



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tas-27 ta' Settembru, 2023

Appell Inferjuri Numru 139/2022 LM

Marie Harris (Detentriċi tal-Passaport Ingliż nru. 210588990)
('ir-rikorrenti')

vs.

STM Malta Pension Services Limited (C 51028)
('l-intimata')

Il-Qorti,

Preliminari

1. Dawn huma żewġ appelli magħmulin, wieħed mis-soċjetà intimata **STM Malta Pension Services Limited (C 50128)** [minn issa 'l quddiem 'is-soċjetà intimata'], u l-ieħor incidentali mir-rikorrenti **Marie Harris (Detentriċi tal-Passaport Ingliż nru. 210588990)** [minn issa 'l quddiem 'ir-rikorrenti'], mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru']

mogħtija fit-28 ta' Settembru, 2022, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrenti fil-konfront tal-imsemmija soċjetà intimata, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkunsidra li l-istess soċjetà intimata għandha tinzamm biss parzjalment responsabbli għad-danni sofferti fil-perċentwali ta' 70%, iddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lir-rikorrenti l-kumpens ta' GBP38,500, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-pagament effettiv, flimkien mal-ispejjeż kollha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament tgħid li sofriet ir-rikorrenti mill-investiment ta' £55,000 li hija kienet għamlet fis-sena 2015 fl-iskema tal-irtirar magħrufa bħala 'STM Retirement Scheme' [minn issa 'l quddiem 'l-Iskema'], tramite l-konsulent finanzjarju tagħha MPM Capital Management Limited [minn issa 'l quddiem 'MPM'], liema Skema kienet amministrata mis-soċjetà intimata.

Mertu

3. Ir-rikorrenti pprezentat ilment quddiem l-Arbitru fit-18 ta' Ġunju, 2021 fil-konfront tas-soċjetà intimata għaliex fil-fehma tagħha din kienet naqset mill-obbligi tagħha fiduċjarji li twettaq *due diligence* xieraq fir-rigward ta' MPM u fir-rigward tal-investiment *Dolphin Loan Note* [minn issa 'l quddiem 'l-Investment'].

4. L-imsemmija soċjetà intimata wiegħbet fit-8 ta' Lulju, 2021 billi eċċepiet li (a) hija kienet straħet fuq is-*suitability report* ipprovdut minn MPM, u kellha kull dritt sabiex tagħmel dan; (b) hija ma kinitx familjari mat-terminologija wżata mir-rikorrenti fejn din allegat li MPM “*ghosted a number of pensions*”, u għalhekk ma setgħetx twieġeb dwar din l-allegazzjoni tagħha; (ċ) kien jirriżulta mid-dokumentazzjoni li r-rikorrenti kienet appuntat lil Serenus Consulting [minn issa 'l quddiem 'Serenus'] bħala l-konsulent finanzjarju tagħha fit-8 ta' Settembru, 2017; (d) ir-rikorrenti ma kinitx ippreżentat l-informazzjoni neċessarja sabiex turi li MPM kienet giet maħtura bħala l-konsulent finanzjarju tagħha; (e) kien jispetta lir-rikorrenti li taħtar konsulent finanzjarju jew *manager*; (f) it-tieni, it-tielet, ir-raba' u l-ħames ilment ma kellhomx x'jaqsmu mar-rimedju li kienet qegħda titlob ir-rikorrenti; (g) hija kienet fehmet in-natura tal-investment propost mid-*Dolphin Capital Group*; (g) hija ma kinitx responsabbli għall-kontenut tas-*suitability report*; (għ) hija ma setgħetx tipprevedi kwalunkwe *mala fede* tal-*management*; u (ħ) ir-rikorrenti ma werietx li t-telf tagħha kien riżultat ta' frodi, imġiba ħażina intenzjonata, jew negligenza grassa tagħha.

Id-deċiżjoni appellata

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

“The Merits of the Case

The Arbiter is considering the Complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the

decision as he is obliged to do in terms of Chapter 555 (fn. 16 Art. 19(3)(d)) which stipulates that he should deal with complaints in 'an economical and expeditious manner'.

The Complainant

The Complainant, born in 1974 and of British nationality, applied to become a member of the Scheme on 31 March 2015. (fn. 17 P. 48 & 53)

Her occupation was not listed in the Scheme's Application Form for Membership. (fn. 18 P. 48 - Field left empty) However, she is involved in the education profession given her 'Teacher's Pension Scheme' as outlined in the Suitability Report prepared by MPM Capital Investments Ltd. (fn. 19 P. 34) No indication was made or has emerged during the proceedings of this case that the Complainant was not a retail investor.

Investment Adviser

The Scheme's Application Form for Membership dated 31 March 2015, indicates MPM Capital Investments Ltd ('MPM Capital') as financial adviser. (fn. 20 P. 50)

According to the Financial Services Register on the website of the Malta Financial Services Authority ('MFSA'), MPM Capital was previously regulated by MFSA to provide investment services activities by virtue of its Category 2 Investment Services Licence (issued in June 2009) by the MFSA, until the MFSA cancelled its licence in 2020. (fn. 21 <https://www.mfsa.mt/financial-services-register/>)

It is noted that an application for the appointment of Serenus Consulting Ltd as the new investment adviser was filed in September 2017 as per the documentation presented by STM Malta. (fn. 22 P. 71-72) Accordingly, MPM Capital was still regulated by the MFSA by the time it was replaced by Serenus Consulting Ltd in 2017 as the new adviser.

It is further noted that in April 2018, the Complainant was informed by Serenus Consulting Limited that she had to appoint another adviser given that Serenus had applied 'to de-authorise its permissions with the Financial Conduct Authority (FCA) and will not be able to provide [her] with any further financial advice with regards to [her] QROPS pension'. (fn. 23 P. 73)

A 'Change of Adviser' form dated 15 February 2019, was subsequently signed by the Complainant for the appointment of Acklam Financial Ltd as the new adviser. (fn. 24 P. 75)

No evidence was provided, or emerged, during the case of MPM Capital being reappointed after the departure of Serenus Consulting Limited. In any case, the

disputed investment, the Dolphin Loan Note, was done at the time of MPM Capital's original appointment in 2015 as shall be seen in the next section.

The disputed underlying investment

*According to the official documentation produced by the Service Provider, **the Complainant invested on 30 April 2015, the amount of GBP55,000 from its Retirement Scheme into a 'Secured Loan Note 2019', 'Dolphin Capital.80 Projekt GmbH & Co. KG' ('the Dolphin Loan Note'), which was indicated as having an 'Average 13.8% fixed rate'.*** (fn. 25 P. 70)

The investment into the Dolphin Loan Note comprised 'a loan' where 'ultimately, the security of the interest payments, and capital repayments, depend on the success of Dolphin Capital's projects renovating German Listed Buildings'. (fn. 26 P. 41.) ***This was indeed described as one of the significant risks of such investment.*** (fn. 27 Ibid.)

*As specified in the 'Addendum to Opening of Account Form' dated 27/03/2015 issued by MPM Capital, (referred to during the proceedings of this case by the parties as the 'Suitability Report'), **the investment of GBP55,000 into the Dolphin Loan Note constituted 70% of the investible amount available within the Retirement Scheme.***

The amount invested of GBP55,000 indeed reflects approximately 70% of the 'Teacher's Pension Scheme £77,540.64' which was the transfer value of the previous pension held by the Complainant. (fn. 28 P. 34 fn. 29 Ibid.)

The remaining 30% allocation of the investible premium was divided 20% into Brooks Macdonald Managed Portfolio Service and 10% retained in cash according to the said Suitability Report. (fn. 30 P. 40)

The Dolphin Loan Note had a fixed term of a number of years. The Suitability Report specified inter alia that 'When investing into Dolphin Capital GmbH using a pension scheme, the 1-year investment term is not available. The investment must be for 3 or 5 years'. (fn. 31 P. 41)

The Complainant's investment into the Dolphin Loan note was indeed tied over nearly a five-year period from 30.04.2015 (date of issue) (fn. 32 P. 70) till November 2019 (the expected redemption date). (fn. 33 P. 62)

Observations & Conclusions

Claim relating to the shortcomings in the due diligence and acceptance of the investment adviser

*The Arbiter first considers that there is no basis on which he can accept and uphold the Complainant's claims that **STM Malta acted negligently and failed in its fiduciary duty to look after her Scheme with respect to MPM Capital's appointment as financial adviser. This is given that no alleged failures in the due diligence and acceptance of the investment adviser have emerged on the part of STM Malta and neither has such allegations been substantiated by the Complainant.***

This is also so when taking the following aspects into consideration:

- (i) The evidence emerging with respect to the appointment of the investment adviser was a regulated entity as outlined under the section in this decision titled 'Investment Adviser' above.*
- (ii) That no evidence has been produced or emerged that STM Malta allocated MPM Capital as the new adviser after Serenus Consulting was no longer in operation, (as alleged by the Complainant). (fn. 34 Point 4 of her Complainant – P. 4) The only satisfactory evidence that has emerged in this case is that, as outlined above, MPM Capital was the original investment adviser prior to being replaced by Serenus Consulting.*
- (iii) The apparent inconsistencies emerging during the hearing of 1 February 2022 in the testimony of the Complainant with respect to the timeline of the appointment of MPM Capital as their adviser. (fn. 35 During the hearing of 1 February 2022, the Complainant indicated that MPM Capital was nominated as adviser after the 'financial adviser [presumably Serenus Consulting] went bust in two or three years' and after they attempted to nominate 'another financial adviser, Acklam Financial'. (P. 102) However, the appointment of MPM Capital was only evidenced at the time of application of the Scheme in March 2015 (P.53) with the disputed investment, the Dolphin Loan Note, occurring also in April 2015 (P.70))*

For the reasons mentioned, the Arbiter is accordingly dismissing the Complainant's claim on such matter.

Alleged delays & Certain aspects raised in the Complaint

Apart from certain aspects which were not considered by the Arbiter (such as the allegation of fraud as outlined above), the Arbiter remarks that certain other aspects raised by the Complainant in her Complaint are deemed as outrightly not relevant or acceptable as a basis for the Complainant's claims for compensation (such as, for example, the claim with reference to contingent liability and the claims relating to the monitoring of the actual operation of the Dolphin Loan Note which are both

considered irrelevant and not applicable when considering the nature of the disputed product and the roles of STM Malta respectively).

With respect to the claims of delays by STM Malta in the submission of requested documentation (namely, the Suitability letter completed by the investment adviser) and delays in the submission of clarifications requested on their financial adviser, the Arbiter considers that he has no sufficient basis either on which he can consider such matters further given the lack of clarity relating to the allegations and lack of evidence to substantiate such claims from the Complainant's part.

Nevertheless, the Arbiter would like to point out that in terms of the obligations arising from STM Malta's roles as Trustee and Retirement Scheme Administrator and the applicable regulatory framework to which STM Malta is subject to, STM is duty bound to reply promptly, clearly and in a comprehensive manner to reasonable and valid requests made by a member in relation to his/her retirement scheme. Failure to do so would go against the obligations applicable to the Service Provider emanating from such roles including the requirement to act with 'due skill, care and diligence' as provided inter alia under the conduct of business rules. (fn. 36 E.g. – SLC 4.1.4 of the Pension rules for Service Providers issued in terms of the Retirement Pensions Act, 2011)

In addition, Standard Licence Condition 5.1.8 of Part B.5 'Conditions relating to information for Scheme Members and Beneficiaries' of the 'Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011' clearly requires that:

'The Retirement Scheme Administrator shall provide any other relevant information, upon request by Members and Beneficiaries'.

Hence, a member of a retirement scheme has every right to demand and insist for proper responses from the trustee and scheme administrator to their valid requests, and in case of failure report such action to the relevant authority and/or file a formal complaint and take other appropriate action available in terms of law.

On a separate aspect, the Arbiter furthermore observes that it took nearly three and a half months for the Service Provider to reply to the Complainant's formal complaint of 18 January 2021. (fn. 37 P. 9) A reply by email was sent by the Service Provider only on 30 April 2021. (fn. 38 P. 14)

The Arbiter does not see a valid reason why the Service Provider took so long to reply to the Complainant's formal complaint and deems it as highly unprofessional for a service provider to procrastinate and delay a complaint in such manner.

This is apart that such delay goes against the requirement for the 'reasonable and prompt handling of complaints' required in terms of SLC 1.4.4 of the 'Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011'.

Claims relating to the Dolphin Loan Note

In her Complaint, the Complainant claimed that 'the Dolphin Loan Note represented approximately 70% of [her] pension fund' and that 'this would seem to be a disproportionate and unacceptable portion of the pension to be invested in a single financial product with no diversification element'. (fn. 39 P. 5)

The Complainant also questioned that the 'Dolphin Loan note does not appear to be covered under acceptable investments'. (fn. 40 Ibid.)

The Arbiter considers that the staggering allocation of 70% of the Complainant's Retirement Scheme into just one single product was indeed not only disproportionate but clearly did not comprise in any way an allocation reflective of the scope of the Scheme as a retirement product that was 'established to provide a life-time income to its members', (fn. 41 P. 47) and where the Scheme's assets were required to be 'invested in a prudent manner ...'. (fn. 42 As provided for under Standard Operational Condition 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 and eventually under 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 issued in terms of the RPA in January 2015)

The Arbiter has also no comfort that the Dolphin Loan Note and the extent to which the Complainant's scheme was exposed to such product can be considered in some way acceptable for the Retirement Scheme given a number of factors including:

- (i) The particular features and nature of such product comprising a loan note, being an unlisted, unregulated, alternative or non-traditional illiquid investment product with a long-fixed investment term.***
- (ii) The high-risk investment element of the Dolphin Loan Note, where the high risk is reflected in the high rate of return of a 'minimum Investor Return offered by Dolphin' of '12% per annum' (fn. 43 P. 40) outlined in the Suitability Report and the 'Average 13.8% Fixed rate' reflected in the product's certificate. (fn. 44 P. 70)***
- (iii) The lack of liquidity of the Dolphin Loan Note.***

It is noted that one of the significant risks mentioned in the Suitability Report involved the liquidity risk of such investment which was clearly illiquid and tied for

a long period of time. The said report outlined that 'Investments are made over a fixed term of 1, 3 or 5 years. Investors' funds will be tied in during this period as the loan note is transferable only on death'. (fn. 45 P. 43)

(iv) ***The lack of diversification inherent in such product.***

*No adequate comfort has emerged during the proceedings of this case that this product, which was **solely concentrated in one specialised sector involving the development/renovation of real estate in Germany**, was itself diversified neither within the German market itself let alone on the wider aspect. The concentration risk to Germany's real estate market was indeed listed as one of the significant risks.*

In its reply, STM Malta noted that 'Each development project would be carried out within a specific special purpose vehicle, which would issue 5-year fixed term loan notes with a specified interest rate'. (fn. 46 P. 66) STM Malta further noted that 'it is submitted that the proposed investment was into a single project supported by a charge on an specific piece of land...'. (fn. 47 P. 67) This implies that the Complainant was only invested into a 'single project' further confirming the lack of diversification within the Dolphin Loan Note itself.

(v) *In addition, there was **no diversification either within the Scheme's overall portfolio of investments** given the material position of **70% of the Scheme's investible amount** allowed to be **invested into one single product**. **The Dolphin Loan Note constituted the predominant investment of the Scheme** with this **heavily exposing the Scheme to the performance of this single investment and thus to material losses or near complete loss of the Retirement Scheme in case of failure of this sole product**. This clearly went against the requirements for *inter alia* diversification, prudence and liquidity.*

Notwithstanding that the advice to invest in the Dolphin Loan Note was provided by a third party regulated investment adviser, STM Malta cannot claim that it had no responsibility. STM Malta clearly had a key and important monitoring function in respect of the Scheme to ensure that the Scheme was operated in line with its scope, the applicable requirements and inter alia to safeguard the Scheme's property.

It is noted that as outlined in the Suitability Report, 'The MFSA imposes strict restrictions on investments ...' as to where a Retirement Scheme can invest in. (fn. 48 P. 39)

The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in 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’). The said Directives applied from the Scheme’s inception until its registration under the Retirement Pensions Act (‘RPA’). (fn. 49 The Retirement Pensions Act (Cap.514) eventually replaced the Special Funds (Regulation) Act, 2002 when it came into force in January 2015. 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)

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 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. 50 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. 51 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. 52 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. 53 SOC 2.7.2 (e) where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme’s assets for any one collective investment scheme. (fn. 54 SOC 2.7.2 (h)(iii) & (v))

Despite the standards of SOC 2.7.1 and SOC 2.7.2, STM Malta allowed the Complainant’s investment portfolio to predominantly comprise the investment into the Dolphin Loan Note.

The Arbiter also notes that following registration of the Scheme under the Retirement Pensions Act (‘RPA’) (fn. 55 The Retirement Pensions Act (Cap. 514) eventually replaced the Special Funds (Regulation) Act, 2002 when it came into force in January 2015. 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) the Scheme

became subject to the 'Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act 2011' (Pension Rules').

It is noted that Standard Condition 3.1.2, of Part B.3 titled 'Conditions relating to the investments of the Scheme' of the Pension Rules provided that: (fn. 56 The same principle was reflected in Rule 2.7.1 of Part B.2.7 titled 'Conduct of Business Rules related to the Scheme's Assets' of the 'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002' which applied to STM Malta as Scheme Administrator at the time it was subject to the Special Funds (Regulation) Act.)

'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'.

The investment restrictions for member directed schemes under the RPA were outlined in Part B.2 titled 'Investment Restrictions of a Personal Retirement Scheme' and Part B.9, 'Supplementary Conditions in the case of entirely Member Directed Schemes' of the Pension Rules.

It is further noted that SLC 3.2.1 of the Pension Rules provided inter alia that 'the Retirement Scheme Administrator shall ensure that the assets of the scheme are sufficiently liquid and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits'. (fn. 57 SLC 3.2.1. (iii) of Part B of the Pension Rules)

The high exposure to the Dolphin Loan Note and the particular features of such product for a pension investment as outlined above, not only did not reflect and clearly went against the investment standards and principles outlined above but neither can they be construed to reflect the prudence, diligence and attention of a bonus paterfamilias required out of the Trustee of the Scheme.

Article 21 (1) of the TTA which deals with the 'Duties of trustees', inter alia stipulates that the trustee should act as a bonus paterfamilias, where 'Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias, act in utmost good faith and avoid any conflict of interest'.

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

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

In their role as Trustee, STM Malta was accordingly duty bound to administer the Scheme to high standards of diligence and accountability.

It is further noted that as also outlined in the Scheme's Client Application Form,

*'Members may indicate their preferred investment preferences **however the Plan Trustees shall retain the ultimate responsibility regarding the selection and ownership of the Plan's investments**, which they will do on the basis of advice received from third party qualified and pre-approved investment advisers'. (fn. 58 P. 50 – Emphasis added by the Arbiter)*

There were accordingly clear responsibilities as outlined above, which STM Malta failed to adhere to in its role of Trustee and Retirement Scheme Administrator in respect of the Complainant's Scheme.

Other observations - Attitude to Risk

*Despite that the Complainant's attitude to risk was one indicated as 'High' in the Scheme's Application Form, (fn. 59 Ibid.) **this however 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 very nature, is not a speculative investment vehicle but a product 'established to provide a life-time income to its members'. Hence the risk profile indicated in the Application Form should be seen in the context of the pension product and not within the context of a regular investment account. (fn. 60 P. 47)

Other observations - Due diligence

STM Malta submitted in its reply that it 'had satisfied itself that Dolphin Capital Group had the apparent resources to undertake the proposed transaction'. (fn. 61 P. 66) It attached a copy of the 2011 Financial Statements of the Dolphin Capital GmbH by way of example of its due diligence.

The Arbiter can however derive no comfort either from such statements not only because of the high counterparty risk emerging in the scenario in question involving the issuer of such product, but also because if STM Malta had truly relied on the 2011 Financial Statements then such due diligence was indeed lacking given that such statements are considered rather dated for the purposes of the investment into the Dolphin Loan Note done in April 2015, that is, over more than three years apart from the date of such statements.

Conclusion & Compensation

For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case (fn. 62 Cap. 555, Article 19(3)(b)) and is partially accepting it in so far as it is compatible with this decision.

Being mindful of the key roles of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of the STM Malta Retirement Plan, and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, the Arbiter concludes that the Complainant should be compensated by STM Malta for the damages suffered by the Complainant as a result of the breaches allowed and committed in relation to her scheme and the lack of protection afforded to her to safeguard her pension.

Whilst the Arbiter does not accept the extent of compensation requested by the Complainant given that:

- (i) reference needs to be made to the amount invested into the Dolphin Loan Note (of GBP55,000)(fn. 63 P. 70) and not the value of the investment at some chosen point in time as done by the Complainant in her Complaint, (fn. 64 the Complainant referred and requested the value of the Dolphin Loan Note she indicated as amounting to GBP104,944.50 as at 1 May 2020, apart from other interest (P.6)) and***
- (ii) other external third parties, like the investment adviser, were involved and also carried responsibility,***

the Arbiter considers that in the particular circumstances of this case, it is fair, equitable and reasonable for STM Malta Pension Services Limited to compensate the Complainant for the amount of 70% of the value invested in the Dolphin Loan Note, with this being calculated to amount to GBP38,500. (fn. 65 70% of GBP55,000)

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the

Complainant the sum of GBP38,500 (thirty-eight thousand and five hundred pounds sterling).

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

The expenses of this case are to be borne by the Service Provider.”

L-Appell u l-Appell Incidentali

6. Is-soċjetà intimata ħasset ruġha aggravata bid-deċiżjoni appellata tal-Arbitru, u fit-18 ta' Ottubru, 2022 ippreżentat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka jew tbiddel id-deċiżjoni appellata billi tilqa' l-eċċezzjonijiet tagħha u tiċċad l-ilment tar-rikorrenti, bl-ispejjeż taż-żewġ istanzi kontra tagħha. Tgħid li l-aggravji tagħha huma s-segwenti: (i) l-Arbitru kellu fi kwalunkwe każ jordna li titressaq l-aħjar prova *ai termini* tal-artikolu 559 tal-Kap. 12; (ii) bla preġudizzju għall-ewwel aggravju, ma kinitx ġusta kif saret l-allokazzjoni ta' responsabbiltà; (iii) bla preġudizzju għall-aggravji l-oħra, id-deċiżjoni appellata tistrieħ fuq konsiderazzjonijiet soġġettivi ta' dak li huwa *“ġust, ekwu u raġonevoli fiċ-ċirkostanzi partikolari u mertu sostantivi tal-każ”*.

7. Ir-rikorrenti wiegħbet fit-13 ta' Marzu, 2023 fejn issottomettiet li l-Qorti għandha tiċċad l-appell tas-soċjetà intimata u tvarja d-deċiżjoni appellata skont dak li kienet qiegħda titlob fl-appell incidentali tagħha, liema appell incidentali hija kienet qiegħda tressaq *ai termini* tal-artikolu 240 tal-Kap. 12, bl-ispejjeż kontra s-soċjetà intimata. Permezz tal-imsemmi appell incidentali, ir-rikorrenti qiegħda titlob sabiex din il-Qorti:

“...jogħgobha, filwaqt li tiċċad l-appell interpost minn STM Malta Pension Services Limited permezz tar-rikors tagħha tat-18 t'Ottubru 2022, tirrifirma u timmodifika d-deċiżjoni appellata tal-Arbitru għas-Servizzi Finanzjarji datata 28 ta' Settembru 2022

mogħtija fit-28 ta' Settembru 2022, bin-numru 080/202, fl-ismijiet Marie Harris (passaport Ingliż nru. 210588990) vs STM Malta Pension Services Limited (C51028) billi filwaqt li tikkonfermaha fir-rigward tas-sejbien dwar responsabbiltà tas-Service Provider, thassarha u tbiddilha fejn stabbiliet il-percentwali ta' 70%, u jogħgobha tissostitwiha bil-percentwali ta' 100% stante li r-responsabbiltà tas-Service Provider bħala 'Trustee' hija responsabbiltà inframmentabbli; u barra minn hekk, jogħgobha tħassar il-figura żbaljata adottata mill-Arbitru ta' GBP 38,500 u jogħgobha tissostitwiha b'GBP 55,000 biex taqbel u tkun konformi mal-ammont investit minn Marie Harris.

Konsegwentement, din l-Onorabbli Qorti jogħgobha tgħaddi biex tillikwida figura oħra superjuri ta' kumpens li tkun tinkwadra u tinkludi fiha l-figura ta' GBP 55,000, kif ukoll it-telf ta' 'growth', imgħax bit-8%, kif ukoll ir-rifużjoni taċ-'charges' kollha versati, u dan bla preġudizzju għal kull telf minħabba danni morali.

Bl-ispejjeż taż-żewġ istanzi kontra STM Malta Pension Services Limited”.

8. Is-soċjetà intimata wiegħbet billi pprezentat ir-risposta tagħha waqt l-udjenza tat-22 ta' Marzu, 2023, fejn talbet lil din il-Qorti sabiex ma tilqax l-appell incidentali għal dawk ir-raġunijiet imfissra fir-risposta tagħha, bl-ispejjeż kontra r-rikorrenti.

Konsiderazzjonijiet ta' din il-Qorti

8. Din il-Qorti ser tgħaddi sabiex tikkonsidra l-aggravji u s-sottomissjonijiet rispettivi tal-partijiet, u dan fid-dawl tal-konsiderazzjonijiet magħmulin mill-Arbitru fid-deċiżjoni appellata.

9. Is-soċjetà intimata dwar l-ewwel aggravju tagħha tissottometti li l-Arbitru kien sema' biss ix-xhieda *viva voce* tar-raġel tar-rikorrenti, meta fid-deċiżjoni appellata stqarr li kienet ir-rikorrenti li *“during the hearing of the 1st February 2022, ... indicated that MPM Capital was nominated as adviser after the ‘financial adviser [presumably Serenus Consulting] went bust (footnote 35).*

Tirrileva li wara li ngħatat id-deċiżjoni appellata, hija kienet irċeviet korrispondenza mingħand ir-rikorrenti, fejn din żvelat li hi u żewġha kienu qegħdin f'proċeduri sabiex jottjenu d-divorzju. Filwaqt li tiċċita d-disposizzjonijiet tal-artikolu 599 tal-Kap. 12, is-soċjetà intimata tgħid li tali disposizzjonijiet kellhom japplikaw hawnhekk, fejn hija qiegħda tišhaq li l-Qorti għandha tirrevedi l-apprezzament li għamel l-Arbitru. Is-soċjetà intimata tissottometti li għalkemm l-Arbitru għaraf li kien hemm inkonsistenzi bejn ix-xhieda *viva voce* u d-dokumenti ppreżentati, xorta waħda l-Arbitru ma talabx li tixhed ir-rikorrenti u għalhekk hija sofriet żvantaġġ billi ma setgħetx tagħmel dawk il-mistoqsijiet lir-rikorrenti sabiex taċċerta wkoll jekk kinitx hi li ffirmat ir-rapport ta' MPM, jekk għamlitx rapport mal-Pulizija dwar l-allegat frodi, jekk kinitx qatt irċeviet korrispondenza mingħand is-soċjetà intimata dwar l-investimenti li forsi ma kellmitx lir-raġel dwarhom, jekk xtaqitx tinvesti fl-Investment in kwistjoni, jew forsi kien ir-raġel stess li ġiegħla tinvesti flusha b'dan il-mod. Izda minflok hija kienet spiċċat sabiex għamlet eżercizzju limitat ta' kontro-eżami ta' persuna li l-involviment tagħha kien wieħed limitat. Filwaqt li taċċenna fuq dawk il-fatti kollha li kienu juru l-involviment personali tar-rikorrenti fir-rigward tal-investment in kwistjoni, irrilevat li hija ma setgħetx tifhem kif l-Arbitru kien ippermetta lir-raġel tagħha jixhed fuq l-imsemmija fatti. Kien b'hekk li rriżultaw diversi inkonsistenzi għaliex dan ma kienx jaf eżattament x'kienet għamlet il-mara tiegħu. Tgħid li hemm dubju serju dwar id-deċiżjoni tar-rikorrenti li ma tixhidx, u dan ma setax iwassal għall-konvinċiment liberu tal-ġudikant. Is-soċjetà intimata tirrileva li l-Arbitru għamel evalwazzjoni tad-dokumenti, izda ma setax jikkonferma l-veraċità tagħhom jew l-għażliet tal-investitur. Tagħmel riferiment għall-kwistjoni ta' diversifikazzjoni, u tgħid li l-

Arbitru ma setax jikkonferma jekk ir-rikorrenti kienet hija stess li għażlet li tinvesti flusha fl-Investment, u jekk kienux ġew spjegati lilha l-kundizzjonijiet u r-riskji ta' tali Investment. Tgħid li hija saħansitra wkoll ma setgħetx tagħmel dan. Issostni li x-xhieda tar-raġel tar-rikorrenti kienet kollha kemm hi *hearsay evidence* jew *detto del detto*, u ma kienx hemm dak li jitlob l-artikolu 599 tal-Kap 12 sabiex dik ix-xhieda setgħet tigi vvalutata, u dan fejn l-aħjar prova setgħet faċilment tigi prodotta. Filwaqt li tagħmel riferiment għal dak li ngħad minn Jonathan Parker LJ fid-deċiżjoni Ingliża fl-ismijiet **Promontoia (Oak) Ltd v. Emanuel & Anor** deċiża fit-30 ta' Jannar, 2020 fir-rigward tal-*best evidence rule*, tirrileva li x-xhieda tar-raġel tar-rikorrenti mhijiex soretta minn xi prova oħra, u għalhekk ma tistax tkun waħda konklussiva. Dwar it-tieni aggravju, tirrileva li l-Arbitru ma setax jistabbilixxi biċ-ċert min kien il-kaġun tat-telf soffert mir-rikorrenti. Tissottometti li l-apprezzament magħmul mill-Arbitru kien difettuż kemm fil-fatt u anki fid-dritt. Tispjega li l-Arbitru kellu qabel xejn isib ness kawżali bejn in-nuqqasijiet tagħha u t-telf soffert mir-rikorrenti, u kellu jikkunsidra li l-konsulent finanzjarju tagħha MPM kien regolat mill-MFSA, kellu liċenzja sabiex jagħti parir finanzjarju, u kienet taf il-prodott li kienet qegħda tbiegħ, u li kellha d-dover illi tispjega lill-klijent ir-riskji kollha dwar l-imsemmi prodott. Hawnhekk is-soċjetà intimata tiċċita dak li qal l-Arbitru fid-deċiżjoni appellata, u tgħid li minkejja n-nuqqas ta' evidenza fir-rigward tan-negliġenza allegata fil-konfront tagħha, huwa wasal għall-konkluzjoni li hija kellha tħallas 70% tal-kumpens dovut lir-rikorrenti. Tikkontendi li r-responsabbiltà tagħha qatt ma setgħet tkun ikbar minn dik ta' min kien ta l-parir, li kienet MPM, jew saħansitra tar-rikorrenti, li kienet hija stess li ħadet id-deċiżjoni li tinvesti fl-Investment. Filwaqt li tagħmel riferiment għad-diversi deċiżjonijiet oħra tal-

Arbitru fejn dan kien enfażizza fuq il-fatt li l-konsulent finanzjarju ma kienx regolat, tgħid li fil-każ odjern hija kienet imxiet mar-*‘reasonable and legitimate expectations’* tar-rikorrenti *ai termini* tal-paġa. (ċ) tas-subartikolu 19(3) tal-Kap. 555. Imma anki jekk din il-Qorti għandha jkollha l-fehma li kien hemm nuqqas ċar ta’ diversifikazzjoni tal-investment, issostni li mhuwiex ġust li hija għandha terfa’ 70% tar-responsabbiltà meta ma kienx ġie ppruvat li kien hemm nuqqas ta’ diligenza min-naħa tagħha. Tispjega li kien hemm indikazzjoni li saħansitra anki l-Arbitru għaraf li hija kienet aġġixxiet fl-interess tar-rikorrenti. Is-soċjetà intimata tgħid li huwa stabbilit li fejn bħal fil-każ odjern ir-responsabbiltà ma tistax tiġi maqsuma b’ċertezza, id-danni għandhom jiġu diviżi ugwalment. Tisottometti fejn fil-każ odjern kien hemm tliet partijiet, jiġifieri hija stess, ir-rikorrenti u l-konsulent finanzjarju, fl-aġġar ipoteżi hija kellha tkun responsabbli għal 33% tal-kumpens. Tikkontendi li l-Qorti mhijiex tenuta tapplika prinċipji li jistgħu jwasslu għall-allokazzjoni ngusta, u fil-każ odjern l-allokazzjoni ta’ 70% tad-danni hekk likwidati mhijiex ġusta jew raġonevoli jew fondata, meħuda in konsiderazzjoni ċ-ċirkostanzi kollha tal-każ. Għal dak li jirrigwarda t-tielet aggravju, is-soċjetà intimata qabel xejn tagħmel riferiment għaddisposizzjonijiet tas-subartikolu 19(3) tal-Kap. 555, u tisottometti li għalkemm il-legislatur qiegħed jagħti s-setgħa lill-Arbitru sabiex jiddeċiedi b’mod effiċjenti u skont l-ekwità, ma kienx ifisser li għandhom jitnessew u jiġu mwarrba l-liġijiet. Tikkontendi li mhuwiex ġust li hija għandha twieġeb għat-telf li allegatament ġarrbet ir-rikorrent meta hija kienet eżegwiet l-istruzzjonijiet tagħha. Barra minn hekk, hija m’għandhiex twieġeb għal azzjonijiet ta’ ħaddieħor jew għall-iżball tar-rikorrenti, li straħet fuq il-parir ta’ terzi li kienu regolati mill-awtorità regolatorja, u li kellhom liċenzja sabiex jagħtu parir finanzjarju. Tikkontendi li

huma MPM jew Serenus, jew saħansitra r-rikorrenti stess, li għandhom iwieġbu għal għemilhom u mhux hi, fejn proprju qiegħda titqies bħala garanzija inerenti u assoluta għall-ħlas ta' danni, fejn MPM m'għadx għandha liċenzja u Serenus għalqet. Tgħid li l-ekwità ma tista' qatt tissostitwixxi l-liġi, iżda tikkumplimentaha, u ma setax jingħad li Tribunal li għandu s-setgħa li jiddeċiedi b'ekwità, jista' jiddeċiedi kif jidhirli għaliex jikkunsidra li jkun qed jimxi b'mod ġust u ekwu. Tikkontendi li dan jikkostitwixxi arbitrarjetà għall-kuntrarju ta' ċertezza. Filwaqt li tagħmel riferiment għall-prinċipju ġenerali li Qorti tal-Appell ma tidholx fuq l-apprezzament tal-provi magħmul mill-ġudikant fl-ewwel istanza, sakemm ma jkunx hemm raġunijiet gravi u mpellenti jew raġunijiet validi fejn issib li l-ġudikant ma setax legalment jew raġonevolment jasal għall-konklużjoni li wasal għaliha, tgħid li fil-każ odjern hemm lok li jiġi disturbat l-apprezzament tal-Arbitru.

10. Ir-rikorrenti tilqa' billi qabel xejn tissottometti li jirriżulta b'mod inekwivoku li n-nuqqasijiet tas-soċjetà intimata kienu tassew waslu għat-telf li hija sofriet, u dan fejn l-imsemmija soċjetà intimata ppruvat titfa' t-tort fuq il-konsulent finanzjarju tagħha. Tikkontendi li din il-Qorti għandha tiddeċiedi li d-difiża tas-soċjetà intimata ma tistax tirnexxi fid-dawl tal-obbligi legali u regolatorji tagħha, u li kienu proprju n-nuqqasijiet tagħha li waslu għat-telf soffert mill-Investment. Kif ikkunsidra l-Arbitru fid-deċiżjoni appellata, l-ilment tressaq minnha stess, u għalhekk għandu jiġi kkunsidrat bħala wieħed magħmul mill-konsumatur u mhux minn professjonist legali, u dan partikolarment kienet qiegħda tgħidu fir-rigward tal-ewwel aggravju tas-soċjetà intimata, li kien jittratta l-kwistjoni tal-aħjar prova. Dwar dan l-aggravju, tinsisti li f'proċeduri ċivili l-grad ta' prova rikjesta huwa ta' *'a balance of probabilities'*, iżda xorta

waħda fil-każ odjern l-aħjar prova *ai termini* tal-artikolu 559 tal-Kap. 12 kienet ġiet prodotta permezz tax-xhieda ta' Jeffrey Harris, li kien f'pożizzjoni aħjar minn dik ta' martu sabiex jixhed dwar il-fatti. Fix-xhieda tiegħu huwa tkellem fil-plural għaliex l-interessi tiegħu u tal-mara kienu l-istess, u kienu jirrigwardaw flus formanti parti mill-komunjoni tal-akkwisti. İzda s-soċjetà intimata tallega li hi u r-raġel tagħha setgħu kellhom interessi separati, u tagħmel riferiment għall-fatt li huma għaddejjin minn proċeduri ta' separazzjoni personali. Ir-rikorrenti tinsisti li l-Qorti m'għandhiex tiegħu konjizzjoni ta' dan l-ewwel aggravju tas-soċjetà intimata, għaliex mhijiex kompetenti sabiex tiddeċiedi kwistjonijiet dwar xoljiment tal-komunjoni tal-akkwisti. Dwar ix-xhieda tar-raġel tagħha Jeffrey Harris, tirrileva li din ċertament ma kinitx '*hearsay*' għaliex dejjem xehed fuq fatti li kien jaf hu personalment bihom, u mhux li kien sar jaf mingħand martu. B'hekk huwa kien xehed dwar il-mertu tal-każ proprju. Tgħid li ma kien hemm l-ebda liġi li tirrikjedi li l-aħjar prova kellha ssir minn parti permezz tax-xhieda ta' dik il-parti, u tikkontendi li għall-kuntrarju, l-aħjar prova tista' titressaq permezz tax-xhieda ta' terzi, billi huwa possibbli li hija turi iktar emozzjoni fejn spiċċat vittma tas-soċjetà intimata. Ir-rikorrenti ssostni li x-xhieda ta' Jeffrey Harris kienet l-aħjar prova li hija setgħet tipproduċi *ai termini* tal-artikolu 559 tal-Kap. 12, għaliex huwa kien involut fil-proċess u anki seta' jixhed b'mod ċar dwar il-fatti, u l-fatt li dan kien fi proċeduri ta' separazzjoni personali magħha ma kellu l-ebda rilevanza. Tirrileva li wara kollox is-soċjetà intimata setgħet talbet li tixhed hija stess u tressaq ukoll lil żewġha bħala xhud tagħha, iżda dan ma seħħx. Ir-rikorrenti hawnhekk tinsisti li l-oneru tal-prova fi proċeduri ċivili jaqa' fuq iż-żewġ partijiet. Dwar it-tieni u t-tielet aggravju tas-soċjetà intimata, tgħid li minkejja dak kollu li ressqet is-soċjetà intimata

quddiem l-Arbitru, dan xorta waħda ddeċieda li hija kienet negligenti u qies li hija fl-aħħar mill-aħħar responsabbli sabiex tħares il-kontijiet tal-klijenti tagħha, li kienu kontijiet tal-pensjonijiet intizi sabiex jipprovdu *“a lifetime income to its members. Hence the risk profile indicated in the Application Form should be seen in the context of the pensions product and not within the context of a regular investment account”*. Tispjega li hija kienet filfatt sofriet telf qawwi mill-investment li sar f’prodotti li ma kienux likwidi u/jew kellhom riskju għoli. Dwar l-ilment tas-soċjetà intimata fir-rigward tal-perċentwali ta’ responsabbiltà, ir-rikorrenti tagħmel riferiment għas-sentenza ta’ din il-Qorti fl-ismijiet **Barrett vs. STM Malta Pension Services Limited** deċiża fit-2 ta’ Marzu, 2022, u tagħmel riferiment għal dak li ntqal hemmhekk. Ir-rikorrenti ssostni li s-soċjetà ntimata għandha l-obbligi tagħha ta’ sorveljanza u ta’ amministrazzjoni ġenerali tal-Iskema, u fil-każ odjern ma kinitx laħqet ir-*‘reasonable and legitimate expectations’* tagħha skont il-para. (ċ) tas-subartikolu 19(3) tal-Kap. 555. Tgħid li l-Arbitru hawnhekk ikkunsidra li: (a) 70% tal-assi ma kienux investiti b’mod prudenti għaliex kienu ġew allokat i fl-istess investment, u dan fejn l-iskop tal-Iskema kien sabiex jassigura pensjoni għaž-żmien wara li hija tirtira mix-xogħol tagħha bħala għalliema; (b) is-soċjetà ntimata naqset milli tassigura li l-Iskema kienet qiegħda topera skont l-iskop tagħha; u (ċ) ma kien hemm l-ebda ġustifikazzjoni għad-dewmien fit-twegiba tas-soċjetà intimata għall-ilment tagħha. Minn hawnhekk, is-soċjetà ntimata tgħaddi sabiex tiċċita silta konsiderevoli mid-deċiżjoni appellata, li tirrifletti l-osservazzjonijiet u l-konklużjonijiet tal-Arbitru, u dan filwaqt li tagħmel riferiment għal diversi sentenzi oħra deċiżi minn din il-Qorti fil-konfront tas-soċjetà ntimata, fejn il-fatti tal-każ kienu simili. Ir-rikorrenti tikkontendi li mhuwiex raġonevoli li hija kienet

sofriet telf mill-Iskema rżultat tan-nuqqasijiet tas-soċjetà intimata, li fl-aħħar mill-aħħar kienet negligenti u ma mxietx skont ir-responsabbiltà u l-profesjonalità mitlub mil-liġi. Tgħid li huwa mifhum li dejjem jista' jirriżulta telf fuq l-investimenti miżmuma f'portafoll, iżda dan jista' jitnaqqas permezz ta' diversifikazzjoni tajba, bilanċjata u prudenti tal-imsemmija investimenti. Ir-rikorrenti tirrileva li kien proprju dan li spjega x-xhud Jeffrey Harris fix-xhieda tiegħu quddiem l-Arbitru fl-1 ta' Frar, 2022. Tikkontendi li għalhekk jirriżulta nuqqas ċar ta' diligenza min-naħa tas-soċjetà intimata fl-amministrazzjoni ġenerali tal-Iskema u anki fl-eżekuzzjoni tal-obbligi tagħha bħala *trustee*. Permezz tal-appell inċidentali tagħha, ir-rikorrenti qegħda tilmenta mid-deċiżjoni tal-Arbitru fejn dan illimita r-responsabbiltà tas-soċjetà intimata għal 70% tat-telf soffert minnha. Tikkontendi li dan l-Arbitru għamlu filwaqt li għaraf sew in-nuqqasijiet serji tas-soċjetà intimata. Issostni li fil-każ odjern, it-*trustee* kien tenut jerfa' r-responsabbiltà kollha għaliex ma jistax ikun hemm responsabbiltà għal 70% ta' malaprassi jew għal 70% ta' malamministrazzjoni. Tgħid li t-*trustee* huwa 100% responsabbli fejn il-provi u l-fatti jistabbilixxu r-responsabbiltà tiegħu, u ma kien hemm xejn fil-liġi sabiex ma jiġix ordnat li jgħorr ir-responsabbiltà sħiħa u kompleta. Ir-rikorrenti tippretendi li l-Arbitru kellu jqiegħda fil-pożizzjoni originali tagħha fejn hija kienet investit GBP55,000, u dan flimkien mal-imgħaxijiet ta' 8%.

11. Is-soċjetà intimata twieġeb għall-appell inċidentali billi ssostni li l-fatt li r-rikorrenti garrbet telf, ma kienx ifisser li hija għandha tinżamm responsabbli għalih minħabba r-rwol li kellha ta' *trustee*. Tikkontendi li dan jista' jwassal sabiex hija tkun garanti fid-doluż biss, li għandu jkun fatali għal kull soċjetà li

topera bħala *trustee*. Dwar il-każ odjern, tirrileva li l-Arbitru ma setax jagħraf min mis-soċjetajiet msemija mir-rikorrenti kien responsabbli għat-telf allegatament soffert mill-istess rikorrenti. Għal dak li tgħid ir-rikorrenti dwar il-parir li allegatament ingħata lill-membri mit-*trustee*, is-soċjetà intimata tissottometti li r-rikorrenti ma fehmitx id-distinzjoni bejn liċenzja regolatorja ta' *trustee* u dik ta' konsulent finanzjarju, fejn it-*trustee*, fil-każ odjern is-soċjetà intimata, għandha biss ir-rwol ta' kustodja tal-assi. Hawnhekk is-soċjetà intimata tagħmel riferiment għal dak li qal l-Imħallef Richards fis-sentenza fl-ismijiet **The Financial Conduct Authority v. 24hr Trading Academy Limited et al** [2021] EWHC 648 (Ch) fir-rigward tat-terminu 'parir finanzjarju'. Tikkontendi li l-Arbitru qabel xejn kellu jstabbilixxi n-ness kawżali bejn in-nuqqasijiet tagħha u t-telf soffert mir-rikorrenti, li ma kinitx qiegħda tapprezza li l-investimenti finanzjarji huma soġġetti għar-riskju tas-suq, għar-riskju tal-emmittenti u ħafna elementi oħra varjabbli mhux fil-kontroll tas-soċjetà intimata, iżda li hija kienet taf bihom sew. Dwar dan il-punt, is-soċjetà ntinata tagħmel riferiment u tiċċita silta mix-xogħol tal-awtur **Jonathan Davies** taħt l-isem '**The Liability of Financial Advisors**', u ssostni li r-rikorrenti kienet naqset milli tipprova l-elementi neċessarji sabiex tirnexxi t-talba tagħha għad-danni. Tgħid li fi kwalunkwe każ, hija qatt ma setgħet tiġi kkundannata tħallas l-imsemmija danni minħabba n-nuqqas ta' ness bejn l-aġir tat-*trustee* bħala kustodju tal-assi, u t-telf soffert. Is-soċjetà intimata tesprimi l-fehma tagħha li l-Arbitru kien korrett fl-apprezzament tal-fatti meta gie sabiex jalloka responsabbiltà, iżda r-responsabbiltà tagħha ma kellha qatt tkun ikbar minn dik tal-persuna li kienet tat il-parir lir-rikorrenti jew tagħha stess.

12. Il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. L-Arbitru beda billi għamel diversi konstatazzjonijiet fir-rigward tal-informazzjoni li seta' jieħu dwar ir-rikorrenti mill-Applikazzjoni għas-Sħubija esebita fl-atti.¹ Imbagħad għamel l-osservazzjonijiet tiegħu fir-rigward tal-konsulent finanzjarju tagħha, li kif indikat fl-Applikazzjoni msemmija, kienet proprju MPM. Irrileva li skont il-*Financial Services Register* li kien jinsab fuq il-*website* tal-Awtorità tas-Servizzi Finanzjarji ta' Malta ['l-ASFM'], MPM kienet regolata mill-istess awtorità, fejn kellha liċenzja sabiex tipprovdi servizzi ta' investiment sakemm l-istess ASFM ikkanċellat dik il-liċenzja fl-2020. Qal li kien jirriżulta mid-dokumenti esebiti mis-soċjetà intimata, li f'Settembru 2017 kienet saret applikazzjoni sabiex tiġi appuntata *Serenus* bħala l-konsulent finanzjarju l-ġdid minflok MPM, iżda f'April 2018, ir-rikorrenti kienet ġiet infurmata mill-istess *Serenus* li hija kienet applikat '*to de-authorise its permissions with the Financial Conduct Authority (FCA)*', u għalhekk ma setgħetx tkompli tippresta s-servizzi tagħha. Għalhekk l-imsemmija rikorrenti kienet iffirmat il-formola '*Change of Adviser*' fil-15 ta' Frar, 2019, sabiex b'hekk tiġi appuntata minflokha Acklam Financial Ltd.

13. L-Arbitru rrileva li skont id-dokumentazzjoni originali pprezentata mis-soċjetà intimata, irriżulta li fit-30 ta' April, 2015 ir-rikorrenti kienet investiet is-somma ta' GBP55,000 taħt l-Iskema tal-Irtirar fl-Investment, li kien indikat li kellu '*Average 13.8% fixed rate*'. Spjega li dan kien filfatt jikkonsisti f'self, fejn ġie ndikat li wieħed mir-riskji sinifikanti tiegħu kien li '*ultimately, the security of the interest payments, and capital repayments, depend on the success of*

¹ Ara a fol. 47 et seq.

Dolphin Capital's projects renovating German Listed Buildings'. Irrileva li kien ġie ndikat fl-*'Addendum to Opening of Account Form'* tas-27 ta' Marzu, 2015 li sar mill-MPM, u l-partijiet irreferew għalih bħala *'Suitability Report'*, li l-investiment ta' GBP55,000 kien jikkonsistiwixxi 70% tal-fondi appartenenti lir-rikorrenti u li kienu miżmuma taħt l-Iskema tal-Irtirar. Qal li r-rimanenti 30% tal-*premium* kien maqsum fir-rigward ta' 20% f'investiment fi *Brooks Macdonald Managed Portfolio Service*, u għall-bqija tal-10% dan baqa' miżmum fi flus kontanti kif indikat fis-*Suitability Report*.

14. L-Arbitru osserva li l-Investiment kien marbut għal ċertu numru ta' snin, u filfatt l-investiment in kwistjoni kien miżmum għal kwazi ħames snin mit-30 ta' April, 2015 sa Novembru 2019. Għal dak li jirrigwarda d-diligenza dovuta li kellha twettaq is-soċjetà intimata, u l-fatt li din kienet aċċettat lil MPM bħala l-konsulent finanzjarju tagħha, l-Arbitru ddikjara li ma kien hemm xejn fuq xiex seta' jistrieħ sabiex jilqa' l-ilment tar-rikorrenti. Spjega li hawnhekk huwa kien ikkunsidra s-segwenti: (a) kien irriżulta li l-konsulent finanzjarju kien regolat; (b) ma kienx irriżulta li s-soċjetà ntinata kienet appuntat lil MPM minflok *Serenus*, kif allegat mir-rikorrenti; u (ċ) l-inkonsistenzi fix-xhieda li rriżultaw waqt is-seduta tal-1 ta' Frar, 2022, fir-rigward taż-żmien li fih ġiet appuntata MPM bħala l-konsulent finanzjarju tagħha. L-Arbitru b'hekk ġustament iddeċieda li għandu jiċċad it-talba tar-rikorrenti dwar il-kwistjoni. Qal ukoll li diversi kwistjonijiet oħra li kienet qajmet ir-rikorrenti fl-ilment tagħha, ma kienux rilevanti jew saħansitra aċċettabbli għall-fini tat-talba tagħha għall-ħlas ta' danni. L-Arbitru mbagħad spjega li fir-rigward tal-allegazzjoni ta' dewmien min-naħa tas-soċjetà intimata fis-sottomissjoni tad-dokumentazzjoni rikjesta minnha mir-rikorrenti, partikolarment is-*Suitability Letter* li saret mill-konsulent finanzjarju, u d-

dewmien fis-sottomissjoni tal-kjarifiki mitluba fir-rigward tal-konsulent finanzjarju, huwa ma setax jikkunsidrahom ulterjorment, stante n-nuqqas ta' kjarizza u ta' evidenza min-naħa tar-rikorrenti.

15. Hawnhekk il-Qorti tqis li jkun opportun li tindirizza l-ewwel aggravju tas-soċjetà intimata. Tgħid li huwa tassew minnu li l-Arbitru qal li huwa kien ikkunsidra x-xhieda tar-rikorrenti, meta din filfatt ma kinitx xehdet quddiemu. Minnu wkoll huwa l-fatt li huwa ħa in konsiderazzjoni x-xhieda tar-raġel tagħha Jeffrey Harris, iżda dan tgħid il-Qorti, saħansitra fejn ikkonstata diversi inkonsistenzi fl-istess xhieda, li wasluh sabiex ċaħad l-ilment tar-rikorrenti fejn dan kien jolqot l-allegata negligenza min-naħa tagħha u l-allegati nuqqasijiet tagħha fl-obbligi fiduċjarji tagħha. Dwar il-fatt li qiegħda tiżvela s-soċjetà intimata quddiem din il-Qorti, fir-rigward tal-proċeduri ta' separazzjoni/divorzju bejn ir-rikorrenti u żewġha, il-Qorti tgħid li s-soċjetà intimata naqset milli tispjega b'mod ċar ir-rilevanza tiegħu, u kif dan għandu jolqot id-deċiżjoni tal-ilment tar-rikorrenti. Is-soċjetà intimata mbagħad tikkontendi li l-aħjar prova tar-rikorrenti kellha tkun ix-xhieda tagħha stess, u l-Arbitru m'għamilx sew li sema' x-xhieda tar-raġel tagħha sabiex iddeċieda l-każ tagħha fejn l-istess Arbitru kien tenut li jordna li ssir l-aħjar prova. Il-Qorti tirrileva li fid-deċiżjoni appellata l-Arbitru pjuttost straħ fuq il-prova dokumentarja li tassew hija tqis li kienet l-aħjar prova li setgħet tressaq ir-rikorrenti sabiex turi n-nuqqasijiet tas-soċjetà intimata. Meħud in konsiderazzjoni dak kollu li huwa seta' kkonstata mid-dokumenti esebiti, il-Qorti ma taqbilx mas-soċjetà intimata li l-Arbitru kellu jsejjaħ lir-rikorrenti sabiex tixhed fejn huwa kellu quddiemu prova iktar ċerta u inekwivoka. Wara kolloxx, is-soċjetà intimata dejjem kellha d-dritt li tikkontradixxi dik il-prova permezz ta' provi oħra, iżda dan m'għamlitux.

Hawnhekk is-soċjetà intimata tikkontendi li l-Arbitru ma setax mill-imsemmija dokumenti jikkonferma il-veraċità tagħhom jew l-għażliet tar-rikorrenti. Bħala eżempju s-soċjetà intimata tispjega li l-Arbitru ma setax jikkonstata jekk kinitx ir-rikorrenti stess li għażlet li tinvesti flusha fid-*Dolphin Loan Note*, u li din kienet l-għażla tagħha u tal-konsulent tagħha. Tgħid li lanqas seta' jivverifika magħha, preżumibbilment tgħid il-Qorti għaliex kienet naqset milli tixhed, jekk kienx ġie spjegat lilha l-kundizzjonijiet u r-riskji ta' dak l-investment. Izda l-Qorti tgħid li din is-sottomissjoni ma tistax treġi fejn l-eżami tal-Arbitru kien jirrigwarda prinċipalment in-nuqqas tas-soċjetà intimata milli taġixxi fid-dawl tal-investment magħmul mir-rikorrenti fid-*Dolphon Loan Note*, meħud in konsiderazzjoni l-obbligi tagħha bħala *trustee* u amministratriċi tal-Iskema, u dan fejn il-fatt li sar l-imsemmi investment ma kienx wieħed ikkontestat. Il-Qorti tagħraf li anki jekk kienet ir-rikorrenti stess li għażlet li tagħmel investment daqsekk qawwi fi prodott wieħed, is-soċjetà intimata kellha l-obbligi tagħha fil-kapaċità tagħha ta' *trustee* u ta' amministratriċi tal-Iskema lejn l-Iskema nnifisha. Jekk imbagħad is-soċjetà intimata ħasset li hija b'xi mod b'hekk kienet giet żvantagġjata billi ma setgħetx tagħmel il-mistoqsijiet tagħha lir-rikorrenti, għal dan taħti biss hi billi naqset milli tħarrek lir-rikorrenti bħala xhud tagħha.

16. L-Arbitru rrileva li madankollu s-soċjetà ntimata bħala *trustee* u amministratriċi tal-Iskema, kienet marbuta skont il-qafas regolatorju li hija kienet topera fih, sabiex twieġeb mill-ewwel b'mod ċar u dettaljat għar-rikjести raġonevoli u validi ta' membru tal-Iskema. Jekk imbagħad hija tonqos, tkun naqset ukoll mill-obbligi tagħha, dak li għandha timxi skont id-debita kura u diligenza kif *inter alia* jipprovdu r-regoli applikabbli, u *jicċita* 'Standard Licence

Condition' [minn issa 'l quddiem 'SLC'] 5.1.8 ta' *Parti B.5 tal-'Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011'*. Qal li fin-nuqqas, il-membru jkollu kull dritt li jipprezenta rapport lill-awtorità rilevanti u/jew jipprezenta lment u jieħu l-azzjoni appożita. L-Arbitru rrileva li s-soċjetà intimata kienet damet kważi tliet xhur u nofs sabiex twieġeb l-ilment tar-rikorrenti, filwaqt li ma seta' jikkonstata l-ebda raġuni valida għal dan, u sewwa kkunsidra dan l-aġir bħala wieħed mhux professjonali. L-Arbitru qal li l-aġir kien imur ukoll kontra dak li jirrikjedi SLC 1.4.4 tar-Regolamenti suriferiti.

17. Għal dak li rrigwarda l-ilmenti tar-rikorrenti dwar id-*Dolphin Loan Note*, l-Arbitru aċċetta li l-investment qawwi ta' 70% tal-fondi tar-rikorrenti miżmuma fl-Iskema, kien tassew wieħed sproporzjonat u ma kienx jirrifletti l-iskop tal-istess Skema, li kien l-assikurazzjoni ta' introjtu tul il-ħajja tal-membru tagħha. Barra minn hekk ikkunsidra li skont id-diversi kundizzjonijiet maħruġa taħt il-*'Pension Rules for Personal Retirement Schemes'* ta' Jannar 2015, l-assi kellhom jiġu nvestiti b'mod prudenti. Ikkunsidra li l-espożizzjoni tal-Iskema għad-*Dolphin Loan Note* ma kinitx aċċettabbli minħabba s-segwenti raġunijiet li l-Qorti tgħid li huma tassew determinanti fid-deċiżjoni tal-ilment, u jirriżultaw b'mod inekwivoku u mhux kontestat mill-prova dokumentarja: (i) il-karatteristiċi u n-natura tal-prodott li kien *unlisted*, mhux regolat, mhux likwidu b'terminu fiss twil; (ii) ir-riskju għoli tal-prodott, li kien rifless fid-dħul għoli ta' 12% fis-sena kif indikat fis-*Suitability Report*, u rata fissa medja ta' 13.8%; (iii) in-nuqqas ta' likwidità, li saħansitra kien indikat fis-*Suitability Report*; (iv) in-nuqqas ta' diversifikazzjoni marbuta mal-prodott li kien konċentrat fuq settur partikolari ta' żvilupp/rinovazzjoni ta' proprjetà immobbli ġewwa l-Ġermanja, fejn b'hekk

il-prodott ma kienx iddiversifikat fis-suq Ġermaniż stess kif saħansitra ndikat u anki spjegat mis-soċjetà intimata, iżda anki fi sfond iktar wiesgħa; (v) ma kienx hemm ukoll diversifikazzjoni fil-portafoll tal-investimenti miżmuma fl-Iskema li kien imur kontra r-rekwiżiti *inter alia* ta' diversifikazzjoni, prudenza u likwidità. Stqarr li għalkemm il-parir lir-rikorrenti sabiex tinvesti fid-*Dolphin Loan Note* ingħata minn terz konsulent finanzjarju regolat, l-Arbitru tajjeb għaraf li s-soċjetà ntinata ma setgħetx tgħid li ma kellha l-ebda responsabbiltà. Il-Qorti hawnhekk żżid tgħid li s-soċjetà intimata għandha obbligi ċari bħala *trustee* u amministratriċi tal-Iskema, obbligi li ġew imfissra sew mill-Arbitru kif ser naraw iktar 'il quddiem f'din is-sentenza, u kuntrarjament għal dak li qiegħda tippretendi, ċertament dawn jirrikjedu li r-rwol tagħha ma jkunx wieħed passiv f'ċirkostanzi bħal dawk tal-każ odjern.

18. Għalhekk sewwa sostna l-Arbitru li l-imsemmija soċjetà ntinata kellha funzjoni kruċjali u importanti fil-moniteragg tal-Iskema, sabiex tassigura li din kienet qiegħda topera skont l-iskop tagħha, ir-rekwiżiti applikabbli, u *inter alia* li l-assi kienu protetti. Osserva li kif indikat fis-*Suitability Report*, '*The MFSA imposes strict restrictions on investments...*' fir-rigward tal-investment li seta' jsir minn skema tal-irtirar. Wara li kkonsidra dak li jipprovdu l-*Standard Operational Conditions* tad-*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*, l-Arbitru stqarr li minkejja l-*standards* stabbiliti permezz ta' dawn ir-regoli, is-soċjetà intimata kienet ippermettiet li l-portafoll ikun kostitwit biss permezz tal-investimenti fid-*Dolphin Loan Note*, fattur waħdu li l-Qorti tqis mill-ewwel bħala wieħed inkwetanti. Qal li l-espożizzjoni qawwija għal dan il-prodott u l-karatteristiċi partikolari tiegħu, ma kienux jirriflettu u saħansitra kienu

jmorru kontra l-*standards* u l-prinċipji appena ndikati, iżda wkoll ma kienux jassiguraw il-prudenza, id-diligenza u l-attenzjoni ta' *bonus paterfamilias* kif mitlub mit-*trustee* tal-Iskema. Hawnhekk l-Arbitru jagħmel riferiment għad-diversi disposizzjonijiet tal-Att dwar *Trusts* u *Trustees*, partikolarment għal dawk tal-artikolu 21, u stqarr li bħala *trustee* is-soċjetà intimata kienet obligata li tamministra l-Iskema skont diligenza u responsabbiltà massima. Qal li anki fl-Applikazzjoni għal Sħubija kien hemm indikati responsabbiltajiet ċari li hija kienet naqset milli tħares bħala *trustee* u amministratriċi fir-rigward tal-Iskema. L-Arbitru kien ferm korrett hawnhekk meta rrileva li għalkemm fl-imsemmija Applikazzjoni, l-attitudni għar-riskju tar-rikorrenti kienet indikata bħala '*High*', dan ma kienx jiġġustifika portafoll għall-investment tal-pensjoni fejn ir-riskji meħudin waħedhom u skont il-portafoll sħiħ, kienu jipperikolaw l-iskop tal-Iskema, kif filfatt gara fil-każ odjern. Il-Qorti tgħid li l-attitudni għar-riskju partikolari ma kienx ifisser li r-rikorrenti kienet lesta li saħansitra titlef l-investment kollu tagħha. Filwaqt li għamel riferiment għal dak li qalet is-soċjetà intimata dwar li hija kienet ħadet ħsieb li tkun sodisfatta li *Dolphin Capital Group* kellha biżżejjed riżorsi sabiex teżegwixxi t-tranzazzjoni, u b'hekk esebit ukoll kopja tar-Rendikonti Finanzjarji għas-sena 2011 ta' *Dolphin Capital GmbH* bħala evidenza tad-diligenza dovuta mwettqa minnha. L-Arbitru madankollu stqarr li dawn ma kienu jagħtuh l-ebda konfort, mhux biss minħabba r-riskju li kien jimponi l-emmittent tal-prodott, iżda anki għaliex jekk is-soċjetà intimata kienet straħet fuq dawn ir-Rendikonti Finanzjarji, tassew ma kienet wettqet l-ebda diligenza dovuta, ikkunsidrat li dawn kien għadda ż-żmien minn fuqhom meħud in konsiderazzjoni li l-investment sar f'April 2015. Dan kollu tgħid il-Qorti, juri biss in-nuqqas ta' diligenza u professjonalità fl-operat tas-soċjetà ntimata.

B'hekk l-Arbitru sewwa għamel meta għadda sabiex aċċetta l-ilment tar-rikorrenti, limitatament għal dak li kien ingħad minnu aktar qabel fid-deċiżjoni appellata, b'dana li s-soċjetà ntimata kienet tenuta tħallas 70% tal-valur investit fid-*Dolphin Loan Note*.

19. Il-Qorti tikkondividi b'mod sħiħ il-fehma tal-Arbitru, u ma ssib xejn x'tiċċensura f'dawn l-osservazzjonijiet u l-konsiderazzjonijiet tiegħu. Tgħid li jirrizulta b'mod ċar li kienu proprju n-nuqqasijiet tas-soċjetà intimata kif ikkunsidrati aktar 'il fuq f'din is-sentenza, li waslu għat-telf soffert mir-rikorrenti. Is-soċjetà intimata ttentat teħles mir-responsabbiltà tan-nuqqasijiet tagħha, billi tirrileva li ma kinitx hi, iżda l-konsulent finanzjarju tar-rikorrenti li kien mexxiha lejn l-investimenti li eventwalment fallelw. Iżda kif gie kkunsidrat minn din il-Qorti, id-difiża tas-soċjetà ntimata 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 mir-rikorrenti mill-investimenti tagħha. Dwar l-aggravju tas-soċjetà intimata li jolqot il-perċentwali ta' responsabbiltà li għandha tintrefa' minnha, u anki l-aggravju tar-rikorrenti kif imfisser fl-appell inċidentali tagħha, il-Qorti tgħid li ma tistax ma taqbilx mad-deċiżjoni tal-Arbitru għaladarba qiegħda wkoll taqbel li s-soċjetà ntimata kienet naqset fl-obbligi tagħha lejn ir-rikorrenti bħala membru, u anki lejn l-Iskema stess, fil-kwalità tagħha ta' *trustee* u amministratriċi, iżda wkoll li għandu jiġi kkunsidrat li kien hemm nuqqasijiet anki ta' terzi li kkontribwew lejn it-telf soffert mir-rikorrenti. Tgħid li hawnhekk l-Arbitru kien ġust meta għaraf li dawn ukoll kellhom jinżammu parzjalment responsabbli għad-danni kkawżati lilha.

20. Il-Qorti filwaqt li tiddikjara li hija qiegħda tagħmel tagħha l-konsiderazzjonijiet kollha tiegħu, tgħid li m'għandhiex aktar x'izzid mad-deċiżjoni appellata tassew mirquma u studjata tal-Arbitru.

Decide

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

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

Moqrija.

**Onor. Dr Lawrence Mintoff LL.D.
Imħallef**

**Rosemarie Calleja
Deputat Registratur**