Before the Arbiter for Financial Services

Case No. 436/2016

TB ('the Complainant')

vs

Hollingsworth International Financial Services Limited (C32457)

('HIFS' or 'the Service Provider')

Sitting of the 15 September 2020

The Arbiter,

PRELIMINARY

The Arbiter wants to clarify that although the complaint and the reply were filed in the Maltese language, during the oral stage before the Arbiter, the parties preferred to continue the proceedings in the English language.

Therefore, the Arbiter is delivering the decision in the English language.

The Case in question

The Complaint relates to the alleged losses suffered by the Complainant on his investment portfolio following the investment advisory services provided by Hollingsworth International Financial Services Limited.[1]

It was explained that the Complainant had a portfolio of over £3.5million, and that during the period November 2005 to December 2011, he availed himself of the professional services of Mark Hollingsworth who operated under the name

[1] *A fol.* 3-5

of Hollingsworth International Financial Services ('HIFS'). HIFS provided financial advice to the Complainant.

It was claimed that the Complainant had no knowledge of financial investments and left every decision completely in the hands of his financial consultant. It was further claimed that the Complainant wanted his investments to be safe and secure.

It was noted that the financial consultant made various investments in the name, and for the interests of, the Complainant where reference was made to the Executive Investment Bond originally issued by Royal Skandia International which later changed its name to Old Mutual International.

It was alleged that the Complainant suffered substantial losses on his investments as a result of the mismanagement of his funds. The Complainant claimed that a substantial number of investments (underlying his Executive Investment Bond), were placed into highly speculative and volatile investments and there were various instances where the purchase and sale of the same stock occurred over a short period of a few months.

It was submitted that the Complainant's instructions were clear and unequivocal in that every investment had to be safe and secure.

The Complainant claimed that there was a lack of prudence and diligence on the Service Provider's part. It was alleged that this resulted from the various valuations and records of several transactions that occurred, in particular, over the period 2007 to 2010 which ended in substantial losses. It was further alleged that a substantial part of such loss could be avoided.

Various statements, which were indicated as having been provided to the Complainant, were attached to the Complaint form as evidence of the substantial loss on various transactions that occurred during the said period.

Particular reference, although not exclusively, was made to the investment of GBP800,000 into the Athena Bonus Coupon relating to the S&P Natural Gas Index that was undertaken on the 3 November 2009.

It was claimed that although this product offered a high potential return, this was not a guaranteed product, and that in view of certain benchmarks which

applied within the product, a loss of over 75% of the investment into this product materialised upon maturity. It was claimed that other products of lower value, but of the same nature known as structured products, suffered the same fate.

It was also pointed out that the last transactions that occurred in 2011, just before the Complainant changed his financial advisor, involved an investment of GBP50,000 respectively made into each of the Axiom Legal Financing Fund and the Premier New Earth Fund. It was claimed that the said investments eventually ended up both in suspension.

It was noted that the Complainant changed his financial advisor in 2012 after he could no longer accept further losses from his investments. It was submitted that a *bonus paterfamilias* would have certainly been much more careful and the loss would have been avoided.

The Complainant requested the Arbiter to consider his case and demand the Service Provider to provide an adequate compensation due to the alleged shortcomings.

In its reply, the Service Provider essentially submitted the following:[2]

1. That, as a preliminary plea, the action against the Service Provider is prescribed in terms of Article 2156 of Cap. 16 of the Laws of Malta given that any form of extra-contractual or contractual interaction that could have occurred between the parties and the direct relationships between them occurred much before the decadence of the applicable prescription periods.

   The Service Provider stated that the contractual relationship between the parties started on the 16 September 2005 and the investments in question, which are the subject of the complaint, were undertaken in 2005 (in the case of the Royal Skandia (Old Mutual) and in the year 2007 (in the case of Friends Provident International), and that the Complainant stopped from continuing investing with the Service Provider in December 2010 and

[2] *A fol.* 34-36

accordingly all the requests made by the Complainant are prescribed and should be rejected.

2. That, as another preliminary plea, and without prejudice to this Complaint and the exceptions that follow, the Service Provider considers the Complaint null in terms of Article 789(1)(c) of Cap. 12 of the Laws of Malta on the basis of how the complaint has been presented, given that the Service Provider cannot make an adequate defence as from the said Complaint no shortfall/s attributable to the Service Provider result that can give rise to this Complaint and any right expected therefrom, nor any amount that the Complainant is asking as compensation has been specified. It was noted that, in the circumstances, it is not possible for the Service Provider to consider the basis of the said Complaint and accordingly the exceptions and subsequently the proves that it needs to produce to adequately defend itself as is its undisputable right and to consider what proves it needs to present to address the claimed damages that, in any case, are totally the result of external factors to the Service Provider.

3. That, without prejudice to what has been stated, in subject and in merit, the Complaint and the allegations made by the Complainant are frivolous and unfounded in fact and at law and should be rejected with cost, as the Service Provider acted within the applicable regulatory requirements and with the highest level of diligence required at law as will be amply proven during the hearing of this case.

4. That, in merit and without prejudice to what has been already stated and the exceptions that follow, the Complaint is not justified in that the loss suffered by the Complainant is the result of market risk, a risk inherent in every type of financial investment especially when one considers that between 2005 and 2015 there was the greatest financial crisis experienced in the past hundred years.

5. That, in the end, the Service Provider does not consider that there are remedies for the Complaint as presented by the Complainant due to the Complainant not being justified.

Having heard the parties and seen all the documents, affidavits and submissions made,

Considers:

Preliminary Pleas

The Plea of Prescription

The Service Provider pleaded that the action against the Service Provider has been prescribed in terms of Article '2156' of the Civil Code. The Arbiter notes that Article '2156' of the Civil Code covers different types of prescription under different sub-articles and none of these has been specifically indicated.

Our Courts have always held that the plea of prescription has to be clearly and specifically indicated because it is not the role of the Court to interfere between the parties and clarify or raise the plea of prescription on its own motion:

'*Hija gurisprudenza konsolidata illi l-Qorti ma tistax tissolleva l-preskrizzjoni hi ex officio. Lanqas ma tista' tkun hi li tindika l-artikolu rilevanti fl-assenza ta' indikazzjoni cara u inekwivoka da parti tal-eccipjent. Lanqas ma tista' tindika hi d-disposizzjoni korretta meta tkun rinfaccjata b'artikolu citat erroneament mill-eccipjent.'*[3]

The Court also quotes the judgement decided on the 21 March 1977 by the Court of Commercial Appeal in the names ***Grech vs Camilleri***, wherein the Court stated:

'Il-proposizzjoni generika ta' l-eccezzjoni tal-preskrizzjoni mill-parti nteressata ma tawtorizzax lill-gudikant biex jindividwa hu t-tip tal-preskrizzjoni li tghodd ghall-kaz. Dan ghaliex huwa l-parti li ghandu l-oneru jaghzel liema wahda mill-varji ipotesijiet prezunti mil-ligi hi applikabbli. Fin-nuqqas ta' indikazzjoni specifika l-eccezzjoni nnifisha ma tistax hlief tigi dikjarata inammissibbli.'

This was further emphasized by Judge Philip Sciberras who explained that, apart from the Article of the Law, even the sub-article has to be specified in cases where this applies:

[3] *David Curmi noe et vs Eucharist Zammit noe et*, PA, 28/02/2012

'Fl-assenza ta' indikazzjoni cara u specifika tal-preskrizzjoni, il-gudikant ma jistax jiehu inizzjattiva biex jissupplixxi hu ghan-nuqqas tal-parti. Dan ifisser li jrid jigi indikat l-Artikolu tal-Ligi relevanti u jekk ikun il-kaz is-subinciz applikabbli.' [4]

Moreover, it has also been established by our Courts that the plea of prescription cannot be raised through the final note of submissions.[5] Therefore, the Service Provider could not specify the relevant sub-article of the Civil Code in the final note of submission as in this case.

The Arbiter also notes that there is a clear legal distinction between the way the plea of prescription could be raised before the Court and before the Arbiter. Whilst before the Courts the plea of prescription could also be raised at the appellate stage of the proceedings, Article 19(3)(e)(prov) of Chapter 555 of the Laws of Malta clearly stipulates that the plea of prescription could only be raised before the Arbiter in the reply.

'*Provided that the financial services provider may only raise the plea of prescription in the first written submissions provided for by article 22(3)(c) unless otherwise authorised by the Arbiter giving reasons for that authorisation'*

The Arbiter notes that in its 'second' reply the Service Provider tried to remedy the plea of prescription.[6] However, when examining the records of the proceedings (verbali),[7] the Arbiter concludes that he did not authorize the Service Provider to file a 'new' reply but only authorised the Service Provider to raise its comments on the list of investments on which the Complainant alleged to have suffered a loss and which the Arbiter ordered the Complainant to specify.

When the second reply by the Service Provider was filed during the sitting of the 15 January 2019,[8] the Arbiter had already been treating the merits of the case for at least four sittings and never authorised the Service Provider to file a new reply or an amended version of the reply already filed.

[4] *Gauci Joseph vs Farrugia Saviour,* QA (Inf), 22.06.2005
[5] *Emmanuele Busuttil vs Francesco Mercieca*, PA, 25/04/1950
[6] *A fol.* 312
[7] *A fol.* 50, 106, 271, 273, 300, 304 and 308 - the latter two in particular refer.
[8] *A fol.* 308

Therefore, the second reply filed by the Service Provider went beyond the authorization of the Arbiter and the Service Provider could not raise new preliminary pleas or amend the plea of prescription already submitted before the Arbiter in the timeframe established by Articles 19(3)(e) and 22(3)(c) of Chapter 555 of the Laws of Malta.

For the above-stated reasons, the Arbiter cannot admit the plea of prescription as raised by the service provider.

Plea of Nullity

The second preliminary plea raised by the service provider is based on Article 789(1)(c) of Code of Organization and Civil Procedure (COCP).

The Arbiter notes that this plea is frivolous because the procedure before the Arbiter in this respect is not regulated by the COCP. Moreover, our Courts have long established that the plea of nullity should be dealt with great care because it is intended to bring the proceedings to an abrupt end without the Court being afforded the possibility of dealing with the merits of the case. Even prior to the amendments of 1995 to the COCP, which clearly limited to a great extent the possibility of nullity of a judicial act, our Courts have always maintained that, if legally possible, a judicial act should be saved, and treated nullity as the exception and not the rule.

The procedure before the Arbiter is an informal one and the legislator did not contemplate nullity of acts. Chapter 555 of the Laws of Malta, which has as its principal aim the lodging of complaints by consumers, did not establish a formal way of filing complaints before the Arbiter and complaints could be initiated by a simple letter. Since the law does not establish the nullity of complaints, the Arbiter cannot create his own laws and accept pleas regarding nullities of complaints.

Furthermore, the Service Provider filed extensive replies and a detailed note of final submissions, clearly indicating that it understood the basis of the Complaint and indeed did not suffer any prejudice by the way the Complaint was filed. The Arbiter finds nothing lacking in the Complaint which could have prejudiced the interests of the Service Provider.

For the above-stated reasons, the Arbiter is declining this plea and considers it to be frivolous.

'New Submissions'

During the proceedings of the case, the Service Provider filed an application wherein it raised *inter alia* that the Complainant should be barred from raising fresh complaints at the late stages of the proceedings. It requested the Arbiter to expunge all the documents presented in the acts of the Complaint by means of the Complainant's note dated 30 July 2018, as this would run counter to the equality of arms principle to the detriment of the defendant's right to a fair hearing.[9]

The Arbiter accepts the submission that no new allegations could be raised by the Complainant at that stage and will limit his decision on the original Complaint, taking also into consideration the directions given by the Arbiter in his *verbali* and the subsequent reply filed by the Service Provider limited to the merits of the case as authorised by the Arbiter.

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.[10]

Investment Advisor

In his affidavit, which Mark Hollingsworth submitted in his capacity of Director of HIFS, it was *inter alia* explained that:

'*HIFS was formed in 2003 and holds a category 1A investment services license with the MFSA (Malta Financial Services Authority). This allows HIFS to provide investment advice, i.e. HIFS does not handle clients' money nor does it offer discretionary investment services. I am currently the sole financial advisor at HIFS*'.[11]

[9] *A fol.* 298-299
[10] Cap. 555, Art. 19(3)(b)
[11] *A fol.* 57

The MFSA's website indicates HIFS as the holder of a Category 1A licence.[12]

Profile of the Complainant

The Complainant explained in his affidavit that he:

'*was absolutely ignorant in investment affairs. In fact I confess that I left school when I was only 14 years old. In my lifetime I have worked mostly as a property developer, apart from other businesses but I did not deal in similar investments on my own*'.[13]

In the hearing of the 19 June 2018, the Complainant stated *inter alia* that:

'*At the time of the investment, I was in property development and I used to have a care hire business'*. [14]

According to the Client Fact Find undertaken in respect of the Complainant dated 16 September 2005 (signed by the Complainant on 16/11/05) which was presented by the Service Provider during the proceedings of the case, the Complainant, born in July 1956 is indicated as '*Managing Director'* of '*Tal-Franciz Construction'*.[15]

In the said Fact Find, the Complainant is indicated as having an investment portfolio of £3,000,000 with an investment of £1,000,000 in the '*Prudential Portfolio Bond (with profits)*' ('the Prudential Bond investment') and an '*HSBC Portfolio*' of £2,000,000.[16]

The Prudential Bond investment was liquidated in 2009 as indicated by Mark Hollingsworth himself in his affidavit.[17] According to a valuation dated 26 August 2009, the said Prudential Bond included two investments, the '*M&G High Yield Corporate Bond Fund*' and the '*Sterling Offshore With Profits Fund*'.[18] With respect to the HSBC Portfolio, it was indicated that three holdings under the

[12] https://www.mfsa.mt/financial-services-register/result/?id=1939
[13] *A fol.* 52
[14] *A fol.* 273
[15] *A fol.* 62-69
[16] *A fol.* 64
[17] *A fol.* 57
[18] *A fol.* 70

portfolio constituted two sub-funds of the HSBC International Select Fund, the HSBC Sterling Adventurous Portfolio (valued as £281,717 as at 15/10/07) and the HSBC Euro Balanced Portfolio (valued as €465,253 as at 15/10/07), and the HSBC Sterling Anglo-American Growth III, this being a sub-fund of the HSBC International Capital Secured Growth Funds p.l.c. (valued £185,251 as at 18/12/06).[19]

During the cross-examination of Mark Hollingsworth at the hearing of the 19 February 2019, it was noted *inter alia* that:

'*Reference is made to paragraph 6 in my affidavit where I state that I got the impression that he was a wealthy, successful building contractor and being said that, that does not mean that he was familiar with financial investments, I say that statement on its own does not necessarily mean he would be, but we gathered information at the outset and I would say that yes, he had experience in financial instruments*'.[20]

During the said cross-examination, Mark Hollingsworth subsequently referred primarily to the investments the Complainant had with HSBC and Prudential arguing that these confirmed '*his awareness of non-conventional investments*'.[21]

It is amply clear that the Complainant is not a professional investor, but his profile is that of a Retail Investor. His profile of a Retail Investor was indeed selected in the Confidential Client Fact Find itself, as he was marked as having the status of a '*Private*' client as compared to a '*Non-Private*' client (the latter terminology used to refer to professional investors in terms of the investment services guidelines applicable at the time).[22]

Investment Objective

In his affidavit, the Complainant stated *inter alia* that:

[19] *A fol.* 57, 71-73
[20] *A fol.* 381-382
[21] *A fol.* 382
[22] *A fol.* 62

'*From the very start I made it very clear to him that this money was the result of very hard work on my part and that therefore he had to make sure that no high-risk investment was involved. Indeed, when I had explained to him that I did not want hazardous investments, he told me that he will only effect calculated investments. He explained to me that he was going to make sure that he would take care of my money as if it was his own and that therefore none of the investments would have to be risky*'. [23]

The Complainant further stated that:

'*My intentions were always that I receive a decent return from my investment either by way of a steady income or by an increase in the value of the investment. Indeed he always assured me that I would get a minimum of 8%. I was happy and I always told him to make sure that they were 100% secure*'.[24]

Mark Hollingsworth rebutted the claims made by the Complainant where, in his affidavit, Hollingsworth claimed that:

'*At no time did I advise TB that the investments were 100% secure as suggested in his affidavit, nor did I ever tell him that he would receive a minimum return of 8%. I rebut any suggestion to the contrary in its entirety. Not only does such guarantee not exist but it is contrary to his risk appetite as confirmed by him in his client fact find and also does not correspond to his previous risk appetite with other service providers, prior to engaging HIFS*'.[25]

The Complainant's attitude to risk was indicated as '*Medium*' in the Confidential Client Fact Find dated 16 September 2005, whilst the investment objective was indicated as '*Capital Growth*'.[26] The Fact Find includes no notes or explanations with respect to investments or how the investment objective was to be achieved; with the section titled '*Notes*' after the sections of '*Risk Profile*' and '*Investment*' being left empty.[27]

A report was, however, presented during the proceedings of the case titled the '*Investment & Financial Advisors*' report, which was prepared for the

[23] *A fol.* 52 – the references to '*him*' refer to Mark Hollingsworth.
[24] *A fol.* 53
[25] *A fol.* 58
[26] *A fol.* 67
[27] *Ibid.*

Complainant by HIFS and dated 4 November 2005. The said report includes *inter alia* an assessment prepared by HIFS as to the reasons for the investment into the Royal Skandia Executive Investment Bond ('the EIB') and an asset allocation as underlying investments of the EIB, with the asset allocation referred to as a '*Balanced Portfolio - Sterling*' and including a list of thirteen investment products (which included various funds) and with the portfolio being allocated a weighting of 30% to '*Fixed Interest*' investments, 40% to '*Property*' investments, 20% to '*Global Equities*' and 10% to '*Commodities*'.[28]

In the said list of investments, each investment is indicated as either comprising 5% or 10% of the overall portfolio. Certain investments within the said list were indicated as having a yield ranging from 5% to 7%.[29] No other reports emerged during the proceedings of the case relating to the investment objective and investment strategy for the Complainant and any changes thereto throughout the years.

With respect to the investment portfolio created by HIFS for the Complainant, Mark Hollingsworth stated *inter alia* in his affidavit that:

'*Importantly, the medium risk profile was established for the* ***overall*** *portfolio, not individual investments entered into. Therefore, within the portfolio, some investments were of a lower risk than others, yet the overall risk profile remained that of* ***medium*** *risk. I estimate that 80 products comprising approximately 82% of his portfolio were invested into standard funds and ETFs that offered daily or close to daily liquidity. Therefore, his portfolio was significantly weighted into non-complex, straightforward investments and well diversified …'.*[30]

It is also to be noted that during the cross-examination of Matthew Bonello at the hearing of the 4 July 2017, Bonello (being the subsequent advisor of the Complainant after the relationship with HIFS was terminated in 2012) stated *inter alia* that:

[28] *A fol.* 78
[29] *Ibid.*
[30] *A fol.* 58

'*When I spoke to TB, I asked him what were the terms of reference of the agreement, and his feedback was that he always understood that the portfolio was to be invested with a medium, calculated risk*'.[31]

Awareness of Investment Portfolio

In his affidavit, Mark Hollingsworth stated *inter alia* that:

'*Until the complainant terminated his relationship with HIFS in 2012, TB had a very active and he was always informed and well aware of the performance of his investments. In order to keep him fully updated, meetings were typically held at his office every two months. Such meetings were to review the current investment portfolio and to administer the new investments when they were being made. In addition, quarterly valuations were hand delivered to the complainant.*' [32]

Furthermore, Mark Hollingsworth stated that:

'*TB states in his affidavit that he ceased using the services of HIFS in April 2012 when he realised he was losing a substantial amount of money. This is incorrect. He was informed and was therefore well aware through several meetings and formal valuations that certain investments did not perform well resulting in a loss, and therefore was aware of the loss as it arose and not in 2012 upon the termination of the relationship*'. [33]

Loss on portfolio

During the cross-examination of the Complainant in the hearing of 19 June 2018, the Complainant stated *inter alia* that:

'*Considering all my investments, even those that performed well, the net result was that I made a huge loss*'.'[34]

The overall resulting loss on the portfolio was not contested as such by the Service Provider.

[31] *A fol.* 107
[32] *A fol.* 59
[33] *Ibid.*
[34] *A fol.* 275

Investments

Attached to his Complaint filed with the Office of the Arbiter for Financial Services, the Complainant filed a list of all the investments undertaken under the advice of the Service Provider.[35]

During the hearing of the 19 June 2018, the cross-examination of the Complainant was suspended, and the Complainant was asked to specify which investments he was complaining about.[36]

Upon the request of the Service Provider during the hearing of the 2 October 2018, the Arbiter directed the Complainant to file a list of the specific investments that he was complaining about.[37]

During the hearing of the 5 November 2018, the Arbiter referred to the information submitted by the Complainant and requested the Complainant to file a specific, numbered list of investments which is clear and definite and the reasons why the Service Provider is held responsible for each investment.[38]

Following such request, a list of investments was submitted, and is in essence summarised in the table below:[39]

Name of investment	Amount invested	Date of investment	Proceeds at maturity/ sale	Date of maturity/ sale	Interest received	Realised Loss on maturity/ sale

[35] *A fol.* 6-8
[36] *A fol.* 276
[37] *A fol.* 300
[38] *A fol.* 304
[39] *A fol.* 305-307

Structured Notes						
S.G. Athena Natural Gas Note	GBP 800,000	13 Oct 2009	GBP 188,852.96	13 Oct 2014		GBP 611,147.04
CITI Titans 3 Year	GBP 270,000	28 Jan 2011	GBP 91,470.60	28 Jan 2014	GBP 68,850	GBP 109,680
Suspended funds						
Premier New Earth Recycling Fund	GBP 50,000	7 Dec 2011				
Axiom Legal Financing Fund	GBP 50,000	1 Dec 2011				
Other losses						
Glanmore Property Fund	GBP 20,000 GBP 19,500	30 Nov 2005 2 Aug 2006	GBP9,394	10 June 2009		GBP30,106
Castlestone Aliquot Agriculture	GBP 140,000	3 July 2008	GBP60,121	13 Oct 2009		GBP79,879
Lyxor EFT India	GBP 205,000	20 Sep 2010	GBP142,454	28 Nov 2011		GBP62,546
ETFS Leverage Live Cattle	USD 99,967	11 July 2008	USD48,672	19 May 2009		USD51,296

ETFS Leverage Corn	USD 99,945	11 July 2008	USD23,674	19 May 2009		USD76,271
Claymore Alphashares China Cap	USD 249,981	17 Dec 2009	USD218,891	10 Feb 2010		USD31,090
Market Vectors Brazil Small Cap ETF	USD 259,974	17 Dec 2009	USD218,228	10 Feb 2010		USD41,746
Powershares Emerging Markets Infrastructure	USD 249,988	17 Dec 2009	USD224,918	10 Feb 2010		USD25,070

The above investments are being taken by the Arbiter as being the subject of this Complaint.

Overview of the Executive Investment Bond and Underlying Investments

Various valuation statements were presented during the proceedings of the case in respect of The Executive Investment Bond (policy number 606943), ('the Policy').

The said reports indicate the various underlying investments held within such policy, which investments included the investments complained about listed in the preceding section of this decision titled '*Investments*'.

It is noted that the valuation summary presented in 2013 indicated that the Executive Investment Bond had '*Total Premiums Paid*' of GBP3,563,909.88.[40]

The valuation summary at the respective year ends indicated the following positions:

[40] *A fol.* 149 & 158

(i) As at 30 Dec 2005 - 99.57% of the portfolio was invested in collective investment schemes ('CISs') with the total value of the portfolio being GBP201,759;[41]

(ii) As at 31 Dec 2006 - 99.68% of the portfolio was invested in CISs with the total value of the portfolio being of GBP423,502;[42]

(iii) As at 31 Dec 2007 - 89.52% of the portfolio was invested in CISs and 10.48% in cash with the total value of the portfolio being of GBP1,346,755;[43]

(iv) As at 31 Dec 2008 – 44.06% of the portfolio was invested in Equities, 14.30% in Debt Instruments and 41.62% in CISs, with the total value of the portfolio being of GBP2,068,779;[44]

(v) As at 31 Dec 2009 – 32.04% of the portfolio was invested in Equities, 25.51% in Debt Instruments and 42.15% in CISs, with the total value of the portfolio being of GBP2,909,192;[45]

(vi) As at 31 Dec 2010 – 35.66% of the portfolio was invested in Equities, 18.63% in Debt Instruments and 45.09% in CISs, with the total value of the portfolio being of GBP2,552,575;[46]

(vii) As at 31 Dec 2011 – 36.65% of the portfolio was invested in Equities, 22.81% in Debt Instruments and 38.12% in CISs, with the total value of the portfolio being of GBP2,290,986; [47]

(viii) As at 31 Dec 2012 – 39.38% of the portfolio was invested in Equities, 18.92% in Debt Instruments and 38.30% in CISs, with the total value of the portfolio being of GBP2,221,000. [48]

[41] *A fol.* 167
[42] *A fol.* 182
[43] *A fol.* 196
[44] *A fol.* 212
[45] *A fol.* 227
[46] *A fol.* 242
[47] *A fol.* 264
[48] *A fol.* 257

As indicated above, for the purposes of this Complaint the investments subject to this complaint are considered by the Arbiter as being those identified in the section titled '*Investments*' above. Consideration will be made by the Arbiter that such investments were not done on their own but within the context of a portfolio of investments advised upon by the Service Provider.

With respect to the table above under the section titled *'Investments'* consideration will first be made of the S.G. Athena Natural Gas Note.

The Societe Generale Athena Bonus Coupon on S&P Natural Gas Index ('the S.G. Athena Natural Gas Note')

The S.G. Athena Natural Gas Note was a structured note issued by Societe Generale with ISIN Code XS0458244620, denominated in GBP and whose performance was linked to the underlying index which was the S&P GSCI Natural Gas Index Excess Return.[49]

One key feature of this product was that the invested capital was at risk in case of a particular event occurring, such as the fall in value beyond certain specified barriers of the underlying index to which the structured note was linked.

As explained by the Service Provider itself:

'*the full return of capital is only dependant on whether the price is above or below the 50% safety net at the notes' maturity date in October 2014*'.[50]

Observations and Conclusions with respect to the S.G. Athena Natural Gas Note

(i) *Investment in high risk instrument and claim of sufficient protection*

It is clear that the S.G. Athena Natural Gas Note entailed certain specific and high risk of investment and was speculative in nature.

Besides the specialised nature of the commodity to which this product was linked, this being natural gas, it is noted that the price of natural gas

[49] *A fol.* 359-362
[50] *A fol.* 92

varied substantially, not only in the same year of the investment in 2009, but also throughout the previous years of investment.

In its own recommendation letter issued by the Service Provider to the Complainant dated 28 September 2009, relating to the investment into this product, the Service Provider indeed highlighted that:

'*You may have noticed that the price of natural gas has fallen from $6.00 per thousand cubic feet to around $2.80 at the present time*'.[51]

The extent of fluctuation in the price of natural gas along the years also emerges from publicly available information found following general internet searches on the price of natural gas.[52]

Secondly, the high risk of the product was reflected in the abnormal high annual coupon rate of 14% offered on this product.[53]

In the same recommendation letter, HIFS highlighted that:

'*We recommend that you purchase the Societe Generale Athena Bonus Coupon on S&P Natural Gas Index, which provides an opportunity to profit from investing in natural gas by offering an annual coupon of 14 percent whilst providing 50% capital protection at maturity*'.

The emphasis made by the Service Provider on the comfort deriving from the indicated '*50% capital protection at maturity*', is considered to have been misplaced and inaccurate. This is in view that the said '*safety net*' was firstly conditional on a number of factors and events occurring. It is clear that there were material consequences if the 50% barrier forming part of the features of this product, was breached as had in reality occurred. Such important and crucial qualification was, however, not highlighted and not even mentioned in the recommendation letter issued by the Service Provider.

The implication of the 50% barrier should have not been overlooked nor discounted as the claim of '*50% capital protection at maturity*' on its own

[51] *A fol.* 355
[52] https://www.macrotrends.net/2478/natural-gas-prices-historical-chart
https://tradingeconomics.com/commodity/natural-gas
[53] *A fol.* 355

provided a false sense of security, besides being inaccurate and incomplete as it was not qualified accordingly. Indeed, the events on which the '*safety net*' was based had indeed occurred, leading to the substantial losses realised on this product.

(ii) *Exposure to single product and level of diversification*

The amount invested into the S.G. Athena Natural Gas Note was indicated as totalling GBP800,000 on 13 October 2009.[54] The '*Cash Account Transactions*' in the Valuation Statement for 2009 indicates the said purchase on 3 November 2009.[55] According to the portfolio valuation statement dated 31 December 2009 this investment constituted 24.77% of the portfolio as at 31 December 2009.[56]

The investment into the S.G. Athena Natural Gas Note constituted such a high percentage of the portfolio even after experiencing a reduction in value of GBP79,520 over a span of two and a half months since the date of its purchase.

It is clear that at the time of purchase, the investment into the S.G. Athena Natural Gas Note indeed constituted a significant part of the portfolio in the range of 20-30% of the portfolio.

The Arbiter notes that the extent of investment into this product contrasts sharply with the level of diversification and extent of individual weighting to single investment products indicated in the '*Investment & Financial Advisors Report*' ('the 'Recommendation Report') of 4 November 2005 prepared by Mark Hollingsworth and provided to the Complainant on the basis of the completed Fact Find as indicated in point 5 of the affidavit of Mark Hollingsworth.[57]

[54] *A fol.* 305
[55] *A fol.* 231
[56] The value of the S.G. Athena Natural Gas Note was GBP720,480 as at 31 December 2009. The '*Total Value'* of the portfolio as at 31 December 2009 was GBP2,909,192.92. Hence, the S.G. Athena Natural Gas Note constituted 24.7656% of the Total Value of the portfolio (GBP720,480 of GBP2,909,192.92) as at 31 December 2009 - *A fol.* 227.
[57] *A fol.* 58

Indeed, the weighting to individual investment products in respect of a '*Balanced Portfolio*' as indicated in the said report, only ranged between 5% to 10% to any one product.[58]

Whilst it could be argued that the said Recommendation Report prepared by HIFS was an indicative asset allocation in respect of a '*Balanced Portfolio – Sterling*' as indicated in the title of Section 3 of the said report, the allocation to the S.G. Athena Natural Gas Note was, however, quite far off the diversification and maximum exposure benchmarks indicated in the said report.

It is noted that no justifiable rationale for taking the relatively high exposure to the said risky product and the basis for the departure from the said balanced allocations to single products of 5-10% indicated in the said Recommendation Report has emerged or been produced.

The allocation of over 20% to a highly risky product in the context of an investor of '*Medium risk*' do not indeed reflect the indicated balanced approach. This also taking into consideration that the portfolio included other investments which cannot be considered to be of low risk, as emerging in the portfolio summary as at 31 December 2009.[59]

Consideration of the overall investment portfolio existing at the time indicates that there was already a substantial investment into just one single equity (*'Standard Bank China Momentum GBP'*) of GBP882,000 existing prior to the investment into the S.G. Athena Natural Gas Note. The portfolio, also, had already exposure to other specialised industries, such as agriculture, wind/solar portfolio funds which entailed their own specific risks (such as *'Dawnay Day Quantum Protected Agriculture Comm II GBP'*, *'Dawnay Day Quantum Protect Wind Portfolio GBP'* and *'Dawnday Day Quantum Protect Solar Portfolio'* which between them comprised in total, an investment of over GBP400,000).[60]

The *'Cash Account Transactions'* in the portfolio valuation summary as at 31 December 2009 also indicated other substantial investments in

[58] *A fol.* 78
[59] *A fol.* 228 to 233
[60] *A fol.* 229

emerging market funds (such as in the *'Market Vectors, Brazil SmallCap ETF USD*' and *'Powershs EMG MKTS Infrastructure USD'* of nearly USD500,000 in total undertaken in October 2009, shortly after which they were sold and again invested into for approximately the same amounts in December 2009).[61]

It is hence unclear on what basis one can consider the said overall portfolio, inclusive of the substantial investment into the S.G. Athena Natural Gas Note, as a balanced one with an adequate level of diversification when taking into consideration the Complainant's attitude to risk and investment objective.

(iii) *Extent of exposure to non-complex products*

During the hearing of 19 February 2019, Mark Hollingsworth stated that:

'*Being asked to confirm that TB's investment was basically in structured notes and trading transactions, I reply that the portfolio, about 90% of the products, were in non-complex, daily traded UCITs or exchange trading funds and the remaining 6 or 7 products were in structured notes*'.[62]

In its submissions, the Service Provider again claimed that:

'*HIFS diversified the portfolio such that 90% of the portfolio was invested in non-complex instruments*'.[63]

In the concluding part of the additional submissions, the Service Provider highlighted that:

'*Ultimately, as provided in Reply 2, and as further confirmed by Mr Hollingsworth in cross-examination during the sitting held on the 19 February 2019 "the portfolio, about 90% of the products were in non-complex, daily traded UCITs or exchange trading funds and the remaining 6 or 7 products were in structured notes". Within the structured products, a number also offered a 100% capital guarantee including the largest*

[61] *A fol. 232*
[62] *A fol.* 386
[63] *A fol.* 405

investment into the China Momentum. The portfolio was therefore highly skewed towards non-complex products'.[64]

On the basis of the valuation statements submitted during the proceedings of the case, it has however not really transpired that '*90% of the portfolio was invested in non-complex instruments,*' as claimed by the Service Provider. Indeed, as indicated in the previous sections of this decision, the valuation statement as at 31 December 2009 (this being the closest one available at the time of purchase of the S.G. Athena Natural Gas Note), reflects an investment into a single structured note constituting nearly 25% of the portfolio as at the date of the valuation statement. Given that, by its nature, the S.G. Athena Natural Gas Note, is considered a complex instrument the assertions of the Service Provider in this regard cannot be considered credible in the circumstances.

The S.G. Athena Natural Gas note is reasonably considered as a complex product in terms of the **Investment Services Rules**[65] **applicable at the time of the investment and also by reference to the guidelines on complex products issued by the European Securities and Markets Authority**.[66]

The said investment product can be classified as a debt instrument embedding a derivative[67] and/or a debt instrument incorporating a structure which makes it difficult for the client to understand the risk - given that the debt instrument had an unusual or unfamiliar underlying; the debt instrument had a complex mechanism to determine to calculate the return; the debt instrument was structured in a way that may not

[64] *A fol.* 407

[65] Standard Licence Condition ('SLC') 2.25 and 2.26(d) of Part B of the Investment Services Rules for Investment Services Providers issued on the 1 November 2007, provided certain indications of criteria relating to complex products. SLC 2.25 referred to *inter alia* bonds that embed a derivative whilst SLC 2.26 (d) to instruments which did not satisfy *inter alia* the criteria of having adequate '*comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average Retail Client to make an informed judgement as to whether to enter into a transaction in that instrument*', as being instruments considered complex.

[66] https://www.esma.europa.eu/sites/default/files/library/2015-1783_-_final_report_on_complex_debt_instruments_and_structured_deposits.pdf

[67] Section on '*Debt instruments embedding a derivative*' - "*… an embedded derivative should be interpreted as meaning a component of a debt instrument that causes some or all of the cash flows that otherwise would result from the instrument to be modified according to one or more defined variables*" – Pg. 31 of the Final Report, Guidelines on complex debt instruments and structured deposits issued by ESMA dated 26 November 2015.

provide for a full repayment of the principal amount – these being criteria of products classified as complex instruments.[68]

The Service Provider also highlighted that the S.G. Athena Natural Gas Note was not the first investment into a structured product and indeed stated that:

'*His first experience was in October 2007 when he invested £109,000 into Dawnay Day Quantum Protected Agriculture Commodities*'.[69]

Firstly, the Portfolio Valuation statement dated 31 December 2007 does not indicate the said Dawnay Day investment.[70] The Valuation Summary for the Policy as at 31 December 2017, indicate that as at 31 December 2007, 89.52% of the portfolio was invested into collective investment schemes with the remaining 10.48% in cash.[71] The previous valuation summary as at end December 2005 and December 2006 indicate also over 99% of the portfolio invested in collective investment schemes as outlined in the section titled *'Overview of the Executive Investment Bond and underlying investments*' above and, hence, no indication of investments into structured notes.

Furthermore, the Arbiter notes that the valuation summary as at 31 December 2008, includes a reference to an investment by the name of '*Dawnay Day Quantum Protected Agriculture Comm II GBP*', where such product is listed as a collective investment scheme and not as a structured product.

No evidence has hence emerged or been produced by the Service Provider regarding the alleged previous experience in structured notes.

Even if, for the sake of the argument (as this has not been proven in practice during the proceedings of this case), there was an investment into a structured note previously, it is noted that, by the Service Provider's own admission, it was only in October 2007 that the Complainant is being

[68] Pg. 31/32 of the Final Report, Guidelines on complex debt instruments and structured deposits issued by ESMA dated 26 November 2015.
[69] *A fol.* 313
[70] *A fol.* 197-202
[71] *A fol.* 196

alleged as having first invested into a structured note, with such claimed investment being in any case of a much lower value to that undertaken in the S.G. Athena Natural Gas Note of £800,000.

Moreover, the other portfolios referred to by HIFS, particularly the Prudential Bond Investment and the HSBC Portfolio do not either include any investments of the same nature and risks of the S.G. Athena Natural Gas Note, nor any substantial allocations of over 20% of the portfolio to such type of investments as had happened in the case of the S.G. Athena Natural Gas note.[72]

Hence, there is no sufficient comfort that the Complainant was familiar with structured notes and able to understand such products, neither that it had previously invested substantial amounts into such products as happened in the case of the S.G. Athena Natural Gas Note.

(iv) *Product subject to high volatility and not capital guaranteed*

It is noted that in its submissions, the Service Provider stated that it was entirely incorrect for the new advisor of the Complainant to claim that:

'*it was irresponsible to invest such a large amount into something which is subject to huge volatility and which does not have a capital guarantee*'.[73]

It has, however, clearly emerged that the S.G. Athena Natural Gas Note was not a '*capital guaranteed*' product. There is clearly a crucial distinction between a '*capital guaranteed*' and a '*capital protected*' product where the latter provides a lower level of comfort with respect to the risks of losing capital. Moreover, the 50% '*capital protection*' referred to by the Service Provider during this case was even more conditional.

During the proceedings of this case, the Service itself claimed *inter alia* that:

'*The product offered full capital protection at maturity so long as the value of the underlying had not fallen more than 50%*'.[74]

[72] *A fol.* 70 & *a fol.* 346 in respect of the Prudential Bond Investment refer; *a fol.* 57 with respect to the HSBC Portfolio.
[73] *A fol.* 313
[74] *A fol.* 313

Indeed, the claimed 50% capital protection was highly dependent and qualified on certain events occurring as outlined above and cannot be considered as providing sufficient comfort and in no way comparable to a '*capital guaranteed*' product.

Moreover, as indicated in the preceding sections of this decision, the price of the asset to which the S.G. Athena Natural Gas note was exposed to was indeed highly volatile.[75]

The Service Provider cannot either reasonably contest that an investment of GBP800,000 was not a substantial investment and was not a large amount, even when considering that this investment constituted 22.45% of the overall '*Total Premiums Paid*' into the policy and constituted nearly 25% of the portfolio as at 31 December 2009 shortly after its purchase in October 2009 (and this even after the market value of the S.G. Athena Natural Gas had fallen in value since the date of its purchase).[76]

(v) *Claim that the Complainant was informed of the risks associated with the product*

It is noted that in its submissions, the Service Provider also explained *inter alia* that:

'*With respect to the investment in SG Athena Natural Gas, it is strongly submitted that the Complainant was informed of the risks associated with this product (see letter of recommendation outlining all the characteristics and risks associated with the investment marked as 'Doc k' attached to Reply 2).*'[77]

A review of the letter of recommendation in respect of the S.G. Athena Natural Gas Note, however, does not indicate that key risks associated with this product were adequately communicated or explained in the said letter. On the contrary, the said letter of recommendation rather

[75] *A fol.* 355 & https://www.macrotrends.net/2478/natural-gas-prices-historical-chart https://tradingeconomics.com/commodity/natural-gas
[76] GBP800,000 of GBP3,563,909.88
[77] *A fol.* 406

indicates a misplaced and somewhat misleading emphasis on the '*50% capital protection*'.

The said letter of recommendation nowhere explains how the barrier actually worked in practice, and not even hinted or made reference to the crucial conditions on which the capital protection was based.

With respect to the section titled '*How safe is my capital*?' in the said recommendation letter, the Service Provider only referred to the credit rating of the issuer of the product and did not even make any mention whatsoever on the risks arising if the value of the underlying had fallen more than 50% which was part of the key features of this product.

As to the question '*How safe is my capital?*', considered in the said recommendation letter, HIFS only and inadequately explained that:

'***Your capital is protected at maturity using securities issued by a major financial institution, with a credit rating of 'A' or better from Standard & Poor's, at the time of issue. You should note that your capital is at risk if you redeem during the 5 year term and that is subject to the continuing solvency of the 'A' rated capital protected issuer. Examples of 'A' or better rated institutions include Nomura Bank and Commerzbank. This offers a high degree of protection***'.[78]

Such an explanation is not only inadequate, as it only focused on the credit risk of the issuer, whilst completely omitting and ignoring other material risks, but is also misleading. Indeed, the explanations in the letter of recommendation are rather misleading as the credit risk of the issuer was not the only material risk related to the product as amply explained above.

Even in the section titled '*Aren't commodities risky investments?*' which featured in the said letter of recommendation, HIFS only explained:

'*Historically, commodity prices have been volatile. This has meant that commodities have been a risky asset class, particularly for low - or medium-risk portfolios. However, the* Societe Generale Athena Bonus Coupon on

[78] *A fol.* 356

S&P Natural *Gas Index offers 50% capital protection at the 5 year maturity, combined with an annual cumulative coupon of 14 percent which is payable when the index is positive*'. [79]

Hence, whilst the Service Provider itself acknowledged the riskiness of the underlying investment in respect of a low/medium risk portfolio, it itself mistakenly downplayed and minimised the risk arising from the S.G. Athena Natural Gas note by superficially and inadequately referring to the '*50% capital protection*' which, in practice, did not effectively offer much protection with respect to the capital invested.

The material risks associated with this product were not even mentioned, let alone clearly and fully explained, in the said letter of recommendation.

Furthermore, the Arbiter notes that the '*Indicative Terms & Conditions*' attached to the letter of recommendation, in no way can be construed either as reasonably providing a Retail Investor with sufficient and clear information regarding the S.G. Athena Natural Gas in order for one to clearly understand the mechanisms, key features and specific risks associated with this product.[80]

Indeed, the '*Indicative Terms and Conditions*' of this product issued on the letterhead of an unrelated party, Sparkasse Bank Malta p.l.c., provides only very general and basic terms. It is also noted that not even a Term Sheet issued by Societe Generale, the issuer of the S.G. Athena Natural Gas note, was attached to the letter of recommendation issued by HIFS to the Complainant.

(vi) *Claim that loss was of no direct consequence to anything done by the Service Provider*

With respect to the investment in the S.G. Athena Natural Gas Note, the Service Provider pointed out that it:

[79] *Ibid.*
[80] *A fol.* 358-365

'*had repeatedly advised the Complainant to liquidate this investment in order to avoid further losses*'.[81]

Reference was made in this regard to the email dated 10 April 2012, sent by Mark Hollingsworth to the Complainant wherein the deteriorating position with Natural Gas and the breach of the '*50% safety net*' was highlighted again to the Complainant and where HIFS advised to sell the Gas Note and restructure the investment.[82] In the said email, it is noted that the deteriorating position with Natural Gas had been highlighted to the Complainant in December, that is December 2011, when it was noted the '*50 safety net*' was first breached.

In its submissions, the Service Provider, in essence, claimed that despite the strong recommendations to sell the investment, the Complainant,

'*of his own accord decided to retain this investment*', and that:

'*Therefore, any losses suffered by the Complainant on this product are certainly of no direct consequence to anything done by HIFS*'.[83]

It is to be noted, however, that according to the Valuation Statement as at 31 December 2011, the market value of the S.G. Athena Natural Gas Note was of GBP234,720 and, thus, already showing a staggering unrealised loss of GBP565,280 at the time.[84]

Hence, even if the Complainant had to liquidate the S.G. Athena Natural Gas Note, as was first recommended to him in December 2011, the Complainant would have still suffered a huge loss on this investment basing on the market value applicable at the time as reflected in the said valuation statement.

Moreover, even if the Complainant had to liquidate the investment soon after HIFS's email of 10 April 2012, the value of the S.G. Athena Natural Gas Note was at the time still substantially below its original value. According to the Valuation Summary as at 30 June 2012, the market value of this

[81] *A fol.* 406
[82] *A fol.* 92
[83] *A fol.* 406
[84] *A fol.* 265

investment was at GBP142,320 with an unrealised loss of GBP657,680,[85] with the indicated loss being even higher than the actual loss suffered of GBP611,147 on the maturity of the product on 13 October 2014.[86]

Hence, it is accordingly unjustifiable how the Service Provider can claim that the losses suffered by the Complainant on the S.G. Athena Natural Gas Note '*are certainly of no direct consequence to anything done by HIFS',* in the circumstances outlined above and when it was HIFS who identified this product and provided the investment advice to the Complainant to purchase this product in the first place.

Suitability of the S.G. Athena Natural Gas Note

The Service Provider was subject to various conduct of business obligations with respect to the investment advisory services provided to the Complainant, as specified in *Part B of the Investment Services Rules for Investment Services Providers* issued 1 November 2007 ('the Rules'),[87] which was applicable at the time of the investment.

With respect to the assessment of the suitability of an investment, particular reference is made to the requirements stipulated in standard licence conditions 2.13 and 2.16 of the said rules which applied at the time and which provided the following:

'*2.13 When providing investment advice or portfolio management services, the Licence Holder shall obtain the necessary information, in accordance with SLCs 2.16 to 2.20 and SLC 2.22 to 2.24 regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the Licence Holder to recommend to or, in the case of portfolio management, to effect for the client or potential client, the Investment Services and Instruments that are suitable for him.*

[85] *A fol.* 143
[86] *A fol.* 305
[87] These Rules were issued by the MFSA in virtue of the Investment Services Act and implementing the MiFID 1 Directive

…

'2.16 Licence Holders shall obtain from clients or potential clients, such information as is necessary for the Licence Holder to understand the essential facts about the client and to have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria:

a. *it meets the investment objectives of the client in question;*
b. *it is such that the client is able financially to bear any related investment risks consistent with his investment objectives;*
c. *it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.'*

Of relevance are also other '*Provisions common to the assessment of suitability …*' as stipulated in Part B of the Investment Services Rules for Investment Services Providers, particularly, Standard Licence Condition 2.22 of the said rules which provided the following:

'2.22 Information regarding the client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved:

a. *the types of service, transaction and Instrument with which the client is familiar;*
b. *the nature, volume, frequency of the client's transactions in Instruments and the period over which they have been carried out;*
c. *the level of education, profession or relevant former profession of the client or potential client.'*

On the basis of the various issues amply highlighted in the section titled '*Observations and Conclusions with respect to the S.G. Athena Natural Gas Note*' above, it is considered that in the particular circumstances of this case, the investment into the S.G. Athena Natural Gas Note did not satisfy the applicable suitability requirements in terms of the Investment Services Rules, namely, in meeting and being consistent with the investment objective of the Complainant; and in being such that the Complainant had the necessary experience and knowledge in order to understand the risks involved in the transaction as outlined in Standard Licence Conditions 2.13, 2.16 and 2.22 of the said Rules.

The said investment on its own and within the context of the overall portfolio existing at the time, was not reflective of the medium risk attitude of the Complainant, given the high risk nature of the investment and the extent of exposure it constituted within the overall portfolio as explained above.

For the same reasons, it did not reflect either the asset allocation of a *'Balanced Portfolio - Sterling*' referred to and outlined in the recommendation report issued by HIFS to the Complainant which was compiled *'on the basis of the completed client fact find and confirmation of prior investment experience*'.[88]

With regards to the Complainant's profile, it is noted that the level of education of the Complainant was rather limited, with him having left school when he was only 14 years old, as confirmed in his affidavit. [89] As to his profession, despite the business acumen of the Complainant in the real estate sector, this - on its own - did not make him in a position to be considered as having the necessary experience and knowledge to understand the risks involved in the structured note investment which not only, by its nature, had particular features different to the investments the Complainant had undertaken previously through his advisors, but also related to a completely different sector, that is, natural gas to which the Complainant had no knowledge and prior exposure to.

[88] *A fol.* 58
[89] *A fol.* 52

Indeed, during the proceedings of the case, it has clearly emerged that before being led to undertake such a major investment into the S.G. Athena Natural Gas Note, the Complainant had no prior and sufficient experience in structured note investments and, thus, was not familiar with such products. It has also convincingly emerged that with respect to investments in investment instruments, the Complainant relied heavily on the investment advice provided by the Service Provider where such investments were left predominantly in HIFS hands and where the Complainant's involvement in such investment decisions was generally minimal.

Moreover, in view of the lack of adequate information provided in relation to the nature and risks associated with the product, it is considered that the actions of the Service Provider were also not in conformity with the requirement relating to client disclosure stipulated in Part B of the Investment Services Rules for Investment Services Providers applicable at the time. Particular reference is made in this regard to Standard Licence Condition 2.27 of the said rules which provided *inter alia* the following:

'2.27 The Licence Holder shall provide appropriate information, in a comprehensible form to its clients or potential clients such that they are reasonably able to understand the nature and risks of the Investment Service to be provided by the Licence Holder and of the specific type of Instrument that is being offered, and consequently to take investment decisions on an informed basis. This information may be provided in standardized format …'

The actual loss on the SG Athena investment was of GBP611,147[90] which sum exceeds the limit of €250,000, which is the maximum amount that can be awarded by the Arbiter.[91]

The Arbiter can, therefore, stop here and conclude his decision. However, for completeness sake, the Arbiter will make a few observations on the other major investments within the portfolio.

[90] (Amount invested: GBP800,000 less GBP188,852.96 = GBP611,147)
[91] *A fol.* 130

Other investments subject to this case

With respect to the other investments subject to this case, as detailed in the section titled '*Investments*' above, the Arbiter would like to make some general and basic observations at this stage with respect to the investments referred to in 2008-2011 as follows:

(i) It is noted that three investments indicated in 2008, the *Castlestone Aliquot Agriculture* for GBP140,000, the *ETFS Leverage Live Cattle* for USD99,967 and the *ETFS Leverage Corn* for USD99,945, all entailed exposure to very particular industry/commodity sectors which typically would not be viewed as low risk.

Apart from such investments, other high exposures were in the very same year made to single equity investments like the investment of GBP882,000 in a single equity of the *Standard Bank China Momentum GBP*, and high exposures to other non-traditional asset classes like the investment of GBP150,000 into *Dawnay Day Quantum Protected Agriculture Comm II GBP*, GBP141,199 into the *Dawnay Day Quantum Protect Wind Portfolio GBP*, another GBP141,999 into the *Dawnay Day Quantum Protect Solar Portfolio GBP* and GBP80,000 in the *Quantum Protected Energy Dynamo GBP*.[92]

(ii) With respect to the three investments indicated as having occurred in 2009, namely, the *Claymore Alphashares China Cap*, *Market Vectors Brazil Small Cap ETF* and *Powershares Emerging Markets Infrastructure*, which comprised an investment of approximately USD250,000 each, it is noted that, despite these being investments in collective investment schemes, these additional substantial investments were all exposed to emerging markets and hence entailed certain risks.

Therefore, one questions how the portfolio can be considered a balanced one overall and of medium risk when considering the extent of exposures being taken to particular sectors which cannot be considered of low risk and substantial exposure to single products as

[92] *A fol.* 213-214

already outlined in the section titled *'Exposure to single product and level of diversification*' above which considered *inter alia* the portfolio prevailing in 2009;

(iii) It is also noted that exposure to emerging markets continued through other investments like, for example, the *Lyxor EFT India* for GBP205,000, indicated as having occurred in 2010, and this when in the said year there was high exposure to investments in alternative asset classes as can be seen in the portfolio valuation for 31 December 2010;[93]

(iv) Similarly, in 2011, exposure to alternative asset classes within the portfolio continued with the investment of another GBP50,000 respectively invested in each of the *Premier New Earth Recycling Fund* and the *Axiom Legal Financing Fund,* when in the same year there was already high exposure to investments in alternative asset classes as can be seen in the portfolio valuation for 31 December 2011.[94]

Apart from the significant investment of the GBP800,000 into the *S.G. Athena Natural Gas Note,* which still existed at the time, the Service Provider also recommended another substantial investment of GBP270,000 in another structured note investment, this being the *CITI 3Y Titans Inc Rev Conv STX,* as indicated in the same valuation statement. The *CITI 3Y Titans Inc Rev Conv STX* indeed seems to have featured similar risks which involved losses to the capital occurring in the case of certain barriers being exceeded,[95] as was the case of the S*.G. Athena Natural Gas Note*. The investment into the *CITI 3Y Titans Inc Rev Conv STX,* indeed, was indicated as resulting in an actual overall loss of GBP109,680 even when taking into consideration income received on this product of GBP68,850.[96]

[93] *A fol.* 243-244
[94] *A fol.* 265-266
[95] *A fol.* 350 & https://www.portman-associates.com/wp-content/uploads/2012/06/64.-Citi-Income-Factsheet.pdf
[96] GBP270,000 less Proceeds at maturity/sale of GBP91,470.60 and interest received of GBP68,850 - *A fol.* 305 - which loss was not contested.

The Arbiter does not accordingly have sufficient comfort that the portfolio as a whole was indeed being maintained as a balanced one and reflective of a medium risk attitude given the extent of high exposure to alternative asset classes and extent of exposure even to individual investments which prevailed at times as was, for example, the case in respect of the S.G. Athena Natural Gas Note which investment formed part of the portfolio in the years from 2009 onwards and beyond 2011.

Conclusion

For the reasons amply explained in this decision, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case,[97] and is accepting it in so far as it is compatible with this decision.

Compensation

The losses suffered by the Complainant well exceed the sum of €250,000.

However, in terms of Article 21(3)(a) of the Arbiter for Financial Services Act (Cap. 555 of the Laws of Malta), the Arbiter '*may not award monetary compensation in excess of two hundred and fifty thousand euros (€250,000), together with any additional sum for interest due and other costs, to each claimant for claims arising from the same conduct*'.

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Hollingsworth International Financial Services Limited to pay the Complainant the sum of two hundred and fifty thousand euros (€250,000).

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

The costs of these proceedings are to be borne by the Service Provider.

[97] Cap. 555, Art. 19(3)(b)

Dr Reno Borg
Arbiter for Financial Services