**Before the Arbiter for Financial Services**

**Case Number 456/2016**

**NG & GG ('the Complainants')**

**Vs**

**Hollingsworth International Financial Services Limited (C32457) ('the Service Provider')**

**Sitting of the 4 December 2018**

**The Arbiter,**

**Having seen the complaint whereby the Complainants submit that:**

Their complaint relates to an investment portfolio comprising of a number of investments, primarily equity index linked notes and others, which were undertaken over a period of more than five and a half years, between November 2009 to August 2015, on the basis of investment advice received from the Service Provider.

In essence, the Complainants claimed that the Service Provider did not act in their best interests and breached the fiduciary obligations to which it is subject to when, as Retail Clients, it provided them with investment advice to invest in high risk, complex investments which were intended for Professional Clients and Eligible Counterparties and not meant for distribution to Retail Clients. In this regard, it was alleged that the Service Provider acted with gross negligence and committed mis-selling as the investment products recommended to the Complainants were not suitable to them given that:

(a) the products were not consistent and compatible with their personal circumstances, financial objectives and low to medium risk attitude with the risks being beyond their loss absorption capacity;

(b) the products were not in line with their investment knowledge and experience as to understand and appreciate the risks involved and unable to take an informed decision; also, because it was claimed that the high-risk products were presented as low risk with the risks being under-emphasised and potential serious consequences of the products not explained; and

(c) they were not eligible to invest in products intended for experienced investors, professional investors and eligible counterparties with them having not transacted before in complex investments.

It was further claimed that the portfolio recommended was not balanced and diversified as the majority of the products were equity linked notes which were in nature all of the same type and had the same product risk. The Complainants highlighted the fact that the Service Provider never even met one of the Complainants and did not give appropriate due consideration to the low risk profile of the Complainants whom they never met. It was also claimed that the investment advice was provided by an official of the Service Provider who communicated with the Complainants using the title of 'Investment Consultant' and used language inferring that he was giving the advice himself but who was, in fact, not authorised to provide investment advice by the MFSA.

They claim that the provisional capital loss is estimated at GBP179,916 (which was arrived at by the Complainants by determining the net capital amount invested of GBP205,816 being the transfers made into the Complainants' bank account, less the withdrawals undertaken and less the remaining portfolio valuation of GBP25,900 as at July 2016, which includes any income received on the various products invested as income was left to accumulate in the portfolio).[1] It was noted that the loss amounts to more than a third of the capital funds made available to the Service Provider for investment.[2]

[1] A fol 82 - 84
[2] A fol 101

The Complainants ask to be compensated and re-instated in their former financial position, being the one prior to commencement of investments through the Service Provider, by obtaining a refund of all the capital invested net of withdrawals for the amount of GBP205,816 or other more updated figure at the time of adjudication of complaint, together with payment of interest.

The Complainants requested payment of interest at a fair and reasonable rate calculated on a day to day basis as from 2 November 2009, till the effective date of the restitution of capital. In this regard, the Complainants request a rate obtainable for an investment compatible with their medium risk attitude, where reference was made to the rate of 3.663% p.a. being the annual yield applicable in 2009 on a GBP UK 10-year government bond.[3] The Complainants remarked that from the compensation of interest no deduction should be made of interest earned on the products forming part of their investment portfolio as such amounts were added to their account and not withdrawn.

The Complainants further asked for the transfer to the Service Provider of the legal and beneficial title and all residual rights of the portfolio as valued at July 2016 and in case where payment exceeds the maximum possible under Article 21 (3)(a) of the Arbiter for Financial Services Act, then they are to be paid any balance in excess of the sum in terms of Article 21 (3)(b).[4]

**In its reply the Service Provider submitted:[5]**

1. That preliminarily, insofar as the Complaint is concerned the Company declares that the copious evidence submitted in this Complaint is irrelevant and should be struck off by the Arbiter as all documents submitted are irrelevant and in clear breach of Article 558 of Chapter 12 of the Laws of Malta which clearly states that *'all evidence must be relevant to the matter in issue between the parties'*. All of the circa 200 page worthless attachments including correspondence between MFSA (Malta Financial Services Authority) considered by the Complainants as *'documentary evidence'*, including all documents marked as Document **G, K.i, K.ii, K.iii, K.iv, K.v, Kvi, K.vii, K.viii, K.ix, K.x, K.xi, K.xii, K.xiii, K.xiv,**

[3] A fol 119
[4] Ibid.
[5] A fol 151

**K.xv, Kxvi, Kxviii, K.xix, K.xx, K.xxi, K.xxii, N, P.i, P.ii, P.iii, Q, R.i, R.ii, R.iii**, **S.i, Sii, S.iii, S.iv, T.i** and **T.ii** submitted by the Claimant, is superfluous and irrelevant and should not be considered as documentary evidence in these proceedings and the Complainants humbly requests that such evidence is disallowed in accordance with Article 560 of Chapter 12 of the Laws of Malta or if the Arbiter rejects the Company's demand and allows such evidence to be produced, it is humbly being requested that the Complainants clearly state the object of such evidence. Further and without prejudice to the above, Complainants include copies of regulatory rules, guidance notes, glossaries and other similar documentation (Documents **P.i, P.ii, P.iii, R.i, R.ii** and **R.iii** in particular). As the Arbiter is required under Article 19(3) of Chapter 555 of the Laws of Malta to decide complaints taking into account "*applicable and relevant laws, rules and regulations, in particular those governing the conduct of a service provider, including guidelines*" it is submitted that such evidence is in breach of the general principle that proof of Maltese law is disallowed, indeed superfluous and accordingly such documentation should be expunged from the records of these proceedings. Lastly and without prejudice to the above, Documents **Q, R.i,** and **R.ii** post-dates the facts giving rise to the Complaint and accordingly and in line with Article 19(3) of Chapter 555 of the Laws of Malta (*'this with reference to the time when it is alleged that the facts giving rise to the complaints occurred'*) is as well as its contents and recommendations included in it, wholly irrelevant;

2. That preliminarily, insofar as the Complaint is concerned, the Company declares that the Complaint is null and inadmissible as it is not in summary form (the Complaint is a 63 page document) and contains 'comments', ample footnotes, 'conclusions', partial assessments and opinions by the Complainants own advisers (Finco) and other matters which are not admissible for a statement of the material facts in the Complaint and this places the Company in a position of prejudice and impossibility to rebut those facts in its reply. The Complaint does not disclose a cause of action, because the nature of the transaction, the parties, and the relevant dates are not set out. But there is some general indication of an intention to plead fraud, misrepresentation and breach of fiduciary obligations and,

therefore, on this basis the Complaint should be considered inadmissible in accordance with Article 159 of Chapter 12 of the Laws of Malta;

3. That preliminarily, the Financial Services Arbiter does not have the competence to hear this Complaint on the basis that the monetary compensation being demanded is in excess of two hundred and fifty thousand euro (EUR250,000) and on this basis the Financial Services Arbiter cannot decide the merits of the Complaint in accordance with Part IV of Chapter 555 of the Laws of Malta;

4. That preliminarily, the Financial Services Arbiter cannot consider the remedy being sought by the Complainants in paragraph 4(iii) page 54 of the Complaint by means of which the Complainants are demanding that the Financial Services Arbiter *'declare and order that the Respondent Firm compensates Complainants and reinstates her in her former financial position, namely the once antecedent to the capital invested on the advice of HIFS and this in the following manner: 'simultaneously with the payments in (i) and (ii) above by the Respondent Firm, the Complainants shall transfer the legal and beneficial title in the Portfolio Number 74792390 held in custody of Ned Bank, valued as of the 31st of July at £STG 205,816, together with a subrogation in favour of the Respondent Firm for all residual rights in the same investment including litigious rights'* owing to the fact that the Arbiter does not have the competence to order such remedy and in doing so would be acting *'ultra vires'* to his functions set out in Article 8 and his powers of adjudication under Article 26 of Chapter 555 of the Laws of Malta;

5. That preliminarily and without prejudice to the above and as far as the Complainants are concerned, the Complaint is time barred by the lapse of five years since the contractual relationship between the Company and Complainants was concluded on the 18th of November 2009, and all investments complained of where concluded more than five years before the date of filing of the Complaint. It is also being stated that the Complainant seems to mention the allegation of fraud and gross negligence and it is being thus stated that the time bar for such action is that of two years and, therefore, the action is also time-barred;

6. That also preliminarily and without prejudice to the above, the Company rejects the allegation in paragraphs 2 and 3 of Section Titled *'Claims and Remedies being requested by the Complainants'* which allegation refers to the conduct of the Company as it *'did not act in the best interests of its client and failed its fiduciary obligations towards her client'* and *'failed to perform its obligations including those of a contractual nature towards the Complainants when as a result of culpa lata, gross negligence and recklessness it committed investment misselling'* as it is being undoubtedly stated that Company acted in accordance with the rules and regulations which strictly regulate the financial services industry. It is also being stated that in the event that the Complaint attempts to indicate that Mark Hollingsworth ('**MH**') is responsible, in his personal capacity, to the alleged misconduct, it is being clearly stated, in no uncertain terms, that MH refutes such claim in its entirety and that, in accordance with section 2153 of the Civil Code, there being no contractual relationship between MH personally and the Complainants, any claim against MH is time-barred by the lapse of two years and secondly, the service provider in this case was always the Company only;

7. That, without prejudice to the above, the Complaint is unfounded in fact and at law and accordingly should be dismissed with costs and this for the reasons as explained in this reply, as shall be further expanded upon and amply proven by the Company throughout the course of the relevant proceedings before the Arbiter for Financial Services;

8. That, further to and without prejudice to the generality of the foregoing, any losses suffered by the Complainants were exclusively as a result of factors inherent to the investments purchased by the Complainants such as market risk, credit risk or fraud risk and not as a result of the actions or omissions of the Company or its agents or employees who always acted in the Complainants' regard in accordance with applicable laws and rules;

9. That, entirely without prejudice to the above and on its merits, the Complaint is unfounded and contains a number of imprecisions, inaccuracies, error in interpretation of the law, irrelevant facts, and half-statements designed, with all due respect, to influence the Arbiter's assessment of the facts underpinning this Complaint and attempt to

present what is in effect a *fait accompli* including creative remedies with no basis at law. By way of example:

a) Paul Tilbrook's role

Complainants mention in several instances Mr. Tilbrook's role attempting to portray this employee as a rogue and unauthorised investment advisor. It is an undisputed fact (and this was always made clear to the Complainants) that Mr. Tilbrook acted as client relationship manager whose role was as interlocutor between the Complainants and the Company including its advisors such as Mr. Hollingsworth. It is an undisputed fact that Mr. Tilbrook never gave any investment advice all of which was issued under Mr. Hollingsworth's hand as the Company's lead advisor with Mr. Tilbrook's role limited to delivering a copy of advice. As evidence of Mr. Tilbrook's purported unauthorised role, the Complainants mentions that "*Mark Hollingsworth delegated to Paul Tilbrook the sensitive task of discussing and assessing the personal circumstances, financial objectives and risk attitude and investment knowledge and experience to Paul Tilbrook*", regrettably, a half-truth. The Complainants, perhaps intentionally, is confusing on the one hand the collection of information required for the purposes of the suitability assessment (see below) and on the other the actual assessment of suitability as part of the process for the provision of investment advice. Mr. Tilbrook's role was simply collecting the necessary information by assisting the Complainants with, among other things, the completion of the Company's Confidential Client Fact Find. That role is not investment advice and it is misleading to confuse the two. Further, merely further explaining the features of an investment which was already recommended by an investment advisor as suitable for the Complainants is not investment advice. Again to allege otherwise is misleading.

b) The KIDs

A substantial part of the Complaint is dedicated to arguing how the investments recommended by the Company could not have been sold to the Complainants since their Key Information Documents ("KID") were marked as "*For Professional Investors and Eligible Counterparties Only;*

*not Suitable for Retail Distribution*" or similar. What the Complainants do not mention, however, is that such designations purely relate to the marketing document, that is the KID, not the underlying product. There is no prohibition under the actual terms of issue of the product that an investor categorised as a "Retail Client" under EU Directive 2004/39/EC ("**MiFID**") acquires the investment. What the Complainants are referring to as a prohibition is actually a disclaimer that the relevant document as drafted does not contain, alone and without additional explanation or an advisor's recommendation, sufficient information to satisfy the UK FSA or other competent authority's guidelines on financial promotions to retail investors (i.e. marketing documents). This is again misleading. It is additionally worth clarifying that the categorisation "Eligible Counterparty" is only relevant in the context of investment services other than investment advice and portfolio management further confirming that the purpose of those disclaimers are purely to ensure that, unless an advisor recommends the product or the documents are further supplemented, they should not be taken as an advertisement that can be acted upon at the initiative of retail investors (i.e. execution only).

c) Relevance of the Products being Complex Products

Complainants place significant emphasis on the categorisation of the relevant investments as complex products under MiFID with the intention of demonising the products and as a result the Company and attempting to draw conclusion that complex products cannot in all circumstances be suitable for Retail Clients. This is simply untrue.

The distinction between non-complex and complex instruments under MiFID is solely relevant in the context of execution only transactions and the limited exemption from the related appropriateness test. Under the suitability test required under MiFID for investment advice the distinction is not relevant and, provided the client has the necessary knowledge and experience to understand the risks involved, complex instruments would be treated equivalently. One needs to analyse the features and risks of the relevant instrument being recommended and compare same to the knowledge and experience of the client as well as whether the client can and appears to be understanding the features. It is disingenuous to utilise

the non-complex vs complex distinction in this case. Further, the Complainants use the argument that the products were, complex to conclude that all the products were "high" risk as though this is an automatic conclusion. As will be amply proven during the course of the proceedings these products, whether due to the protection offered or other features are actually lower risk than holding the equities (with which the Complainants were familiar - this shall be amply proved) and it is submitted fit within their risk tolerance and investment objectives.

d) Provision of Copies of Internal Documentation

It is submitted that there was (in 2009) no regulatory obligation to provide or right to obtain copies of internal documentation such as the Confidential Client Fact Find ("**CCF**") or even to have this countersigned by the client. The purpose of a CCF is to document the information collected by the relevant licence holder and serve as a reference point to the information used as the basis of the licence holder's suitability assessment. Again it must be stressed that the suitability assessment is not the completion of the CCF but the intellectual assessment of the information contained in the CCF and other information collected or disclosed by the client as against the products being recommended. It would be disingenuous to think or imply otherwise.

Although outside the Arbiter's competence, it is worth noting, as evidence of the Complainants' agenda to misguide, that there is also no obligation or right under Data Protection legislation to obtain copies of documentation let alone a copy of the CCF.

e) The Timelines for replies to the initial complaint

The Complainants' patronisingly comment that "*this practice of refusing to provide copies and to give information requested also goes against good industry practice* ... " and *"the same malpractice also goes against the manifest legitimate expectations of an investor to be provided with copies of documents signed by the same*", another half truth. One can simply refer to the MFSA's standard licensing conditions for Investment

Services Licence Holders - Part B (the "**MFSA MiFID Rules**"), Appendix 16 on Complaints Handling which clearly state:

*"2.07 **Procedure for Responding to Complaints***

*Licence Holders shall ensure that the following procedures are followed:*

*(a) The Licence Holder shall, in writing, acknowledge receipt of any complaint within seven days of such receipt and shall also provide confirmation of the following:*

*i. the Licence Holder shall investigate the complaint;*

*ii. the Licence Holder shall, on completion of the investigation and without unnecessary delay, write to the complainants concerning the outcome of the investigation and describing its proposed course of action; and*

*iii. if the investigation is not completed within two months of receipt of the complaint, the Licence Holder shall inform the complainants of such fact within seven business days from the end of that period.*

…

*(d) where the investigation of a complaint is not completed within two months from receipt of the complaint, the Licence Holder shall, in the communication referred to in point (iii) of point (a) above:*

*i. inform the complainants about the causes of the delay;*

*ii. provide an indication as to when the investigation is likely to be completed; and*

*iii. inform the complainants that, if the complainants is not satisfied with the progress of the investigation, the matter may be referred by him to the Consumer Complaints Unit within the MFSA;"*

Due to the sheer size of the Complainants' file held by the Company, the number of transactions undertaken as well as the aggressive approach taken by Complainants' representative in making the original complaint, it must be considered reasonable that the assessment would take a considerable amount of time. One has to only look at the volume of the

Complaint to understand the Company's anxiety and paranoid precision which it must be indoctrinated with when handling the Complainants.

f) Documentary evidence relating to preceding investment experience

Complainants misquote SLC 3.01 which provides that an ISP must provide explanations and information relating to the products which is 'fair, clear and not misleading' as Complainants fail to state that the information required to be collected under SLC 2.22 can be collected orally and indeed a licence holder is under SLC 2.24 of the MFSA MiFID Rules "*entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete*". The actual information provided (even orally) is what the Company is entitled to rely on and proof will be presented to show that the Complainants are even here purposely understating their prior investment experience. Further, one notes that Complainants do not mention their net worth in the Complaint which at the point of investment was a substantial amount of money and their experience was vast.

g) The Suitability Assessment itself

Lastly, Complainants attempt to portray the suitability assessment as an objective exercise which necessarily could not be reasonably satisfied. For the reasons mentioned in the Company's final response letter dated 14th April 2016 (Document E.ii to the Complaint) it is clear that the suitability assessment were satisfied in relation to the Complainants and this will be examined in depth throughout the course of the relevant proceedings before the Arbiter. It must be stressed that the nature of investment advice necessarily involves the exercise of professional judgement and is by its very nature highly subjective. Statements such as those of the Complainants in Paragraph 7 are dangerous and will be rebutted at length throughout the proceedings.

The above are just some of the gross exaggerations and purposely misleading statements and opinions expressed in the Complaint. During the course of the proceedings the Company would be afforded sufficient time to examine each point raised by the Complainants in their 35/36

page complaint and 200 plus page documentary evidence and demonstrate to the necessary level of proof just how unfounded and misleading the Complaint is.

10. That accordingly, and always without prejudice to the above, the Complaint is unfounded in fact and at law and should, therefore, be rejected with costs because:

(1) *With regards to the First Remedy being sought by means of which the Complainants demand a declaration that the Respondent Firm failed its obligations towards its clients when it refused to provide copies of the documents requested and to provide the information requested;*

The Company is not authorised to and does not hold and control clients' monies or assets (nominee services) or provide discretionary portfolio management services. Services offered to and provided to the Complainants were limited to investment advice and, where the Complainants agree to accept the Company's recommendations, reception and transmission of orders.

As the Company provided neither of the services of acting as nominee or discretionary portfolio management issuance of statements or valuations of holdings was not a regulatory or contractual requirement.

For the above reasons, the Complainants' complaint is in our view unfounded. Complainants could have asked for valuations from the Company as an additional service but this was neither requested nor offered.

(2) *With regards to the Second Remedy requesting a declaration that the Complaint submitted by the Complaint constitutes a case where the latter has not acted in the best interest of its clients and has failed its fiduciary obligations towards her client including those emanating from Articles 1124A and 1124B of the Civil Code when these obligations "arise in virtue of law, contract quasi-contract, trusts, assumptions of office or behaviour*".

The Complainants' claim is unfounded as the Company has always acted in a professional manner and has always operated with a given level of

competence and conducted business with the Complainants in a manner that is of an adequate standard as is required by the financial services regulatory framework and as shall be amply proved by means of written testimonies as well as ample documentary evidence;

(3) *With regards to the Third Remedy demanded a declaration that as a result of the misconduct of Respondent Firm, HIFS did not perform its obligations including those of a contractual nature, towards the Complainants when as a result of culpa lata, gross negligence and recklessness, it committed investment misselling*;

The Complainants' demand is unfounded as it shall be amply proved to the Arbiter that first investment made by the Complainants was suitable for them. All subsequent recommendations provided to the Complainants were similar in complexity and in addition Complainants had over the years of investing accumulated significant additional experience in investing in these products with over 40 transactions.

For the above reasons, the Complainants complaint is in our view unfounded. Complainants' losses including unrealised losses are not due to the complexity or unsuitability of the products recommended but as a result of unforeseeable market movements (Market risk). Which risk was to an extent mitigated by the diversification provided.

(4) *With regards to the Fourth Remedy which is based on a declaration and order for compensation in the amount of £205,816 including interest and the subrogation:*

The Financial Services Arbiter should reject this demand on the basis that it does not have the competence to decide matters above the stipulated quantum of EUR 250,000 and the loss suffered by the Complainants was not due to the Company' negligence or misconduct but solely due to unforeseeable market movements known to the market in question.

(5) *With regards to the Fifth Remedy which is that in the event that the monetary value of (i) above less than (iii) above is in excess of the amount competent to the Arbiter aware, the Hon. Arbiter shall recommend to the*

*Respondent Firm to pay the Complainants any balance in excess of such sum in terms of Article 21(3)(b);*

The Financial Services Arbiter should reject this demand; as such order is discretionary and should be based on relevant evidence, which substantiates this demand.

(6) *With regards to the Sixth Remedy which is to declare and order the Respondent Firm to pay interest at a fair and reasonable rate for the period from 2nd November 2009 and the date of effective restitution of the capital invested of £205,816 as per claim 4.i above;*

The Financial Services Arbiter should reject this demand on the basis that it does not have the competence to decide matters above the stipulated quantum of EUR 250,000 and the loss suffered by the Complainants was not due to the Company's negligence or misconduct. No guarantee was ever given to the Complainants that the investments being the subject of the Complaint will pay back all that was expected of them. Such "automatic" guarantee does not exist at law.

11. That in view of the above, it is submitted that there could be no remedy to the Complaint as it is unjustified in fact and at law.

Having seen all acts of the case,

Having heard the parties.

**Considers:**

***Preliminary Pleas***

Basically, the first preliminary plea states that: '*in so far as the Complaint is concerned the Company declares that the copious evidence submitted in this Complaint is irrelevant and should be struck off by the Arbiter as all documents submitted are irrelevant and in clear breach of Article 558 of Chapter 12 of the*

*Laws of Malta which clearly states that 'all evidence must be relevant to the matter in issue between the parties'.* [6]

The Arbiter rejects this plea on the grounds that the procedure before the Arbiter is not regulated by Chapter 12 of the Laws of Malta but by Chapter 555. This special law established to regulate the Arbiter's procedure clearly states that the procedure is established by the Arbiter and, consequently, Article 558 of Chapter 12 is irrelevant and does not apply to proceedings before the Arbiter.

This legal position taken by the Arbiter in this regard has also been confirmed recently by the Court of Appeal.[7]

The Arbiter also wants to underscore that even the service provider has filed extensive documentation and lengthy submissions that not all of them might be relevant to the merits of the case.

The Arbiter has adopted the procedure that unless extraordinary circumstances exist, he will not strike off any document filed by the parties but will obviously weigh the relevance and materiality of each document filed and will ignore those documents which, in his opinion, are irrelevant to the merits of the case. For the above-stated reasons, this plea is rejected.

The second plea based on Article 159 of Chapter 12 states that the complaint should be declared null and void as it is not in summary form and it is drafted in such a way as to make it impossible for the service provider to make its defence and should be inadmissible.

This plea is also being rejected because apart from the fact that the procedure established for the Arbiter is that contemplated in Chapter 555 of the Laws of Malta and not by Chapter 12, nullity of acts has also been regarded by our Courts as a very exceptional occurrence and where a judicial act could be saved, the Courts have done so because they argued that justice could be better served if they adopted this course of action. There is abundant jurisprudence in this respect.

Moreover, Chapter 555 of the Laws of Malta does not mention nullity of acts and if the legislator did not contemplate nullity, it is not the Arbiter's role to

[6] A fol 151

[7] ***Daniel Caruana et vs Crystal Finance Investments Ltd.*, 5/11/2018**

create a different law, abandon established jurisprudence and abort the proceedings before him simply to nullify the complaint.

Furthermore, the service provider's reasoning about the length of the complaint is not justified and is selective, because the service provider itself has filed a very long reply and extensive documentation.

Moreover, regarding the requisites for a complaint the law only states that the complainant has to comply with the following:

"*A complainant shall complain to the Arbiter in writing identifying the party against whom the complaint is made, the reasons for the complaint, and the remedy that is being sought."*[8]

Even if there is non-compliance with the above, the Arbiter cannot annul the complaint because the law does not specify nullity in these cases. In that eventuality, the Arbiter may ask the complainant to comply with the law by making the necessary amendments to the complaint. However, in this case, the complaint complies with the requisites of Article 22(1) of Cap. 555 and there is nothing null with it.

Since there are no legal grounds for this plea the Arbiter considers it to be frivolous and is rejecting it.

In this respect the position taken so far by the Arbiter has also been confirmed by the Court of Appeal.[9]

The third plea is that the Arbiter does not have competence to hear the complaint on the basis that the monetary compensation being demanded is in excess of two hundred and fifty thousand euro (EUR250,000).

In this regard Chapter 555 of the Laws of Malta provides that:

"*An Arbiter may not award monetary compensation in excess of two hundred and fifty thousand euro (€250,000), together with any additional sum for interest*

[8] Cap. 555, Art 22(1)

[9] ***Carmel Bartolo et vs Crystal Finance Investments Ltd.*, 5/11/2017**

*due and other costs, to each claimant for claims arising from the same conduct."*[10]

However, Article 21(3)(b) establishes that:

"*An Arbiter may, if he considers that fair compensation requires payment for a larger compensation than that stipulated in paragraph (a), recommend that the financial service provider pay the complainant the balance, but such recommendation shall not be binding on the service provider*."

In reading both sub-articles of Article 21 together, there is no doubt that while the Arbiter can only grant monetary compensation which is binding up to the sum of €250,000, if he considers that "*fair compensation requires payment for a larger"* amount, with regard to the excess, he can only make a recommendation.

Therefore, it is amply clear that the Arbiter's competence *rationae valoris* is not limited to the amount of €250,000, but may only grant up to that amount as monetary compensation **which is binding** on the service provider. In excess of that amount the Arbiter can only make a recommendation **which is non-binding**.

For this reason, this plea is being rejected.

***Plea of Prescription***

The service provider submitted this plea as follows:

"*That preliminarily and without prejudice to the above and as far as the Complainants are concerned, the Complaint is time barred by the lapse of five years since the contractual relationship between the Company and Complainants was concluded on the 18th of November 2009, and all investments complained of where concluded more than five years before the date of filing of the Complaint. It is also being stated that the Complainant seems to mention the allegation of fraud and gross negligence and it is being thus stated that the time*

[10] Art. 21(3)(a)

*bar for such action is that of two years and, therefore, the action is also time-barred" .*[11]

The Arbiter notes that, first of all, the service provider did not specify the relevant Article of the Civil Code on which it is basing the plea of prescription. There is abundant jurisprudence which states that the party raising the plea of prescription must cite the specific section of the law. In the Court judgement delivered by the First Hall Civil[12] it was held that:

"*Illi f'dan il-kuntest jinghad li huwa principju llum stabbilit li jekk l-eccipjent ma jispecifikax liema preskrizzjoni qed jinvoka l-Qorti ma tistax tikkonsidraha u dan ghaliex altrimenti l-Qorti tkun qed tissupplixxi ghall-parti eccipjenti f'materja odjuza li fiha ma tistax tiehu inizjattiva. (A.C. R. Cali vs Perit Galea - 11 ta' Mejju, 1956 - Vol. XL p.1 p.166); Air Malta p.l.c. vs Via Holidays and Travel Limited (P.A. (GV) – 29 ta' Jannar 2002) tant li fis-sentenza fl-ismijiet Henry P. Cole vs Salvatore sive Sammy Murgo (P.A. - 10 ta Lulju 2003) gie deciz:-*

*'L-imsemmija l-ewwel eccezzjoni, rigwardanti l-preskrizzjoni, ma tista' qatt tigi akkolta, peress li l-konvenut naqas li jindika l-artikolu tal-ligi li fuqu huwa qed jibbaza din l-istess eccezzjoni tieghu.'*

*'Illi tal-istess portata hija s-sentenza Margaret Camilleri et vs The Cargo Handling Co. Ltd. (P.A. – 3 ta' Ottubru 2003) fis-sens li: "Kwantu ghall-eccezzjoni tal-preskrizzjoni huwa principju assodat fil-gurisprudenza illi l-Qorti ma tistax ex officio taghti effett ghall-preskrizzjoni jekk din ma tigix eccepita mill-parti interessata f'forma specifika. Ara decizjonijiet a Vol.XXXIII P1 p481 u Vol. XLI P1 p178.)'"*

The service provider did not indicate the specific Article on which it is basing the plea of prescription and this cannot be done by the Arbiter because, in that eventuality, he will be interfering in the dispute which militates against the very basic principles of impartiality. Furthemore, the service provider did not produce evidence to sustain this plea as it is obliged to do.

For these stated reasons the Arbiter is rejecting the plea of prescription.

[11] A fol 153

[12] *Paola Galea et vs John Cauchi et,* PA, 26.03.2010

Plea number 6 *inter alia* states that:

"*It is also being stated that in the event that the Complaint attempts to indicate that Mark Hollingsworth ('**MH**') is responsible, in his personal capacity, to the alleged misconduct, it is being clearly stated, in no uncertain terms, that MH refutes such claim in its entirety and that, in accordance with section 2153 of the Civil Code, there being no contractual relationship between MH personally and the Complainants, any claim against MH is time-barred by the lapse of two years and secondly, the service provider in this case was always the Company only*' .[13]

Regarding the above, the Arbiter decides that the complainants did not enter into a contractual relationship with Mr Hollingsworth personally and, on the basis of evidence of this case and the documents produced, it results that the contractual relationship was established between the complainants and Hollingsworth International Financial Services Limited and Mr Mark Hollingsworth personally is not a party to this case.

Therefore, this plea is exhausted.

The other pleas raised by the service provider will be dealt with under the merits of the case.

**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.[14]**

***The Products in respect of which the complaints are being made***

Twenty-nine investments were undertaken between November 2009 and August 2015 as per the chronological list of complex products presented by the Complainants to the OAFS. Out of the said investments, there were 26 investments in complex equity index linked securities, 2 in complex funds for Experienced Investors (comprising the LM Managed Performance Fund and Premier New Earth Solutions Recycling) and 1 non-complex instrument (Invesco

[13] A fol 153
[14] Cap. 555, Art 19(3)(b)

GT Man Bond Fund). Complainants still held 4 products as at end July 2016.[15] The index linked products recommended by the Service Provider typically had a fixed term of 3 to 5 years.[16]

***Document/ Investment Analysis***

The Complainants (who are husband and wife) were 62 and 53 years old respectively at the time of commencement of the investments with the Service Provider in 2009. One of the Complainants had graduated in XXX and worked in the transport and health sector having retired in 2006 whilst the other worked as a primary school teacher who switched to part-time in 2008 and retired fully in 2012.[17] The source of income of the Complainants was their occupational income and investment income.

As per the Confidential Client Fact Find dated 18th November 2009,[18] the Complainants were indicated as Retail Clients being provided the service of Investment Advice. The Complainants did not have any dependants. One of the Complainants was indicated as being employed with this being then corrected to read '*retired*'. A net annual income of GBP27,000 and GBP35,000 was mentioned as being respectively received by the Complainants. The Complainants were also described as being familiar with bonds and equities and with investment advisory services.

As also indicated in the Confidential Client Fact Find, the Complainants had a home for the value of Eur600,000 and another property for Eur200,000, financial instruments with Barclays Wealth UK for GBP186,013 and Bank deposits of GBP344,198 and Eur323,261 (GBP285,600 and Eur53,200 with Anglo Irish; Eur106,600 with ING France; and GBP58,598 and Eur163,461 with Credit Suisse). Life insurance policies for the amount of Eur150,000 were also indicated in the Confidential Client Fact Find with this figure being however stricken out.[19]

[15] A fol 80 and 253
[16] A fol 107
[17] A fol 66 and 67
[18] A fol 192
[19] A fol 194

The total bank savings and investments as indicated in a separate document dated 16th October 2009,[20] featured the list of assets held by the Complainants which was of GBP686,611, Eur333,130 and CHF19,311.

As to the Complainants' investment objectives, planning and risk profile, the Confidential Client Fact Find reveals that the Complainants wished to invest capital of GBP41,000 for 5 years as a one-off investment initially, with the purpose of capital growth and with the investors attitude to risk being corrected to read "*Low/ Medium*" instead of "*Medium*". No other updated Confidential Client Fact Find was presented to the OAFS.

***Other aspects***

The Arbiter notes that the communications and correspondence were done with the husband and not with both spouses, with the Service Provider having only met the husband. It is further noted, however, that during the hearing of 27 February 2017, the wife confirmed that her husband was "*also acting on my behalf*",[21] and that this "*was an informal arrangement with my husband*".[22]

Prior to being engaged, the Service Provider had issued a Personal Recommendation Report dated 29 January 2009,[23] wherein it was indicated that the Complainants' wish was "*to invest in structured products with full capital protection and non-correlated investments to the stock market*"[24] and with the Service Provider recommending to invest up to GBP400,000 into a managed portfolio containing structured investments.

Another Personal Recommendation Report dated 27 November 2009,[25] was issued by the Service Provider wherein it was indicated *inter alia* that Mark Hollingsworth, the Managing Director of the Service Provider, is the personal advisor of the Complainants. The said Personal Recommendation Report dealt with the recommendation to invest in the Societe Generale Athena Natural

[20] A fol 198-200
[21] A fol 642
[22] Ibid.
[23] A fol 179 et seq
[24] A fol 180
[25] A fol 595

Gas.[26] No other Personal Recommendation Reports were presented to the OAFS.

The Complianants had highlighted the preference to invest in simpler structured products where the husband had *inter alia* highlighted that "*I have also suggested several times that I would prefer structured products to be much simpler and follow just one or two relatively stable indices such as the FTSE100*",[27] and that following the losses in value the husband had consistently highlighted the concerns on capital losses and the low risk attitude at least since December 2012.[28]

There were various communications sent by the husband during the period December 2012 till 2015 (emails dated 26 December 2012, 13 January 2013, 3 April 2013, 17 November 2014 and 15 September 2015) where the husband had clearly and on a consistent basis highlighted the low risk attitude to investments (as compared to the low to medium risk indicated originally in the Confidential Client Fact Find).[29] In its letter of 17 December 2015 to the formal complaint made by the Complainants dated 29 October 2015, the Service Provider indeed acknowledged that after the Complainants had expressed concerns about the losses in his email of 13 January 2013, and wish "*a failure rate of not more than 1%*",[30] the Service Provider "*had altered the strategy to only recommend index linked notes*",[31] and that "*No further investments were recommended or invested into other than a single index note and two Recovery Notes*".[32] The chronological list of transactions,[33] however, indicates 6 transactions as from September 2013 to August 2015 with all 6 investments sustaining considerable losses for the amount of GBP48,496 and Eur39,533 (over the respective investments undertaken on the said period of GBP79,475 and Eur47,000).[34]

***Analysis of Other Investments held by the Complainants***

[26] A fol 595 et seq.
[27] A fol 235
[28] A fol 229 et seq.
[29] A fol 230 - 231
[30] A fol 246
[31] Ibid.
[32] A fol 247
[33] A fol 253
[34] Ibid. – Investments numbered 24 to 29 in the chronological list of transactions

With regards to previous experience, the Complainants indicated that in February 2009, they had invested money held on deposit with Anglo Irish banks into the following:[35]

(a) a life insurance company Irish Life International (which was later transferred to SEB Ireland), by undertaking a single premium policy for GBP150,000 the underlying investment of which consisted of GBP Cautious Fund ("*mostly consisting of British Gov bonds/ Gilts and a Barclays deposit*");[36]

(b) GBP50,000 into the Barclays 6 Year Minimum Return Plan, defined as a Capital Guaranteed Equity Linked Structured Note. The Complainant emphasised that this was not high risk as it was capital guaranteed and the products recommended by the Service Provider did not have this type of capital protection.

In Section 2, Annex 1 to the Complainant's Formal Complaint dated 29 October 2015, signed by the husband, it was stated that "*I had little experience of investment business with my main experience being three Barclays Wealth structured products which followed the FTSE and had 50% or 60% capital protection*".[37] The Complainant also stated that "*Also I have invested elsewhere in 9 such structured products since 2009. None of these have failed or indeed gone anywhere near the protection limit and on average they have easily returned over 6% pa*".[38]

On the other hand, in his affidavit dated 24 February 2017,[39] the Director of the Service Provider explained *inter alia* that as part of the Client Fact Find exercise a list of assets held by the Complainants was compiled on 16 October 2009.[40] It was pointed out, amongst others, that the Complainants "*owned property valued at EUR800,000 plus cash assets totaling EUR333,130 and GBP686,611*".[41]

[35] A fol 106
[36] Ibid.
[37] A fol 230
[38] A fol 240
[39] A fol 590
[40] Ibid.
[41] A fol 591

Such amounts are reflected in the said list of assets dated 16 October 2009,[42] which indicates the following: immovable property for Eur800,000; various current/ savings bank accounts with the main ones being those held with Anglo Irish Bank IOM for GBP285,600 and Eur53,200, accounts held with ING Bank France for EUR106,600 as well as accounts held with Credit Suisse for GBP58,598 and Eur163,461; investments with Barclays Wealth UK comprising of a Barclays Wealth Regular Income Bond (GBP102,636), a Barclays 6 year Minimum Return Plan (GBP51,318),a Diversified Returns Plan AKO80 (for GBP25,659); and a unit linked contract of insurance the Assurance Vie of Irish Life International Ireland (for GBP150,000).[43] As to other investments, the Complainants also held a nominal amount of investment (GBP1,970) in Aviva and Friends Provident shares. The Confidential Client Fact Find dated 18 November 2009,[44] indicated a net annual income of GBP27,000 and GBP35,000 gross respectively for the Complainants.

The Service Provider claimed that the Barclays AKO80 (done prior to commencing investments with the Service Provider) was an equity index linked note.[45] It was further claimed that the unit linked policy included various underlying investments in structured products, "*namely Barclays 3 year Guaranteed Digital Deposit Account and S&P Diversified Trends Indicator 80% protected funds*".[46]

The leaflet provided by the Service Provider in respect of the S&P Diversified Trends Indicator indicates that this is a capital protected fund Oeic (open-ended investment company) which was open for lump sum investments of a minimum GBP1,000 offering protection of 80% of the fund's highest NAV and with the performance being linked to the S&P diversified trends indicator.[47] No details were provided in respect of the Barclays 3 year Guaranteed Digital Deposit Account.

**Final Observations and Conclusions**

[42] A fol 198 for 'Total Immovables' and a fol 200 for 'Total Bank Savings + investments'.
[43] A fol 198-200
[44] A fol 192
[45] A fol 591
[46] A fol 591-592
[47] A fol 619

In providing investment advice, the Service Provider was subject to the assessment of suitability where, in terms of the **Rules issued by the MFSA (Standard Licence Conditions 2.16, 2.18, 2.19 and 2.22 till 2.24 of Part B of the Investment Services Rules for Investment Services Providers applicable at the time),** certain requirements had to be satisfied.

As indicated in SLC 2.16, the specific transactions recommended had to satisfy 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*".

Having considered the information and explanations provided by the parties involved and taking into consideration the nature of the communications exchanged between the Service Provider and the husband, who was also acting on behalf of the wife, as confirmed during the hearing of 27 February 2017,[48] it can be concluded that:

a) the Complainants wanted to invest in structured products with capital protection and are considered to have been conscious of the nature of investments being made as compared to the choice of investing in other types of instruments, like bonds, for example. They aimed for a rate of return of 6% p.a.,[49] but at the same time indicated a low to medium risk profile.[50] The limited extent of capital protection provided in the structured products invested into gave them a false sense of protection as they were not anticipating such downfall in the markets with the resulting consequences, as they themselves indicated when it was

[48] A fol 642
[49] A fol 230, 653
[50] A fol 196

assumed "*that the possibility of any underlying indices would drop below 50% was extremely unlikely especially as equities were strengthening*".[51]

The limitations on the capital protection afforded on the underlying investments was understood, at least by the husband, who was aware that there are respective protection limits that would no longer apply in certain circumstances, as also reflected in the extent of analysis and considerations made by the Complainant in his communications with the Service Provider (such as the emails dated 16 June 2010,[52] 26 December 2012,[53] 23 January 2013,[54] 3rd April 2013[55] and 23 September 2015.[56])

Similarly, one would reasonably expect, in the circumstances, that the Complainant would have been aware that the products offered were targeted to professional investors also **in light that he actively involved himself in discussions relating to investment products and had a certain level of understanding (as reflected, for example, in his emails of the 24 June 2013,[57] 8 and 9 December 2009,[58] and information prepared by Mr NG himself like the comparative table on valuations);[59]**

b) the husband had himself on occasions (such as in his email of 24 June 2013),[60] suggested to the Service Provider investing in specific structured products providing details and names of the products in question, although having possibly different features;

c) it is considered that the extent of the net worth of the Complainants enabled them to bear the related investment risks given that as reflected in the Confidential Client Fact Find and lists of assets dated 16 October 2009,[61] it was indicated that in addition to immovable property of Eur800,000, and yearly income of GBP27,000 and GBP35,000

[51] A fol 231
[52] A fol 627
[53] A fol 210
[54] A fol 212
[55] A fol 213
[56] A fol 238
[57] A fol 235
[58] A fol 620
[59] A fol 244
[60] A fol 235
[61] A fol 192-200

respectively, the Complainants had total bank savings and investments amounting to GBP686,611, Eur333,130 and CHF19,311.[62] The claimed provisional capital loss on the portfolio invested with the Service Provider estimated at GBP179,916 is seen in such context as well as the Complainants objective to obtain higher returns of 6% p.a.[63] The said target return of 6% p.a. contrasts with the requested figure of interest refund of 3.663% p.a. made in this complaint indicated as the annual yield applicable in 2009 on a GBP UK 10-year government bond and described as reflecting a medium risk attitude.[64] **It is, thus, not convincing that the Complainants were not aware of the additional higher risks being taken to achieve the higher targeted rates of return;**

d) As to the extent of experience by the Complainants in structured products prior to the commencement of their investments with the Service Provider, the Complainants had certain investment exposure with their experience being seemingly more garnered along the years from 2009 onwards through the investments made with the Service Provider and other practitioners as confirmed by the husband in the Complainant's letter dated 29 October 2015,[65] when he stated that "*I had little experience of investment business with my main experience being three Barclays Wealth structured products which followed the FTSE and had 50% or 60% capital protection*",[66] and when he also stated that "*Also I have invested elsewhere in 9 such structured products since 2009. None of these have failed or indeed gone anywhere near the protection limit and on average they have easily returned over 6% pa*".[67]

Despite the fact that there were various communications since December 2012 (such as the emails dated 26 December 2012, 13 January 2013 and 3 April 2013 as indicated in section 2 of Annex 1 to the formal complaint letter dated 29 October 2015),[68] where the husband had highlighted the low risk attitude to investments (as compared to the low to medium risk

[62] A fol 200
[63] A fol 230, 653
[64] A fol 119
[65] A fol 227
[66] A fol 230
[67] A fol 240
[68] A fol 230

originally indicated in the Confidential Client Fact Find), the Complainants continued to pursue the investment strategy in complex structured products, undertaking six further transactions in such complex products as from September 2013 to August 2015. This was done notwithstanding the losses previously sustained on the same investments in previous years and their awareness of the extent of loss that could be incurred with such investments. This is considered as somewhat contradictory to and weakening the arguments for the claims made.

e) It is also noted that certain investments indicated in the portfolio of the Complainants had not yet matured at the time of the complaint and, hence, the claimed losses are only an estimate.

**For the above-stated reasons the Arbiter cannot conclude that the complaint is fair, equitable and reasonable in the particular circumstances and substantive merits of the case and is, therefore, rejecting it.**

**Since the Arbiter has rejected a number of preliminary pleas raised by the Service Provider, the costs of the proceedings of this case are to be borne as to two-fifths by the Service Provider and three-fifths by the Complainants.**

**Dr Reno Borg**
**Arbiter for Financial Services**