MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-15 ta' Lulju, 2022

Appell Inferjuri Numru 1/2022 LM

Robert William Smith (Passaport nru. 0034672320736)
('l-appellat')

vs.

Momentum Pensions Malta Limited (C 52627)
('l-appellanta')

Il-Qorti,

Preliminari

1. Dan huwa appell magħmul mis-soċjetà intimata **Momentum Pensions Malta Limited (C 52627)** [minn issa 'l quddiem 'is-soċjetà appellanta'] mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fl-14 ta' Diċembru, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrent **Robert**

William Smith (Passaport nru. 0034672320736) [minn issa 'l quddiem 'l-appellat'] fil-konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinżamm biss parzjalment responsabbli għad-danni sofferti li huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555 hija għandha tħallas lill-appellat il-kumpens bil-mod kif stabbilit, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effettiv pagament, filwaqt li kull parti kellha tħallas l-ispejjeż tagħha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament jgħid li sofra l-appellat mill-investimenti sottoskritti l-polza ta' assikurazzjoni fuq il-ħajja tiegħu li huwa kien ittrasferixxa f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] jew QROPS fis-sena 2015, liema skema kienet qegħda tiġi ġestita mis-soċjetà appellanta, u dan wara li segwa l-parir tad-ditta *Continental Wealth Management* [minn issa 'l quddiem 'CWM'].

Mertu

3. L-appellat għalhekk ippreżenta lment quddiem l-Arbitru fis-6 ta' Awwissu, 2020 fil-konfront tas-soċjetà appellanta, fejn allega li huwa qatt ma ngħata l-informazzjoni sħiħa u li saħansitra qatt ma ngħata parir tajjeb. Ikkontenda wkoll li kien hemm xi dokumenti li huwa qatt ma ffirma għalihom. Fid-dawl tat-telf li

huwa sofra, l-appellat qal li huwa kien qed jippretendi li jirċievi kumpens sabiex jirrifletti t-telf tal-kapital , u dan filwaqt li kellu jingħata kumpens rappreżentanti profit ta' bejn 4% u 6% li huwa kien tenut li jirċievi sakemm huwa kien għadu membru tal-Iskema, u rimbors għall-ispiża neċessarja sabiex huwa jittrasferixxi l-fondi għal kumpannija oħra.

4. Is-soċjetà appellanta wieġbet fit-2 ta' Awwissu, 2018 billi talbet lill-Arbitru sabiex jiċħad l-ilment tal-appellat. Hija eċċepiet fost affarijiet oħra li (i) l-azzjoni kienet preskritta *ai termini* tal-para. (ċ) tas-subartikolu 21(1) tal-Kap. 555; (ii) l-appellat kien għażel lil CWM bħala l-konsulent finanzjarju tiegħu, u li kull negozju li din ressqet quddiem is-soċjetà appellanta kien fil-parametri tar-regoli maħruġa mill-MFSA fir-rigward ta' provdituri tas-servizz; (iii) fejn l-ilment tal-appellat kien jolqot il-parir li kien ingħata jew in-nuqqas ta' parir li kien ingħata mingħand CWM, dan ma kienx dirett lejha, u għaldaqstant ma setgħetx tinżamm responsabbli; (iv) l-appellat kellu jfisser x'ried jgħid meta qal li kien hemm xi noti li ma kienux ġew iffirmati minnu; (v) id-dokumenti mehmuża mal-ilment f'pagni 9 sa 12 ma kellhomx x'jaqsmu mal-imsemmi lment, u għalhekk kellhom jiġu sfilzati, b'dana li fin-nuqqas hija kienet qegħda tikkontesta l-kontenut tagħhom; (vi) hija ma kinitx tipprovdi pariri dwar investiment; u (vii) kienet qegħda tikkontesta kull responsabbiltà għall-ħlas tat-telf reklamat stante li hija ma kinitx aġixxiet b'mod negliġenti jew kisret xi wieħed mill-obbligi tagħha.

Id-deċiżjoni appellata

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

> ***"Further Considers:***
>
> ***Preliminary Pleas***
>
> ***Since the Service Provider raised the question of competence and also requested the Arbiter to expunge from the records of the case a number of pages (pg. 9-12 of the Complaint), the Arbiter will deal with these pleas first.***
>
> *Preliminary Plea regarding the Competence of the Arbiter*
>
> *Plea number 3 (fn. 25 A fol. 120) raised in the reply submitted by the Service Provider, relates to the competence of the Arbiter under article 21(1)(b) of Chapter 555 of the Laws of Malta.*
>
> *Article 21(1)(b) of Chapter 555 of the Laws of Malta stipulates:*
>
> 'An Arbiter shall have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider which occurred on or after the first of May 2004:
>
> Provided that a complaint about conduct which occurred before the entry into force of this Act shall be made by not later than two years from the date when this paragraph comes into force.'
>
> *Firstly, the Arbiter notes that it took nearly three months for the Service Provider to send the Complainant a reply to his formal complaint. (fn. 26 The Complainant's formal complaint dated 3 April 2018 was answered by MPM through a letter dated 22 June 2018 - A fol. 77) The Arbiter does not see a valid reason why the Service Provider took so long to send a reply and related documents.*
>
> *The Arbiter deems it as very unprofessional for a service provider to make all in its powers to hinder a complaint against it, procrastinate and then raise the plea of lack of competence on the pretext that the action is* 'time-barred'*. It is a long accepted legal principle that no one can rest on his own bad faith.*
>
> *As to Article 21(1)(b), it is noted that the said article stipulates that a complaint related to the* 'conduct' *of the financial service provider which occurred before the*

entry into force of this Act shall be made not later than two years from the date when this paragraph comes into force. This paragraph came into force on the 18 April 2016.

The law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

Consequently, the Arbiter has to determine whether the conduct complained of took place before the 18 April 2016 or after, in accordance with the facts and circumstances of the case.

In the case of a financial investment, the conduct of the service provider cannot be determined from the date when the transaction took place and, it is for this reason that the legislator departed from that date and laid the emphasis on the date when the conduct took place.

In this case, the conduct complained of involves the conduct of the Service Provider ***as trustee and retirement scheme administrator of the Scheme****, which role MPM occupied since the Complainant became member of the Scheme and* ***continued to occupy beyond the coming into force of Chapter 555 of the Laws of Malta.***

It is considered that the Service Provider's arguments with respect to article 21(1)(b) have certain validity only with respect to the alleged failure on the right of withdrawal, that is the cooling off period. This is in view that the cooling off period is a distinct right which applied and existed at the time of purchase of the policy in April 2015. (fn. 27 A fol. 19) The alleged misconduct of the Service Provider in this regard, of not providing the Complainant with the cooling off period at the time of purchase of the policy in 2015, could have thus only been raised with the Arbiter by 18 April 2018. The complaint with the Office of the Arbiter for Financial Services ('OAFS') was filed on the 6 August 2020. Accordingly, for the reasons explained, the Arbiter is rejecting and not considering the part of the complaint relating to the alleged failure of the Service Provider to provide the Complainant with the indicated cooling off period.

Other key aspects were however raised as considered above. Even if, for argument's sake only, the Arbiter had to limit himself to the question of the investment portfolio, the Service Provider did not prove in this particular case that the products invested into no longer formed part of the portfolio ***after*** *the coming into force of Chapter 555 of the Laws of Malta. The onus of proof for such evidence rests with the Service Provider. Furthermore, the Arbiter notes that there is actually clear evidence from the Annual Member Statement for the year ending 31 December 2019 that the portfolio still included a structured note as part of his portfolio as at the date of the said statement. (fn. 28 A fol. 193-194)*

It is further noted that the complaint in question involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the advisor of the Complainant in relation to the Scheme. The Service Provider itself declares that it no longer accepted business from CWM ***as from September 2017****. (fn. 29 Para. 44, Section E of the affidavit of Stewart Davies, Director of MPM – A fol. 231).*

CWM was therefore still accepted by the Service Provider and acting as the investment advisor to the Complainant after the coming into force of Chapter 555 of the Laws of Malta. The responsibility of MPM in this regard is explained later on in this decision.

The Arbiter considers that the actions related to the Retirement Scheme complained about cannot be considered to have all occurred before 18 April 2016 and therefore the plea as based on Article 21(1)(b) is being rejected and the Arbiter declares that he has the competence to deal with the Complaint.

Request to expunge documents and substance of complaint

In its reply, MPM inter alia *submitted that the Complainant attached sheets to his complaint '*which were not prepared by him' *and which '*do not relate to the present complaint'*. (fn. A fol. 122) The Service Provider listed certain inconsistencies between the details included in the said sheets and the Complainant's case as justification of its claims and request. MPM requested the Arbiter to accordingly expunge from the records of the case pages 9-12 of the complaint filed with the OAFS.*

The Arbiter would first like to point out that he is not ordinarily amenable to requests for the expunging of documents in cases considered under Chapter 555 of the Laws of Malta. This is in view of the nature of the proceedings and complaints covered under the said Act which relate to customers of financial services. The Arbiter is ultimately in a position to himself determine what documentation submitted during the proceedings of the respective case is applicable and what is relevant or not when deciding a case under Cap. 555. Documentation submitted by the parties to the complaint will be attributed the merited importance, if any, as considered appropriate by the Arbiter when deciding the case.

The Arbiter considers that requests for the expunging of documents for cases considered under Cap. 555 should accordingly be exceptional and really and truly justified in the particular circumstances of the respective case.

The Arbiter would also like to highlight with respect to the case in question that this is a Complaint filed by a retail consumer of financial services within the structure of Chapter 555 of the Laws of Malta. The Service Provider should accordingly consider

the complaint made by the Complainant in such context and not expect the client, who chose to file the complaint himself, as allowed within the parameters of the law, to reply in a legalistic manner or with the knowledge and expertise of a professional in the field.

With respect to this Complaint, the Arbiter would furthermore like to make the following observations:

- *That the sheets (pages 9-12) that were requested to be expunged constitute part of the very first attachments the Complainant made to his Complaint Form (of 5 pages) and his voluminous attachments (110 pages in all);*
- *That the said sheets include various serious allegations against MPM. Expunging the said sheets would have a material implication on the complaint and significantly alter its substance;*
- *That the fact that the said sheets include certain inconsistencies, namely:*
  - *in respect of the dates of the initial complaint and MPM's reply thereto,*
  - *in the amount originally invested and, in the amount, claimed as compensation by the Complainant, as raised by MPM in its reply, does not, in itself, justify or form a sufficient and solid basis for the said sheets to be expunged. This is also in view that the inconsistencies identified by MPM are not considered as changing or affecting whatsoever the Complaint in question.*

The Arbiter can actually clearly determine the correct dates of the initial complaint and of MPM's reply thereto (these respectively being the 3 April 2018 and 22 June 2018) given that the Complainant himself attached a copy of his actual initial complaint and MPM's reply as part of the attachments to his complaint. (fn. 31 A fol. 77 & 110)

The Arbiter can also clearly determine the correct figure of the original amount invested, this being GBP85,262.11 as indicated in the sheet on page 6 filed by the Complainant and corroborated in the table of the investor profile provided by MPM itself and the covering letter to the Old Mutual International bond. (fn. J32 A fol. 19 & 203) The actual amount of compensation requested by the Complainant can also be determined as GBP45,457.02 - this being the figure reflected in the first attachment (fn. A fol. 6) to the Complaint Form (where the correct figure of the original amount invested is included). The said figure of GBP45,457.02 indicated by the Complainant as 'Per Statement From Momentum/Old Mutual International Dated: 22nd August 2019' (fn. 34 Ibid.) also closely reflects the loss (inclusive of fees paid) (fn. 35 Loss of GBP27,458+Fees of GBP10,077 & GBP 4,375 = GBP41,910(A fol. 203)) indicated by MPM in the table of investor profile that it provided during the proceedings of this

case based on the 'Current Valuation at 16/09/2020' (fn. 36 A fol. 203) as well as the amount of loss originally indicated in the formal complaint that the Complainant sent to the Service Provider. (fn. 37 A fol. 110)

- *MPM has also not submitted evidence or sufficient basis to back its claim that the said sheets '*do not relate to the present complaint'*. Whilst the dates or figures quoted in the said sheets, as indicated above, where indeed incorrect however, on its own, this does not make the various allegations included in the said sheets as not being applicable to the present complaint.*

- *To justify its request for the expunging of the documents, MPM also noted that the '*Complainant has attached sheets to his own complaint which were not prepared by him'*. This is again not considered by the Arbiter as sufficient basis to expunge the said documents. Even if the said sheets were prepared by someone else other than the Complainant, this does not change the fact that such allegations were included and attached as part of his Complaint Form. If the allegations included in the said sheets are relevant to the Complainant's case then the said allegations cannot accordingly be ignored or removed by the Arbiter.*

- *It is further noted that certain allegations made in the contested sheets, such as those relating to the acceptance of CWM as an unlicensed advisor and that his fund was invested into high-risk professional investor only structured notes which did not reflect his risk profile as a retail investor, were indeed also reflected in the Complainant's formal complaint with the Service Provider. (fn. 38 Ibid.)*

Hence, the Arbiter finds no justifiable reason why the allegations included in the said sheets should be discarded given also that they are not inconsistent and in substance further reflect allegations made in the formal complaint that the Complainant made with the Service Provider.

In the circumstances and for the reasons amply indicated above, the Arbiter considers that there is no sufficient and adequate basis on which he can accept the request to expunge the said sheets and is accordingly refuting the Service Provider's request.

*Having reviewed the Complaint, it is furthermore considered that whilst the Complainant could have structured, and presented his Complaint in a more articulate manner, the Arbiter does not agree with MPM that '*it is amply clear from the complaint form that the complaint is with respect to the advice, or alleged lack thereof, received from CWM' *and that* 'The only allegation levelled against Momentum is that complainant 'seldom received' information from Momentum' *(fn. 39 A fol. 121)*

At the outset the Arbiter would like to point out that he shall not delve into claims made in this complaint against CWM given inter alia *that CWM is not a party to this complaint or eligible as a financial service provider under Cap. 555. However, the role played by CWM as advisor will be considered in the apportionment of responsibility and payment of compensation later on in this decision.*

Having reviewed the Complaint, the key alleged shortcomings in respect of MPM, are considered, in substance and in essence, to mainly involve the claim that MPM did not act in the best interests of the Complainant by (1) accepting CWM when this was an unlicensed investment advisor and (2) not ensuring that his funds were invested in a prudent manner as funds were allegedly invested in high-risk structured notes aimed only for professional investors with such investments not being in line with his profile of a low/medium risk retail investor and not in conformity with the investment guidelines (3) lack of information provided to the Complainant.

MPM provided and made extensive submissions on these aspects, inter alia, during the proceedings of this Case which the Arbiter shall consider accordingly.

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))*

The Complainant

The Complainant, born in 1960, is of British nationality and resided in Spain at the time of application for membership as per the details contained in the Application Form for Membership of the Momentum Malta Retirement Trust ('the Application Form for Membership'). (fn. 41 A fol. 33)

The Complainant's occupation was indicated as Company Director in the said Application Form.

It was not indicated, nor has it emerged, during the case that the Complainant was a professional investor. The Complainant can accordingly be regarded as a retail client.

The Complainant was accepted by MPM as member of the Retirement Scheme on 24 March 2015. (fn. 42 A fol. 15)

His risk profile was indicated as 'Lower to Medium' out of the five options available of 'Low', 'Lower to Medium', 'Medium', 'Medium to High', and 'High' in the Application Form for Membership. (fn. 43 A fol. 34)

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator (fn. 44 https://www.mfsa.mt/financial-services-register/result/?id=3453) and acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 45 A fol. 254 - Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit))

The Legal Framework

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

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015. (fn. 46 Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/)

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by MFSA under the RPA.

As confirmed by the Service Provider, registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and hence the framework under the RPA became applicable as from such date. (fn. 47 As per pg. 1 of the Affidavit of Stewart Davis and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 January 2016 attached to his affidavit – A fol. 220 & 244-246)

Despite not being much mentioned by MPM in its submissions, the Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA, in light of

MPM's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

Indeed, Article 1(2) of the TTA provides that 'The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A', *with Article 43(6)(c) in turn providing that '*A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes *…'.*

Particularities of the Case

The Retirement Scheme in respect of which the Complaint is being made

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA (fn. 48 https://www.mfsa.mt/financial-services-register/result/?id=3454) as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 (fn. 49 Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's Affidavit) and under the Retirement Pensions Act in January 2016. (fn. 50 Registration Certificate dated 1 Jan 2016 issued by MFSA to the Scheme (attached to Stewart Davies's Affidavit).

*As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme '*was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap. 331) on the 23 March 2011' *(fn. 51 Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit) – A fol. 252) and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011'*. (fn. 52 Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit) – A fol. 254.)*

*The Scheme Particulars specify that '*The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death'*. (fn. 53 Ibid.)*

The case in question involves a member-directed personal retirement scheme where the Member was allowed to appoint an investment advisor to advise him on the choice of investments.

The assets held in the Complainant's account with the Retirement Scheme were used to acquire a whole of life insurance policy for the Complainant.

The life assurance policy acquired for the Complainant was called the European Executive Investment Bond issued by Old Mutual International ('OMI'). (fn. 54 A fol. 67)

The premium in the said policy was in turn invested in a portfolio of investment instruments under the direction of the Investment Advisor and as accepted by MPM.

*The underlying investments at times comprised solely or predominantly of structured notes as indicated in the table of investments forming part of the '*Investor Profile' *presented by the Service Provider during the proceedings of the case. (fn. 55 The* 'Investor Profile' *is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant. A fol. 203)*

*The '*Investor Profile' *presented by the Service Provider in respect of the Complainant also included a table with the '*current valuation' *as at 16/09/2020. The said table indicated a loss (excluding fees) of -GBP27,458 as at that date. (fn. 56 A fol. 203) The loss experienced by the Complainant is higher when taking into account the fees incurred and paid within the Scheme's structure. The loss, inclusive of fees, indeed amounts to -GBP41,910 on the total amount invested of GBP85,262 based on a* 'current valuation at 16/09/20' *of GBP43,352. It is to be noted that the Service Provider does not explain whether the loss indicated in the* 'current valuation' *for the Complainant relates to realised or paper losses or both.*

Investment Advisor

Continental Wealth Management ('CWM') was the investment advisor appointed by the Complainant. (fn. 57 As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant (A fol. 121) and Section 5 of the Application Form for Membership (A fol. 160)). The role of CWM was to advise the Complainant regarding the assets held within his Retirement Scheme.

*In its reply to this complaint, MPM explained inter alia that CWM '*is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH'*. (fn. 58 Pg. 1 of MPM's reply to the OAFS – A fol. 120)*

*In its submissions, it was further explained by MPM that '*CWM was appointed agent of Trafalgar International GmbH ('Trafalgar') and was operating under Trafalgar International GmbH licenses' (*fn. 59 Para. 39, Section E, titled* 'CWM and Trafalgar International GmbH' *of Stewart Davies' affidavit – A fol. 229) and that Trafalgar* 'is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and

Financial Asset Mediator licence 34F: D-F-125-KXGB-53'. *(fn. 60 Ibid.)*

Underlying Investments

As indicated above, the investments undertaken within the life assurance policy of the Complainant were summarised in the table of investment transactions included as part of the 'Investor Profile' *provided by the Service Provider. (fn. 61 Attachment to the additional submissions made by MPM in respect of the Complainant – A fol. 203) The investment transactions undertaken within the Complainant's portfolio as reflected in the said* 'Investor Profile'*, are summarised below: (fn. 62 A fol. 203)*

- *an investment of GBP28,000 into the Commerzbank 2Y AC Phoenix On AAPL EDC ROVI P (ISIN no. XS1218203823);*
- *an investment of GBP14,000 into the Leonteq 6.76% Multi Barrier Rev Conv on 4 Equities (ISIN no. CH0266685335);*
- *an investment of GBP14,000 into the Leonteq 2Y Multi Barrier Express Cert 8.64% (ISIN no. CH0273397221);*
- *an investment of GBP14,000 into the Leonteq 2Y Multi Barrier Exp Cert 9% Pharmaceutical (ISIN no. CH0273397288);*
- *an investment of GBP14,000 into the Leonteq 5Y Express Cert GAP Coors Pfizer Sandisk (ISIN no. CH0266685236);*
- *the said table also indicates an investment of GBP3,000 into a collective investment scheme, the Invest Fd Serv Ltd Brooks Macdonald Balanced D done in 2016.*

During the tenure of CWM, the investment portfolio was clearly invested at times solely or predominantly into structured notes.

Further Considerations

Responsibilities of the Service Provider

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

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

*As indicated in the MFSA's Registration Certificate dated 28 April 2011 issued to MPM under the SFA, MPM was required, in the capacity of Retirement Scheme Administrator, '*to perform all duties as stipulated by articles 17 and 19 of the Special Funds (Regulation) Act, 2002 … in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the [SFA]*'.*

*The obligations of MPM as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the various conditions stipulated in the original Registration Certificate which inter alia also referred to various Standard Operational Conditions (such as those set out in Sections B.2, B.5, B.7 of Part B and Part C) of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002' *('the Directives').*

In terms of the said Registration Certificate issued under the SFA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the SFA, the regulations and the Directives issued thereunder.

Following the repeal of the SFA and issue of the Registration Certificate dated 1 January 2016 under the RPA, MPM was subject to the provisions relating to the services of a retirement scheme administrator in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the RPA. As a Retirement Scheme Administrator, MPM was subject to the conditions outlined in the 'Pension Rules for Service Providers issued under the Retirement Pensions Act' *('*the Pension Rules for Service Providers'*) and the '*Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' ('the Pension Rules for Personal Retirement Schemes'*).*

In terms of the said Registration Certificate issued under the RPA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the RPA, the regulations and the Pension Rules issued thereunder.

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

From the various general conduct of business rules/standard licence conditions applicable to MPM in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively, it is pertinent to note the following general principles; (fn. 63 Emphasis added by the Arbiter)

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

The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled 'Conduct of Business Rules' *of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, and which applied to MPM as a Scheme Administrator under the RPA, provided that* 'The Service Provider **shall act with due skill, care and diligence** …'.

b) *Rule 2.7.1 of Part B.2.7 titled* 'Conduct of Business Rules related to the Scheme's Assets', *of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that* **'The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries** …'.

The same principle continued to apply under the rules issued under the RPA. Standard Condition 3.1.2, of Part B.3 titled 'Conditions relating to the investments of the Scheme' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provided that **'The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries** and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document';

c) *Rule 2.6.4 of Part B.2.6 titled* 'General Conduct of Business Rules applicable to the Scheme Administrator' *of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA provided that* 'The Scheme Administrator shall organise and control its affairs in a responsible manner and **shall have adequate operational, administrative** and financial procedures **and controls in respect of its own business and the Scheme** to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed …'.

The same principle continued to apply under the rules issued under the RPA. Standard Condition 4.1.7, Part B.4.1 titled 'Conduct of Business Rules' *of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, provided that* 'The Service Provider shall organise and control its affairs in a responsible manner and **shall have adequate operational, administrative** and financial procedures **and controls in respect of its own business and the Scheme** or Retirement Fund, as applicable, to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed.'

> *Standard Condition 1.2.2, Part B.1.2 titled* 'Operation of the Scheme, of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA', *also required that* '**The Scheme shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative** and financial procedures **and controls to ensure compliance with all regulatory requirements**'.

Trustee and Fiduciary obligations

*As highlighted in the section titled '*The Legal Framework' *above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is also relevant for MPM considering its capacity as Trustee of the Scheme. This is an important aspect on which not much emphasis on, and reference to, has been made by the Service Provider in its submissions.*

Article 21 (1) of the TTA which deals with the 'Duties of trustees', *stipulates a crucial aspect, that of the* **bonus paterfamilias***, which applies to MPM. The said article provides that* '(1) **Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias,** act in utmost good faith and avoid any conflict of interest'.

*It is also to be noted that Article 21 (2)(a) of the TTA, further specifies that '***Subject to the provisions of this Act, trustees shall carry out and administer the trust according to its terms; and, subject as aforesaid, the trustees shall ensure that the trust property is vested in them or is under their control and shall, so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage** …'.

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

*The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property '*as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'. *(fn. 64 Ganado Max (Editor), 'An Introduction to Maltese Financial Services Law',) Allied Publications 2009) p.174)*

*As has been authoritatively stated, '*Trustees have many duties relating to the property vested in them. These can be summarized as follows: **to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'**. *(fn. 65 Op. cit., p 178)*

*The fiduciary and trustee obligations were also highlighted by MFSA in a recent publication where it was stated that, '***In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries**. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations**'*. (fn. 66 Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6th December 2017) p.9)*

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

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

Other relevant aspects

*One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments**. As acknowledged by the Service Provider whilst MPM's duties did not involve the provision of investment advice, however, MPM did '…* **retain the power to ultimately decide whether to proceed with an investment or otherwise**'*. (fn. 67 Para. 17, page 5 of the affidavit of Stewart Davies – A fol. 224)*

*Once an investment decision is taken by the member and his/her investment advisor and such decision is communicated to the retirement scheme administrator, MPM explained that as part of its duties '***The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed)**…' (fn. 68 Para. 31, Page 8 of the affidavit of Stewart Davies – A fol. 227)*

***MPM had accordingly the final say prior to the placement of a dealing instruction**, in that, if MPM was satisfied that the level of diversification is suitable and in order, and the member's portfolio as a whole is in line with his attitude to risk and investment guidelines '*the dealing instruction will be placed with the insurance company and the trade will be executed. **If the RSA is not so satisfied, then the trade**

will not be proceeded with'. *(fn. 69 Para. 33, Page 9 of the affidavit of Stewart Davies (A fol. 228) & Para. 17 of Page 5 of the said affidavit also refers (A fol. 224).*

This, in essence, reflected the rationale behind the statement reading:

'I accept that I or my designated professional adviser may suggest investment preferences to be considered, however, **the Retirement Scheme administrator will retain full power and discretion for all decisions relating to the purchase, retention and sale of the investments** within my Momentum Pensions Retirement Fund' *which featured in the '*Declarations' *section of the Application Form for Membership signed by the Complainant. (fn. 70 A fol. 133)*

The MFSA regarded the oversight function of the Retirement Scheme Administrator as an important obligation where it emphasised, in recent years, the said role. The MFSA explained that it:

'… is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'. *(fn. 71* Pg.7 of the MFSA's Consultation Document dated 16th November 2018 titled 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions act' (MFSA Ref. 15/2018) - https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/.)

*The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment advisor stating that '*the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments'. *(fn. 72 Pg. 9 of MFSA's Consultation Document dated 16 November 2018 titled* 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' *(MFSA Ref. 15/2018)*

Despite that the above quoted MFSA statements were made in 2018, an oversight function applied during the period relating to the case in question as explained earlier on.

*As far back as 2013, MPM's Investment Guidelines indeed also provided that '***The Trustee need to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversificatio*n** *…', (fn. 73 Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies (A fol. 267). The same statement is also included in page 9 of the Scheme Particulars of May 2018 (also attached to the same affidavit) - A fol. 259.) whilst para. 3.1 of the section titled '*Terms and Conditions' *of the Application Form for Membership into the Scheme also provided inter alia that '…* **in its role as Retirement Scheme Administrator [MPM] will exercise judgement as to the merits or suitability of any transaction** *…'. (fn. 74 A fol 168)*

Other Observations and Conclusions

Allegations in relation to fees

The Complainant claimed that no charges were ever discussed with him at the time of joining the Scheme and that the fees for the underlying OMI bond were prohibitively expensive. (fn. A fol. 4 & 11)

The Complainant has not provided any further basis, explanations and/or evidence for the allegations made.

The Arbiter further notes that the Complainant himself provided a charges sheet signed by him dated 18/03/15. (fn. 76 A fol. 46) Dealing charges and other fees relating to the underlying policy were also described in the Charges Schedule which was attached to the covering letter dated 21 April 2015 issued by Old Mutual International in respect of the policy, a copy of which was sent by email to the Complainant by the Service Provider on the 13 October 2015 as evidenced during the proceedings of this case. (fn. 77 A fol. 18-22)

In the circumstances, the Arbiter considers that there is insufficient basis and evidence for him to consider further the allegations made in respect of fees.

On the point of fees, the Arbiter would however like to make a general observation. The Arbiter considers that the trustee and scheme administrator of a retirement scheme, in acting in the best interests of the member as duty bound by law and rules to which it is subject to, is required to be sensitive to, and mindful of, the

implications and level of fees applicable within the whole structure of the retirement scheme and not just limit consideration to its own fees.

In its role of a bonus paterfamilias, the trustee of a retirement scheme is reasonably expected to ensure that the extent of fees applicable within the whole structure of a retirement scheme is reasonable, justified and adequate overall when considering the purpose of the scheme. Where there are issues or concerns these should reasonably be raised with the prospective member or member as appropriate. Consideration would in this regard need to be given to a number of aspects including: the extent of fees vis-à-vis the size of the respective pension pot of the member; that the extent of fees are not such as to inhibit or make the attainment of the objective of the Scheme difficult to be actually reached without taking excessive risks; neither that the level of fees motivate investment in risky instruments and/or the construction of risky portfolios.

Allegation relating to the signature on the dealing instructions/lack of information

The Complainant alleged that the dealing instructions were supposedly signed by him but never were. (fn. 78 A fol. 4 & 10) The Complainant further claimed that he has seldom received any information from MPM.

It is noted that the dealing instructions (fn. 79 A fol. 71 & 72) presented by the Complainant himself during the proceedings of the case did include a signature. (fn. 80 A fol. 64) Given that no further explanations or evidence was provided by the Complainant on the issue the dealing instructions the Arbiter cannot accept this allegation.

Nonetheless, the Arbiter would like to comment on the practice adopted by the Service Provider, particularly with respect to the dealing instructions and the nature of regular reporting made by MPM to the Complainant.

Communications relating to dealing instructions seem to have only occurred between MPM and the investment adviser without the Complainant being in copy or made promptly and adequately aware of the investment instructions given by the investment adviser and executed by MPM. It has indeed not emerged during the proceedings of the case that the Complainant was being adequately and promptly notified by MPM about material developments relating to his portfolio of investments within the Scheme as would reasonably be expected in respect of a consumer of financial services.

In its submissions, MPM referred to the Annual Member Statements as to the regular reporting to the Complainant. The said Annual Member Statements from 2015 till

2018, however, did not provide details of the underlying investments but were generic in nature and only mentioned the underlying policy. (fn. 81 A fol. 177-186) Such statements did not include details of the investment transactions undertaken over the respective period nor details about the composition of the portfolio of investments as at the year end. Indeed, it is noted that only in the Annual Member Statement for the year ending 31 December 2019, has MPM provided a summary of the underlying investments. (fn. 82 A fol. 193-194)

In its capacity as Trustee and Scheme Administrator, MPM had full details of the investment transactions undertaken and the composition of the portfolio, yet it did not report about such nor ensure that the Member had received the said information for the period 2015 to 2018.

***This indicates an apparent lack of adequate controls and administrative procedures implemented by MPM** which reasonably put into question MPM's adherence with the requirements to have adequate operational, administrative and controls in place in respect of its business and that of the Scheme as it was required to do in terms of Rule 2.6.4 of Part B.2.6 of the Directives under the SFA and Standard Condition 4.1.7, Part B.4.1 of the Pension Rules for Service Providers issued under the RPA as well as Standard Condition 1.2.2, Part B.1.2 of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA during the respective periods when such rules applied as outlined above.*

The lack of adequate controls and administrative procedures features on other aspects involving the ongoing activities of the Scheme Administrator. This is particularly so with respect to the controls on the verification of compliance with the Investment Guidelines as shall be considered below in this decision.

<u>Key considerations relating to the principal alleged failures</u>

The Arbiter will now consider the key alleged failures as indicated above and whether there were any shortcomings in MPM's duties and responsibilities as a trustee and retirement scheme administrator of the Scheme in relation to the following aspects:

- *MPM not acting in the best interests of the Complainant by:*
    - *accepting business from an unlicensed advisory firm, CWM;*
    - *not ensuring that his funds were invested in a prudent manner given that funds were allegedly invested in high-risk structured notes aimed only for professional investors where such investments were not in line with his profile of a low/medium risk retail investor and not in conformity with the investment guidelines;*

- *the lack of information provided to the Complainant.*

General observations

On a general note, it is clear that MPM did not provide investment advice in relation to the underlying investments of the member-directed scheme. The role of the investment advisor was the duty of other parties, such as CWM.

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

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested financial instruments, ***MPM had nevertheless certain obligations to undertake in its role of Trustee and Scheme Administrator. The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial bearing on the operations and activities of the scheme and affect direct, or indirectly, its performance****.*

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

A. The Appointment of the Investment Advisor

It is noted that the Complainant chose the appointment of CWM to provide him with investment advice in relation to the selection of the underlying investments and composition of the portfolio within the member-directed Scheme. ***However, from its part, MPM allowed and/or accepted CWM to provide investment advice to the Complainant within the Scheme's structure****.*

There are a number of aspects which give rise to concerns on the diligence exercised by MPM when it came to the acceptance of, and dealings with, the investment adviser as further detailed below.

Inappropriate and inadequate material issues involving the Investment Advisor

i. Incomplete and inaccurate material information relating to the advisor in MPM's Application Form for Membership

It is considered that ***MPM accepted and allowed inaccurate and incomplete material information relating to the Advisor to prevail in its own Application Form for Membership****. MPM should have been in a position to identify, raise and not accept the material deficiencies arising in the Application Form.*

If inaccurate and incomplete material information arose in the Application Form for Membership in respect of such a key party it was only appropriate and in the best interests of the Complainant, and reflective of the role as Trustee as a bonus paterfamilias, for MPM to raise and flag such matters to the Complainant and not accept such inadequacies in its form. MPM had ultimately the prerogative whether to accept the application, the selected investment advisor and also decide with whom to enter into terms of business.

The section titled 'Professional Adviser's Details' *in the Application Form for Membership in respect of the Complainant indicated even a different name* 'Continental Wealth Trust' *rather than* 'Continental Wealth Management' *('CWM') as the company's name of the professional adviser.*

In the same section of the Application Form, the adviser was indicated as having a registered address in Spain and that it had 'Global Net' *as regulator. The field for* 'Licence Number' *in the same section was left unanswered. (fn. 83 A fol. 127)*

The Arbiter considers the reference to Global Net *as regulator to be inadequate and misleading.*

*With respect to the reference to '*Globalnet' *as the regulator of the adviser, it is to be noted that MPM itself had explained that '*Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union'. *(fn. 84 A fol. 120) Global Net could have thus not been the regulator of a professional adviser.*

Global Net is clearly not a regulatory authority and, being an unregulated and connected company itself, could not have reasonably provided any comfort that there was some form of regulation nor that there were any adequate controls and/or supervision equivalent to that applicable for regulated investment services providers.

Indeed, no evidence was actually submitted by MPM of CWM being truly regulated.

ii. Lack of clarity/convoluted information

It is noted that the lack of clarity and convolution relating to the investment adviser has also prevailed in the Application Form submitted in respect of the acquisition of the underlying policy*, that is, the one issued by Old Mutual International.*

MPM, as Trustee of the Scheme had clear sight of the said application and had indeed signed the application for the acquisition of the respective policy in its role as trustee.

*It is noted that the Application Form of the policy provider refers to, and includes, the stamp of another party as financial adviser. The first page of the said application form includes a section titled '*Financial adviser details*' and a field for '*Name of financial adviser*', with such section including a stamp bearing the name of '*Trafalgar International GmbH' ('Trafalgar*') apart from reference to '*Continental Wealth*'. (fn. 85 A fol. 141) Trafalgar is then featured in the section titled '*Financial adviser declaration*' of the said form which section also includes the same stamp of Trafalgar (with a PO Box in Cyprus and Head Office in Germany), in the part titled* 'Financial adviser stamp'*.*

There is accordingly a lack of clarity on the exact entity ultimately taking responsibility for the investment advice being provided to the Complainant. For the reasons explained, the information on the financial adviser is also somewhat inconsistent between that included in MPM's application form and the application form of the issuer of the underlying policy.

iii. No proper distinctions between CWM and Trafalgar

*It is also unclear why the Annual Member Statements aimed for the Complainant and produced by MPM for the years ended 31 December 2015 to 31 December 2016 indicated '*Continental Wealth Management*' as '*Professional Adviser*' whilst at the same time indicated another party, '*Trafalgar International GmbH*' as the '*Investment Adviser*'. (fn. 86 A fol. 177-180)*

*No indication or explanation of the distinction and differences between the two terms of '*Professional Adviser*' and '*Investment Adviser*' were either provided or emerged nor can reasonably be deduced.*

Besides the lack of clarity on the entity taking responsibility for the investment advice and the lack of clear distinction/links between the indicated parties in the application forms and statements, it has also not emerged that the Complainant was provided with clear and adequate information regarding the respective roles and responsibilities between the different mentioned entities throughout.

If CWM was acting as an appointed agent of another party, such capacity, as an agent of another firm, should have been clearly reflected in the application forms and other documentation relating to the Scheme. Relevant explanations and

implications of such agency relationship and respective responsibilities should have also been duly indicated without any ambiguity.

It is also noted that during the proceedings of this case MPM has not provided evidence of any agency agreement between CWM and Trafalgar.

***In the reply that MPM sent directly to the Complainant in respect of his formal complaint, MPM itself explained that '*Momentum in its capacity as Trustee and RSA, in exercising its duty to you ensured: The full details of the Scheme, <u>including all parties' roles and responsibilities were clearly outlined</u> <u>to you in the literature provided ensuring no ambiguity</u>** *(fn. 87 Emphasis added by the Arbiter)* **including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules'**. *(fn. 88 Section 3, titled* 'Overview of Momentum Controls in place in exercising a duty to all members' *in MPM's reply to the Complainant in relation to the complaint made in respect of the Scheme - A fol. 95)*

The Arbiter does not have comfort that such a duty has been truly achieved in respect of the advisor for the reasons amply explained above.

iv. No regulatory approval in respect of CWM

During the proceedings of this case no evidence has emerged either about the regulatory status of CWM. As indicated earlier, MPM only referred to the alleged links between CWM and Trafalgar and only indicated authorisations issued to Trafalgar International GmbH (and not CWM) by IHK, (the Chamber of Commerce and Industry in Frankfurt) with the 'Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'. *(fn. 89 Copy of authorisations issued to Trafalgar were specifically referred to in para. 39 Section E, titled* 'CWM and Trafalgar International GmbH' *in the affidavit of Stewart Davies – A fol. 229)*

*MPM's statement that CWM '*was operating under Trafalgar International GmbH licenses' *(fn. 90 Para. 39, Section E titled* 'CWM and Trafalgar International GmbH' *of the affidavit of Stewart Davies – A fol. 229) has not been backed up by any evidence during the proceedings of this case. No comfort can be thus taken either from the authorisation/s held by Trafalgar.*

Indeed, no evidence of any authorisation held by CWM in its own name or as an agent of a licensed institution, authorising it to provide advice on investment instruments and/or advice on investments underlying an insurance policy has, ultimately been produced or emerged during the proceedings of this case.

In the absence of such, ***the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM* 'was authorised to trade in Spain and in France by Trafalgar International GmbH'***, (fn. 91 Pg. 1, Section A titled 'Introduction', of the Reply of MPM submitted before the Arbiter for Financial Services - A fol. 120)* ***are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant****.*

This also taking into consideration that:

*(i) Trafalgar is itself no regulatory authority but a licensed entity itself. Similarly, GlobalNet was not a regulatory authority and as explained by the Service Provider itself this was just '*an unregulated company'*, being* 'an associate company of Trafalgar' offering 'administrative services to entities outside the European Union'*; (fn. 92 Pg. 1, Section A titled* 'Introduction', *of the Reply of MPM submitted before the Arbiter for Financial Services – A fol. 120)*

(ii) the inconsistency and lack of clarity in respect of the investment advisor, including its regulatory status in the Application Forms as well as the confusing and unclear references in the statements relating to the advisor as indicated above;

(iii) legislation covering the provision of investment advisory services in relation to investment instruments, namely the Markets in Financial Instruments Directive (2004/39/EC) already applied across the European Union since November 2007.

No evidence was provided that CWM, an entity indicated as being based in Spain, held any authorisation to provide investment advisory services, in its own name or in the capacity of an agent of an investment service provider under MiFID*.*

Article 23(3) of the MiFID I Directive, which applied at the time, indeed provided specific requirements on the registration of tied agents. (fn. 93 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN)

No evidence of CWM featuring in the tied agents register in any EU jurisdiction was either produced or emerged.

Neither was any evidence produced of any exemption from licence under MiFID or that CWM held an authorisation or exemption under any other applicable European legislation for the provision of the contested investment advice*.*

*The Service Provider noted inter alia that '*CWM was appointed agent of Trafalgar International GmbH'. *(fn. 94 Para. 39, Section E, titled* 'CWM and Trafalgar International GmbH' *of Stewart Davies's affidavit - A fol.229)*

The nature of the agency agreement that CWM was claimed to have was not explained nor defined, and it was not indicated either in terms of which European financial services legislation such agency agreement was in force and permitted the provision of the disputed investment advice. Nor evidence of any agency agreement existing between CWM and any other party was produced during the proceedings of this case as indicated above*.*

Other observations & synopsis

As explained above, albeit being selected by the Complainant, the investment adviser was however accepted, at MPM's sole discretion, to act as the Complainant's investment advisor within the Scheme's structure.

The responsibility of MPM in accepting and allowing CWM to act in the role of investment advisor takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM. As indicated above, MPM accepted CWM when, as verified in the Complainant's Application Form for Membership, it was being stated in MPM's own application form that CWM was a regulated entity. However, no evidence has transpired that this was so, as amply explained above.

MPM allowed and left uncontested key information in its own Application Form for Membership of the Retirement Scheme with respect to the regulatory status of the investment advisor.

*The Service Provider argued inter alia in its submissions that it was not required, in terms of the rules, to require the appointment of a regulated advisor during the years 2013-2015 under the SFA regime and until the implementation of Part B.9 titled '*Supplementary Conditions in the case of entirely Member Directed Schemes' *of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA updated in December 2018, where the latter clearly introduced the requirement for the investment advisor to be regulated. (fn. 95 A fol. 230)*

The Arbiter notes in this regard that in its affidavit Steward Davies highlighted that: 'There was no law or rule requiring Momentum to carry out any due diligence or ensure that CWM/ Trafalgar was licensed'. *(fn. 96 Ibid.)*

However, the Arbiter strongly believes that the aspect of scrutinising an investment advisor known to the RSA and Trustee to be operating in relation to a retirement scheme, impinges on the RSA and Trustee and their duty of care and professional diligence.

This goes beyond the mere legalistic approach of shedding off responsibility by interpreting regulatory rules, which are in the first place intended to establish the minimum standards expected of a licensed operator, in such a way as to avoid responsibility.

The Arbiter wants to underscore that the compliance with regulatory rules does not substitute the further obligations that an RSA and Trustee of a retirement scheme have towards the members of the scheme. As amply stated earlier in this decision under the section titled* 'The legal framework', *a Trustee must act diligently and professionally in the same way as a* bonus paterfamilias*. A* bonus paterfamilias *does not abdicate from his responsibilities to suite his interests.

The appointment of an entity such as CWM as investment advisor meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where an adequately regulated advisor is appointed. An adequately regulated financial advisor is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory authority.

MPM, being a regulated entity itself, should have been duly and fully cognisant of this. It was only in the best interests of the Complainant for MPM to ensure that the Complainant had correct and adequate key information about the investment advisor.

Besides the issue of the regulatory status of the advisor, MPM also allowed and left uncontested important information, which was convoluted, misleading, unclear and lacking as explained above, with respect to the investment advisor, namely in relation to:

- ***CWM's alleged role as agent of another party, and the respective responsibilities of CWM and its alleged principal;***
- ***the entity actually taking responsibility for the investment advice given to the Complainant as more than one entity was at times mentioned with respect to investment advice;***
- ***the distinctions between CWM and Trafalgar.***

It is also to be noted that apart from the above, MPM had itself a business relationship with CWM, having accepted it to act as its introducer of business. Such relationship gave rise to potential conflicts of interest, where an entity whose actions were subject to certain oversight by MPM on one hand was on the other hand channelling business to MPM.

Even in case where, under the previous applicable regulatory framework, an unregulated advisor was accepted by the trustee and scheme administrator to provide investment advice to the member of a member-directed scheme (on the basis of clear understanding by the member of such unregulated status and implications of such, and the member's subsequent clear consent for such type of advisor), ***one would, at the very least, reasonably expect the retirement scheme administrator and trustee of such a scheme to exercise even more caution and prudence in its dealings with such a party in such circumstances.***

This is even more so when the activity in question, that is, one involving the recommendations on the choice and allocation of underlying investments, has such a material bearing on the financial performance of the Scheme and the objective to provide for retirement benefits.

It would have accordingly been only reasonable, to expect the trustee and retirement scheme administrator, as part of its essential and basic obligations and duties in such roles, to have an even higher level of disposition in the probing and querying of the actions of an unregulated investment adviser in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances.

The Arbiter does not have comfort that such level of diligence and prudence has been actually exercised by MPM for the reasons already stated in this section of the decision.

B. The permitted portfolio composition

Investment into Structured Notes

Preliminary observations

The sale of, and investment into, structured notes is an area which has attracted various debates internationally including reviews by regulatory authorities over the years. Such debates and reviews have been occurring even way back since the time when the Retirement Scheme was granted registration in 2011.

The Arbiter considers that caution was reasonably expected to be exercised with respect to investments in, and extent of exposure to, such products since the time of the Scheme's registration. Even more so when taking into consideration the nature of the Retirement Scheme and its specific objective.

Nevertheless, the Complainant's investment portfolio constituted at times solely or predominantly of structured notes as detailed in the section titled 'Underlying Investments' above.

*A typical definition of a structured note provides that '*A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index'*.*

*A structured note is further described as '*a debt obligation – basically like an IOU from the issuing investment bank – with an embedded derivative component; in other words, it invests in assets via derivative instruments'*. (fn. 98 https://www.investopedia.com/articles/bonds/10/structured-notes.asp)*

No fact sheets were presented by the Complainant during the case and, as part of the investigatory powers granted under Cap. 555, the Office of the Arbiter for Financial Services was unable to trace fact sheets publicly available over the internet in respect of the structured notes featuring in the Complainant's investment portfolio. (fn. 99 Traced from Case 130/2018 against MPM decided on 28 July 2020)

Whilst there are different types of structured notes, the Arbiter is aware that various structured notes available at the time of the investments of the Complainant's portfolio, involved the application of capital buffers and barriers where the invested capital was at risk in case of a particular event occurring.

Such event typically comprised a fall, observed on a specific date of more than a specified percentage, in the value of any underlying asset to which the structured note was linked (typically a basket of stocks or indices) and there were material consequences if just one asset, out of a basket of assets to which the note respectively was linked, fell foul of the indicated barrier.

Such type of structured note investments were typical of those done on the advice of CWM in similar member-directed pension portfolios as emerging in various other similar cases against MPM decided by the Arbiter on the 28 July 2020. On the balance of probabilities, the Complainant's portfolio must have included such type of

structured notes given the extent of material losses experienced by the Complainant on his portfolio.

The Arbiter shall nevertheless focus on the exposure to the structured products as emerging from the information provided by the Service Provider.

Excessive exposure to structured products and to single issuers in respect of the Complainant's portfolio

The portfolio of investments in respect of the Complainant comprised at times solely or predominantly of structured products. This clearly emerges from the Table of Investments forming part of the 'Investor Profile' *provided by the Service Provider as detailed in the section titled* 'Underlying Investments' *above.*

In addition, high exposures to the same single issuer/s, both through a singular purchase and/or through cumulative purchases in products issued by the same issuer emerged in the Complainant's portfolio. Four out of the five structured notes were all Leonteq structured notes as reflected in the name of the products. (fn. 100 A fol. 203)

Even in case where the issuer of the structured product was a large institution, the Arbiter does not consider this to justify or make the high exposure to single issuers acceptable even more in the Scheme's context. The maximum limits relating to exposures to single issuers outlined in the MFSA rules and MPM's own Investment Guidelines did not make any distinctions according to the standing of the issuer.

Hence, the maximum exposure limits to single counterparties should have been applied and ensured that they are adhered to across the board.

Context of entire portfolio and substance of MPM's Investment Guidelines

For the avoidance of doubt, and with reference to the emphasis made by the Service Provider for investments to be seen in the context of the entire portfolio, (fn. 101 Affidavit of Steward Davies – A fol. 227) the Arbiter would like to point out that consideration has indeed been duly made of the entire investment portfolio held in the Complainant's individual account within the Scheme including how such portfolio was constituted at inception and (to the extent possible on the basis of the information provided), how the constitution of the portfolio progressed over the years.

Furthermore, the Arbiter has also considered what percentage of the policy value each respective underlying investment constituted at the time of their respective purchase, on the basis of the information provided by the Service Provider itself in the table of 'Investor Profile' *attached to its submissions. (fn. 102 A fol. 203) Consideration was*

then further made of how the said percentage allocation, reflected the maximum limits outlined in the investment restrictions and diversification requirements in the MFSA Rules as well as MPM's own Investment Guidelines that were applicable at the time of purchase.

It is to be pointed out that in the case of a member directed scheme, each member would have his/her own individual account within the retirement scheme, with such account having its own specific and distinct investment portfolio. Hence, it is only reasonable and correct for the principles, including the investment restrictions specified for the Retirement Scheme to have been applied and adhered to at the level of the individual account. Failure to do so would have meant that the safeguards emanating from the investment conditions and diversification requirements would have not been adopted and ensured in practice in respect of the individual member's portfolio, defeating the aim of such requirements in the first place.

The application of investment restrictions at a general level, that is at scheme level without application on an individual account basis, would only make sense and be reasonable in the context of, and where, the members of such a scheme are participating in the <u>same</u> portfolio of assets held within the scheme and not in the circumstance where the members have their own individual separate investment portfolios, as was the case in question.

An analogy can be made in this regard to the market practice long adopted in the context of collective investment schemes, namely, in respect of stand-alone schemes (fn. *103 i.e., a collective investment scheme without sub-funds) and* umbrella schemes*. (fn. 104 i.e., a collective investment scheme with sub-funds, where each sub-fund would typically have its own distinct investment policies and separate and distinct investment portfolios) Whilst investment restrictions would be applied at scheme level in the case of a stand-alone scheme (given that the investors into such scheme would be participating, according to their respective share in the scheme, in the performance of the same underlying investment portfolio), in the case of an umbrella fund, the investment restrictions are not applied at scheme level but at the sub-fund level and would indeed be tailored for each individual sub-fund given that each sub-fund would have its own distinct and separate investment portfolio and investment policy.*

As to the substance of MPM's Investment Guidelines, it is noted that the Service Provider seemed to somehow downplay the importance and weighting of its own Investment Guidelines by stating that these were just to provide guidance 'but should not be applied so strictly so as to stultify the ultimate objective, that the investment

is placed in the best interests of the member'. *(fn. 105 A fol. 228 – Para. 32 of the affidavit of Stewart Davies)*

Apart that it is contradictory to infer that by not adhering with the guidelines one would be acting in the best interests of the member - given that the scope of such guidelines should have been, in the first place, to ensure that the portfolio is diversified and risks are spread and, thus, to ensure the best interests of the member - it has, in any case, not been demonstrated or justified in any way what instances were somehow deemed appropriate by the Service Provider where it was more in the best interests of the member to depart and not comply with the investment guidelines rather than to ensure adherence thereto.

It is further to be noted that the specific parameters and limits outlined in MPM's Investment Guidelines were themselves stipulated in MPM's key documentation and, as specified in the same documentation, MPM itself had to ensure adherence with the specified limits and conditions in its role of Trustee of the Retirement Scheme. Furthermore, no qualifications or any disclaimers regarding the compliance or otherwise with such guidelines have emerged in this case. Neither has it emerged in what circumstances, divergences could possibly be permitted, if at all. Hence, the stipulated Investment Guidelines were binding and should have been followed accordingly. Even if one had to, for the sake of the argument only (which was not the case as outlined above), somehow construe that these were 'just' *guidelines and not strict rules as the Service Provider tried to argue, (fn. 106 A fol. 228 – Para. 32 of the affidavit of Stewart Davies) one would in any case reasonably not expect any major departure from the limits and maximum exposures specified in the stipulated guidelines.*

With respect to the Complainant's portfolio, it is considered that not only were various investments not reflective of MPM's Investment Guidelines but, on multiple occasions, there were material departures from such guidelines where the maximum limits were materially exceeded as outlined further below.

Portfolio not reflective of the MFSA rules

*The high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio, jarred with the regulatory requirements that applied to the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002', *('*the Directives'*) which applied from the Scheme's inception in 2011 until the*

registration of the Scheme under the RPA on 1 January 2016. The applicability and relevance of these conditions to the case in question was highlighted by MPM itself. (fn. 107 Para. 21 & 23 of the Note of Submissions filed by MPM – A fol. 207)

*SOC 2.7.1 of Part B.2.7 of the Directives required inter alia that the assets were to '*be invested in a prudent manner and in the best interest of beneficiaries *…'.*

*SOC 2.7.2 in turn required the Scheme to ensure inter alia that, the assets of a scheme are '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole' *(fn. 108 SOC 2.7.2 (a)) and that such assets are* 'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'. *(fn. 109 109 SOC 2.7.2.(b))*

*SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets'*; (fn. 110 SOC 2.7.2 (c)) to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings*' (fn. 111 SOC 2.7.2 (e)) where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme. (fn. 112 SOC 2.7.2 (h)(iii) & (v))*

Despite the standards of SOC 2.7.2, MPM allowed the portfolio of the Complainant to comprise at times solely or predominantly of structured products.

In the case of the Complainant it has also clearly emerged that individual exposures to single investments and issuers were at times even higher than 30%, this being the maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above. It is noted that the investment portfolio included an exposure of 32.84% of the policy value to a single structured note at the time of purchase (the Commerzbank 2Y AC Phoenix On AAPL EDC Rovi P) and collective exposures to a single issuer above 32% of the policy value (such as to EFG and Leonteq & TCM through multiple purchases). (fn. 113 A fol. 203)

The table of investments further indicates material positions into seemingly high risk investments where the high risk is reflected in the high rate of return - for example of 9% and 8.64% as featuring in the name of some of the structured notes constituting the Complainant's investment portfolio.

Portfolio not reflective of MPM's **own** Investment Guidelines

In its submissions MPM produced a copy of the Investment Guidelines marked 'January 2013' and 'Mid-2014', which guidelines featured in the Application Form for Membership, and also Investment Guidelines marked '2015', '2016', 'Mid-2017', 'Dec-2017' and '2018' where, it is understood the latter respectively also formed part of the Scheme's documentation such as the Scheme Particulars issued by MPM.

Despite that the Service Provider claimed that the investments made in respect of the Complainant were in line with the Investment Guidelines, ***MPM has however not adequately proven such a claim****.*

The investment portfolio in the case reviewed was ultimately solely/predominantly invested in structured notes.

If one had to look at the composition of the Complainant's portfolio there is undisputable evidence of non-compliance with requirements detailed in MPM's own Investment Guidelines.

This is particularly so with respect to the requirements applicable regarding the proper diversification, avoidance of excessive exposure and permitted maximum exposure to single issuers.

Table A below shows some examples of excessive single exposures allowed within the portfolio of the Complainant as emerging from the respective 'Table of Investments' *forming part of the* 'Investor Profile' *produced by MPM as part of its submissions. (fn. 114 A fol. 203)*

Table A – Examples of Excessive Exposure to a Single Issuer of Structured Notes ('SNs')

Exposure to single issuer in % terms of the policy value at time of purchase	*Issuer*	*Date of purchase*	*Description*

32.84%	*Commerzbank*	*April 2015*	*1 SN issued by Commerzbank constituted 32.84% of the policy value at the time of purchase in April 2015.*
32.84%	*EFG*	*April 2015*	*2 SNs issued by EFG respectively constituted 16.42% each of the policy value at the time of purchase in April 2015.**
32.84%	*Leonteq & TCM*	*April 2015*	*2 SNs issued by 'Leonteq & TCM' respectively constituted 16.42% each of the policy value at the time of purchase in April 2015.**
**Furthermore, both the 2 structured notes whose issuer was EFG and the 2 structured notes whose issuer was 'Leonteq & TCM' were all Leonteq structured notes as reflected in the name of these products. Accordingly 65.68% were invested into Leonteq structured notes.*			

The fact that such high exposures to a single investment and single counterparties was allowed in the first place indicates, in itself, the lack of prudence and excessive exposure and risks that were allowed to be taken on a general level, particularly when no capital guarantees were involved.

Indeed, no evidence has been produced during the proceedings of this case that these products had underlying guarantees. The extent of losses experienced actually indicate that there were no guarantees on the capital invested (which guarantees could have possibly justified high exposures) as otherwise such losses on the principal would have not occurred. (As indicated above, the exposures allowed by MPM were even higher than the 30% maximum limit on deposits held with any one bank as reflected in MFSA's rules). There is clearly no apparent reason, from a prudence point of view, justifying such high exposures as allowed within the Complainant's investment portfolio.

Indeed, the Arbiter considers that the high exposure to structured products as well as to single issuers in the Complainant's portfolio jarred, and did not reflect to varying degrees, with one or more of MPM's own investment guidelines applicable at the time when the investments were made, most particularly with respect to the following guidelines: *(fn. 115 Emphasis in the mentioned guidelines added by the Arbiter)*

<u>Investment Guidelines marked 'January 2013':</u>
*o **Properly diversified** in such a way as to **avoid excessive exposure**:*
▪ ***Singular structured products should be avoided due to the counterparty risk** but are acceptable as part of an overall portfolio.*
<u>Investment Guidelines marked 'Mid-2014':</u>
• ***Where products with underlying guarantees** are chosen, **no more than one third of the overall portfolio to be subject to the same issuer default risk**.*
*In addition, **further consideration needs to be given to** the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to **avoid excessive exposure**:* • *...* • ***To any single credit risk***
<u>Investment Guidelines marked '2015':</u>
• ***Where products with underlying guarantees** are chosen, i.e. **Structured Notes**, these will be **permitted up to a maximum of 66% of the portfolio's values**,*
*with **no more than one third** of the portfolio to be **subject to** the **same issuer default risk**.*

*In addition, **further consideration needs to be given to** the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to **avoid exposure**:* • *...* • ***To any single credit risk**.*

***MPM had also to ensure that the investments were* 'in line with the underlying member's attitude to risk' *as reflected in MPM's Investment Guidelines marked* 'Mid-2014' *and* '2015'.**

It is unclear how MPM considered the permitted investments to reflect the Complainant's* 'Lower to Medium' *risk profile. The extent of losses suffered indeed further substantiates the notion that the investments were not reflective of the Complainant's risk profile.

For the reasons amply explained, the Arbiter has no comfort that MPM's role as RSA and Trustee in ensuring the Scheme's investments are managed in accordance with relevant legislation and regulatory requirements and in accordance with its own documentation, has been truly achieved by MPM generally, and at all times, in respect of the Complainant's investment portfolio.

Other observations & synopsis

The Service Provider did not help its case by not providing detailed information on the underlying investments as already stated in this decision. Although the Service Provider filed a Table of Investments*, it did not provide adequate information to explain the portfolio composition and justify its claim that the portfolio was diversified. It did not provide fact sheets in respect of the investments comprising the portfolio of the Complainant and it did not demonstrate the features and the risks attached to the investments.*

Various aspects had to be taken into consideration by the Service Provider with respect to the portfolio composition.

Such aspects include, but are not limited to:

- *the nature of the structured products being invested into and the effects any specific features of such products would have had on the investment as detailed above;*
- *the potential rate of returns as indicative of the level of risk being taken;*
- *the level of risks ultimately exposed to in the respective product and in the overall portfolio composition; and*
- *not the least, the issuer/counterparty risk being taken.*

The extent of losses experienced on the capital of the Complainant's portfolio is in itself indicative of the failure in adherence with the applicable conditions on diversification and avoidance of excessive exposures. Otherwise, material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have not occurred.

Apart from the fact that no sensible rationale has emerged for limiting the composition of the pension portfolio solely/predominantly to structured products, no adequate and sufficient comfort has either emerged that such composition reflected the prudence expected in the structuring and composition of a pension portfolio.

Neither that the allocations were in the best interests of the Complainant or reflective of his risk profile of 'Lower to Medium' *Risk.*

In the circumstance where the portfolio of the Complainant was solely/ predominantly invested into structured products with a high level of exposure to single issuer/s, and for the reasons amply explained above, the Arbiter does not consider that there was proper diversification nor that the portfolio was at all times '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole' *(fn. 116 SOC2.7.2(a) of Part B.2.7 of the Directives) and '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'*. *(fn. 117 SOC2.7.2(b) of Part B.2.7 of the Directives)

*Apart from the fact that the Arbiter does not have comfort that the portfolio was reflective of the conditions and investment limits outlined in the MFSA's Rules and MPM's own Investment Guidelines, **it is also being pointed out that over and above the duty to observe specific maximum limits relating to diversification as may have been specified by rules, directives or guidelines applicable at the time, the behaviour and judgement of the Retirement Scheme Administrator and Trustee of the Scheme is expected to, and should have gone beyond compliance with maximum percentages and was to, in practice, reflect the spirit and principles***

behind the regulatory framework <u>and in practice promote the scope for which the Scheme was established</u>.

The excessive exposure to structured products and their issuers nevertheless clearly departed from such principles and cannot ultimately be reasonably considered to satisfy and reflect in any way a suitable level of diversification nor a prudent approach.

This is even more so when considering the crucial aim of a retirement scheme being that to provide for retirement benefits – an aspect which forms the whole basis for the pension legislation and regulatory framework to which the Retirement Scheme and MPM were subject to. The provision of retirement benefits was indeed the Scheme's sole purpose as reflected in the Scheme Particulars.

C. <u>The Provision of information</u>

With respect to reporting to the member of the Scheme, MPM mentioned and referred only to the Annual Member Statement in its submissions. As explained above, the said annual statements (for the years ending 2015 till 2018) issued by the Service Provider to the Complainant are however highly generic reports which only listed the underlying life assurance policy and included no details of the underlying investments, that is, the structured notes comprising the portfolio of investments. (fn. 118 A fol. 177-186)

Hence, the extent and type of information sent to the Complainant by MPM as a member of the Scheme in respect of his underlying investments is considered to have been lacking and insufficient

SOC 9.3(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes of 1 January 2015 already provided that, in respect of member directed schemes, 'a record of all transactions (purchases and sales) occurring in the member's account during the relevant reporting period should be provided by the Retirement Scheme Administrator to the Member at least once a year and upon request …'.

It is noted that the Pension Rules for Personal Retirement Schemes under the RPA became applicable to MPM on 1 January 2016 and that, as per the MFSA's communications presented by MPM, (fn. 119 MFSA's letter dated 11 December 2017, attached to the Note of Submissions filed by MPM in 2019) Part B.9 of the said rules did not become effective until the revised rules issued in 2018.

Nevertheless, it is considered that even where such condition could have not strictly applied to the Service Provider from a regulatory point of view, the Service Provider as a Trustee, obliged by the TTA to act as a bonus paterfamilias *and in the best*

interests of the members of the Scheme, should have felt it its duty to provide and report fully to members adequate information on the underlying investment transactions.

Moreover, prior to being subject to the regulatory regime under the RPA, the Service Provider was indeed already subject to regulatory requirements relating to the provision of adequate information to members such as the following provisions under the SFA framework:

- *Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002 (fn. 120 Condition 2.2 of the Certificate of Registration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives) respectively already provided that:*

  '2.6.2 The Scheme Administrator shall act with due skill, care and diligence in the best interests of the Beneficiaries. Such action shall include:

  …

  b) ensuring that contributors and prospective contributors are provided with adequate information on the Scheme to enable them to take an informed decision …';

  '2.6.3 The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and nor misleading. This shall include:

  …

  b) reporting fully, accurately and promptly to contributors the details of transactions entered into by the Scheme …'.

There is no apparent and justified reason why the Service Provider did not report itself on key information such as the composition of the underlying investment portfolio, which it had in its hands as the trustee of the underlying life assurance policy held in respect of the Complainant.

The general principles of acting in the best interests of the member and those relating to the duties of trustee, as already outlined in this decision, (fn. 121 The section titled 'Responsibilities of the Service Provider'.) *and to which MPM was subject to, should have prevailed and should have guided the Service Provider in its actions to ensure*

that the Member was provided with an adequate account of the underlying investments within his portfolio.

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainant ***cannot*** *just be attributed to the under-performance of the investments as a result of general market and investment risks and/or the issues alleged against one of the structured note providers, as MPM has inter alia suggested in these proceedings. (fn. 122 For example, in the reference to litigation filed against Leonteq – A fol. 232)*

There is sufficient and convincing evidence of deficiencies on the part of MPM in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above which, at the very least, impinge on the diligence it was required and reasonably expected to be exercised in such roles.

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

Had MPM undertaken its role adequately and as duly expected from it, in terms of the obligations resulting from the law, regulations and rules stipulated thereunder and the conditions to which it was subject to in terms of its own Retirement Scheme documentation as explained above, such losses would have been avoided or mitigated accordingly.

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with MPM being one of such parties.

In the particular circumstances of the cases reviewed, the losses experienced on the Retirement Scheme are ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which MPM was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainant.

Final remarks

As indicated earlier, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance of the specified rules.

The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had, however, clear duties to check and ensure that the portfolio composition recommended by the investment advisor provided a suitable level of diversification and was inter alia in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme. The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

It is considered that, had there been a careful consideration of the contested structured products and extent of exposure to such products and their issuers, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others.

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

Whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly when it came to the dealings and aspects involving the appointed investment adviser; the oversight functions with respect to the Scheme and portfolio structure; as well as the reporting to the Complainant on the underlying portfolio.

It is also considered that there are various instances which indicate non-compliance by the Service Provider with applicable requirements and obligations as amply explained above in this decision.

The Arbiter also considers that the Service Provider did not meet the* 'reasonable and legitimate expectations'** *(fn. 123 Cap. 555, Article 19(3)(c))* ***of the Complainant who had placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

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

Cognisance needs to be taken, however, of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment advisor to the Member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the losses incurred.

Compensation

Being mindful of the key role of Momentum Pensions Malta Limited as Trustee and Retirement Scheme Administrator of the Momentum Malta Retirement Trust, and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by Momentum Pensions Malta Limited for part of the realised losses on his pension portfolio.

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited, to be held responsible for seventy per cent of the net realised losses sustained by the Complainant on his investment portfolio.

The Arbiter notes that the latest valuation and list of transactions provided by the Service Provider in respect of the Complainant is not current. Besides, no detailed breakdown was provided regarding the status and performance of the respective investments within the disputed portfolio.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for the purpose of this decision in order for the performance on the whole investment portfolio to be taken into consideration.

The Service Provider is accordingly being directed to pay the Complainant compensation equivalent to 70% of the sum of the Net Realised Loss incurred within the whole portfolio of underlying investments constituted under Continental Wealth Management and allowed by the Service Provider.

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

(i) ***For every such investment it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised). Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;***

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

The computation of the Net Realised Loss shall accordingly take into consideration any realised gains or realised losses arising within the portfolio.

(iii) ***Investments which were constituted under Continental Wealth Management in relation to the Scheme and are still held and remain open within the current portfolio of underlying investments as at, or after, the date of this decision are not the subject of the compensation stipulated above. This is without prejudice to any legal remedies the Complainant might have in future with respect to such investments.***

In accordance with Article 26 (3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Momentum Pensions Malta Limited to pay the indicated amount of compensation to the Complainant.

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

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

The costs of these proceedings are to be borne by the Service Provider."

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fit-3 ta' Jannar, 2022 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka u tħassar id-deċiżjoni appellata, billi tilqa' l-aggravji tagħha. Tgħid li l-aggravji tagħha huma s-segwenti: (i) l-Arbitru applika u nterpreta ħażin il-liġi meta ddeċieda li s-soċjetà appellanta naqset mid-dmirijiet tagħha fil-kwalità tagħha ta' *trustee* jew mod ieħor, iżda partikolarment meta ddeċieda fost affarijiet oħra li (a) hija kienet naqset għaliex ippermettiet lil CWM taġixxi bħala *investment adviser* tal-appellat; u (b) il-kompożizzjoni u s-superviżjoni tal-portafoll tal-appellat ma kienx skont il-liġijiet, regoli u linji gwida applikabbli; (ii) ma kienx jeżisti l-ebda ness kawżali u għalhekk l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet infondati; u (iii) l-Arbitru għamel apprezzament ħażin tal-fatti u tal-liġi, meta ddeċieda dwar il-prassi adottata mis-soċjetà appellanta fir-rigward ta' verifikar ta' firem u dwar il-miżati tagħha u dak mistenni minnha. Is-soċjetà appellanta annettiet dokument li permezz tiegħu għamlet sottomissjonijiet ulterjuri.

7. L-appellat wieġeb fit-23 ta' Frar, 2022 fejn issottometta li d-deċiżjoni appellata hija ġusta, u għaldaqstant timmerita li tiġi kkonfermata għal dawk ir-raġunijiet li huwa jispjega fit-tweġiba tiegħu.

<u>Konsiderazzjonijiet ta' din il-Qorti</u>

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

9. *<u>L-ewwel aggravju</u>:* Meta tfisser l-ewwel aggravju tagħha, is-soċjetà appellanta tikkontendi li l-Arbitru ddeċieda ħażin li hija kienet responsabbli għaliex naqset mill-obbligi tagħha meta ħalliet lil CWM taġixxi bħala *investment advisor,* hekk kif din kienet ġiet maħtura mill-appellat stess. Tirrileva li l-Arbitru stess kien osserva li CWM ġiet magħżula mill-appellat innifsu, u li s-soċjetà appellanta ma kellha l-ebda obbligu li tivverifika jekk din kinitx entità regolata jew jekk kinitx awtorizzata taħt sistema regolatorja sabiex tipprovdi pariri dwar investimenti. Tgħid li l-obbligu tagħha sabiex tivverifika jekk CWM kellhiex awtorizzazzjoni regolatorja sabiex tagħti pariri ta' investiment jew jekk kinitx entità regolatorja, daħal fis-seħħ fis-sena 2019 meta nbidlu r-regoli mill-MFSA, u għalhekk dawn l-obbligi mhumiex applikabbli għall-każ odjern. Madankollu l-Arbitru xorta waħda sostna li hija kienet naqset fl-obbligi tagħha. Tirrileva li l-Arbitru semma erba' aspetti fejn naqset is-soċjetà appellanta, iżda hija tinsisti li ma kien hemm l-ebda obbligu, u għaldaqstant ma seta' jkun hemm l-ebda nuqqas. Iżda minflok l-Arbitru fittex nuqqasijiet oħra sabiex jiġġustifika l-konklużjoni tiegħu li hija kienet naqset fl-obbligi tagħha. Is-soċjetà appellanta ssostni li l-punt ċentrali kien jekk hija kellhiex obbligu tivverifika jekk CWM kinitx liċenzjata u mhux jekk din fil-fatt kinitx liċenzjata, iżda l-Arbitru ddeċieda li hija min-naħa tagħha ma kinitx ressqet l-ebda prova sabiex turi li CWM kienet

liċenzjata sabiex tagħti pariri ta' investiment, u tispjega kif din il-konklużjoni hija waħda difettuża f'żewġ aspetti. Hija tagħmel riferiment għal dak li xehed Stewart Davies fl-affidavit tiegħu, fejn dan stqarr li ma kien hemm l-ebda liġi jew regola dak iż-żmien li kienet titlob li s-soċjetà appellanta tagħmel eżerċizzju ta' *due diligence* jew li tassigura li CWM kienet liċenzjata, u dan fejn wara kollox kien proprju l-appellat li volontarjament ħatar lil CWM bħala l-konsulent finanzjarju tiegħu. Iżda fid-deċiżjoni appellata tiegħu, is-soċjetà appellanta tgħid li l-Arbitru mar lil hinn mill-punt kruċjali, u strah fuq l-obbligu ġenerali ta' *trustee* li jaġixxi fl-aħjar interess tal-benefiċjarji, sabiex wasal għall-konklużjoni tiegħu. Is-soċjetà appellanta tirrileva li l-Arbitru saħansitra għamel interpretazzjoni tassew wiesgħa ta' dak li kienet tipprovdi l-formola tal-Applikazzjoni għal Sħubija. Filwaqt li tiddikjara li hija ma kinitx qegħda tikkontesta l-obbligu ġenerali ta' *trustee* li jaġixxi f'kull każ fl-aħjar interess tal-benefiċjarji u bl-attenzjoni ta' *bonus paterfamilias,* is-soċjetà appellanta tikkontendi li dan l-obbligu ta' *trustee* ma kienx iħaddan ukoll l-obbligu speċifiku li ssir verifika dwar jekk il-konsulent finanzjarju kienx liċenzjat *o meno*, u dan meta l-imsemmi konsulent finanzjarju kien magħżul mill-appellat innifsu. Is-soċjetà appellanta ikkontendi li kieku l-obbligu kien diġà jeżisti qabel ma l-MFSA bidlet ir-regolamenti applikabbli fl-2019, ma kienx hemm proprju l-ħtieġa li ssir din il-bidla. Dwar it-tieni parti ta' dan l-ewwel aggravju tagħha, is-soċjetà appellanta tissottometti li d-deċiżjoni appellata hija msejsa fuq il-konklużjoni li kien hemm *"excessive exposure to structured products and to single issuers",* sabiex b'hekk il-portafoll ma kienx jirrifletti r-regoli tal-MFSA u l-*investment guidelines* tagħha stess, u ma kienx hemm diversifikazzjoni xierqa jew *"prudent approach".* Għalhekk l-Arbitru ddeċieda li hija kienet naqset mill-obbligu tagħha li timxi bl-

attenzjoni ta' *bonus paterfamilias* bħal ma kienet tenuta li tagħmel fil-kwalità tagħha ta' *trustee.* Tgħid li madankollu d-deċiżjoni appellata hija żbaljata, u l-Arbitru hawn ukoll kien naqas milli jieħu in konsiderazzjoni l-profil ta' riskju tal-appellat u jevalwa r-riskju ndividwali skont il-kompożizzjoni tal-portafoll sħiħ. Filwaqt li tirrileva li hija ssottomettiet l-informazzjoni kollha dwar il-portafoll tal-appellat, anki l-profil ta' riskju tiegħu u l-istruzzjonijiet li kienu ngħataw lilha, is-soċjetà appellanta tgħid li hija aġixxiet fil-parametri tal-linji gwida applikabbli. Tgħid li jidher li l-Arbitru kellu l-impressjoni li l-prodotti strutturati kellhom riskju ogħla minn dak li fil-fatt intrinsikament kellhom. Is-soċjetà appellanta hawn tirrileva li l-MFSA dejjem kienet tippermetti investiment f'dawn il-prodotti, kif kienu jagħmlu wkoll il-linji gwida tagħha, u l-investiment għalhekk qatt ma kien ipprojbit, iżda kellu jsir fil-parametri permissibbli. Tirrileva mbagħad li kull investiment fih element ta' riskju inerenti, u dan filwaqt li taċċetta li hija kienet obbligata li tassigura li l-portafoll kien f'kull mument fil-parametri tal-profil ta' riskju tal-membru, u anki tal-linji gwidi u tar-regoli applikabbli. Filwaqt li tiċċita dak li jirrileva l-Arbitru fir-rigward ta' prodotti strutturati, is-soċjetà appellanta tgħid li kuntrarjament għal dak li jgħid, il-profil kien juri li l-linji gwida applikabbli kienu ġew osservati meta sar in-negozju, inkluż l-espożizzjoni għal prodotti strutturati u għal emittenti singolari. Tikkontendi b'riferiment għal Table A f'paġna 53 tad-deċiżjoni appellata, li l-Arbitru jagħmel biss riferiment għall-profil li hija kienet ippreżentat fir-rigward tal-allegata espożizzjoni żejda għal prodotti strutturati. Tispjega b'riferiment għal dak li qal l-Arbitru fejn osserva li matul is-snin hija kienet naqset il-limitu permissibbli ta' investiment f'noti strutturati, li dawn dejjem baqgħu permissibbli fil-limiti identifikati, u li l-limiti, bħal fil-każ ta' kull prodott ieħor, dejjem kienu dinamiċi. Tgħid li wkoll fir-rigward tal-allegat

excessive exposure to single issuers, l-Arbitru għalhekk kien ukoll żbaljat fattwalment. Minn hawn is-soċjetà appellanta tgħaddi sabiex tissottometti kif l-Arbitru applika ħażin ir-regoli tal-MFSA. Tikkontendi li mhux ċar x'ried ifisser biha l-kelma "*jarred*", u lanqas kif wasal għall-konklużjoni li

> *"...The high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio jarred with the regulatory requirements that applied to the Retirement Scheme at the time..."*.

Tgħid li l-Arbitru applika ħażin l-i*Standard Operational Conditions* 2.7.1 u 2.7.2 għaliex dawn kienu applikabbli fir-rigward ta' skema fit-totalità tagħha u mhux fir-rigward ta' portafoll. Tirrileva li sussegwentement ir-regola kienet tbiddlet, u sar applikabbli l-kunċett ta' diversifikazzjoni fil-livell tal-membru u mhux tal-Iskema biss, imma l-bidla saret wara l-2017. Għalhekk peress li l-obbligu ma kienx jeżisti, l-Arbitru ma setax jgħid li hija kellha xi obbligu li tapplika l-imsemmija prinċipji fil-livell tal-membru. Minn hawn is-soċjetà appellanta tgħaddi sabiex tagħmel is-sottomissjonijiet tagħha, fejn hija kienet qegħda ssostni li l-Arbitru ddeċieda ħażin fir-rigward tal-linji gwida dwar l-investiment tagħha stess. Filwaqt li tagħmel riferiment għall-affidavit ta' Stewart Davies fuq imsemmi, tikkontendi li dawn huma intiżi sabiex iservu ta' gwida, iżda fl-istess ħin iżommu livell ta' flessibilità li jirrikjedi kull każ partikolari, u għalhekk m'għandhomx jiġu applikati b'mod tassattiv. Tinsisti li m'hemmx *'one size fits all'* fl-applikazzjoni ta' dawn il-linji gwida. Min-naħa tagħha hija kienet ippreżentat il-profil tal-appellat, iżda xorta waħda l-Arbitru ddeċieda li hija ma kinitx ressqet evidenza sabiex turi b'mod sodisfaċenti li l-investimenti saru skont il-linji gwida in kwistjoni. Is-soċjetà appellanta tirrileva li r-regola ġenerali hija li

min jallega għandu l-oneru tal-prova, u għalhekk hawn l-appellat kellu l-obbligu li jsostni l-ilment tiegħu, u dan filwaqt li tikkontendi li hija fil-fatt kienet ġabet prova sodisfaċenti sabiex turi li l-linji gwida kienu ġew osservati. Is-soċjetà appellanta tgħid li l-Arbitru mbagħad żbalja wkoll meta skarta l-prova tagħha anki meta din ma kinitx ġiet ikkontestata mill-appellat. Ir-raba' punt li tqajjem is-soċjetà appellanta, huwa li l-Arbitru naqas milli jikkonsidra l-profil ta' riskju tal-investitur. Tgħid li skont l-appellat, l-investimenti ma kienux skont il-profil ta' riskju tiegħu, u hija min-naħa tagħha kienet ikkontestat din l-allegazzjoni. Filwaqt li għal darb'oħra tagħmel riferiment għall-affidavit ta' Stewart Davies, issostni li l-profil ta' riskju kien għaliha jagħmel parti integrali mill-konsiderazzjonijiet tagħha bħala Amministratur, u li kieku dan ma kienx il-każ, ma kinitx tistaqsi għalih fil-formola tal-applikazzjoni tagħha stess. Dan filwaqt li tirrileva li x-xhieda ta' Stewart Davies ma kinitx ġiet ikkontestata, u għalhekk l-Arbitru kellu jistrieħ fuqha. Għal dak li kien jirrigwarda d-deċiżjoni appellata fejn l-Arbitru ddikjara li ma kien hemm l-ebda raġuni ġustifikata għaliex is-soċjetà appellanta kienet naqset milli tagħti nformazzjoni dwar l-investimenti sottoskritti, tgħid li hawn l-Arbitru jirrepeti l-iżball tiegħu, meta filwaqt li jirrikonoxxi li hija ma kellha l-ebda obbligu speċifiku, huwa ddikjara li bħala *trustee* bl-obbligu li timxi bħala *bonus paterfamilias* hija kienet tenuta tipprovdi rendikont aktar dettaljat. B'hekk l-Arbitru kien saħansitra nferixxa obbligi fir-rigward tal-kwalità u l-estent ta' dik l-informazzjoni, u ħoloq inċertezza dwar x'kienu l-obbligi tagħha taħt il-liġi, billi silet obbligi mill-obbligi ġenerali li jirregolaw it-*trustees*. Is-soċjetà appellanta issostni li SOC 2.6.2 u SOC 2.6.3 jirreferu għall-iskema fit-totalità tagħha, meta l-appellat ma kienx qed jilmenta

li huwa ma ngħatax informazzjoni dwar l-Iskema, fejn ukoll ma kienx il-punt li kien qed jiġi deċiż.

<u>It-tieni aggravju</u>: Is-soċjetà appellanta tgħid li hija tħossha aggravata wkoll għaliex l-Arbitru ddikjara li hija kienet parzjalment responsabbli għal 70% tat-telf soffert mill-appellat. Tgħid li fl-ewwel lok l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet li hija kienet diġà fissret li kienu nfondati, iżda jekk imbagħad wieħed kellu jaċċetta li huwa kellu raġun, tgħid li huwa naqas milli jispjega kif attribwixxa lilha r-responsabbiltà ta' 70% tat-telf. Dan filwaqt li tgħid li sabiex jiddikjara responsabbiltà, l-Arbitru kellu qabel xejn isib li hemm ness kawżali bejn in-nuqqasijiet tagħha u t-telf soffert mill-appellat. Hawn is-soċjetà appellanta tikkontendi li ċertament ir-responsabbiltà tagħha ma setgħet qatt tkun akbar minn ta' min ta l-parir, jiġifieri CWM jew tal-appellat li ħa d-deċiżjoni. Tagħmel ukoll riferiment għar-riskji naturali tas-suq, u tisħaqq li meħud dan kollu in konsiderazzjoni, ir-responsabbiltà tagħha kellha tkun inqas minn 70%.

<u>L-aggravji l-oħra</u>: Is-soċjetà appellanta tiddikjara li għalkemm l-Arbitru jiddentifika tliet *"principal alleged failures"* fil-konfront tagħha, l-allegat nuqqas ta' żvelar jew spjegazzjoni tal-miżati ma kinitx waħda minnhom. Tgħid li hija ma kinitx qegħda taqbel mal-kummenti tal-Arbitru li hawn ukoll hija kienet tenuta timxi bħala *bonus paterfamilias,* u li kellha xi obbligu li taċċerta li l-miżati tagħha jkunu raġonevoli. Is-soċjetà appellanta mbagħad tgħaddi sabiex tittratta l-kwistjoni tal-*mala fede* tagħha, meta skont l-Arbitru hija bagħtet ir-risposti tagħha tard intenzjonalment sabiex l-ilmenti tal-appellat jiġu preskritti skont l-artikolu 21 tal-Kap. 555. Tgħid li hija tħossha aggravata b'din il-parti tad-deċiżjoni appellata peress li l-Arbitru ma kellu l-ebda prova li hija kienet hawn

aġixxiet *in mala fede,* u dan kien inaċċettabbli minħabba l-fatt li d-deċiżjoni appellata kienet waħda fid-dominju pubbliku u hija għandha klijenti kullimkien fid-dinja.

10. L-appellat jilqa' billi jikkontendi li ġaladarba huwa kien ikkwalifika bħala *"retail client",* jiġifieri ma kienx investitur professjonali, kienet mistennija aktar diliġenza min-naħa tas-soċjetà appellanta. Jgħid li kif sewwa osserva l-Arbitru fid-deċiżjoni appellata, għalkemm is-soċjetà appellanta ma ndaħlitx fl-għażla tiegħu tal-konsulent finanzjarju, hija kellha ftehim ma' CWM fejn kienet aċċettat li tintroduċi lil din tal-aħħar mal-membri bħala konsulent finanzjarju, u saħansitra kienet imniżżla fl-applikazzjoni tas-soċjetà appellanta. B'hekk il-klijent seta' kien influwenzat biex jagħżel lil CWM bħala konsulent finanzjarju tiegħu, u jgħid li f'każ ta' *retail client* aktar kien il-każ li dan jistrieħ fuq ir-rakkomandazzjonijiet mogħtija mis-soċjetà appellanta. Iżda bħala t-*Trustee* u l-Amministratur tal-Iskema tal-Irtirar, l-appellat jgħid li l-obbligi bażiċi tas-soċjetà appellanta kienu jirrikjedu wkoll diliġenza u prudenza fil-ftehim li għamlet ma' CWM. Iżda mill-applikazzjoni stess kien jirriżulta li s-soċjetà appellanta kienet aċċettat u anki ħalliet informazzjoni ineżatta dwar il-konsulent finanzjarju. L-appellat jgħid li dwar dan ukoll kien irrileva l-punt l-Arbitru. L-appellat jirrileva li hemm dubbji dwar x'kienu r-riċerki li saru dwar CWM u Trafalgar, għaliex għalkemm fl-applikazzjoni kien hemm miktub li CWM kienet entità regolata, hija ma ressqet l-ebda prova dwar dan. L-Arbitru dan kollu kkonstatah fid-deċiżjoni appellata, kif ukoll sab illi fl-applikazzjoni ma kienx ċar dwar min fil-fatt kellu r-rwol ta' konsulent finanzjarju, u ma kien hemm l-ebda indikazzjoni jew spjegazzjoni dwar id-differenza bejn it-termini *"Professional Adviser"* u

"Investment Adviser". Hawn l-appellat jiċċita is-subartikolu 1(2) tal-Att dwar *Trusts* u *Trustees* [Kap. 331 tal-Liġijiet ta' Malta], u anki l-para. (ċ) tas-subartikolu 43(6) u l-artikolu 21 tal-istess liġi. Huwa jagħmel ukoll riferiment għal pubblikazzjoni tal-MFSA u jiċċita silta minnha, liema dokument jgħid li kien ġie ppubblikat fl-2017, iżda kien jittratta prinċipji ġenerali tal-Kap. 331 u tal-Kodiċi Ċivili li kienu diġà fis-seħħ qabel dik is-sena. Għalhekk jiċċita ukoll l-*Investment Guidelines* ta' Jannar 2013. Imbagħad jagħmel riferiment għall-para. 3.1 tas-sezzjoni ntestata *'Terms and Conditions'* fil-formola tal-Applikazzjoni għas-Sħubija tal-Iskema, u jsostni li minkejja li s-soċjetà appellanta kellha d-dettalji tat-transazzjonijiet kollha u anki tal-portafoll sħiħ, hija naqset fl-obbligu ta' rapportaġġ, u saħansitra ma ressqet l-ebda prova dwar dan. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru dwar il-kompożizzjoni tal-portafoll tiegħu, l-appellat jikkontendi li kien irriżulta tassew ċar li kien hemm numru ta' riskji assoċjati mal-kapital investit f'dan it-tip ta' prodotti, u kien hemm saħansitra noti li tali prodotti kienu riżervati għal investituri professjonali biss u li seta' jintilef il-kapital. Għal dak li jirrigwarda l-argument tas-soċjetà appellanta dwar l-i*Standard Operational Conditions* 2.7.1 u 2.7.2, l-appellat jibda billi jiċċita l-istess u anki dak li qal l-Arbitru fir-rigward, filwaqt li jissottometti li s-soċjetà appellanta ma kinitx ħielsa milli tosserva l-obbligi tagħha fuq livell individwali għaliex l-Iskema kienet tirrifletti l-investimenti u l-portafolli individwali. Dwar l-argument tas-soċjetà appellanta li l-Arbitru kien applika u ddeċieda ħażin fir-rigward tal-linji gwida magħmulin minnha stess, jirrileva li huwa diffiċli li wieħed jikkontendi li filwaqt li s-soċjetà appellanta toħroġ l-istess linji gwida, dawn ma kellhomx japplikaw b'mod rigoruż u li hija setgħet tagħżel li ma ssegwihomx. L-appellat jirrileva li mill-proċeduri quddiem l-Arbitru, kien irriżulta li l-

investimenti f'noti strutturati kellhom tipikament maturità jew terminu ta' investiment ta' madwar sena jew sentejn, jew saħansitra ta' ħames snin. Jgħid li kif osservat mill-Arbitru, kien hemm ukoll f'ċertu każijiet l-possibbilità ta' suq sekondarju għal dawn in-noti strutturati, iżda dan ma setax jipprovdi livell ta' kumdità adegwata dwar il-likwidità. L-appellat ikompli fuq il-kwistjoni li l-prodotti strutturati kienu mmirati lejn investituri professjonali, u jiċċita dak li qal l-Arbitru dwar l-investigazzjoni li saret għall-verifika ta' dan il-punt u l-konklużjoni tiegħu. Jissottometti dwar l-ilment tas-soċjetà appellanta fir-rigward tal-investigazzjoni li kien wettaq l-Arbitru, li dan kellu kull dritt li jagħmel riċerka li qies bżonnjuża, u hawn huwa jagħmel riferiment għall-artikolu 25 tal-Kap. 555. Għal dak li jirrigwarda d-deċiżjoni tal-Arbitru li s-soċjetà appellanta ma kinitx toffri informazzjoni adegwata lill-membri tal-Iskema, jgħid li l-Arbitru tajjeb osserva li ma kien hemm l-ebda raġuni għalfejn is-soċjetà appellanta naqset. Jgħid li l-argument tas-soċjetà appellanta li hija ma kellha l-ebda obbligu speċifiku għaliex id-Direttivi jitkellmu dwar l-iskema, ma jreġix għaliex hija ma setgħetx tinjora l-obbligi tagħha fir-rigward tal-Iskema b'mod ġenerali, u l-obbligi ta' *bonus paterfamilias* kienu jservu sabiex jirregolaw sitwazzjonijiet fejn forsi ma kienux regolati permezz ta' provvediment partikolari tal-liġi. Għal dak li jirrigwarda t-tieni aggravju tas-soċjetà appellanta, l-appellat isostni li għall-kuntrarju ta' dak li qegħda tikkontendi s-soċjetà appellanta, l-Arbitru ma naqasx milli jagħraf in-ness kawżali u n-nuqqasijiet min-naħa tagħha, u jiċċita dak li qal l-Arbitru dwar il-kwistjoni, u anki dwar kif it-telf għandu jiġi kkalkolat. Dwar l-aħħar parti tar-rikors tal-appell fejn is-soċjetà appellanta tittratta dak li ssejjaħ 'Aggravji Oħra', l-appellat jibda billi jissottometti li mhux ċar x'inhu l-aggravju tas-soċjetà appellanta fir-rigward tal-ilment tiegħu dwar il-miżati, għaliex l-

Arbitru kien proprju ċaħdu. Fir-rigward tal-kummenti tas-soċjetà appellanta dwar il-*mala fede,* li l-Arbitru assoċja man-nuqqas tagħha li twieġeb għall-ilment tal-appellat, dan tal-aħħar jirrileva li l-Arbitru kien straħ fuq il-provi fattwali, u fi kwalunkwe każ is-soċjetà appellanta ma ressqet l-ebda aggravju dwar id-deċiżjoni tiegħu dwar il-preskrizzjoni. L-appellat jagħlaq l-aħħar kummenti tiegħu billi jsostni li l-aggravji quddiem din il-Qorti għandhom ikunu limitati għal punti ta' liġi u mhux jittrattaw kummenti li setgħu saru mill-Arbitru fil-konsiderazzjonijiet tiegħu.

11. Qabel xejn din il-Qorti ser tindirizza s-sottomissjonijiet magħmulin mis-soċjetà appellanta fil-parti E tar-rikors tal-appell tagħha. F'din il-parti hija qegħda tqajjem il-kwistjoni dwar l-allegati miżati tagħha kif imħallsin mill-appellat, iżda din il-Qorti tgħid li ġaladarba, kif tirrileva s-soċjetà appellanta stess, l-Arbitru m'aċċettax l-allegazzjonijiet magħmulin mill-appellat, hija qegħda tastjeni milli tieħu konjizzjoni ulterjuri ta' dan l-aħħar aggravju. Barra minn hekk hija qegħda tastjeni milli tieħu konjizzjoni tat-tieni parti tas-sezzjoni E li tittratta l-allegata *mala fede* tagħha fil-preżentata ta' risposta tardiva lill-appellat. Tikkonferma li dan kien biss kumment min-naħa tal-Arbitru li permezz tiegħu ma ddeċieda l-ebda parti mill-ilment tal-appellat jew mill-eċċezzjonijiet tagħha, u għaldaqstant ma tikkonsidrax li jista' jikkostitwixxi aggravju rilevanti fir-konfront tad-deċiżjoni appellata.

12. Għal dak li jirrigwarda l-aggravji l-oħra tas-soċjetà appellanta, il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. L-Arbitru jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu

u raġonevoli fiċ-ċirkostanzi partikolari u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad, wara li huwa għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellat mill-Applikazzjoni għas-Sħubija tal-Iskema[1], innota li ma kienx ġie ndikat jew ippruvat li l-appellat huwa investitur professjonali, u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti ssib li dawn l-osservazzjonijiet huma kollha korretti u anki f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

13. Wara li spjega l-qafas legali li kien jirregola l-Iskema u anki lis-soċjetà appellanta, l-Arbitru rrileva li tali skema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta u kif awtorizzata mill-MFSA bħala *Retirement Scheme* f'April 2011 taħt l-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar), u f'Jannar 2016 taħt l-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta). Spjega li l-assi kollha formanti parti mill-kont tal-appellat fl-Iskema kienu ġew investiti f'polza tal-assikurazzjoni tal-ħajja tal-appellat, li kienet il-*European Executive Investment Bond* kif maħruġa minn Skandia International/Old Mutual International.[2] Imbagħad il-*premium* ġie nvestit f'portafoll ta' investimenti oħra f'noti strutturati waħedhom jew fil-biċċa l-kbira tagħhom, kif murija fl-*Investor Profile* ippreżentat mis-soċjetà appellanta, u dan skont il-parir tal-konsulent finanzjarju li kien ġie aċċettat mill-imsemmija soċjetà appellanta stess. L-Arbitru spjega li s-soċjetà appellanta kienet indikat li l-valur tal-Iskema kien ta' GBP43,352 fis-16 ta' Settembru, 2020 kontra l-valur investit ta' GBP85,262, u għalhekk b'telf riżultanti fl-ammont ta' GBP41,910, meħud in konsiderazzjoni d-

[1] Ara *a fol.* 33 *et seq.*
[2] Ara l-ittra li permezz tagħha Old Mutual laqgħet l-applikazzjoni tal-appellat, *a fol.* 67 fil-21.04.15.

drittijiet imħallsa. Osserva wkoll li s-soċjetà appellanta ma spjegatx jekk it-telf kienx dak attwalment soffert.

14. L-Arbitru kkonsidra li CWM kienet il-konsulent finanzjarju kif maħtura mill-appellat sabiex tagħtih parir dwar l-assi miżmuma fl-Iskema. Irrileva li s-soċjetà appellanta fir-risposta tagħha ddikjarat li *"...CWM was authorised to trade in Spain and in France by Trafalgar International GmbH",* u mbagħad fis-sottomissjonijiet tagħha ddikjarat li CWM kienet aġent ta' Trafalgar u kienet qegħda topera taħt il-liċenzji ta' din tal-aħħar, li kienet liċenzjata u regolata permezz ta' Deutsche Industrie Handelskammer (IHK) ġewwa l-Ġermanja.

15. L-Arbitru osserva li filwaqt li l-investimenti magħmulin taħt il-polza ta' assikurazzjoni tal-ħajja tal-appellat kienu ndikati fl-elenku tat-transazzjonijiet esebit mis-soċjetà appellanta stess[3], qal li mill-istess elenku kien jirriżulta li l-investimenti f'noti strutturati kienu sostanzjali, u kien hemm żmien fejn il-portafoll kien saħansitra magħmul biss jew l-aktar mill-imsemmija noti strutturati matul iż-żmien li CWM kienet il-konsulent finanzjarju.

16. L-Arbitru mbagħad għadda sabiex ikkonsidra li s-soċjetà appellanta bħala Amministratriċi u *Trustee* tal-Iskema kienet soġġetta għall-obbligi, funzjonijiet u responsabbiltajiet applikabbli, kemm dawk legali u wkoll dawk li kienu stipulati fiċ-Ċertifikat ta' Registrazzjoni tagħha kif maħruġ mill-MFSA fit-28 ta' April, 2011, li jagħmel riferiment għall-i*Standard Operational Conditions* [minn issa 'l quddiem "SOC"] tad-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act,*

[3] *A fol.* 203.

2002 [minn issa 'l quddiem 'id-Direttivi"]. Huwa hawn għamel riferiment għall-Att li Jirregola Fondi Speċjali, li ġie sostitwit permezz tal-Att dwar Pensjonijiet għall-Irtirar, u għar-regoli magħmula taħthom, li għalihom ġiet soġġetta s-soċjetà appellanta mal-ħruġ taċ-Ċertifikat ta' Reġistrazzjoni tal-1 ta' Jannar, 2016 taħt il-Kap. 514. Sostna li wieħed mill-obbligi ewlenija tagħha bħala Amministratur tal-Iskema skont il-Kap. 450 u l-Kap. 514, kien proprju li taġixxi fl-aħjar interessi tal-Iskema.

17. Il-Qorti hawn iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta kellha obbligi daqstant ċari hawn li timxi fl-aħjar interess tal-Iskema, anki fid-dawl tad-disposizzjonijiet tal-Att dwar Pensjonijiet għall-Irtirar, li ġie fis-seħħ proprju fis-sena 2015 meta l-appellat sar membru tal-Iskema u sussegwentement ġarrab it-telf allegat.

18. Minn hawn l-Arbitru għadda sabiex elenka diversi prinċipji li kienu applikabbli fil-konfront tas-soċjetà appellanta skont il-*General Conduct of Business Rules/Standard Licence Conditions* taħt ir-reġim tal-Kap. 450 kif imħassar, u tal-Kap. 514 li ssostitwih. Għal darb'oħra l-Qorti tirrileva li jirriżulta li s-soċjetà appellanta bħala Amministratur tal-Iskema kienet tenuta li timxi b'kull ħila dovuta, kura u diliġenza fl-aħjar interessi tal-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li minn dan li ngħad diġà, jirriżulta li d-difiża tagħha li hija qatt ma setgħet tinżamm responsabbli għaliex ma kellha l-ebda obbligu fil-konfront tal-appellat, ma tistax tirnexxi.

19. Iżda l-Arbitru ma waqafx hawn għaliex ikkonsidra wkoll il-kariga tas-soċjetà appellanta bħala *Trustee,* u rrileva li hawn kienu applikabbli l-provvedimenti tal-Att dwar *Trusts* u *Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-3 ta' Ġunju, 1989 kif sussegwentement emendat, u l-Arbitru għamel riferiment partikolari għas-subartikolu 21(1), u l-para. (a) tas-subartikolu 21(2). Hawn il-Qorti tgħid li għal darb'oħra d-difiża tas-soċjetà appellanta ma ssib l-ebda sostenn. L-Arbitru rrileva li fil-kariga tagħha ta' *Trustee,* is-soċjetà appellanta kienet tenuta li tamministra l-Iskema u l-assi tagħha skont diliġenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa ċċita l-pubblikazzjoni bl-isem An Introduction to Maltese Financial Services Law[4], u anki silta mill-pubblikazzjoni riċenti tal-MFSA tas-sena 2017 fejn din ittrattat prinċipji diġà stabbiliti qabel dik id-data, permezz tal-Att dwar *Trusts* u *Trustees* u anki permezz tal-Kodiċi Ċivili.

20. L-Arbitru mbagħad aċċenna għal obbligu ieħor tas-soċjetà appellanta li huwa qies importanti u rilevanti għall-każ in kwistjoni, dak ta' sorveljanza u monitoraġġ tal-Iskema, inkluż l-investimenti magħmula. Huwa għamel riferiment għall-affidavit ta' Stewart Davies[5], fejn dan aċċetta li s-soċjetà appellanta fl-aħħar mill-aħħar kellha s-setgħa li tiddeċiedi jekk l-investiment għandux isir, iżda meta kkonsidrat il-portafoll sħiħ, tali investiment kien jassigura livell adegwat ta' diversifikazzjoni u kien jirrifletti l-attitudni ta' riskju tal-membru u tal-linji gwida ta' dak iż-żmien. Dan kollu kif imfisser, tgħid il-Qorti, jagħmel ċar li s-soċjetà appellanta kienet taf sew x'inhuma l-obbligi tagħha lejn il-membri tal-Iskema, u li dawn saħansitra kienu obbligi pożittivi fejn hija kienet

[4] Ed. Max Ganado.
[5] A *fol.* 107 para. 17, *fol.* 110 para. 31 u *fol.* 111 para. 33.

tenuta tħares il-portafoll tal-membru individwali tal-Iskema u taġixxi skont il-każ. L-Arbitru osserva li x-xhieda ta' Stewart Davies kienet riflessa saħansitra fil-Formola tal-Applikazzjoni għal Sħubija ffirmata mill-appellat.[6] L-Arbitru qal li l-MFSA kienet tqis ukoll il-funzjoni ta' sorveljanza bħala obbligu importanti tal-Amministratur tal-Iskema, u huwa ċċita siltiet mill-*Consultation Document* tagħha maħruġ fis-16 ta' Novembru, 2018, filwaqt li nsista li l-istqarrijiet hemm magħmula kienu applikabbli wkoll għaż-żmien li fih sar l-investiment in kwistjoni. Għamel ukoll riferiment għall-*Investment Guidelines* magħmulin mis-soċjetà appellanta fis-sena 2013, u għal darb'oħra għal dak li kien jipprovdi l-para. 3.1 tas-sezzjoni ntestata *'Terms and Conditions'* fil-Formola tal-Applikazzjoni għal Sħubija.

21. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju ż-żewġ punti li fuqhom huwa msejjes l-ewwel aggravju tas-soċjetà appellanta. Huwa aċċetta li kien inekwivoku li s-soċjetà appellanta ma kinitx ipprovdiet parir dwar l-investimenti sottoskritti, u li dan kien l-obbligu ta' terzi bħal CWM. L-Arbitru ddikjara li kien tal-fehma, kif inhi din il-Qorti, li s-soċjetà appellanta bħala Amministratur ta' Skema għall-Irtirar u t-*Trustee,* kellha ċertu obbligi mportanti li setgħu jkollhom rilevanza sostanzjali fuq l-operat u l-attivitajiet tal-Iskema, u li jaffettwa direttament jew indirettament l-andament tagħha. Kien għalhekk li kellu jiġi investigat jekk is-soċjetà appellanta naqset mill-obbligi relattivi tagħha, u jekk fl-affermattiv allura safejn dan kellu effett fuq l-andament tal-Iskema u r-riżultanti telf tal-appellat.

[6] *Ibid.*

22. L-Arbitru osserva li l-appellat kien għażel huwa stess li jaħtar lil CWM sabiex din tipprovdih b'pariri dwar l-investimenti formanti parti mill-portafoll tagħha fl-Iskema, u min-naħa tagħha s-soċjetà appellanta aċċettat u/jew ħalliet il-konsulent joffri l-parir tiegħu lill-appellat. L-ewwel punt li rrileva l-Arbitru hawn huwa li s-soċjetà appellanta ppermettiet li l-Formola ta' Applikazzjoni għal Sħubija tħaddan informazzjoni mhux sħiħa u preċiża fir-rigward tal-konsulent finanzjarju, u spjega dawn x'kienu. Jirrileva li fir-rwol tagħha ta' *Trustee* u *bonus paterfamilias,* hija kienet tenuta tiġbed l-attenzjoni tal-appellat għal dawn in-nuqqasijiet, u qal li fl-aħħar mill-aħħar hija kellha l-prerogattiva li taċċetta o meno l-applikazzjoni, lill-konsulent finanzjarju u anki l-persuna ma' min kienet ser tinnegozja. Osserva li l-ebda prova ma tressqet li kienet turi li CWM kienet fil-fatt regolata, u l-Qorti għandha tgħid li hija tikkondividi l-fehma tiegħu. It-tieni punt li qajjem l-Arbitru jirrigwarda n-nuqqas ta' kjarezza fil-Formola ta' Sħubija fir-rigward tal-kapaċità li fiha kienet qegħda taġixxi CWM. Il-Qorti hawn iżżid tgħid li s-soċjetà appellanta tonqos li tikkonvinċi lil din il-Qorti kif dan seta' ma kienx minnu, anki permezz tas-sottomissjonijiet ulterjuri magħmulin fl-Anness I tar-rikors tal-appell tagħha. Imbagħad it-tielet punt tiegħu jirrigwarda l-kwistjoni li ma kienx hemm distinzjoni ċara bejn CWM u Trafalgar, u ma kienx jirriżulta b'mod inekwivoku jekk CWM kinitx qegħda taġixxi bħala aġent in rappreżentanza ta' ditta oħra, meta dan kellu jkun rifless b'mod ċar fid-dokumentazzjoni kollha. Fir-raba' punt tiegħu, l-Arbitru stqarr li ma rriżultat l-ebda evidenza li kienet turi jekk CWM kienet entità regolata. Qal li min-naħa tagħha s-soċjetà appellanta ma pproduċiet l-ebda evidenza dwar dak allegat minnha fir-rigward tal-awtorizzazzjoni ta' CWM.

23. Fir-rigward tal-argument miġjub mis-soċjetà appellanta li bejn 2013 u 2015 taħt il-qafas regolatorju tal-Kap. 450, u sakemm ġew implimentati l-*Pension Rules for Personal Retirement Schemes* taħt il-Kap. 514, hija ma kellha l-ebda obbligu li teżiġi l-ħatra ta' konsulent regolat, l-Arbitru sostna li xorta waħda kien mistenni li l-Amministratur u t-*Trustee* jeżegwixxu l-obbligu tagħhom ta' kura u diliġenza professjonali bħal fil-każ ta' *bonus paterfamilias.* L-Arbitru hawn sostna li l-ħatra ta' entità li ma kinitx regolata sabiex isservi ta' konsulent, kienet tfisser li l-appellat kien igawdi minn inqas protezzjoni, u s-soċjetà appellanta kienet tenuta li tkun konxja ta' dan il-fatt u li tassigura li l-appellat ikollu l-informazzjoni korretta u adegwata dwar il-konsulent. L-Arbitru qal li mhux biss is-soċjetà appellanta naqset milli tindirizza l-kwistjoni li l-konsulent ma kienx regolat, iżda wkoll hija bl-ebda mod ma qajmet dubju dwar informazzjoni importanti fir-rigward ta' diversi aspetti oħra konċernanti CWM. L-Arbitru rrileva li l-ftehim eżistenti bejn is-soċjetà appellanta u CWM, li diġà sar riferiment għalih aktar 'il fuq f'din is-sentenza, qajjem potenzjal ta' kunflitt ta' interess fejn l-entità li kienet soġġetta għas-sorveljanza partikolari mis-soċjetà appellanta, fl-istess ħin kienet qegħda tgħaddilha n-negozju. Il-Qorti ma tistax ma tikkondividiex din il-fehma, u tikkonsidra ċertament minn dak kollu li s'issa ġie rilevat u kkonsidrat, li l-kariga tas-soċjetà appellanta ma setgħetx tkun dik ta' amministrazzjoni sempliċi u bażika, meħud kont li hija saħansitra kienet ukoll *Trustee* tal-Iskema.

24. L-Arbitru għalhekk sewwa qal li s-soċjetà appellanta kellha turi iktar kawzjoni u prudenza, aktar u aktar meta x-xelta u l-allokazzjoni tal-investimenti sottoskritti kien ser ikollhom effett fuq l-andament tal-Iskema nnifisha, u l-

objettiv tagħha li tipprovdi għal benefiċċji għall-irtirar. Il-Qorti hawn tikkondividi wkoll il-ħsieb tal-Arbitru li l-amministratur tal-iskema u t-*Trustee* tagħha kien mistenni li jfittex iktar u jinvestiga dwar l-azzjonijiet ta' dik l-entità mhux regolata sabiex b'hekk jitħarsu l-interessi tal-membri l-oħra tal-iskema u r-riskji jitnaqqsu.

25. Dwar it-tieni punt sollevat mis-soċjetà appellanta fl-ewwel aggravju tagħha, l-Arbitru osserva li l-investimenti li kienu sottoskritti l-polza ta' assikurazzjoni taħt l-Iskema, kienu magħmula l-aktar jew biss f'noti strutturati. Irrileva li ma ġew ippreżentati l-ebda *fact sheets* mill-appellat fir-rigward tan-noti strutturati formanti parti mill-portafoll tiegħu, u anki *ai termini* tal-poter investigattiv taħt il-Kap. 555, l-Uffiċċju tal-Arbitru ma seta' isib l-ebda *fact sheet* fir-rigward tal-imsemmija investimenti u li kienet disponibbli għall-pubbliku mill-*internet.* Jikkontendi li wisq probabbli l-portafoll tal-appellat kien jikkonsisti wkoll f'noti strutturati b'twissija f'kull waħda dwar l-eventwalità ta' tnaqqis fil-valur tal-kapital kif marbut ma' perċentwal. Għalhekk, qal l-Arbitru, kien hemm konsegwenzi materjali jekk il-valur ta' wieħed biss mill-assi kollha tan-noti strutturati kien jinżel mill-minimu ndikat.

26. Imbagħad osserva wkoll li l-portafoll tal-appellat kien ġie espost b'mod eċċessiv għal prodotti strutturati, u dan għal żmien twil u kif kien jirriżulta mit-*Table of Investments* li kienet tagħmel parti mill-*Investor Profile* li esebiet is-soċjetà appellanta. Osserva wkoll li kien hemm espożizzjoni għolja għar-riskju għaliex kienu nxtraw prodotti permezz ta' transazzjoni waħda jew permezz ta' diversi transazzjonijiet mingħand emittent wieħed, meta fil-fehma tiegħu

kellhom jiġu applikati l-limiti massimi kif imfissra fir-regoli tal-MFSA u tal-*Investment Guidelines* tas-soċjetà appellanta stess.

27. B'riferiment għall-insistenza tas-soċjetà appellanta li l-investimenti kellhom jiġu kkunsidrati fil-kuntest tal-portafoll sħiħ, l-Arbitru ddikjara li dan kien fil-fatt l-eżerċizzju li huwa kien wettaq, iżda anki kif l-imsemmi portafoll kien kostitwit fil-bidunett, u sussegwentement kif dan inbidel minn żmien għal żmien. Qal li huwa kien ukoll ikkonsidra l-perċentwal tal-valur sħiħ tal-portafoll li kien jirrappreżenta kull wieħed mill-investimenti sottoskritti meta dawn ġew akkwistati skont it-tagħrif li kienet ipprovdiet is-soċjetà appellata permezz tal-*Investor Profile* annessa mas-sottomissjonijiet tagħha. Imbagħad huwa kien ikkonsidra l-imsemmi perċentwal fid-dawl tal-limiti massimi stabbiliti mir-regoli tal-MFSA u mil-linji gwida tas-soċjetà appellanta, kif applikabbli fiż-żmien tal-akkwist tal-investimenti in kwistjoni. Huwa spjega li fil-każ ta' skema mmexxija mill-membri, kull membru jkollu portafoll ta' investimenti partikolari u distinti soġġetti għal ċertu kundizzjonijiet. Qal iżda li fil-każ fejn il-portafoll huwa l-istess wieħed fir-rigward ta' kull membru, il-kundizzjonijiet applikabbli mbagħad jiġu applikati f'livell ġenerali u mhux individwali. L-Arbitru esprima l-fehma li s-soċjetà appellanta kienet qegħda tonqos milli tikkonsidra l-importanza tal-linji gwida tagħha, u saħansitra waslet biex tqis b'mod kontradittorju li wieħed ikun qed jaġixxi fl-aħjar interessi tal-membru fejn ma jsegwiex il-linji gwida, iżda dan mingħajr ma ġabet prova dwar fejn dan kien ikun xieraq. Is-soċjetà appellanta terġa' tittenta targumenta din id-darba quddiem din il-Qorti, li r-regoli suriferiti jolqtu biss l-Iskema iżda mhux il-portafoll tal-membru individwali, imma l-Qorti mhijiex tal-istess fehma, u għaldaqstant mhijiex qegħda tilqa' dan l-argument.

Tgħid li huwa daqstant ċar mid-diċitura ta' dawn ir-regoli, li l-intendiment huwa li jiġu regolati l-investimenti kollha li jaqgħu fl-iskema, u dan mingħajr distinzjoni bejn l-iskema nnifisha u l-portafoll ta' kull membru. Il-Qorti żżid tgħid li l-argument tas-soċjetà appellanta lanqas jista' jitqies li huwa wieħed loġiku, meħud in konsiderazzjoni l-fatt li jekk ifalli portafoll ta' membru, dan jista' ċertament ikollu effett fuq il-kumplament tal-iskema.

28. L-Arbitru minn hawn għadda sabiex iddikjara li l-espożizzjoni qawwija għal prodotti strutturati u għal emittent singolari li tħalliet issir mis-soċjetà appellanta, ma kinitx tirrispetta r-rekwiżiti regolatorji applikabbli għall-Iskema dak iż-żmien, u huwa jagħmel riferiment partikolari għal SOC 2.7.1 u SOC 2.7.2, li kienu applikabbli sa mill-bidunett meta nħolqot l-Iskema fis-sena 2011 sad-data li din ġiet reġistrata fl-1 ta' Jannar, 2016 taħt il-Kap. 514. Qal li s-soċjetà appellanta stess kienet għamlet aċċenn dwar l-applikabbilità u r-rilevanza ta' dawn il-kundizzjonijiet għall-każ odjern. L-Arbitru ċċita partijiet minn dawn id-Direttivi u rrileva li minkejja li SOC 2.7.2 kienet teżiġi ċertu livell, is-soċjetà appellanta kienet ippermettiet li l-portafoll tal-appellat xi kultant ikun magħmul biss jew fil-parti l-kbira tiegħu minn prodotti strutturati. Barra minnhekk l-espożizzjoni għal emittent waħdieni kien f'xi drabi iktar mill-massimu ta' 30% stabbilit mir-regoli għal investimenti aktar siguri bħal depożiti.

29. L-Arbitru mbagħad jaqbad, iżda din id-darba iktar fil-fond, il-kwistjoni li l-portafoll saħansitra ma kienx jirrifletti l-*Investment Guidelines* tas-soċjetà appellanta. Filwaqt li ħa konjizzjoni tal-imsemmija linji gwida għas-snin 2013 sa 2018 li s-soċjetà appellanta annettiet mas-sottomissjonijiet tagħha, irrileva li hija ma kienx irnexxielha turi b'mod adegwat li dawn kienu ġew applikati fir-

rigward tal-investimenti in kwistjoni. Qal li l-portafoll tal-appellat kien kompost l-aktar jew saħansitra biss min-noti strutturati għal perijodu twil ta' żmien. Għalhekk qal li jekk wieħed kellu jeżamina l-kompożizzjoni tal-portafoll tal-appellat, kien hemm evidenza ċara li r-rekwiżiti tal-linji gwida tas-soċjetà appellanta ma kienux ġew segwiti. L-Arbitru rrileva li dan kien partikolarment fir-rigward tar-rekwiżit ta' diversifikazzjoni xierqa, it-twarrib ta' espożizzjoni eċċessiva u l-espożizzjoni massima permessa għal emittenti singulari, u għadda sabiex ta diversi eżempji ta' dan. Qal li l-fatt li ġew permessi dawn l-espożizzjonijiet għolja għal investiment wieħed u għal emittent singolari, kien juri nuqqas ta' prudenza u espożizzjoni eċċessiva u riskji li tħallew fil-livell ġenerali tal-Iskema, partikolarment meta ma kien hemm l-ebda sigurtà fuq il-kapital. Qal li saħansitra ma kienet tressqet l-ebda prova li l-prodotti kienu koperti permezz ta' garanziji, u fil-fatt it-telf soffert kien juri li ma kienx hemm garanziji fuq il-kapital investit li wassal għal telf, liema garanziji setgħu possibbilment jiġġustifikaw espożizzjonijiet iktar għolja. Iddikjara li ma kien hemm l-ebda raġuni tenut kont tal-prudenza, li setgħet tiġġustifika l-espożizzjoni daqstant għolja permessa fil-portafoll tal-appellat. L-Arbitru qal li din l-espożizzjoni saħansitra ma kinitx ħarset il-linji gwida tas-soċjetà appellanta stess kif applikabbli għaz-żmien li saru l-investimenti, u silet ir-rekwiżiti partikolari fil-linji gwida li kienet ħarġet is-soċjetà appellanta matul is-snin bil-għan li tiġi evitata l-espożizzjoni eċċessiva tal-investimenti. Qal li ma kienx ċar għaliex is-soċjetà appellanta kienet ikkunsidrat li l-investimenti permessi kienu jirriflettu l-profil ta' riskju tal-appellat, li kien wieħed *'Lower to Medium'.* L-Arbitru hawn stqarr li t-telf soffert kien saħansitra juri li l-investimenti ma kienux saru skont il-profil ta' riskju tal-appellat.

30. Imbagħad l-Arbitru osserva wkoll li fil-fehma tiegħu s-soċjetà appellanta m'għenitx id-difiża tagħha meta naqset milli tipprovdi informazzjoni dettaljata dwar l-investimenti sottoskritti. Huwa aċċenna għal darb'oħra għal dawk l-aspetti li kellhom jiġu kkonsidrati mis-soċjetà appellanta fir-rigward tal-kompożizzjoni tal-portafoll tal-appellat, u qal li t-telf tal-kapital soffert mill-appellat kien juri n-nuqqas min-naħa tas-soċjetà appellanta li tassigura d-diversifikazzjoni u li tiġi evitata espożizzjoni eċċessiva. Kieku dan in-nuqqas ma seħħx, iddikjara li ma kienx ikun hemm it-telf li raġonevolment mhux mistenni f'prodott li kellu l-iskop li jipprovdi għal benefiċċji ta' irtirar.

31. L-Arbitru mbagħad ikkonsidra kwistjoni oħra li qajjem l-appellat, dik ta' nuqqas ta' rappurtaġġ u notifika dwar it-transazzjonijiet. Filwaqt li ħa konjizzjoni tal-fatt imressaq mis-soċjetà appellanta li hija kienet tibgħat rendikonti annwali lill-membri tal-iskema, osserva li dawn kienu ġeneriċi fin-natura tagħhom fejn kien hemm biss indikat il-polza tal-ħajja mingħajr dettalji fir-rigward tal-investimenti sottoskritti li kienu jikkonsistu fin-noti strutturati. Għaldaqstant sewwa kkonsidra l-Arbitru li din l-informazzjoni mibgħuta lill-appellat bħala membru tal-Iskema, ma kinitx biżżejjed u suffiċjenti. Huwa hawn jagħmel riferiment għal SOC 9.3(e) tal-Parti B.9 tal-*Pension Rules for Personal Retirement Schemes,* li kienu applikabbli fir-rigward tas-soċjetà appellanta sa mill-1 ta' Jannar, 2016, b'dana li rrileva li l-Parti B.9 saret biss applikabbli fis-sena 2018. Iżda esprima l-fehma, u hawn għal darb'oħra l-Qorti tgħid li qegħda taqbel, li madankollu bħala *bonus paterfamilias* li kellha timxi fl-aħjar interessi tal-membri tal-Iskema, is-soċjetà appellanta kellha l-obbligu li tagħti rappurtaġġ sħiħ lill-membri dwar it-transazzjonijiet tal-investimenti sottoskritti. Is-soċjetà

appellanta hawn tikkontendi għal darb'oħra li hija ma kellha l-ebda obbligu speċifiku u l-Arbitru ddeċieda ħażin meta silet l-obbligu mill-prinċipju ġenerali li hija kienet tenuta timxi skont id-doveri tagħha ta' *bonus paterfamilias.* Iżda l-Qorti hawn ukoll mhijiex qegħda taċċetta l-argument tas-soċjetà appellanta, u dan mhux biss fid-dawl tal-obbligi tagħha ta' *bonus paterfamilias,* li kif diġà ngħad, ma jistgħu qatt jitwarrbu fl-assenza ta' obbligi speċifiċi, iżda wkoll għar-raġuni oħra li ta l-Arbitru, li qal li s-soċjetà appellanta kienet diġà qabel ma ġie fis-seħħ il-Kap. 514 soġġetta għad-disposizzjonijiet tar-regolamenti li kienu saru taħt il-Kap. 450, u hawn huwa jiċċita SOC 2.6.2 u SOC 2.6.3 tal-Parti B.2 tad-Direttivi. L-Arbitru ddikjara li ma kienet tirriżulta l-ebda raġuni għaliex is-soċjetà appellanta ma kinitx għaddiet informazzjoni mportanti, u ċertament tgħid il-Qorti, li hawn is-soċjetà appellanta wriet nuqqas kbir min-naħa tagħha li ġabet l-inkarigu tagħha fix-xejn għal dak ta' sempliċi amministrazzjoni tal-Iskema.

32. L-Arbitru għadda sabiex jittratta l-kwistjoni tan-ness kawżali tad-danni sofferti mill-appellat. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ riżultat tal-andament negattiv tal-investimenti riżultat tas-suq u tar-riskji inerenti, u/jew tal-allegat frodi tal-konsulent finanzjarju, kif allegat mis-soċjetà appellanta. Qal li kien hemm evidenza biżżejjed u konvinċenti ta' nuqqasijiet da parti tas-soċjetà appellanta fit-twettiq tal-obbligazzjonijiet u d-doveri tagħha kemm bħala *Trustee* u anki bħala Amministratur tal-Iskema tal-Irtirar, li kienu juru nuqqas ta' diliġenza. Qal li saħansitra l-istess nuqqasijiet ma ħallew l-ebda mod li bih seta' jiġi minimizzat it-telf, u fil-fatt ikkontribwew għall-istess telf, u b'hekk l-Iskema ma kinitx laħqet l-għan prinċipali tagħha. Fil-fehma tiegħu, it-telf kien ġie kkawżat mill-azzjonijiet u min-nuqqas tagħhom tal-partijiet

prinċipali nvoluti fl-Iskema, fosthom is-soċjetà appellanta. Qal li seħħew diversi avvenimenti li din tal-aħħar kienet obbligata u saħansitra setgħet twaqqaf, u tinforma lill-appellat dwarhom. Il-Qorti tikkondividi l-fehma sħiħa tal-Arbitru. Jirriżulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkonsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-appellat. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà għan-nuqqasijiet tagħha billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tal-appellat li kien mexxih lejn l-investimenti li eventwalment fallew, mhux biss b'mod reali iżda wkoll fallew l-aspettattivi tiegħu. Dan filwaqt ukoll li tgħid li hija bl-ebda mod ma kienet tenuta taċċerta l-identità tal-imsemmi konsulent finanzjarju u fl-istess ħin tħares dak kollu li kien qed isir, inkluż il-kompattibilità tal-istruzzjonijiet mal-profil tal-appellat u anki l-andament tal-investimenti, u żżomm linja ta' komunikazzjoni miftuħa mal-appellat. Iżda kif ġie kkonsidrat minn din il-Qorti, id-difiża tas-soċjetà appellanta ma tistax tirnexxi fid-dawl tal-obbligi legali u regolatorji tagħha, u huwa proprju għalhekk li n-nuqqasijiet tagħha għandhom jitqiesu li kkontribwew lejn it-telf soffert mill-appellat mill-investimenti tiegħu.

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

(i) għalkemm ma kinitx responsabbli sabiex tagħti parir finanzjarju lill-appellat, u lanqas kellha r-rwol ta' amministratur tal-investimenti, hija kienet tenuta tassigura li l-kompożizzjoni tal-portafoll tal-appellat kien jipprovdi għal diversifikazzjoni adegwata u li kien

iħares ir-rekwiżiti applikabbli, sabiex b'hekk ukoll jintleħaq l-għan prinċipali tal-Iskema permezz tal-prudenza;

(ii) kienet tenuta tikkonsidra l-prodotti in kwistjoni, u mill-ewwel u ta' mill-inqas turi it-tħassib tagħha dwar ċerti investimenti f'noti strutturati formanti parti mill-portafoll tal-appellat, u saħansitra ma kellhiex tħalli li jsiru investimenti riskjużi għaliex dawn kienu kontra l-oġġettivi tal-Iskema tal-Irtirar, u fost affarijiet oħra ma kienux fl-aħjar interess tal-appellat; u

(iii) kien straħ fuqu l-appellat, u anki terzi nvoluti fl-istruttura tal-Iskema, sabiex jintlaħaq l-għan tagħhom li jirċievu benefiċċji tal-irtirar filwaqt li tiġi assigurata l-pensjoni

34. Għalhekk l-Arbitru esprima l-fehma, liema fehma din il-Qorti tikkondividi pjenament, li filwaqt li kien mifhum li t-telf dejjem jista' jsir fuq investimenti f'portafoll, dawn jistgħu jitnaqqsu u saħansitra jinżamm il-kapital oriġinali kif investit, permezz ta' diversifikazzjoni tajba, bilanċjata u prudenti tal-investimenti. Iżda fil-każ odjern kien jirriżulta pjenament li seta' jingħad li mill-inqas kien hemm nuqqas ċar ta' diliġenza min-naħa tas-soċjetà appellanta fl-amministrazzjoni ġenerali tal-Iskema, u anki fl-esekuzzjoni tal-obbligi tagħha bħala *Trustee,* partikolarment meta wieħed iqis l-obbligu ta' sorveljanza tal-Iskema u l-istruttura tal-portafoll fejn kellu x'jaqsam il-konsulent finanzjarju. Qal li fil-fatt is-soċjetà appellanta ma kinitx laħqet ir-*'reasonable and legitimate expectations'* tal-appellat skont il-para. (ċ) tas-subartikolu 19(3) tal-Kap. 555. Il-Qorti filwaqt li tiddikjara li hija qegħda tagħmel tagħha l-konklużjonijiet tal-

Arbitru, tgħid li m'għandhiex aktar x'iżżid mad-deċiżjoni appellata tassew mirquma u studjata.

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

Decide

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

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

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur