MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-14 ta' Settembru, 2022

Appell Inferjuri Numru 123/2021 LM

Nicholas Timothy Rush (Passaport nru. 508769983)
('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 fid-19 ta' Ottubru, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrent **Nicholas**

Timothy Rush (Detentur tal-Passaport nru. 508769983) [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, 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-pagament effettiv, filwaqt li kull parti kellha tħallas l-ispejjeż tagħha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament 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 il-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 fil-25 ta' Frar, 2020 fil-konfront tas-soċjetà appellanta, fejn filwaqt li allega li huwa qatt ma ngħata rendikonti għas-snin 2015 u 2016, u kellu jitħabat sabiex jottjeni informazzjoni dwar l-investiment tiegħu, iddikjara li t-trasferiment tal-fondi

mill-pensjoni tiegħu għal skema tal-irtirar ma kienx permess skont il-liġijiet tat-taxxa tar-Renju Unit, u kien jikkostitwixxi investiment f'skemi li jippreżentaw riskju għoli u li fil-fatt tilfu valur sostanzjali mingħajr ma kien ġie avżat minn qabel. 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 t-telf ta' dħul fil-futur meħud in konsiderazzjoni l-*Final Salary Pension Scheme (Rolls Royce Pension Scheme)*, liema telf huwa kien qed jistma f'somma li teċċedi STG140,000.

4. Is-soċjetà appellanta wieġbet fit-18 ta' Marzu, 2020 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) kuntrarjament għall-allegazzjoni tal-appellat, huwa kien ingħata rendikont għas-snin 2015 u 2016; (v) dawn ir-rendikonti annwali kienu jipprovdu informazzjoni dwar fejn kien sar l-investiment tiegħu, u l-*email* annessa magħhom kienet tipprovdi li l-membri, u allura l-appellat ukoll, kellhom jiddiskutu l-andament tal-imsemmi investiment mal-konsulent finanzjarju tiegħu; (vi) hija ma kinitx tipprovdi pariri dwar investiment u wisq inqas tħajjar lill-individwi sabiex jagħmlu deċiżjonijiet fir-rigward tal-investiment; u (vii) kienet qegħda tikkontesta kull responsabbiltà għall-ħlas tat-

telf allegat stante li hija dejjem ħarset l-obbligi tagħha fir-rigward tal-appellant, u anki l-linji gwida inklużi dawk tal-investiment.

Id-deċiżjoni appellata

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

"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. 38 Cap. 555, Art. 19(3))b))*

The Complainant

The Complainant, born in 1962, of British nationality (fn. 39 A fol. 122) was indicated as tax resident 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. 40 A fol. 110) The Complainant's occupation was left blank 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 was accepted by MPM as member of the Retirement Scheme on 1 October 2013. (fn. 41 A fol. 143)

The risk categories of 'Low Risk' and 'Medium Risk' were selected to reflect his risk profile out of the five categories available of 'No Risk', 'Low Risk', 'Medium Risk', 'Med/High Risk', and 'High Risk' in the Application Form for Membership. (fn. 42 A fol. 113)

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. 43 https://www.mfsa.mt/financial-services-register/result/?id=3453) and acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 44 A fol. 190

– 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. 45 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. 46 As per pg. 1 of the Affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 January 2016 attached to his affidavit – A fol. 156 & 182-186)

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. 47 https://www.mfsa.mt/financial-services-register/result/?id=3454) as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 (fn. 48 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. 48 Registration Certificate dated 1 January 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 Tru*sts and* Trustees Act (Cap. 331) on the 23 March 2011' *(fn. 50 Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit) - A fol. 188) and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011'*. (fn. 51 Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit) – A fol. 190)*

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. 52 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 was called the European Executive Investment Bond issued by Skandia International ('the OMI Bond') (fn. 53 A fol. 120) (fn. 54 Skandia International eventually rebranded to Old Mutual International – https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandia-international-rebrands-to-old-mudutal-international/)

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 said investments underlying the policy 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 MPM – A fol. 236)

The 'Investor Profile' presented by MPM in respect of the Complainant also included a table with the 'current valuation' as at 12/08/2019. The said table indicated a loss (excluding fees) of -GBP24,415 as at that date. (fn. 56 Ibid.) 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 -GBP34,547 on the total amount invested of GBP52,736 based on a 'current valuation at 12/08/2019' of GBP18,189. (fn. 57 Ibid.)

It is to be noted that MPM 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. 58 As per pg. 2 of MPM's reply to the OAFS in respect of the Complainant (A fol. 105) and Section 5 of the Application Form for Membership (A fol. 111)). 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. 59 Pg. 1 of MPM's reply to the OAFS – A fol. 104)*

*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. 60 Para. 39, Section E, titled 'CWM and Trafalgar International GmbH' of Stewart Davies' affidavit - A fol.165) 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. 61 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. 62 Attachment to the additional submissions made by MPM in respect of the Complainant – A fol. 236)

The investment purchases undertaken within the Complainant's portfolio as reflected in the said 'Investor Profile' are summarised (in their order of execution) below: (fn. 63 Attachment to the additional submissions made by MPM in respect of the Complainant – A fol. 236)

- *a structured note investment for the amount of GBP20,000 into the RBC 2Y Retail Income GBP (ISIN no. XS0964845266);*
- *a structured note investment for the amount of GBP20,000 into the Commerzbank 10% GBL Phar Inc NT (ISIN no. XS0977428985);*
- *a structured note investment for the amount of GBP12,000 into the Nomura Global Phoenix 5Y AC (ISIN no. XS0982016700);*
- *a structured note investment for the amount of GBP11,760 into the Leonteq 1.5Y Multi Barrier (ISIN no. CH0245655904);*
- *a structured note investment for the amount of GBP4,756 into the Leonteq Express Cert Herbalife, Mann Sarepta Therapeutics (ISIN no. CH0259240692);*
- *a structured note investment for the amount of GBP1,982 into the Leonteq Barrier Discount on Sarepta Therapeutics (ISIN no. CH0259240734);*
- *a structured note investment for the amount of GBP3,571 into the Leonteq Barrier Discount Sarepta Therapeutics (ISIN no. CH0259240734);*
- *a structured note investment for the amount of GBP5,824 into the EFG Red April 5 (ISIN no. CH0273397270);*

- *a structured note investment for the amount of GBP5,824 into the EFG Red April 6 (ISIN no. CH0273397429);*
- *an investment into a collective investment scheme for the amount of GBP10,000 into the OMI IE GBP Compass Portfolio 4;*
- *an investment into a collective investment scheme for the amount of GBP5,000 into the Gemini Investment Principal Ast Allocation C;*
- *a structured note investment of GBP455 into the Leonteq 4 Year Step-Up Auto Call.*

During the tenure of CWM, the investment portfolio was accordingly 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. 64 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 <u>with the prudence, diligence and attention of a</u> <u>bonus paterfamilias</u>**, act in utmost good faith and avoid any conflict of interest'.

It is also to be noted that Article 21 (2)(a) of the TTA, further specifies that:

'**Subject to the provisions of this Act, trustees shall carry out and administer the trust according to its terms; and subject as aforesaid, the trustees shall ensure that the trust property is vested in them or is under their control and shall, so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage** …'.

In its role as Trustee, 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. 65 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. 66 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 obligation**'. *(fn. 67 Consultation Document on*

Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 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. 68 Para. 17, Page 5 of the affidavit of Stewart Davies – A fol. 160)*

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. 69 Para. 31, Page 8 of the affidavit of Stewart Davies – A fol. 163)*

***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. 70 Para. 33, Page 9 of the affidavit of Stewart Davies (A fol. 164) & Para. 17 of Page 5 of the said affidavit also refers. (A fol. 160))*

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. 71 A fol. 115)*

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. 72 Pg. 7 of the MFSA's Consultation Document dated 16 November 2018 titled 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' (MFSA Ref. 15/2018) - 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. 73 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 diversification** …', *(fn. 74 Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies (A fol. 203). The*

same statement is also included in page 9 of the Scheme Particulars of May 2018 (also attached to the same affidavit) – A fol. 195) 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. 75 A fol. 116)*

Other Observations and Conclusions

Allegations in relation to fees

The Complainant claimed that the fees for the underlying OMI bond were prohibitively expensive. (fn. 76 A fol. 4 & 11)

The Complainant has not provided any further basis, explanations and/or evidence in respect of the said allegation and accordingly the Arbiter considers that there is insufficient basis and evidence for him to consider further this allegation.

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 is 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.

Claim that transfer was not permitted under UK tax laws

The Complainant claimed inter alia that the transfer of his pension fund to the Retirement Scheme, as a QROPS, was not permitted under UK tax laws.

He pointed out that he only owned a holiday home in Spain and had always been a resident in the UK and was a 'UK Tax Resident'. (fn. 77 A fol. 4)

The Complainant provided no further basis nor any further details of the provisions of the UK tax laws on which he was claiming his transfer was not permitted.

Moreover, the Arbiter noted that, in his Application Form for Membership, the Complainant himself indicated 'Spain' as being his 'Tax Residence'. (fn. 78 A fol. 110)

In the circumstances, the Arbiter considers that there is no sufficient basis on which he can consider this matter further.

Key considerations relating to other principal alleged failures

The Arbiter will now consider the remaining 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 allegations:

- *MPM accepting the services of CWM when this was an unlicensed investment advisor;*
- *MPM failing in its duty of care as the investment portfolio had to be in line with the member's profile, attitude to risk and in line with the applicable investment guidelines;*
- *The lack of information on where his funds were invested and losses incurred, including lack of receipt of the annual statements for 2015/2016. (fn. 79 A fol. 4)*

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. <u>The appointment of the Investment Advisor</u>

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.

<u>Inappropriate and inadequate material issues involving the Investment Advisor</u>

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

Apart from accepting an application for membership with incomplete details (as various parts, such as details of the 'Occupation'*,* 'Nationality' *and* 'Home/Work Tel' *of the Complainant) were left unanswered, (fn. 80 A fol. 110) 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 'CWM' as the company name for the professional adviser. (fn. A fol. 111)

In the same section of the Application Form, the adviser was indicated as having a registered address in Spain and that it was regulated with the question 'Is the company regulated*?' ticked as* 'Yes'*. The name of the regulator of the professional adviser was indicated as 'ICCS'.*

The Arbiter considers the reference to ICCS as regulator of CWM to be inadequate and misleading.

With respect to the reference to 'ICCS' such reference was not defined or explained in the Application Form. Neither was such reference ever explained or referred to during the comprehensive submissions made by the Service Provider during the proceedings of the case. It has not emerged either that ICCS is, or was, a regulatory authority for investment advisors in Spain or in any other jurisdiction. It appears that 'ICCS' *could be an acronym for the 'Cypriot Insurance Companies Control Service'. The Cypriot Insurance Companies Control Service is involved in the insurance sector in Cyprus. (fn. 82 http://mof.gov.cy/en/directorates-units/insurance-companies-control-service) No evidence of any authorisation or any form of approval issued by such to CWM has however ever been mentioned by the Service Provider nor produced by it during the proceedings of the case.*

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

The reference to ICCS could not have thus reasonably provided any comfort to MPM that this was a regulator of CWM and neither that there was some form of regulation and adequate controls and/or supervision on CWM equivalent to that applicable for regulated investment services providers*.*

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 Skandia 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 advisor. 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 'Inter-Alliance Worldnet' ('Inter-Alliance') apart from reference to 'Continental Wealth Management'. (fn. 83 A fol. 12)

Inter-Alliance is then featured in the section titled 'Financial adviser declaration' of the said form which section also includes the same stamp of Inter-Alliance (with a PO Box in Cyprus), 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 and 31 December 2016 indicated 'Continental Wealth Management' as '<u>Professional</u> <u>Adviser</u>' whilst at the same time indicated another party, 'Trafalgar International GmbH' as the '<u>Investment Adviser</u>'. (fn. 84 A fol. 137-140)

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 distinct 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 Inter-Alliance and/or 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 to you in</u> <u>the literature provided ensuring no ambiguity</u>,** *(fn. 85* ***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. 86 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. 19)*

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

iv. No regulatory approval in respect of CWM

Despite that the Application Form for Membership indicates CWM as being regulated, no evidence has however emerged during the proceedings of this case 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. 87 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. 166)

MPM's statement that CWM 'was operating under Trafalgar International GmbH licenses' *(fn. 88 Para. 39, Section E titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies – A fol. 165) 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. 89 Pg. 1, Section A titled 'Introduction', of the Reply of MPM submitted before the Arbiter for Financial Services – a fol. 104)* ***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;*

(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. 90 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. 91 Para. 39, Section E titled 'CWM and Trafalgar International GmbH' of Stewart Davies's affidavit – A fol. 165)*

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 the case as amply explained above.

MPM allowed and left uncontested, in its own Application Form for Membership of the Retirement Scheme and during the tenure of CWM, key information 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. 92 A fol. 166)

The Arbiter notes in this regard that in his 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. 93 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 suit 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, Inter-Alliance 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. <u>The permitted portfolio composition</u>

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'. *(fn. 94 https://www.investopedia.com/terms/s/struturednote.asp)*

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. 95 https://www.intestopedia.com/artiles/bonds/10/structured-notes.asp)*

The Complainant presented a fact sheet of the Leonteq 4 Years Step-Up Autocall (fn. 96A fol. 80-82) which reflects a structured note bought in November 2016 indicated in the table of investments presented by the Service Provider during the proceedings of the case. (fn. 97 A fol. 236)

As part of the investigatory powers granted under Cap. 555, the Office of the Arbiter for Financial Services was also able to trace fact sheets publicly available over the internet in respect of some other structured notes featuring in the Complainant's investment portfolio. These are the fact sheets in respect of the structured notes with ISIN XS0964845266 (fn. 98 https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-Retail-Fixed-Income-Notes-FactSheet1.pdf) and XS0982016700 (fn. 99 https://www.scribd.com/document/366660737/Nomura-Global-Phoenix-Autocallable-Factsheet) which formed part of the Complainant's portfolio. (fn. 100 A fol. 236)

Apart from inter alia the credit risk of the issuer and the liquidity risk, other risks that are typically highlighted (for structured notes with no guarantees on the return of the original capital invested), include the risk that the investor could possibly receive less than the original amount invested or potentially even losing all of the investment as was the case in respect of the fact sheets sourced by the OAFS.

The underlying asset to which the structured notes were linked to typically comprised stocks or indices. A particular feature emerging of the type of structured notes invested into, involved the application of capital buffers and barriers. For example, the fact sheets sourced described and included warnings that 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. The fall in value would typically be observed on maturity/final valuation of the note.

The fact sheets indeed highlighted the risk that where the performance of the worst performing underlying measured a fall of a percentage (of 50%) as specified in the respective fact sheet, investors would receive a capital amount equivalent to the performance of the worst performing asset and capital would be lost.

It is accordingly clear that there were certain specific risks in the structured products invested into 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*. *The implication of such a feature should have not been overlooked nor discounted. Given the said particular features neither should have comfort been derived regarding the adequacy of such products just from the fact that the structured notes were linked to a basket of quoted shares or indices.

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.

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 so 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 Affidavit of Steward Davies – A fol. 163) 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. 2 A fol. 236) 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. 164 – 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. 164 – 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. 220)

*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. 109 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 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 2.72 (3)) 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, for example, an exposure of 37.92% of the policy value to single structured notes at the time of purchase (such as in the case of the RBC 2Y Retail Income and the Commerzbank 10% GBL Phar Inc NT respectively) and collective exposures to a single issuer above 30% of the policy value (such as to EFG) through multiple purchases). (fn. A fol. 236)

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 14%, 10% and 8.5% as featuring in the name and fact sheets 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****.*

It is unclear how a portfolio composition solely or predominantly invested in structured notes truly satisfied certain conditions specified in MPM's own Investment Guidelines such as:

(i) ***The requirement that the member's assets had to be*** **'predominantly invested in regulated markets'**.

This was a condition which prevailed in all of the presented MPM's Investment Guidelines since January 2013 till that of 2018. (fn. 114 Investment Guidelines attached to the affidavit of Stewart Davies – A fol. 203-214)

*The said requirement of being '*predominantly invested in regulated markets' *meant, and should have been construed to mean, that investments had to be predominantly invested in listed instruments, that is financial instruments that were admitted to trading. With reference to industry practice, the terminology of* 'regulated markets' *is referring to a regulated exchange venue (such as a stock exchange or other regulated exchange).*

*The term '*regulated markets' *is in fact commonly referred to, defined and applied in various EU Directives relating to financial services, including diversification rules applicable on other regulated financial products. (fn. 115 Such as UCITS schemes - the Undertakings for Collective Investments in Transferable Securities (UCITS) Directive (Directive 2009/65/EC as updated). The Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EC as repealed by Directive 2014/65/EU) also includes a definition as to what constitutes a* 'regulated market'*) Hence, the interpretation of* 'regulated markets' *has to be seen in such context.*

*The reference to '*predominantly invested in regulated markets' *cannot be interpreted as referring to the status of the issuers of the products and it is typically the product itself which has to be traded on the regulated market and not the issuer of the product.*

Moreover, a look through approach, could not either be sensibly applied to the structured notes for the purposes of such condition taking into consideration the nature and particular features of the structured notes invested into as explained above.

*No evidence was submitted that predominantly the portfolio, which comprised solely/mostly of structured notes, constituted listed structured notes in respect of the Complainant. On its part, the Service Provider did not prove that the portfolio of the Complainant was '*predominantly invested in regulated markets' *on an ongoing basis.*

Furthermore, when investment in unlisted securities was itself limited to 10% of the Scheme assets, as stipulated throughout MPM's own Investment Guidelines for 2013 to 2018, it is unclear how the Trustee and Scheme Administrator chose to allow higher exposures (as indicated in this section) to structured notes, a debt security, which are typically unlisted.

(ii) The requirement relating to the liquidity of the portfolio.

The Investment Guidelines of MPM marked January 2013 required no more than a 'maximum of 40% of the fund *(fn. 116 The reference to 'fund' is construed to refer to the member's portfolio)* in assets with liquidity of greater than 6 months'.

This requirement remained, in essence, also reflected in the Investment Guidelines marked 'Mid-2014' which read 'Has a maximum of 40% of the fund in assets with expected liquidity of greater than 6 months,' *as well as in the subsequent Investment Guidelines marked 2015 till 2018 which were updated by MPM and tightened further to read a* 'maximum of 40% of the fund in assets with expected liquidity of greater than 3 months but not greater than 6 months'.

It is evident that the scope of such requirement was to ensure the liquidity of the portfolio as a whole by having the portfolio predominantly (that is, at least 60%) exposed to liquid assets which could be easily redeemed within a short period of time, that is 3-6 months (as reflected in the respective conditions) whilst limiting exposure to those assets which take longer to liquidate to no more than 40% of the portfolio.

With reference to the fact sheets sourced in the Complainant's portfolio, it is noted that the structured notes invested into typically had a maturity or investment term of 2 to 5 years as evidenced in the product fact sheets. The bulk of the assets within the policy was, at times, invested into a few structured notes as featuring in the table of investments presented by MPM. It is unclear how the 40% maximum limit referred

to above could have been satisfied in such circumstances where the portfolio was predominantly invested into structured notes which themselves had long investment terms.

It is further noted that the possibility of a secondary market existing for structured notes meant that a buyer had to be first found in the secondary market in case one wanted to redeem a holding into the structured note prior to its maturity. Indeed, the fact sheet of the Nomura structured note stated inter alia that the structured note was 'intended to be held for the entire period' *of its investment terms of 5 years. (fn. 117 https://www.scribd.com/document/366660737/Nomura-Global-Phoenix-Autocallable-Factsheet)*

The secondary market furthermore could not have provided an adequate level of comfort with respect to liquidity*.*

There are indeed various risks highlighted in relation to the secondary market as highlighted in the fact sheets sourced.

MPM should have been well aware about the risks associated with the secondary market. It has indeed itself seen the material lower value that could be sought on such market in respect of the structured notes invested into.

The lower values of the structured notes on the secondary market were indeed affecting the value of the Scheme as can be deduced from the respective Annual Member Statements that MPM itself produced.

Hence, no sufficient comfort about liquidity could have possibly been derived with respect to the secondary market in case of unlisted structured notes.

The Arbiter is not accordingly convinced that the conditions relating to liquidity were being adequately adhered to either, nor that the required prudence was being exercised with respect to the liquidity of the portfolio, when considering the above-mentioned aspects and when keeping into context that the portfolio of investments that was allowed to develop within the Retirement Scheme was, at times, solely/predominantly invested into the said structured notes.

It is also to be noted that <u>even if one had to look at the composition of the Complainant's portfolio purely from other aspects, there is still undisputable evidence of non-compliance with other requirements detailed in MPM's own Investment Guidelines</u>. 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.

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*
37.92%	*RBC*	*Oct 2013*	*1 SN issued by RBC constituted 37.92%, at the time of purchase in Oct 2013.*
Exposure to single issuer in % terms of the policy value at time of purchase	*Issuer*	*Date of purchase*	*Description*

37.92%	*Commerzbank*	*Oct 2013*	*1 SN issued by Commerzbank constituted 37.92%, at the time of purchase in Oct 2013.*
Over 31.70%	*EFG*	*Apr 2015*	*2 SNs issued by EFG respectively constituted 15.85% each of the policy value at the time of purchase in April 2015. (This is over and above the previous already existing high exposure to EFG through other earlier previous purchases).*

The fact that such high exposures to single investments and single counterparties was allowed in the first place indicates, in itself, the lack of prudence and excessive exposure and risks to single counterparties 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).

The Arbiter notes that the Service Provider has, along the years, revised various times the investment restrictions specified in its own 'Investment Guidelines' with respect to structured products, both in regard to maximum exposures to structured products and maximum exposure to single issuers of such products. The exposure to structured notes and their issuers was indeed progressively and substantially reduced over the years in the said Investment Guidelines.

The specified maximum limit of 66% of the portfolio value in structured notes having underlying guarantees which featured in the 'Investment Guidelines' marked 2015 (fn. 118 MPM's Investment Guidelines '2015' as attached to the affidavit of Stewart Davies) was reduced to 40% of the portfolio's value in the 'Investment Guidelines' marked December 2017 (fn. 119 MPM's Investment Guidelines 'Dec-2017' as attached to the affidavit of Stewart Davies) and subsequently reduced further to 25% in the 'Investment Guidelines' for 2018. (fn. 120 MPM's Investment Guidelines '2018' as attached to the affidavit of Stewart Davies))

Similarly, the maximum exposure to single issuers for 'products with underlying guarantees', *that is structured products as referred to by MPM itself, in the 'Investment Guidelines' marked Mid-2014 and 2015 specifically limited maximum exposure to the same issuer default risk to no more than (33.33%), one third of the portfolio. The maximum limit to such products was subsequently reduced to 25%, one quarter of the portfolio, in the 'Investment Guidelines' marked 2016 (fn. 121 MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies) and mid-2017, (fn. 122 MPM's Investment Guidelines 'Mid-2017' as attached to the affidavit of Stewart Davies)) reduced further to 20% in the 'Investment Guidelines' marked December 2017 and subsequently to 12.5% in the 'Investment Guidelines' for 2018.*

Even before the Investment Guidelines of Mid-2014, MPM's Investment Guidelines of January 2013 <u>still limited exposure to individual investments</u> <u>(aside from collective investment schemes) to 20%</u>.

In the case reviewed, there were instances where the extent of exposure to single issuers was even higher than one third of the policy value as amply indicated in the above table.

There is clearly no apparent reason, from a prudence point of view, justifying such high exposures. Indeed, the Arbiter considers that the high exposure to structured products as well as to single investments/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. 123 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**:*
*▪ If **individual investments** or equities are considered then **not more than 20% in any singular asset**, aside from collective investments.*
▪ …
*▪ **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**.*

<table>
<tr><td>In addition, further consideration needs to be given to the following factors:

• …

• Credit risk of underlying investment

• …

…</td></tr>
<tr><td>• In addition to the above, the portfolio must be constructed in such a way as to avoid excessive exposure:

• …

• To any single credit risk</td></tr>
</table>

<table>
<tr><td><u>Investment Guidelines marked ‘2015’:</u></td></tr>
<tr><td>• 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,</td></tr>
<tr><td>with no more than one third of the portfolio to be subject to the same issuer default risk.</td></tr>
<tr><td>In addition, further consideration needs to be given to the following factors:

• …

• Credit risk of underlying investment

• …

…</td></tr>
</table>

- *In addition to the above, the portfolio must be constructed in such a way as to* ***avoid exposure****:*
- *...*
- ***To any single credit risk****.*

<u>Investment Guidelines marked '2016' & 'Mid-2017':</u>

• Where ***products with underlying Capital 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 quarter*** *of the portfolio to be* ***subject to*** *the* ***same issuer/ guarantor default risk****.*

• ***Where no such Capital guarantee exists****, investment will be* ***permitted up to a maximum of 50% of the portfolio's value****.*

…

- *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****.*

Besides the mentioned excessive exposure to single issuers, it is noted that additional investments into structured notes were observed *(fn. 124 'Table of Investments' in the 'Investor Profile' provided by MPM refers – A fol. 236)* ***to have been allowed to occur within the Complainant's portfolio, in excess of the limits allowed on the overall maximum exposure to such products.***

MPM's Investment Guidelines of 2015, 2016 and mid-2017 specifically mentioned a maximum limit of 66% of the portfolio value to structured notes. In the case reviewed, the Service Provider still continued to allow in 2015 and 2016 further investments into structured products at one or more instances when the said limits should have applied. The additional investments also occurred despite the portfolio being already exposed to structured notes more than the said percentage at the time when the additional purchase was being made.

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.

Portfolio invested into Structured Products **Targeted for Professional Investors**

Besides the issues mentioned above, there is also the aspect relating to the nature of the structured products and whether the products allowed within the portfolio comprised structured notes aimed solely for professional investors.

The Service Provider has not claimed that the Complainant, whose occupation was not even indicated in the Application Form for Membership, was a professional investor. No details have either emerged indicating the Complainant not being a retail investor.

The fact sheets sourced by the OAFS as indicated above clearly specify that the products were targeted for professional investors only.

With respect to the structured products issued by RBC, for example, the fact sheet clearly indicates that the investment was 'For Professional Investors Only' with the 'Target Audience' for such product being specified as 'Professional Investors Only' as outlined in the 'Key Features' section of the fact sheet. (fn. 125 https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-Retail-Fixed-Income-Notes-FactSheet1.pdf)

*The references to '*Professional Investors only*' in the Fact Sheets cannot be referred to the marketed documentation and it is clear that such fact sheets were issued*

purposely for those investors who were eligible to invest in the product. It is also clear that such products were not aimed for retail investors but only for professional investors.

It is therefore considered that, in the case of the Complainant's portfolio, there is sufficient evidence resulting from multiple instances which show that his portfolio generally included investments not appropriate and suitable for a retail client and, hence, against his profile of a retail investor. It is clear that there was a lack of consideration by the Service Provider with respect to the suitability and target investor of the structured notes.

Such lack of consideration is not reflective of the principle of acting with* 'due skill, care and diligence'** ***and* 'in the best interests of'** ***the member as the relevant laws and rules mentioned above obliged the Service Provider to do.

<u>Other observations & synopsis</u>

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 'Low Risk' and 'Medium' Risk which, in itself, gives rise to potential confusion and inconsistencies. It is noted that the 'Attitude to Risk' in the Annual Member Statements was indeed inconsistent with the Risk Profile indicated in the Application Form as it only indicated the risk attitude of the Complainant as 'Medium' when the application form showed the Complainant being of low/medium risk. In any case, the portfolio is not considered to be reflective of a medium risk profile let alone of the risk profile of the Complainant.

In the circumstance where the portfolio of the Complainant was solely/predominantly invested into structured products with a high level of exposure to single investments/issuers, 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. 126 SOC 2.7.2(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. 127 SOC 2.7.2(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 and in practice promote the scope for which the Scheme was established.***

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>

Whilst no evidence has emerged that the Complainant has not received the Annual Member Statements for the years 2015/2016 as claimed, however, the Arbiter would like to comment on the lack of information alleged by the Complainant regarding his investments and his alleged lack of 'understanding of where my funds have been invested/lost'. *(fn. 128 A fol. 4)*

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 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. 129 A fol. 137-140)

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. 130 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. 131 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. 132 The section titled 'Responsibilties 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. 133 For example, in the reference to litigation filed against Leonteq – A fol. 168)*

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’[1] *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 percent 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.

[1] Cap. 555, Article 19(3)(c).

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) inclusive of any realised currency gains or losses. 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 and any realised currency gains or losses), 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.

In case where any currency conversion/s is/are required for the purpose of finally netting any realised profits/losses within the portfolio which remain denominated in a different currency such conversion shall, if and where applicable, be made at the spot exchange rate sourced from the European Central Bank and prevailing on the date of this decision. Such a direction on the currency conversion is only being given in the very particular circumstances of this case for the purpose of providing clarity and enabling the calculation of the compensation formulated in this decision and avoid future unnecessary controversy.

(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 expenses of this case are to be borne by the Service Provider."

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fit-8 ta' Novembru, 2021 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; (b) il-kompożizzjoni u s-superviżjoni tal-portafoll tal-appellat ma kienux skont il-liġijiet, regoli u linji gwida applikabbli; u (ċ) hija ma kinitx ipprovdiet informazzjoni biżżejjed jew adegwata lill-appellat; (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 ddikjara ruħhu u ddeċieda dwar il-miżati u dak mistenni minnha; u (iv) l-Arbitru għamel apprezzament ħażin tal-fatti meta ddeċieda li hija kienet in mala fede. Is-soċjetà appellanta annettiet dokument li permezz tiegħu għamlet sottomissjonijiet ulterjuri.

7. L-appellat wieġeb fit-8 ta' Marzu, 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.

<u>L-ewwel aggravju</u>

9. 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 nnifsu, u 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 s-soċjetà appellanta kienet naqset fl-obbligi tagħha. Tirrileva li l-Arbitru semma erba' aspetti fejn is-soċjetà appellanta naqset, iżda hija tinsisti li ma kien hemm l-ebda obbligu, u għaldaqstant ma seta' jkun hemm l-ebda nuqqas. Imma l-Arbitru fittex minflok nuqqasijiet oħra sabiex jiġġustifika l-konklużjoni tiegħu, li hija kienet naqset fl-obbligi tagħha. Issostni li l-punt ċentrali kien jekk hija kellhiex obbligu tivverifika jekk CWM kinitx liċenzjata u mhux jekk fil-fatt din kinitx liċenzjata, iżda l-Arbitru ddeċieda li hija min-naħa tagħha ma kienet ressqet l-ebda prova sabiex turi li CWM kienet liċenzjata biex 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 dak iż-żmien ma kien hemm l-ebda liġi jew regola 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 is-soċjetà appellanta tgħid li l-Arbitru sabiex wasal għall-konklużjoni tiegħu fid-deċiżjoni appellata, mar lil hinn mill-punt kruċjali, u straħ fuq obbligu ġenerali ta' *trustee* li jaġixxi fl-aħjar interess tal-benefiċjarji. Tirrileva li huwa 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. Tikkontendi li kieku l-obbligu kien diġà jeżisti qabel ma l-MFSA bidlet ir-regolamenti applikabbli fl-2019, ma kienx ikun hemm proprju l-ebda ħtieġa li ssir din il-bidla. Dwar it-tieni parti ta' dan l-ewwel aggravju tas-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',* fejn l-Arbitru ddikjara li hija kienet naqset milli tikkonsidra l-profil ta' riskju tal-ilmentatur. 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 li jevalwa r-riskju individwali 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, 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 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 għall-imsemmija 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. Is-soċjetà appellanta tgħid li l-kummenti tal-Arbitru fir-rigward tal-*capital protection barriers* juru nuqqas ta' tagħrif għaliex dawn proprju huma ntiżi sabiex itaffu r-riskju. 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 anki fir-rigward tal-allegat *excessive exposure to single issuers,* l-Arbitru kien għalhekk ukoll żbaljat fattwalment. Minn hawn is-soċjetà appellanta tgħaddi sabiex tissottometti kif l-Arbitru applika ħażin ir-regoli tal-MFSA. Tikkontendi li mhuwiex 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, iżda l-bidla saret biss wara l-2017. Għalhekk stante li l-obbligu ma kienx jeżisti, l-Arbitru ma setax jgħid li hija kellha xi obbligu li tapplika l-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. 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. Tgħid li l-Arbitru għażel żewġ eżempji sabiex jispjega kif hija ma kinitx applikat il-linji gwida tagħha stess. Dwar l-ewwel wieħed, li kien li l-investiment kellu jsir l-aktar f'swieq regolati, hija tgħid li ma ngħatatx l-opportunità sabiex tispjega kif hija kienet applikat din il-linja gwida, u għalhekk illum hija rinfaċċjata b'deċiżjoni li qatt ma kellha l-opportunità li tikkontestaha. Barra minn hekk hija ma kinitx taf minn fejn l-Arbitru kien sab l-informazzjoni jew liema kienu l-*fact sheets* li huwa kkonsulta, u dan kien ipoġġiha f'pożizzjoni fejn ma setgħetx tikkontesta l-pożizzjoni meħuda minnu. Issostni li din il-Qorti wkoll issa kienet ser issib li ma setgħetx tieħu pożizzjoni, għaliex ma kienx ċar jekk din l-informazzjoni li straħ fuqha l-Arbitru kinitx tagħmel parti mill-proċess. Dwar dak

li kien iddikjara l-Arbitru, is-soċjetà appellanta tgħid li l-investimenti kollha, anki n-noti strutturati, kienu fil-fatt *'listed'* jew fuq l-elenku, u għalhekk setgħu jiġu negozjati fi swieq li jiffaċilitaw u li jiġġestixxu n-negozju fi strumenti finanzjarji. Għalhekk, tkompli tgħid, il-konklużjoni tal-Arbitru li l-linja gwida ma kinitx ġiet osservata fil-kompożizzjoni tal-portafoll, kienet tassew żbaljata. It-tieni eżempju meħud mill-linji gwida, kien jirrigwarda l-konklużjoni tal-Arbitru li huwa ma kienx konvint li l-kundizzjonijiet dwar likwidità kienu qed jiġu osservati adegwatament. Tikkontendi li hija kellha tinsab responsabbli mhux fuq sempliċi nuqqas ta' konvinzjoni, u mingħajr ma tingħata raġuni għal tali konvinzjoni. Fil-mertu, tgħid li l-Arbitru huwa żbaljat għaliex il-prodott kien *'realisable'* fl-intier tiegħu f'kull stadju, u s-suq għall-prodott kien pprovdut minn min kien ħareġ in-nota, għaliex dan kien jixtri lura dik in-nota. 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 ntegrali mill-konsiderazzjonijiet tagħha bħala Amministratur, u li kieku dan ma kienx il-każ, ma kinitx issaqsi 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 informazzjoni 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, billi kienet tenuta tqis li hekk kien id-dover tagħha. B'hekk huwa 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*. Issostni li SOC 2.6.2 u 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. Barra minn hekk hawn tgħid li l-affidavit ta' Stewart Davies ġie skartat. Il-ħames punt li tirrileva, huwa li l-Arbitru ddeċieda ħażin fir-rigward tal-prodotti strutturati ntiżi għal investituri professjonali. Dan tgħid li qalu skont dak li kkonstata mill-*fact sheets* li huwa kien sab, u li lanqas kienu jinstab fl-atti, u dan minflok ma ta każ ix-xhieda ta' Stewart Davies, u hawn hija tagħmel riferiment partikolari għal dak li qal dan ix-xhud dwar il-fatt li jittieħed in konsiderazjoni l-portafoll sħiħ fir-rigward ta' struzzjonijiet għal negozju ta' investiment. Tispjega li għandha ssir evalwazzjoni tal-livell ta' riskju li jġorr portafoll sħiħ meta jiġi kkonsidrat jekk il-profil ta' riskju ta' membru kienx qed jiġi sodisfatt. Iżda tgħid li l-Arbitru ma mexiex b'dan il-mod.

<u>*It-tieni aggravju*</u>

Is-soċjetà appellanta tgħid li hija tħossha aggravata wkoll għaliex l-Arbitru ddikjara li hija kienet parzjalment responsabbli għas-70% tat-telf soffert mill-appellat. Tgħid li fl-ewwel lok l-Arbitru sejjes in-ness kawżali fuq konsider-azzjonijiet 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, huwa 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 qatt ma setgħet 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 żewġ *"principal alleged failures"* fil-konfront tagħha, l-allegat nuqqas ta' żvelar jew spjegazzjoni tal-miżati ma kienux waħda minnhom. Tgħid li hija ma kinitx qegħda taqbel mal-kummenti tal-Arbitru li hija kienet tenuta timxi hawn ukoll 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, għaliex l-Arbitru ma kellu l-ebda prova li hawn hija kienet aġixxiet *in mala fede,* u dan kien inaċċettabbli minħabba l-fatt li d-deċiżjoni appellata kienet waħda fid-dominju pubbliku u hija għandha klijenti ma' kullimkien fid-dinja.

10. L-appellat jilqa' billi jikkontendi li ġaladarba huwa kien ikkwalifika bħala *'retail client',* jiġifieri huwa ma kienx investitur professjonali, kien mistenni 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 dan peress li f'każ ta' *retail client* aktar kien il-każ li dan jistrieħ fuq ir-rakkomandazzjonijiet mogħtija mis-soċjetà appellanta. Iżda bħala *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. Jgħid iżda li mill-applikazzjoni stess, kien jirriżulta li s-soċjetà appellanta kienet aċċettat u anki ħalliet informazzjoni ineżatta dwar il-konsulent finanzjarju. Jgħid li dwar dan ukoll kien irrileva l-punt l-Arbitru. L-appellat jgħid 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 wkoll ikkostata dan kollu 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 tat-Kap. 331 u tal-Kodiċi Ċivili, li diġà kienu fis-seħħ qabel dik is-sena. Għalhekk jagħmel riferiment ukoll għall-*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' rappurtaġġ, 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 ġie osservat mill-Arbitru, kien hemm ukoll f'ċertu każi l-possibilità ta' suq sekondarju għal dawn in-noti strutturati, iżda dan ma setax jipprovdi livell ta' kumdità adegwata dwar il-likwidità. 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. B'riferiment għall-ilment tas-soċjetà appellanta fir-rigward tal-investigazzjoni li kien wettaq l-Arbitru, huwa hawn jirreferi għal dak li ġie dikjarat minn din il-Qorti fis-sentenza tagħha tat-23 ta' Frar. 2022 fl-ismijiet **Christine Helen Morrison *vs.* Momentum Pension Malta Limited**. Jgħid li għalkemm is-soċjetà appellanta tikkontendi li l-prodott tal-investiment kien *'realisable'* fl-intier tiegħu f'kull ħin, ma kien hemm l-ebda prova dwar dan, jew li l-istess prodott seta' jinxtara lura b'mod liberu. 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 tipprovdi informazzjoni adegwata lill-membri tal-Iskema, jgħid li l-Arbitru tajjeb osserva li ma kien hemm l-ebda raġuni għaliex 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. 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. Jirrileva li l-Arbitru kellu kull dritt *ai termini* tal-artikolu 25 tal-Kap. 555 li jagħmel investigazzjoni, u dan filwaqt li għandu setgħat wesgħin kif jipprovdu s-subartikoli (5), (6) u (7) tal-istess artikolu 25. L-appellat jgħid li huwa nkwetanti li s-soċjetà appellanta tisħaq illi hija m'għandhiex aċċess għall-*fact sheets,* li skont l-Arbitru dehru fil-portafoll ta' numru ta' investimenti tiegħu, u dan stante

li kienet hija stess li tamministra l-Iskema. Jagħlaq billi jwieġeb għall-aħħar argument tas-soċjetà appellanta, li wieħed irid jikkonsidra r-riskju ta' portafoll fl-intier tiegħu, billi jgħid li fil-każ ta' investitur li jkun *retail client,* m'għandu qatt isir investiment li jkun limitat għal investituri professjonali. Għal dak li jirrigwarda t-tieni aggravju tas-soċjetà appellanta, l-appellat isostni li għall-kuntrarju ta' dak li qegħda tikkontendi, l-Arbitru ma naqasx milli jagħraf in-ness kawżali u n-nuqqasijiet min-naħa tagħha, u jiċċita dak li qal l-imsemmi 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 mhuwiex ċar x'inhu l-ilment tagħha 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. 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-rigward 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. Huwa jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġjonevoli 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*,* innota li ma kienx ġie ndikat jew ippruvat li l-appellat huwa nvestitur professjonali, fejn ir-riskju tiegħu kien ġie ndikat bħala 'Low' u 'Medium', u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti ssib li dawn huma kollha korretti u anki f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom, u dan filwaqt li tirrileva li mhux minnu dak li qegħda tikkontendi s-soċjetà appellanta, li l-Arbitru naqas milli jikkonsidra l-profil ta' riskju tal-appellat.

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. 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. L-Arbitru spjega li s-soċjetà appellanta fl-istima datata tat-12 ta' Awwissu, 2019 kienet indikat telf fl-ammont ta' GBP24,415, iżda qal li dan fil-fatt kien ogħla meħud in konsiderazzjoni d-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. Filwaqt li l-Arbitru osserva li l-investimenti magħmulin taħt il-polza ta' assikurazzjoni tal-ħajja tal-appellat kienu ndikati fl-elenku tat-transazzjonijiet esebit mis-soċjetà appellanta stess[2], qal li mill-istess elenku kien jirriżulta li l-investimenti f'noti strutturati kienu sostanzjali, u saħansitra kien hemm żmien fejn il-portafoll kien magħmul biss jew l-aktar mill-imsemmija noti strutturati matul iż-żmien li CWM kienet il-konsulent finanzjarju.

[2] *A fol.* 236.

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 anki 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, 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 żżid 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 kien 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* applikabbli taħt ir-reġim tal-Kap. 450 kif imħassar, u tal-Kap. 514 li ssostitwixxa dan tal-aħħar. 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-benefiċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li minn dan li diġà ngħad, jirriżulta li d-difiża tagħha li hija qatt ma setgħet tinżamm responsabbli stante li ma kellha l-ebda obbligu fil-konfront tal-appellat, ma tistax tirnexxi.

19. Iżda l-Arbitru ma waqafx hawn, għaliex ikkonsidra wkoll il-kariga tagħha bħala *Trustee,* u rrileva li hawn kienu applikabbli l-provvedimenti tal-Att dwar *Trusts* u *Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-30 ta' Ġunju, 1989, kif sussegwentement emendat, u l-Arbitru għamel riferiment partikolari għas-subartikolu 21(1), u l-para. (a) tas-subartikolu 21(2) tiegħu. 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 saħansitra tamministra l-Iskema u l-assi tagħha skont diliġenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa ċċita l-pubblikazzjoni An Introduction to Maltese Financial Services Law[3], 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[4], fejn dan aċċetta li s-soċjetà

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[3] Ed. Max Ganado.

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

appellanta fl-aħħar mill-aħħar kellha s-setgħa li tiddeċiedi jekk l-investiment għandux isir, u li 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 gwidi 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 kienu saħansitra obbligi pożittivi fejn hija kienet tenuta tħares il-portafoll tal-membru ndividwali 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.[5] Qal li l-MFSA kienet ukoll tqis 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 anki 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 t-tliet 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 importanti

[5] *Ibid.*

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 nvestigat 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.

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 tiegħu 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 hawn l-Arbitru, huwa li s-soċjetà appellanta ppermettiet li l-Formola ta' Applikazzjoni għal Sħubija tinkludi informazzjoni mhux sħiħa u preċiża fir-rigward tal-konsulent finanzjarju, u spjega din x'kienet. 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 kien ser jinnegozja. 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 kinitx 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 konsapevoli ta' dan il-fatt, u li tassigura li l-appellat ikollu l-informazzjoni korretta u adegwata dwar il-konsulent. 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, tenut kont li hija saħansitra kienet ukoll *Trustee* tal-Iskema.

24. L-Arbitru għalhekk sewwa qal li s-soċjetà appellanta kellha turi iktar kawtela u prudenza, aktar u aktar meta l-għażla 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-konklużjoni 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 l-appellat kien ippreżenta *fact sheet* fir-rigward tal-*Leonteq 4 Years Step-Up Autocall,* li kienet turi l-akkwist ta' nota strutturata f'Novembru 2016, iżda *ai termini* tal-poter investigattiv skont il-Kap. 555, l-Uffiċċju tal-Arbitru fittex u sab *fact sheets* oħrajn fir-rigward ta' noti strutturati oħra tal-portafoll tal-appellat, u li kienu disponibbli għall-pubbliku permezz tal-*internet.* Jikkontendi li minbarra r-riskju tal-kreditu tal-emittent u r-riskju tal-likwidità, għal dak li jirrigwarda noti strutturati fejn ma kienx hemm garanzija dwar ir-ritorn tal-kapital oriġinali nvestit, kien hemm is-soltu twissija li l-investitur seta' jirċievi inqas mill-ammont oriġinali nvestit jew saħansitra seta' jitlef l-investiment sħiħ kif kien il-każ fir-rigward tal-*fact sheets* misjuba mill-OAFS. Qal li tipikament l-investimenti sottoskritti n-noti strutturati kienu *stocks* jew *indices.* Imbagħad element partikolari tan-noti strutturati li fihom sar l-investiment kien jinvolvi l-applikazzjoni ta' *capital buffers/barriers,* jiġifieri li l-kapital kien f'riskju f'każ li jiġri fatt partikolari, u ġeneralment it-tnaqqis fil-valur

ta' investimenti sottoskritt kif marbut ma' perċentwali. Għalhekk, qal l-Arbitru, kien hemm konsegwenzi materjali jekk il-valur ta' wieħed biss mill-assi kollha tan-noti strutturati u li kellu andament diġà negattiv, jinżel mill-minimu ndikat.

26. Il-Qorti hawn ser tikkonsidra dak li ġie rilevat mis-soċjetà appellanta fir-rigward tal-investigazzjoni mwettqa mill-Arbitru. Min-naħa tiegħu l-Arbitru fid-deċiżjoni appellata għamel osservazzjoni finali, li s-soċjetà appellanta saħansitra dgħajfet id-difiża tagħha meta naqset milli tippreżenta informazzjoni u anki prova dokumentarja dwar l-investimenti sottoskritti jew dwar l-Iskema nnifisha. Anki l-Qorti ikkonstatat dan kollu, u tgħid li ċertament dan il-fatt ma għenx id-difiża tas-soċjetà appellanta fejn saħansitra jibqa' d-dubju jekk b'dan il-mod hija ħalliet mistura dettalji jew informazzjoni li ma kienux favur id-difiża tagħha. Tqis għalhekk li l-Arbitru m'għamel xejn li ma tippermettix l-kompetenza tiegħu skont kif ċirkoskritta mill-artikolu 25 tal-Kap. 555, u mingħajr dubju sabiex jassigura li huwa kien qed jiddeċiedi l-ilment fil-parametri tal-para. (b) tas-subartikolu 19(3) tal-istess liġi. Il-Qorti tirrileva li r-riżultat tat-tfittxija tiegħu juri kemm kien korrett li ma jieqafx fl-investigazzjoni tiegħu minħabba l-informazzjoni limitata a dispożizzjoni diretta tiegħu, li l-Qorti tqis li ma kinitx ir-riżultat ta' nuqqas ta' attenzjoni, u b'hekk allura jkun qed igħin id-difiża tas-soċjetà appellanta. Ma tqisx li b'hekk min-naħa l-oħra huwa kien qed igħin il-każ imressaq mill-appellat, iktar milli biex jaċċerta li ssir ġustizzja. Is-soċjetà appellanta tilmenta wkoll li hija qatt ma kellha l-opportunità li tieħu konjizzjoni tal-informazzjoni meħuda mill-*fact sheets,* iżda jirriżulta minn dak li qal l-Arbitru, li l-informazzjoni saħansitra ma kinitx waħda diffiċli sabiex tinkiseb permezz ta' riċerka fuq l-*internet,* u għalhekk din kienet disponibbli anki għall-pubbliku, inkluż is-soċjetà appellanta. B'hekk ukoll is-soċjetà appellanta kellha

kull opportunità, imma fil-fatt naqset milli tagħmel dan, li tikkontesta dik l-informazzjoni miksuba. Iżda l-Qorti tikkonsidra li jekk hija għandha temmen li s-soċjetà appellanta qatt ma kellha din l-informazzjoni a dispożizzjoni tagħha, tassew din kienet qegħda tonqos minn kull obbligu ta' *bonus paterfamilias.*

27. Imbagħad l-Arbitru 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.

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

29. 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 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 kien jeżiġi 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 minn hekk l-espożizzjoni għal emittent wieħed kien f'xi drabi iktar mill-massimu ta' 30% stabbilit mir-regoli għal investimenti aktar siguri bħal depożiti.

30. 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. Huwa hawn aċċenna għal żewġ kundizzjonijiet partikolari.

31. L-ewwel kondizzjoni mfissra mill-Arbitru, hija li l-assi tal-membru kellhom jiġu nvestiti l-aktar fi swieq regolati. Filwaqt li ddikjara li dan kien ifisser li huwa l-prodott u mhux l-emittent tiegħu li kellu jkun soġġett għan-negozju f'dawk is-swieq, l-Arbitru qal li s-soċjetà appellanta kienet naqset milli turi li l-portafoll tal-appellat kien dejjem *'predominantly invested in regulated markets'*. Is-soċjetà appellanta hawn issostni quddiem din il-Qorti, li l-Arbitru ikkonsidra li l-kliem *'regulated markets'* għandhom ikollhom l-istess tifsira bħall-kliem *'listed instruments'*, iżda l-Qorti ma tikkonsidrax li dan huwa minnu, u dak li qegħda tittenta tagħmel is-soċjetà appellanta huwa li tilagħab bil-kliem. Huwa daqstant ċar mid-deċiżjoni appellata, li l-Arbitru qies li suq regolat f'dan il-każ kien *'regulated exchange venue'*, fejn il-prodott jista' jiġi negozjat u mhux li l-emittent tal-imsemmi prodott ikun regolat. It-tieni kundizzjoni li fisser l-Arbitru

hija l-likwidità tal-portafoll. Qal li l-linji gwida tas-soċjetà appellanta dejjem talbu għal likwidità ta' aktar minn sitt xhur jew saħansitra anki tliet xhur għal massimu ta' 40% tal-assi, iżda skont il-*fact sheets* misjuba mill-OAFS, kien irriżulta li ġeneralment in-noti strutturati kellhom terminu ta' maturità jew investiment ta' bejn sentejn u ħames snin, u dan fejn kien hemm il-possibilità ta' suq sekondarju, sabiex b'hekk l-Arbitru esprima l-fehma li huwa ma kienx konvint li l-kundizzjoni fir-rigward tal-likwidità kienet qegħda tiġi mħarsa. Qal li anki jekk wieħed kellu jeżamina l-kompożizzjoni tal-portafoll tal-appellat minn aspetti oħra, 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 għaż-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. L-Arbitru hawn stqarr li t-telf soffert kien saħansitra juri li l-investimenti ma kienux saru skont il-profil ta' riskju tal-appellat.

31. Imbagħad l-Arbitru rrileva li l-*fact sheets* tan-noti strutturati li għalihom huwa kien irrefera qabel, kienu jagħmluha ċara li l-prodotti kienu ntiżi għal investituri professjonali biss. Filwaqt li ħa in konsiderazzjoni l-insistenza tas-soċjetà appellanta li l-indikazzjoni *'Professional Investors only'* fil-*fact sheets* kienet qegħda tagħmel riferiment għad-dokumentazzjoni kummerċjalizzata, qal li l-każ ma kienx hekk, u kien ċar li dawk il-*facts sheets* kienu ġew maħruġa għal dawk l-investituri li kienu eliġibbli sabiex jinvestu fil-prodott. Fid-dawl ta' dan kollu, l-Arbitru seta' jgħid li kien hemm evidenza suffiċjenti li kienet turi li fil-portafoll tal-appellat kien hemm investimenti li ma kienux tajbin għal *retail client,* u li kien hemm nuqqas ta' ħsieb min-naħa tas-soċjetà appellanta li ma kienx jirrifletti l-prinċipju li hija kienet tenuta timxi permezz ta' *'due skill, care and diligence'* u *'in the best interests'* tal-membru, kif kienu jitolbu l-liġijiet u r-regoli msemmija aktar 'il fuq fid-deċiżjoni appellata. Il-Qorti ma tistax ma taqbilx hawn mhux biss mal-konklużjoni tal-Arbitru, iżda anki ma' kull argument miġjub minnu in sostenn tagħha. F'dan ir-rigward tosserva li s-soċjetà appellanta fir-rikors tal-appell tagħha naqset sew milli tirribatti dan kollu b'mod konvinċenti, u saħansitra baqgħet siekta fuq bosta mill-punti li rrileva l-Arbitru.

32. 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.

33. L-Arbitru mbagħad ikkonsidra kwistjoni oħra li qajjem l-appellat, dik ta' nuqqas ta' rappurtaġġ u notifika dwar it-transazzjonijiet. Osserva li r-rendikonti annwali maħruġa mingħand is-soċjetà appellanta kienu ġeneriċi fin-natura tagħhom, fejn kien hemm biss indikat il-polza tal-ħajja mingħajr dettalji fir-rigward tal-investimenti sottoskritti li kienu jikkonsistu f'noti strutturati. Għaldaqstant l-Arbitru sewwa kkonsidra 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 l-Arbitru esprima l-fehma, u hawn għal darb'oħra l-Qorti tgħid li qegħda taqbel, li madankollu bħala *bonus paterfamilias* li kellu jimxi 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. Huwa 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 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 importanti, 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.

34. L-Arbitru għadda sabiex ittratta l-kwistjoni tan-ness kawżali tad-danni sofferti mill-appellat. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ b'konsegwenza 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 wkoll bħala Amministratur tal-Iskema tal-Irtirar, li kienu juru nuqqas ta' diliġenza. Qal li l-istess nuqqasijiet saħansitra ma ħallew l-ebda mod li bih seta' jiġi minimizzat it-telf, u fil-fatt ikkontribwew għall-istess telf, u b'hekk l-Iskema ma kinitx laħqet l-għan prinċipali tagħha. Fil-fehma tal-Arbitru, 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 fejn 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 ikkunsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mill-appellat. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà

tan-nuqqasijiet tagħha, billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tal-appellat, li kien mexxih lejn l-investimenti li eventwalment fallew, mhux biss b'mod reali, iżda fallew ukoll 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.

35. 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, iġifieri 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 kienet tipprovdi għal diversifikazzjoni adegwata u li kienet tħares 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

36. 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 tal-investimenti tajba, bilanċjata u prudenti. Imma fil-każ odjern kien jirriżulta pjenament li seta' jingħad li tal-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. L-Arbitru 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 kollha tal-Arbitru, tgħid li m'għandhiex aktar x'iżżid mad-deċiżjoni appellata tassew mirquma u studjata.

37. 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