MALTA

# QORTI TAL-APPELL
**(Sede Inferjuri)**

## ONOR. IMĦALLEF
## LAWRENCE MINTOFF

Seduta tal-10 ta' Lulju, 2024

Appell Inferjuri Numru 108/2023 LM

**Fabrizio Napolitano (Passaport Numru YB0924429)**
*('l-appellat')*

***vs*.**

**Sovereign Pension Services Limited (C 56627)**
*('l-appellanta')*

**Il-Qorti,**

**<u>Preliminari</u>**

1. Dan huwa appell magħmul mis-soċjetà intimata **Sovereign Pension Services Limited (C 56627)** [minn issa 'l quddiem 'is-soċjetà appellanta'] mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fit-13 ta' Ottubru, 2023, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddeċieda li jilqa' l-ilment tar-rikorrent **Fabrizio Napolitano (Detentur tal-Passaport nru. YB0924429)**[minn issa 'l quddiem 'l-appellat'] fil-

konfront tal-imsemmija soċjetà appellanta, u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkunsidra li l-istess soċjetà appellanta għandha tinżamm responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lill-appellat il-kumpens ta' GBP37,014 (sebgħa u tletin elf u erbatax-il Lira Sterlina) bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-pagament effettiv u bl-ispejjeż ta' dik il-proċedura.

## **Fatti**

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament jgħid li sofra l-appellat mill-investiment tiegħu fi skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] jew QROPS bl-isem *Centaurus Retirement Benefit Scheme,* kif ġestita mis-soċjetà appellanta. Jirriżulta li huwa kien issieħeb fl-Iskema f'Diċembru 2016, u f'Ġunju 2019 huwa kien informa lis-soċjetà appellanta li xtaq li jittrasferixxi l-investiment tiegħu minn Malta għar-Renju Unit. Skont l-appellat, fid-9 ta' Lulju 2019 l-investiment tiegħu kien miżmum fi flus kontanti, u skont il-valutazzjoni li nħarġet dakinhar stess, dan kellu valur ta' GBP510,728.72. Fl-10 ta' Lulju, 2019, l-appellat kien ta struzzjonijiet lil Sovereign Wealth UK għat-trasferiment tal-flus, u fil-21 ta' Lulju, 2019 huwa kien ġie mgħarraf li l-istruzzjonijiet tiegħu kienu ġew segwiti. Iżda fl-4 ta' Marzu, 2020, huwa sar jaf li mingħajr il-permess tiegħu s-soċjetà appellanta kienet ibbilanċjat mill-ġdid il-portafoll tiegħu, fejn minkejja li l-flus kienu miżmuma f'USD, dawn intużaw sabiex jiġu akkwistati investimenti f'GBP. Skont l-appellat, il-valutazzjoni tal-investiment tiegħu datata 2 ta' Marzu, 2020, kienet turi telf ta' GBP40,000 a detriment tiegħu.

**Mertu**

3. L-appellat għalhekk ippreżenta lment quddiem l-Arbitru fil-konfront tas-soċjetà appellanta, fejn filwaqt li allega li din kienet aġixxiet mingħajr l-awtorità tiegħu, u saħansitra warrbet l-istruzzjonijiet tiegħu għat-trasferiment tal-investiment tiegħu, u b'hekk ġarrab telf, talab sabiex jitħallas kumpens ta' GBP40,000 flimkien mal-imgħaxijiet sabiex jagħmel tajjeb għad-danni li kien sofra.

4. Is-soċjetà appellanta wieġbet billi talbet lill-Arbitru sabiex jiċħad l-ilment tal-appellat. Hija eċċepiet fost affarijiet oħra li: (i) fl-1 ta' Jannar, 2019, l-Awtorità ta' Malta għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-MFSA'] kienet ħarġet regoli ġodda għall-amministraturi tal-iskemi tal-irtirar fir-rigward tal-konsulenti finanzjarji, u l-appellat kien ġie debitament infurmat mill-MFSA li skont dawn ir-regoli huwa kellu jinnomina konsulent finanzjarju ġdid stante li dak eżistenti ma kienx konformi mar-regoli l-ġodda; (ii) l-appellat ma kienx ħa passi sabiex jinnomina konsulent finanzjarju addattat, u b'hekk l-Iskema ma kienitx konformi mar-Regolamenti; (iii) sadanittant l-appellat kien ġie nfurmat li sakemm huwa kien ser jaħtar konsulent finanzjarju ġdid, Sovereign Wealth kienet ser tiġi maħtura minflok il-konsulent finanzjarju eżistenti sabiex b'hekk jiġu sodisfatti r-rekwiżiti tal-liġi; (iv) l-investiment tiegħu ma kienx jissodisfa r-rekwiżiti ta' sezzjoni B3.2.1 (ii) tar-Regolamenti, stante li kien miżmum kollu kemm hu fi flus kontanti, u għalhekk hija kienet infurmatu li l-portafoll kellu jiġi bbilanċjat mill-ġdid, u dan filwaqt li huwa qatt ma pprotesta; (v) hija kienet irċeviet ir-rikjesta għat-trasferiment tal-investiment fit-30 ta' Settembru, 2019, u hija rċeviet id-dikjarazzjoni tar-residenza għall-fini tat-taxxa u prova dokumentarja tal-indirizz fit-2 ta' Jannar, 2020 u fil-5 ta' Frar, 2020; (vi) sadanittant l-investiment ma kienx konformi mar-Regolamenti u anki l-istruzzjonijiet tal-AMSF. Għaldaqstant is-

soċjetà appellanta kkontestat kull responsabbiltà meta aġixxiet sabiex tassigura konformità mar-Regolamenti.

## Id-deċiżjoni appellata

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

> ***"Considers:***
>
> ***The Merits of the Case***
>
> ***The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.*** *(fn. 14 Cap. 555, Art. 19(3)(b))*
>
> **The Complainant**
>
> *The Complainant, born in February 1970, is of Italian nationality and was resident in Zurich at the time of application for membership into* The Centaurs Retirement Benefit Scheme *('the Retirement Scheme' or 'Scheme'). (fn. 15 P. 54)*
>
> *The Application Form for membership into the Scheme dated 14 November 2016 ('the Application Form'), indicates the Complainat's occupation as '*Partner Deloitte'. *(fn. 16 P. 54 & 69). During the hearing of 22 November 2021, the Complainant confirmed that he was '*a Management Consultant'. *(fn. 17 P. 218)*
>
> *As detailed in the Application Form, the Scheme was to be funded from the transfer of the previous pension fund held by the Complainant with* Transact *for an approximate transfer value of GBP 470,000 (fn. 18 P. 58)*
>
> **The Service Provider**
>
> *SPSL acts as the Retirement Scheme Administrator and Trustee of the Scheme and is licensed by the MFSA as a Retirement Scheme Administrator. (fn. 19 P. 29 & 34)*
>
> **The Product in respect of which the Complaint is being made**
>
> *The Scheme is a trust domiciled in Malta registered with the Malta Financial Services Authority ('MFSA'), as a Personal Retirement Plan, originally registered under the Special Funds (Regulation) Act 2002 (Chapter 450 of the Laws of Malta) and subsequently under the Retirement Pensions Act.*

*The Retirement Scheme was established by a trust deed dated 13 July 2014 by SPSL (fn. 20 P. 35 & 64). As described by the Service Provider, the Scheme is member-directed where, the Complainant, as a member of the Scheme, appoints his own investment adviser in relation to the investment options. (fn. 21 P. 29)*

Monfort International GmbH *based in Switzerland, was the Financial Adviser indicated in the Scheme's Application Form for Membership. (fn. 22 P. 54)*

*The Complainant became a member of the Scheme in December 2016 (fn. 23 P. 95) and the assets held in the Complainant's account with the Retirement Scheme were used to acquire the* Executive Investment Bond*, a life assurance policy, ('the Policy') issued by* Old Mutual International *('OMI'), through which underlying investments were made and held. An application to acquire the Executive Investment Bond, (fn. 24 P. 70-80) signed on 14 November 2016 was filed by the Scheme's Trustee (in its capacity as Applicant) (fn. 25 P. 71 & 77) and by the Complainant (as Life Assured). (fn. 26 P. 72, 77 & 80)*

*The Policy held by the Scheme commenced on 26 January 2017. (fn. 27 P. 131) The Policy's Currency was not specified under section A of the OMI's Application Form. The said section however specified the following in bold:*

'Please note if no currency is entered your bond currency will be pound sterling (£). The BOND CURRENCY CANNOT BE CHANGED AFTER THE BOND IS SET UP'. *(fn. 28 P. 71)*

***Timeline of Events***

*The following is a summary of the timeline of relevant events according to the documentation produced and information that emerged during the proceedings of the case:*

- *13 May 2019 – Email from SPSL to the Complainant notifying him about changes to the regulatory regime introduced by MFSA on 1 January 2019 with respect to the required licensing status of investment advisers. The said email encouraged:*

    'Members to contact their current Investment Adviser as soon as possible to ascertain whether they hold the correct authorisation'. *(fn. 29 P. 81)*

    *SPSL noted in the said email, that if the current investment advisers are not duly authorised:*

    'Members will need to appoint an alternative MiFID-licensed Investment Advisor, and/or appoint a MiFID-licensed Investment

Manager to manage their pension scheme investments on a discretionary basis, prior to 1 July 2019'. *(fn. 30 Ibid.)*

- *25 June 2019 – Application for Membership into the MW SIPP 2 (with the product referred to as '*The Sovereign International SIPP'*, this being 'the generic name of the product purchased by the applicant established under the MW SIPP 2 Trust Deed'), (fn. 31 P. 152) signed by the Complainant on 25 June 2019. The Trustee of this retirement plan was indicated as '*MW SIPP Trustees Ltd*', with its Scheme Administrator indicated as '*Sovereign Pension Services (UK) Limited'*. (fn. 32 P. 151-168)*

- *25 June 2019 – An 'Application To Transfer Out' form issued by SPSL was signed by the Complainant on 25 June 2019. (fn. 33 P. 89-91) The said form related to the transfer out from the Retirement Scheme to another pension plan named 'MW SIPP 2', (fn. 34 The MW SIPP 2 was a scheme set up under UK Law which the Complainant eventually becam a member of in September 2019 – P. 19) with the method of transfer being 'in specie'. (fn. 35 P. 90)*

  *(According to SPSL, the Transfer Out Form was received by the trustee MW SIPP Trustees Ltd on 1 July 2019 and was in turn forwarded to SPSL in September 2019). (fn. 36 P. 31)*

- *1 July 2019 – Email sent by SPSL to the Complainant highlighting that, following its communication of 14 May 2019, action was required in respect of the Complainant's Investment Adviser given that the current adviser '*has either failed to respond to our communication' *or it did not meet the new criteria introduced by the MFSA. (fn. 37 P. 84)*

  *SPSL reiterated that '*a regulated investment adviser needs to be appointed to your plan' *and explained the need to receive a signed written instruction from the Member for the new appointment and that SPSL will also be in touch to discuss the Member's options. (fn. 38 ibid.)*

- *18 Sept 2019 – The Complainant became a member of another retirement plan (set up under UK Law), the Sovereign International SIPP No. 4046, ('the MW SIPP') on 18 September 2019. (fn. 39 P. 6 & 19) The Trustee of the Sovereign SIPP was MW SIPP Trustees Ltd with the administrator being '*Sovereign Pension Services (UK) Ltd'*. (fn. 40) P. 19)*

- *25 September 2019 – Letter dated 25 September 2019 where Sovereign Pension Services (UK) Ltd notified SPSL of the Complainant's wish to transfer his pension to the MW SIPP pension scheme. (fn. 41 P. 231-232)*

- *15 October 2019 – Email from SPSL to the Complainant noting inter alia that 'With effect from 1 July 2019…', any investment adviser not meeting the new MFSA criteria regarding who is able to provide members with investment advice in relation to their pension scheme, 'is no longer permitted to carry on providing investment advice in respect of accounts held by a Malta Retirement Scheme'. (fn. 42 P. 86)*

*In the said email, SPSL also informed the Complainant the following:*

> 'According to our records, you do not currently have a properly authorised investment adviser appointed to your plan. As your Retirement Scheme Administrator, we wrote to you in May, and again in June, but we have not as yet heard back from you. We are now in breach of these new rules and are therefore obliged by the MFSA to take action to rectify this position.
>
> Sovereign Asset Management Ltd (SAM) is the in-house investment arm of the Sovereign Group. It is authorised and regulated by the Gibraltar Financial Services Commission….
>
> Sovereign Wealth, a trading name of SAM, meets the MFSA criteria as a properly authorised investment adviser. As you have not provided us with an alternative, in our capacity as Retirement Scheme Administrator we will be appointing Sovereign Wealth (SW) as the investment adviser to your pension plan.
>
> SW will shortly begin to review your portfolio…
> …If the value of your pension fund exceeds £50,000, your portfolio will be invested in a Model Portfolio solution with an appropriate risk profile that matches your current portfolio. The New portfolios will be managed by WH Ireland, which is authorised and regulated by the UK Financial Conduct Authority…
> …
> Members may still appoint an alternative investment adviser that meets the MFSA criteria. If you do not wish to proceed with the appointment of SW, please report back to us within seven (7) working days with an instruction to appoint an alternative authorised investment adviser…' *(fn. 43 P. 86-87)*

- *Part of the documents produced during the proceedings of the case involved a copy of a 'Dealing Instruction Form' dated 31 October 2019. The said form featured the contact details of Simon Bartlett (Sovereign Wealth Gibraltar), issuing instructions to purchase a number of investments as per the allocation indicated in the dealing instruction form. (fn. 44 P. 88)*

*The form instructed the following purchases:*

- *a 50% allocation into TC New Horizon Global Balanced Fund*
- *a 5% allocation into iShares Global Agg Bond ETF GBP Hedged Dist*
- *a 2.5% allocation into iShares JP Morgan EM Local Government Bond*
- *a 7.5% allocation into UBS MSCI World SRI USD*
- *a 12.5% allocation into SPDR UK Dividend Aristocrats*
- *a 15% allocation into Amundi IS MSCI Emerging Markets ETF*
- *a 2.5% allocation into ETFS Physical PM Basket*

*The Dealing Instruction Form also included the following additional comments:*

> 'Please FX all USD into GBP. Please use GBP cash to cover EUR deficit. Once done please then invest in line with weightings listed above retaining 5% in cash' *(fn. 45 Ibid.)*

- *15 November 2019 – Email to the Complainant from Simon Bartlett, Wealth Advisor of Sovereign Wealth Gibraltar, noting that:*

  'Following on from the email correspondence…please note that the rebalancing of your existing asset allocation and the appointment of Sovereign Wealth will be conducted on Monday 18th November 2019, in order to rectify the scheme's current regulatory position and to ensure your plan is meeting the necessary requirements provided by MFSA' *(fn. 46 P. 85 & 277)*

  *The Wealth Advisor invited the Complainant to discuss the matter further with him should he like to.*

- *15 November 2019 – Exchange of emails between SPSL and Sovereign Pension Services (UK) Limited regarding the Complainant's transfer out of the Scheme where Sovereign Pension Services (UK) Limited requested 'an* update regarding the [Complainant's] in-specie transfer' *and asking when it could expect receipt of the Deed of Assignment. (fn. 47 P. 267)*

- *19 November 2019 – During the hearing of 22 November 2021, the official of the Service Provider declared that 'The* dealing instructions were submitted on 19 November [2019*]'. (fn. 48 P. 222)*
- *The 'Historical* Cash Account Transactions' *statement issued in respect of the Policy indicates multiple investment transactions (including the conversion of USD cash into GBP) being undertaken on 25 November 2019. Other purchases of investments were undertaken on 26 and 27 November 2019. (fn. 49 P. 212 & 215)*

- *February/March 2020 – According to the Service Provider, following the submission of certain outstanding documentation (such as the tax residency*

*declaration and proof of address document), the instruction to re-assign the Policy to the new trustee was sent in February 2020 with the re-assignment of the Policy completed by* Quilter International *(previously OMI) (fn. 50 https://forthcapital.com/omi-has-rebranded-to-quilter/#:~:text=Part%20of%20the%20Quilter%20family.their%20parent%20company%2C%20Quilter%20plc) on 3 March 2020. (fn. 51 P. 31)*

- *12 June 2020 – Email from the Complainant to his adviser,* Monfort International, *where it was inter alia indicated that:*

  '● My stated and deployed holding strategy for 2019 was cash only, in USD
  - In June 2019 we decided to move the pension fund away from Malta to the UK
  - The transfer was requested as 'in kind', USD to USD ….
  - In March…we placed a buy order as the markets bottomed out, and we were only then told that the portfolio had other assets…and not USD cash
  - We immediately disposed of the assets once we discovered their existence
  - The assets had also generated a loss of over £40,000' *(fn. 52 P. 93)*

- *15 June 2020 - Letter/declaration from the Director of* Monfort International*, where it was stated inter alia that:*

  '…Both myself and Fabrizio Napolitano had no idea that his QROPS/ SIPP had been switched from cash into funds. In 2019 we specifically went in USD cash as a hedge against possible problems with BREXIT, GBP and the world economy in general.

  In July 2019 there was a change in policy in Malta…Therefore, Fabrizio Napolitano and I decided to move the Malta QROPS to a UK SIPP…

  We were not informed that in November the trustees of Sovereign appointed the financial advisor arm, Sovereign Wealth, as financial advisors and they in turn rebalanced the portfolio into funds unbeknown to FABRIZIO NAPOLITANO or myself.

  Once the transfer to the UK had taken place in March 2020, we then discovered that the positions had changed from USD cash into GBP funds. We sent a dealing instruction on the 30 March 2020. It was only then we discovered we were not in USD cash but in funds. We complained to Sovereign Malta as to why we had not been informed and we immediately asked to sell the positions…

> JD and I did not have internet access to his portfolio during this time and we were completely in the dark not worrying about anything as the markets started to decline and we thought we were in USD cash a good place to be in the conditions. Also FABRIZIO NAPOLITANO in fact lost money as both the GBP and the funds went down'. *(fn. 53 P. 205)*

**Other Observations and Conclusion**

*Actions of the Service Provider*

*The Arbiter notes that following the changes to the regulatory framework setting out new criteria as to who could act as investment adviser for member directed retirement schemes and, also, after the lack of feedback from the Complainant for the replacement of his investment adviser, SPSL chose to itself appoint an investment adviser which satisfied the new regulatory requirements.*

*The new investment adviser appointed by SPSL in respect of the Complainant's Scheme account then undertook a* 'rebalancing' *of the Complainant's holdings. SPSL, as trustee and RSA, allowed the various investment transactions that the new adviser subsequently sent for execution to be undertaken within the Complainant's Scheme.*

*Whilst the Arbiter notes and appreciates that SPSL as trustee and RSA of the Scheme had to ensure that the Scheme is in line with the new requirements within the required deadlines,* ***the Arbiter however cannot consider the actions taken by SPSL, as the Trustee and RSA, as being reasonable nor justified in the particular circumstances of the case, and neither reflective of its duty to act in the best interests of the Complainant*** *which it was also required to ensure in the said roles.*

***The Arbiter considers that SPSL, as trustee and RSA of the Scheme, failed to act properly and in a manner reflective of its key duties as Trustee and RSA of the Scheme****, including inter alia: to* 'act with the prudence, diligence and attention of a bonus paterfamilias' *as required in terms of Article 21(1) of the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta; to* 'carry out and administer the trust according to its terms' *in terms of Article 21(2)(a) of the TTA;* 'to act in the best interest of the scheme' *as per Article 13(1) of the Retirement Pensions Act ('RPA'); and the requirement to act* 'with due skill, care and diligence' *as required under 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.*

*The above-mentioned decision is based taking into account various factors, particularly, the following:*

i. Actions went beyond terms of appointment and without consent of the Complainant

*In its reply, and throughout the proceedings of the case, the Service Provider indicated that the new investment adviser,* Sovereign Wealth Gibraltar *was appointed as an investment adviser and accordingly not as a discretionary investment manager. This is an important aspect given the material distinctions emanating between the role of an investment adviser (with no discretion) and that of an investment manager.*

*As an investment adviser (with no discretionary mandate), the role of Sovereign Wealth Gibraltar should have been limited to the provision of investment advice to the Complainant, with the latter then deciding on whether to proceed with the advice provided by the adviser.*

*It has neither been indicated, nor evidence provided, in the first place that* Sovereign Wealth Gibraltar *had some sort of discretion regarding investment transactions that were equivalent or similar to that of an investment manager.*

*It is indeed unclear on what basis and authority* Sovereign Wealth Gibraltar *has sent the investment transactions for execution when its role was limited to just acting as an investment adviser (that is, with no discretionary mandate on investments).*

*The appointment of a default investment adviser by the Trustee/RSA, should not have been taken to mean that such adviser had authority to take and instruct the execution of investment decisions on a discretionary basis.*

*The consent of the Complainant should have accordingly been clearly and unequivocally first sought prior to proceeding with the execution of the disputed investment transactions. SPSL, in its role of trustee and RSA should have ensured that this was indeed the case.*

*Notwithstanding that:*

*a. there was no such consent by the Complainant for the investment transactions recommended by the adviser, and*
*b. the role of* Sovereign Wealth Gibraltar *was just limited to an investment advisory role*

*SPSL, as trustee and RSA, still permitted and allowed the investment transactions to be undertaken, itself actually co-signing the dealing instruction form of 31 October 2019. (fn. 54 P. 11)*

ii. No evidence that the Complainant was adequately informed of what investment transactions were recommended to him/were going to be undertaken if he did not revert.

*It is noted that no clear evidence has either emerged throughout the proceedings of this case that the Complainant was adequately notified of the investment transactions recommended to him.*

*During the hearing of 22 November 2021, the senior official of the Service Provider testified that:*

> 'Asked who advised Mr JD of the type of investments we would be dealing in, I say it would be Simon Bartlett. In his email of the 15 November, he informed him what changes had to be made to his policy and what portfolio they would be investing in'. *(fn. 55 P. 222)*

*The Arbiter notes that no such evidence however emerged from the email of 15 November 2019 as explained further below.*

*During the hearing of 18 January 2022, the senior official of the Service Provider testified that:*

> 'Being referred to Doc SPS 8, an email dated 15 November 2019 (a fol. 277) by which we notified Mr FABRIZIO NAPOLITANO that there would be a rebalancing, I say that this is an email which Mr Simon Bartlett sent to Mr Fabrizio Napolitano.
>
> …
>
> Asked to confirm that this was the only form of communication to Mr FABRIZIO NAPOLITANO in relation to the rebalancing, I say, no; that was not the only communication, there is Document SPS 7 (a fol. 273 & 275) where we, Sovereign Pensions, on the 15 October 2019, sent an email to Mr JD saying that we were appointing Sovereign Wealth and it also goes on to say that the pension fund would be invested *in The New Horizon Model Portfolio that Sovereign Wealth has selected'. (fn. 56 P. 337)*

*The email dated 15 November 2019 sent by the Wealth Advisor of Sovereign Wealth Gibraltar did not however include details informing the Complainant of what investment transactions will be undertaken but only made a general reference to* 're-balancing' *just stating that:*

> '…please note that the re-balancing of your existing asset allocation and the appointment of Sovereign Wealth will be conducted on Monday 18th November 2019, in order to rectify the schemes current regulatory position and to ensure your plan is meeting the necessary requirements…
>
> If you would like to discuss this further with me, I would be more than happy to schedule a telephone appointment, my contact details can also be found below'. *(fn. 57 P. 277)*

*The said email also did not either clearly and categorically inform the Complainant that if he did not revert, the adviser and the Scheme would be proceeding with undertaking the material investment transactions.*

*The other email dated 15 October 2019 by SPSL, where reference was made to '*a Model Portfolio solution…The New portfolios will be managed by WH Ireland' *and that* 'If your pension funds are invested in the New Horizon Model Portfolio, SW will monitor the portfolio's performance…'*, does not reasonably either provide sufficient details nor a proper indication of the investment transactions that were to be selected/recommended.*

*Such part of the said email of 15 October 2019, which is rather unclear and insufficient, did not mention the selected investments and proposed allocations thereof (as ultimately featured in the Dealing Instruction Form of 31 October 2019). Nor did it explain what was the nature of the* 'New Horizon Model Portfolio'*, and neither did it provide any details about the composition of the said '*New Horizon Model Portfolio'*. (fn. 58 P. 273-275)*

iii. No adequate prior discussions and notifications to the Complainant

*The Arbiter cannot also help but notice the short timeframes provided to the Complainant within which he was being asked to revert and within which material decisions were being taken with respect to his Scheme.*

*It is noted that in the document presented by the Service Provider ('DOC SPS12') indicated as '*Consultation on Amendments to Pension Rules for Personal Retirement Schemes. Feedback to statements issued further to industry responses to MFSA consultation documents 4 January 2019 (page 6 – transitory 6 month period*)', (fn. 59 P. 227) MFSA had stated that:*

> 'Furthermore, in paragraph 2.1.11 of the Feedback Statement dated 4 January 2019, the MFSA noted that notwithstanding a six month transitional period is granted (until 1 July 2019), the necessary measures are to be taken without delay…'. *(fn. 60) P. 328 – Emphasis added by the Arbiter)*

*As outlined under the section titled* 'Timeline of Events' *above, the Complainant seems to have been first notified by SPSL about the changes in the regulatory framework on 13 May 2019, in essence giving him just one and a half months' notice about inter alia the removal of the investment adviser '*as of 1 July 2019' *if his adviser did not meet the new criteria. (fn. 61 P. 81)*

*Five months thereafter, on 15 October 2019, SPSL informed the Complainant that given they had not heard back from the Complainant they will be*

*appointing* Sovereign Wealth *(in Gibraltar) as investment adviser to his pension plan.*

*After a further one month from the said notification, the Complainant received an email dated 15 November 2019 from* Sovereign Wealth Gibraltar*, notifying him that on 18 November 2019, (within a mere 3 days) a re-balancing of his asset allocation will be undertaken.*

*As indicated in the timeline above, the transactions were eventually undertaken on 25 November 2019.*

*It is noted that, in its reply to the complaint received by OAFS, the Service Provider pointed out that:*

> 'SW did notify the Member that his portfolio had to be re-balanced. SW did allow 7 working days for the Member to protest the re-balancing, but the Member never objected the change within the portfolio'. *(fn. 62 P. 31-32)*

*The provision of a mere few days within which to protest material transactions was in itself clearly inadequate. This is apart from not being justified in the context of the Complainant's particular situation as shall be considered further on below.*

*The Arbiter ultimately cannot understand how the material disputed transactions were allowed to be somehow undertaken without being actively first discussed with the Complainant. It is clear that the Service Provider failed to ensure that such important discussions were held in the first place by its own appointed adviser (which it is furthermore noted is a related group company and which could accordingly give rise to possible conflicts of interest).*

*iv.* SPSL was aware of the Transfer Out Request before permitting the investment transactions

*Another key aspect that emerges in the particular circumstances of this case is that the Service Provider was (or should have been) aware of the Complainant's request to transfer out of the Scheme. This key aspect does not seem to have been given much importance by SPSL.*

*It is noted that during the hearing of 18 January 2022, the Service Provider confirmed that:*

> '…Sovereign Wealth, who were already appointed as the investment advisor (as Mr FABRIZIO NAPOLITANO had not rejected the appointment), telling him that the rebalancing would happen in the next

few days. This was on the 15 November and the rebalancing happened on the 18 November.

Asked if the company was aware at the time of Mr JD's transfer out to Sovereign UK, I say, yes, we were aware but we were still in breach of the regulations; the transfer to the UK would take some time to be finalised'. *(fn. 63 P. 338)*

*The Arbiter furthermore considers that whilst, prima facie, it might appear that the Complainant ignored communications regarding the appointment of the new investment adviser and subsequent rebalancing, it is however understandable that, in light of his communication at the time to transfer out and also considering that he only had a cash holding remaining in his Scheme, the Complainant did not feel obliged to adopt the indicated changes in the circumstances.*

*Once the Complainant had decided to transfer out and the Service Provider was aware of this, the trustee should indeed have reasonably not proceeded with the material changes to his Scheme.*

*v.* No apparent imminent threat to the value of the Complainant's holdings

*The underlying assets held within the Scheme's underlying Policy were all in cash (part in GBP and part in USD as shall be considered in detail further on in this decision).*

*No imminent risk was indicated, nor has it emerged, that existed to the Complainant's holdings which necessitated some urgent action by the Service Provider to preserve and safeguard his assets. This, taking also into consideration the Complainant's intention to transfer out of his Scheme as described above.*

*The Service Provider submitted that the portfolio, which was held in cash at the time, was not adequately diversified and hence it was felt by the new adviser/trustee that the Complainant's portfolio needed to be instantly invested. According to the Service Provider, this (apart from the new regulatory requirements about advisers) also justified the multiple investment transactions to be somehow rashly undertaken.*

*Such submissions, however, cannot reasonably and justifiably be accepted. It is considered that the question of diversification primarily arises, and is rather pressing, at the point of investment when selecting the instrument/s for investments and, also, thereafter with respect to the composition of the overall portfolio of investments, rather than at the point in time when the*

*underlying assets are just held in cash and (typically) in their original state of transfer.*

*The retention of all, or the majority of, the Scheme's assets in cash in the long term, is rather considered to raise other issues (such as inter alia with respect to the performance and the achievement of a return and the scope of the Scheme) rather than the issue of diversification raised by the Service Provider. As indicated above, such concerns however were not really applicable and/or material in the Complainant's particular circumstances.*

*vi. No direction provided by an authority for SPSL to act in the way it did*

*It is noted that in the extracts of a meeting held on 22 October 2019 between MARSP (Malta Association of Retirement Scheme Practitioners) and MFSA, the following was stated (with respect to investment advisers in Switzerland):*

'MARSP confirmed that this is still work in progress and the MFSA understood this but confirmed that each RSA would need to clearly document the position vis à vis each member and advisory firm in terms of migration <u>to a suitably qualified advisor or to another territory</u>'. *(fn. 64 P. 336 – Emphasis added by the Arbiter)*

*The above emerges from an email dated 25 October 2019 that was presented during the proceedings of the case. (fn. 65 P. 227 & 335-336 ('Doc SPS 13')*

*No evidence has emerged that the MFSA provided the Service Provider with any direction to allow material investment decisions to be taken without the member's consent. Indeed, the above extract actually indicates the possibility of the '*migration…to another territory' *which was one of the options applicable at the time, and which was ultimately the route taken by the Complainant.*

*The Complainant's wish to transfer out and migrate his Scheme to another territory was indeed already communicated to SPSL prior to the disputed transactions as considered above.*

*The trustee's concerns about the alleged lack of compliance with the new framework and any possible regulatory action being taken against it by MFSA were accordingly not applicable and should have not arisen in the circumstances.*

***For the reasons amply explained, the actions of the Service Provider are therefore considered by the Arbiter to have been unjustifiable and inappropriate at the time.***

***In order to award any compensation to the Complainant in terms of Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter needs to however be satisfied that there is actually a '*loss of capital or income or damages suffered by the complainant as a result of the conduct complained of'.** *(fn. 66 Article*

*26(3)(c)(iv) of Cap. 555)* ***This aspect shall be considered in detail in the next sections.***

Alleged losses claimed by the Complainant & Proof of Loss

*The Complainant claimed a loss of GBP 40,000 in his Complaint to the Arbiter. (fn. 67 P. 3 & 219) The Service Provider however contested the alleged loss during the proceedings of the case.*

*It is noted that during the hearing of 22 November 2021, the Complainant testified that:*

> 'It is being said that my portfolio is actually making a good gain and has suffered no loss till today, I say that this is not a correct interpretation of what happened. My portfolio was transferred in kind after you have made the new asset allocation. The moment we saw that it was transferred in kind, we had to sell all the holdings because I work for a regulated entity and I have to get permission to hold any asset, so we had to close all the positions. The moment we closed the positions, we generated a loss of about £40,000. The fact that today I am making some money, the entire market is going up so it is a completely irrelevant question. The relevant question is why did you do the asset reallocation and why did you force me to close the positions'. *(fn. 68 P. 219)*

*During the same hearing of 22 November 2021, the Managing Director of SPSL testified that:*

'The dealing instructions were submitted on 19 November. At that point, the policy was valued at GBP 496,094 and, then the portfolio was making a gain so up until the 31 December 2019, it was valued at GBP 507,498. So, the portfolio was making a gain with the assets purchased by Sovereign Wealth…

The transfer happened on the 8 January...and at the point of transfer, the value was GBP 497,435. So, at the point of transfer, Mr FABRIZIO NAPOLITANO made a gain, not a loss'. *(fn. 69 P. 222)*

*The Arbiter further notes the declaration made by the Complainant during the same sitting of 22 November 2021, that:*

> *'*Asked by the Arbiter if up till now I made a loss or a profit, I say that I made a profit'*. (fn. 70 P. 219)*

*There were accordingly* ***conflicting statements and divergent positions provided by the parties on whether a loss resulted from the disputed transactions****.*

*It is noted that, as emerging from the judicial protest filed in the First Hall of the Civil Court by the Complainant against SPSL of 13 November 2020, (fn. 71 P. 98-100) the Complainant has calculated his loss by comparing the market value of his holdings as at 7 July 2019 of GBP 510,728.72 (fn. 72 P. 98 & P. 173) against the market value of the holdings as at 2 March 2020 of GBP 470,267.60. (fn. 73 P. 100 & 196) The difference between these two valuations indeed amounts to GBP 40,461.12.*

*The reference to the '*valuation of the holdings as at the 2nd March, 2020' *which '*revealed a loss of forty thousand British pounds (GBP 40,000)' *was also mentioned in the Complainant's final submissions, where it was noted that '*In fact, the valuation as at 7th July 2019 show a cash position of GBP 510,728.72 while a valuation received on the 2nd March, 2020 shows a valuation of GBP 470,267.60'*. (fn. 74 P. 350)*

*On its part, the Service Provider compared the market value of the holdings applicable on 19 November 2019, on 31 December 2019 and on 8 January 2020. In its final submissions, SPSL indeed reiterated that:*

> 'The service provider contends that the Complainant suffered no loss and the values which must be taken into consideration are the value as at the day the re-balancing occurred and the value when the policy was assigned to the UK'. *(fn. 75 P. 353)*

*First, the Arbiter notes that no evidence has emerged that the transfer from the Scheme to the MW SIPP pension scheme actually happened on 8 January 2020 as claimed by the Service Provider during the hearing of 22 November 2021. (fn. 76 P. 222) In its reply to the Complaint, the Service Provider moreover indicated a different date, that of 3 March 2020, as to when '*the re-assignment [of the policy] was completed by Quilter International'*. (fn. 77 P. 31) Indeed, it is further noted that a statement as at 8 January 2020 still indicated the '*Policyholder' *as '*Sovereign Pensions Services Limited as trustee of Centaurus RBS Re: F Napolitano'. (*fn. 78 P. 299)*

***Apart from the conflicting statements made, the Arbiter considers that, for the purposes of this decision, the submissions provided by both parties to the Complaint are inappropriate in determining whether a loss or profit has in practice emerged as a result of the disputed transactions undertaken in 2019.***

***This is in view that apart from the different arbitrary dates taken to compare the value of the portfolios in GBP, both parties also compared values that involved paper or unrealised losses/ profits – including in respect of a material FX position** (i.e., the value of the cash position of USD 507,480.31 reported in GBP), **which until the disputed transactions was still a variable position.** (fn. 79 The cash position of USD 507,480.31 was actually converted into GBP, (for the amount of GBP*

*392,185.59 at the rate of USD/GBP 1.29398) and thus crystallised on 25 November 2019 as per the* 'Historical Cash Account Transactions' *Statement issued by Quilter International – P. 212)*

*The Arbiter has, in this regard, considered the multiple Valuation Statements at different time periods which were produced by the parties during this case.*

*It is first noted that, according to a Valuation Statement issued by OMI, the '*Total Current Market Value' *of the Policy as at 31 December 2018 was GBP 507,252.47. This figure was made up of cash in the amount of GBP 109,322.33 and cash of USD 507,480.31 (valued in GBP at 397,930.14 GBP) as at 31 December 2018, as specified in the said statement. (fn. 80 P. 135 – GBP 109,322.33 + GBP 397,930.14 = GBP 507,252.47)*

*The Arbiter further notes that, as detailed in the said Valuation Statement as at 31 December 2018, the Complainant previously held a portfolio of investments (under a GBP account and a USD account), which investment instruments were sold by end of December 2018 and the respective proceeds retained in cash. (fn. 81 P. 136)*

*Various other OMI Valuation Statements were also produced during the proceedings of the case – namely as at 1 May 2019; 7 July 2019; 19 November 2019; 31 December 2019; 8 January 2020 and 2 March 2020. (fn. 82 p. 140-146) (fn. 83 P. 171-177) (fn. 84 P. 279-285) (fn. 85 P. 194-203)*

*The following emerges from the said valuation statements:*

- *The statement as at 1 May 2019, indicated the '*Total Current Market Value' *of the Policy as GBP 496,324.37. (fn. 86 P. 142) The said market value was made up of cash in the amount of GBP 106,931.36 (less GBP 17.91 from a conversion of -20.72 EUR) and cash of USD 507,480.31 (valued in GBP at 389,410.92 at the time). (fn. 87 P. 144) (fn. 88 GBP 106,931.36 – GBP 17.91 + GBP 389,410.92 = GBP 496,324.37)*

- *The statement as at 7 July 2019, indicated the '*Total Current Market Value' *of the Policy as GBP 510,728.72. (fn. 89 P. 175) The said market value was made up of cash in the amount of GBP 105,638.36 (less GBP 18.85 from a conversion of -21 EUR) and cash of USD 507,480.31 (valued in GBP at 405,109.21 at the time). (fn. 90 P. 144) (fn. 91 GBP 105,638.36 - GBP 18.85 + GBP 405,109.21= GBP 510,728.72)*

- *The statement as at 19 November 2019, indicated the '*Total Current Market Value' *of the Policy as GBP 496,094.81. (fn. 92 P. 281) The said market value was made up of cash in the amount of GBP 104,345.36 (less GBP 18.33 from a conversion of -21.28 EUR) and cash of USD 507,480.31 (valued in GBP at*

*391,767.78 at the time). (fn. 93 p. 283) (fn. 94 GBP 104,345.36 - GBP 18.33 + GBP 391,767.78 = GBP 496,094.81)*

- *The statement as at 31 December 2019, indicated the* 'Total Current Market Value' *of the Policy as GBP 507,498.86. (fn. 95 P. 289)*

  *The said figure was made up of* 'Cash' *of GBP 24,772.24,* 'Collectives' *(i.e. collective investment schemes) of GBP 251,259.45 and* 'Exchange Traded Funds' *of GBP 231,467.17. (fn. 96 Ibid. – GBP 24,772.24 + GBP 251,259.45 + GBP 231.467.17 = GBP 507,498.86)*

  *It is noted that according to the said statement, the* 'Collectives' *and* 'Exchange Traded Funds' *comprised the following seven investment products at the time: (fn. 97 P. 290-291)*

  Collective

  - 'Equity Trustees Fund Services New Horizon Global Balanced c ACC' (at a Book Value of GBP 248,256.35)

  Exchange Traded Funds

  - 'Amundi MSCI Emerging Markets UCITS ETF' (at a Book Value of GBP 74,137.01)
  - 'ETFS Metal Securities ETFS Physical PM Basket' (at a Book Value of USD 15,967.36 equivalent to GBP 12,350.99)
  - 'Ishares III plc Global Aggregat BD UCITS ETF' (at a Book Value of GBP 24,821.84)
  - 'Ishares III Plc JP Morgan EM Local Govt Bon' (at a Book Value of GBP 12,389)
  - 'SPDR ETF S&P UK Divd Aristocrats' (at a Book Value of GBP 61,330.43)
  - 'UBS ETF SICAV MSCI WRD SOC ESP UCIT A USD' (at a Book Value of GBP 36,963.13)

  *The above-mentioned seven investments reflect the investments listed in the OMI Dealing Instruction Form dated 31 October 2019 referred to earlier on. (fn. 98 P. 192)*

  *A breakdown of the 'Unrealised – Profit Loss' for each of the investment instruments indicated above was included in the same statement. (fn. 99 Ibid.)*

- *The statement as at 8 January 2020 indicated the '*Total Current Market Value' *of the Policy as GBP 497,435.56. (fn. 100 P. 301)*

*The said figure was made up of* 'Cash' *of GBP 24,772.44,* 'Collectives' *of GBP 239,447.25 and* 'Exchange Traded Funds' *of GBP 233,215.87. (fn. 101 Ibid. – GBP 24,772.44 + GBP 239,447.25 + GBP 233,215.87 =- GBP 497,435.56) A breakdown of the* 'Unrealised – Profit/Loss' for *each of the investment instruments was included in the same statement. (fn. 102 P. 302)*

- *The statement, issued by Quilter International (previously Old Mutual International), as at 2 March 2020 in respect of the Policy (now held by the 'MW SIPP Trustees Ltd as trustee of MW SIPP2'), (fn. 103 P. 194) indicates the* 'Total Current Market Value' *as GBP 470,267.60. (fn. 104 P. 196)*

  *The said figure was made up of* 'Cash' *of GBP 23,081.13,* 'Collectives' *of GBP 228,085.52 and* 'Exchange Traded Funds' *of GBP 219,100.95. (fn. 105 Ibid. – GBP 23,181.13 + GBP 228,085.52 + GBP 219,100.95 = GBP 470,267.60) A breakdown of the* 'Unrealised – Profit/ Loss' *for each of the investment instruments is included in the same statement. (fn. 106 P. 197)*

*Given that the Arbiter required more information to finalise his decision, a decree was issued on 28 August 2023 requesting the parties to provide further details, namely, evidence of the proceeds resulting from the actual reversal (i.e. the actual sale) of the disputed investment transactions which the Complainant had claimed that he had ordered once discovering about the disputed investments and also a copy of the valuation statement reflecting the cash holdings just prior to the rebalancing. (fn. P. 361)*

*The following pertinent matters emerge from the information provided by the parties following the Arbiter's decree:*

*(i) As to the exact cash holdings of the policy just prior to rebalancing, the Service Provider referred to the statement as at 19 November 2019, which indicated total value of the policy as GBP 496,094.81. (FN. 108 p. 363)*

*As noted above, this figure consisted of cash in the amount of GBP 104,327.03 and cash of USD 507,480.31 (valued in GBP at 391,767.78 at the time). (fn. 108 P. 363)*

*(ii) Six out of the seven disputed purchased investments were indeed sold on 11 and 18 March 2020. The realised profit/losses emerging from such transactions on the respective investments are detailed in Table A below.*

***Table A***

***Details emerging from the* 'Historical Cash Account Transactions' *statement of Quilter International as at 04/03/20** (fn. 110 P. 212 & 215) **and the statement issued by Quilter International as at 17/03/20** (fn. 111 P. 418 & 420)*

| ***Name of Investment*** | ***Date bought*** | ***CCY*** | ***Purchase amount*** | ***Date sold*** | ***Sale price*** | ***Realised Capital Loss/Profit (exclusive dividends/ interest)*** |
|---|---|---|---|---|---|---|
| *Equity Trustees Fund Services New Horizon Global Balanced c ACC* | *27.11.2019* | *GBP* | *248,256.35* | *18.03.2020* | *232,740.33* | *-15,516.02* |
| *Amundi MSCI Emerging Markets UCITS ETF* | *26.11.2019* | *GBP* | *74,137.01* | *11.03.2020* | *65,175.35* | *-8,961.66* |
| *ETFS Metal Securities ETFS Physical PM Basket* | *25.11.2019* | *USD* | *15,967.36* | *No details emerged that this investment was sold. The account statement actually indicates that further purchases were made into this investment on 11/03/2020 (fn. 112 P. 419)* | | |
| *Ishares III plc Global Aggregat BD UCITS ETF* | *25.11.2019* | *GBP* | *24,821.84* | *11.03.2020* | *25,500.04* | *+678.20* |
| *Ishares III Plc JP Morgan EM Local Govt Bon* | *25.11.2019* | *GBP* | *12,389.00* | *11.03.2020* | *11,420.15* | *-968.85* |
| *SPDR ETF S&P UK Divd Aristocrats* | *25.11.2019* | *GBP* | *61,330.43* | *11.03.2020* | *55,524.23* | *-5,806.20* |
| *UBS ETF SICAV MSCI WRD SOC ESP UCIT A USD* | *25.11.2019* | *GBP* | *36,963.13* | *11.03.2020* | *32,899.11* | *-4,064.02* |
| ***Total realised loss in GBP (excluding dividends and transaction fees)*** | | | | | | *-34,638.55* |

*According to the statements provided, the total cash dividends received from the disputed investments until these were sold as well as the transaction fees incurred on the purchase/sale of the disputed investments are as follows:*

- *a cash dividend of GBP 197.74 from Ishares III plc Global Aggregat BD UCITS ETF on 29.01.2020; (fn. 113 P. 418)*
- *a cash dividend of USD 420.78 and USD 296.40 on 29/01/2020 and 06/02/2020 respectively on Ishares III plc JP Morgan EM Local Govt Bon and UBS ETF SICAV MSCI WRD SOC ESP UCIT A USD. (fn. 114 P. 419) According to the USD/GBP conversion rate applicable on the indicated dates these are calculated to be the equivalent of GBP 323.159 and GBP 229.295*

*respectively (in total thus amounting to GBP 552.45); (fn. 115 Spot rate as at 29.01.2020 was 1 USD = 0.768 GBP whilst spot rate as at 06.02.2020 was 1 USD = 0.7736)*

- *Transaction charges incurred on the purchase/sale on the six investments that were actually sold calculated as GBP 164 (GBP14x10 + GBP12x2). (fn. 116 P. 212 & 418-419)*

*The above corroborates that the Complainant did indeed promptly sell the disputed investments (with the exception of one investment) and that a total realised loss arose from the disputed investments (taking into consideration dividends received, any realised gains and transaction fees incurred). (fn. 117 Any FX conversions excluded) (fn. 118 GBP 34,638.55 + GBP 197.74 + GBP 552.45 – GBP 164 =34,052.36)*

Other observations

*It is noted that as part of the information provided by the Complainant following the Arbiter's decree, the Complainant indicated a new figure of loss (based on a valuation of July 2019 and on 17 March 2020) claiming that:*

> *'In summary, net loss from the full cash position of July 2019: GBP 505,273.28 – GBP 429,661.29 = GBP 75,611.99. Additionally, this doesn't include a currency loss which we cannot estimate as Sovereign rebalancing in November was done in GBP when all our cash was in USD. GBP lost value vs USD since 2017 and worsen steeply during early 2020 because of the pandemic'. (fn. 119 P. 392)*

*Apart that the Complainant cannot change the claimed losses at such late stage of the proceedings, the Arbiter still considers that the benchmarks used to calculate his loss (by taking the valuation as at July 2019 and comparing it to that of 17 March 2020) is not appropriate for the reasons outlined in the section titled '*Alleged losses claimed by the Complainant' *above.*

*The Arbiter shall next proceed to determine how, in his opinion, and given the particular circumstances of the case, the Complainant is to receive compensation, if any, to put him close to his original position (of cash GBP 104,327.03 and cash of USD 507,480.31) had the disputed transactions not been undertaken.*

Calculation of any applicable compensation

*For the purposes of this decision, the following calculations, taking into consideration the latest statement provided of 17 March 2020, are being made to arrive at a figure of shortfall or otherwise: (fn. 120 P. 412 - 420)*

*(i) The opening Cash balance in GBP (upon the re-assignment of the policy to the new retirement scheme on 3 March 2020 excluding the regular fees and*

*charges that would have in any ways applied) is considered to amount to GBP 24,953.73 (i.e., GBP 24,755.99 plus the cash dividend of GBP 197.74). (fn. 121 p. 418)*

*(ii) The sum of the proceeds received from the sale of investments (as per Table A above) - that is, the sum of GBP 32,899.11, GBP 25,500.04, GBP 55,524.23, GBP 11,420.15, GBP 65,175.35 and GBP 232,740.33 - amounts in total to GBP 423,259.21. (fn. 122 p. 418 & 419) Less the indicated transaction fees of GBP 70, the resulting figure is GBP 423,189.21.*

*(iii) The resulting total cash position in GBP (following the sale of the disputed investments) is accordingly calculated to amount to GBP 448,142.94. (fn. 123 GBP 24,953.73 + GBP 423,189.21 = GBP 448,142.94)*

*(iv) The opening Cash balance in USD (upon the re-assignment of the policy to the new retirement scheme on 3 March 2020) was USD 738.93. (fn. 124 P. 419)*

*(v) The resulting position in USD in total is accordingly calculated to be USD 16,706.29 (USD 738.93 plus the retained investment of USD 15,967.36 as indicated in Table A above and as emerging from the statement of 17 March 2020).*

*(vi) The spot exchange rate applicable at the date of the reversal done by the Complainant (that is, on 11 March 2020) was 1GBP = USD1.2887 (or 1USD = GBP0.7760) (fn. 125 https://www.bankofengland.co.uk/boeapps/database/Rates/asp?TD=11&TM=Mar&TY=2020&into=GBP&rateview=D) The 11 March 2020 is the cut-off date being applied for the purposes of this decision.*

*(vii) The resulting cash position of GBP 448,142.94 in March 2020 less the Complainant's GBP position in November 2019 of GBP 104,327.03 as mentioned above equals to GBP 343,815.91. According, to the abovementioned spot USD rate this figure is calculated to be the equivalent of USD 443,075.56 as at 11 March 2020. (fn. 126 GBP 343,815.91 converted to USD using the exchange rate of 1GBP = USD1.2887)*

*Together with the USD balance of USD 16,706.29, as referred to above, the total USD balance is thus calculated to amount as USD 459,781.85.*

*The difference between the resulting figure of USD 459,781.85 and the Complainant's original USD position in 2019 of USD 507,480.31, results into a shortfall of USD 47,698.46. The said shortfall is calculated to be the equivalent of GBP 37,014 as at the date of the reversals of 11 March 2020. (fn. 127 USD 47,698.46 converted to GBP using the exchange rate of 1USD = GBP0.7760)"*

## L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata tal-Arbitru, u fit-2 ta' Novembru, 2023, intavolat appell fejn qed titlob lil din il-Qorti sabiex tirrevoka, tħassar jew tvarja d-deċiżjoni appellata. Tgħid li l-aggravji tagħha huma s-segwenti: (i) l-Arbitru applika u nterpreta ħażin il-liġi meta ddeċieda li s-soċjetà appellanta naqset mid-dmirijiet tagħha fil-kwalità tagħha ta' *trustee* meta ngaġġat lil Sovereign Wealth; u (ii) l-Arbitru naqas li jieħu in konsiderazzjoni l-fatt li l-bejgh tal-prodott sar wara li l-portafoll ġie trasferit lil terzi.

7. L-appellat wieġeb fis-27 ta' Novembru, 2023, fejn issottometta li d-deċiżjoni appellata hija ġusta, u għaldaqstant timmerita li tiġi kkonfermata għal dawk ir-raġunijiet li huwa jispjega fit-tweġiba tiegħu.

## Konsiderazzjonijiet ta' din il-Qorti

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

9. Is-soċjetà appellanta tissottometti li l-appellat bħala konsumatur kellu l-obbligu li juri diliġenza xierqa billi jaqra jew tal-inqas jagħti każ id-dokumentazzjoni jew il-korrispondenza li kien qiegħed jirċievi mingħandha. Tikkontendi li ma jistax jingħad li l-appellat ma kellu l-ebda tagħrif, taħriġ jew esperjenza fil-qasam tas-servizzi finanzjarji, għaliex huwa kien jaħdem proprju f'pożizzjoni maniġerjali f'ditta li toffri biss servizzi finanzjarji. Lanqas ma seta' jingħad li huwa ma kienx jaf jew ma kkontemplax l-effett tan-nuqqas tiegħu. Tikkontendi li kien proprju n-nuqqas li jħares l-obbligi tiegħu bħala konsumatur,

flimkien maċ-ċirkostanzi appena msemmija, li wasslu għat-telf allegatament imġarrab minnu. Is-soċjetà appellanta tinsisti li hija kienet aġixxiet fl-aħjar interess tal-appellat membru sabiex tipproteġi l-assi tiegħu, u dan filwaqt li applikat il-prudenza u l-għaqal fid-deċiżjonijiet tagħha fl-amministrazzjoni tal-portafoll tiegħu. Iżda dan f'ċirkostanzi fejn kien hemm professjonist li kien injora l-istruzzjonijiet tat-*trustee,* mingħajr ma talab spjegazzjoni ta' dak li kien qiegħed jingħad lilu jew iwieġeb għalih. Għalhekk issostni li l-uniku triq li kien fadlilha kien proprju li taħtar konsulent regolat u liċenzjat għan-nom tiegħu. Filwaqt li tagħmel riferiment għat-Tabella A f'paġna 32 tad-deċiżjoni appellata, tirrileva li din it-Tabella ġiet ikkomputata mill-Arbitru stess wara li huwa kien osserva li:

> *"apart from the conflicting statements made, the Arbiter considers that, for the purposes of this decision, the submissions provided by both parties to the Complaint are inappropriate in determing whether a loss or profit has in practice emerged as result of the disputed transactions".*

Is-soċjetà appellanta tgħid li l-Arbitru kellu jieqaf hemm, u jiddikjara li ma kienx hemm prova tat-telf allegat, anzi tgħid li fil-każ odjern kien tassew ċar li l-appellat kien fil-fatt għamel profitt mill-portafoll tiegħu. Is-soċjetà appellanta tgħid li l-Arbitru kellu fuq kollox jistabbilixxi ness kawżali bejn in-nuqqasijiet allegati tagħha, u t-telf soffert mill-appellat, li kellu jiġi ppruvat sal-grad rikjest mil-liġi. Filwaqt li tiċċita dak li qal l-Arbitru fid-deċiżjoni ASF 101/2021 fl-ismijiet **ZT u TT rispettivament *vs*. Bank of Valletta plc**, is-soċjetà appellanta tirrileva li minkejja li l-Arbitru kellu quddiemu valutazzjoni li kienet xhieda tal-profitt li kien għamel l-appellat, huwa ddikjara li kien hemm telf riżultat tal-ibbilanċjar mill-ġdid li sar tal-portafoll tiegħu. Is-soċjetà appellanta tgħid li skont il-valutazzjoni tad-19 ta' Novembru, 2019, qabel ma sar l-imsemmi *rebalancing* tal-portafoll, dan kellu valur ta' GBP 496,094.81, u wara l-eżerċizzju in kwistjoni l-valur kien ta' GBP

507,498.86. Iżda hawnhekk is-soċjetà appellanta tikkontendi li l-Arbitru kellu jikkunsidra l-valur tal-portafoll kollu kemm hu, u mhux biss il-*cash balances.* Hija tikkontendi li huwa prinċipju assodat fl-industrija tas-servizzi finanzjarji, li l-valur ta' portafoll huwa l-valur tal-assjem tal-investimenti u mhux tal-flus kontanti eskluži l-investimenti. Tgħid li mill-imsemmija Tabella A, jirriżulta li l-investimenti inbiegħu wara li ġie trasferit lil terzi, u għalhekk mhuwiex minnu li t-telf li ġarrab kienet taħti għalih hi. Filwaqt li tirrileva li l-parir li ngħata mill-konsulent finanzjarju tiegħu li *"the transfer was very easy to do",* ma kienx wieħed tajjeb għaliex il-proċess kien wieħed li kellu jieħu ż-żmien. Barra minn hekk tgħid li t-telf li seħħ ma kienx riżultat tal-għażla tal-prodott minn Sovereign Wealth, iżda ż-żmien li fih sar il-bejgħ skont id-deċiżjoni tal-appellat. Tagħlaq billi ssostni li mill-provi prodotti, l-Arbitru ma seta' qatt wasal għall-konklużjoni tiegħu.

10. L-appellat jikkontendi li d-deċiżjoni appellata hija waħda ġusta, u għalhekk għandha tiġi kkonfermata. Jissottometti li l-Arbitru esprima ampjament il-ħsibijiet tiegħu li wassluh sabiex jilqa' l-ilment tiegħu, u saħansitra elenka diversi fatturi li jirriflettu l-aġir tas-soċjetà appellanta, li waslu għat-telf li huwa ġarrab. L-appellat hawnhekk jagħmel riferiment għal dawn il-fatturi mfissra mill-Arbitru, iżda wkoll dak li qal l-imsemmi Arbitru dwar ir-responsabbiltà għat-telf. L-appellat jgħid li mhux minnu dak li qiegħda tallega s-soċjetà appellanta, li huwa kien iddeċieda li jbiegħ l-investimenti tiegħu f'suq instabbli, u jissottometti li l-ilment tiegħu huwa dwar in-nuqqas ta' awtorizzazzjoni u għarfien tiegħu meta hija kienet ħadet id-deċiżjoni tagħha, u dan fejn hija stess kienet iffirmat struzzjonijiet fil-31 ta' Ottubru, 2019. Isostni li l-aggravju tas-soċjetà appellanta huwa frivolu, għaliex mil-liġijiet applikabbli, kien jirriżulta li din bħala *trustee* kellha l-obbligu li tissalvagwardja l-portafoll tiegħu. Huwa jistaqsi kif l-imsemmija soċjetà appellanta tista' targumenta li l-Arbitru naqas milli jikkunsidra li l-bejgħ

tal-prodott sar wara li l-portafoll kien ġie trasferit lil terzi, meta f'paġna 18 u 19 tad-deċiżjoni appellata hemm imfisser tajjeb kif it-terz Sovereign Wealth Gibraltar ġiet appuntata bħala konsulent finanzjarju u mhux *discretionary investment manager,* u hija kienet involuta fid-deċiżjonijiet fir-rigward tal-portafoll. Huwa jiċċita dak li qal l-Arbitru fid-deċiżjoni appellata dwar l-involviment tas-soċjetà appellanta, u anki dwar ir-responsabbiltà tagħha fir-rigward tat-tranżazzjonijiet li kienet ippermiet. Huwa jagħlaq is-sottomissjonijiet tiegħu billi jagħmel riferiment għal dak li qalet din il-Qorti fis-sentenza tagħha tad-19 ta' Jannar, 2022, fl-ismijiet **Elizabeth Green (Passaport Ingliż nru. 210802400) *vs.* Momentum Pensions Malta Limited (C 52627)**, u anki l-Arbitru fid-deċiżjoni tiegħu dwar l-istess każ.

11. Il-Qorti mill-ewwel tgħid li d-deċiżjoni tal-Arbitru hija waħda tajba. L-Arbitru jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġonevoli fiċ-ċirkostanzi partikolari, u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad għadda sabiex għamel diversi osservazzjonijiet fir-rigward tal-appellat, u anki fir-rigward tas-soċjetà appellanta. Huwa kkonstata li l-Iskema kienet tikkonsisti f'*trust* b'domiċilju hawn Malta kif awtorizzata mill-MFSA bħala *Personal Retirement Plan* taħt l-Att li Jirregola Fondi Speċjali (Kap. 450 tal-Liġijiet ta' Malta kif imħassar), u dan permezz ta' *trust deed* tat-13 ta' Lulju, 2012. Għaraf li kif irrilevat is-soċjetà appellanta stess, l-Iskema kienet diretta mill-membri tagħha, fejn l-appellat bħala membru kellu jinnomina l-konsulent finanzjarju tiegħu għall-fini tal-investiment li kellu jsir.

12. L-Arbitru għaraf li Monfort International GmbH, li kienet stabbilita ġewwa l-Iżvizzera, kienet ġiet indikata mill-appellat fl-applikazzjoni għas-sħubija fl-

Iskema bħala l-konsulent finanzjarju tiegħu. Irrileva li l-appellat kien issieħeb fl-Iskema f'Diċembru 2016, u l-assi fil-kont tiegħu kienu ntużaw sabiex inxtrat polza ta' assikurazzjoni fuq il-ħajja mingħand *Old Mutual International* magħrufa bħala l-*Executive Investment Bond,* fejn imbagħad saru diversi tranżazzjonijiet sottostanti. Irrileva li fl-14 ta' Novembru, 2016, l-applikazzjoni ġiet iffirmata mit-*Trustee* tal-Iskema, u anki mill-appellat bħala l-assigurat, u din kellha tiġi fis-seħħ fis-26 ta' Jannar, 2017. Osserva li ma kien hemm l-ebda indikazzjoni fl-imsemmija applikazzjoni tal-munita li kellha tiġi adoperata, għalkemm kien hemm indikat li fin-nuqqas din kellha tkun il-Lira Sterlina u l-munita ma setgħetx tinbidel sussegwentement.

13. Minn hawn l-Arbitru għadda sabiex elenka kronoloġikament, u fisser l-avvenimenti u l-korrispondenza kollha li għaddiet bejn il-partijiet mit-13 ta' Mejju, 2019 sal-15 ta' Ġunju, 2020. Imbagħad huwa għamel l-osservazzjonijiet tal-aħħar tiegħu, qabel m'għadda għad-deċiżjoni tiegħu. Qal li kien wara li seħħet bidla fil-qafas regolatorju fir-rigward ta' min seta' jżomm il-kariga ta' konsulent finanzjarju fi skemi li kienu diretti mill-membri, u wara li hija ma kellha l-ebda tweġiba mingħand l-appellat, li s-soċjetà appellanta għażlet li tinnomina minn jeddha konsulent finanzjarju skont dak rikjest mir-regolamenti l-ġodda. L-Arbitru rrileva li l-konsulent finanzjarju l-ġdid imbagħad għadda sabiex ibbilanċja mill-ġdid il-portafoll tal-appellat, filwaqt li s-soċjetà appellanta ppermettiet it-tranżazzjonijiet li dan bagħat sabiex jiġu eżegwiti. L-Arbitru sostna li bħala *Trustee* u Amministratriċi tal-Iskema, hija kienet tenuta tassigura li l-imsemmija Skema kienet tirrispetta r-rekwiżiti l-ġodda tar-regolamenti entro t-termini stabbiliti, iżda korrettement huwa ma kkunsidrax li l-aġir tagħha kien wieħed raġonevoli jew ġustifikat fiċ-ċirkostanzi partikolari tal-każ, u lanqas ma kien jirrifletti d-dover tagħha li taġixxi fl-aħjar interessi tal-appellant, li hija kellha

tħares fil-kwalitajiet tagħha ta' *Trustee* u Amministratriċi. Il-Qorti tgħid li hawnhekk l-Arbitru għaraf proprju l-qofol tal-kwistjoni li wasslet għat-telf imġarrab mill-appellat, u sewwa rrileva li l-aġir tas-soċjetà appellanta ma kienx wieħed aċċettabbli fiċ-ċirkostanzi tal-każ odjern, fejn hija kienet ingħatat struzzjonijiet ċari mill-appellat għat-trasferiment tal-investiment tiegħu.

14. L-Arbitru kkunsidra li s-soċjetà appellanta bħala Amministratriċi u *Trustee* tal-Iskema, kienet naqset milli taġixxi sew u b'mod li kien jirrifletti d-doveri tagħha fl-imsemmija karigi, inkluż fost oħrajn li hija taġixxi bil-prudenza, diliġenza u attenzjoni ta' *bonus paterfamilias ai termini* tas-subartikolu 21(1) tal-Att dwar *Trusts* u *Trustees* (Kap. 331), li tamministra l-Iskema skont it-termini stabbiliti kif rikjest mill-para. (a) tas-subartikolu 21(2) tal-istess liġi, li taġixxi fl-aħjar interessi tal-Iskema skont is-subartikoilu 13(1) tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514 tal-Liġijiet ta' Malta), u li taġixxi bil-ħila dovuta, kura u diliġenza kif titlob ir-regola 4.1.4 ta' Part B.4.1 intestat '*Conduct of Business Rules'* tar-Regoli li nħarġu fl-1 ta' Jannar, 2015, taħt il-Kap. 514.

15. Spjega li huwa kien wasal għal din il-konklużjoni wara li qies is-segwenti li l-Qorti tgħid jirriflettu sew il-fehma tagħha, u għalhekk tagħmilhom tagħha:

(i) *L-azzjonijiet li ttieħdu marru oltre t-termini tal-ħatra u saru mingħajr il-kunsens tal-appellat.* L-Arbitru hawnhekk għamel enfażi fuq id-distinzjoni bejn ir-rwol ta' konsulent finanzjarju li ma kellu l-ebda diskrezzjoni, u dak ta' *manager* tal-investiment, wara li kkunsidra li s-soċjetà appellanta kienet irrilevat li Sovereign Wealth Gibraltar kienet ġiet maħtura bħala l-konsulent finanzjarju l-ġdid tal-appellat. Huwa qal li ma kienx ġie ndikat jew ippruvat li din kellha xi diskrezzjoni fir-rigward tat-tranżazzjonijiet, bħal fil-każ ta' *manager* tal-investiment, u

għalhekk sewwa rrileva li ma kienx ċar b'liema awtorità hija kienet talbet sabiex jiġu eżegwiti t-tranżazzjonijiet tal-investimenti. Għalhekk l-appellat kellu jagħti l-kunsens tiegħu b'mod ċar u inekwivoku, qabel l-eżekuzzjoni in kwistjoni, u l-Qorti hawnhekk tagħmel enfażi partikolari fuq dan ir-raġunament. Min-naħa tagħha tajjeb sostna l-Arbitru li s-soċjetà appellanta kellha tassigura bħala *Trustee* u Amministratriċi tal-Iskema, li tali kunsens kien ingħata, iżda minflok hija ppermettiet li jsiru l-imsemmija tranżazzjonijiet, u saħansitra ffirmat konġuntivament l-istruzzjonijiet fil-31 ta' Ottubru, 2019.

(ii) *Ma kienx hemm evidenza li l-appellat kien ġie debitament infurmat bit-tranżazzjonijiet irrakkomandati/li kellhom isiru fin-nuqqas ta' tweġiba mingħandu.* L-Arbitru osserva li kuntrarjament għal dak li ngħad mill-uffiċjal tas-soċjetà appellanta waqt ix-xhieda tiegħu fis-seduta tat-22 ta' Novembru, 2021, l-*email* tal-15 ta' Novembru, 2019 ma kienitx turi li l-appellat kien ġie debitament infurmat bit-tibdil li kellu jseħħ fil-polza, u liema kienu l-investimenti li kellhom isiru, iżda kien hemm biss riferiment ġeneriku għar-ribilanċjar tal-portafoll. Fl-istess *email* ma kien hemm l-ebda twissija li jekk l-appellat jonqos milli jwieġeb, il-konsulent finanzjarju u l-Iskema kienu ser jipproċedu bit-tranżazzjonijiet. L-Arbitru qal li wkoll fl-*email* tal-15 ta' Ottubru, 2019, is-soċjetà appellanta kienet naqset li tagħti dettalji suffiċjenti, u li tindika liema kienu t-tranżazzjonijiet magħżula jew irrakkomandati. Dan kollu tgħid il-Qorti ċertament huwa xhieda tan-nuqqas ta' trasparenza u kjarezza fl-operat tas-soċjetà appellanta.

(iii) *Ma kienx hemm diskussjonijiet adegwati bil-quddiem u notifiki lill-appellat.* L-Arbitru osserva li l-appellat kien ingħata termini qosra sabiex iwieġeb. B'riferiment għal dak li ngħad mill-Awtorità fid-dokument tagħha ntestat *'Consultation on Amendments to Pension Rules for Personal Retirement Schemes. Feedback to statements issued further to industry reponses to MFSA consultation documents 4 January 2019',* irrileva li l-appellat kien ġie notifikat mis-soċjetà appellanta bl-emendi leġislattivi fil-qafas regolatorju fit-13 ta' Mejju, 2019, fir-rigward tat-tneħħija tal-konsulent finanzjarju tiegħu jekk dan ma kienx konformi mal-kriterji l-ġodda. Irrileva li kien imbagħad ħames xhur wara, fil-15 ta' Ottubru, 2019, li huwa ġie nfurmat li fin-nuqqas ta' tweġiba mingħandu, is-soċjetà appellanta kienet ser taħtar lil Sovereign Wealth Gibraltar bħala konsulent finanzjarju tiegħu. Imbagħad fil-15 ta' Novembru, 2019, l-appellat irċieva wkoll *email* mingħand l-imsemmija Sovereign Wealth Gibraltar, fejn ġie mgħarraf li tliet ijiem wara fit-18 ta' Novembru, 2019, il-portafoll tiegħu kien ser jiġi bilanċjat mill-ġdid. L-Arbitru imbagħad qal li dan seħħ fil-25 ta' Novembru, 2019. Sostna korrettement li fejn l-appellat kien ingħata ftit jiem biss sabiex jipprotesta rigward it-tranżazzjonijiet, dan ma setax jitqies bħala terminu adegwat jew saħansitra ġustifikat fis-sitwazzjoni partikolari tal-appellat. L-Arbitru qal li s-soċjetà appellanta kienet naqset li tassigura li r-ribilanċjar tal-portafoll kien ġie diskuss mill-appellat u mill-konsulent finanzjarju maħtur minnha stess, liema konsulent finanzjarju kienet soċjetà li tagħmel parti mill-istess grupp ta' kumpanniji, u għalhekk seta' saħansitra kien hemm possibilità ta' kunflitt ta' nteress.

(iv) *Is-soċjetà appellanta kienet taf li l-appellat kien talab sabiex jittrasferixxi l-investiment tiegħu qabel ma ppermettiet it-tranżazzjonijiet*. L-Arbitru ċertament kien għal kollox ġustifikat meta qal li s-soċjetà appellanta kienet taf jew kellha tkun taf bit-talba tal-appellat għat-trasferiment tal-investiment tiegħu, iżda ma kienx jidher li hija tat wisq każ ta' dan il-fattur. Irrileva li waqt l-udjenza tat-18 ta' Jannar, 2022, l-imsemmija soċjetà appellanta kienet ikkonfermat li hija kienet taf bit-talba, iżda *"...we were still in breach of the regulations; the transfer to the UK would take some time to be finalised".* L-Arbitru qal li għalkemm *prima facie* kien jidher li l-appellat ma kienx ta każ l-avviż tal-ħatra tal-konsulent finanzjarju l-ġdid, u anki tar-ribilanċjar tal-portafoll, huwa korrettement stqarr li seta' jifhem li l-imsemmi appellat ma kienx ħass il-ħtieġa li jaċċetta t-tibdil, ġaladarba huwa kien talab għat-trasferiment tal-investiment, u li huwa kellu biss investiment fl-Iskema konsistenti fi flus kontanti. L-Arbitru kkunsidra ġustament li ġaladarba saret it-talba għat-trasferiment, is-soċjetà appellanta ma kellhiex tipproċedi bit-tibdil fil-konfront tiegħu.

(v) *Ma kienx hemm theddida imminenti għall-valur tal-investiment.* Barra minn hekk l-Arbitru sewwa għaraf li ma kienx irriżulta li kien hemm xi riskju imminenti għall-investiment tal-appellat li rrikjeda azzjoni urġenti min-naħa tas-socjetà appellanta. Huwa qies li l-argumenti msejsa fuq id-diversifikazzjoni neċessarja fil-portafoll, ma kienux aċċettabbli fejn l-assi kienu qegħdin jinżammu fi flus kontanti kif kienu oriġinarjament qabel ma ġew investiti. Il-Qorti tikkondividi dan ir-raġunament.

(vi) *Ma kienx hemm indikazzjoni minn xi awtorità sabiex is-soċjetà appellanta taġixxi kif għamlet.* Filwaqt li l-Arbitru għamel riferiment għal dak li ntqal fir-rigward ta' konsulenti finanzjarji ġewwa l-Iżvizzera waqt laqgħa tat-22 ta' Ottubru, 2019 bejn il-Malta Association of Retirement Scheme Practitioners u l-Awtorità, sewwa rrileva li ma kienx hemm evidenza li l-Awtorità kienet indikat lis-soċjetà appellanta li hija setgħet tippermetti deċiżjonijiet dwar investimenti mingħajr il-kunsens tal-membru. Qal li l-estratt li huwa kien appena ċċita, kien juri proprju li kien hemm possibilità ta' trasferiment tal-investiment għal territorju ieħor, hekk kif proprju kien għażel li jagħmel l-appellat.

16. Għal dawn ir-raġunijiet kollha, l-Arbitru qal li huwa kien qiegħed jikkunsidra l-aġir tas-soċjetà appellanta bħala wieħed mhux ġustifikat, u saħansitra mhux xieraq fiċ-ċirkostanzi ta' dak iż-żmien. Kif diġà esprimiet ruħha l-Qorti, hija tikkondividi bi sħiħ dak kollu li fisser l-Arbitru in sostenn tad-deċiżjoni tiegħu, u tassew ma ssib xejn li għandu jiġi ċċensurat.

Minn hawnhekk l-Arbitru għadda sabiex ikkunsidra jekk tassew l-appellat kien bata telf fil-kapital jew qligħ, jew jekk sofra xi danni riżultat tal-aġir ilmentat. Filwaqt li għaraf li l-pretensjoni għad-danni tal-appellat kienet fis-somma ta' GBP 40,000, liema pretensjoni kienet qiegħda tiġi kkontestata mis-soċjetà appellanta, huwa kkunsidra dak li qal l-appellat fix-xhieda tiegħu waqt is-seduta tat-22 ta' Novembru, 2021, u anki dak li qal id-direttur manniġerjali tas-soċjetà appellanta waqt l-istess seduta. Irrileva li l-pożizzjonijiet tal-partijiet kienu kunfliġġenti dwar jekk tassew l-appellat sofra telf, iżda tgħid il-Qorti li sewwa għamel meta ma waqafx hawn, u ndaga l-kwistjoni iktar fil-fond. Tikkunsidra li ċertament dan m'għamlux sabiex b'xi mod jiffavorixxi lill-appellat, iżda sabiex tiġi riżolta l-vertenza bejn il-partijiet b'mod l-aktar ekwu u ġust. L-Arbitru osserva

li kif kien jirriżulta mill-protest ġudizzjarju li ppreżenta l-appellat kontra s-soċjetà appellanta fit-13 ta' Novembru, 2020, huwa kien ikkalkula t-telf tiegħu billi għamel paragun bejn il-valur tas-suq tal-investiment tiegħu riżultanti fis-7 ta' Lulju, 2019, li kien fl-ammont ta' GBP 510,728.72 u l-valur tas-suq tal-istess investiment riżultanti fit-2 ta' Marzu, 2020, fl-ammont ta' GBP 470,267.60. L-Arbitru qal li minn dan kien jirriżulta li t-telf soffert kien tassew ta' GBP 40,461.12. Huwa kkunsidra wkoll l-allegazzjoni tiegħu li f'Marzu 2020 kien jirriżulta telf ta' GBP 40,000, punt li huwa reġa' ssolleva fin-nota ta' sottomissjonijiet finali tiegħu. L-Arbitru kkunsidra wkoll li s-soċjetà appellanta kienet għamlet paragun tal-valur tal-investiment fis-suq riżultanti fid-19 ta' Novembru, 2019, fil-31 ta' Diċembru, 2019 u fit-8 ta' Jannar, 2020, u li hija kienet qiegħda ssostni li l-appellat fil-fatt ma sofra l-ebda telf, u li l-valuri rilevanti kienu dawk riżultanti meta sar l-ibbilanċjar tal-investiment u meta l-polza ġiet trasferita. L-Arbitru qal li ma kien hemm l-ebda evidenza li fit-8 ta' Jannar, 2020, tassew seħħ it-trasferiment tal-investiment, fejn is-soċjetà appellanta kienet saħansitra indikat data differenti, jiġifieri dik tat-3 ta' Marzu, 2020. Osserva li fil-fatt ir-rendikont tat-8 ta' Jannar, 2020, kien jindika lis-soċjetà appellanta bħala t-titolari tal-polza. Huwa għamel diversi osservazzjonijiet fir-rigward tar-rendikonti diversi li ħarġet Old Mutual International, u li ġew esebiti waqt il-proċeduri fejn kien hemm indikazzjoni tal-valur tal-investiment. L-Arbitru spjega li peress li huwa kellu bżonn iktar informazzjoni sabiex jasal għad-deċiżjoni tiegħu, huwa kien talab lill-partijiet sabiex jipprovdu iktar dettalji, proprju evidenza tar-rikavat riżultanti mill-bejgħ tal-investiment, iżda wkoll kopja tal-valutazzjoni li kienet tirrifletti l-investiment fi flus kontanti hekk qabel ma ġie ribilanċjat. Hawnhekk huwa elenka dak li fil-fehma tiegħu huwa pertinenti għall-każ odjern, anki permezz ta' Tabella A, u korrettement sab li l-appellat tassew

kien għamel telf meta biegħ l-investimenti kkontestati. B'hekk l-Arbitru għadda sabiex għamel eżerċizzju skont kif fil-fehma kellu jiġi kkalkulat il-kumpens dovut lill-imsemmi appellat, jekk tassew dovut, sabiex huwa jitqiegħed viċin il-pożizzjoni oriġinali tiegħu.

17. Il-Qorti f'dan kollu ma ssib xejn irraġonevoli u mhux ġustifikat, u tagħraf li d-deċiżjoni tal-Arbitru hija tassew waħda mirquma li ma tħalli l-ebda dubju dwar dak kollu li jingħad, u għalhekk m'għandha xejn aktar x'iżżid magħha. Għaldaqstant il-Qorti ma ssibx li l-aggravji mressqa mis-soċjetà appellanta huma ġustifikati, u sejra tiċħadhom.

**<u>Decide</u>**

**Għar-raġunijiet premessi l-Qorti taqta' u 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**