



QORTI TA' L-APPELL

**ONOR. IMHALLEF
PHILIP SCIBERRAS**

Seduta tas-26 ta' Frar, 2010

Appell Civili Numru. 25/2009

**Peter J. Azzopardi, Adrian P. Azzopardi, Paul S.
Azzopardi, Mario W. La Pira u Joseph N. Fava bhala
promoturi ta' Sibylline Capital Management Co.
Limited**

vs

Awtorita` ghas-Servizzi Finanzjarji

Il-Qorti,

Fid-19 ta' Ottubru, 2009 it-Tribunal dwar Servizzi Finanzjarji ppronunzja s-segweni decizjoni fl-ismijiet premessi:-

“1. It-tribunal ircieva s-segweni ittra datata 12 ta' Novembru 2004 minghand l-Avukat Dottor Pio M. Valletta ghan-nom ta' Peter J. Azzopardi, Adrian P. Azzopardi, Paul S. Azzopardi, Mario W. La Pira u Joseph N. Fava :-

"This is an application for appeal in terms of Article 21 of the Malta Financial Services Authority Act - Chapter 330 of the Laws of Malta and Article 19 of the Investment Services Act - Chapter 370 of the Laws of Malta filed by the undersigned on behalf of Peter J. Azzopardi, Adrian P. Azzopardi, Paul S. Azzopardi, Mario W. La Pira and Joseph N. Fava as per attached mandate which is being marked "APP 1".

An appeal is being sought from the decision by the Malta Financial Services Authority ("MFSA") dated 20th October, 2004 to refuse an application for a license to trade potential clients' funds abroad on the spot FOREX ("FX") market dated 23rd January, 2004. The licence was submitted by my clients Messrs. Peter J. Azzopardi, Adrian P. Azzopardi, Paul S. Azzopardi, Mario W. La Pira and Joseph N. Fava. Copies of the letter of refusal of the 20th October, 2004 and of the letter of application are being attached herewith and marked "APP2"and"APP3".

Also attached are copies of all correspondence exchanged between the applicants or their legal counsel and the Malta Financial Services Authority, which copies are collectively marked "APP4 ".

GROUND FOR REFUSAL

From an examination of the MFSA 's letter of the 20th October, 2004 and from a reading of all previous correspondence the grounds for refusal are:-

a) Lack of MFSA's competence requirements on the part of the applicants or any of them

b) FX Market Risk for Private Clients

GROUNDS FOR APPEAL

a) Lack of MFSA's competence requirement on the part of the applicants or any of them

MFSA's refusal to grant the license requested on the ground of lack of competence requirements constitutes an abuse of the authority's discretion and is manifestly unfair taking account of the local general situation.

Nowhere in MFSA's correspondence can one find an adequate or objective motivation why the persons indicated as those who would be executing the trading activity, namely Peter J. Azzopardi and Paul S. Azzopardi do not comply with the competence requirements specific to the activity for which the license is being requested. No specific competence requirements for the activity for which the license is requested were ever stated and an examination of all relevant and related documentation provides no specific reference

The only attempt to provide a justification appears in MFSA's letter of the 18th June, 2004 where it was argued that the provision of advice, information or suggestions in relation to the FX trading activity and the act of putting such advice, information and suggestions into action, were absolutely distinct and hence the competence in one area does not imply competence in the other area. Apart from being highly futile, this justification did not possess those characteristics which could render it a fair, objective and valid ground for the refusal of the application on the ground of lack of competence.

*In the book **Judicial Review of Administrative Action**, the author Professor S.A. De Smith in page 253 (3rd Edition) amongst other things, states when writing about the Principles governing the exercise of discretionary powers:*

"The authority in which discretion is vested ... must act in good faith, must have regard to all relevant consideration and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously".

Moreover the well known English Jurist Coke said that discretion was scire per legem quod sit justum; it was "a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences and not to do according to their wills and private affections".

These dictas help one to set out the rules of revision of any act of discretion such as that conferred to the MFSA by Article 6 of the Investment Services Act - Chapter 370 of the Laws of Malta.

When examining all the justifications and motivations advanced by the MFSA to give strength to their decision that, there existed lack of the competence requirements provided under the relevant legislation in the persons assigned with the duty to exercise the licensable activity, it should result that those safeguards so ingrained in our legal system to counter any misuse or misapplication of discretion, have been overstepped.

It will result that in the examination of all the facts provided to MFSA by the applicants with respect to this first ground of refusal, MFSA failed to take regard of all relevant considerations, the spirit of the legislation was not sought and furthermore the arguments used to back this ground for refusal lacked objectivity and were highly arbitrary and capricious.

Competence is assessed on qualification, training and work experience, in this order. These three criteria are however to be solely relevant and judged by reference to that type of market one intends to deal in. Judging these criteria by reference to markets which one does not intend to deal with would clearly mean that one is bringing into the exercise of his discretion irrelevant considerations.

The Spot FX market is distinct and separate from the derivatives market and therefore qualifications for the latter in no way apply to the former. Spot FX traders simply make decisions using technical factors and/or economic fundamentals. Mr. Peter Azzopardi, a UK graduate in Economics and Accountancy, therefore without doubt satisfies the 'qualifications' criteria.

On the other hand, a person can be 'qualified' without having a degree or diploma. Mr. Jay Meisler's letter submitted with the applicants letter dated 27th April, 2004 confirms that Mr. Paul Azzopardi is qualified in providing trading signals. This was evident from the beginning, one hardly expects that a premiere FX site like Global-View.com would allow an 'incompetent' to manage a pay service on their esteemed site. The provision of consistently correct trading signals, coupled with a multi-defence

risk management strategy, are the sole keys to successful FX trading.

Furthermore, 'track-records' can also serve as a 'qualification', especially if the results achieved are favourable. Whilst it is accepted that consistent profitable past performances can never be assessed as a guide to future achievements, the opposite is to be also more than true. Therefore, unprofitable past performances automatically signify 'incompetence'. A verifiable accumulation of 'pips' attained for years 2002 and 2003 respectively would prove this. Regrettably, applicants offer for an audit, to be conducted by a prime audit firm, confirming net 'pip' acquisitions, together with their respective monetary value, under the protective umbrella of our highly effective risk management strategy, was dismissed as almost irrelevant by the Investment Services Unit.

The other two criteria namely training and experience, coupled with qualifications, are more than interlinked, in fact either cannot exist without the other. One cannot have work-experience without having undergone training. Furthermore, for one to undergo training means that one must have a knowledge of the subject matter. This knowledge on the other hand cannot be simply restricted to information acquired from books, courses etc., but must be more profound, as we have demonstrated above, vis-a-vis positively consistent trading signals, coupled with our risk-management strategy.

In this respect, research conducted on the System in 1998, using data extrapolated from the 6 previous years, confirmed that the results yielded in 1998 were no fluke and that the system maintained a notable level of

accuracy. This massive exercise served as a pseudo form of training for both Mr. Peter Azzopardi and Mr. Paul Azzopardi considering that the trading environment was an important factor of this research.

Work-experience can, on the other hand, be said to have initiated during 2001, precisely when Paul Azzopardi and Peter Azzopardi started posting trading recommendations on the Forex Forum of Global-View.com. Since 2002 Paul Azzopardi and Peter Azzopardi were invited to start a trading signal recommendation service, which is still active to date.

Furthermore it is not correct to argue as MFSA have done and continue to do, that in the absence of training/qualifications and in order to satisfy the competence test, one must prove undergoing relative work experience of a minimum number of years with an authorised financial institution. In the first instance there is an unlimited number of authorised financial institutions, but only a select few can be deemed to be specifically authoritative on the subject matter. In the second instance one must discern exactly what designation the word 'trader' implies. The majority of so called 'traders' simply follow 'in-house' signals and can be simply termed as 'deal-executors'. A sound and authoritative financial institution would have a team of 'technical and economic' advisors, whose sole purpose would be to generate trading signals. Traders and advisors work independently of each other, with the latter enjoying the only onerous role. It would therefore be correct in saying that traders working for a top notch financial institution cannot be considered as competent to generate trading signals and this irrespective of the number of years in the

institution's employment. On the other hand advisors, by MFSA 's standards, would not qualify as being competent, primarily because they have never actually traded.

In the case of the applicants however MFSA was informed that both Mr. Peter Azzopardi and Mr. Paul Azzopardi had positive signalling skills and the art of actual trading, the latter coupled with an effective risk management strategy.

b) FXMarket Risk for Private Claim

A logical construction of this ground for refusal as explained in the relevant letters constitutes an unofficial indicator, implying that applicant's proposal might be acceptable to the MFSA if catering solely for one particular type of client, namely the non-private client, vis a Professional Investor Fund, vis-a-vis a Collective Investment Scheme.

In the first instance if applicants are deemed to be competent enough to service non-private clients, simple reasoning implies that they are competent enough to service any type of client.

Secondly, the proceeds arising from potential clients will be traded abroad, in bulk and under one market. Nowhere has it been stated in applicant's proposal that clients will participate vis the issue of shares or units of subscription, the opposite was in fact clearly outlined. Although pooling of contributions and profits and the principle or risk-spreading occurs, the main object of a Collective Investment Scheme, namely 'capital acquired by means of an offer of unit of subscription' does not occur. Therefore, applicant's proposed fund cannot be deemed to be a Collective Investment

Scheme, let alone a Professional Investor Fund.

It is understood that since the (set-up' of the applicant's proposed scheme is not included anywhere in the MFSA 's structures, it either cannot exist and therefore cannot be regulated or worst still, applicants are being manoeuvred into a position where they would have to accept modifications to their 'set-up' to fit the MFSA's structures.

The spirit of the relevant legislation namely the Investment Services Act is that of regulating the carrying on of investment business. It is not that of blocking an activity because of its intrinsic risks (as most if not all investment services would be blocked) but to regulate such activity so as not to be used to harm consumers or against their legitimate interests. In protecting all types of investors seeking financial assistance from third parties via a regulatory framework, it is not the MFSA 's role to determine how much and where an investor may or may not invest. Hence it is not the MFSA 's role to distinguish between investors. It is however, the MFSA 's role to verify competence and moreover see that all systems and procedures to be adopted by the operator are well above board allowing no space for kick-backs, misrepresentation and fund misappropriation. This is contained in the applicants' letter of the 23 January, 2004, under headings, Business Continuity Scenario, Movement of Funds and Conduct of Business and most importantly Trading Philosophy (risk management strategies).

It was underlined in the applicant's proposal that not only would all potential investors be made aware that their capital outlay and projected profits would be at risk but that these

same investors would have to signify their understanding of this scenario. It would therefore be Valletta Fund Management's role (as the designated back office administrators in applicant's proposal) to see that no misrepresentation occurs and that investors understand and signify acceptance of the risk involved.

In this respect it was remarked during formal meetings with MFSA officials that according to this experience a large number of investors simply sign on the dotted line and when things get bad, plead ignorance or illiteracy. Whilst accepting the fact that these type of investors do exist, the MFSA cannot in first instance withhold a venture simply to protect these people. After all there is in existence an even larger number of potential investors who are literate even though these same investors do not possess any financial experience.

The speculative nature of FX Trading for laymen was never disputed. This is not so for experts, which my clients deem themselves to be and have provided proof of such expertise. For people like my clients trading the Spot FX market has to be considered as an investment. It has been proved that my clients know this particular market because they have achieved positive and consistent results over a number of years. Furthermore, the multi-point risk management strategy which was submitted by them with their initial proposal leaves absolutely no doubt that the speculative exposure was reduced to pure calculated risk.

FX trading, as an investment, can best be summed up via these new funds that are beginning to sprout up in the world of finance. Only recently Deutsche (Singapore)

announced the launch of their first FXfund, please refer to:

<http://www.dollardex.com/sg/index.cfm?current=../contents/currencyfund&contentID=2065>

From this article, one should note, that when asked why this fund was being setup, the Deutsche representative stated: "We see the Currency Fund as the first in a new asset class. It's an "active Alpha" (skill based) fund with low correlation to traditional asset classes like bonds and equities. So it is a good way for investors to diversify their risk. Also, many people may not know that the risk-return characteristics of professional currency management compared with equities and bonds are good. Historically, the Sharpe ratios have been as good if not higher than equities or bonds".

Notice the verbiage, 'new class asset', 'skill' and 'professional currency management'. Verbiage that holds weight with what the Sibylline project is about. Again it must be reiterated that this market is not for the layman, but in the hands of a savvy operator, it can be lucrative.

Another point in question is why distinguish between the risk levels of various investment vehicles. It is quite true that some investments are riskier than others. It is also true that projected profits vary with the risk. Nobody can argue, this is natural, the higher the risk the greater the reward. On the other hand can one be absolutely sure that the lower the projected profit the lower would be the risk, even when one is guaranteed one's capital outlay? Would the capital really be guaranteed? Investments with banks for

example are guaranteed up to the bank's authorised share capital or the bank's own property. Bond-holders are guaranteed via a company's assets but who is to tell one, if things go wrong, how much those assets will bring in during liquidation. It is contended that establishing a risk matrix is a thing of the past simply because since the abolition of the Gold Standard in 1971, long-term traders have seen their life become more difficult with advent of time. In this present day, it is not the markets themselves that primarily govern but events or phenomena such as globalisation, wars, terrorist acts, aids epidemics etc.

Some would even go so far as to put it down to an erratic US Government's massive trade deficit. In fact the great stock guru of our age, Warren E. Buffet, in his article to Fortune online, of October 3rd, 2003 saw fit that his company, Berkshire Hathaway, decided to liquidate stocks in favour of holding and redenominating foreign currencies. Berkshire Hathaway believed that this was the best form of risk management, for its clients, in these turbulent times. Once again lending more weight to this great myth that delving into Foreign Exchange is a highly risky business. (It will be recalled, that Sibylline will, every 7 to 21 days, be practicing currency redenomination conversions as part of the risk management scenario).

The MFSA should therefore not concern itself with the risk matrix of the investment market per se. On the contrary the MFSA's roles are to determine that the promoters of any particular venture are indeed competent to operate and that proper safeguards are in place which in no way allow any type of misconduct to the detriment of investors.

It was indicated by MFSA officials during the formal meetings held that Spot FX trading is not a regulated activity. It is felt that this statement applies solely to those investors who trade directly and the Inter-Bank FX and Forward markets. Otherwise Spot FX trading undertaken, to deal for third party accounts, for the purpose of investments, is in fact a regulated business. This, whether under Collective Investment Scheme or not.

In the light of the above consideration it is felt that the refusal on the part of MFSA to grant a licence based on the proposal submitted by my clients has wrongly applied the relevant provisions of the law regulating Investment Services and apart from being manifestly unfair constitutes an abuse of discretion. Consequently the Tribunal is respectfully requested to reverse the decision of the Malta Financial Services Authority and to grant a licence to the applicants under such conditions as the Tribunal may deem fit and appropriate and to order the Malta Financial Services Authority to issue the appropriate licence with all the appropriate and applicable conditions."

Ir-Risposta ta' L-MFSA

2. Illi l-appell gie appuntat għall-10 ta' Dicembru 2004 meta, bi qbil mall-partijiet, it-tribunal ikkonceda lill-MFSA zmien sal-5 ta' Jannar 2005 sabiex tintavola r-risposta tagħha. L-appell gie diferit għall-10 ta' Jannar 2005.

3. Fir-risposta tagħha l-MFSA issottomettiet illi:

"Il-Malta Financial Services Authority (aktar il-quddiem imsejha l-MFSA jew l-Awtorita`) tikkontesta l-appell tal-kumpannija Sybelline Capital Management Co. Limited (aktar il-

quddiem imsejja "il-Kumpannija") ghal diversi ragunijiet, kemm ta' natura ta' eccezzjoni preliminari u kemm eccezzjonijiet dwar il-mertu. Ghaldaqstant l-MFSA qeghda bir-rispett tissottometti r-ragunijiet taghha ghala dan l-appell odjern ghandu jigi michud.

1. Eccezzjoni preliminari

Proceduralment l-appell ghandu jigi michud stante li gie intavolat wara z-zmien perentorju ffissat fil-ligi ghal dan l-iskop. Infatti l-artikolu 21(11) tal-Malta Financial Services Authority Act (Chapter 330) tirrekjedi illi appell isir bil-miktub mhux aktar tard minn tletin jum wara li persuna tigi notifikata bid-decizjoni in kwistjoni. Id-decizjoni tal-MFSA ittiehdet fit-3 ta' Settembru 2004 (kopja annessa ma' l-appell) u ntbaghtet lill-appellanti bil-fax dak il-jum stess. Ma jidhirx illi hemm xi disputa dwar jekk din in-notifikazzjoni saritx jew le, anzi jirrizulta mill-atti presentati ma' l-appell illi l-promoturi tal-Kumpannija bhala reazzjoni ghal din id-decizjoni ghazlu li jergghu jiktbu lill-MFSA fit-28 ta' Settembru 2004. Permezz ta' din l-ittra (annessa ma' l-appell), il-promoturi tal-Kumpannija jikkonfermaw li kienu talbu laqgħa u din it-talba intlaqet u fil-fatt inzammet laqgħa fl-20 ta' Settembru 2004. Dawn ic-cirkostanzi ma jhassrux jew ma jwaqfux il-posizzjoni legali li tagħti zmien massimu ta' tletin jum sabiex jitreppaq appell — u dan irid jew ma jridx ir-regolatur li ma jistax hlief japplika il-ligi kif isibha. Il-ligi, fl-artikolu 21 ga imsemmi, ma tagħti ebda diskrezzjoni li jittawwal dan iz-zmien li huwa ta' natura perentorja. L-appell mill-kumpannija tressaq hafna aktar tard milli huwa rikjest, u cioe fit-12 ta' Novembru, 2004, hafna aktar minn tletin jum wara d-data tad-decizjoni tat-3 ta' Settembru, 2004, anzi madwar tlett gimghat aktar tard milli-perjodu massimu stabbilit. It-tezi li qegħdin jittantaw l-

appellanti li d-decizjoni tal-MFSA ttiehdet fl-20 ta' Ottubru 2004, minflok fit-3 ta' Settembru 2004, bir-rispett hija infondata u intiza biss sabiex artifizjalment jitwal iz-zmien li fih kellhom jifgħu l-appell.

Jirrizulta car mill-kontenut tagħha illi l-ittra tal-MFSA tal-20 ta' Ottubru 2004 ma kinetx tammonta għal decizjoni, imma kienet ittra sussegwenti għad-decizjoni diga mehuda. L-ittra konfermat u re-iterat id-decizjoni li kienet ittiehdet xi zmien qabel, fit-3 ta' Settembru 2004 u fil-fatt tagħmel referenza esplicita għaliha.

Għal dawn ir-ragunijiet, l-MFSA tissottometti bir-rispett li dan l-appell huwa null u bla effett u għandu jigi michud.

2. Eccezzjonijiet fil-mertu

F'din il-parti, kif mitlub mit-Tribunal fl-ewwel seduta tiegħu f'din id-disputa, l-MFSA sejra tindika wkoll l-eccezzjonijiet tagħha dwar il-mertu tal-appell imressaq mill-Kumpannija. Dan naturalment qed isir minghajr pregudizzju għall-eccezzjoni preliminari ga esposta.

Fil-fehma tal-MFSA, l-appellant naqas illi b'xi mod juri b'liema mod l-MFSA naqset mill-obbligi tagħha li timxi bil-bwona fede jew b'xi mod iehor abbuzat mid-diskrezzjoni li tagħtiha l-ligi. Fil-kuntest ta' din il-kawza partikolari, il-ligijiet pertinenti, fi ftit kliem, jippermettu appell meta persuna thoss li decizjoni tal-MFSA tikkostitwixxi abbuz ta' diskrezzjoni li tkun manifestament ingusta. Izda l-ligi tghid ukoll illi d-diskrezzjoni ta' l-awtorita kompetenti ma tistax, ladarba tkun giet ezercitata b'mod xieraq, tigi mistharrga mit-Tribunal.

L-MFSA hija tal-fehma illi t-talba kontenuta fl-appell odjern hija biss re-statement li l-promoturi tal-kumpannija ma jaqblux mal-konkluzjonijiet tal-Awtorita. Dan ghandhom dritt kollu li jaghmlu, doe li ma jaqblux, imma din wahedha ma tistax tikkostitwixxi bazi sufficjenti sabiex fuqha tibni appell skond il-ligi. Il-ligi tirrikjedi provi cari mill-appellant ta' xi forma ta' abbuz jew ingustizzja manifesta da parti tal-MFSA. Din il-prova ma tesistix. Apparti d-dokumenti ga annessi u li ghad iridu jigu ezebiti skond il-htiega tal-prova matul is-seduti, L-MFSA thoss li hi f'posizzjoni li turi lit-Tribunal l-iter kollu tal-process estensiv u professjonali li bih giet trattata t-talba ghal-licenzja mill-kumpanija. L-MFSA lesta turi b'liema mod serju studjat bir-reqqa t-talba tal-promoturi tal-Kumpannija, process li kien jinkludi korrisondenza estensiva u diversi laqghat, fejn dejjem fittxet li timxi in bwona fede u fejn zammet bhala principju baziku li hi qeghda hemm primarjament sabiex taqdi interessi pubblici u mhux privati.

L-MFSA ma thossx li l-appellanti ssodisfaw il-parametri li tirrikjedi l-ligi u fil-fehma taghha l-appell ghandu jigi michud anke fuq il-mertu ghax ma giex indikat liema cirkostanza tikkostitwixxi mala fede jew nuqqas ta' bwona fede u lanqas jista jidentifika fejn setghet tkun hatja ta' "misuse or misapplication of discretion" (pagna tnejn ta' l-appell).

L-Awtorita studjat in-nota ta' l-appell tal-kumpannija u thoss li handha tindika xi punti fejn jidher li l-appell huwa mibni fuq premissi zbaljati. Sejrin jissemmghu whud minn dawn:

(a) L-appell jissuggerixxi li ghax xi hadd forsi mar tajjeb f'xi intrapriza personali li teffettwa biss flusu, mela dan issa bil-fors tajjeb sabiex tafdal fuq ta' terzi (pagna 3 ta' l-appell) - Din

premissa zbaljata u insostenibbli ghax il-protezzjoni tat-terzi tinbena fuq standards oghla minn hekk;

(b) L-appell jissugerixxi li ghax promotur jigi accettat minn xi cirklu kummercjali (eg Global-View.com, f'pagna 2 ta' l-appell), mela ghandu jkun ukoll awtomatikament accettabbli minn regolatur - Din premissa ohra zbaljata ghax regolatur ma jimxiex biss fuq kriterji ta' kif jista jahsibha xi operatur kummercjali privat;

(c) L-appell jissuggerixxi illi ghax is-Sur Peter Azzopardi gradwat fl-accountancy u economics allura hu "without doubt satisfies the qualifications criteria" (pagna 2 ta' l-appell) - Din ukoll premissa zbaljata u inaccettabbli ghax il-fit and proper test hija rikjesta ghal kulhadd f'dan is-settur u l-ligi ma taghti ebda trattament specjali lil ebda kategorija u l-ligi ma tippresumi xejn.

(d) L-appell jissuggerixxi illi track record fi hwejjeg fmanzjarji kumplessi ta' biss tlett snin (pagna 3 ta' l-appell tirreferi ghal work experience li nbeda fl-2001) huwa bizzejjed sabiex tistabilixxi track record ghal skop ta' licenzja formali taht l-Investment Services Act (Kap 370) u ligijiet ohra pertinenti - Din premissi hazina u insufficienti.

(e) L-appell jissuggerixxi (pagna tlieta) illi "In the first instance if applicants are deemed to be competent enough to service non-private clients, simple reasoning implies that they are competent enough to service any type of client", u aktar tard f'pagna 4, jkompli "it is not the MFSA's role to distinguish between investors", u anke, "the MFSA cannot in the first instance withhold a venture simply to protect these people", u "why distinguish between the risk levels of various investment

vehicles?". Dawn huma stqarrijiet sorprendenti li ma jirriflettux il-principji fundamentali tar-regolamentazzjoni tas-servizzi finanzjarji. Infatti, hemm hafna postijiet fejn il-ligijiet rilevanti jaghmlu distinzjonijiet importanti bejn private investors u non-private investors u dan sabiex aktar jittiehdu mizuri ghall-protezzjoni tal-private investors. Dawn huma l-kategorija ta' investituri komuni u l-aktar vulnerabbli li ma jgawdux minn xi patrimonju kbir jew li ma jkollhomx tahrig jew knowledge sofistikat u li for si aktar facli jaqaw f'ingann jew jitilfu is-savings taghhom. U ma hemmx dubju li certi investment vehicles huma aktar riskuzi minn ohrajn, kuntrarjament ghall-istqarrija fl-appell

Bir-rispett dawn il-punti u stqarrijiet tal-appellanti juru kemm l-MFSA u l-promoturi tal-Kumpannija jidhru li ghandhom valuri differenti hafna u jigu minn kulturi regolatorji differenti sew. Dawn jistghu wkoll juru illi l-promoturi ma fehmux bizzzejed certi principji bazici ghalfejn wara kollox hawn ligijiet finanzjarji u ghalfejn hawn regolaturi finanzjarji, u ghalfejn l-MFSA waslet ghall-konkluzjoni kif ghamlet dwar it-talba taghhom.

Minkejja dawn il-konsiderazzjonijiet kollha, il-promoturi jistghu u ghandhom dritt ma jaqblux u jzommu fehma diversa, imma dan ma jfissirx u ma jimplikax abbuz jew mala fede da parti ta' l-Awtorita, allegazzjoni li ma giet b'ebda mod ippruvata.

Ghaldaqstant, ghar-ragunijiet suesposti, l-MFSA titlob li dan it-Tribunal jichad l-appell."

Is-Seduti Mizmuma u Hwejjeg Relatati

4. Fis-seduta ta' l-10 ta' Jannar 2005 it-tribunal ordna li qabel xejn tigi ttrattata u deciza l-eccezzjoni preliminari tal-MFSA. F'din is-seduta l-

partijiet qablu illi d-dokumenti esibiti mill-appellanti ma' l-ittra taghhom tat-12 ta' Novembru 2004 huma kopji fidili ta' l-original u li t-tribunal jista' jistrieħ fuqhom bhala dokumenti awtentici meta jasal biex jiddeciedi l-appell. L-appell gie differit sabiex jixhdu Dr Andre Camilleri u Ms Christina Parlato Trigona għall-21 ta' Jannar 2005.

5. Fis-seduta tal-21 ta' Jannar 2005 xehed Dr Andre Camilleri. Il-partijiet qablu illi ma kienx hemm applikazzjoni formali biex tinhareg licenza għan-negożju mertu ta' dan l-appell; bl-appellanti jsostnu li dan sar bi qbil ma' l-MFSA sabiex fi stadju preliminari, fost affarijiet oħra, ma jkunx mehtieg li jsiru hlasijiet. Dr Valletta, għall-appellanti, talab illi jigu esibiti l-minuti tas-*Supervisory Council* tal-MFSA relattivi għall-laqgħat li wasslu għall-ittra tal-3 ta' Settembru 2004 u laqgħat sussegwenti, dejjem in konnessjoni mal-proposta *de quo*. Dr David Fabri għall-MFSA ma oggezzjonax. It-Tribunal laqa' t-talba u ordna li għas-seduta li jmiss għandhom jigu prodotti l-minuti. L-appell gie differit għall-kontinwazzjoni għall-4 ta' Frar 2005.

6. Fis-seduta ta' l-4 ta' Frar 2005 xehed Robert Higgins, Segretarju tas-*Supervisory Council*, prodott miz-zewg partijiet. Il-partijiet iddikjaraw li m'għandhomx aktar provi dwar l-ewwel eccezzjoni sollevata mill-MFSA. L-appell gie differit għas-sentenza dwar din l-eccezzjoni kif ukoll dwar il-punt sollevat mit-tribunal dwar jekk huwiex kompetenti illi jezamina decizjoni tal-MFSA f'kwistjoni ta' rikjesta għal licenza meta ma kienx hemm applikazzjoni formali. Il-partijiet gew mogħtija l-fakulta li jipprezentaw sottomissjonijiet bil-miktub sat-18 ta' Frar 2005 u li jirreplikaw bil-miktub sal-25 ta' Frar 2005. Fil-fatt kemm is-sottomissjonijiet kif ukoll ir-repliki gew ipprezentati.

7. Illi permezz ta' decizjoni mogħtija fit-30 ta' Marzu 2005 dan it-tribunal iddikjara illi m'għandux

is-setgha li jisma dan l-appell, dan ghar-raguni sollevata minnu stess, u heles lill-Awtorita Ghas-Servizzi Finanzjarji ta' Malta milli tibqa' izjed fil-gudizzju.

8. Illi l-appellanti Peter J. Azzopardi et intavolaw appell minn din id-decizjoni lill-Onorabbli Qorti ta' l-Appell (Kompetenza Inferjuri) li permezz ta' sentenza moghtija fit-18 ta' Ottubru 2006 laqghet l-appell fil-kap devolut lilha u konsegwentement hassret u rrevokat id-decizjoni ta' dan it-tribunal li ddeterminat l-inkompetenza tieghu fuq l-eccezzjoni *mate proprio* sollevata u ddeterminat invece li dan it-tribunal kien hekk kompetenti li jjehu konjizzjoni ta' l-appell prezentat lilu u ghal dan il-fini rrinvjat l-atti lura lil dan it-tribunal ghad-definizzjoni u decizjoni tal-mertu ta' l-appell quddiemu u ta' l-eccezzjonijiet ghalih.

9. Illi sadanittant fl-24 ta' Awissu 2006 it-tribunal ircieva appell mill-promoturi ta' Sibylline Capital Management Company Limited (in formation) Peter J. Azzopardi, Adrian P. Azzopardi, Paul S. Azzopardi u Mario W. La Pira fejn wara applikazzjoni, din id-darba maghmula b'mod formali, ghall-hrug ta' licenzja simili ghal dik mertu ta' din il-kawza, l-imsemmija promoturi appellaw minn decizjoni tal-MFSA ikkomunikata lilhom permezz ta' ittra datata 4 ta' Awissu 2006 u li permezz taghha l-MFSA cahdet it-talba ghal licenzja, hekk kif formalment mitluba minnhom.

10. Illi l-intiza bejn il-kontendenti kienet illi z-zewg appelli jinstemghu flimkien b'dan illi l-provi jinstemghu fl-appell l-iehor, cioe dak intavolat f'Awissu 2006, u jkunu jghoddu ghal dan l-appell. Ma' dana kollu kien biss fl-udjenza ta' llum illi dan l-arrangement gie formalment verbalizzat.

Il-Fatti

11. Illi l-fatti saljenti ghal din id-decizjoni li rrizultaw waqt it-trattazzjoni ta' dan l-appell huma s-segwenti:

(1) Illi permezz ta' *e-mail* datata 20 ta' Ottubru 2003 Robert Higgins (*Manager - Investment Services Unit - MFSA*) qal lill-appellant Mario W. Lapira:

"Reference is made to our preliminary meetings held on 13th June and 5th August 2003.

Should you still be interested in applying for an investment services licence, you should first submit a comprehensive "written description of the proposed activities (as requested in our meeting of 5th August) before proceeding further. The proposal should include details of how the company will be structured and details of the persons who will be involved in providing investment activities and how they satisfy the competence requirements. The proposal should also include details of the operational aspects (i. e. details of how the services are to be provided and the links/relationships with third parties if any). The following Personal Questionnaire forms should also be completed by the proposed senior management/directors/shareholders."

(2) Illi permezz ta' ittra datata 23 ta' Jannar 2004 indirizzata lis-Sinjura Cristina Parlato Trigona Direttur, *Malta Financial Services Authority*, liema ittra hija esibita bhala Dok. App.3 ma' l-ittra ta' l-appell ta' l-appellanti, Peter J. Azzopardi, Adrian P. Azzopardi, Paul S. Azzopardi, Mario W. Lapira u Joseph N. Fava stqarrew li huma bi hsiebhom jiffurmaw socjeta lokali bl-isem ta' *Sibylline Capital Management Company* bil-ghan li din is-socjeta *"will trade potential clients' funds abroad on the*

spot FOREX market". Huma komplew jghidu li l-iskop ta' l-ittra kien sabiex jottjenu *"the required MFSA licence approval, category 2 according to the First Schedule No: 3 and the Second Schedule No: 5, both of the Investment Services Act, 1994"*. Fl-ittra de quo l-appellanti spjegaw b'certu dettal

(i) X'inhu l-Forex Market (bazikament is-suq fejn wiehed jixtri munita partikolari b'munita differenti u jbiegh il-munita mixtrija ghall-prezz li jithallas f'munita differenti li tista' tkun l-istess munita li biha jkun xtraha originarjament, u dan kollu bl-iskop li wiehed jaghmel il-qliegħ mill-kambjament li jkun hemm minn zmien għal zmien fir-rati tal-kambju bejn munita u ohra).

(ii) Is-servizz li l-kumpannija kienet se toffri lill-klijenti prospettivi tagħha, inkluz l-fees li kienet sejra jzommilhom.

(iii) *It-Trading Philosophy* li kienet sejra taddotta l-kumpannija.

(iv) L-esperjenza li għandhom f'dan il-qasam Paul Azzopardi u Peter Azzopardi.

(v) Il-mod kif il-kumpannija kienet bi hsiebha topera u l-apparat li kellha l-intenzjoni li tuza.

(vi) Il-persuni li kienu se jassistuha fl-operat tagħha e.z. banek, avukati u awdituri.

(vii) Il-kontijiet bankariji li kien fi hsiebha zzomm.

(viii) Il-mod kif kienet sejra tikkonduci n-negozju tagħha u r-records li kien fi hsiebha zzomm u kif kienet sejra zzomhom.

(ix) Diskussjonijiet li kellha sa dakinnhar ma' terzi - *Lombard Bank plc, Valletta Fund Management Ltd. u l-International Tax Unit.*

L-appellanti ghalqu l-ittra taghhom hekk:

"We hope that the aforementioned information enables you to evaluate our proposal and we shall look forward to a favourable reply in order that we may submit, a final report in conjunction with and after liaising with Valletta Fund Management. "

(3) Marianne Scicluna (*Senior Manager - Investment Services, MFSA*) irrispondiet ghall-ittra ta' l-appellanti tat-23 ta' Jannar 2004 permezz ta' ittra datata 17 ta' Marzu 2004. Fiha:-

(i) Ghamlet resume ta' l-attivitá kif proposta mill-appellanti bl-ittra taghhom tat-23 ta' Jannar 2004 kif fehemitha l-MFSA u talbet numru ta' kjarifiki.

(ii) Qalet li jekk l-MFSA fehmet il-proposta ta' l-appellanti sewwa, jekk l-attivitá kienet se tkun wahda *for investment purposes rather than for speculative purposes* u suggett li jigu kkjarifikati l-punti sollevati mill-MFSA allura *it appears that the proposed activity would be licensable under the Investment Services Act, 1994.*

(iii) Ziedet tghid li *"the main issues which arise with respect to the proposed activities"* kienu, fost ohrajn, illi:

"in view that trading on the forex market carries a very high risk, these type of services would need to be limited solely to Non-Private Clients (as defined in the Glossary of Terms in the Investment Services Guidelines) rather than the retail public",

u

"the Authority would need to be satisfied of the fitness and properness of the individuals involved"

haga li dahlet f'certu dettal aktar l-isfel fl-ittra fejn tat x'tifhem li min dak li kien irrizulta lill-MFSA sa dakinhar l-appellanti ma kellhomx il-kwalifiki necessarji.

(iv) Ghalqet l-ittra billi qalet:

"We hope you will find our initial feedback useful. Please feel free to correct or expand on our understanding of your proposal as you consider appropriate. "

(4) L-appellanti wiegbu din l-ittra ta' Marianne Scicluna permezz ta' ittra datata 30 t'April, 2004 fejn huma kkorregew numru ta' punti li l-MFSA kienet fehemet hazin, ikkjarifikaw il-punti li gew mitluba li jikkjarifikaw u trattaw numru ta' punti sollevati minn Marianne Scicluna fl-ittra taghha tas-17 ta' Marzu 2004 fosthom:-

- Il-ghaliex l-attivitá li kienu qeghdin jipponu m'ghandix tkun ristretta ghal *non-private clients*; u
- Li huma ghandhom l-kwalifiki necessarji sabiex jissodisfaw il-*fit and proper test* rikjesta mill-MFSA meta tohrog licenzja taht l-*Investment Services Act*, 1994. Huma kkonkludew l-ittra taghom billi qalu:

"the undersigned deem that we have effectively corrected and expanded on your reply To this effect we feel that we have thoroughly addressed your queries and look forward to having our proposed activity sanctioned and eventually brought to fruition. "

(5) Marianne Scicluna wiegbet l-ittra ta' l-appellanti tat-30 ta' April, 2004 permezz ta' ittra datata 18 ta' Gunju 2004 fejn principalment ittrattat iz-zewg punti ta' *Private vs. Non-Private Clients* u l-*fit and proper test*.

Dwar l-*Private vs. Non-Private Clients* hija sostniet li persuni li jinvestu f'attivitá bhal dik ikkontemplata mill-appellanti

"... need to possess the experience, knowledge and expertise and properly assess the inherent risks and also (be) able to withstand potentially substantial losses ... We re-iterate our position that these type of services would need to be limited solely to Non-Private Customers. We ... consider this to be ... an issue of investor protection for the retail public".

Dwar il-kwistjoni tal-*fit and proper test* hija regghet sostniet illi l-appellanti m'ghandhomx il-kwalifiki necessarji u fil-fatt ghalqet l-ittra taghha billi qalet:

"In the absence, that the Company being able to demonstrate to the MFSA that it adequately satisfies the competence criteria on the basis of the issues described earlier-namely, qualification(s) which is/are directly relevant to trading spot forex coupled with hands-on experience or alternatively relevant work experience with a regulated entity involved on the proposed activities) - we regret to inform you that the proposed activity, as is, cannot be sanctioned to be provided to third parties"

(6) Ghal din l-ittra rrisponda ghall-appellanti l-Avukat Dottor Pio Valletta. Dan permezz ta' ittra datata 29 ta' Lulju, 2004 fejn wara li kkjarifika numru ta' punti msemmija fl-ittra ta' Marianne Scicluna tat-18 ta' Gunju 2004 ta r-ragunijet il-ghaliex klijenti privati m'ghandhomx jigu eskluzi mill-attivitá proposta mill-klijenti tieghu u sostna li l-klijenti tieghu jissodisfaw il-*fit and proper test*. Huwa kkonkluda l-ittra tieghu billi qal:

"In the light of the above clarifications, responses and considerations it is felt that the proposed application fully and objectively satisfies all the statutory requirements set out in the applicable legislation and that consequently the appropriate license setting out the conditions which MFSA would consider, in its absolute statutorily granted discretion, as adequate and appropriate to further safeguard the interest of third parties, should be granted to the company forthwith.

We are prepared to discuss any points which you feel require any further discussion and for this purpose we are willing to meet you at your earliest convenience should such a need arise".

L-ittra giet ikkupjata, fost ohrajn, lill-Professor Joseph Bannister - Chairman tal-Bord tal-Gvernaturi tal-MFSA.

(7) Fil-11 ta' Awissu 2004 l-avukat ta' l-appellanti baghat fax lil Professor Bannister fejn wara li gharfu illi hu ma kien ircieva l-ebda risposta mill-MFSA ghall-ittra tieghu tad-29 ta' Lulju, 2004, talbu biex jintervjeni bl-iskop li l-MFSA twiegbu.

(8) FI-24 ta' Awissu 2004 l-avukat ta' l-appellanti baghat fax ohra lill-Professor Bannister fejn, rega gharfu li l-MFSA kienet ghadha ma wegbitx l-ittra tieghu tad-29 ta' Lulju 2004, li d-dewmien kien ta' pregudizzju ghall-klijenti tieghu u li l-intervent tieghu, cioe tal-Professor Bannister, kien necessarju sabiex tigi evitata azzjoni legali u talba sabiex jintervjeni l-Ministru responsabbli.

(9) Il-Professor Bannister wiegeb fil-25 ta' Awissu, 2004 permezz ta' fax u posta normali fejn gharraf lill-avukat ta' l-appellanti illi kien f'posizzjoni jikkonferma illi *"the matter is being processed with*

the diligence and the procedures envisaged in the relevant legislation."

(10) FI-istess gurnata, cioe fil-25 ta' Awissu 2004, Cristina Parlato Trigona (Id-Direttur - *Investment Services Unit*) kitbet lill-avukat ta' l-appellanti permezz ta' fax u posta normali fejn gharrfitu:-

"Please note that the MFSA has been considering the proposal and the explanations you have provided in your various communications including your detailed letter of 29th July. The matter in question has now been analysed by my Unit and has now moved to the next stage, namely being referred to the Supervisory Council of the MFSA. You should know that the Supervisory Council, amongst other things, is the MFSA organ which is responsible for the approval of and for the issuing of licences and other authorisations in the financial services sector.

We are sure you will also appreciate that in order for the matter to be given the attention it deserves and be adequately considered internally, there are certain internal processes which may take some time. Despite that no formal application for a licence has ever been submitted in terms of the relevant Schedules of the Investment Services Act, 1994, the MFSA has always been ready to consider the information provided at length in order to assist Messrs. Azzopardi and La Pira.

Lastly, kindly note that we shall revert with the position taken by the Supervisory Council at the earliest opportunity."

(11) Dr. Valletta wiegeb lil Cristina Parlato Trigona permezz ta' ittra datata 27 ta' Awissu, 2004 li

baghat *via fax* u bil-posta normali. Hu qal, *inter alia*:

"I note with satisfaction that my client's proposal has now, been referred to the Supervisory Council, which as you explain is the organ responsible for the approval of and for the issuing of licences and other authorisations in the financial services sector.

I do appreciate that applications such as the one my clients have put forward require time, care and attention and I am confident that the time your unit has taken to examine my clients' application has enabled your unit to understand that my clients are proposing an operation which fully conforms to the set statutory parameters and meets all the objective requirements.

In your letter however, you do refer to the fact that, no formal application for a licence has been submitted by my clients in terms of the relevant schedules of the Investment Services Guidelines nor any application fee has been paid for a license under the Investment Services Act, 1994. May I refer you to an e-mail received by my clients from Mr. Robert Higgins — Manager Investment Services Unit dated the 20th October, 2003 (copy is being herewith attached for ease of reference) in which Mr. Higgins suggests that my clients should first submit a comprehensive written description of the proposed activities before proceeding further.

Kindly indicate at your earliest whether your reference at this juncture, to my clients' failure to submit a formal application and to effect payment of the licence fees signifies that my clients need to file such a formal application and pay the prescribed fee for their application

to proceed further and receive proper consideration. If such is the case my clients are willing to file the formal application and pay the prescribed fees forthwith.

I thank you for your attention and await with eagerness your comments and/or responses in respect of the matter raised in the preceding paragraph of this letter".

(12) Cristina Parlato Trigona wiegbet permezz ta' ittra datata 30 ta' Awissu 2004 li hija batet permezz ta' fax u bil-posta normali. Hija qalet:

"We acknowledge that - as is standard practice with new proposals - your clients were as a first step requested to submit a written proposal describing their business plans as well as details regarding the individuals to be involved in providing the services in question. The main reason for this was to enable us to consider the proposed business plan in order to identify the regulatory implications and whether 'in principle', this would qualify for licensing under the Investment Services Act, 1994, bearing in mind the 'fit and proper' criteria which need to be satisfied. This approach was adopted in order to assist your clients in avoiding the risk of unnecessarily having to incur costs and time in submitting all the required application documents.

The fact that your clients have to date not yet submitted a formal application, has in no manner impinged on the thoroughness with which the MFSA has considered their proposal. Although your clients are free to submit such application at any time, at this stage, this will not affect the Authority's consideration of their proposal which is being given the attention it deserves.

As indicated in our letter dated 25th August, 2004, we shall revert with the position taken by the Supervisory Council at the earliest opportunity. "

(13) *Is-Supervisory Council ikkunsidra l-kwistjoni fil-laqgha ta' l-1 ta' Settembru 2004. Il-minuta relattiva tghid:*

"Ms. Parlato Trigona referred to her memorandum, dated 16 August 2004, regarding a proposal for an investment services licence by Sibylline Capital Management Co. Ltd. The purpose of the company would be to engage in spot Forex day trading for retail investors on a discretionary basis.

The main issue arising relates to the satisfaction of the competence criteria. It was explained that ISU believes that the promoters who would be involved in the Forex trading do not satisfy the standard fit and proper criteria on the basis of lack of hands-on relevant work experience with a regulated entity; the absence of specialised training in relation to their proposed activity, as well as a lack of relevant qualifications in the field of investment services/financial markets.

Following a discussion, Council members resolved to agree, as recommended, that the promoters be informed that the Authority remains of the view that the promoters do not satisfy the required competence criteria for licensing under the ISA. It was also agreed that the Legal Unit would be requested to vet the communication to the promoters in this regard prior dispatch. "

(14) Fit-3 ta' Settembru, 2004, l-Avukat Dr. Andre Camilleri, Direttur Generali ta' l-MFSA, kiteb lill-appellanti fejn qalilhom li l-proposta taghhom giet mressqa mill-*Investment Services Unit* lis-*Supervisory Council* u cioe "*the organ responsible for taking regulatory decisions in respect of licensable activities*" u liema Kunsill ikkunsidra din il-proposta. Hu temm l-ittra tieghu billi qal:

"On the basis of the information provided, the Supervisory Council does not find sufficient basis on which it can consider the individuals to be carrying out the Company's licensable activity, to satisfy the competence criterion - an essential element of the 'fit and proper test' which needs to be satisfied for licensing under the Investment Services Act, 1994 ("ISA"). Such a position is based on the inability to demonstrate the possession of relevant and adequate "work experience obtained over a number of years with a regulated financial services entity, combined with the absence of appropriate qualifications on investment services or financial markets, as well as the absence of specialised training in the proposed activity.

For the sake of accuracy and completeness and as a secondary issue, given the exchange of previous correspondence wherein the issue of the nature of the Company's proposed licensable activity was raised, we wish to emphasise that irrespective of the nature of licence applied for in terms of the ISA, the same competence requirements apply.

Please be guided accordingly "

(15) L-Appellanti Peter J. Azzopardi u Mario W. La Pira kitbu ittra lill-Avukat Dr. Andre Camilleri datata 28 ta' Settembru 2004 liema, ittra bdewha kif gej:

"In the first instance we would sincerely like to thank you for allowing time to meet us and discuss our proposed 'Sibylline' project this 20th September.

To our regret it emerged that our previous correspondence with the MFSA was not evaluated personally by yourself. On the other hand, we appreciate that you, as Director General of the Supervisory Council have a tight schedule and must rely on evaluations passed on to you by the Investment Services Unit. Nonetheless, our distinct impression was that the final recommendation passed on to you was not comprehensive on the subject matter and leaned towards an outright refusal.

You have been portrayed to us as being a man of honour, of undoubted integrity and enjoying an open and analytical mind. We were therefore glad to hear that all our previous submissions would now be thoroughly examined by yourself. This with the main view of setting up another meeting and properly tackling the MFSA's Supervisory concerns, if any are in fact encountered after evaluation of all our submissions to date.

During our meeting of the 20th September the following points were raised by yourself, namely: competence, end-user profile, Spot Forex (FX) market risk and we were asked to revert, albeit in concise form on same. Having put to paper all that had to be said in our previous submissions, these fresh comments are simply meant to be complimentary."

Huma komplew l-ittra tagghom billi:

(i) Regghu ttrattaw il-kwistjoni tal-kwalifiki sabiex iwettqu l-progett tagghom.

(ii) Regghu ttrattaw il-kwistjoni tal-*Private vs. Non-Private Client*. F'dan ir-rigward bdew billi qalu *"It further emerged that although your letter of the 3rd September dealt solely with the "(competence issue"*

(iii) Ittrattaw il-punt dwar l-*"FX Market Risk; u*

(iv) Ikkonkludew l-ittra b'dan il-kliem:

"Whilst thanking you again for taking time in allowing us to present our case, we would kindly request your good-self, after having gone through our full correspondence, to set up a secondary meeting, in order that we may iron out each and every outstanding problem".

(16) F'seduta tas-*Supervisory Council* mizmuma fit-28 ta' Settembru 2004 gie registrat is-segwenti:

"Ms. Parlato Trigona confirmed that a meeting was held with the promoters on their request following their receipt of the Supervisory Council's decision on the matter. The promoters intend submitting representations."

(17) FI-20 ta' Ottubru 2004 Dr. Andre Camilleri kiteb lill-appellanti "Mr. P. Azzopardi/Mr. M. Lapira" fejn irrefera ghall-ittra taghhom tat-28 ta' Settembru 2004. Hu beda din l-ittra billi qal:

"Firstly, I would like to clarify that the Supervisory Council has access to all information and correspondence in support of the recommendations made by regulatory units. I can assure you that the Supervisory Council takes its decisions objectively and based on comprehensive assessments as was the case in respect of the Company."

More specifically, we have gone through your comments regarding competence, the end-user profile and the spot for ex market risk",

u kkonkludiha hekk:

"We have thoroughly considered your further submissions which in our view do not include new elements which alter the basis upon which the Supervisory Council resolved to take the stance expressed in our letter of 3rd September 2004. In the circumstances, additional meetings will serve no purpose unless substantial new elements regarding the applicants are presented. "

(18) Fis-seduta tas-Supervisory Council tas-27 ta' Ottubru 2004 Ms Parlato Trigona infurmat il-membri li l-appellanti kienu qeghdin jikkonsidraw li jissottomettu applikazzjoni formali ghal licenza taht l-*Investment Services Act*. Is-Supervisory Council ddecieda illi

"... .. should the promoters of Sibylline submit a formal application, the ISU should take into consideration the very extensive review process which it had conducted in the pre-application stage, concerning the competence of the promoters and regulatory requirements of the proposed activity. It was also agreed that in replying to the promoters in respect of such application, reference could be made to previous correspondence exchanged with the promoters during the pre-application stage. "

(19) Fis-seduta tas-Supervisory Council ta' l-10 ta' Novembru 2004 Ms Parlato Trigona infurmat lill-membri li l-appellanti kienu ghadhom ma issottomettewx applikazzjoni formali.

(20) Fis-seduta tas-*Supervisory Council* ta' l-14 ta' Dicembru 2004 Ms Parlato Trigona infurmat il-membri illi promoturi ta' Sibylline kienu intavolaw l-appell odjern.

Kunsiderazzjonijiet

12. Illi f'dan l-appell l-ewwel kwistjoni li trid tigi determinata hija jekk l-proceduri gewx intavolati fi zmien it-tletin jum stabbiliti mill-artikolu 21(9) tal-Kap. 330. Il-kontendenti ma jaqblux dwar id-data minn meta dawn it-tletin jum bdew jiddekorru. L-awtorita appellata ssostni li bdew jghaddu mid-data meta giet ikkomunikata lill-appellanti l-ittra taghha tat-3 ta' Settembru 2004 filwaqt illi l-appellanti jsostnu illi dan l-appell gie intavolat regolarment fit-12 ta' Novembru 2004 stante li d-decizjoni ta' l-awtorita kompetenti inghatat permezz ta' l-ittra ta' l-20 ta' Ottubru 2004.

13. Mill-provi prodotti t-tribunal hu tal-fehma illi fuq dan il-punt l-appellanti ghandhom ragun. Minn ezami ta' x'gara wara l-ittra tal-MFSA tat-3 ta' Settembru 2004 (paragrafu 11(14) *et seq supra*) jirrizulta illi l-MFSA, minghajr ebda riserva, regghet fethet il-bibien ghall-applikazzjoni ta' l-appellanti. Iltaqghet ma' l-appellanti fl-20 ta' Settembru, 2004. Fil-laqgħa tas-*Supervisory Council* tat-28 ta' Settembru 2004 gie verbalizzat illi "*Ms. Parlato Trigona confirmed that a meeting was held with the promoters on their request following their receipt of the Supervisory Council's decision on the matter. The promoters intend submitting representations*". Fil-fatt dawn ir-reprezentazzjonijiet saru permezz ta' ittra ta' l-appellanti tat-28 ta' Settembru 2004, liema ittra giet ikkunsidrata mill-MFSA u regghet inghatat decizjoni permezz ta' l-ittra ta' l-20 ta' Ottubru 2004.

14. Għal dak li jirrigwarda l-mertu ssir referenza għad-decizjoni ta' dan it-tribunal mogħtija llum

stess fl-appell intavolat mill-promoturi ta' Sibylline Capital Management Company Limited u a skans ta' repetizzjoni u ghar-ragunijiet moghtija fl-imsemmija decizjoni, pero limitament ghall-kriterji ta' esperjenza, kwalifiki u tahrig li jaqghu taht il-kappa ta' kompetenza tal-*fit and proper test* (stante li f'dan l-appell ma tqajmux il-kwistjonijiet relatati mall-kontijiet bankarji u ma' l-insolvenza tal-kumpannija Carlton Holdings Limited), ma jsib xejn x'ticcensura fid-decizjoni ta' l-MFSA kif spjegata fl-ittri taghha tat-3 ta' Settembru 2004 u ta' l-20 ta' Ottubru 2004. Kif qal dan it-tribunal fl-imsemmija decizjoni, il-poteri tieghu li jintervjeni f'decizjonijiet ta' l-MFSA huma limitati bid-disposizzjonijiet ta' l-artikolu 21 (9) tal-Kap. 330. Fil-kaz odjern ma rrizultax li l-MFSA applikat il-ligi hazin jew abbużat mid-diskrezzjoni taghha jew li d-decizjoni taghha kienet ingusta manifestament. Irrizulta illi l-kriterji u l-*standards* li l-MFSA uzat ghar-rigward l-esperjenza, il-kwalifiki u t-tahrig huma rilevanti ghall-licenza ta' servizz ta' investiment mitluba mill-appellanti. Dment li huma rilevanti u dment li ma gewx sodisfatti mill-appellanti, dan it-tribunal ma jistax jintervjeni.

15. Galadarba t-tribunal ma sab xejn irregolari fid-decizjoni ta' l-MFSA li tichad l-applikazzjoni ta' l-appellanti ghaliex ma ssoddifawx il-kriterji tal-*fit and proper test* m'hemmx il-htiega li t-tribunal jinvestiga kwistjonijiet ohra inkluz dik tal-*non-private clients* u klijenti ohra.

Decizjoni

Ghal dawn il-mottivi t-tribunal filwaqt li jirrespingi l-eccezzjoni preliminari ta' l-awtorita` appellata jirrespingi wkoll l-appell ta' Peter J. Azzopardi, Adrian P. Azzopardi, Paul S. Azzopardi, Mario W. La Pira u Joseph N. Fava u jikkonferma d-decizjoni ta' l-Awtorita` ghas-Servizzi Finanzjarji ta' Malta fl-interita` taghha, bl-ispejjez kontra l-istess appellanti.”

Bl-appell taghhom minn din id-decizjoni r-rikorrenti jilmentaw illi, bil-kontra ta' dak dedott mit-Tribunal ghal Servizzi Finanzjarji, l-Awtorita` ma mxieta bil-bwona fede fl-istharrig ta' l-applikazzjoni taghhom ghal-licenzja jew, b'mod iehor, abbuza mid-diskrezzjoni li taghtiha l-ligi. Telegrafikament, ghas-suffragju ta' dan l-ilment taghhom huma jissottomettu dan li gej:-

(i) Ma tirrizulta ebda gustifikazzjoni adegwata u oggettiva il-ghala gie deciz mill-Awtorita` illi r-rikorrenti Peter Azzopardi u Paul Azzopardi ma kienux jissodisfaw ir-rekwizit tal-*“fit and proper test”*;

(ii) Qatt ma gie indikat lilhom x'kienu l-elementi li kellhom jissodisfaw;

(iii) Ma kien hemm ebda *“due diligence”* da parti ta' l-Awtorita` u din strahet fuq gudizzju arbitrarju, kapriccjuz u mhux oggettivament motivat;

(iv) Jikkonsegwi illi l-Awtorita` ma segwietx il-linja gwida li kienet tenuta tosserva skond il-ligi;

Kontra dan l-appell l-Awtorita` tqajjem in linea preliminari l-pregudizzjali ta' l-inappellabilita` ghaliex issostni li l-appell ma jmissx il-punt ta' ligi skond l-Artikolu 21 (14) ta' l-Att dwar Awtorita` ghas-Servizzi Finanzjarji ta' Malta (Kapitolu 330). In kwantu ghall-mertu ta' l-aggravju sottopost, l-istess Awtorita` wiegbet illi d-decizjoni taghha li tirrifjuta t-talba ta' l-appellanti ghal-licenzja ttiehdet in pjena ottemperanza ma' l-obbligi legali taghha u in bwona fede. Konkizament, hu mill-Awtorita` sottomess illi:-

1. Hi ma abuzatx mid-diskrezzjoni taghha u, anzi, dejjem akkordat l-opportunita` lill-appellanti biex jindirizzaw dawk l-aspetti ta' l-applikazzjoni taghhom li ma kienux konformi ma' dak rikjest mil-ligi;

2. In bazi ghall-istandards u kriterji stabbiliti hi kellha kull dritt tiddetermina jekk il-promoturi kienux persuni addattati sabiex jipprovdu l-attivitaa` finanzjarja ghal-liema talbu l-licenzja; b'mod partikolari, jekk kellhomx

il-kompetenza, il-kwalifiki u l-esperjenza mehtiega ghal dak il-fini;

3. L-istharrig minnha sar b'mod analitikament korrett u l-asserzjoni ta' l-appellanti li ma sarx hekk ma ssib ebda riskontru fil-provi;

4. Id-decizjoni taghha ttiehdet ghab-bazi ta' studju li sar dwar dak rikjest mil-ligi ghall-ghoti ta' licenzja u dwar jekk l-appellanti kienux issodisfaw l-kriterji mill-istess ligi prefissi;

5. L-appellanti kellhom kull dritt ma jaqblux mad-decizjoni taghha izda dan ma jwassalx ghat-thassir taghha ghax din ittiehdet b'ghaqal u skrupolozita`;

Premess l-aggravju ta' l-appellanti u r-risposta ghalih mill-Awtorita`, huwa fl-ordni logiku illi l-Qorti ghandha, qabel kollox, tghaddi biex tinvesti l-kwestjoni ta' l-inammissibilita` ta' l-appell sollevata mill-Awtorita`;

L-eccezzjoni ta' l-Awtorita` hija principalment bazata fuq il-motiv illi l-appell sottopost huwa unikament fondat fuq censura tal-valutazzjoni tal-provi mit-Tribunal. Fil-hsieb tal-Qorti ma jidherx li dan hu ghal kollox korrett in kwantu huwa evidenti wkoll mill-korp ta' l-appell illi gew sollevati aspetti li jirrigwardaw principji ta' dritt in materja ta' l-ezercizzju tad-diskrezzjoni da parti ta' l-Awtorita` u, essenzjalment, jekk tali ezercizzju sarx kif kellu legittimament isir skond il-ligi, u dan huwa punt ta' ligi li jirrendi s-sentenza tat-Tribunal appellabbli quddiem din il-Qorti. Gja mill-antik kien inghad illi "*è essenzialmente giuridica la questione, e quindi definibile dall'awtorita` giudiziaria diretta a stabilire se l'atto posto in essere dallo Stato e dei suoi funzionari sia o no illegittimo*", ("**Giorgio Demarco et nomine -vs- James Turner nomine et**", Prim' Awla, Qorti Civili, 12 ta' Ottubru, 1933). Ukoll, in vista ta' din l-enuncjazzjoni vertenti fuq kwestjoni ta' diskrezzjoni, l-eccezzjoni ta' l-inappellabilita` opposta mill-Awtorita` appellata ma tistax tigi milqugha u qeghda

ghaldaqstant tigi respinta. B'danakollu l-Qorti trid taghmilha cara illi l-analisi minnha tad-denuncja ta' l-appellanti ser tkun wahda cirkoskritta ghall-konsiderazzjoni tal-principju u mhux ukoll ghall-investigazzjoni tal-fatti u kif dawn gew apprezzati mit-Tribunal;

Eliminata din il-pregudizzjali, ma jidherx li hu disputat illi fl-ghazla tad-decizjonijiet taghha l-Awtorita` ghandha diskrezzjoni. S'intendi, dan huwa hekk dejjem fil-limiti tal-ligi u dawk il-limiti l-ohra bosta drabi senjalati mill-gurisprudenza ghall-ezercizzju tal-funzjonijiet affidati lill-entitajiet, korpi u awtoritajiet regolatrici. Funzjonijiet dawn li, fil-kaz in ispecje, huma dettaljament specificati fl-Artikolu 4 tal-Kapitolu 330 u f'disposizzjonijiet ohra ta' l-istess Kapitolu, senjatament l-Artikolu 16 tieghu;

L-appellanti jippretendu illi fil-kaz taghhom l-Awtorita` ma ezercitatx sewwa u b'mod sufficientement adegwat id-diskrezzjoni taghha. Huma, anzi, jikkontendu b'rikollegament ghall-Artikolu 21 (9)(b) tal-Kapitolu imsemmi, illi "*the decision of the competent authority constitutes an abuse of discretion or is manifestly unfair*". Akkoppjat ma' din is-sottomissjoni affermata taghhom l-appellanti jissollewaw ukoll kwestjonijiet vertenti fuq il-principju tad-diligenza u l-kuncett tal-bwona fede. Dan, huma jaghmluh biex isostnu l-punt illi l-ezercizzju tad-diskrezzjoni mill-Awtorita` huwa vizzjat minn attitudni errata u koncett zbaljat dwar dawk li huma skond il-ligi il-funzjonijiet u setghat ta' l-Awtorita` fl-ezami tal-kwestjoni;

Huwa opportun illi qabel kull konsiderazzjoni ohra l-Qorti tanalizza l-portata tal-kliem fid-dispost hawn riprodott;

In generali, l-abbuz jimplika l-ezistenza ta' dak l-*animus nocendi* intiz bhala dik l-intenzjoni eskluzivament rivolta biex tikkreja hsara lil xi parti. Sostanzjalment, dan hu element soggettiv izda, b'danakollu, min hu hekk mgħobbi

bil-piz li jipprova l-abbuz jista' jasal ghalih bil-prova ta' xi mgieba esterjuri insita fl-ezercizzju materjali tad-diskrezzjoni. F'dan il-qafas in-nozzjonijiet tad-diligenza u tal-bwona fede, ghal liema jirrikorru l-appellanti, jsibu l-ispejgazzjoni taghhom in kwantu, huma elementi strumentali ghal kejl siewi ta' valutazzjoni oggettiva tac-cirkostanzi partikolari tal-kaz. Fl-istess waqt iservu wkoll bhala fren fl-ezercizzju indiskriminat tad-dritt. Wisq logikament, meta jinstab li jkun jezisti abbuz bhal dan, id-diskrezzjoni ma tistax tircievi tutela guridika;

Fuq il-versanti l-iehor tal-“*manifestly unfair*” jigi osservat illi hi regola dottrinali konfermata mill-gurisprudenza illi l-ezercizzju tad-diskrezzjoni jrid ikun mhux biss “*rite*” imma anke “*recte*”. Dan fis-sens ta' “*fair and honest*”. Dan anke fir-rigward tad-diskrezzjoni gudizzjali. Ara f'dan is-sens is-sentenzi fl-ismijiet “**Negte Ugo Pace et -vs- Prof. Joseph Anastasi Pace nomine**”, Prim' Awla, Qorti Civili, 1 ta' Mejju, 1946 u “**Avukat Dr. Francesco Masini nomine -vs- Wilfred Podesta nomine**”, Appell Civili, 21 ta' April, 1961. Ukoll fiz-zmenijiet imghoddija u oltre sekolari kien avvertit illi “*la discrezione pero` non può tradursi in arbitrio; anzi al contrario nel fare uso della discrezione accordata è mestiere che risulti essere giusta, e fatta con discernimento e giudiziosamente, secondo l'esigenza del caso e lo spirito della legge. Di fatti la discrezione secondo i dottori non è che 'discernere per legem quid sit justum*” (“**Negte Leonardo Saverio Caruana -vs- Onor. Neg. Emmanuele Scicluna nomine**”, Appell Kummercjali, 16 ta' Frar, 1876);

lpprecizat dan, hu spjegat fid-dottrina (ara **Franzoni “Il danno al patrimonio”** p. 465) illi “*la discrezionalita` riguarda il modo in cui il giudice (u dan japplika ugwalment ghal kull awtorita` aggudikanti) assolve alla sua funzione e si risolve principalmente nella liberta di valutazione delle prove u nella formazione del convincimento nel decidere la controversia*”. Fundamentalment, hu ragonevolment mistenni illi ghall-ezercizzju bhal dan it-tribunal jew awtorita` aggudikanti

jipprovdu motivazzjoni kongruwa tal-process logiku li permezz tieghu jkunu waslu ghad-decizjoni;

L-atti tal-kaz, u l-aktar d-decizjoni ta' l-Awtorita` appellata tat-3 ta' Settembru 2004, juru u jillustraw b'mod adegwat ir-raguni li nduciet lill-Awtorita` tirrifjuta r-rikjesta ta' l-appellanti ghall-hrug tal-licenzja. Il-Qorti mhix ser tidhol fil-legittimita` o meno ta' l-istandards u tal-kriterji prefissi mill-Awtorita` ghaliex, sew kif jiddixxendi mil-limitazzjoni ta' skrutinju skond wiehed mill-provisos ghall-Artikolu 21 (9) fuq riferit, sew ukoll ghal dik ir-raguni biex wiehed jissellef mid-decizjoni gja citata in re: **“Demarco -vs-Turner”** (12 ta' Ottubru, 1933), *“questa questione sfugge al potere giurisdizionale di questi Tribunali Civili, il quale non puo` censurare i criteri che hanno ispirato detto Direttore nel fare quella dichiarazione, senza che esso Tribunale venga ad invadere il campo che non è il suo”*. Similment, il-Qorti lanqas ma hi behsiebha taddentra ruhha biex tirriezamina l-fatti ghaliex biex taghmel dan irid qabel xejn jirrizultalha li saret enuncjazzjoni guridika zbaljata u dan, hawnhekk, ma jidherx li hu l-kaz. Frankament, il-Qorti mhix sodisfatta, jew, pjuttost, hi sodisfatta mill-kuntrarju tad-dedott mill-appellanti, illi l-Awtorita` appellata abuzat mid-diskrezzjoni taghha. Anzi, hi tal-fehma ponderata illi l-appellanti lanqas f'dan l-istadju ma ressqu spjegazzjonijiet konvincenti u ragunijiet gustifikativi ghall-akkoljiment ta' l-ilment taghhom. Almenu, il-provi attendibbli u c-cirkostanzi saljenti tal-kaz ma humiex talili jeliminaw id-dubju tal-fehma taghha illi, tabilhaqq, l-appellanti ma pprovdewx b'mod konkret u ghas-serhan tal-mohh, it-taghrif kollu pertinenti biex jista' ragonevolment jinghad illi huma issodisfaw il-kriterji tal-komptenza u ta' l-affidabilita` ghall-koncessjoni mill-Awtorita` tal-licenzja mitluba;

Terga', fil-hsieb konsiderat ta' din il-Qorti, il-valutazzjoni tal-provi li saret mill-Awtorita`, kif ispirata mid-dover etiku-guridiku, imqiegghed ghab-bazi tal-koncett tal-bwona fede, ma jidherx li gie f'dan il-kaz assunt b'xi propozitu specifiku li jarreka pregudizzju lill-appellanti, kif hekk donnu

ssuggerit minnhom. Pjuttost, il-Qorti ssib li, fil-kumpless, l-atteggjament ta' l-Awtorita` fil-konfront ta' l-appellanti kien sew improntat ghal dik ir-responsabilita` u dik il-korrettezza diligenti, in kwantu kardini tad-dixxiplina legali skond il-bwona fede. Jitrapela sew, in fatti, minn dan l-istess atteggjament, in bazi ghall-provi, sija testimonjali, sija dokumentali, illi l-Awtorita` kienet preokkupata illi l-investituri potenzjali setghu jkunu esposti ghal riskji zejda, una volta ddeterminat, mhux minghajr raguni, illi l-appellanti ma kienux persuni idoneji, skond il-*“fit and proper test”* prefiss mil-ligi [Artikolu 6 (1) (a) tal-Kapitolu 370] biex jipprovdu s-servizzi ta' investiment. Ghal din il-Qorti din il-preokkupazzjoni hi kapibbli ghaliex, anke minghajr ma, b'daqshekk, tiffa xi ombra fuq il-kondotta personali ta' l-appellanti, ma huwa xejn inawdit jew barra mill-ordinarju s-sussistenza tal-pregudizzji li spiss drabi jinkorru l-konsumaturi inesperti ta' dawk is-servizzi. L-ezemplaritajiet storici mill-grajjiet finanzjarji huma ben maghrufa, u xejn ma hu remot jew improbabbli. Ukoll ghal din il-Qorti, dan jintegra l-kontenut tal-bwona fede, u dan, fil-kaz prezenti, jidher li gie mill-Awtorita` validament inhares u indokrat;

Meqjusa l-qaghda taht dawn il-profili ta' hsieb, il-motivazzjoni tas-sentenza attakkata mhix nieqsa minn razzjonalita` u dak tad-deduzzjoni konkluzjonali raggunta mit-Tribunal, wara raffront riflessiv bejn ir-raguni tad-decizjoni u r-rizultanzi probatorji. Fuq kollox, imbaghad, il-Qorti hi tal-ferma konvinzjoni illi l-Awtorita` appellata la ttrasgrediet il-principju tad-diligenza u lanqas dik tal-kanoni tal-bwona fede biex jista' legittimament jinghad, kif hekk pretiz mill-appellanti, illi l-Awtorita` appellata agixxiet b'mod kapriccjuz u skond esigenzi indebiti, jew ukoll li naqset milli tadempixxi ruhha *“rite”* u *“recte”* fl-uzu tad-diskrezzjoni affidata lilha mil-ligi.

Ghal motivi predetti, u prevja c-cahda tal-pregudizzjali ta' l-inammissibilita` ta' l-appell sottomessa mill-Awtorita` bl-ispejjez kontra l-istess Awtorita`, il-Qorti tirrespingi l-aggravju ta' l-appellanti fil-mertu u, konsegwentement,

Kopja Informali ta' Sentenza

tikkonferma s-sentenza appellata tat-Tribunal dwar
Servizzi Finanzjarji bl-ispejjez jibqghu sopportabbli mill-
appellanti.

< Sentenza Finali >

-----TMIEM-----