jiġi determinat.

11. Wara li r-rikorrent spjega l-fatti relattivi għall-każ odjern, jirrileva li t-tliet aggravji tas-soċjetà intimata fil-fatt huma aggravju wieħed, jiġifieri li l-Arbitru naqas li jagħmel apprezzament tajjeb tal-fatti u tal-provi mertu tal-każ odjern. Dwar *l-ewwel aggravju*, ir-rikorrent jirrileva li in kontro-eżami huwa kien ċaħad kategorikament li huwa qatt irċieva rakkomandazzjoni sabiex ibiegħ il-*Lecta* qabel ir-ristrutturar tal-kumpannija. Barra minn hekk kif dejjem insista, huwa kien ġie assigurat mill-ewwel konsulent tiegħu David Calleja, meta dan tah il-pariri sabiex jixtri l-*bonds* inklużi l-*Lecta,* li *"... [at] a certain point a bond will always get redeemed at a hundred and that was the explanation".* Huwa wkoll jikkontesta l-mod, jiġifieri permezz ta' *email,* kif ingħata parir sabiex ibiegħ mingħand Calvin Caruana Triccas, u jikkontendi li d-disposizzjonijiet tal-MiFID II dwar *Statement of Suitability,* huma applikabbli għal kull meta konsulent jagħti l-parir tiegħu kemm ta' bejgħ, kif wkoll ta' xiri. Jirrileva li huwa kien diġà ressaq dawn in-nuqqasijiet serji permezz tal-ilment tiegħu u anki fin-nota ta' sottomissjonijiet tiegħu, u l-Arbitru kien qabel għal kollox miegħu. Imbagħad dwar ir-ristrutturar stess, ir-rikorrent jgħid li huwa minnu li huwa rċieva *email* mingħand CCISL fis-16 ta' Jannar, 2020 fejn il-*bond holders* kienu ntalbu sabiex jivvutaw, iżda *"I did not receive any advice from Calamatta Cuschieri as to how I should vote or otherwise. I did not take any action as I was at a loss as to what*

was in my best interest". Dan kollu jgħid li l-Arbitru ħadu in konsiderazzjoni, filwaqt li ċaħad dak li kienet qegħda tipproponi s-soċjetà intimata.

Dwar *it-tieni aggravju*, ir-rikorrent jibda billi jikkontradixxi dak li qalet is-soċjetà intimata meta nsistiet li *"l-investiment huwa addattat għar-risk profile tal-investitur li f'dan il-każ kien Moderate Risk u High Return".* Jissottometti li dak li qal proprju l-Arbitru kien *"the Arbiter notes that whilst the Complainant's objective was not 'a low risk/low return strategy' it was, however, neither a high-risk strategy but rather one of 'moderate risk'...".* Ikkonferma li l-oġġettivi tiegħu għall-investiment kienu hekk kif imfissra mis-soċjetà intimata stess fl-*Investment Proposal* tagħha tal-21 ta' Mejju, 2018, u jikkontendi li l-fatt li huwa xtaq li l-investimenti jrendu iktar minn 1% li kien il-massimu tal-imgħax mogħti fuq depożiti bankarji, ċertament ma setax jinftiehem li huwa ried dħul għoli. Jgħid li kuntrarjament għal dak allegat mis-soċjetà intimata, l-Arbitru spjega sew fid-deċiżjoni appellata l-motivazzjonijiet tiegħu, anki fejn ikkonsidra t-tliet kriterji fundamentali biex wieħed jasal sabiex jistabbilixxi jekk strument finanzjarju huwiex adattat għal klijent jew le, u dan fid-dawl ta' dak li jipprovdi għalih il-MiFID II, kif traspost f'R.4.4.21 u R.4.4.30 tal-*Conduct of Business Rulebook* applikabbli għall-vertenza odjerna. Filwaqt li jagħmel riferiment għal żewġ sentenzi ta' din il-Qorti, kif diversament ippreseduta, jirrileva li n-nuqqas ta' tagħrif u ta' esperjenza f'dak li jirrigwarda *debt securities,* jiġifieri dawk ta' *investment grade bonds,* u wisq inqas ta' kwalità inferjuri *high yield non-investment grade bonds* jew *junk bonds,* kien indikat fuq l-*Opening of Account Form.* Jikkontendi li għalkemm skont is-soċjetà intimata huwa kien bniedem ta' skola speċjalizzat fir-relazzjonijiet pubbliċi u fil-produzzjoni ta' dokumentarji televiżivi, dan ma kienx ifisser li huwa kellu għarfien dwar *debt securities.* Jgħid

li l-investimenti l-oħra fl-Afrika t'Isfel kienu delegati lil *managers* tal-investimenti professjonali fuq mandat diskrezzjonarju, iżda ma kellhom l-ebda element ta' *bonds.*

Dwar *it-tielet aggravju*, ir-rikorrent jgħid li l-fatti jindikaw il-kuntrarju, u ma kienu jħallu l-ebda dubju. Jgħid li għalkemm ir-rakkomandazzjoni tas-soċjetà intimata kienet sabiex huwa jinvesti 62.5% f'*bonds* inqas riskjużi u 37.5% f'*bonds* ferm aktar riskjużi, hija kienet investiet b'mod tassew differenti, tant li l-perċentwali tal-investimenti rakkomandati nqalbu. Għalhekk, ma kien hemm l-ebda sorpriża dwar it-telf imġarrab. Jikkontendi li anki il-parir tal-bidu ma kienx wieħed idoneu għal investitur li kien għamilha ċara li huwa kien ser ikollu bżonn il-flus fi żmien tmintax-il xahar. Ir-rikorrent spjega kif fil-fatt saru l-investimenti, fejn tnejn mill-*bonds* ikkwotati fuq il-Borża ta' Malta, jiġifieri *Von der Heyden 4.4% 2024* u *SP Finance 4%2029,* kienu *unsecured* u bla ebda *credit rating.* Isostni li kien proprju b'xorti tajba li ma sar l-ebda telf minn fuq dawn l-investimenti. Irrileva li filwaqt li l-ewwel *bond* kellu sitt snin oħra fid-data li nxtara qabel ma kien ser jimmatura, it-tieni wieħed kien saħansitra baqgħalu ħdax-il sena, u dan kuntrarjament għal dak indikat minnu bħala *investment time horizon* ta' massimu ta' tmintax-il xahar. Ir-rikorrent ikompli jirrileva li għalkemm l-intenzjoni kienet li fl-ewwel *bond* jiġi nvestit €50,000, fil-fatt ġiet investita s-somma ta' €100,000, u dan filwaqt li t-tieni *bond* ma kienx issemma fil-pjan oriġinali. Jirrileva mbagħad li erbgħa mis-seba' *bonds* li fihom sar l-investiment, li kienu *Von der Heyden, Lecta, Garfunkelux* u *CMA CGM*, kellhom valur ta' iktar minn €100,000 kull wieħed, kienu kollha mhux garantiti jew mingħajr *credit rating* jew b'*credit rating* li kienet ndikata bħala *speculative non-investment grade bonds.* Il-*misselling* hawn però irriżulta f'telf qawwi ferm fi

tlieta mill-erba' *bonds,* u li huma mertu tal-każ odjern, liema telf sar qabel ma tfaċċat il-COVID. Ir-rikorrent jallega li dan it-telf kien biss riżultat tan-negliġenza u tan-nuqqas ta' prudenza tas-soċjetà intimata stante li l-objettivi tiegħu kienu li l-kapital jibqa' ma jintmessx, u li huwa seta' joħroġ mill-investimenti fi żmien massimu ta' tmintax-il xahar bla telf. Ir-rikorrent spjega l-*credit ratings* li kellhom il-*Lecta,* il-*Garfunkelux* u l-*CMA/CGM* fiż-żmien li dawn inxtraw, u sussegwentement meta ġew *downgraded.* Huwa jikkontendi li fil-fatt kienu biss żewġ *bonds* li kienu addattati b'xi mod għaċ-ċirkostanzi personali, l-oġġettivi u l-preferenzi tiegħu, jiġifieri l-*Ford* u l-*Apple.* Ir-rikorrent jagħmel riferiment għal dak li qal l-Arbitru dwar in-nuqqas ta' kontestazzjoni da parti tas-soċjetà intimata fir-rigward tal-fatt li l-prodotti li ma kienux ta' *investment grade,* li ma kienux garantiti u li kellhom *rating* tassew baxx, u dan filwaqt li jirrileva li l-istess Arbitru fid-deċiżjoni appellata, jelenka l-ksur tar-Regoli applikabbli skont il-*Conduct of Business Rulebook* li kienet ħarġet l-MFSA f'Diċembru 2017. Imbagħad ir-rikorrent, filwaqt li jagħmel riferiment għall-kontestazzjoni tas-soċjetà intimata dwar ir-raġuni tat-telf, jikkontendi li għalkemm wieħed jista' jallega li t-telf kien riżultat ta' falliment jew malamministrazzjoni fil-livell tas-soċjetà emittriċi, dan ma kienx ifisser li s-soċjetà intimata ma kinitx responsabbli għall-imsemmi telf riżultanti. Jagħlaq is-sottomissjonijiet tiegħu billi filwaqt li jirrileva l-prinċipju li għajr għal ċirkostanzi eċċezzjonali, qorti ta' reviżjoni m'għandhiex tiddisturba l-apprezzament magħmul minn qorti tal-ewwel grad, isostni li fil-każ odjern ċertament ma jeżistux raġunijiet gravi u eċċezzjonali li jistgħu jwasslu sabiex jingħad li l-Arbitru kien manifestament żbaljat fl-apprezzament li għamel tal-fatti u tad-dritt.

12. *L-appell inċidentali* tar-rikorrent jolqot il-kwistjoni tal-likwidazzjoni tal-kumpens dovut lilu kif ikkalkolat mill-Arbitru fid-deċiżjoni appellata. Jgħid li *l-ewwel aggravju* tiegħu huwa li l-Arbitru ma kienx laqa' it-talba tiegħu għall-kumpens tat-telf fuq il-kapital ta' €3,430 fuq is-*CMA CGM* u ta' €9,300 fuq il-*Garfunkelux,* għaliex skont l-Arbitru huwa kien irċieva biżżejjed imgħax li kien ikopri l-kapital. Jgħid li *t-tieni aggravju* tiegħu huwa fir-rigward ta' dak li ġie deċiż mill-Arbitru dwar it-tnaqqis li kellu jsir mit-telf kapitali soffert fuq il-*Lecta.* Dwar dawn l-ewwel żewġ aggravji, ir-rikorrent jagħmel riferiment għal żewġ sentenzi ta' din il-Qorti, kif diversament ippreseduta, in sostenn tal-argument tiegħu li m'għandux jitnaqqas ukoll l-imgħax jew qliegħ ieħor fuq investimenti oħra fl-istess portafoll fil-kalkolazzjoni ta' dak li huwa dovut lilu għat-telf ta' kapital. Huwa jagħmel riferiment wkoll għall-artikolu 31 tal-Kap. 331 u għall-artikolu 1124A tal-Kodiċi Ċivili in sostenn tal-argument tiegħu. *It-tielet aggravju* tar-rikorrent jirrigwarda l-mod kif l-Arbitru ddeċieda l-kap tal-ispejjeż, għaliex skont hu l-proporzjon bejn il-kumpens ta' dak li ngħata u ta' dak li ntalab mhux 50% / 50%, iżda t-talba tiegħu ntlaqgħet fil-perċentwal ta' 80%. Barra minhekk jekk jittieħed in konsiderazzjoni l-imgħax u xi qligħ żgħir fuq l-investimenti kollha skont id-deċiżjoni tal-Arbitru, il-perċentwal jinżel biss għal 71.33% tat-talba, u għalhekk fl-agħar ipoteżi l-ispejjeż kellhom jintlaqgħu fil-perċentwali ta' 70% / 30%.

Is-soċjetà intimata min-naħa tagħha tittratta l-ewwel żewġ aggravji flimkien, u ssostni li ġaladarba ma rriżulta l-ebda telf, l-Arbitru kien korrett *ai termini* tas-subinċiż (iv) tal-para. (c) tas-subartikolu 26(3) tal-Kap. 555. Tikkontendi li l-każ iċċitat mir-rikorrent kellu ċirkostanzi ferm differenti minn dawk tal-każ odjern, fejn issostni li r-rikorrent huwa investitur ta' ċerta esperjenza u għarfien fil-

qasam finanzjarju, fejn ukoll kien jikteb fuq l-ekonomija ta' Malta, kif innota wkoll l-Arbitru fid-deċiżjoni appellata. Is-soċjetà intimata tagħmel riferiment għal deċiżjoni tal-Ombudsman għas-Servizzi Finanzjarji tal-Ingilterra, u tiċċita estensivament mill-istess deċiżjoni, filwaqt li tagħmel diversi sottomissjonijiet oħra sabiex tissostanzja d-difiża tagħha li hija kienet segwiet il-kriterji kollha mfissra fil-*COB Rulebook* u dawk dwar l-idoneità tal-investiment. Tikkontendi li kien ir-rikorrent li għażel li jinvesti b'mod li jkollu ntrojtu għoli, u dan minkejja t-twissijiet tagħha. Is-soċjetà intimata ssostni li hekk kif investitur jagħżel li ma jieħux il-parir tal-konsulent tiegħu, ir-relazzjoni ta' bejniethom tinbidel għal waħda ta' *non-advisory,* u l-providtur tas-servizz ma jista' jagħmel xejn għajr li jsegwi l-istruzzjonijiet tal-investitur. Dwar it-tieni aggravju, is-soċjetà intimata tagħmel riferiment għas-sottomissjonijiet magħmula minnha fir-rikors tal-appell prinċipali, u mingħajr preġudizzju għalihom tagħmel riferiment għal deċiżjoni tal-Arbitru tal-15 ta' Diċembru, 2020 fl-ismijiet **YD *vs.* Jesmond Mizzi Financial Advisors Limited**. Tikkontendi li l-każ l-ieħor iċċitat mir-rikorrent fl-appell inċidentali tiegħu fl-ismijiet **Carmel u Nicholina Bartolo *vs.* Crystal Finance Investments Limited,** ukoll kien jippreżenta ċirkostanzi differenti, u għalhekk ir-riferiment ma kellu l-ebda rilevanza għall-każ odjern. Għal dak li jirrigwarda t-tielet aggravju, is-soċjetà intimata tgħid li dan huwa wieħed irritwali u tagħmel riferiment għall-artikolu 223 tal-Kap. 12 in sostenn tal-pożizzjoni tagħha.

13. Il-Qorti għandha mill-ewwel tgħid li d-deċiżjoni appellata hija waħda tajba u ġusta, salv għal dak li ser jingħad dwar il-kap tal-ispejjeż, u li hija tikkondividi pjenament il-ħsibijiet tal-Arbitru, kif issa ser tgħaddi biex tfisser u tikkonsidra.

Wara li l-Arbitru beda bis-solita dikjarazzjoni li huwa ser jiddeċiedi l-ilment quddiemu skont dak li fil-fehma tiegħu huwa ġust, ekwu u raġonevoli fiċ-ċirkostanzi partikolari tal-każ, meħudin in konsiderazzjoni l-merti sostantivi tiegħu, huwa ppreżenta fil-qosor il-fatti tal-każ odjern li kienu jolqtu ċ-ċirkostanzi partikolari tar-rikorrent kif dawn kienu jirriżultaw mill-*Opening of Account Form* imħejjija mis-soċjetà intimata, fejn il-Qorti qegħda tieħu in konsiderazzjoni l-qasam tal-għarfien tiegħu u anki l-qagħda finanzjarja tiegħu. Imbagħad l-Arbitru għadda sabiex ikkonstata l-objettivi tar-rikorrent fir-rigward tal-investiment li huwa xtaq jagħmel, u dan għal darb'oħra skont l-*Opening of Account Form*[2]*,* fejn ġie indikat li r-rikorrent xtaq li jkollu qligħ mill-investiment li kien ser jagħmel, u l-profil tar-riskju tiegħu ġie ndikat bħala wieħed moderat fejn xtaq jinvesti sa massimu ta' ħames snin. L-Arbitru osserva wkoll li mill-*Investment Proposal* kien jirriżulta li l-għan tar-rikorrent kien sabiex jinvesti s-somma ta' €450,000 depożitata mal-BOV, u meħud in konsiderazzjoni l-qagħda tal-imgħaxijiet, din tiġi investita aħjar sakemm ikollu bżonnha madwar tmintax-il xahar wara għal ammeljoramenti fil-proprjetà tiegħu hawn Malta. Imbagħad l-Arbitru osserva li r-rakkommandazzjoni tal-konsulent finanzjarju tas-soċjetà intimata, kienet fost affarijiet oħra li *"I would usually recommend that you retain the funds in cash deposits, as there is no investment I can offer you that would guarantee any return".* Kompla josserva li l-konsulent finanzjarju madankollu xorta waħda offra portafoll ta' investimenti, iżda enfasizza li stante l-limitazzjoni tat-terminu mpoġġija mir-rikorrent għal dawn l-investimenti, ġew eskluži mill-portafoll skemi ta' investiment kollettiv, b'mod li kien hemm inqas diversifikazzjoni tal-investimenti. Il-Qorti hawn ma tistax toqgħod lura milli

[2] *A fol.* 15 *et seq.*

tosserva li l-konsulent finanzjarju kien diġà f'dan l-istadju kif huwa stess iddikjara, daħal f'xena li kienet tmur lil hinn mis-solita rakkomandazzjoni tiegħu, u ċertament dan kien jirrikjedi kawtela u attenzjoni.

14. L-Arbitru nnota li l-istess konsulent finanzjarju ndika li l-ftehim mar-rikorrent kien li jiġi eskluż l-investiment fl-ekwitajiet, minħabba l-valuri volatili tagħhom, sabiex b'hekk ir-rakkommandazzjoni tiegħu kienet għal *"...a portfolio of individual, investment grade and high yield bonds".*

15. Imbagħad l-Arbitru għadda sabiex investiga t-tranżazzjonijiet tal-investimenti li saru matul ir-relazzjoni li r-rikorrent kellu mas-soċjetà intimata, u dan skont il-parir mogħti lilu. Iddeskriva l-andament tal-investimenti mertu tal-ilment, jiġifieri l-*Garfunkelux,* il-*Lecta* u s-*CMA CGM,* u għamel diversi konstatazzjonijiet fir-rigward tal-*Lecta* li ma kienx għadu ġie mifdi, stante li kif kitbet is-soċjetà intimata fl-*email* tagħha tat-30 ta' Ġunju, 2020, *"this instrument has been restructured as per our previous correspondence dated 16/01/2020 hence it can no longer be sold on the market"*[3]*,* u *"there is still the option for clients to elect to restructure and be given the new notes"*[4]*,* fejn *'your holdings will be locked under the lock up agreement scheme as per the announcement'*.[5] Dan kollu wara li s-soċjetà intimata kienet tat rakkomandazzjoni għall-bejgħ ta' dan l-investiment, u hawn l-Arbitru jagħmel riferiment għall-affidavit tar-rappreżentant tas-soċjetà intimata[6], filwaqt li juri l-andament tal-imsemmi

[3] *A fol.* 162 u 159.
[4] *A fol.* 162.
[5] Ibid.
[6] *A fol.* 179.

investiment skont kif dan jirriżulta mill-*Portfolio Valuation Statements* maħruġa fid-dati ndikati.

16. L-Arbitru hawn għadda sabiex jagħmel evalwazzjoni tal-idoneità tar-rikorrent fid-dawl tal-*Conduct of Business Rulebook* [minn issa 'l quddiem '*COB Rulebook'*], kif maħruġ mill-MFSA f'Diċembru 2017, li kien applikabbli fil-konfront tas-soċjetà intimata fiż-żmien li sar l-investiment, u li spjega li kien iħaddan id-Direttiva MiFID u l-*Implementing Measures* tagħha, b'mod li d-dokument kien għalhekk jinkorpora l-obbligazzjonijiet tal-entitajiet neċessarji fir-rigward tan-negozju tagħhom ta' kuljum. Għalhekk l-Arbitru għażel li jagħmel riferiment għad-diversi regolamenti, iżda partikolarment dawk li kienu jirregolaw l-assessjar tal-idoneità, iż-żamma ta' *records* u l-għodda tal-assessjar.

17. Wara li ħa in konsiderazzjoni t-tliet kriterji li għandhom jiġu applikati fejn għandu jiġi deċiżi jekk prodott huwiex wieħed adattat għall-klijent, għamel is-segwenti kummenti li l-Qorti tqis li huma ferm rilevanti għall-mertu tal-appell odjern:

(a) *L-istruttura tal-portafoll*: Fil-bidunett u fl-ewwel ftit xhur, kważi 60% tal-portafoll kien rappreżentat minn żewġ prodotti, il-*Garfunkelux* u l-*Lecta,* u għalhekk kien hemm espożizzjoni konsiderevoli u qawwija għal dawn iż-żewġ prodotti. Osserva li mid-dokumenti esebiti kien jirriżulta li kien hemm perċentwal għoli tal-portafoll investit f'prodotti li ma kienux ta' grad ta' investiment (*non-investment grade).* Qal li dan kien ammess mis-soċjetà intimata stess

fl-*email*[7] tagħha tal-25 ta' Mejju, 2018, fejn indikat li fil-bidu kien hemm 36% mill-portafoll ta' €250,000 investit f'prodotti li kienu ta' grad ta' investiment, u 64% f'prodotti li minnhom kien hemm qligħ għoli. Żied jgħid li ntweriet ukoll l-intenzjoni fl-istess *email* li l-perċentwali kellhom jinbidlu għal 25% u 75% rispettivament permezz tar-*reinstatement* tal-€100,000 investiment fil-*Lecta.* L-Arbitru hawn għamel osservazzjoni importanti ferm. Qal li r-raġuni tal-espożizzjoni għolja tal-portafoll għal prodotti li ma kienux ta' grad ta' investiment, u dan kemm b'mod individwali u anki b'mod kollettiv, ma tirriżultax b'mod ċar fl-*Investment Report* tas-soċjetà intimata u dokumenti oħra relatati mal-parir mogħti. Il-Qorti hawn tagħmel riferiment għall-kumment oriġinali tal-konsulent finanzjarju dwar is-solita rakkomandazzjoni tiegħu, meħud in konsiderazzjoni l-objettiv tal-klijent, jiġifieri li l-fondi jibqgħu miżmuma f'depożiti. Filwaqt li ċċita dak li qal ir-rappreżentant tas-soċjetà intimata fl-affidavit tiegħu tas-16 ta' Lulju, 2020, stqarr li għalkemm l-objettiv tar-rikorrent ma kienx *"a low-risk/low return strategy",* lanqas kien wieħed *"high-risk strategy",* iżda ta' *"moderate risk",* fejn huwa kien lest li jaċċetta ċaqliq fil-kapital ta' madwar 15%, kif indikat fl-*Investment Report.* Irrileva li kif kien jirriżulta minn *Table D* u *Table F* fid-deċiżjoni appellata, il-*Lecta* kien ra tnaqqis fil-valur tiegħu ta' kważi 30% f'inqas minn sena, u fix-xhur sussegwenti l-valur baqa' nieżel aktar għal 50% tal-valur oriġinali tiegħu. L-Arbitru hawn kellu raġun li jagħraf li t-tnaqqis fil-valur tal-*Lecta* u anki tal-investimenti l-oħra mertu tal-

[7] *A fol.* 109(b).

vertenza kien mar lil hinn mill-massimu ta' ċaqliq fil-valur, kif kien lest li jaċċetta r-rikorrent. Għalhekk tgħid il-Qorti, li mill-ewwel osservazzjonijiet tal-Arbitru kif imfissra, qed jirriżulta li l-allegazzjonijiet tar-rikorrent fil-konfront tas-soċjetà intimata huma fondati.

(b) *In-natura riskjuża tal-investimenti kontestati:* L-Arbitru osserva, kif fil-fatt għamlet mill-ewwel din il-Qorti, li s-soċjetà intimata qatt ma kkontestat l-ilment li l-prodotti li ma kienux ta' grad ta' investiment ma kienux garantiti, u li kellhom *credit rating* tassew baxx meta nxtraw, saħansitra 4 sa 6 *notches* inqas mill-aħjar *credit rating* li kien hemm fost l-i*speculative/non-investment grade credit ratings* kif allegat mir-rikorrent fis-sottomissjonijiet tiegħu.[8] Qal li dan kien isarraf f'riskju għoli għall-investimenti in kwistjoni.

(ċ) *Ir-riskju li kien lest li jieħu r-rikorrent:* dan qal l-Arbitru kien jirriżulta mill-*Investment Report*[9]*,* iżda fil-fatt il-portafoll tar-rikorrent kien ġie espost għal riskju aktar għoli minħabba l-espożizzjoni għal strumenti li ma kienux ta' grad ta' investiment, kemm individwalment u anki b'mod kollettiv, u anki tenut kont tan-natura ta' dawk l-istrumenti kif deskritt aktar 'il fuq. Il-Qorti tgħid li dwar dan, il-provi ma jħallu l-ebda dubju. L-Arbitru rrileva li jekk ir-rikorrent kien lest li jaċċetta telf ikbar fil-kapital sabiex jirċievi qligħ ikbar, kif kien qed jiġi allegat mis-soċjetà intimata, l-Arbitru sostna li dan kellu jiġi muri sew

[8] *A fol.* 6 u 42.
[9] *A fol.* 69.

permezz tad-dokumentazzjoni kif rikjest mill-*COB Rulebook,* li jispjega r-riskju li jġib miegħu assessjar fqir tar-riskju li lest li jġorr il-klijent, u hawn huwa għamel riferiment u ċċita r-regoli kif imfissra fil-verżjoni tal-20 ta' Diċembru, 2017 u tat-2 ta' April, 2019. Filwaqt li għamel riferiment għax-xhieda tar-rikorrent mogħtija waqt is-seduta tad-29 ta' Lulju, 2020, irrileva ġustament, u l-Qorti tgħid li ma jirriżulta l-ebda dubju, li l-imsemmi rikorrent ma kienx jidher li kellu għarfien tajjeb tar-riskji tal-istrumenti li kien qed jiġi espost għalihom meta investa f'*non-investment grade bonds,* u l-fatt li huwa skarta investimenti azzjonarji, kien juri li huwa xtaq jinvesti f'prodotti iktar stabbli u sikuri, anki meħud in konsiderazzjoni l-għan li l-investiment kellu jkun għal żmien qasir.

(d) *Nuqqasijiet oħra – it-test tal-idoneità:* L-ewwel punt li qajjem l-Arbitru, li huwa ferm rilevanti, huwa li skont is-sezzjoni '*Suitability Test*' fil-*Market Order Form*[10] fir-rigward tal-€100,000 investiti fil-*Garfunkelux* u l-*Lecta,* hemm indikat li l-oġġettiv tal-investiment kien wieħed fit-tul, meta dan jikkontrasta ferm mal-indikazzjoni tal-investiment qasir kif tirriżulta fl-*Investment Profile* u l-*Opening of Account Form.*[11] Kien biss fil-*Market Order Form* tas-CMA CGM fejn l-oġġettiv indikat huwa wieħed ta' investiment qasir.[12] L-Arbitru mbagħad irrileva li d-dettalji meħuda mingħand ir-rikorrent saħansitra ma kienux preċiżi. Hawn ukoll il-Qorti tikkonstata att ieħor

[10] *A fol.* 26.
[11] *A fol.* 11 u 24.
[12] *A fol.* 98.

ta' negliġenza u traskuraġni da parti tas-soċjetà intimata, aġir li ċertament ma jistax ikun mistenni minn provditur ta' servizzi finanzjarji, li l-klijent jistrieħ fuqu għall-aħjar interessi tiegħu. Qal li fl-istess *Market Order Forms*[13] tal-*Garfunkelux* u tal-*Lecta,* kien hemm indikat li r-rikorrent kien diġà nvesta f'prodotti li kienu jixbħu dawk suġġeriti. L-Arbitru osserva li dawn in-notamenti ma kienux jirriflettu l-informazzjoni fl-*Opening of Account Form,* fejn kien ġie ndikat li r-rikorrent ftit li xejn kien investa fil-passat f'bonds korporattivi, u lanqas kienu jaqblu mad-dikjarazzjoni li għamel ir-rikorrent waqt it-trattazzjoni tal-ilment.[14] L-Arbitru mbagħad għadda sabiex investiga għaliex is-soċjetà intimata kienet skartat il-mudell tipiku tagħha għall-allokazzjoni ta' prodotti, kif rifless fl-*Investment Report* għal investituri ta' riskju moderat, fejn l-oġġettiv tagħhom kien wieħed ta' qligħ, sabiex b'hekk ir-rakkomandazzjoni kellha tkun ta' investimenti fil-perċentwal ta' 50% f'*bonds* li kienu ta' grad ta' investiment, u massimu ta' 30% f'prodotti li ma kienux ta' grad ta' investiment. Ċertament hawn il-Qorti tagħraf li s-soċjetà intimata kellha l-oneru tal-prova sabiex turi għaliex dan kien il-każ, u hawn għal darb'oħra tqis saħansitra l-kumment tal-bidu tal-konsulent finanzjarju tagħha dwar dak li normalment huwa jirrakkomanda f'każ bħal dan, u li l-Qorti diġà kellha l-opportunità li taċċenna għalih aktar qabel f'din is-sentenza. Iżda l-Arbitru osserva tajjeb li ma kien hemm l-ebda notament ċar u adegwat u ġustifikanti fl-*Investment Report* jew xi dokument ieħor

[13] *A fol.* 93 u 94.
[14] *A fol.* 183.

relatat mal-assessjar tal-idoneità. Dwar is-suġġeriment tar-rikorrent sabiex isir investiment mill-ġdid ta' €100,000 fil-*Lecta* skont l-*email* tiegħu tal-25 ta' Mejju, 2018[15], u dan wara l-konsulent finanzjarju tas-soċjetà intimata kien neħħa l-imsemmi investiment u ssuġġerixxa permezz tal-*email* tiegħu tal-24 ta' Mejju, 2018[16] li €200,000 jitħallew depożitati fil-bank, hekk kif ir-rikorrent stess qallu li huwa kien ser jiġi bżonn dan l-ammont sa Ottubru 2018[17], l-Arbitru ddikjara, u l-Qorti tikkondividi pjenament il-fehma tiegħu, li hawn is-soċjetà intimata ma setgħetx teżonera ruħha mir-responsabbiltà tagħha. Irrileva li hija ma kinitx qegħda tipprovdi servizz ta' esekuzzjoni, iżda wieħed ta' konsulenza finanzjarja, fejn hija aċċettat it-tranżazzjoni. L-Arbitru tajjeb osserva li wara kollox il-konsulent finanzjarju fl-imsemmija *email* tiegħu tal-25 ta' Mejju, 2018, iddikjara li *"I don't mind your suggestion at all"*[18]*,* u jekk is-soċjetà intimata ma kinitx qegħda taqbel mas-suġġeriment tar-rikorrent, hija kienet tenuta tirrileva l-kwistjoni u ma tibqgħax għaddejja bit-tranżazzjoni bħala konsulent finanzjarju tar-rikorrent. Il-Qorti żżid tgħid li fejn hija kienet qegħda tiddipartixxi mill-parir oriġinali tagħha, is-soċjetà intimata kienet tenuta tispjega b'mod ċar lill-klijent għaliex issa hija kienet qegħda taċċetta li jsir l-investiment, anki jekk f'ammont inqas, li wara kollox dejjem baqa' wieħed konsiderevoli. Iżda s-soċjetà intimata saħansitra naqset li tiġġustifika l-aġir tagħha anki f'dawn il-proċeduri, fejn minflok ittentat

[15] *A fol.* 110.
[16] *A fol.* 75.
[17] *A fol.* 75.
[18] *A fol.* 109(b).

tixħet ir-responsabbiltà fuq il-klijent tagħha. Dan kollu wkoll għarfu l-Arbitru, u sewwa għaraf ukoll li dan saħansitra ma jistax inaqqas mir-responsabbiltà tagħha, għaliex il-kwistjoni kienet tirrigwarda fl-ewwel lok l-idoneità tal-investiment, u anki kellu jittieħed in konsiderazzjoni li l-*Lecta* kienet diġà esperjenzat tnaqqis ta' iktar minn 50% fil-valur. Fattur li ċertament kien jirrikjedi spjegazzjoni ulterjuri mingħand is-soċjetà intimata.

(e) *kwistjonijiet oħra – it-twissija:* L-Arbitru qal li għalkemm il-konsulent finanzjarju kien wissa lir-rikorrent dwar il-perċentwali bejn l-investimenti *High Yield* u dawk *Investment Grade,* sewwa jikkontendi li t-twissija ma kinitx adegwata u suffiċjenti, għaliex ir-riskju ma kienx wieħed li żdied bil-ftit, iżda kien wieħed li żdied sostanzjalment. Il-Qorti tgħid li ċertament kliem il-konsulent finanzjarju bl-ebda mod ma seta' jinftiehem li l-*Lecta* kienet ser tippreżenta riskju mhux aċċettabbli meħud in konsiderazzjoni l-profil ta' riskju tar-rikorrent. Filwaqt li l-Arbitru ċċita dak li qal l-imsemmi konsulent finanzjarju fis-seduta tas-16 ta' Settembru, 2020, qal li kuntrarjament għal dak allegat, ma kien hemm l-ebda dettalji dwar il-*credit rating* fl-*Investment Recommendations* tal-*Investment Report.*[19] L-Arbitru irrileva wkoll li ma kien hemm l-ebda prova tal-klassifikazzjoni tar-riskju fir-rigward ta' kull *bond* li seta' ingħata lir-rikorrent jew li ġie diskuss mis-soċjetà intimata miegħu. L-Arbitru għamel ukoll riferiment għax-xhieda tal-istess rikorrent mogħtija

[19] *A fol.* 13-14.

waqt is-seduta tad-29 ta' Lulju, 2020, fejn dan jinnega li r-rappreżentant tas-soċjetà intimata kien spjega sew il-klassifikazzjonijiet tal-kreditu tal-prodotti u li kien hemm saħansitra titoli Maltin li ma kellhom l-ebda klassifikazzjoni ta' kreditu. Il-Qorti tirrileva li jekk il-każ kien mod ieħor, ftit li xejn tista' tifhem kif ir-rikorrent għadda sabiex aċċetta l-portafoll tiegħu kif inħoloq mis-soċjetà intimata. L-Arbitru esprima l-fehma li seta' kien il-każ li min-naħa tas-soċjetà intimata ma ngħatatx id-debita mportanza lir-riskji nvoluti, u sewwa osserva tgħid il-Qorti, li r-rikorrent ngħata perċezzjoni ħażina jew mhux preċiża fir-rigward tar-riskji reali li kienu qegħdin jittieħdu, u li huwa kien qed jiġi espost għalihom. Dan qal li kien jikkonfliġġi mar-rekwiżiti mniżżla fil-*COB Rulebook.* Irrileva li ma ġiet ippreżentata l-ebda dokumentazzjoni li kienet turi u tispjega b'mod ċar u suffiċjenti r-riskji tal-prodotti lir-rikorrent u partikolarment: (i) ir-riskji ta' grad mhux ta' investiment meta mqabbel ma' grad ta' investiment; (ii) il-klassifikazzjoni ta' kreditu fir-rigward ta' kull wieħed mill-prodotti rakkommandati, u x'kienet tfisser il-klassifikazzjoni partikolari; (iii) ir-riskji assoċjati ma' kull investiment rispettiv u r-riskji assoċjati mal-għażla qawwija fil-portafoll ta' prodotti li ma kienux ta' grad ta' investiment. L-Arbitru ddikjara li ma rriżultax ukoll li s-soċjetà intimata kienet ipprovdiet informazzjoni lir-rikorrent sabiex huwa jifhem sew ir-riskji assoċjati kif mitlub fil-*COB Rulebook,* u għadda sabiex iċċita r-regoli applikabbli mill-verżjoni tiegħu tal-20 ta' Diċembru, 2017 u tat-2 ta' April, 2019.

(f) *Kwistjonijiet oħra – tibdil spiss:* L-Arbitru qal li fis-sottomissjonijiet tagħha s-soċjetà intimata kienet ilmentat dwar it-tibdil spiss fiċ-ċirkostanzi tar-rikorrent u anki fl-eżiġenzi tiegħu fir-rigward tal-investiment u tal-likwidità, iżda stqarr li dan ma kienx inaqqas jew ibiddel ir-responsabbiltà tas-soċjetà intimata. Tajjeb tassew tgħid il-Qorti li l-Arbitru kkonsidra li l-attenzjoni dejjem kellha tibqa' fuq il-kompożizzjoni tal-portafoll kif strutturat fil-bidunett meta saru l-investimenti lamentati, u fuq iċ-ċirkostanzi riżultanti f'dak iż-żmien. L-Arbitru kkonsidra li l-aġġornament tal-profil tal-klijent u taċ-ċirkostanzi tiegħu matul ir-relazzjoni tiegħu mal-provditur tas-servizz, huwa parti mis-servizz li jingħata u l-ħtieġa ta' dan l-aġġornament huwa ndikat fil-*COB Rulebook,* u għal darb'oħra huwa ċċita r-regoli applikabbli miż-żewġ verżjonijiet tiegħu.

(g) *Dikjarazzjoni ta' idoneità:* L-Arbitru hawn ukoll għamel riferiment għal dak li jipprovdi l-*COB Rulebook,* u qal li d-dokumenti rilevanti sabiex issir din id-dikjarazzjoni kienu l-*Investment Report* tal-21 ta' Mejju, 2018, il-*Market Order Forms* u l-iskambju ta' *emails* bejn il-konsulenti finanzjarji tas-soċjetà intimata u r-rikorrent. Iżda l-Arbitru ma kienx konvint li kienet tħejjiet sew din id-dikjarazzjoni, u li ġew rispettati r-regoli tal-*COB Rulebook* kif ċitati minnu. Qal li lanqas ukoll ma kienu saru valutazzjonijiet perjodiċi adegwati skont l-istess *COB Rulebook,* u hawn ukoll jiċċita r-regola rilevanti. L-Arbitru kkonkluda li fil-fehma tiegħu ma kienx ġie ppruvat min-naħa tas-soċjetà intimata li hija kienet aderiet ruħha ma' dak mitlub minnha anki fir-rigward

tad-dikjarazzjoni tal-idoneità. Il-Qorti tgħid li hawn ukoll l-Arbitru jidher li huwa ġustifikat fil-fehma tiegħu.

18. Fl-aħħarnett ma tistax din il-Qorti ma tikkonsidrax ir-rimarki finali tal-Arbitru li jiġbru fil-qosor dak li hija wkoll tagħraf li huma n-nuqqasijiet serji u lampanti tas-soċjetà intimata fil-konfront tar-rikorrent. Irrileva li għalkemm ir-rikorrent irriżulta li huwa bniedem ta' ċertu livell ta' edukazzjoni kif muri mill-iskambju ta' *emails* mas-soċjetà intimata, u l-artikli tiegħu li kienu ġew ippubblikati, kif ukoll li kien finanzjarjament stabbli, xorta waħda dan ma kienx jiġġustifika l-espożizzjoni qawwija għal prodotti li ma kienux ta' grad ta' investiment kif irrakkomandat mill-imsemmija soċjetà intimata, tenut kont taċ-ċirkostanzi, objettivi u l-profil tar-riskju tar-rikorrent, u dan kemm fir-rigward ta' prodotti singolari u anki fir-rigward tal-portafoll sħiħ. Sostna li kif jirriżulta mir-regoli tal-*COB Rulebook,* il-provditur tas-servizz għandu diversi obbligi onerużi sabiex dan jagħmel valutazzjoni tajba u jiddokumenta sew fost affarijiet oħra r-riskju li l-klijent lest li jieħu u x'inhu l-oġġettiv tiegħu tal-investiment. L-Arbitru kkontenda li r-responsabbiltà tal-provditur tas-servizz hawnhekk hija konsiderevoli, u dan għandu jkun f'pożizzjoni fejn juri b'mod ċar u inekwivoku li l-obbligi tiegħu kienu ġew sodisfatti sew. Iżda minn dak li ġie kkonstatat fid-deċiżjoni appellata, l-Arbitru kompla jgħid li huwa kien jikkonsidra, li fil-każ odjern il-provditur tas-servizz ma kienx onora l-obbligi tiegħu skont il-*COB Rulebook,* partikolarment fejn kienu jirrigwardaw l-objettivi tal-investiment u t-tolleranza tar-rikorrent għar-riskju. Għalhekk l-investimenti rakkomandati mis-soċjetà intimata ma kienux addattati għar-rikorrent, meħudin iċ-ċirkostanzi tiegħu, partikolarment għaliex il-portafoll rakkomandat ma kienx skont l-

objettivi u t-tolleranza tiegħu għar-riskju. L-Arbitru b'hekk għadda sabiex laqa' l-ilment tar-rikorrent parzjalment skont kif imfisser fid-deċiżjoni appellata tiegħu, jiġifieri limitatament għar-rigward tal-*Lecta.*

19. Il-Qorti tikkondividi pjenament dawn il-konsiderazzjonijiet ferm mirquma u dettaljati tal-Arbitru, u ma ssib xejn fl-appell tas-soċjetà intimata li jpoġġi fid-dubju d-deċiżjoni appellata jew xi parti minnha, li jista' ixejjen din il-fehma tagħha. Għalhekk issib li l-aggravji tas-soċjetà intimata mhumiex ġustifikati u tiċħadhom.

20. L-istess tgħid fir-rigward tal-ewwel żewġ aggravji tar-rikorrent kif imressqa quddiem din il-Qorti permezz tal-appell inċidentali. Filwaqt li tirrileva li l-Arbitru, kif dejjem sewwa jsostni, għandu d-diskrezzjoni li jiddeċiedi l-każ skont dak li huwa ġust, ekwitabbli u raġonevoli fiċ-ċirkostanzi tal-każ partikolari, u meħudin in konsiderazzjoni l-merti sostantivi tiegħu, tagħraf li m'hemm l-ebda raġuni għaliex għandha tvarja d-deċiżjoni tiegħu. Tqis li fil-każ odjern ir-rakkomandazzjonijiet tas-soċjetà intimata kienu għal portafoll sħiħ ta' investimenti u mhux għal investiment singolari, u n-nuqqasijiet tagħha ġew ikkonstatati fir-rigward ta' kull wieħed mit-tliet investimenti kif lamentat mir-rikorrent. Għalhekk tqis li l-mod kif ġie stabbilit il-kumpens mill-Arbitru huwa wieħed ġust, fejn it-telf fil-kapital ta' investiment għandu jiġi kkumpensat billi l-investimenti li jżommu l-valur tal-kapital tagħhom u joffru ntrojtu, għandhom jagħmlu tajjeb għall-investimenti l-oħra li jagħmlu telf saħansitra fil-kapital tagħhom. Dan filwaqt li dawk l-investimenti li juru telf fil-kapital għandu jagħmel tajjeb qabel xejn l-introjtu li sar minn fuqhom. Imbagħad dwar it-tielet u l-aħħar aggravju tar-rikorrent, il-Qorti tqis li hawn huwa għandu raġun u jkun aktar

ekwu u ġust li r-rikorrent u s-soċjetà intimata għandhom ibatu l-ispejjeż fil-perċentwali rispettivi ta' 30% u ta' 70%.

Decide

Għar-raġunijiet premessi l-Qorti tiddeċiedi dwar (a) l-appell tas-soċjetà appellanta billi tiċħdu; u (b) l-appell inċidentali tar-rikorrent billi tiċħdu wkoll, għajr għall-aggravju fir-rigward tal-kap tal-ispejjeż, u dan filwaqt li tikkonferma d-deċiżjoni appellata fl-intier tagħha.

L-ispejjeż marbuta mad-deċiżjoni appellata għandhom jitħallsu in kwantu għal 30% mir-rikorrent u in kwantu għal 70% mis-soċjetà intimata, kif għandhom ukoll jitħallsu l-ispejjeż tal-appell inċidentali, filwaqt li l-ispejjeż tal-appell prinċipali għandhom ikunu a karigu tas-soċjetà appellanta.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur