MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-14 ta' Settembru, 2022

Appell Inferjuri Numru 39/2021 LM

Susan Morgan (Passaport nru. 515365040)
('l-appellata')

vs.

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

Il-Qorti,

<u>Preliminari</u>

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 fis-6 ta' April, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti **Susan Morgan (Detentriċi**

tal-Passaport nru. 515365040) [minn issa 'l quddiem 'l-appellata'] 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-appellata l-kumpens bil-mod kif stabbilit, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effettiv pagament, filwaqt li kull parti kellha tħallas l-ispejjeż tagħha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament tgħid li sofriet l-appellata fis-sena 2014 mill-investiment f'skema tal-irtirar [minn issa 'l quddiem 'l-Iskema' jew 'QROPS'] ġestita mis-soċjetà appellanta, tal-polza ta' assikurazzjoni fuq il-ħajja maħruġa minn Skandia International [minn issa 'l quddiem 'Skandia'], li aktar tard ħadet l-isem Old Mutual International [minn issa 'l quddiem 'OMI'], liema polza kienet magħrufa bħala *European Executive Investment Bond*. Dan seħħ wara li hija kienet ikkonsultat lil *Continental Wealth Management* [minn issa 'l quddiem 'CWM'], li hija kienet ħatret bħala l-konsulent finanzjarju tagħha għall-fini tal-investiment tal-*premium* ta' dik il-polza.

Mertu

3. L-appellata għalhekk ippreżentat lment quddiem l-Arbitru fil-5 ta' Settembru, 2019 fil-konfront tas-soċjetà appellata fejn esprimiet il-fehma tagħha li din kienet uriet negliġenza u nuqqasijiet fejn kellu x'jaqsam l-obbligu tagħha ta'

kura u r-responsabbiltajiet tagħha ta' fiduċjarja fil-konfront tagħha bħala *Trustee* tal-Iskema, fejn saħansitra naqset li timxi fl-aħjar interessi tagħha billi ppermettiet investiment f'noti strutturati ta' riskju għoli li ma kienux adegwati għal investitur bl-imnut. Għalhekk hija kienet qegħda tippretendi kumpens tat-telf allegatament soffert minnha fl-ammont ta' GBP63,976.36, rappreżentanti s-somma tal-investiment oriġinali tagħha, u dan flimkien mal-imgħaxijiet bir-rata li kellha titqies raġonevoli li kieku t-*Trustees* tagħha mxew b'diliġenza u kura dovuta u ppermettew biss investimenti xierqa għal skema tal-irtirar u adegwati għal investitur bl-imnut, kif kienet tqis ruħha l-appellata.

4. Is-soċjetà appellanta wieġbet fis-26 ta' Settembru, 2019 billi talbet lill-Arbitru sabiex jiċħad l-ilment tal-appellata. 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-appellata kienet indikat il-konsulent finanzjarju tagħha fl-Applikazzjoni għal Sħubija; (iii) l-appellata naqset milli tiċċara kif is-soċjetà appellanta kienet allegatament naqset fl-obbligi tagħha, u min kien li għamel id-diversi allegati wegħdiet u li ta l-pariri, li ċertament ma setgħetx kienet is-soċjetà appellanta; (iv) l-appellata kienet indikat fl-Applikazzjoni għal Sħubija li l-profil ta' riskju tagħha kien *Med/High Risk,* u hija kienet iffirmat l-istruzzjonijiet għall-investiment; (v) l-appellata kellha d-dritt li tikkanċella waqt il-*cooling off period* ta' 30 jum, iżda dan m'għamlitux; (vi) ir-riferiment tal-appellata għal "The Pensions Act 2011 part D.1" ma kienx ċar; (vii) l-appellata għamlet ukoll riferiment għal dokumenti ta' konsultazzjoni maħruġa mill-MFSA, iżda dawn ma kienux rilevanti għall-każ odjern; (viii) is-soċjetà appellanta kienet bagħtet rendikonti annwali lill-appellata għas-snin 2014-2018; (ix) hija ma kinitx tagħti parir dwar investiment; (x) hija ma

kinitx responsabbli għall-ħlas ta' kwalunkwe ammont reklamat mill-appellata, u din tal-aħħar kellha turi kif l-azzjonijiet jew l-ommissjonijiet min-naħa tas-soċjetà appellanta kienu wasslu għall-allegat telf.

Id-deċiżjoni appellata

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

> ***"Further Considers:***
>
> ***Preliminary Plea regarding the Competence of the Arbiter***
>
> *The Service Provider raised the preliminary plea that the Arbiter has no competence to consider this case based on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta.*
>
> Plea relating to **Article 21(1)(b)** of Chapter 555 of the Laws of Malta
>
> *Article 21(1)(b) states that:*
>
> 'An Arbiter shall have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider which occurred on or after the first of May 2004:
>
> Provided that a complaint about conduct which occurred before the entry into force of this Act shall be made by not later than two years from the date when this paragraph comes into force.'
>
> *The said article stipulates that a complaint related to the 'conduct' of a financial service provider which occurred before the entry into force of this Act shall be made not later than two years from the date when this paragraph comes into force. This paragraph came into force on the 18 April 2016.*
>
> *The law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.*

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

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

In this case, the conduct complained of involves the conduct of the Service Provider in respect of the Scheme. It is noted that MPM's role with the Scheme is that of a ***trustee and retirement scheme administrator****, with such roles having been occupied by MPM in respect of the Complainant since the time the Complainant became a member of the Scheme and* ***continued to be occupied beyond the coming into force of Chapter 555 of the Laws of Malta****.*

The Arbiter notes that the submissions made by the Service Provider in respect of Article 21(1)(b) are general in nature and just focused on when the trades/investments were made. Consideration of article 21(1)(b) shall, nevertheless, be made with respect to the main aspects raised by the Complainant.

In this regard, it is considered that the Service Provider's arguments with respect to article 21(1)(b) have certain validity only with respect to the matter raised by the Complainant on the right of withdrawal.

This is in view that the right of withdrawal is a distinct right which applied and existed at the time of purchase of the policy in August 2014. (fn. 12 A fol. 30) The alleged misconduct of the Service Provider in this regard, of not providing the Complainant with a 30 day cooling off period at the time of purchase of the policy in 2014, could have thus only been raised with the Arbiter by 18 April 2018. The complaint filed with the Office of the Arbiter for Financial Services ('OAFS') is dated 18 August 2019. Accordingly, for the reasons explained, the Arbiter will not consider the part of the complaint relating to the alleged failure of the Service Provider to provide the Complainant with the indicated cooling off period.

In addition to the complaint made with respect to the right of withdrawal, the Complainant however raised other key aspects in her complaint, including that MPM allowed her pension fund to comprise high risk structured notes which were unsuitable to her as a retail investor and that the investments did not reflect a suitable level of diversification, her risk profile and not compliant with MPM's own investment guidelines.

With respect to the said aspects, it has clearly emerged that various structured note investments disputed by the Complainant still constituted part of the portfolio ***after*** *the coming into force of Chapter 555 of the Laws of Malta. (fn. 13* 'Historical Cash Account Transactions' *statement issued by Old Mutual International dated 12/08/19 – A fol. 9-19)*

The comments in relation to the applicability or otherwise of Article 21(1)(c) below also refer in this regard.

It is furthermore noted that as described in the affidavit of Stewart John Davies (Director of MPM), (fn. 14 Para. 44, Section E – A fol. 138) the Service Provider had terminated its terms of business with the advisor of the Complainant, CWM, (on whom the Complainant had reservations as outlined in her complaint to MPM), (fn. 15 A fol. 35-36) only as from September 2017. The Arbiter is also aware from other decided cases, that 'CWM ceased trading on or around 29 September 2017'. *(fn. 16 Such as in Case number 127/2018 decided on 28 July 2020) CWM was therefore still accepted by the Service Provider and acting as the investment advisor with respect to the Complainant's portfolio of investments after the coming into force of Chapter 555 of the Laws of Malta. CWM was eventually replaced in September 2017 when MPM no longer accepted business from CWM. The responsibility of MPM in this regard is explained later on in this decision.*

Accordingly, it is considered that the alleged shortcomings involving the conduct of MPM complained about in relation to the Retirement Scheme cannot be considered to have all occurred before 18 April 2016 and, therefore, the plea as based on Article 21(1)(b) cannot be upheld.

Article 21(1)(c)

The Service Provider alternatively also raises the plea that Article 21(1)(c) of Chapter 555 should apply.

Article 21(1)(c) stipulates:

'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act, if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'

*In that case, the Complainant had two years to complain to the Service Provider '*from the day on which the complainant first had knowledge of the matters complained of'*.*

In its Reply before the Arbiter, the Service Provider only submitted that more than two years have lapsed since the conduct complained of took place and did not elaborate any further as to why the complaint cannot be entertained in terms of the said article.

In its additional submissions, MPM noted that without prejudice to its plea relating to Article 21(1)(b), the complaint is also 'prescribed' on the basis of Article 21(1)(c) and, in this regard, MPM just submitted that:

*'*The complainant received annual member statements from the start of her investment (Appendix 4 attached to the reply filed by Momentum), and yet she only filed a complaint with Momentum in July 2019 (as emerges from the documentation filed with the original complaint)*'. (fn. 17 A fol. 204)*

First of all, the Arbiter wants to underline the fact that the timeframes established under Article 21(1)(b)(c)(d) of Chapter 555 of the Laws of Malta are not 'prescriptive' periods but periods of decadence and therefore different rules apply. However, it is not necessary to enter into these legal distinctions in this particular case.

It is noted that the fact that the Complainant was sent an Annual Member Statement, as stated by the Service Provider in its notes of submissions, could not be considered as enabling the Complainant to have knowledge about the matters complained of. This taking into consideration a number of factors including that the said Annual Member Statement was a highly generic report which only mentioned the underlying life assurance policy.

The Annual Member Statement issued to the Complainant by MPM included no details of the specific underlying investments held within the said policy. Hence, the Complainant was not in a position to know, from the Annual Member Statements she received, what investment transactions were actually being carried out within her portfolio of investments under such policy.

It is also noted that the Annual Member Statement sent to the Complainant by the Service Provider had even a disclaimer highlighting that certain underlying investments may show a value reflecting an early encashment value or potentially a zero value prior to maturity and that such value did not reflect the true performance of the underlying assets.

The disclaimer read as follows:

'Investment values are provided to Momentum Pensions Malta Limited by Investment Platforms who are responsible for the accuracy of this information. Every effort has been made to ensure that this statement is correct but please accept this statement on this understanding.

Certain underlying assets with the Investment, may show a value that reflects an early encashment value, or potentially a zero value, prior to the maturity date. This will not reflect the true current performance of such underlying assets.'

Such a disclaimer did not reveal much to the Complainant about the actual state of the investments and the statements in question could not have reasonably enabled the Complainant to have knowledge about the matters being complained of.

Moreover, the Arbiter, makes reference to decided Case Number 137/2018 (fn. 18 Decided on 28 July 2020) involving the same Service Provider, whereby it results that the Service Provider itself declared in July 2015, in reply to a member's concern regarding losses, that: '… whilst we, as Trustees, will review and assess any losses, **these can only be on the maturity of the note**, *(fn. 19 Emphasis of the Arbiter)* as any valuations can and will be distorted ahead of the expiry'. *(fn. 20 Case Number 137/2018 decided on 28 July 2020)*

It is noted from the Historical Cash Account Transactions statement provided by the Complainant that half of the structured notes invested into were sold or matured in 2017.

The Arbiter has also discovered from another decided case (fn. 21 Case Number 127/2018 decided on 28 July 2020) that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM. (fn. 22 Ibid.) In this regard, in September 2017, members were notified by MPM about the suspension of the terms of business that MPM had with CWM. Later, in October 2017, MPM also notified the members of the Scheme about the full withdrawal of such terms of business with CWM.

It is further noted that, in her complaint Form to the OAFS, the Complainant indicated the 4 October 2017 as the date when she first had knowledge of the matters she was complaining about. (fn. 23 A fol. 3) The indicated date is indeed reflective of the developments occurring at the time of the suspension of the terms of business with CWM as mentioned above and any subsequent updates and verification of her portfolio thereafter.

The Complainant in this case submitted her formal complaint with the Service Provider on the 7 July 2019, and thus within the two-year period established by Art. 21(1)(c) of Chapter 555.

*The Service Provider did not ultimately prove that, in this case, the Complainant raised the complaint '*later than two years from the day on which the complainant first had knowledge of the matters complained of'.

For the above-stated reasons, this plea is also being rejected and the Arbiter declares that he has the competence to deal with this complaint.

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. 24 Cap. 555, Art 19(3)(b))*

The Complainant

The Complainant, born in 1967, is of British nationality and resided in Spain at the time of application for membership as per the details contained in the Application for Membership of the Momentum Malta Retirement Trust ('the Application Form for Membership'). (fn. 25 A fol. 54/66)

The Complainant's occupation was indicated as a 'Musician' in the said Application Form.

It was not indicated, nor has it emerged, during the case that the Complainant was by any means, a professional investor. The Complainant can thus be treated as being a retail client.

The Complainant was accepted by MPM as member of the Retirement Scheme on 22 July 2014. (fn. 26 A fol. 96)

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. 27 https://www.mfsa.mt/financial-services-register/result/?id=3453) *and acts as the Retirement Scheme Administrator* ***and Trustee*** *of the Scheme. (fn. 28 A fol. 112 – Role of the Trustee, pg. 4 of the 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. 29 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. 30 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)

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. 31 https://www.mfsa.com.mt/financial-services-register/result/?id=3454) as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 (fn. 32 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. 33 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 Trusts and Trustees Act (Cap. 331) on the 23 March 2011,' *(fn. 34 Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).) and is*

'an approved Personal Retirement Scheme under the Retirement Pensions Act 2011'. *(fn. 35 Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit))*

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'. *(Ibid.)*

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

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

The life assurance policy acquired for the Complainant was called the European Executive Investment Bond issued by Skandia International (fn. 37 Skandia International eventually rebranded to Old Mutual International - *https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandia*https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandia-international-rebrands-to-old-mutual-international/*international-rebrands-to-old-mutual-international/)/Old Mutual International ('OMI'). (fn. 38 A fol. 64)*

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

*The underlying investments comprised substantial investments in 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. 39 The 'Investor Profile' is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant. A fol. 207) and as also emerging from the* 'Historical Cash Account Transactions' *statement presented by the Complainant. (fn. 40 The '*Investor Profile' *is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant. A fol. 207 Appendix 1 to her Complaint Form - A fol. 9-19)*

*The '*Investor Profile' *presented by the Service Provider for the Complainant also included a table with the '*current valuation' *as at 12/08/2019. The said table indicated a loss (excluding fees) of GBP54,051 as at that date. The loss experienced by the Complainant is thus higher when taking into account the fees incurred and paid within the Scheme's structure.*

*It is to be noted that the Service Provider does not explain whether the loss indicated in the '*current valuation' *for the Complainant relates to realised or paper losses or both.*

However, from the 'Historical Cash Account Transactions' *statement issued by Old Mutual International dated 12/08/19 presented by the Complainant, it transpires that all of the eight structured note investments existing within the Complainant's portfolio experienced a realised capital loss (exclusive of dividends) as described in the section of this decision titled* 'Underlying Investments' *hereunder.*

Investment Advisor

Continental Wealth Management ('CWM') was the investment advisor appointed by the Complainant. (fn. 41 As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant) The role of CWM was to advise the Complainant regarding the assets held within her Retirement Scheme.

It is noted that in the notices issued to members of the Scheme in September and October 2017, as referred to above in the 'Preliminary Plea' *section, MPM described CWM as '*an authorised representative/agent of Trafalgar International GMBH'*, where CWM's was Trafalgar's '*authorised representative in Spain and France'*.*

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 advisor and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH'. *(fn. 42 Pg. 1 of PMP's reply to the OAFS)*

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. 43 Para. 39, Section E, titled* 'CWM and Trafalgar International GmbH' *of the affidavit of Stewart Davies) 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. 44 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. 45 Attachment to the '*Additional submissions' *made by MPM in respet of the Complainant. A fol. 207) The transactions undertaken within her portfolio also emerge from the* 'Historical Cash Account Transactions' *statement issued by OMI presented by the Complainant. (fn. 46 Appendix 1 to her Complaint Form – A fol. 9-19)*

The investment transactions undertaken within the Complainant's portfolio from commencement of the underlying policy are as follows:

Table A

Investment	***Date bought***	***CCY***	***Price***	***Date sold***	***Maturity/ Sale price***	***Capital Loss/ Profit (excluding dividends)***
Leonteq 1.5Y Multi Barrier EXPR US Opp	*19/09/2014*	*GBP*	*17,000*	*17/03/2016*	*7,769.82*	*GBP (9230.18)*
Leonteq 1.5Y Multi Barrier GBP	*19/09/2014*	*GBP*	*18,000*	*20/04/2015*	*8,465.40*	
				23/04/2015	*8,820.00*	*GBP (714.6)*

Commerzbank 1.5Y AC Phnx NT ARO GBP	*29/09/2014*	*GBP*	*18,000*	*06/04/2016*	*1,067.94*	*GBP (16,932.06)*
Commerzbank 1Y6M AC Phoenix Worst AKS INVN	*12/12/2014*	*GBP*	*11,696. 10*	*03/05/2017*	*7,693.92*	*GBP (4,002.18)*
Leonteq 1.5Y MB EXP Cert On Herbalife & Invensense	*15/12/2014*	*GBP*	*12,000*	*15/06/2017*	*2,120.52*	*GBP (9,879.48)*
Leonteq 2Y Multi Barrier Cert	*19/12/2014*	*GBP*	*13,000*	*19/12/2016*	*436.8*	*GBP (12,563.2)*
EFG Red April 6	*08/05/2015*	*EUR*	*14,000*	*08/05/2017*	*519.48*	*EUR (13,480.52)*
EFG Red April 5	*08/05/2015*	*EUR*	*13,000*	*08/05/2017*	*1,723.52*	*EUR (11,276.48)*
Invest FD Serv Ltd Brooks MacDonald Balanced	*24/02/2016*	*GBP*	*6,000.0 0*			
VAM Managed Funds Lux Close Brothers Balanced Fund	*30/03/2016*	*GBP*	*7,000.0 0*			
Gemini Investment Principal Ast Allocation C	*03/06/2016*	*GBP*	*3,000.0 0*			

During the tenure of CWM, eight structured notes were in total purchased between 2014-2015 and three collective investment schemes were eventually purchased in 2016.

It is noted that the table of investments presented by the Complainant in her complaint, excludes the investment of GBP18,000 into the 'Leonteq 1.5Y Multi Barrier GBP' done in September 2014 as well as the investment into three collective investment schemes of GBP6,000, GBP7,000 and GBP3,000 undertaken in 2016 as indicated in Table A above, (apart that the figures for two investments were indicated in the wrong currency). (fn. 47 Figures in respect of the EFG Red April were in EUR and not GBP).

According to the Historical Cash Account Transactions *statement there were still open positions in the indicated three collective investment schemes as at 12/08/2019, this being the date of the said statement.*

It is noted that, as indicated in Table B below, when taking into consideration the dividends received from the respective investments, as reflected in the Historical Cash Account Transactions *statement,* ***all the structured notes with the exception of the GBP18,000 investment into the 'Leonteq 1.5Y Multi Barrier GBP', still experienced a net loss after dividend payments****.*

(The said Leonteq investment is calculated to have yielded only a marginal overall gain of less than GBP100 inclusive of dividends as per Table B below).

Table B

Investment	***Capital Loss/ Profit (excluding dividends)***	***Total Dividends***	***Total Loss/Profit (inclusive of dividends)***
Leonteq 1.5Y Multi Barrier EXPR US Opp	*GBP (9,230.18)*	*2,295.00*	*GBP (6,935.18)*
Leonteq 1.5Y Multi Barrier GBP			
	GBP (714.6)	*810.00*	*GBP 95.4*
Commerzbank 1.5Y AC Phnx NT ARO GBP	*GBP (16,932.06)*	*2,398.68*	*GBP (14,533.38)*
Commerzbank 1Y6M AC Phoenix Worst AKS - INVN	*GBP (4,002.18)*	*1,739.40*	*GBP (2,262.78)*

Leonteq 1.5Y MB EXP Cert On Herbalife & Invensense	*GBP (9,879.48)*	*2,400.01*	*GBP (7,479.47)*
Leonteq 2Y Multi Barrier Cert	*GBP (12,563.2)*	*3,057.60*	*GBP (9,505.60)*
EFG Red April 6	*EUR (13,480.52)*		*EUR (13,480.52)*
EFG Red April 5	*EUR (11,276.48)*	*2600*	*EUR (8,676.48)*

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. 48 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 or reference has been made by the Service Provider in its submissions.

Article 21(1) of the TTA which deals with the 'Duties of trustees', stipulates a crucial aspect, that of the ***bonus paterfamilias****, which applies to MPM.*

The said article provides that:

'(1) **Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias**, act in utmost good faith and avoid any conflict of interest'.

Then, 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. 49* Ganado Max (Editor), '*An Introduction to Maltese Financial Services Law',) Allied Publications 2009) p. 174)*

'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. 50 Op.cit, p.178)*

The fiduciary and trustee obligations were also highlighted by MFSA in a recent publication where it was stated that:

'**In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of**

members and beneficiaries. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations**'. *(fn. 51 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. 52 Para. 17, page 5 of the affidavit of Stewart Davies)*

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. 53 Para. 31, Page 8 of the affidavit of Stewart Davies)*

***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. 54 Para. 33, Page 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers)*

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

'I accept that I or my designated professional advisor 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.*

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. 55* 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. 56 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 still 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. 57 Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies. The same statement is also included in page 9 of the Scheme Particulars of May 2018 (Also attached to the same affidavit) 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** *…'.*

Other Observations and Conclusions

Allegations in relation to fees

In her complaint to the OAFS, the Complainant claimed that the Service Provider failed to ensure that only costs that are appropriate and reasonable were incurred in relation to her Retirement Scheme.

The Complainant has however not provided any further basis and explanation for such allegation nor any evidence about such claim.

In the circumstances, the Arbiter considers that there is insufficient basis and evidence for him to determine whether, in the particular circumstances of the case, the Service Provider failed to ensure that only appropriate and reasonable costs were incurred in relation to her Retirement Scheme as alleged by the Complainant.

On the point of fees, the Arbiter would however like to make a general observation. The Arbiter considers that the trustee and scheme administrator of a retirement scheme, in acting in the best interests of the member as duty bound by law and rules to which it is subject to, is required to be sensitive to, and mindful of, the implications and level of fees applicable within the whole structure of the retirement scheme and not just limit consideration to its own fees.

In its role of a* bonus paterfamilias*, the trustee of a retirement scheme is reasonably expected to ensure that the extent of fees applicable within the whole structure of a retirement scheme is reasonable, justified and adequate overall when considering the purpose of the scheme. Where there are issues or concerns these should reasonably be raised with the prospective member or member as appropriate. Consideration would in this regard need to be given to a number of aspects including: the extent of fees vis-à-vis the size of the respective pension pot of the

member; that the extent of fees are not such as to inhibit or make the attainment of the objective of the scheme difficult to be actually reached without taking excessive risks; neither that the level of fees motivate investment in risky instruments and/or the construction of risky portfolios.

Key considerations relating to the principal alleged failures

The Arbiter will now consider the principal alleged failures. As indicated above, the Complainant raised a number of main aspects in her complaint where, in essence, she alleged that MPM has been negligent and failed to act in her best interests and with due care, skill and prudence claiming that:

(i) *MPM allowed her pension fund to be invested in high-risk structured notes which were unsuitable to her as a retail investor with no previous investment experience and understanding of these types of instruments;*

(ii) *the investments allowed by MPM did not reflect a suitable level of diversification, her risk profile (which she claimed was not checked by MPM) and MPM's own investment guidelines.*

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 advisor and the RSA and Trustee had in this case as will be later seen in this decision.

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

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

A. The permitted portfolio composition

Investment into Structured Notes

Preliminary observations

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

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

Nevertheless, the exposure to structured notes allowed within the Complainant's portfolio was extensive, with the insurance policy underlying the Scheme being at times solely invested into such products and such instruments being the predominant investments within her portfolio 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. 58 https://investopedia.com/terms/s/structurednote.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. 59* https://www.investopedia.com/articles/bonds/10/structured-notes.asp)

Apart from the credit risk of the issuer and the liquidity risk, other risks that are typically highlighted for structured notes with no guarantees of returning back the original capital invested, include the warning that the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment.

The underlying assets to which structured notes may be linked to include stocks and financial indices. A particular common feature of structured notes involves the application of capital buffers and barriers where the invested capital would be at risk in case of a particular event occurring. Such event would typically comprise 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 would be linked to, where the fall in

value would typically be observed on maturity/final valuation of the note. Such structured notes would carry significant risks as the risk of loss related would be similar to an investment in the worst performing underlying and the investor could end up losing the total capital invested or substantial part thereof in case of the barrier event occurring.

It is accordingly clear that there are certain specific risks in structured products and where barrier events are applied, material consequences if just one asset, out of a basket of assets to which the note would be linked, falls foul of the barrier event. Hence, the implication of such features could have not been overlooked nor discounted and one could not derive comfort regarding the adequacy of such products either by just considering the nature and/or range of underlying assets.

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. Such excessive exposure to structured products occurred over a long period of time. This clearly emerges from the Table of Investments forming part of the 'Investor Profile' provided by the Service Provider and the 'Historical Cash Account Transactions' *statement.*

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 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. The credit risk of the respective issuer was indeed still one of the applicable risks.

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. 60 Affidavit of Steward Davies – A fol. 134) 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 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. 61 A fol. 207) 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.

The application of investment restrictions at a general, 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. 62 i.e. a collective investment scheme without sub-funds) and* umbrella schemes*. (fn. 63 i.e. a collective investment shceme 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 <u>its own</u> 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. 64 A fol. 135)*

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. (fn. 65 For example, as clearly outlined in the Investment Guidelines marked 'January 2013' and 'Mid-2014' in the Scheme's Application Form)

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. 66 A fol. 135 – 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 own 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. 67 Para. 21 & 23 of the Note of Submissions filed by MPM – A fol. 191) 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. 68 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. 69 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. 70 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. 71 SOC 2.7.2.(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. 72 SOC 2.7.2 (h)(iii) & (v))*

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

In the case of the Complainant, it has also clearly emerged that individual exposures to single 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 would have been more sensible for the maximum limit of 10% applicable to single issuers in case of securities to have been similarly applied for those structured products which featured barrier events and provided risk of loss similar to an investment in the worst performing underlying.

The structured products invested into were also not indicated, during the proceedings of this case, as themselves being traded in or dealt on a regulated market. The portfolio also included material positions into high risk investments where the high risk is reflected in the extent of the losses experienced.

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

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

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

The investment portfolio in the case reviewed was ultimately solely or predominantly invested in structured notes for a long period of time.

It is also to be noted that over 97% of the underlying policy was invested into just three structured notes at the time of the purchase of such products in September 2014. *(fn. 73 A fol. 207 - 31.40% in respect of the Leonteq 1.5Y Multi Barrier EXPR; 33.25% in the Leonteq 1.5Y Multi Barrier and 33.25% in Commerzbank 1.5Y AC Phnx Nt all purchased at the same time in September 2014.)*

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. 74 Investment Guidelines attached to the affidavit of Stewart Davies)

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. 75 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 of structured notes.

*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 will be indicated further below) 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. 76 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.

It is noted that structured notes invested into typically do not have a maturity of a few months but a longer term view commonly between one or more years. The bulk of the assets within the policy was, at times, invested into a few structured notes. 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.

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

There are indeed various risks applicable in relation to the secondary market. 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 where the lower values of the structured notes on the secondary market would have affected 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, 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 nevertheless also to be noted that <u>even if one had to look at the</u> <u>composition of the Complainant's portfolio purely from other aspects, there is</u> <u>still undisputable</u>

<u>evidence of non-compliance with other requirements</u> <u>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*
64.65%	*EFG*	*Sept 2014*	*2 SNs issued by EFG respectively constituted 31.40% and 33.25% of the policy value at the time of purchase in September 2014.*
Approx. 47%	*Commerzbank*	*Sept/Dec 2014*	*2 SNs issued by Commerzbank respectively constituted 33.25% and 14.23% of the policy value at the time of purchase in September/ December 2014.*

The fact that such high exposures to a single counterparty 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*.*

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. 77 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. 78 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. 79 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. 80 MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies) and mid-2017, (fn. 81 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 still limited exposure to individual investments (aside from collective investment schemes) to 20%.

In this case under examination by the Arbiter, 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 exposure to single issuers.

Indeed, the Arbiter considers that the high exposure to structured products as well as to single issuers in the Complainant's portfolio jarred, and did not reflect to varying degrees, with one or more of MPM's own investment guidelines applicable at the time when the investments were made, most particularly with respect to the following guidelines: *(fn. 80 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**.*
*In addition, **further consideration needs to be given to** the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to **avoid excessive exposure**:* • *…* • ***To any single credit risk***

<u>Investment Guidelines marked '2015':</u>
• *Where products with underlying guarantees are chosen, i.e.* ***Structured Notes****, these will be* ***permitted up to a maximum of 66% of the portfolio's values****,*
with ***no more than one third*** *of the portfolio to be* ***subject to*** *the* ***same issuer default risk****.*
In addition, ***further consideration needs to be given to*** *the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to* ***avoid exposure****:* • *...* • ***To any single credit risk****.*
<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 also noted that additional investments into structured notes were observed *(fn. 83 'Table of Investments' in the 'Investor Profile' provided by MPM refers)* ***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 this case, the Service Provider still continued to allow 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 is convinced 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 not been truly achieved in respect of the Complainant's investment portfolio.

<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 events or barriers that may form part of the key features of such products, would have on the investment if and when such events occur as already 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 at times solely or 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 despite the indication that her risk profile was described as 'Med/High Risk'.

The fact that the Complainant's risk profile in the Application Form for Membership was indicated as 'Med/High Risk' cannot be construed as some sort of justification for the creation of a pension investment portfolio, where the risks taken, individually and within the whole portfolio, were to such an extent as to put into prejudice the achievement of the scope for which the Retirement Scheme was created, as has happened in this case.

This is particularly so in the context of a pension scheme which, by its nature, is not a speculative investment account/vehicle.

Moreover, the Arbiter is of the view that not only was the investment portfolio not of* '**medium to high risk**' *(but rather one involving substantial high risks as reflected in the extent of realised losses experienced by the Complainant, where all of the structured notes invested into yielded a loss, some of which on nearly all or substantial parts of the capital invested as detailed in the section titled 'Underlying Investments' above), but ultimately, the investment portfolio went against and was not reflective of the applicable investment principles and parameters as amply considered in detail in the preceding sections.

In the circumstance where the portfolio of the Complainant was at times, solely or predominantly invested in structured products with a high level of exposure to single issuer/s, and for the reasons amply explained above, the Arbiter does not consider that there was proper diversification nor that the portfolio was at all times* '**invested in order to ensure the security quality, liquidity and profitability of the portfolio as a whole**'** *(fn. 84 SOC2.7.2(a) of Part B.2.7 of the Directives)* ***and **'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'.** *(fn. 85SOC2.7.1(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.

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. 86 For example, in the reference to litigation filed against Leonteq – A fol. 139)*

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 this case, 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 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 her 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 oversight functions with respect to the Scheme and portfolio structure. It is also considered that there are various instances which indicate non-compliance by the Service Provider with applicable requirements and obligations as amply explained above in this decision.

The Arbiter also considers that the Service Provider did not meet the* 'reasonable and legitimate expectations'** *(fn. 87 Cap. 555, Article 19(3)(c))* ***of the Complainant who had placed her 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 only 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 her pension portfolio.

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

The Arbiter notes that the latest valuation and list of transactions provided by the Service Provider in respect of each Complainant is not current and there were still open investment positions within the portfolio constituted by CWM.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for the Complainant for the purpose of this decision.

Given that the complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of Continental Wealth Management acting as advisor, compensation shall be provided solely on the investment portfolio constituted under Continental Wealth Management.

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 within the said portfolio which, at the date of this decision, no longer forms part of the Member's investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised) 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, as at the date of this decision.

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 and are still held 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.

Because of the novelty of this case, each party is to bear its own legal costs of these proceedings."

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fis-26 ta' April, 2021 intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka u tħassar id-deċiżjoni appellata billi tilqa' l-aggravji tagħha. Tgħid li dawn l-aggravji 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 partikolmarment meta ddeċiedia fost affarijiet oħra li l-kompożizzjoni u s-superviżjoni tal-portafoll tal-appellata ma kienx skont il-liġijiet, regoli u linji gwida applikabbli; (ii) ma kienx jeżisti l-

ebda ness kawżali u għalhekk l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet infondati; u (iii) l-Arbitru għamel apprezzament ħażin tal-fatti u tal-liġi fir-rigward ta' dak li ddeċieda dwar il-miżati u dak li kien mistenni mingħandha.

7. L-appellata wieġbet fis-17 ta' Marzu, 2022 fejn issottomettiet li d-deċiżjoni appellata hija ġusta, u għaldaqstant timmerita li tiġi kkonfermata għal dawk ir-raġunijiet li hija tispjega fit-tweġiba tagħha.

<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-appellata, u anki tal-konsiderazzjonijiet magħmulin mill-Arbitru fid-deċiżjoni appellata.

9. *<u>L-ewwel aggravju</u>:* Meta tfisser l-ewwel aggravju tagħha, is-soċjetà appellanta tikkontendi li d-deċiżjoni appellata hija msejsa fuq il-konklużjoni li kien hemm *"excessive exposure to structured products and to single issuers",* sabiex b'hekk il-portafoll ma kienx jirrifletti r-regoli tal-MFSA u l-*investment guidelines* tagħha stess, u ma kienx hemm diversifikazzjoni xierqa jew *"prudent approach".* Għalhekk l-Arbitru ddeċieda li hija kienet naqset mill-obbligu tagħha li timxi bl-attenzjoni ta' *bonus paterfamilias* bħal ma kienet tenuta li tagħmel fil-kwalità tagħha ta' *trustee.* Tgħid li madankollu d-deċiżjoni appellata hija żbaljata u l-Arbitru hawn kien ukoll naqas milli jieħu in konsiderazzjoni l-profil ta' riskju tal-appellata. Filwaqt li tirrileva li hija ssottomettiet l-informazzjoni kollha dwar il-portafoll tal-appellata, anki l-profil ta' riskju tagħha 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 tirrileva hawnhekk li l-MFSA dejjem kienet tippermetti investiment f'dawn il-prodotti, kif kienu jagħmlu anki l-linji gwida tagħha, u dan l-investiment għalhekk qatt ma kien ipprojbit, imma 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. Tgħid li l-espożizzjoni għall-prodotti strutturati u għal emittenti singolari dejjem żammet mar-regoli tal-MFSA u anki mal-linji gwida tagħha stess. Tikkontendi b'riferiment għal Table A f'paġna 44 tad-deċiżjoni appellata, li l-Arbitru jagħmel riferiment biss għall-profil li hija kienet ippreżentat fir-rigward tal-allegata espożizzjoni żejda għal prodotti strutturati. Tispjega b'riferiment għal dak li qal l-Arbitru, fejn osserva li matul is-snin hija kienet naqset il-limitu permissibbli ta' investiment f'noti strutturati, li dawn dejjem baqgħu permissibbli fil-limiti identifikati, u li l-limiti, bħal fil-każ ta' kull prodott ieħor, dejjem kienu dinamiċi. Tgħid li anki fir-rigward tal-allegat *excessive exposure to single issuers,* l-Arbitru għalhekk kien ukoll żbaljat fattwalment b'referiment partikolari għal dak li qal fir-rigward ta' żewġ noti strutturati maħruga minn EFG, u tnejn oħra maħruġa minn Commerzbank. Minn hawn is-soċjetà appellanta tgħaddi sabiex tissottometti kif l-Arbitru applika ħażin ir-regoli tal-MFSA. Tikkontendi li mhux ċar x'ried ifisser biha l-kelma "*jarred*", u lanqas kif wasal għall-konklużjoni li *"...The high exposure to structured products (as well as high exposure to single issuers in respect of the*

Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio jarred with the regulatory requirements that applied to the Retirement Scheme at the time...". Tgħid li l-Arbitru applika ħażin l-i*Standard Operational Conditions* 2.7.1 u 2.7.2, għaliex dawn kienu applikabbli fir-rigward ta' skema fit-totalità tagħha u mhux fir-rigward tal-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 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 l-linja gwida huma ntiżi 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. Minnaħa tagħha hija kienet ippreżentat il-profil tal-appellata, 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-appellata kellha l-obbligu li ssostni l-ilment tagħha, 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-appellata. Tgħid li l-Arbitru għażel żewġ eżempji sabiex jispjega kif hija ma kinitx applikat

il-linji gwida tagħha stess. Dwar l-ewwel wieħed fejn kien l-investiment kellu jsir l-aktar f'swieq regolati, is-soċjetà appellanta tgħid li l-investimenti kollha, anki n-noti strutturati, kien 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 kienux ġew osservati 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 ta' likwidità kienu qed jiġu osservati adegwatament. Is-soċjetà appellanta tikkontendi li hija kellha tinstab responsabbli mhux fuq sempliċi nuqqas ta' konvinzjoni u mingħajr ma tingħata raġuni għal tali konvinzjoni. Fil-mertu, is-soċjetà appellanta 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 mis-soċjetà appellanta huwa li l-Arbitru naqas milli jikkonsidra l-profil ta' riskju tal-investitur. Tgħid li skont l-appellata, l-investimenti ma kienux skont il-profil ta' riskju tagħha, u hija min-naħa tagħha kienet ikkontestat din l-allegazzjoni. Filwaqt li għal darb'oħra tagħmel riferiment għall-affidavit ta' Stewart Davies, issostni li l-profil ta' riskju kien għaliha jagħmel parti integrali mill-konsiderazzjonijiet tagħha bħala Amministratur, u li kieku dan ma kienx il-każ, ma kinitx tistaqsi għalih fil-formola tal-applikazzjoni tagħha stess. Dan filwaqt li tirrileva li x-xhieda ta' Stewart Davies ma kinitx ġiet ikkontestata, u għalhekk l-Arbitru kellu jistrieħ fuqha.

<u>It-tieni aggravju</u>: Is-soċjetà appellanta tgħid li hija tħossha aggravata wkoll għaliex l-Arbitru ddikjara li hija kienet parzjalment responsabbli għal 70% tat-

telf soffert mill-appellata. Tgħid li fl-ewwel lok l-Arbitru sejjes in-ness kawżali fuq konsiderazzjonijiet li hija kienet diġà fissret li kienu infondati, iżda jekk imbagħad wieħed kellu jaċċetta li l-Arbitru 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-appellata. Tgħid li kemm CWM, li aġixxew bħala konsulenti finanzjarji, u anki l-ilmentatur jekk ammetta li ffirma l-istruzzjonijiet *in blank,* kellhom jerfgħu responsabbiltà. 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-appellata li ħadet id-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>: Skont is-soċjetà appellanta l-Arbitru ddeċieda ħażin meta filwaqt li m'aċċettax l-allegazzjonijiet tal-appellata li l-miżati ma kienux ġew żvelati jew spjegati lilha, daħħal l-obbligu tagħha taħt il-kappa ta' *bonus paterfamilias.* Tgħid li hija ma setgħetx taġixxi bħala *bonus paterfamilias* fir-rigward ta' dmir li ma kienx jirriżulta mil-liġi jew mir-regoli applikabbli. Barra minn hekk, fejn l-Arbitru ddikjara li t-telf soffert mill-appellata kien ikbar stante li kellhom jittieħdu in konsiderazzjoni d-drittijiet imħallsa, hawn huwa kien żbaljat għaliex id-drittijiet tħallsu għas-servizzi li hija kienet irrendiet, u l-fatt li l-appellata sofriet telf ma kienx ifisser li l-istess servizz ma kienx ġie pprovdut.

10. L-appellata tilqa' billi tikkontendi li bħala Amministratur tal-Iskema, is-soċjetà appellanta għandha wkoll obbligi ta' *Trustee.* Hawn l-appellata tiċċita 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. Hija tagħmel ukoll riferiment għal pubblikazzjoni tal-MFSA u tiċċita silta minnha, liema dokument tgħid li kien ġie ppubblikat fl-2017, iżda kien jittratta prinċipji ġenerali tat-Kap. 331 u tal-Kodiċi Ċivili li kienu diġà fis-seħħ qabel dik is-sena. Għalhekk ukoll tiċċita l-*Investment Guidelines* ta' Jannar 2013. Imbagħad tagħmel riferiment għall-para. 3.1 tas-sezzjoni ntestata *'Terms and Conditions'* fil-formola tal-Applikazzjoni għas-Sħubija tal-Iskema, u ssostni 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 tagħha, l-appellata tikkontendi li kien irriżulta tassew ċar li kien hemm għadd 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, hija tibda billi tiċċita l-istess u anki dak li qal l-Arbitru fir-rigward, filwaqt li tissottometti 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, tirrileva li huwa diffiċli li wieħed jikkontendi għas-soċjetà appellanta, li dawn ma kellhomx japplikaw b'mod rigoruż u li hija setgħet tagħżel li ma ssegwihomx. Filwaqt li tagħmel riferiment għal dak li kienu jipprovdu dwar il-massimu ta' assi li setgħu jinżammu b'likwidità ta' iktar minn 6 xhur jew inqas, tirrileva 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. Tirrileva li kif ġie osservat mill-Arbitru, kien hemm ukoll f'ċerti każijiet l-possibilità ta' suq sekondarju għal dawn in-noti strutturati, iżda dan ma setax jipprovdi livell ta' kumdità adegwata dwar il-likwidità. Tiċċita dak li qal l-Arbitru dwar l-investigazzjoni li saret għall-verifika ta' dan il-punt u l-konklużjoni tiegħu. Tissottometti 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 l-allegat ness kawżali, l-appellata tgħid li għall-kuntrarju l-Arbitru ma naqasx milli jagħraf l-imsemmi ness kawżali u n-nuqqasijiet tas-soċjetà appellanta fil-konfront tat-telf soffert minnha. Hija tiċċita dawk il-partijiet mid-deċiżjoni appellata fejn l-Arbitru ttratta proprju din il-kwistjoni, u anki fejn tgħid li huwa ddikjara kif għandu jiġi kkalkulat it-telf. Dwar l-aħħar parti tar-rikors tal-appell tas-soċjetà appellanta, tgħid li mhux ċar hawn l-ilment tas-soċjetà appellanta ġaladarba l-Arbitru ma laqax l-argumenti tal-appellata, u għalhekk l-aggravju huwa rritu u null.

11. Qabel xejn din il-Qorti ser tindirizza s-sottomissjonijiet magħmulin mis-soċjetà appellanta fl-aħħar parti tar-rikors tal-appell tagħha. F'din il-parti hija qegħda tqajjem il-kwistjoni dwar il-miżati tagħha li dwarhom ilmentat l-appellata, iżda din il-Qorti tgħid li ġaladarba, kif tirrileva s-soċjetà appellanta stess, l-Arbitru ċaħad din il-parti tal-ilment tal-appellata, hija qegħda tastjeni milli tieħu konjizzjoni ulterjuri ta' dan l-aħħar aggravju.

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 raġonevoli fic-cirkostanzi 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-appellata mill-Applikazzjoni għas-Sħubija tal-Iskema[1], innota li ma kienx ġie ndikat jew ippruvat li l-appellata hija investitur professjonali, u mbagħad għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tas-soċjetà appellanta. Il-Qorti ssib li dawn il-konstatazzjonijiet kollha huma korretti u anki f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

13. Wara li spjega l-qafas legali li kien jirregola l-Iskema u anki lis-soċjetà appellanta, l-Arbitru rrileva li tali Skema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta u kif awtorizzata mill-MFSA bħala *Retirement Scheme* f'April 2011 taħt l-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar) u f'Jannar 2016 taħt l-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta). Osserva li l-assi fil-kont tal-appellata miżmum fl-Iskema, kienu ġew utilizzati għax-xiri ta' polza ta' assikurazzjoni fuq il-ħajja maħruġa minn Skandia/OMI, u l-*premium* ta' dik il-polza mbagħad ġie investit f'portafoll ta' diversi prodotti, bosta minnhom noti strutturati, kif kien jirriżulta mill-*Investor Profile,* u dan taħt id-direzzjoni tal-konsulent finanzjarju tagħha kif aċċettat mis-soċjetà appellanta. L-Arbitru spjega li mill-istess *Investor Profile* ippreżentat

[1] Ara *a fol.* 55 *et seq.*

mis-soċjetà appellanta stess, kien jirriżulta li fit-12 ta' Awwissu, 2019 ġià kien hemm telf ta' GBP54,051, u dan mingħajr ma ttieħdu in konsiderazzjoni d-drittijiet imħallsa, u jgħid li għalhekk it-telf soffert mill-appellata kien fil-fatt ikbar. Irrileva li hawn is-soċjetà appellanta ma kinitx spjegat ukoll jekk it-telf kienx wieħed attwali.

14. L-Arbitru kkonsidra li CWM kienet il-konsulent finanzjarju kif maħtura mill-appellata, sabiex tagħtiha parir dwar l-assi miżmuma fl-Iskema. Irrileva li s-soċjetà appellanta fl-avviż li bagħtet lill-appellata f'Ottubru 2017, kienet iddeskriviet lil CWM bħala *'an authorised representative/agent of Trafalgar International GMBH'*[2]*,* fejn CWM kienet *'authorised representative in Spain and France'* ta' Trafalgar*,* u dan filwaqt li għamel ukoll riferiment għar-risposta tal-imsemmija soċjetà appellanta u għas-sottomissjonijiet tagħha, fejn terġa' tirrileva dan il-fatt. Irrileva wkoll li s-soċjetà appellanta kienet issottomettiet 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-appellata kienu ndikati fl-elenku tat-transazzjonijiet esebit mis-soċjetà appellanta stess, qal li matul iż-żmien li fih ġiet maħtura CWM bħala l-konsulent finanzjarju tal-appellata, b'kollox kienu nxtraw tmien noti strutturati fil-perijodu bejn l-2014 u l-2015, u ġew akkwistati wkoll tliet skemi tal-investiment kollettiv fl-2016. Qal li kien jirriżulta mill-*Historical Cash*

[2] *A fol.* 130.

Account Transactions maħruġa minn OMI u esebita mill-appellata, u dan bl-eċċezzjoni tan-nota strutturata ta' Leonteq 1.5Y Multi Barrier GBP, li n-noti strutturati xorta waħda sofrew telf *net* wara l-ħlas ta' dividendi.

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 hawn iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta hawn kellha obbligi daqstant ċari li timxi fl-aħjar interess tal-Iskema, kemm fiż-żmien fejn saret l-assenjazzjoni tal-polza lis-soċjetà appellanta fis-sena 2014, meta kienu applikabbli d-dispożizzjonijiet tal-Kap. 450, u anki sussegwentement meta ġie fis-seħħ l-Att dwar Pensjonijiet għall-Irtirar fis-sena 2015, u l-appellata kienet għadha membru tal-Iskema u ġarrbet 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-benefiċċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant li l-Qorti tirrileva li diġà minn dan li ngħad, jirriżulta li d-difiża tagħha li hija ma setgħet qatt tinżamm responsabbli stante li ma kellha l-ebda obbligu fil-konfront tal-appellata, ma tistax tirnexxi.

19. Iżda l-Arbitru ma waqafx hawn għaliex ikkonsidra wkoll il-kariga tas-soċjetà appellanta bħala *Trustee,* u rrileva li hawn kienu applikabbli l-provvedimenti tal-Att dwar *Trusts* u *Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-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 saħansitra tenuta li tamministra l-Iskema u l-assi tagħha skont diliġenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa ċċita 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.

[3] Ed. Max Ganado.

20. L-Arbitru mbagħad aċċenna fuq 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 appellanta fl-aħħar mill-aħħar kellha s-setgħa li tiddeċiedi jekk l-investiment għandux isir, billi 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 obbligi pożittivi fejn hija kienet tenuta tħares il-portafoll tal-membru individwali tal-Iskema, u taġixxi skont il-każ. L-Arbitru osserva li x-xhieda ta' Stewart Davies kienet riflessa saħansitra fil-Formola tal-Applikazzjoni għal Sħubija ffirmata mill-appellata.[5] Qal li l-MFSA kienet tqis ukoll il-funzjoni ta' sorveljanza bħala obbligu importanti tal-Amministratur tal-Iskema, u huwa ċċita siltiet mill-*Consultation Document* tagħha maħruġ fis-16 ta' Novembru, 2018, filwaqt li nsista li l-istqarrijiet hemm magħmula kienu applikabbli wkoll għaż-żmien li fih sar l-investiment in kwistjoni. L-Arbitru 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 intestata 'Terms and Conditions' fil-Formola tal-Applikazzjoni għal Sħubija.

21. L-Arbitru mbagħad għadda sabiex ikkonsidra proprju dak li jistrieħ fuqu l-ewwel aggravju tas-soċjetà appellanta. Huwa beda billi aċċetta li kien

[4] *A fol.* 131 para. 17, *fol.* 134 para. 31 u *fol.* 135 para. 33.
[5] *Ibid.*

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

22. 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. Imbagħad għadda sabiex irrileva x'kienu r-riskji li kellhom n-noti strutturati, u qal li fost oħrajn kien hemm ir-riskju tal-kreditu ta' min kien qed joħroġhom u anki ir-riskju tal-likwidità, iżda jingħataw ukoll diversi twissijiet fosthom li n-noti ma kellhomx il-kapital protett u li l-investitur seta' jirċievi inqas mill-ammont oriġinarjament investit, jew saħansitra li seta' jitlef il-kapital kollu. Kollox tgħid il-Qorti, ferm indikattiv tal-fatt li l-investiment fin-noti strutturati ma kienx wieħed kompatibbli mal-informazzjoni dwar l-appellata. L-Arbitru qal li aspett komuni tal-imsemmija noti strutturati kien l-applikazzjoni ta' *capital buffers* u *barriers*, dwar l-eventwalità ta' tnaqqis fil-valur tal-kapital kif marbut ma' perċentwali. Għalhekk, qal l-Arbitru, kien hemm konsegwenzi materjali jekk il-valur ta' wieħed biss mill-assi kollha tan-noti strutturati, kien inżel mill-minimu ndikat.

23. Imbagħad osserva wkoll li l-portafoll tal-appellant 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.

24. L-Arbitru minn hawn għadda sabiex iddikjara li l-espożizzjoni qawwija għal prodotti strutturati u għal emittent waħdieni li tħalliet issir mis-soċjetà appellanta, ma kinitx tirrispetta r-rekwiżiti regolatorji applikabbli għall-Iskema dak iż-żmien, u huwa jagħmel riferiment partikolari għal SOC 2.7.1 u SOC 2.7.2, li kienu applikabbli sa mill-bidunett meta nħolqot l-Iskema fis-sena 2011 sad-data li din ġiet reġistrata fl-1 ta' Jannar, 2016 taħt il-Kap. 514. Qal li s-soċjetà appellanta stess kienet għamlet aċċenn dwar l-applikabbilità u r-rilevanza ta' dawn il-kundizzjonijiet għall-każ odjern. L-Arbitru ċċita partijiet minn dawn id-Direttivi, u rrileva li minkejja li SOC 2.7.2 kien jeżiġi ċertu livell, is-soċjetà appellanta kienet ippermettiet li l-portafoll tal-appellata xi kultant ikun magħmul biss jew fil-parti l-kbira tiegħu minn prodotti strutturati. Barra minn hekk l-espożizzjoni għal emittent waħdieni kienet xi kultant iktar mill-massimu ta' 30% stabbilit mir-regoli għal investimenti aktar siguri bħal depożiti. L-Arbitru osserva li matul il-proċeduri ma kienx ġie ndikat jekk il-prodotti strutturati kienux ġew negozjati f'suq regolat, u fejn ir-riskju li dawn kienu jġorru kien rifless fl-estent tat-telf soffert. Is-soċjetà appellanta tittenta targumenta 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.

25. 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 s-soċjetà appellata ma kienx irnexxielha turi b'mod adegwat li dawn kienu ġew applikati fir-rigward tal-investimenti in kwistjoni. Qal li l-portafoll tal-appellata kien kompost biss jew l-aktar min-noti strutturati għal perijodu twil ta' żmien. Jinnota li saħansitra li iktar minn 97% tal-investimenti sottoskritti l-polza ta' assikurazzjoni kienu jikkonsistu f'tliet noti strutturati fiż-żmien tal-akkwist tagħhom f'Settembru 2014.

26. Wara dawn l-osservazzjonijiet, l-Arbitru għadda sabiex ittratta żewġ istanzi fejn il-kompożizzjoni tal-portafoll ma kinitx tirrispetta l-linji gwida. L-ewwel rekwiżit li kkonsidra huwa li l-assi kellhom jiġu investiti l-aktar fi swieq regolati. Wara li ta t-tifsira tal-frażi *'predominantly invested in regulated markets'* kif din kienet tidher fil-linji gwida, sostna li ma ġiet sottomessa l-ebda evidenza li kienet turi li l-portafoll kien magħmul kollu kemm hu jew l-aktar

f'noti strutturati elenkati. Is-soċjetà appellanta hawn issostni li l-Arbitru ikkunsidra 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 l-emittent tal-imsemmi prodott.

27. L-Arbitru rrimarka korrettement li ma kienx ċar kif fid-dawl tal-massimu ta' 10% tal-assi tal-Iskema impost mil-linji gwida għas-snin bejn 2013 sa 2018 fir-rigward ta' investiment f'titoli mhux elenkati, it-*Trustee* u l-Amministratur tal-Iskema ippermetta investiment b'espożizzjoni aktar għolja f'noti strutturati li kienu garanzija ta' debitu, u li s-soltu ma kienux elenkati. It-tieni rekwiżit li jittratta l-Arbitru huwa l-likwidità tal-portafoll. Wara li osserva li l-linji gwida ta' Jannar 2013 u għal nofs is-sena 2014 kienu jirrikjedu li mhux aktar minn 40% tal-fond jew tal-portafoll tal-membru kellu jiġi nvestit f'assi li kellhom likwidità ta' aktar minn 6 xhur, osserva wkoll li aktar tard fis-snin 2015 sa 2018 it-terminu tnaqqas għal bejn tlieta u sitt xhur. Irrileva li s-soltu n-noti strutturati ma kellhomx terminu ta' maturità ta' ftit xhur, iżda kellhom terminu twil ta' maturità ta' sena u iktar. Osserva li l-possibbilità ta' suq sekondarju fir-rigward ta' noti strutturati ma kienx jiggarantixxi assikurazzjoni adegwata ta' likwidità, u aċċenna għall-valuri aktar baxxi li dan is-suq kien joffri, tant li l-istess valuri kellhom effett fuq l-Iskema sħiħa kif irriżulta mir-rendikonti annwali maħruġa lill-membri mis-soċjetà appellanta.

28. L-Arbitru qal li kien hemm diversi aspetti oħra fejn il-kompożizzjoni tal-portafoll ma kienx jirrispetta r-rekwiżiti l-oħra kif mfissra fil-linji gwida tas-soċjetà appellanta stess, u fosthom kien hemm id-diversifikazzjoni xierqa, it-twarrib ta' espożizzjoni eċċessiva, u l-espożizzjoni massima permessa għal emittenti singulari, u għadda sabiex ta diversi eżempji ta' dan. Irrileva li matul is-snin, is-soċjetà appellanta kienet saħansitra emendat il-linji gwida tagħha sabiex naqqset l-espożizzjoni għal noti strutturati u l-emittenti tagħhom, iżda osserva li dawn ma ġewx segwiti fil-każ tal-portafoll tal-appellata, u dan mingħajr raġuni li setgħet tiġġustifika espożizzjoni tant għolja għal emittenti singolari. L-Arbitru hawn 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. Innota wkoll li kien sar investiment mill-portafoll tal-appellata f'noti strutturati li kien jeċċedi l-massimu tal-espożizzjoni għal dawn il-prodotti.

29. 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 fuq 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. Huwa qal li l-portafoll tal-appellata ma kienx wieħed ta' riskju medju/għoli, iżda kien aktar

wieħed fejn ir-riskji nvoluti kienu sostanzjalment għolja kif kien juri t-telf soffert. Iddikjara li l-imsemmi portafoll ma kienx jirrispetta u jirrifletti l-prinċipji u l-parametri applikabbli fir-rigward tal-investiment kif spjegat aktar ’il fuq fid-deċiżjoni tiegħu.

30. L-Arbitru għadda sabiex ittratta l-kwistjoni tan-ness kawżali tad-danni sofferti mill-appellata. Beda billi osserva li t-telf soffert ma setax jingħad li seħħ b’riżultat tal-andament negattiv tal-investimenti riżultat tas-suq u tar-riskji inerenti u/jew kwistjonijiet fir-rigward ta’ wieħed mill-provvdituri tan-noti strutturati, kif allegat mis-soċjetà appellanta. Qal li kien hemm evidenza biżżejjed u konvinċenti ta’ nuqqasijiet da parti tas-soċjetà appellanta fit-twettiq tal-obbligazzjonijiet u d-doveri tagħha kemm bħala *Trustee* u anki bħala Amministratur tal-Iskema tal-Irtirar, li kienu juru nuqqas ta’ diliġenza. Qal li l-istess nuqqasijiet saħansitra ma ħallew l-ebda mod li bih seta’ jiġi minimizzat it-telf u fil-fatt ikkontribwew għall-istess telf, u b’hekk l-Iskema ma kinitx laħqet l-għan prinċipali tagħha. Fil-fehma tiegħu, it-telf kien ġie kkawżat mill-azzjonijiet u min-nuqqas tagħhom tal-partijiet prinċipali nvoluti fl-Iskema, fosthom is-soċjetà appellanta. Qal li seħħew diversi avvenimenti li din tal-aħħar kienet obbligata u setgħet saħansitra twaqqaf, u tinforma lill-appellata dwarhom. Il-Qorti tikkondividi l-fehma sħiħa tal-Arbitru. Jirriżulta b’mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà appellanta kif ikkonsidrati aktar ’il fuq f’din is-sentenza, li waslu għat-telf soffert mill-appellata. Is-soċjetà appellanta ttentat teħles mir-responsabbiltà għan-nuqqasijiet tagħha billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tal-appellata li kien mexxiha lejn l-investimenti li eventwalment fallew mhux biss b’mod reali, iżda fallew ukoll l-aspettattivi

tagħha. Dan filwaqt li tgħid ukoll 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-appellata, u anki l-andament tal-investimenti, u żżomm linja ta' komunikazzjoni miftuħa mal-appellata. 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-appellata mill-investimenti tagħha.

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

(i) għalkemm ma kinitx responsabbli sabiex tagħti parir finanzjarju lill-appellata, u lanqas kellha r-rwol ta' amministratur tal-investimenti, hija kienet tenuta li tassigura li l-kompożizzjoni tal-portafoll tal-appellata 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 t-tħassib tagħha dwar ċerti investimenti f'noti strutturati formanti parti mill-portafoll tal-appellata, u saħansitra ma kellhiex tħalli li jsiru investimenti riskjuži, għaliex dawn kienu kontra l-oġġettivi tal-Iskema tal-Irtirar, u fost affarijiet oħra ma kienux fl-aħjar interess tal-appellata; u

(iii) kienet straħet fuqha l-appellata, u anki terzi nvoluti fl-istruttura tal-Iskema, sabiex jintlaħaq l-għan tagħhom li jirċievu benefiċċji tal-irtirar, filwaqt li tiġi assigurata l-pensjoni

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

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

<u>Decide</u>

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