MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF LAWRENCE MINTOFF

Seduta tal-15 ta' Settembru, 2023

Appell Inferjuri Numru 138/22 LM

Christopher Ball (Detentur tal-Passaport nru. GBR 518406710)
('l-appellant')

vs.

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

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mir-rikorrent **Christopher Ball (Detentur tal-Passaport nru. GBR 518406710)** [minn issa 'l quddiem 'l-appellant'] mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fit-28 ta' Settembru, 2022, [minn issa 'l quddiem 'id-deċiżjoni

appellata'], li permezz tagħha ddeċieda li jilqa' parti mill-ilment tiegħu fil-konfront tas-soċjetà intimata **STM Malta Pension Services Limited (C 50128)** [minn issa 'l quddiem 'is-soċjetà appellata'], u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellata għandha tinżamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lill-appellant il-kumpens fis-somma ta' GBP196,376.92 (mija sitta u disgħin elf tliet mija sitta u sebgħin Lira Sterlina u tnejn u disgħin pence) kif ukoll iċċedi jew tirrifondi l-*exit fees* tagħha jekk applikabbli, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effettiv pagament, filwaqt li s-soċjetà appellata kellha tħallas l-ispejjeż kollha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament jgħid li sofra l-appellant mill-investiment li huwa kien għamel tramite s-soċjetà appellata fi skema tal-irtirar magħrufa bl-isem Harbour Retirement Scheme [minn issa 'l quddiem 'l-Iskema']. Jirriżulta li l-imsemmi appellant kien ċempillu ċertu wieħed Marc Rees, li huwa kien fehem li kien konsulent finanzjarju ma' *Aspinal Chase,* għall-ħabta ta' Lulju, 2013, fejn offrielu li mingħajr l-ebda dritt jew kumpens jirrevedi l-investiment tal-pensjoni tiegħu. Imbagħad għall-ħabta tat-8 ta' April, 2014 l-istess Marc Rees talbu sabiex jikteb u jiffirma ittra li huwa kien persuna idonea sabiex tinvesti ma' Blackmore Global, u sussegwentement il-pensjoni kollha tiegħu ġiet investita b'dan il-mod. F'Diċembru, 2016, l-appellant kien għamel talba sabiex jifdi l-investiment tiegħu, u saħansitra talab

bosta drabi għall-informazzjoni. Iżda kien biss permezz ta' ittra tal-11 ta' Awwissu, 2020 li s-soċjetà appellata kienet infurmatu bil-preokkupazzjonijiet tagħha dwar l-istess investiment.

Mertu

3. L-appellant ippreżenta lment quddiem l-Arbitru fil-11 ta' Frar, 2021 fil-konfront tas-soċjetà appellata, fejn issottometta fost affarijiet oħra li din bħala *trustee/*amministratrici tal-Iskema kienet ippermettiet li l-investiment tal-pensjoni tiegħu kollha fil-Blackmore Global Fund, li ma kien joffri l-ebda trasparenza, kien jippreżenta riskju għoli, ma kien bl-ebda mod regolat u saħansitra ma kienx wieħed likwidu, u dan fejn huma sallum ma kienu jafu xejn dwaru. Għalhekk, huwa kien qed jitlob li (i) il-valur tal-pensjoni tiegħu jerġa' għal dak li kien oriġinarjament u jiġi aġġustat sabiex jirrifletti t-telf; (ii) tingħata rifużjoni tad-drittijiet kollha mħallsa minnu; (iii) il-pensjoni tiegħu tiġi ttrasferita fi flus lil provditur tas-servizzi finanzjarji regolat ġewwa r-Renju Unit a spejjeż tas-soċjetà appellata; u (iv) jitħallsu danni għad-dwejjaq u għall-inkonvenjenza kkawżati.

4. L-imsemmija soċjetà appellata wieġbet fit-9 ta' Marzu, 2021 billi eċċepiet li (a) skont id-disposizzjonijiet tal-para. (ċ) tas-subartikolu 22(1) tal-Kap. 555, l-Arbitru ma kellu l-ebda kompetenza sabiex jittratta l-ilment; (b) hija ma kinitx il-leġittimu kuntradittur; (ċ) l-*ex trustees* u l-amministratturi tal-Iskema m'għandhom l-ebda setgħa li jagħtu parir dwar l-investimenti magħżulin mill-appellant stess; (ċ) kienu dawk il-persuni li taw il-parir lill-appellant sabiex jittrasferixxi l-pensjoni tiegħu, li kellhom jinżammu responsabbli għad-

deċiżjonijiet meħuda mill-appellant; (d) Harbour Pensions Limited aġixxiet b'mod diliġenti; u (e) ma kien hemm l-ebda delega tal-obbligi.

Id-deċiżjoni appellata

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

> ***"The Merits of the Case***
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> *The Arbiter is considering the Complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555 (fn. 95 Art. 19(3)(d)) which stipulates that he should deal with complaints in* 'an economical and expeditious manner'.
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> The underlying investments - Exposure
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> *The Complainant applied to become a member of the Scheme on 18/04/2014. (fn. 96 P. 58) He was accepted by Harbour Pensions as a member on 13 May 2014. (fn. 97 P. 16 & 29)*
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> *As indicated in the '*Subscription Statement and Current Valuation' *attached to the letter dated 29 July 2015 issued by Harbour Pensions, the Scheme was invested into four cells (sub-funds) forming part of the Blackmore Global PCC Limited, the BG Fund, as follows:*
>
> (i) Blackmore Sustainable Sub-Fund – *a subscription of £42,735.03 (42,735.03 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £16,325.69 (16,271.99 shares @ GBP1.0033) allocated on 22 January 2015, amounting in total to a subscription of £59,060.72;*
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> (ii) Blackmore Lifestyle Sub-Fund - *a subscription of £10,683.76 (10,683.76 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £4,081.42 (3,986.15 shares @ GBP1.0239) allocated on 22 January 2015, amounting in total to a subscription of £14,765.18;*
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> (iii) Blackmore Property Sub-Fund - *a subscription of £85,470.07 (85,470.07 shares @ GBP1) allocated on 16 September 2014 as well as a further*

subscription of £32,651.39 (32,469.56 shares @ GBP1.0056) allocated on 22 January 2015, amounting in total to a subscription value of £118,121.46;

(iv) Blackmore Private Equity Sub-Fund - *a subscription of £64,102.55 (64,102.55 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £24,488.54 (24,017.79 shares @ GBP1.0196) allocated on 22 January 2015, amounting in total to a subscription value of £88,591.09.*

Hence, the investment into the four cells of the BG Fund in total amounts to GBP280,538.45 according to the said statement. Apart from the amount invested into the BG Fund, *the Complainant kept other assets in cash, as per the said statement. (fn. 98 P. 165) The valuation 'based on 30.04.3015 NAV' indicated a total value overall of GBP304,604.55.*

It is accordingly noted that a staggering 95% of the Scheme's investible amount (of approx. GBP295,000), (fn. 99 £213,675.17 + £81,628.47 = £295,303.64 as per the **'Subscription Statement and Current Valuation' – P.165)** ***was solely invested into the BG Fund, with 20% of such investible amount being placed in the Blackmore Sustainable Sub-Fund; (fn. 100 £59,060.72 of GBP295,303.64 = 20%) 5% into the Blackmore Lifestyle Sub-Fund; (fn. 101 £14,765.18 of GBP295,303.64 = 5%) 40% in the Blackmore Property Sub-Fund; (fn. £118,121.46 of GBP295,303.64 = 40%) and 30% in the Blackmore Private Equity GBP Sub-Fund. (fn. £88,591.09 of GBP295,303.64=30%)***

The underlying investments – Key Features & relevant observations

As emerging from the copy of the Offering Document presented in respect of the BG Fund, this scheme and its cells had the following distinguishing features: (fn. 104 Emphasis added by the Arbiter)

(i) *Incorporated as a* ***closed-ended*** *investment company with limited liability on 2 October 2013, (fn. 105 P. 88) and* '**tailored for long term investment**'*; (fn. 106 P.93)*

(ii) *The* ***Cell Shares were*** *'***non-voting**, **non-redeemable** preference shares'*; (fn. 107 P. 89)*

(iii) *Investors were* **'not entitled to have their Cell Shares redeemed or repurchased by, or out of funds provided by the Company**' and **could not 'trade Cell Shares on an investment exchange'** *either; (fn. 108 P. 111)*

(iv) *The Exit Strategy was very tight and restrictive. The Offering Document stated inter alia that '*Shareholders will **not be entitled to redeem their**

shares at any time' *(fn. 109 P. 107) and that* ***each cell had*** **'a fixed investment period'** *where '*At the end of each investment period, it is the intention of the Directors that the assets of the relevant Cell are sold and the proceeds distributed to the Cell Shareholders by way of an offer to repurchase the Cell Shares, a cash dividend or combination of the two'. *(fn. 110 P. 96)*

The Offering Document further provided that 'In the event the Directors do not believe the market conditions are beneficial for the sale of any particular investment, **the Directors may extend the lifetime of any** individual **Cell or Cells at their discretion**'. *(fn. 111 Ibid.)*

*Indeed, the Offering Document warned that '*The investor should be aware **the investment is viewed for the lifetime of the closed Cell** … A **shareholder will not be permitted to assign or transfer its shares** … **without prior consent of the Directors … Shareholders must therefore be prepared to bear the risks of owning Cell Shares for an extended period of time in excess of the lifetime of a particular Cell**'. *(fn. 112 P. 97)*

As also emerging from the Fact Sheet produced during the case, the ***lock-in period for the cells was of 10 years*** *as also described throughout the proceedings of the Complaint by both parties. (fn. 113 P. 76)*

(v) *That* ***investments were*** **'not subject to any restriction and may hold any number of investments in any particular Cell'***; (fn. 114 P. 97)*

(vi) *That with respect to borrowing and leverage the Directors of the BG Fund had* **'unlimited power to borrow for the account of any Cell'***; (fn. 115 P. 96)*

(vii) *That '***Investors may not recover the full value of their investment either during the life of the Company or on completion of the closed-ended period'***; (fn. 116 P. 97)*

(viii) *That* '**Close Ended Investment Companies are** regarded as **private arrangements** and are **not subject to regulation**. A Close Ended Investment Company is **not subject to approval in the Isle of Man** and **investors** in such companies **are not protected by any statutory compensation arrangements in the event of the Company's failure'**. *(fn. 117 P. 111)*

Given the features of the BG Fund and the extent of exposure to this single collective investment scheme, there are clearly concerns regarding the adequacy

of such investment and how this fitted and satisfied the scope of the Retirement Scheme and the applicable investment principles and restrictions.

The fact that:

- ***the BG Fund was closed-ended, with no entitlement to redemptions;***
- ***the investment was of long-term having a fixed lock-in period of 10 years and where the lifetime of the cell could possibly be extended even further solely at the discretion of the directors;***
- ***the shares were non-voting and hence investors lacked control on the fund;***
- ***the fund was relatively new and had no, or very limited, track record of only around a year;***
- ***the fund was not subject to any restriction on investment;***
- ***the fund was not subject to regulation,***

make it all amply clear that this was not an adequate investment for a retirement scheme.

Moreover, the fact that 95% of the investible premium was solely invested into the cells of the BG Fund makes it even more questionable how such investment could have been allowed and concerns not raised by (i) Harbour Pensions at the time of investment, and (ii) also by STM Malta at the time when it took over as trustee and RSA of the Scheme.

It should have clearly and immediately become evident to both Harbour Pensions and STM Malta that there are issues with this investment.

Irrespective of any confirmation letters from the Complainant or from any investment adviser (regulated or otherwise) regarding the alleged suitability of such investment, the Trustee had to undertake its own independent proper assessment.

A trustee cannot just abdicate from its responsibilities by relying on a third party who may have had his own interest and/or on a member's confirmation, an unprofessional retail investor, when it itself had such a key and important duty to ensure the proper administration of and the Scheme's compliance with its scope, the provisions of the trust deed and applicable regulatory requirements.

Scope of the Scheme and oversight function by the Trustee/RSA

The purpose of the Scheme is defined in the Trust Deed. Clause 2.4 of the Deed provides that:

'its principal purpose shall be and shall continue to be to provide retirement benefits during retirement and other benefits as set out in this Deed ...*'. (fn. 118 P. 193)*

As to the role of the Trustee/RSA with respect to investments, it is noted that as outlined in the Declaration section of the Retirement Scheme's Application Form, **'... the final decision in respect to the acceptance of any assets or investment into the Harbour Retirement Scheme is with the Administrator of the Harbour Retirement Scheme'***. (fn. 119 P. 57)*

This aspect where the RSA had the final decision in respect of a member directed scheme, in order to ensure compliance and adherence with the investment restrictions/principles, is further reiterated in the 'Scheme Key Facts/Particulars Document' ('the Scheme Particulars')*. The latter provided inter alia that* 'The final decision in respect to the investment and the overall weighting within the Scheme rests with the Administrator' *(fn. 120 P. 66) The Scheme Particulars also provided that* 'The Administrator will retain ultimate control and discretion with regard to the investment decisions *...'. (fn. 121 P. 69)*

It is noted that in its reply, STM Malta ultimately itself acknowledged that the Trustee/RSA had '… a regulatory obligation to ensure that the investments chosen are within the parameters of the rules applicable at the time'*. (fn. 122 P. 159)*

It is furthermore noted that clause 5.3.3 of the Trust deed also provided that 'for the purposes of 5.3.1 and 5.3.2 the directions from the Member to the Scheme Administrator shall be ... subject to the Retirement Scheme Administrator retaining the overall responsibility for the overall operation of the Scheme'*. (fn. 123 P. 200)*

The Trustee/RSA had accordingly a key monitoring function with respect to investments which function formed part of the important safeguards and controls on the Scheme's underlying investments*.*

Investment principles and regulatory requirements

Clause 5.6 of the Trust Deed provided that **'All investments of the Scheme ... shall be made in accordance with Maltese Law and with the Retirement Scheme Law'***. (fn. 124 P. 201 – Emphasis added by the Arbiter)*

'Retirement Scheme Law' *was defined as meaning the Special Funds (Regulation) Act, ('SFA') including* 'any regulation, rule, directive, guidance or requirement issued under it from time to time'*. (fn. 125 P. 192)*

Clause 5.4 of the Trust Deed further provided inter alia *that '*... **the Retirement Administrator shall arrange for the Scheme assets to be invested in the best interest of Beneficiaries**...'*. (fn. 126 P. 200 – Emphasis added by the Arbiter)*

With respect to investments, the Scheme Particulars issued at the time by Harbour Pensions, (fn. 127 P. 65) stipulated that:

'**The Administrator must ... always execute investments within the parameters of restricted investments, prudent management and diversification** as required by the MFSA'*. (fn. 128 P. 66 – Emphasis added by the Arbiter)*

The Scheme Particulars further stated that 'The MFSA imposes strict restrictions on investments ...' *(fn. 129 Ibid.)*

The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the 'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) *Act, 2002', ('the Directives'). The said Directives applied from the Scheme's inception in 2013 until the registration of the Scheme under the RPA.*

SOC 2.7.1 of Part B.2.7 of the Directives required inter alia that the assets were to 'be invested in a prudent manner and in the best interest of beneficiaries …'.

SOC 2.7.2 in turn required that the assets of a scheme are 'invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole' *(fn. 130 SOC 2.7.2 (a)) and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'*. (fn. 131 SOC 2.7.2 (b))*

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be 'predominantly invested in regulated markets'*; (fn. 132 SOC 2.7.2. (c)) to be* 'properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings' *(fn. 133 SOC 2.7.2 (e)) where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme. (fn. 134 SOC 2.7.2 (h)(iii) & (v))*

Despite the standards of SOC 2.7.1 and SOC 2.7.2, Harbour Pensions allowed the Complainant's investment portfolio to comprise solely the investment into the BG

Fund and its cells*. *STM Malta did not question either, when it took over as Trustee/RSA, the portfolio's compliance with the mentioned investment principles and regulatory requirements.

The Arbiter also notes that following registration of the Scheme under the Retirement Pensions Act ('RPA') (fn. 135 The Retirement Pensions Act *(Cap. 514) eventually replaced the* Special Funds (Regulation) Act, 2002 *when it came into force in January 2015. The* Retirement Pensions (Transitional Provisions) Regulations, 2015 *provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorization under the RPA) the Scheme became subject to* the 'Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act 2011' (Pension Rules')*. The investment restrictions for member directed schemes were outlined in Part B.2 titled* 'Investment Restrictions of a Personal Retirement Scheme' *and Part B.9,* 'Supplementary Conditions in the case of entirely Member Directed Schemes' *of the Pension Rules.*

It is noted that SLC 3.2.1 of the Pension Rules provided inter alia that 'the Retirement Scheme Administrator shall ensure that the assets of the scheme are sufficiently liquid and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits'*. (fn. 136 SLC 3.2.1 (iii) of Part B of the Pension Rules)*

Whilst it is noted that SLC 9.5(d) of the Pension Rules, which also dealt with the conditions in relation to investments, included a footnote stating that 'The said investment restrictions shall apply to the current investments of members in a member directed scheme once any movements occur within the member's pension account or in the case of new investments entered into, as from 1st January 2019'*, **STM Malta should nevertheless still have promptly raised the matters involving the adequacy of the underlying portfolio – that is the lack of diversification, lack of liquidity and lack of compliance with the principles and requirements outlined, for necessary action to be taken**.*

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

*Indeed, Article 21 (1) of the TTA which deals with the '*Duties of trustees'*, inter alia stipulates that the trustee should act as a* **bonus paterfamilias***, where '***Trustees**

shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias, act in utmost good faith and avoid any conflict of interest'. *It is also to be noted that Article 21 (2)(a) of the TTA, further specifies that:*

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

In their role as Trustee, Harbour Pensions and STM Malta respectively were accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.

Compliance with investment conditions – Other

It is noted that STM Malta argues in its reply that 'S.2.7.2(a) and (b) refer to the scheme as a whole and not to the pension assets of Mr Ball in isolation'*. (fn. 137 P. 160)*

This argument however cannot be accepted by the Arbiter.

S.2.7.2 refers to the 'portfolio as a whole' *and can only reasonably be considered, in the case of a member directed scheme, to refer to the whole portfolio within the respective individual's member's account, given that such account would have its own specific and distinct investment portfolio.*

Hence, it is only reasonable and correct for the principles, including the investment restrictions specified for the Retirement Scheme to have been applied and adhered to at the level of the individual account. Failure to do so would have meant that the safeguards emanating from the investment conditions and diversification requirements would have not been adopted and ensured in practice in respect of the individual member's portfolio, defeating the aim of such requirements in the first place.

The application of investment restrictions at a general level, that is at scheme level without application on an individual account basis, would only make sense and be reasonable in the context of, and where, the members of such a scheme are participating in the same portfolio of assets held within the scheme and ***not in the circumstance where the members have their own individual separate investment portfolios, as was the case in question.***

An analogy can be made in this regard to the market practice long adopted in the context of collective investment schemes, namely in respect of stand-alone schemes *(fn. 138 i.e., a collective investment scheme without sub-funds) and* umbrella schemes*. (fn. 139 i.e., a collective investment scheme with sub-funds, where each sub-fund would typically have its own distinct investment policies and separate distinct investment portfolios) Whilst investment restrictions would be applied at scheme level in the case of a stand-alone scheme (given that the investors into such scheme would be participating, according to their respective share in the scheme, in the performance of the same underlying investment portfolio), in the case of an umbrella fund, the investment restrictions are not applied at scheme level but at the sub-fund level and would indeed be tailored for each individual sub-fund given that each sub-fund would have its own distinct and separate investment portfolio and investment policy.*

Further Considerations

***For the reasons amply stated above, the BG Fund was not appropriate and suitable for the scope of the Retirement Scheme and the applicable requirements, let alone in the case where the Complainant's risk profile was actually one of* 'Medium Risk'*, where his* 'Investment Objective' *was described as* 'willing to accept a small amount of risk to provide for potential growth over the medium to long term'**. *(fn. 140 P. 56)*

Hence, one cannot really justify how the investment in the BG Fund was allowed in the first place and how no Trustee and RSA had ever raised any issues about the incompatibility and inadequacy of such investment within the Retirement Scheme, not only with reference to the Complainant's risk profile, but also with the scope of the Retirement Scheme and provisions of the Trust Deed as outlined above.

There was ultimately no prudence, no diversification and no adherence with the relevant investment provisions.

In the case in question, the Arbiter cannot thus conclude that STM Malta has truly acted in the best interests of the Complainant when it took over as Trustee and RSA.

Not only has STM Malta not promptly raised itself concerns and alerted the Complainant on the various issues with the BG Fund investment as indicated in this decision, but STM Malta has rather itself untenably took the stance of defending the position taken by Harbour Pensions in allowing such investment within the Retirement Scheme.

***It is indeed somewhat incredulous how, in the face of the glaring and manifest breaches of trust, STM Malta kept defending the actions of Harbour Pensions stating inter alia in its reply that '*... the Respondent asserts that in any event Harbour Pensions did take actions that were sufficient to satisfy any obligation of diligence required by S21 of the Trusts and Trustee Act', and that '... Harbour Pensions Limited has acted with due care in relying on the advice of a regulated investment adviser'*. (*fn. 141 P. 162)*

Even during the hearing of 1 June 2021, the official of STM Malta stated before the Arbiter that **'Being asked what steps are STM taking to remedy the breach of trust that has been carried out by the Trustees of the Harbour Pension Scheme as per TTA 30, Sub-Section 3, I say that I have got no evidence of a breach of trust'.** *(fn. 142 P. 257)*

The Arbiter considers that it would have only been reasonable, adequate and appropriate for STM Malta to promptly raise and bring to the Complainant's attention the various issues related to this investment as considered and mentioned in this decision, with the aim to remedy the breaches.

As outlined above, in its letter of 11 August 2020, (fn. 143 P. 72) STM Malta raised, **(nearly two years after taking over as trustee*) only certain issues involving just the value of the investment, by which time the previous trustee and retirement scheme administrator, Harbour Pensions, had already been dissolved and struck off from the Malta Business Registry***.*

Conclusion & Compensation

For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case *(fn. 144 Cap. 555, Article 19(3)(b))* ***and is partially accepting it in so far as it is compatible with this decision.***

Being mindful of the key role of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of the STM Harbour Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by STM Malta for the damages suffered by the Complainant as a result of the breaches allowed and committed in relation to this scheme and the lack of protection afforded to him to safeguard his pension as amply outlined in this decision.

The Arbiter considers that apart from the Service Provider, other parties, like the investment adviser, were involved and also carried responsibility. Therefore, the

Arbiter considers that in the particular circumstances of this case, it is fair, equitable and reasonable for STM Malta Pension Services Limited to:

(i) ***compensate the Complainant for the amount of 70% of the value invested in the Blackmore Global PCC Limited, which is calculated to amount to GBP196,376.92; (fn. 145 70% of GBP280,538.45 which is the total amount invested in the four cells of the BG Fund as indicated in the statement titled '*****Subscription Statement and Current Valuation'** ***attached to Harbour Pensions letter of 29 July 2015 – P. 165)) and***

(ii) ***as part of the compensation being awarded, waive or reimburse its own exit fees that may be applicable in case of a transfer out of the Retirement Scheme.***

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the Complainant the sum of GBP196,376.92 (one hundred and ninety-six thousand, three hundred and seventy-six pounds sterling and ninety-two pence), as well as waive or reimburse its own exit fees in case of a transfer out of the Retirement Scheme.

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

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

L-Appell

6. L-appellant ħass ruħu aggravat bid-deċiżjoni appellata, u ntavola appell minnha quddiem din il-Qorti fit-18 ta' Ottubru, 2022, fejn talab sabiex:

"...din l-Onorabbli Qorti jogħġobha tilqa' dan l-appell, u tirriforma u timmodifika d-deċiżjoni appellata, billi filwaqt li tikkonfermaha fir-rigward tas-sejbien dwar responsabbiltà tas-Service Provider, ***tħassarha u tbiddilha*** *fejn stabbiliet il-perċentwali ta' 70%, u jogħġobha tissostitwiha bil-perċentwali ta' 100% stante li r-responsabbiltà tas-Service Provider bħala 'Trustee' hija responsabbiltà inframmentabbli; u barra minn hekk, jogħġobha* ***tħassar*** *il-figura żbaljata addotata mill-Arbitru ta' GBP196,376.92, u jogħġobha tissostitwiha biex taqbel u tkun konformi mat-talba ta' Christopher Ball lill-Arbitru sa mill-bidu tal-proċeduri, jigifieri, "***He accordingly sought a compensation of the total initial investment of £309,351.51**

> ***plus lost growth, plus refund of all charges, plus compensation for distress and inconvenience."*** *Konsegwentement, din l-Onorabbli Qorti jogħġobha tgħaddi biex tillikwida figura oħra superjuri ta' kumpens li tkun tinkwadra u tinkludi fiha l-figura ta' GBP309,351.51, kif ukoll it-telf ta'* 'growth'*, kif ukoll ir-rifużjoni taċ-*'charges' *kollha versati, u dan bla preġudizzju għal kull telf minħabba danni morali,* 'si et quatenus'. *Bl-ispejjeż.".*

Jgħid li l-aggravji tiegħu huma (i) fir-rigward tas-sejbien ta' responsabbiltà għal 70% biss tat-telf soffert minnu; (ii) l-Arbitru uża ċifra żbaljata waqt il-komputazzjoni tal-ħsara.

7. Is-soċjetà appellata filwaqt li rrilevat li hija wkoll kienet ippreżentat rikors tal-appell mid-deċiżjoni appellata, talbet sabiex l-appell odjern jiġi miċħud, iżda jintlaqa' l-appell tagħha appena msemmi.

<u>Konsiderazzjonijiet ta' din il-Qorti</u>

8. Il-Qorti ser tgħaddi sabiex tikkonsidra l-appell imressaq mill-appellant, u dan fid-dawl ta' dak li ġie kkunsidrat u deċiż fid-deċiżjoni appellata, u meħudin ukoll in konsiderazzjoni s-sottomissjonijiet tas-soċjetà appellata.

9. L-ewwel aggravju tal-appellant jirrigwarda r-responsabbiltà limitata għat-telf li huwa sofra. Filwaqt li jaċċetta li d-deċiżjoni appellata hija waħda ekwa u ġusta, u saħansitra li din fiha motivazzjoni tajba dwar is-sejbien ta' responsabbiltà, jiddikjara li huwa ma jaqbilx mal-Arbitru fejn dan illimita r-responsabbiltà tas-soċjetà appellata għal 70% tat-telf li huwa sofra. Jikkontendi li filwaqt li l-liġi ċivili tippermetti li r-responsabbiltà tista' tinqasam, il-każ odjern ma kienx wieħed minn dawk fejn dan huwa permess. Jissottometti li t-*trustee* jerfa' r-responsabbiltà kollha għaliex ma jistax jinstab responsabbli għal 70% ta'

malpractice jew malamministrazzjoni. Jikkontendi li l-liġi dwar ir-rwol ta' *trustee* mhijiex bħal dik tal-liġi ċivili ġenerali. L-appellant jispjega li dan għaliex l-enti kummerċjali tkun għalqet sakemm l-investitur ikun sar jaf mingħand il-provditur tas-servizz li l-investiment tiegħu jkun spiċċa fix-xejn, proprju kif ġara fil-każ preżenti, u kif ikkonstata l-Arbitru. Isostni li f'każ bħal dan, ma jkun hemm l-ebda raġuni valida fil-liġi li żżomm milli t-*trustee* jiġi dikjarat waħdu responsabbli għall-akkadut, meta dan ikun tellef lill-investitur l-opportunità li jieħu azzjoni f'waqtha. It-tieni aggravju tal-appellant huwa li l-Arbitru uża ċifra żbaljata fil-komputazzjoni tiegħu tal-ħsara sofferta minnu, u dan meta huwa kien iċċita ċ-ċifra korretta f'paġna 12 tad-deċiżjoni appellata. Jispjega li huwa kien talab lill-Arbitru għall-kjarifiki tal-imsemmija deċiżjoni appellata, billi talbu sabiex isewwiha, u anki permezz tal-ittra tiegħu tat-12 ta' Ottubru, 2022, huwa kien talab lill-Arbitru sabiex jikkoreġi l-komputazzjoni tiegħu billi juża ċ-ċifra korretta. Wara li jiċċita dak li qal l-Arbitru fil-provvediment tiegħu tal-5 ta' Ottubru, 2022, dak li qal huwa stess fl-ittra tiegħu lill-Arbitru fuq indikata, u anki l-*email* li huwa rċieva mill-Uffiċċju tal-Arbitru għas-Servizzi Finanzjarji [OAFS], sostna li l-iżball tal-Arbitru kien wieħed li seta' ġie evitat li kieku dan żamm iċ-ċifra li huwa kien indika lill-Arbitru, u li l-istess Arbitru għamel riferiment għaliha f'paġna 12 tad-deċiżjoni appellata. Jikkontendi li ċ-ċifra li għażel li jaddotta l-Arbitru hija waħda ferm inferjuri, u ġejja minn sors li ma kienx verifikabbli u għalhekk inaffidabbli, jiġifieri miċ-ċifri ta' Blackmore Global. L-appellant isostni li l-iżball tal-Arbitru mhuwiex wieħed ġustifikat u/jew raġonevoli, u lanqas mhux wieħed li seta' ġie antiċipat u evitat mill-appellant innifsu. B'hekk hemm lok għal tiswija f'dan l-istadju tal-appell. Huwa hawnhekk jiċċita parti mid-deċiżjoni

appellata li tinstab fil-paġna 11 tagħha, sabiex juri kif tassew l-Arbitru kellu quddiemu ċ-ċifra l-preċiża, u li huwa ma kienx jaħti għan-nuqqas.

10. Is-soċjetà appellata tilqa' billi tagħmel riferiment għar-rikors tal-appell tagħha, iżda fejn il-Qorti tosserva hija ma tindirizzax b'xi mod l-ewwel aggravju tal-appellant, u minflok tirrileva kwistjoni oħra u ċioé li *trustee "...ma jistax jitqies responsabbli għal azzjonijiet ta' ħaddieħor, ma jistax jitqies bħala a 'continuation from one person to another', ma jistax jitqies bħala suċċessur tat-trustee ta' qablu".* Dwar it-tieni aggravju tal-appellant, is-soċjetà appellata tibda billi tagħmel riferiment għal paġna 39 tad-deċiżjoni appellata, fejn l-Arbitru elenka l-investimenti formanti l-portafoll tal-appellant. Tgħid li ċ-ċifri ċċitati rriżultaw mill-provi stess, u l-partijiet qatt ma kkontestawhom, u kien biss wara li ngħatat id-deċiżjoni appellata li l-appellant xtaq jippreżenta provi ulterjuri dwar l-ammont investit minnu, u talab l-Arbitru sabiex jikkorreġi żball fil-komputazzjoni tiegħu. Is-soċjetà appellata tgħid li kien jispetta lill-appellant li jressaq il-provi relattivi sabiex isostni l-ilment tiegħu, u tilmenta mill-fatt li huwa addottata proċedura saħansitra mhijiex kontemplata mil-liġi sabiex permezz ta' ittra tat-12 ta' Ottubru, 2022 huwa talab mill-ġdid għal kjarifika. Tirrileva li lanqas l-appellant m'huwa f'pożizzjoni li jivverifika s-somma rappreżentanti t-telf li għamel fuq il-portafoll tiegħu. Is-soċjetà appellata tikkontendi li l-Arbitru ma jistax jagħti kumpens fi flus ta' iżjed minn €250,000, u għalhekk it-talba tal-appellant kif magħmula ma tistax tintlaqa'. Tikkontendi li kif issottomettiet fir-rikors tal-appell tagħha, ma jirriżulta l-ebda ness kawżali fid-deċiżjoni appellata bejn in-nuqqasijiet tagħha u t-telf soffert mill-appellant, u l-appellant stess ma ressaq l-ebda prova li turi li kien hemm dan in-ness. Tikkontendi wkoll li d-deċiżjoni tal-Arbitru li jalloka 70% tat-telf lilha hija waħda arbitrarja u mingħajr

proporzjon, meta jitqies li l-istess Arbitru rrikonoxxa r-responsabbiltà ta' Harbour Pensions u tal-konsulent finanzjarju magħżul mill-appellant stess.

11. Il-Qorti tirrileva li joħroġ ċar mid-deċiżjoni appellata li hemm diversi fatti li joħorġu mill-provi li juru li l-aġir ta' terzi persuni ikkontribwixxa wkoll lejn it-telf soffert mill-appellant. Għalhekk tgħid li l-Arbitru kien qed ikun korrett u anki ġust, meta attribwixxa parti mir-responsabbiltà għad-danni sofferti mill-appellant lil dawn it-terzi persuni. Għalkemm l-imsemmi appellant jinsisti li l-każ odjern mhux wieħed fejn huwa permess skont il-liġi ċivili li r-responsabbiltà għad-danni tiġi attribwita skont ir-responsabbiltà għall-akkadut, u saħansitra jippretendi li t-*trustee* għandu jerfa' ir-responsabbiltà kollha, ma jiċċita l-ebda provvediment legali in sostenn ta' dan l-argument tiegħu. Il-Qorti madankollu xorta waħda ħaditu in konsiderazzjoni, iżda tirrileva li m'hemm l-ebda provvediment legali li jista' jsaħħaħ dan l-argument tal-appellant. Għaldaqstant ma ssibx l-ewwel aggravju tiegħu ġustifikat, u tiċħdu.

12. Dwar it-tieni aggravju tal-appellant, hawnhekk ukoll ma ssibx li dan huwa ġustifikat. Tikkunsidra li l-allegata *'figura korretta'* li l-appellant jgħid li l-Arbitru saħansitra jindikaha f'paġna 12 tad-deċiżjoni tiegħu, ma ġietx sostanzjata min-naħa tiegħu permezz ta' prova jew ikkonfermata u spjegata fix-xhieda tiegħu. Filfatt l-uniku prova li seta' jistrieħ fuqha l-Arbitru korrettement sabiex jikkwantifika kemm kien l-investiment tal-appellant, kienet is-*"Subscription Statement and Current Valuation"* annessa mal-ittra ta' Harbour Pensions tad-29 ta' Lulju, 2015 a *fol.* 165 tal-atti tal-Arbitraġġ. Hawnhekk l-appellant jirrileva li ċ-ċifra li straħ fuqha l-Arbitru ma kinitx affidabbli, ġaladarba ma kinitx ukoll verifikabbli. Iżda l-Qorti tgħid li kkunsidrat in-nuqqas ta' prova dwar is-somma

investita mill-appellant, l-Arbitru kien pjuttost ġeneruż lejh meta għażel li jaddotta din iċ-ċifra, u ċertament l-appellant ma jistax jinsisti li minflok l-Arbitru messu qagħad fuq id-dikjarazzjoni mhux ġuramentata tiegħu kif ippreżentata fl-ilment imressaq minnu. Għaldaqstant dan l-aggravju wkoll qiegħed jiġi miċħud.

Decide

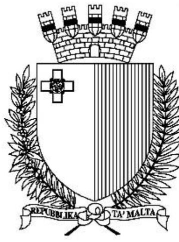
Għar-raġunijiet premessi l-Qorti tiddeċiedi dwar l-appell tal-appellant billi tiċħdu, u dan filwaqt li tikkonferma d-deċiżjoni appellata fl-intier tagħha.

L-ispejjeż marbuta mad-deċiżjoni appellata għandhom jibqgħu kif deċiżi, filwaqt li l-ispejjeż ta' dan l-appell għandhom ikunu a karigu tal-appellant.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-15 ta' Settembru, 2023

Appell Inferjuri Numru 140/2022 LM

Christopher Ball (Detentur tal-Passaport nru. GBR 518406710)
('l-appellat')

***vs*.**

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

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **STM Malta Pension Services Limited (C 51028)** [minn issa 'l quddiem 'is-soċjetà appellanta'] mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa 'l quddiem 'l-Arbitru'] mogħtija fit-28 ta' Settembru, 2022, [minn issa 'l quddiem 'id-deċiżjoni

appellata'], li permezz tagħha ddeċieda li jilqa' parti mill-ilment tar-rikorrent **Christopher Ball (Detentur tal-Passaport nru. GBR 518406710)** [minn issa 'l quddiem 'l-appellat'], u dan safejn kompatibbli mad-deċiżjoni appellata, u wara li kkonsidra li l-istess soċjetà appellanta għandha tinżamm biss parzjalment responsabbli għad-danni sofferti, huwa ddikjara li a tenur tas-subinċiż (iv) tal-para. (ċ) tas-subartikolu 26(3) tal-Kap. 555, hija għandha tħallas lill-appellat il-kumpens fis-somma ta' GBP196,376.92 (mija sitta u disgħin elf tliet mija sitta u sebgħin Lira Sterlina u tnejn u disgħin pence), kif ukoll iċċedi jew tirrifondi l-*exit fees* tagħha jekk applikabbli, bl-imgħaxijiet legali mid-data ta' dik id-deċiżjoni appellata sad-data tal-effettiv pagament, filwaqt li s-soċjetà appellanta kellha tħallas l-ispejjeż kollha konnessi ma' dik il-proċedura.

Fatti

2. Il-fatti tal-każ odjern jirrigwardaw it-telf eventwali li allegatament jgħid li sofra l-appellat mill-investiment li huwa kien għamel tramite s-soċjetà appellanta fi skema tal-irtirar magħrufa bl-isem Harbour Retirement Scheme [minn issa 'l quddiem 'l-Iskema']. Jirriżulta li l-imsemmi appellat kien ċempillu ċertu wieħed Marc Rees, li huwa kien fehem kien konsulent finanzjarju ma' *Aspinal Chase,* għall-ħabta ta' Lulju, 2013, fejn offrielu li mingħajr l-ebda dritt jew kumpens jirrevedi l-investiment tal-pensjoni tiegħu. Imbagħad għall-ħabta tat-8 ta' April, 2014 l-istess Marc Rees talbu sabiex jikteb u jiffirma ittra li huwa kien persuna idonea sabiex tinvesti fil-Blackmore Global Fund [minn issa 'l quddiem 'Blackmore'], u sussegwentement il-pensjoni kollha tiegħu ġiet investita b'dan il-mod. F'Diċembru, 2016, l-appellat kien għamel talba sabiex

jifdi l-investiment tiegħu, u saħansitra talab bosta drabi għall-informazzjoni. Iżda kien biss permezz ta' ittra tal-11 ta' Awwissu, 2020 li s-soċjetà appellanta kienet infurmatu bil-preokkupazzjonijiet tagħha dwar l-istess investiment.

<u>Mertu</u>

3. L-appellat ippreżenta lment quddiem l-Arbitru fil-11 ta' Frar, 2021 fil-konfront tas-soċjetà appellanta, fejn issottometta fost affarijiet oħra li din bħala *trustee/*amministratrici tal-Iskema, kienet ippermettiet li l-investiment tal-pensjoni tiegħu kollha fil-Blackmore, li ma kien joffri l-ebda trasparenza, kien jippreżenta riskju għoli, ma kien bl-ebda mod regolat, u saħansitra ma kienx wieħed likwidu, u dan fejn huma sallum ma kienu jafu xejn dwaru. Għalhekk, huwa kien qed jitlob li (i) il-valur tal-pensjoni tiegħu jerġa' għal dak li kien oriġinarjament u jiġi aġġustat sabiex jirrifletti t-telf; (ii) tingħata rifużjoni tad-drittijiet kollha mħallsa minnu; (iii) il-pensjoni tiegħu tiġi ttrasferita fi flus lil provditur tas-servizzi finanzjarji regolat ġewwa r-Renju Unit a spejjeż tas-soċjetà appellanta; u (iv) jitħallsu danni għad-dwejjaq u għall-inkonvenjenza kkawżati.

4. L-imsemmija soċjetà appellanta wieġbet fit-9 ta' Marzu, 2021 billi eċċepiet li (a) skont id-disposizzjonijiet tal-para. (ċ) tas-subartikolu 22(1) tal-Kap. 555, l-Arbitru ma kellu l-ebda kompetenza sabiex jittratta l-ilment; (b) hija ma kinitx il-leġittimu kuntradittur; (ċ) l-*ex trustees* u l-amministratturi tal-Iskema m'għandhom l-ebda setgħa li jagħtu parir dwar l-investimenti magħżulin mill-appellat stess; (ċ) kienu dawk il-persuni li taw il-parir lill-appellat sabiex jittrasferixxi l-pensjoni tiegħu, li kellhom jinżammu responsabbli għad-deċiżjonijiet meħuda mill-appellat; (d) Harbour Pensions Limited [minn issa 'l

quddiem 'Harbour Pensions'] aġixxiet b'mod diliġenti; u (e) ma kien hemm l-ebda delega tal-obbligi.

Id-deċiżjoni appellata

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

"Plea raised that STM Malta is not the legitimate defendant in this Complaint

STM Malta claimed that it is not the legitimate defendant given that it 'was not the trustee or service provider administering the pension of the Complainant at the time when the actions he is complaining of occurred'. *(fn. 74 Ibid.)*

It further submitted that the Complainant himself kept referring to Harbour Pensions in his Complaint, and only referred to STM Malta when it took over as trustee in 2018, this occurring much after when the Complainant transferred his scheme and made the disputed investments.

STM Malta also referred to the provisions of article 30 of the Trusts and Trustees Act ('TTA') which it claimed exonerated the trustee from liability for a breach of trust committed by another person, prior to its appointment.

The Arbiter rejects STM Malta's claim that it is not the legitimate defendant when taking into consideration the particular circumstances of this case, nature of the Complaint, and the various reasons outlined hereunder.

Context

The Arbiter observes that Harbour Pensions Limited ('Harbour Pensions') was the initial Trustee and RSA in respect of the Complainant's Retirement Scheme as per the Trust Deed dated 19 February 2013. (fn. 75 P. 187)

Harbour Pensions was licensed by the MFSA as a Retirement Scheme Administrator until it voluntarily surrendered its licence with effect from 5 October 2018. (fn. 76 https://www.mfsa.mt/financial-services-register/) Harbour Pensions is no longer in operation and was subsequently dissolved and struck off from the records held with the Malta Business Registry with effect from 31 January 2020. *(fn. 77*

https://registry.mbr.mt/ROC/index.jsp#/ROC/companiesReport.do?action=companyDetails&fKey=b8f98cfe-2e72-47bc-bb28-d5c36dd6f56c)

Before Harbour Pensions ceased to exist, STM Malta was the entity which* 'acquired the business of Harbour Pensions Limited'** *(fn. 78 P.72)* ***and subsequently took over as the Trustee and RSA of the Scheme. This was accordingly not merely a replacement of the trustee of the Scheme but an acquisition of business by STM Malta.

As outlined in a public notice featuring on the STM Group plc website: *(fn. 79 https://info.stmgroupplc.com/acquistion-malta-based-barbour-pensions-limited/)*

'STM Malta Trust and Company Management Ltd signed a Sale and Purchase Agreement ("the Acquisition") with the shareholders of Harbour Pensions Limited ("Harbour") to acquire the entire issued share capital of the company and **its related pension trust schemes**.*' (fn. 80 Emphasis added by the Arbiter)*

Moreover, this Complaint covers other important aspects than those mentioned by the Service Provider in its plea.

As explained further on in this decision, these relate to the actions and steps taken by STM Malta with respect to the Complainant's Scheme and its underlying investment when it took over as Trustee/RSA of the Retirement Scheme. Such aspects also form an integral part of the Complaint which accordingly needs to be duly considered in all of its multiple material aspects.

Transfer of business and new trustee

The Arbiter cannot accept the argument by STM Malta that it is not the legitimate defendant because the Complaint relates to the time when Harbour Pensions was administering the Scheme for various reasons as outlined hereunder.

a) ***If the Arbiter had to accept STM's contention, he would be creating a lacuna which can give rise to grave abuse in the financial system, with the resulting negative implications in the trust needed for the proper operation of the financial services sector. If a*** **'Retiring Trustee/RSA'** ***and a*** **'New Trustee/RSA'** ***are allowed to agree on a transfer of a pension scheme which absolves them from liability towards the Scheme Members, (simply because there was a transfer of business), there could be situations where the*** **'Retiring Trustee/RSA'*, to ward off any liability towards the Members, would dispose of the Scheme, and*** **the New Trustee/RSA** ***would acquire the business at an advantageous price expecting no action to be lodged against it for the shortcomings of its predecessor. Such an abusive transfer would only be to the***

detriment of the members and cannot be condoned. For this and other reasons outlined hereunder, the plea raised by STM Malta is unsustainable.

b) No evidence of any waiver of liability catering for the existing scenario

During the proceedings of the case, STM Malta presented a copy of the 'Deed of Appointment and Retirement of Trustee qua also Retirement Scheme Administrator', *dated 31 August 2018, entered into between Harbour Pensions and STM Malta (*'the Deed of New Trustee'*). (fn. 81 P. 251-253)*

It is noted that, with respect to liability, Harbour Pensions and STM Malta indemnified each other under certain specific circumstances as per clause 6 of the said Deed. *(fn. 82 P. 252)*

Before assuming the business, STM Malta was at liberty to conduct a due diligence exercise to discover any liabilities that Harbour Pensions might have had towards the Scheme Members, and as is the norm, would have factored in such liabilities in the acquisition price.

Moreover, it is clearly stated in the Deed of the New Trustee (fn. 83 P. 251) that:

'The Parties agree that all the assets of the Pension Scheme **and all the duties, powers and discretions of the Retiring Scheme Administrator arising under the Rules and any deeds supplemental thereto** *(fn. 84 emphasis added by the Arbiter)* are to be transferred to and vest in the New Retirement Scheme Administrator …'.

This is clear evidence that the Service Provider was acquiring both the assets and liabilities connected with the Scheme and cannot pick and choose the assets and abandon any obligations which the Retiring Administrator might have had towards the Members of the Scheme.

In reality the Service Provider entered into the boots of its predecessor because there was a continuation of business related to the Scheme, and when the Service Provider agreed with Harbour Pensions that 'the New Retirement Scheme Administrator is to be the retirement scheme administrator and Trustee of the Pension Scheme **in place of the Retiring Retirement Scheme Administrator**,' *(fn. 85 P. 252 Emphasis added by the Arbiter) it was simply* ***continuing*** *the administration of the scheme as* 'inherited' *from the previous Scheme Administrator, namely, Harbour Pensions.*

STM Malta, as the entity which has **'acquired the business of Harbour Pensions Limited',** *(fn. 86 P. 72)* ***cannot thus just evade and dismiss any claim***

involving the previous trustee, also by quoting the provisions of Article 30 of the Trust and Trustees Act which shall also be considered next.

c) Article 30 of the Trust and Trustees Act

STM Malta referred to Article 30 of the TTA in order to support its claim that it is not liable for a breach of trust committed by some other person prior to its appointment. It stated that 'Section 30 of the Trusts and Trustees Act ... clearly lays out that "A trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person"'. *(fn. 87 P. 158)*

Apart from the fact that the Service Provider did not quote ***the entire Article 30*** *of the Trusts and Trustees Act (which will shortly be dealt with), in this particular case, one cannot argue that de facto, the Service Provider can exculpate itself on the basis of this Article when in reality* ***it was continuing the administration*** *of the same scheme of its predecessor, and it just substituted itself for the previous Trustee.*

Moreover, the Service Provider omitted to include an important part of sub-section 3 of Article 30 of the TTA. The said sub-section is reproduced in full below*:*

'(3) A trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person. **It shall, however, be the duty of the trustee on becoming aware of it to take all reasonable steps to have such breach remedied**.' *(fn. 88 Emphasis added by the Arbiter)*

The Arbiter considers that, if there was a breach of trust and issues of adequacy with the underlying investment as alleged by the Complainant, STM Malta as the new trustee should have become aware of it, at or around the time, when it took over the role of Trustee and RSA, in 2018.

The Arbiter considers it reasonable, justifiable and equitable in the circumstances of this case to expect that the new Trustee/RSA had, or should have undertaken, a review of the Complainant's pension scheme at the time when it acquired the business in order to be able to comply with its obligations applicable in the said roles and:

(i) ***act with*** **'the prudence, diligence and attention of a bonus paterfamilias'***; (fn. 89 As provided for in Article 21(1) of the TTA which deals with the* 'Duties of trustees'.*)*

(ii) **'act with due skill, care and diligence …'***; (fn. 90 As provided for in Rule 2.6.2 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator' *of the* 'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*' ('the Directives') issued under the Special Funds (Regulation) Act, 2002 ('SFA') and eventually under Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules' *of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the Retirement Pensions Act ('RPA'))* ***and***

(iii) ***ensure that the Scheme's assets are*** **'invested in a prudent manner and in the best interest of Members and Beneficiaries'**. *(fn. 91 As provided for under Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets'*, of the Directives issued under the SFA and eventually under Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme' *of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA.)*

Such review should have **inter alia** ***been done in order to ensure that the Complainant's Scheme was in order and in compliance with the applicable regulatory provisions, the conditions of the Trust Deed and the scope of the Retirement Scheme; and ensure that it remained so. Otherwise, proper remedial actions had to be taken as appropriate.***

Hence, <u>an important aspect that needs to be considered is whether STM Malta took all reasonable steps when it took over as the new Trustee and RSA of the Scheme. Such aspect shall be considered as part of the merits of the case</u>.

Complaint ultimately captures actions of STM Malta

The Arbiter notes that in his Complaint, the Complainant is also questioning the actions of STM Malta since it took over as trustee and retirement scheme administrator in 2018.

The Complaint accordingly does not only involve, or is strictly limited to, the actions of the Trustee and RSA at the time when the investment into the BG Fund was undertaken, but also involves the actions occurring thereafter.

The Arbiter notes that in Doc 3, titled 'Arbiter Complaint' *attached to his Complaint Form, the Complainant submitted, for example, that:*

'STM Malta purchased the Scheme on or around the beginning of 2018 and it is reasonable to assume they carried out due diligence before committing to that purchase. It is also reasonable to assume that due diligence would have exposed the lack of transparency, the lack of audited financial statements and the growing negative commentary in the media. And yet, it seems, the RSA failed to consider exercising its powers to mitigate the unequivocally high risk the Scheme was exposed to'. *(fn. 92 P. 32)*

The Complainant further questioned the timing of STM Malta's action and how long the RSA should have taken to realise something was very wrong. (fn. 93 P. 39)

Other

In addition to the above, it is furthermore noted that STM Malta has ultimately strongly defended the actions of Harbour Pensions in allowing the disputed investment, even going as far as claiming that Harbour Pensions **'went beyond what was required by regulation or the contractual terms'***, (fn. 94 P. 24)* ***a position that it continued to maintain before the Arbiter during the proceedings of this case.***

STM Malta's strong defence of its predecessor strongly implies that STM itself recognises that once it acquired the business from Harbour Pensions it was also assuming its predecessor's liabilities towards the Scheme.

For the reasons amply mentioned, the Arbiter is rejecting the Service Provider's claim that it is not the legitimate defendant in this Complaint. The Arbiter shall accordingly consider next the merits of the case and all relevant aspects to ensure that the case is determined and adjudged by what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case as required in terms of Article 19(3)(b) of the Act.

"The Merits of the Case

The Arbiter is considering the Complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555 (fn. 95 Art. 19(3)(d)) which stipulates that he should deal with complaints in 'an economical and expeditious manner'.

The underlying investments - Exposure

The Complainant applied to become a member of the Scheme on 18/04/2014. (fn. 96 P. 58) He was accepted by Harbour Pensions as a member on 13 May 2014. (fn. 97 P. 16 & 29)

*As indicated in the '*Subscription Statement and Current Valuation' *attached to the letter dated 29 July 2015 issued by Harbour Pensions, the Scheme was invested into four cells (sub-funds) forming part of the Blackmore Global PCC Limited, the BG Fund, as follows:*

(i) Blackmore Sustainable Sub-Fund – *a subscription of £42,735.03 (42,735.03 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £16,325.69 (16,271.99 shares @ GBP1.0033) allocated on 22 January 2015, amounting in total to a subscription of £59,060.72;*

(ii) Blackmore Lifestyle Sub-Fund - *a subscription of £10,683.76 (10,683.76 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £4,081.42 (3,986.15 shares @ GBP1.0239) allocated on 22 January 2015, amounting in total to a subscription of £14,765.18;*

(iii) Blackmore Property Sub-Fund - *a subscription of £85,470.07 (85,470.07 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £32,651.39 (32,469.56 shares @ GBP1.0056) allocated on 22 January 2015, amounting in total to a subscription value of £118,121.46;*

(iv) Blackmore Private Equity Sub-Fund - *a subscription of £64,102.55 (64,102.55 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £24,488.54 (24,017.79 shares @ GBP1.0196) allocated on 22 January 2015, amounting in total to a subscription value of £88,591.09.*

Hence, the investment into the four cells of the BG Fund in total amounts to GBP280,538.45 according to the said statement. Apart from the amount invested into the BG Fund, *the Complainant kept other assets in cash, as per the said statement. (fn. 98 P. 165) The valuation 'based on 30.04.3015 NAV' indicated a total value overall of GBP304,604.55.*

It is accordingly noted that a staggering 95% of the Scheme's investible amount (of approx. GBP295,000), (fn. 99 £213,675.17 + £81,628.47 = £295,303.64 as per the **'Subscription Statement and Current Valuation' – P.165)** ***was solely invested into the BG Fund, with 20% of such investible amount being placed in the Blackmore Sustainable Sub-Fund; (fn. 100 £59,060.72 of GBP295,303.64 = 20%) 5% into the Blackmore Lifestyle Sub-Fund; (fn. 101 £14,765.18 of GBP295,303.64 = 5%) 40% in the***

Blackmore Property Sub-Fund; (fn. £118,121.46 of GBP295,303.64 = 40%) and 30% in the Blackmore Private Equity GBP Sub-Fund. (fn. £88,591.09 of GBP295,303.64=30%)

The underlying investments – Key Features & relevant observations

As emerging from the copy of the Offering Document presented in respect of the BG Fund, this scheme and its cells had the following distinguishing features: (fn. 104 Emphasis added by the Arbiter)

(i) *Incorporated as a* ***closed-ended*** *investment company with limited liability on 2 October 2013, (fn. 105 P. 88) and* '**tailored for long term investment**'*; (fn. 106 P.93)*

(ii) *The* ***Cell Shares were*** '**non-voting**, **non-redeemable** preference shares'*; (fn. 107 P. 89)*

(iii) *Investors were* **'not entitled to have their Cell Shares redeemed or repurchased by, or out of funds provided by the Company**' and **could not 'trade Cell Shares on an investment exchange'** *either; (fn. 108 P. 111)*

(iv) *The Exit Strategy was very tight and restrictive. The Offering Document stated inter alia that* 'Shareholders will **not be entitled to redeem their shares at any time**' *(fn. 109 P. 107) and that* ***each cell had*** **'a fixed investment period'** *where* 'At the end of each investment period, it is the intention of the Directors that the assets of the relevant Cell are sold and the proceeds distributed to the Cell Shareholders by way of an offer to repurchase the Cell Shares, a cash dividend or combination of the two'*. (fn. 110 P. 96)*

The Offering Document further provided that 'In the event the Directors do not believe the market conditions are beneficial for the sale of any particular investment, **the Directors may extend the lifetime of any** individual **Cell or Cells at their discretion**'*. (fn. 111 Ibid.)*

Indeed, the Offering Document warned that 'The investor should be aware **the investment is viewed for the lifetime of the closed Cell** … A **shareholder will not be permitted to assign or transfer its shares** … **without prior consent of the Directors … Shareholders must therefore be prepared to bear the risks of owning Cell Shares for an extended period of time in excess of the lifetime of a particular Cell**'. *(fn. 112 P. 97)*

As also emerging from the Fact Sheet produced during the case, the ***lock-in period for the cells was of 10 years*** *as also described throughout the proceedings of the Complaint by both parties. (fn. 113 P. 76)*

(v) *That* ***investments were*** **'not subject to any restriction and may hold any number of investments in any particular Cell'***; (fn. 114 P. 97)*

(vi) *That with respect to borrowing and leverage the Directors of the BG Fund had* **'unlimited power to borrow for the account of any Cell'***; (fn. 115 P. 96)*

(vii) *That '***Investors may not recover the full value of their investment either during the life of the Company or on completion of the closed-ended period'***; (fn. 116 P. 97)*

(viii) *That* '**Close Ended Investment Companies are** regarded as **private arrangements** and are **not subject to regulation**. A Close Ended Investment Company is **not subject to approval in the Isle of Man** and **investors** in such companies **are not protected by any statutory compensation arrangements in the event of the Company's failure'**. *(fn. 117 P. 111)*

Given the features of the BG Fund and the extent of exposure to this single collective investment scheme, there are clearly concerns regarding the adequacy of such investment and how this fitted and satisfied the scope of the Retirement Scheme and the applicable investment principles and restrictions.

The fact that:

- ***the BG Fund was closed-ended, with no entitlement to redemptions;***
- ***the investment was of long-term having a fixed lock-in period of 10 years and where the lifetime of the cell could possibly be extended even further solely at the discretion of the directors;***
- ***the shares were non-voting and hence investors lacked control on the fund;***
- ***the fund was relatively new and had no, or very limited, track record of only around a year;***
- ***the fund was not subject to any restriction on investment;***
- ***the fund was not subject to regulation,***

make it all amply clear that this was not an adequate investment for a retirement scheme.

<u>Moreover, the fact that 95% of the investible premium was solely invested into the cells of the BG Fund makes it even more questionable how such investment could have been allowed and concerns not raised by (i) Harbour Pensions at the time of</u>

investment, and (ii) also by STM Malta at the time when it took over as trustee and RSA of the Scheme.

It should have clearly and immediately become evident to both Harbour Pensions and STM Malta that there are issues with this investment.

Irrespective of any confirmation letters from the Complainant or from any investment adviser (regulated or otherwise) regarding the alleged suitability of such investment, the Trustee had to undertake its own independent proper assessment.

A trustee cannot just abdicate from its responsibilities by relying on a third party who may have had his own interest and/or on a member's confirmation, an unprofessional retail investor, when it itself had such a key and important duty to ensure the proper administration of and the Scheme's compliance with its scope, the provisions of the trust deed and applicable regulatory requirements.

Scope of the Scheme and oversight function by the Trustee/RSA

The purpose of the Scheme is defined in the Trust Deed. Clause 2.4 of the Deed provides that:

'its principal purpose shall be and shall continue to be to provide retirement benefits during retirement and other benefits as set out in this Deed ...'*. (fn. 118 P. 193)*

As to the role of the Trustee/RSA with respect to investments, it is noted that as outlined in the Declaration section of the Retirement Scheme's Application Form, **'... the final decision in respect to the acceptance of any assets or investment into the Harbour Retirement Scheme is with the Administrator of the Harbour Retirement Scheme'***. (fn. 119 P. 57)*

This aspect where the RSA had the final decision in respect of a member directed scheme, in order to ensure compliance and adherence with the investment restrictions/principles, is further reiterated in the 'Scheme Key Facts/Particulars Document' ('the Scheme Particulars')*. The latter provided inter alia that* 'The final decision in respect to the investment and the overall weighting within the Scheme rests with the Administrator' *(fn. 120 P. 66) The Scheme Particulars also provided that* 'The Administrator will retain ultimate control and discretion with regard to the investment decisions *...'. (fn. 121 P. 69)*

It is noted that in its reply, STM Malta ultimately itself acknowledged that the Trustee/RSA had '… a regulatory obligation to ensure that the investments chosen are within the parameters of the rules applicable at the time'*. (fn. 122 P. 159)*

It is furthermore noted that clause 5.3.3 of the Trust deed also provided that 'for the purposes of 5.3.1 and 5.3.2 the directions from the Member to the Scheme Administrator shall be ... subject to the Retirement Scheme Administrator retaining the overall responsibility for the overall operation of the Scheme'*. (fn. 123 P. 200)*

The Trustee/RSA had accordingly a key monitoring function with respect to investments which function formed part of the important safeguards and controls on the Scheme's underlying investments*.*

Investment principles and regulatory requirements

Clause 5.6 of the Trust Deed provided that **'All investments of the Scheme ... shall be made in accordance with Maltese Law and with the Retirement Scheme Law'***. (fn. 124 P. 201 – Emphasis added by the Arbiter)*

'Retirement Scheme Law' *was defined as meaning the Special Funds (Regulation) Act, ('SFA') including* 'any regulation, rule, directive, guidance or requirement issued under it from time to time'*. (fn. 125 P. 192)*

Clause 5.4 of the Trust Deed further provided inter alia *that '*... **the Retirement Administrator shall arrange for the Scheme assets to be invested in the best interest of Beneficiaries**...'*. (fn. 126 P. 200 – Emphasis added by the Arbiter)*

With respect to investments, the Scheme Particulars issued at the time by Harbour Pensions, (fn. 127 P. 65) stipulated that:

'**The Administrator must ... always execute investments within the parameters of restricted investments, prudent management and diversification** as required by the MFSA'*. (fn. 128 P. 66 – Emphasis added by the Arbiter)*

The Scheme Particulars further stated that 'The MFSA imposes strict restrictions on investments ...' *(fn. 129 Ibid.)*

The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the 'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) *Act, 2002', ('the Directives'). The said Directives applied from the Scheme's inception in 2013 until the registration of the Scheme under the RPA.*

SOC 2.7.1 of Part B.2.7 of the Directives required inter alia that the assets were to 'be invested in a prudent manner and in the best interest of beneficiaries …'.

SOC 2.7.2 in turn required that the assets of a scheme are 'invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole' *(fn. 130*

*SOC 2.7.2 (a)) and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'*. (fn. 131 SOC 2.7.2 (b))*

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be 'predominantly invested in regulated markets'*; (fn. 132 SOC 2.7.2. (c)) to be* 'properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings' *(fn. 133 SOC 2.7.2 (e)) where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme. (fn. 134 SOC 2.7.2 (h)(iii) & (v))*

Despite the standards of SOC 2.7.1 and SOC 2.7.2, Harbour Pensions allowed the Complainant's investment portfolio to comprise solely the investment into the BG Fund and its cells. STM Malta did not question either, when it took over as Trustee/RSA, the portfolio's compliance with the mentioned investment principles and regulatory requirements.

The Arbiter also notes that following registration of the Scheme under the Retirement Pensions Act ('RPA') (fn. 135 The Retirement Pensions Act *(Cap. 514) eventually replaced the* Special Funds (Regulation) Act, 2002 *when it came into force in January 2015. The* Retirement Pensions (Transitional Provisions) Regulations, 2015 *provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorization under the RPA) the Scheme became subject to* the 'Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act 2011' (Pension Rules')*. The investment restrictions for member directed schemes were outlined in Part B.2 titled* 'Investment Restrictions of a Personal Retirement Scheme' *and Part B.9,* 'Supplementary Conditions in the case of entirely Member Directed Schemes' *of the Pension Rules.*

It is noted that SLC 3.2.1 of the Pension Rules provided inter alia that 'the Retirement Scheme Administrator shall ensure that the assets of the scheme are sufficiently liquid and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits'*. (fn. 136 SLC 3.2.1 (iii) of Part B of the Pension Rules)*

Whilst it is noted that SLC 9.5(d) of the Pension Rules, which also dealt with the conditions in relation to investments, included a footnote stating that 'The said

investment restrictions shall apply to the current investments of members in a member directed scheme once any movements occur within the member's pension account or in the case of new investments entered into, as from 1st January 2019'*, **STM Malta should nevertheless still have promptly raised the matters involving the adequacy of the underlying portfolio – that is the lack of diversification, lack of liquidity and lack of compliance with the principles and requirements outlined, for necessary action to be taken**.*

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

*Indeed, Article 21 (1) of the TTA which deals with the '*Duties of trustees'*, inter alia stipulates that the trustee should act as a* **bonus paterfamilias***, where '***Trustees shall in the execution of their duties and the exercise of their powers and discretions act <u>with the prudence, diligence and attention of a bonus</u> <u>paterfamilias</u>**, act in utmost good faith and avoid any conflict of interest'*. It is also to be noted that Article 21 (2)(a) of the TTA, further specifies that:*

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

In their role as Trustee, Harbour Pensions and STM Malta respectively were accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.

Compliance with investment conditions – Other

It is noted that STM Malta argues in its reply that 'S.2.7.2(a) and (b) refer to the scheme as a whole and not to the pension assets of Mr Ball in isolation'*. (fn. 137 P. 160)*

This argument however cannot be accepted by the Arbiter.

S.2.7.2 refers to the 'portfolio as a whole' *and can only reasonably be considered, in the case of a member directed scheme, to refer to the whole portfolio within the respective individual's member's account, given that such account would have its own specific and distinct investment portfolio.*

Hence, it is only reasonable and correct for the principles, including the investment restrictions specified for the Retirement Scheme to have been applied and adhered to at the level of the individual account. Failure to do so would have meant that the safeguards emanating from the investment conditions and diversification requirements would have not been adopted and ensured in practice in respect of the individual member's portfolio, defeating the aim of such requirements in the first place.

The application of investment restrictions at a general level, that is at scheme level without application on an individual account basis, would only make sense and be reasonable in the context of, and where, the members of such a scheme are participating in the <u>*same*</u> *portfolio of assets held within the scheme and* ***not in the circumstance where the members have their own individual separate investment portfolios, as was the case in question.***

An analogy can be made in this regard to the market practice long adopted in the context of collective investment schemes, namely in respect of stand-alone schemes *(fn. 138 i.e., a collective investment scheme without sub-funds) and* umbrella schemes*. (fn. 139 i.e., a collective investment scheme with sub-funds, where each sub-fund would typically have its own distinct investment policies and separate distinct investment portfolios) Whilst investment restrictions would be applied at scheme level in the case of a stand-alone scheme (given that the investors into such scheme would be participating, according to their respective share in the scheme, in the performance of the same underlying investment portfolio), in the case of an umbrella fund, the investment restrictions are not applied at scheme level but at the sub-fund level and would indeed be tailored for each individual sub-fund given that each sub-fund would have its own distinct and separate investment portfolio and investment policy.*

Further Considerations

For the reasons amply stated above, the BG Fund was not appropriate and suitable for the scope of the Retirement Scheme and the applicable requirements, let alone in the case where the Complainant's risk profile was actually one of **'Medium Risk'*,*** ***where his*** **'Investment Objective'** ***was described as*** **'willing to accept a small amount of risk to provide for potential growth over the medium to long term'**. *(fn. 140 P. 56)*

Hence, one cannot really justify how the investment in the BG Fund was allowed in the first place and how no Trustee and RSA had ever raised any issues about the incompatibility and inadequacy of such investment within the Retirement Scheme,

not only with reference to the Complainant's risk profile, but also with the scope of the Retirement Scheme and provisions of the Trust Deed as outlined above.

There was ultimately no prudence, no diversification and no adherence with the relevant investment provisions.

In the case in question, the Arbiter cannot thus conclude that STM Malta has truly acted in the best interests of the Complainant when it took over as Trustee and RSA.

Not only has STM Malta not promptly raised itself concerns and alerted the Complainant on the various issues with the BG Fund investment as indicated in this decision, but STM Malta has rather itself untenably took the stance of defending the position taken by Harbour Pensions in allowing such investment within the Retirement Scheme.

***It is indeed somewhat incredulous how, in the face of the glaring and manifest breaches of trust, STM Malta kept defending the actions of Harbour Pensions stating inter alia in its reply that '*...** the Respondent asserts that in any event Harbour Pensions did take actions that were sufficient to satisfy any obligation of diligence required by S21 of the Trusts and Trustee Act', and that '... Harbour Pensions Limited has acted with due care in relying on the advice of a regulated investment adviser'**. (fn. 141 P. 162)*

Even during the hearing of 1 June 2021, the official of STM Malta stated before the Arbiter that **'Being asked what steps are STM taking to remedy the breach of trust that has been carried out by the Trustees of the Harbour Pension Scheme as per TTA 30, Sub-Section 3, I say that I have got no evidence of a breach of trust'.** *(fn. 142 P. 257)*

The Arbiter considers that it would have only been reasonable, adequate and appropriate for STM Malta to promptly raise and bring to the Complainant's attention the various issues related to this investment as considered and mentioned in this decision, with the aim to remedy the breaches.

As outlined above, in its letter of 11 August 2020, (fn. 143 P. 72) STM Malta raised, **(nearly two years after taking over as trustee*) only certain issues involving just the value of the investment, by which time the previous trustee and retirement scheme administrator, Harbour Pensions, had already been dissolved and struck off from the Malta Business Registry*.**

Conclusion & Compensation

For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case *(fn. 144 Cap. 555, Article 19(3)(b))* ***and is partially accepting it in so far as it is compatible with this decision.***

Being mindful of the key role of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of the STM Harbour Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by STM Malta for the damages suffered by the Complainant as a result of the breaches allowed and committed in relation to this scheme and the lack of protection afforded to him to safeguard his pension as amply outlined in this decision.

The Arbiter considers that apart from the Service Provider, other parties, like the investment adviser, were involved and also carried responsibility. Therefore, the Arbiter considers that in the particular circumstances of this case, it is fair, equitable and reasonable for STM Malta Pension Services Limited to:

(i) ***compensate the Complainant for the amount of 70% of the value invested in the Blackmore Global PCC Limited, which is calculated to amount to GBP196,376.92; (fn. 145 70% of GBP280,538.45 which is the total amount invested in the four cells of the BG Fund as indicated in the statement titled '*****Subscription Statement and Current Valuation'** *attached to Harbour Pensions letter of 29 July 2015 – P. 165)) and***

(ii) ***as part of the compensation being awarded, waive or reimburse its own exit fees that may be applicable in case of a transfer out of the Retirement Scheme.***

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the Complainant the sum of GBP196,376.92 (one hundred and ninety-six thousand, three hundred and seventy-six pounds sterling and ninety-two pence), as well as waive or reimburse its own exit fees in case of a transfer out of the Retirement Scheme.

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

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

L-Appell

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata u ntavolat appell quddiem din il-Qorti fit-18 ta' Ottubru, 2022 fejn talbet sabiex:

> *"...din l-Onorabbli Qorti jogħġobha: tirrevoka, tħassar jew tvarja s-sentenza li ttieħdet mill-Arbitru għas-Servizzi Finanzjarji fit-28 ta' Settembru 2022 u dan salv dawk li jidhrilha xieraq u opportun din l-Onorabbli Qorti.*
>
> *Bl-ispejjeż kontra l-appellat".*

Tgħid li l-aggravju tagħha huwa li l-Arbitru applika u nterpreta ħażin is-subartikolu 30(3) tal-Kap. 331, meta ddeċieda li hija kienet naqset mid-dmirijiet tagħha ta' *trustee,* u li kienet responsabbli għall-ksur tal-obbligi fiduċjarji min-naħa ta' Harbour Pensions.

7. L-appellat wieġeb fit-30 ta' Diċembru, 2022 fejn issottometta li l-appell odjern għandu jiġi miċħud, u għajr għal dak li talab fl-appell tiegħu, il-Qorti għandha tvarja biss id-deċiżjoni appellata skont l-istess appell.

<u>Konsiderazzjonijiet ta' din il-Qorti</u>

7. Il-Qorti ser tgħaddi sabiex tikkonsidra l-appell imressaq mis-soċjetà appellanta, u dan fid-dawl ta' dak li ġie kkunsidrat u deċiż fid-deċiżjoni appellata, u meħudin ukoll in konsiderazzjoni s-sottomissjonijiet tal-appellat.

8. L-aggravju tas-soċjetà appellanta huwa li l-Arbitru applika u nterpreta ħażin is-subartikolu 30(3) tal-Kap. 331, meta ddeċieda li hija kienet naqset mid-drittijiet tagħha bħala *trustee,* u għalhekk hija kienet responsabbli għall-ksur tal-obbligi fiduċjarji min-naħa ta' Harbour Pensions fiż-żmien qabel il-ħatra tagħha. Issostni li l-Arbitru mhux biss skarta għal kollox ir-retroxena tal-investiment in kwistjoni, iżda applika ħażin ukoll l-artikoli tal-liġi dwar ir-responsabbiltà ta'

trustee, għaliex huwa qatt ma seta' jsib li hija kienet responsabbli għan-nuqqasijiet ta' terzi. Filwaqt li tiċċita dak li jiddisponi għalih is-subartikolu 30(3) tal-Kap. 331, u anki s-subartikolu 34(3) tal-istess liġi, issostni li dak li ried jipprovdi għalih il-leġislatur joħroġ ċar hawnhekk, jiġifieri li *trustee* m'għandux jitqies responsabbli għall-azzjonijiet ta' terzi, u ma jistax jitqies bħala suċċessur tat-*trustee* ta' qablu. Hawnhekk is-soċjetà appellanta tagħmel riferiment għall-artikolu 30 tal-liġi, u tissottometti li ma jistax jitwemmen kif l-Arbitru wasal għall-konklużjoni tiegħu li:

> *"a trustee cannot just abdicate from its responsibilities by relying on a third party who may have had his own interest and/or member's confirmation, an unprofessional retail investor, when it itself had such a key and important duty to ensure the proper administration of and the Scheme's compliance with its scope, the provisions of the trust deed and applicable regulatory requirements".*

Dan tgħidu għaliex (i) hija ma kinitx teżisti bħala *trustee* fiż-żmien li sar l-investiment, u saħansitra fl-erba' snin ta' wara; (ii) hija kienet qagħdet fuq l-għażla tal-membru stess, fejn dak iż-żmien ma kienx hemm il-ħtieġa li konsulent finanzjarju jkun liċenzjat. Għalhekk il-fehma li *trustee* jidħol fiż-żarbun tat-*trustee* ta' qablu, u jġorr in-nuqqasijiet tiegħu, hija waħda żbaljata, sakemm ma jirriżultax li l-ewwel *trustee* jkun ħadem flimkien mat-tieni wieħed sabiex b'hekk jagħmlu profitt mit-*trust,* jew f'każ fejn it-tieni *trustee* jkun jaf dwar in-nuqqasijiet tat-*trustee* l-ieħor, u ma jitkellimx. Madankollu dan ma ġarax fil-każ odjern, fejn temmen li saħansitra ma kienx hemm nuqqasijiet min-naħa ta' Harbour Pensions, u jekk jirriżulta li kien hemm, allura kienet din tal-aħħar li kellha twieġeb għalihom. Is-soċjetà appellanta tagħmel riferiment għad-disposizzjonijiet tas-subartikolu 30(4) tal-Kap. 331, li jipprovdu dwar ir-responsabbiltà ta' *co-trustee,* sabiex issostni l-pożizzjoni tagħha dwar

responsabbiltà fejn *trustee* jitlaq jew jirriżenja, u jiġi sostitwit b'ieħor. Tagħmel ukoll riferiment għall-para. (ġ) tal-artikolu 1124(D) tal-Kodiċi Ċivili, u filwaqt li tgħid li l-liġi tagħna hija msejsa fuq il-liġi ta' Jersey, tiċċita dak li qal Lordship Blackburne J fil-każ **Nationwide Building Society *v.* Balmar Radmore (a firm) and others**, u tissottometti li fil-każ odjern ma kienx ġie muri li hija kienet konxja tan-nuqqasijiet ta' Harbour Pensions, li hija tgħid li ma kienx hemm. Tagħmel ukoll riferiment għal żewġ sentenzi tal-Qrati tagħna[1], u tinsisti li hija ma ħbietx in-nuqqasijiet ta' Harbour Pensions jew weriet li hija kienet parteċipi fl-allegati nuqqasijiet, u hekk kif saret taf li l-investiment ma kienx sejjer tajjeb, hija kienet għamlet dak li setgħet sabiex tillimita d-danni. Barra minn hekk, hija kienet eżaminat il-portafoll tal-appellat u d-dokumenti rilevanti, u ma kien hemm xejn x'juri li dan kien kontra l-prinċipji regolatorji ta' dak iż-żmien. Is-soċjetà appellanta hawnhekk tagħmel riferiment għal dak li qal l-Avukat Max Ganado fil-kontribuzzjoni tiegħu għal Trusts e Attività Fiduciarie 2013, u tissottometti li mkien dan ma jgħid li f'każ ta' parir ħażin għandu jkun it-*trustee* li jagħmel tajjeb għat-telf tal-investiment. Tgħid li min-naħa tagħha l-*monitoring* kien sar, iżda ma setgħetx issir taf dwar l-aġir frawdolenti minn diretturi f'Blackmore, jekk din qatt ma ħarġet fil-pubbliku, u ħadd ma kien jaf b'xejn. Tgħid li anki l-Arbitru kien żbaljat meta qal li hija kienet akkwistat Harbour Pensions, għaliex kienet il-*parent company* tagħha li akkwistatha. Tispjega d-differenza bejn il-klawsola tal-indennizzar f'każ ta' soċjetà kummerċjali u f'każ ta' *trust* fejn it-*trustee* l-antik jiġi assigurat li jiġi ndennizzat mit-*trust fund* u jekk jiġi mfittex minn xi membru wara s-sostituzzjoni tiegħu, il-kumpens joħroġ mit-*trust fund,* u mhux mill-assi personali tiegħu, sakemm ma jkunx ġie deċiż li l-aġir tiegħu huwa

[1] GBCom Limited *vs.* Dr. Nicolai Vella Falzon et (PA 30.11.2020); u Carmen Xuereb *vs.* L-Avukat Anton Micallef (PA 02.12.2013).

frawdolenti jew tirriżulta negliġenza grossolana. Is-soċjetà appellanta tikkontendi li mill-artikolu 40 tal-Kap. 331, għandu jiġi mifhum li fejn hemm trasferiment minn *trustee* għal ieħor, għandu dejjem japplika l-prinċipju tal-*buona fede,* li tissottometti li huwa prinċipju ewlieni tad-dritt fil-liġi Maltija. Tkompli billi tagħmel ukoll riferiment għas-subartikolu 40(3) tal-istess liġi, u tinsisti li hawnhekk l-istess persuna għandha d-dritt li tistrieħ fuq id-dikjarazzjonijiet tat-*trustee* dwar kull ħaġa li għandha x'taqsam mas-setgħat tiegħu. Is-soċjetà appellanta tgħaddi sabiex tapplika dan is-subartikolu fil-każ odjern, fejn hija kienet issostitwiet lil Harbour Pensions, u b'hekk akkwistat l-Iskema, u dan filwaqt li tiċċita dak li qal l-Arbitru li qabel ma ħadet in-negozju, STM Malta setgħet tikkonduċi eżerċizzju ta' diliġenza dovuta sabiex tistħarreġ jekk Harbour Pensions kellhiex xi obbligazzjonijiet lejn il-membru tal-Iskema. Tgħid li dan jiġri biss f'kuntest kummerċjali, iżda mhux f'każ ta' *trust.* Is-soċjetà appellanta tissuġġerixxi li m'hemmx definizzjoni ċara ta' obbligazzjonijiet jew *liabilities* f'każ ta' *trusts,* u jekk kif qed jgħid l-Arbitru, dawn kienu *"glaring and manifest",* tistaqsi jekk il-MFSA kinitx ser tapprova t-trasferiment. Iżżid tgħid ukoll li investiment magħmul minn membru li sa dakinhar ikun għadu sejjer tajjeb, ma jistax jitqies bħala *liability.* Filwaqt li tiċċita kliem l-Arbitru dwar dak li seta' jwassal għalih trasferiment ta' skema fejn it-tieni *trustee* ma jieħux miegħu l-obbligazzjonijiet tal-ewwel wieħed, tgħid li hawnhekk jidher li l-Arbitru ma jafx id-differenza kbira bejn trasferiment ta' avvjament, u sostituzzjoni ta' *trustee,* u tgħaddi sabiex tispjega dak li tgħid hija d-differenza ta' bejniethom. Tiċċita dak li qal l-awtur l-Avukat Patrick J. Galea fix-xogħol tiegħu The Trust Laws of Jersey and Malta: a civilian interpretation, u sussegwentement telenka l-verifiki li hija kienet wettqet skont l-industrija dak

iż-żmien. Tikkontendi li jekk sussegwentement ħareġ li kien hemm frodi min-naħa tal-kapijiet ta' Blackmore, jew li d-dokumenti ma kienux ġew iffirmati mill-firmatarju, hawnhekk ma kien hemm l-ebda nuqqas min-naħa tat-*trustee* il-ġdid. Is-soċjetà appellanta ssostni li l-Arbitru kien qiegħed jinsisti fuq interpretazzjoni wiesgħa tal-kelma 'prudenza', fejn it-*trustee* kważi kważi huwa mistenni li jaqra l-futur u jagħti xi garanzija tat-telf, u b'hekk tgħid li huwa jittanta saħansitra li jassisti lill-konsumatur sabiex dan jieħu dak li tilef. Filwaqt li tiċċita kliem l-Arbitru, ittenni għal darb'oħra li dan huwa żbaljat għaliex m'hemm l-ebda suċċessjoni fil-liġi ta' *trusts* kif interpretat mill-istess Arbitru. Tgħid li lanqas ukoll ma setgħet tiġi nterpretata l-klawsola relattiva fid-*'Deed of the New Trustee',* li jagħmel riferiment għaliha l-Arbitru bil-mod kif huwa nterpretaha, għaliex din kienet intiża biss li tiġi ffaċilitata t-tranżazzjoni.

9. L-appellat jirrileva li s-soċjetà appellanta qegħda tistrieħ fuq id-disposizzjonijiet tas-subartikolu 30(3) tal-Kap. 331 u tas-subartikolu 34(2) tal-istess liġi, iżda dan fejn l-artikolu 30 kellu jinqara kollu, u hawnhekk huwa saħansitra jiċċita d-dispożizzjonijiet tas-subartikolu (3) tiegħu. Jikkontendi li s-soċjetà appellanta naqset mill-obbligu li jipprovdi għalih dan is-subartikolu, obbligu li skont huwa jħaddan element ta' tempestività u fejn fil-każ odjern in-nuqqas ta' avviż ipperdura għal sentejn, dan kien nuqqas serju min-naħa tagħha. Jikkontendi wkoll li mhux minnu li l-Arbitru skarta r-retroxena tal-investiment, u li dan wasal għal konklużjoni żbaljata. Hawnhekk l-appellat jirrileva l-argument li huwa qiegħed iressaq fl-appell tiegħu deċiż kontestwalment ma' dak odjern, jiġifieri li r-responsabbiltà ta' *trustee* ma tistax tinqasam skont it-tort. Jissottometti li t-talba għat-tħassir tad-deċiżjoni appellata tmur kontra klawsola espressa fejn is-soċjetà appellanta kellha

tassumi l-obbligi, piż u dejn tal-predeċessur tagħha. L-appellat jgħid li għalkemm is-soċjetà appellanta tikkontendi li hija kienet għamlet il-verifiki tagħha skont il-prattika fl-industrija dak iż-żmien, il-fatti kienu juru mod ieħor, u jirrileva li rriżultat frodi min-naħa tad-diriġenti ta' Blackmore, filwaqt li s-soċjetà appellanta damet sentejn tittanta ssib kif tista' teħles mir-responsabbiltà tagħha lejn l-investituri. Hija kienet saħansitra ħalliethom fid-dlam, u b'hekk ma ħalliethomx jipproteġu l-interessi u d-drittijiet tagħhom. Dan jikkontendi jagħmilha responsabbli għat-telf li sofrew. Jgħid li huwa prinċipju fundamentali li *trustee* għandu l-obbligu li jipproteġi t-*trust asset,* u għalhekk huwa għandu jkun viġilanti u jżomm ruħu nfurmat fuq l-andament, kif ukoll għandu jkun lest li jieħu azzjoni skont l-informazzjoni miksuba jekk it-*trust asset* titlob protezzjoni. Filwaqt li jiċċita dak li ngħad fil-każ **Bartlett *v.* Barclays Bank Trust Co Ltd (1980)**, jissottometti li s-soċjetà appellanta ħadet ir-responsabbiltà ta' meta naqset li tipproteġi t-*trust asset.* Huwa jiċċita wkoll dak li qalet il-Qorti Suprema ta' Massachusetts fil-każ **O'Connor *v.* Redstone**, u jinsisti li '*successor trustee'* għandu jitlob lill-predeċessur tiegħu sabiex jgħaddilu tagħrif sħiħ dwar it-*trust*, u jekk jonqos imbagħad ma jistax jgħid li huwa jkun wettaq il-verifiki tiegħu sew u li eżegwixxa d-diliġenza dovuta. L-appellat jagħmel riferiment għal dak li qalet din il-Qorti fis-sentenza tagħha fl-ismijiet **Catherine Wiltshire *vs.* Momentum Pensions Malta Limited**.[2]

10. Il-Qorti mill-ewwel tgħid li l-Arbitru kien ġust u anki korrett fattwalment u legalment fid-deċiżjoni tiegħu. Wara li ħa konjizzjoni tal-eċċezzjoni li kienet qegħda tressaq is-soċjetà appellanta, li hija ma kinitx il-leġittimu kuntradittur fl-

[2] App.Inf., 19.01.2022.

azzjoni odjerna, kuntrarjament għal dak li qegħda ssostni l-istess soċjetà appellanta, huwa kkunsidra l-kuntest sħiħ li fih kien qed isir l-ilment tal-appellat. Irrileva li skont it-*Trust Deed* tad-19 ta' Frar, 2013, Harbour Pensions kienet oriġinarjament it-*trustee* u anki l-amministratriċi tal-Iskema kif liċenzjata mill-MFSA, iżda fl-2018 kienet ċediet il-liċenzja tagħha hekk kif ma baqgħetx topera, u sussegwentement ġiet likwidata u tneħħiet minn fuq ir-*records* tal-Malta Business Registry b'effett mill-31 ta' Jannar, 2020. Jirrileva li qabel ma seħħ dan kollu, is-soċjetà appellanta kienet akkwistat in-negozju ta' Harbour Pensions, u anki daħlet minflokha bħala *trustee* u amministratriċi tal-Iskema. Enfasizza korrettement li din ma kinitx kwistjoni ta' semplici bidla fit-*trustee,* iżda kien hemm akkwist tan-negozju min-naħa tas-soċjetà appellanta. Huwa għamel aċċenn għal avviż li kien deher fuq il-*website* ta' STM Group plc, liema avviż il-Qorti tikkunsidra li huwa tassew rilevanti għall-każ odjern, u li kien jgħid:

> *"STM Malta Trust and Company Management Ltd signed a Sale and Purchase Agreement ("the Acquisition") with the shareholders of Harbour Pensions Limited ("Harbour") to acquire the entire issued share capital of the company and* ***its related pension trust schemes****".*

11. L-Arbitru rrileva wkoll, u hawnhekk il-Qorti tgħid li dan huwa wieħed mill-fatturi determinanti għall-kwistjoni li qegħda tqajjem is-soċjetà appellanta permezz tal-aggravju tagħha, li l-ilment tal-appellat jittratta aspetti oħra mportanti u mhux biss dawk li semmiet l-istess soċjetà appellanta fl-eċċezzjoni tagħha. Spjega li dawn ikopru l-azzjonijiet u l-passi li kienet ħadet is-soċjetà appellanta fir-rigward tal-Iskema, u fir-rigward tal-investiment sottoskritt tal-istess Skema, hekk kif hija kienet daħlet minflok Harbour Pensions bħala *trustee/*amministratriċi tagħha. Minn hawnhekk l-Arbitru għadda sabiex

ikkunsidra iktar fil-fond dawn iż-żewġ punti rilevati minnu. Dwar it-trasferiment tan-negozju, u l-fatt li s-soċjetà appellanta kienet issostitwiet lil Harbour Pensions bħala *trustee*[3], mill-ewwel qal li huwa ma setax jilqa' l-eċċezzjoni tagħha, u fisser ir-raġunijiet tiegħu għal dan. Spjega li jekk huwa kien ser jasal sabiex jaċċetta dan l-argument miġjub mis-soċjetà appellanta, huwa kien ser jagħti lok għal *lacuna* li setgħet toħloq abbuż serju fis-sistema finanzjarja, li jwassal għall-implikazzjonijiet negattivi fuq il-fiduċja neċessarja sabiex jopera is-settur tas-servizzi finanzjarji. Irrileva li jekk it-*trustee*/amministratur li jkun ser jirtira, jingħata d-dritt li jiftiehem mat-*trustee*/amministratur il-ġdid li mat-trasferiment ta' skema tal-pensjoni l-ewwel wieħed kien ser jeħles minn kull responsabbiltà lejn il-membri ta' dik l-iskema, seta' jagħti l-lok li l-ewwel *trustee*/amministratur, sabiex jeħles minn kull responsabbilità lejn l-imsemmija membri, jiddeċiedi li jiddisponi mill-istess skema, filwaqt li t-tieni *trustee/*amministratur jakkwista n-negozju bi prezz vantaġġjuż, mingħajr l-ebda ħsieb li jista' jkun soġġett għal azzjoni kontrih minħabba n-nuqqasijiet tal-ewwel *trustee/*amministratur. Dan kollu, sewwa tassew irrileva l-Arbitru, seta' jkun biss għad-detriment tal-membri, u ma setax jiġi aċċettat, u għalhekk l-eċċezzjoni tas-soċjetà appellanta ma setgħetx tintlaqa'.

12. Iżda fil-fehma tal-Qorti iktar importanti minn hekk, stante li ma jistgħux bl-ebda mod jitwarrbu l-obbligazzjonijiet li joħorġu saħansitra mil-liġi, ikkunsidra wkoll in-nuqqas ta' evidenza tal-eżoneru ta' responsabbiltà tas-soċjetà appellanta. Irrileva li din tal-aħħar kienet ippreżentat kopja tad-dokument intestat *'Deed of Appointment and Retirement of Trustee qua also*

[3] Dak iż-żmien kienet tissejjaħ 'STM Malta Trust and Company Management Limited', u n-numru ta' reġistrazzjoni ndikat fid-dokument *Deed of Trust* huwa xhieda tal-kontinwità tal-kumpannija taħt isem ieħor.

Retirement Scheme Administrator' [minn issa 'l quddiem '*Deed of Trust'*] li kien sar fil-31 ta' Awwissu, 2018 bejn Harbour Pensions u s-soċjetà appellanta.[4] Tajjeb qabel xejn li għaraf li hekk kif kienet ser takkwista n-negozju, l-imsemmija soċjetà appellanta kellha l-opportunità li tagħmel eżerċizzju ta' diliġenza dovuta sabiex tfittex jekk Harbour Pensions kellhiex xi obbligi lejn il-membri tal-Iskema, u kif is-soltu jiġri dawn kellhom jiġu riflessi fil-prezz ta' akkwist. Hawnhekk il-Qorti żżid tgħid li l-argument tas-soċjetà appellanta kif imsejjes fuq l-artikolu 40 tal-Kap. 331, mhuwiex f'loku u lanqas jista' jreġi. Tikkunsidra li fil-każ odjern ma kien hemm l-ebda akkwist ta' proprjetà, iżda biss kif jixhed sew id-*Deed of Trust,* trasferiment tal-amministrazzjoni stante is-sostituzzjoni tat-*trustee,* u għalhekk l-artikolu 40 mhuwiex applikabbli. B'hekk ukoll għall-istess raġuni l-argument tagħha li ma kienx hemm suċċessjoni fl-obbligi, ma jistax jintlaqa'.

13. Barra minn hekk, is-soċjetà appellanta ma tistax tinvoka l-*bona fede* tagħha fir-rigward ta' dan it-trasferiment, għaliex kif sewwa irrileva l-Arbitru, hija kienet tenuta tagħmel eżerċizzju approfondit ta' diliġenza dovuta sabiex tikseb stampa ċara dwar dak li kien qed jiġi ttrasferit lilha mingħand Harbour Pensions. Il-Qorti saħansitra tosserva wkoll li r-riferiment tas-soċjetà appellanta għal The Trust Laws of Jersey and Malta: a civilian interpretation jikkontradixxi l-pożizzjoni tagħha. Tikkunsidra li hija hawnhekk kienet tenuta titlob għal spjega ta' kull dubju tagħha. B'hekk biss, tgħid il-Qorti, hija setgħet tgħaddi sabiex trankwillament taċċetta t-trasferiment minflok tidħol għalih fl-għama, u sussegwentement meta l-andament tal-investiment ma jibqax wieħed tajjeb, hija tinvoka l-*bona fede* tagħha fit-tranżazzjoni jew titfa' l-obbligu tal-eżerċizzju

[4] *A fol.* 251 tal-atti quddiem l-Arbitru.

ta' diliġenza dovuta fuq terzi, billi ssostni li wara kollox kien ġie approvat mill-MFSA.

14. Issa, l-Arbitru filwaqt li ċċita dak li kien jgħid l-imsemmi dokument dwar it-trasferiment tad-dmirijiet, setgħat u diskrezzjonijiet li kellhom jiġu wkoll trasferiti għal fuq is-soċjetà appellanta, irrileva li kien ċar minn dan li hija kienet qegħda takkwista kemm l-assi iżda wkoll r-responsabbiltajiet konnessi mal-Iskema, u li ma setgħetx tagħżel biss dawk tal-ewwel u tiskarta l-obbligi tagħha lejn il-membri tal-Iskema. Ikkontenda korrettement li b'hekk hija kienet daħlet fiż-żarbun tal-predeċessur tagħha, għaliex kien hemm kontinwazzjoni fin-negozju tal-Iskema, u dan kien rifless fil-kliem tal-ftehim tagħhom li *"the New Retirement Scheme Administrtor is to be the retirement scheme administrator and Trustee of the Pension Scheme in place of the Retiring Retirement Scheme Administrator".* Għalhekk tgħid il-Qorti, il-partijiet permezz tal-klawsola 6 tad-*Deed of Trust* ftehmu li s-soċjetà appellanta kellha d-dritt ta' rivalsa kontra Harbour Pensions f'każ ta' ksur tal-fiduċja jew f'każ ta' att jew nuqqas negliġenti jew frawdolenti min-naħa ta' din tal-aħħar qabel id-data tal-imsemmi ftehim:

> *"...the Retiring Retirement Scheme Administrator agrees that it will at all times indemnify and keep indemnified and hold harmless the New Retirement Scheme Administrator (and every person who is or has been a director, officer, or employee of the New Retirement Scheme Administrator) against any liabilities (including tax liabilities), damages or obligations of any kind, as well as any expenses (including legal fees and costs) incurred in connection with any claim, action, suit or proceedings incurred or suffered by the Retiring Retirement Scheme Administrator in respect of the Pension Scheme (the "**Relevant Claim**"). The indemnity applies in the event that the Relevant Claim is a result of a breach of trust or a negligent or fraudulent act or omission committed by the Retiring Retirement Scheme Administrator to which he was privy before the date of this Agreement. ..."* (enfażi tal-Qorti)

15. B'hekk qal l-Arbitru, is-soċjetà appellanta ma setgħetx tinvoka wkoll favur tagħha d-disposizzjonijiet tal-artikolu 30 tal-Kap. 331. Irrileva li hawnhekk is-soċjetà appellanta kienet naqset milli tiċċita l-artikolu sħiħ, hekk ukoll kif qegħda tevitah quddiem din il-Qorti, u dan ukoll fejn hija kienet qegħda tkompli l-amministrazzjoni tal-Iskema wara l-predeċessur tagħha hekk kif kienet issostitwietu. Hawnhekk l-Arbitru ċċita d-disposizzjonijiet tas-subartikolu 30(3) tal-Kap. 331, u għamel enfażi fuq dik il-parti li l-Qorti tikkunsidra għandha xxejjen kull argument tas-soċjetà appellanta, u li tgħid *"[i]t shall, however, be the duty of the trustee on becoming aware of it to take all reasonable steps to have such breach remedied".* Ikkunsidra li jekk kien hemm ksur tal-obbligu tal-fiduċja, u kien hemm ukoll kwistjonijiet dwar jekk l-investiment sottoskritt kienx wieħed addattat kif allegat mill-appellat, is-soċjetà appellanta bħala t-*trustee* il-ġdid kienet ċertament taf bihom hekk kif hija daħlet bħala *trustee*/amministratriċi tal-Iskema fl-2018. Spjega li huwa għandu jikkunsidra bħala raġonevoli, ġusifikat u ekwitabbli fiċ-ċirkostanzi tal-każ, li jippretendi li t-*trustee*/amministratur il-ġdid kien jew kellu jagħmel reviżjoni tal-iskema tal-pensjoni tal-appellat meta ġie akkwistat in-negozju, sabiex b'hekk ikun ħares l-obbligazzjonijiet applikabbli għal dan ir-rwol, u hawnhekk l-Arbitru jelenka d-diversi dmirijiet skont id-disposizzjonijiet tal-Kap. 331. Ikkunsidra li l-eżerċizzju kellu jsir fost affarijiet oħra sabiex jiġi assigurat li l-Iskema kienet skont id-disposizzjonijiet regolatorji applikabbli, skont il-kundizzjonijiet tat-*Trust Deed,* u skont l-iskop tal-istess Skema. Qal li kellu jiġi assigurat li baqgħu hekk konformi, u fin-nuqqas kellha tittieħed azzjoni rimedjali addattata.

16. Hawnhekk l-Arbitru jittratta t-tieni punt li huwa kien irrileva iktar qabel, jiġifieri li l-appellat filfatt qiegħed iqajjem dubju dwar l-aġir tas-soċjetà appellanta

wara li din issostitwiet lil Harbour Pensions fl-2018. Jagħraf, kif ukoll mill-ewwel għarfet din il-Qorti meta kkunsidrat dak li huwa l-ilment tal-appellat, li l-imsemmi ilment jittratta wkoll l-azzjonijiet li ttieħdu mit-*trustee*/amministratur wara li sar l-investiment, u hawnhekk huwa għamel riferiment għall-partijiet rilevanti mill-ilment. Għal dawn ir-raġunijiet l-Arbitru ddikjara li kien qed jiċħad l-eċċezzjoni tas-soċjetà appellanta li hija ma kinitx il-leġittima kuntradittriċi.

17. Il-Qorti tikkondividi bis-sħiħ dawn il-ħsibijiet, u filwaqt li tagħmilhom tagħha, tgħid li m'għandha xejn iktar x'iżżid ma' dak li ngħad hawn fuq.

18. Għaldaqstant tiċħad l-aggravju tas-soċjetà appellanta ġaladarba hija mhijiex qegħda ssibu ġustifikat.

<u>Decide</u>

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

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

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur