Before the Arbiter for Financial Services

Case No: 054/2019

VA (the Complainant)

vs

Hollingsworth International Financial Services Limited (C 32457) (the Service Provider) and Mark Hollingsworth

Hearing of the 16 September 2020

The Arbiter,

Having seen the complaint, whereby the complainant submits that the service provider and Mr Hollingsworth have failed their professional and fiduciary duties towards her and her late husband by mis-selling complex investment products, that is, offshore unregulated bond funds and also failed to take remedial action to '*extricate them from these Funds.*'

The Funds in question are:

- *The Premier Investment Opportunities Fund PCC Plc – Premier New Earth recycling* (*New Earth*) whereby the sum of £14,000 was invested in March 2013. The complainant argued that the Fund went into liquidation in June 2016 and the full investment is written off;

- *Montreux Capital Management Natural Resources Fund B (feeder fund) (Montreux)* whereby the sum of £16,000 was invested in August 2013 and £24,000 invested in November 2014, totalling £40,000. The complainant stated that in November 2015, subscriptions and redemptions were

suspended and in March 2018, the Fund was closed, with the price also being suspended and the Fund value being zero. She also stated that the assets are under restructuring with potential sale.

The complainant admitted that she became aware of the substantive facts of this complaint late in 2017.

The complainant stated that her husband, who was the main decision maker, died in November 2016 aged 86. She claimed that at the time of signing the relative purchasing documents, he was not in a position to give free consent because he was suffering from dementia.

She also stated that the service provider and Mr Hollingsworth have failed to comply with 'Know Your Customer' (KYC) requirements, and also failed to meet the financial services definition of 'vulnerable client' - who is any person over 70 years of age which entails an added duty of care.

The complainant insisted that the products in question were mis-sold to her late husband when he was 83 years old in 2013. She submitted that both her late husband and she were not acknowledged to be vulnerable clients and hence, whatever policies were adopted by the service provider to identify and/or review vulnerable clients are inadequate.

The complainant argued that the service provider and Mr Hollingsworth acknowledged that the investment products in question *'were only suitable of experienced investors'*, and they were in fact retail investors. She also stated that the products in question were only suitable for institutional investors (Qualifying 144a investors), whilst insisting that the length of client relationship and previous investment history is not relevant.

In light of the above, the complainant requests the service provider's and Mr Hollingsworth's licence, to be revoked to protect other vulnerable clients from financial loss through inappropriate advice and also requested financial compensation for the losses incurred amounting to £54,000.

Having seen the reply by the service provider which states:

1. That preliminary the Complaint is instituted against both the Company **and** Mr. Mark Hollingsworth (Section C and D of the Complaint Form).

Mr Mark Hollingsworth does not hold and has never held a licence issued by the Malta Financial Services Authority and accordingly Mr. Mark Hollingsworth does not fall within the definition of a financial services provider in terms of Article 2 of Chapter 555 of the Laws of Malta (See extract of the Financial Services Register from the Malta Financial Services Authority website marked as 'Doc E'). Therefore, Mr. Mark Hollingsworth is to be formally declared non-suited in these proceedings by the Arbiter for Financial Services.

2. That also preliminary and without prejudice to the above, the alleged wrongful conduct by the Defendants or either one of them has already been the subject of an identical complaint bearing reference number 188/2018 ("**First Complaint"**) (herewith attached and marked as '**Doc F**') which has been subsequently unconditionally withdrawn by Mr VVV ("**First Complainant"**) who had filed the First Complaint. The Company has reason to believe that the First Complaint was withdrawn by the First Complainant pursuant to the Company's second plea in its reply the First Complain ('Doc F'). However, it appears that the First Complaint was withdrawn unconditionally without cause or reason and it is not known to the Company whether a termination order in terms of Article 22(7)(i) of the Act was issued. Apart from the fact that the Defendants reserve their rights as to the costs incurred by the Company in respect of the First Complaint, it transpires that this Complaint is largely identical to the First Complaint save for minor additions and deletions evidently done to address certain objections and defences (particularly the third plea) raised by the Company in its reply to the First Complaint. In the absence of a termination order as provided in Article 21(7)(i), the Company is being subject to two identical complaints filed by different parties.

3. That preliminary and without prejudice to the above, the Complainant ought to prove her entitlement to institute these proceedings on her own and in her own name (as she has done), given that the investments being the subject of the Complaint were held by her jointly with her deceased husband, Mr AA. In default, in so far as this Complaint

addresses the deceased's share of the investments, this Complaint cannot be upheld.

4. That also preliminary and without prejudice to the above, the Financial Services Arbiter is not competent to hear and decide upon this Complaint because the Complaint is all about the alleged conduct of the Company which occurred between 1 May 2004 and 18 April 2016, and therefore in terms of the proviso to Article 21(1)(b) of the Act, the Complainant had until 18 April 2018 to submit a complaint for consideration by the Arbiter for Financial Services. Therefore, the complaint is time-barred under the special provisions of the Act and ought to be rejected with costs against the Complainant.

5. That also preliminary and without prejudice to the above, the Complaint is time-barred in terms of Article 2153 Chapter 16 of the Laws of Malta insofar as the Complaint is directed against Mark Hollingsworth.

6. That preliminary and without prejudice to the above, the Defendants declare that they are not debtors of the Complaint and that the Complaint is time barred by the lapse of five years in terms of Article 2156(f) of the Civil Code, Chapter 16 of the Laws of Malta, since the contractual relationship between the Company and the Complainant was concluded upon the purchase of the investment products in March and August 2013 respectively, and furthermore the terms of investment were concluded on 1 December 2013.

7. That also preliminary and without prejudice to the above, the Complaint is premature insofar as it relates to the investment in Montreux Capital Management Natural Resources Fund B (feeder fund) is only temporarily suspended pending restructuring and is, therefore, not in default.[1]

8. That entirely without prejudice to the above and on its merits, the Complaint is unfounded and contains a number of non-facts and inaccuracies. The Company shall provide the correct factual background behind the relationship between spouses AA and the Company:

[1] This was indeed acknowledged by the Complainant in the Complaint – '*Assets under restructuring and potential sale.'*

a. Firstly Mr. AA (deceased) and Mrs VA began to invest via the Company in December 2003 (see Confidential Client Fact Find dated 1 December 2003 marked as 'Doc. A'). Before that they were private clients of PIC/Forsyth and dealt with Mr Mark Hollingsworth since the year 2000. Therefore, spouses VA had 19 years' experience in the investment services sector.

b. As reflected in the Confidential Client Fact Find dated 1 December 2003, spouses VA's attitude to risk was recorded as being balanced/medium risk. The Client Fact Find records that they had a diverse range of investments including an aggressive portfolio with Friends Provident International which was heavily weighted into Asian equities. As evidenced in the subsequent Confidential Client Fact Find dated 8 January 2014 ('**Doc B**'), their attitude to risk remained as medium and had been investing in complex instruments and experienced investor funds since 2008 with positive returns;

c. In the Complaint, the Complainant alleges that Mr AA, now deceased, had been suffering from dementia since 2008 until his death in 2016. The representative of the Company was never made aware of this nor were any of the symptoms of this condition ever apparent during the various encounters between the representative of the Company and Mr. AA in the presence of Mrs VA who likewise never disclosed this condition. He always came across as being of sound and clear mind, fully aware of his investment position. In point of fact, the latest fact find was completed face to face with spouses VA in January 2014 (**Doc. B**) and at no such point did Mr AA appear to be incoherent. The first time that the Defendants were informed that Mr AA came to suffer from dementia was in February 2016 during a meeting held with the Complainant, Mr AA and their son Mr VVV and as a result of that meeting, it was decided to stream line the two existing investment portfolios at the time by starting with the liquidation of **all** investments that could be sold in order to adopt a more defensive strategy (see letter dated 14 June 2016 marked as Doc.

C) and at which point no concerns or comments were raised by the Complainant or Mr VVV.

d. An amount of £14,000 was invested into New Earth in March 2013. Excluding property assets, this investment represented around 3.5% of spouses VA's invested wealth (excluding cash and property investments). Their overall wealth at the time was approximately GBP 1.1 million and therefore the investment in New Earth represented 1.25% of their patrimony. The fund entered into administration in June 2016 which was communicated to spouses VA in a timely manner. Since then, the fund remains suspended with no set outcome. The Company continued to keep the investors updated until the Complainant and her son Mr VVV elected to 'write-off' the fund in August 2018, therefore, waiving any rights to any future payments from the fund. Therefore, the investment formed part of a diversified portfolio.

e. An amount of £16,000 was invested into Montreux in August 2013. An additional amount of £24,000 was invested in November 2014 from proceeds following a successful maturity in a complex product – Nomura Japan, Australia and Taiwan (**Doc. D**). GBP 35,000 were invested in the said Nomura note resulting in proceeds of GBP 49,700 upon maturity, thereby realising a profit of GBP 14,700 which was in turn invested in Montreux. The investment in Montreux represented approximately 8% of spouses VA's invested wealth (excluding cash and property investments). In November 2015 the fund suspended subscriptions and redemptions which was communicated to spouses VA in a timely manner. The fund remains suspended although it has entered into a wind-down over the next 18 months and therefore there is no indication as yet of the gain or loss suiffered by the fund.[2] The latest pricing of the fund in March 2018 shows that their investment of GBP 40,000 was valued at GBP 83,268.53, given that

[2] So much so that by the Complainant's very own admission, the fund is '*restructuring and potential sale.*'

the fund has entered into a structured winding down, the final pay-out is not yet accurately determinable.

9. That, further to and without prejudice to the generality of the foregoing, any losses suffered by the Complainant was exclusively as a result of factors inherent to the investments purchased by the Complainant such as market risk, credit risk or fraud risk and not as a result of the actions or omissions of the Defendants or either of them or the Company's agent or employees who always acted in the Complainants' regard in accordance with applicable laws and rules.

10. That in view of the above, there could be no remedy to the Complaint as it is unjustified in fact and at law and should be rejected with costs.

Having heard the parties,

Having seen all the documents of the case including the parties' final submissions,

Further Considers:

The Complainant's Version

The Complainant testified[3] that she has attended some meetings with her late husband when he was investing in the products subject of this complaint, and basically, it was him that was in charge. She stated that Mr Hollingsworth visited their house and whilst he talked to her husband, she just sat there and was not involved in the discussion. She claimed to have been a housewife at that time and did not have experience in investments. As as a result, she did not understand what was happening.

[3] *A Fol.* 89

The Complainant admitted that it was her husband who was in charge of the investments and, although she thinks that she and her husband had a joint account, she is not in a position to say whether they had any prior investments or not.

In addition, **VVV**,[4] the Complainant's son who is assisting his mother with this complaint, also made submissions on the Complainant's behalf.

He stated that his father never talked to him about the investments in question in a coherent manner because he started suffering from dementia and admitted that what he was going to say was from the documents that his father had. He was not involved in the transactions merits of this case.

VVV submitted that his mother is complaining about the lack of suitability of these investments taking into consideration her profile and risk appetite. He stated that the products were too complex and too risky, and the company did not have a process to deal with vulnerable clients like his mother and father who were very old, and his father was already suffering from dementia.

He argued that, despite being a regulatory requirement, there was a lack of reviews over the years. From the documents he had, it resulted that there were only two reviews over a span of 16 years, whilst meetings to review the portfolio and to sell new products were held on a yearly basis. He insisted that when dealing with vulnerable people over 70 years of age, such reviews are even more important and enhanced precautions should have been taken for a better and more detailed due diligence.

Mr VVV also submitted that he thinks that it is irregular for the Confidential Fact Finding Forms to be filled by Mr Hollingsworth as these should have been done by the clients themselves. He also mentioned the fact that his father's signature on such Forms had deteriorated, evidence that he was suffering from dementia. He insisted that had Mr Hollingsworth done the review carefully, he would have known that his late father was suffering from dementia.

He further stated that the products recommended and sold by Mr Hollingsworth did not meet the clients' medium risk profile and the Prospectuses of these

[4] *A Fol.* 90 *et seq*

instruments were not in the possession of the Complainant as, quoting from the same Prospectus, it was limited for distribution only to investment professionals, high net worth companies, and sophisticated investors. He also emphasised that the prospectus dated November 2016, also detail the risk which does not match with the client's risk profile.

Mr VVV reiterated that the three issues being raised are: the complexity of the product; the definition of the investor's experience; and the vulnerability of the client.

The Service Provider's Version

The Service Provider submitted that the relationship with the Complainant and her husband goes back a minimum of twenty years.

The last Client Fact find was compiled in 2014, and should the late Mr AA have been unable to transact in 2014, this was not up to Mr Hollingsworth to diagnose as this could have been done by Mr AA himself or by his wife at the time of the meeting.

The Service Provider submitted further that although Mr VVV says that the two investments in question were highly risky and also spoke in the past, the Montreux Fund is expected to be redeemed together with a return of capital and possibly with profits on investments.

As to the New World investment, this was in liquidation. Moreover, the Montreux Fund is suspended and is going through a structured winding down and is expected to be wound down within the following 18 months together with profit thereon. It has been emphasised that the Montreux Fund is not in liquidation but is suspended.

The Service Provider also referred to the fact that conveniently enough, the Complainant's son has not mentioned that at the beginning of June there was a meeting held by the directors of Montreux (who were brought to Malta to speak to investors), whereby he had the opportunity to verify everything with them. Montreux's directors have confirmed that the meeting was a fruitful one and Mr VVV had understood the structured winding down of this particular investment.

The Service Provider also insisted on the fact that at the time of investment, New World comprised 3% of their portfolio while Montreux comprised 8% of the same portfolio.

In addition, the Service Provider emphasised that despite Mr VVV's allegations that they became aware of the substantive facts in the late 2017, this is entirely incorrect as there is submitted correspondence going way back before 2015; indicating that dividends were paid and regular updates given, which show that they were well informed since before 2015.

As part of its statements to the Arbiter, the Service Provider also submitted a sworn declaration by Mr Mark Hollingsworth in his role as a Director of the same Service Provider.

In his affidavit, Mr Hollingsworth basically addressed the same points already mentioned in this decision.[5]

The Arbiter shall determine and adjudge the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.[6]

Preliminary Pleas

The **first** preliminary plea raised by the Service Provider is to the effect that Mr Mark Hollingsworth in his personal capacity should be declared non-suited because he did not act in his personal capacity and, in his dealings with the Complainant and her husband, he was acting on behalf of Hollingsworth International Financial Services Ltd.

After the Arbiter examined the acts of these proceedings, it results that Mark Hollingsworth was not acting in his personal capacity, but he was acting on behalf of his company afore mentioned. The Arbiter therefore declares that Mark Hollingsworth in his personal capacity is declared non-suited.

[5] *A Fol.* 94 *et seq*
[6] Cap. 555, Art. 19(3)(b)

The **second** preliminary plea relates to a previous complaint filed by VVV which was later unconditionally withdrawn. The Service Provider submits that it should not be prejudiced twice on the same subject matter of the complaint. To avoid any doubt in this respect, the Arbiter declares that the first complaint was withdrawn and abandoned and, therefore, is no longer being considered.

Plea number 3 is to the effect that the Service Provider is asking the Complainant to prove that she could institute this complaint in her own name given that the investments being the subject of this complaint were held by her jointly with her deceased husband. In default, in so far as this complaint addresses the deceased's share of the investments, this complaint cannot be upheld.

In this regard, the Arbiter notes that the two Client Fact Finds compiled on 1 December 2003[7] and 8 January 2014[8] by the Service Provider clearly indicate that the advice that had been given by Mark Hollingsworth was directed at both Mr AA and Mrs VA.

The Complainant submitted what appears to be an extract from a Will[9] drawn up by Dr John Gambin LL.D. on 22 December 2008 in which, *inter alia*, the testator (AA) '*nominates and appoints as his sole and universal heiress and successor to his Estate in Malta his wife VA ….'.* A copy of the death certificate[10] was also filed in these proceedings.

The Service Provider does not make any further reference to this plea during the hearing of 16 September 2019.[11] Neither is this issue raised by Mark Hollingsworth in his Sworn Statement.[12] Moreover, after the death of Mr AA, the Service Provider continued to correspond with the Complainant, thereby accepting that she was the holder of the investments in question. If the Service Provider did not find any difficulty in accepting the Complainant as the holder of the investments in question, it cannot raise the question now that the Complainant is seeking a remedy before the Arbiter.

[7] *A Fol.* 36 *et*
[8] *A Fol.* 45
[9] *A Fol.* 24
[10] *A Fol.* 25
[11] *A Fol.* 89
[12] *A Fol.* 94 *et seq*

Furthermore, the Service Provider did not follow this plea during the proceedings, thereby accepting the extract of the will submitted by the Complainant from which it results that the Complainant is the universal heiress of her deceased husband. Therefore, this plea is being rejected.

The **fourth** preliminary plea states that the Arbiter has no competence to hear and decide upon this complaint because it is about the Service Provider's conduct which occurred between 1 May 2004 and 18 April 2016. Therefore, in terms of Article 21(1)(b) of Chapter 555 of the Laws of Malta, the Complainant had until April 2018 to submit the complaint which is time-barred.

The issues that are being highlighted in this complaint relate to two investments – the Premier New Earth Recycling Fund (**New Earth**) and the Montreux Natural Resources Fund (**Montreux**).

The Arbiter will first decide about his competence in relation to the New Earth.

In the ***New Earth*** fund, the Complainant and her late husband invested GBP14,000 in March 2013. According to the Service Provider, the fund entered into administration in June 2016.[13] The Provider submitted a list indicating dates at which it issued updates to the complainant in regard to this fund.[14]

The first communication to the Complainant about this fund is dated 23 June 2016.[15]

This communication details the processes that were taken by the directors of the Fund as to the appointment of an Administrator and the sale of the assets of the New Earth Group of Companies (NERR) which is '*unlikely that the sale of these assets will generate a return to NERR or to the Fund*'.

Although the Service Provider did not prove that this communication was actually received by the Complainant or her husband, in her complaint,[16] the Complainant states that:

'Fund went in liquidation June 2016. Full investment written off'.

[13] *A Fol.* 34
[14] *A Fol.* 180
[15] *A Fol.* 181
[16] *A Fol.* 4

Moreover, during the proceedings the Complainant did not contest that she or her husband were first notified by the communication dated 23 June 2016.

The announcement that the fund was put into administration occurred after the coming into force of the Act which sets up the Arbiter for Financial Services. This means that the event that might have triggered a complaint in relation to the Service Provider's '*conduct*' occurred after 18 April 2016.

Therefore, Article 21(1)(b) of Chapter 555 does not apply, and this plea with regard to this investment is being rejected and the Arbiter has the competence to deal with the complaint in this respect.

As to the other investment, namely, the Montreux Natural Resources Fund (**Montreux**) the Service Provider submitted two pleas, namely, the lack of competence of the Arbiter based on Article 21(1)(b) of Chapter 555 of the Laws of Malta and a **conflicting plea** stating that the complaint was filed prematurely since the Complainant can recover her investment through a pending process of liquidation.

Since the Service Provider itself declares that the Complainant had filed the complaint prematurely, it cannot argue that the complaint should have been filed by the 18 April 2018. Therefore, the plea regarding the competence of the Arbiter based on Article 21(1)(b) of Chapter 555, cannot be entertained by the Arbiter.

The same applies to plea number 7 which is in conflict with plea number 4. All pleas have to be proven by the Service Provider, and it cannot prove that the complaint was filed prematurely when at the same time it submits that the complaint should have been filed with the Arbiter by the 18 April 2018.

For these reasons, plea number 4 and plea number 7 are being rejected.

Since Mark Hollingsworth has been declared non-suited, **plea number 5** has been exhausted.

Plea number 6 is a plea of prescription based on Article 2165(f) of the Civil Code. The Service Provider contends that the complaint is time-barred because more than five years have passed since the contractual relationship between the

Company and the Complainant was concluded in March and August 2013, and the terms of investment were concluded on 1 December 2013.

The Arbiter has already decided in other cases that, in the case of a financial product, it is not logical, fair or reasonable to establish the objective date from which an action can be instituted as the date of the inception of the contractual relationship, because the complainant (as well as the service provider) do not presume that from that date there might be a breach of rights that warrant the filing of a judicial act against the defendant company. This line of thought has been accepted and confirmed by the Court of Appeal in various judgements dealing with appeals from the Arbiter's decisions.[17]

Moreover, the reply by the Service Provider was filed on the 11 July 2019 and, by that date, certain amendments to the Civil Code regarding prescription were already in force. As a matter of fact, the relevant amendments came into force on the 13 January 2017.

The relevant article is Article 2160 which stipulates:

'2160(1): *The prescriptions established in articles 2147, 2148, 2149, 2156 and 2157 shall not be effectual if the parties pleading them, do not of their own accord declare on oath, during the cause, that they are not debtors, or that they do not remember whether the thing has been paid.'*

Our Courts have already explained how the defendant should deal with the plea of prescription after these amendments came into force.

In the Court judgement in the names of: ***Bottega Del Marmista Ltd -vs- Paul Mifsud pro et*** **decided on 26 January 2018, the Court of Appeal** ***inter alia*** **stated:**

'*Imbaghad fis-seduta tal-25 ta' Jannar, 2017, il-konvenuti xehedu li m'ghandhomx jaghtu lis-socjetà attrici (fol. 38 u 39). Però, dan ma kienx kaz fejn il-konvenuti nghataw il-gurament decizorju izda fejn huma xehedu minn jeddhom. Ghalhekk ma jistghux jigu applikati l-principji tal-gurament decizorju.*

[17] For example, *Anthony u Lorenza Pullicino vs GlobalCapital Financial Management Ltd.* (CA, Inf. Jur.), 21 ta' Ottubru, 2019.

Il-qorti zzid li bl-Att 1 tal-2017, li dahal fis-sehh fit-13 ta' Jannar, 2017, saret emenda kardinali fl-Artikolu 2160 tal-Kodici Civili. Qabel dakinhar id-disposizzjoni kienet tikkontempla l-possibiltà lill-attur li jaghti l-gurament decizorju lill-konvenut:

"*Il-preskrizzjonijiet imsemmija fl-artikoli 2147, 2148, 2149, 2156 u 2157 m'ghandhomx effett jekk il-partijiet li jeccepuhom, meta jinghata lilhom il-gurament, ma jistqarrux li mhumiex debituri, jew li ma jiftakarx jekk il-haga gietx imhallsa".*

Bl-emenda li saret bl-Att 1 tal-2017 il-legislatur impona fuq il-konvenut l-obbligu li jiehu l-gurament u fin-nuqqas il-konvenut ma jkunx jista' jiehu beneficcju mill-preskrizzjonijiet qosra.'

The First Hall Civil Court in: ***P&S Ltd et vs Noel Zammit et*** **decided on 16 January 2018,** further added that the oath to be taken by the defendant of his **own volition** has to follow certain formal requisites as established by Article 2160 and, if this formality is not adhered to, the oath taken by the defendant is not valid and the defendant cannot benefit from the plea of prescription.

The Court stated:

'*Minkejja t-tibdil fil-ligi kif fuq inghad, dawn iz-zewg formuli ta' gurament xorta baqghu sagramentali, u kull devjazzjoni minnhom ma tiswiex ai fini ta' dawn ix-xorta ta' eccezzjonijiet. Li tghid li d-dejn huwa preskritt, minghajr ma tuza t-test li trid il-ligi, ma jiswiex biex tirnexxi din ix-xorta ta' eccezzjoni. Ma hux kompitu tal-Konvenut li jasal ghall-konkluzjonijiet legali. Il-kompitu tieghu hu li jimxi skont dak li jitlob l-artiklu imsemmi. Il-Konvenut imkien ma jghid, lanqas in kontroezami, testwalment, dak li jrid l-artiklu 2160 tal-Kodici Civili.*

F'dan ir-rigward gie affermat fis-Sentenza tal-Qorti tal-Appell Inferjuri fl-ismijiet ***Tabib Principal tal-Gvern -vs- Georgina Muscat tat-8 ta' Marzu 1978****: "Il-formula tal-gurament hi inalterabbli u l-allegat kreditur ma jistax joqghod jitlob spjegazzjonijiet ohra lill-konvenut, bhal per ezempju, il-kawza ta' l-estinzjoni, imma ghandu joqghod strettament ghall-formula tal-gurament, li ghal dik li jirrigwarda l-allegat debitur hi wahda jew l-ohra mit-tnejn specifikati fl-Artikolu 2265(1) (illum 2160(1)] Kodici Civili". 22. Huwa minnu li dan il-bran intqal fid-*

dawl tal-ligi kif kienet. Izda huwa minnu ukoll, li fil-ligi kif inhi llum, il-formula baqghet hemm u inalterabbli'.

In this case, the Service Provider did not adhere to the requisites of Article 2160, as amply explained in the above stated judgements. It did not file the required formal oath and, therefore, cannot benefit from the plea of prescription.

For the above-stated reasons, this plea is also being rejected.

THE MERITS OF THE CASE

The complaint mainly deals with the *'misselling'* of the investments in question because they did not reflect the risk profile and appetite of the Complainant and her husband, particularly, when at the time of purchase, they were both vulnerable and the husband was already suffering from dementia.

On the other hand, the Service Provider argued that the Complainant had 19 years' experience in the investments and she and her husband had a diverse range of investments including an aggressive portfolio with Friends Provident International which was heavily weighted into Asian equities. Also, that they had subsequently been investing in complex instruments and experienced investor funds since then, with positive returns.

Further Considerations

The relationship between the Complainant and the Service Provider started in the year 2003. From the Confidential Client Fact Find,[18] it resulted that their investment portfolio at that time held a current value of around GBP520,000. Their attitude to risk has been noted as Balanced with a Medium risk profile, whilst their investment objective was medium risk.

The investments subject to this complaint were made between 2013 and 2014, and no Client Fact Find has been filed in relation to the purchase of these two investments.

An important document to be considered is the Confidential Client Fact[19] dated 8 January 2014. Although no capital was to be invested at that time, a particular

[18] *A Fol.* 38
[19] *A Fol*. 45

section[20] dealing with the understanding of complex and/or experienced/professional funds show that the Complainant and her husband had gained such understanding by investing in *'complex products'* in the past and details in this regard have also been included.

It states that:

'You first invested into structured notes in 2008 through your Royal Skandia portfolio and have done so regularly ever since through the Royal Skandia and more recently Nedbank portfolios. The types of notes invested into have been income, phoenix and autocall notes. These have been linked to individual equities, commodities and indices. Your portfolios presently have ten active structured notes in total. You have had maturities during this period which have been reinvested.

In addition, you have also invested into New Earth Recycling, Coral Student, Coral Prime, two Curzon funds, Montreux Gold and Darwin Leisure Funds – ***all of which are deemed experienced investor funds****.* (emphasised)

You have therefore gained sufficient experience over the last five years to continue to invest into all of these types of instruments. In particular your investments into structured income notes has increased in the last 1-2 years to generate additional income.'

Both in the original complaint submitted and even in the Complainant's son submissions to the Arbiter, it has been continuously argued that the two investments subject to this complaint were not suitable to the Complainant's balanced/medium risk profile. The Complainant also submitted that even the Service Provider acknowledged that these investments were suitable for experienced investors and, since the Complainants were retail clients, these investments were not suitable to the Complainant.

However, the investment in the New Earth and Montreux Gold were not the only two experienced investor funds that the Complainant held. The fact that the Complainant held other experienced investor funds was not contested by the Complainant.

[20] *A Fol.* 57

But, for some reason or another, no complaint regarding the suitability in respect to the other experienced investor funds was raised.

In the complaint form, the Complainant argued that the full investment in the Premier Investment Opportunities Fund p.l.c. has been written off, whilst for the Montreux Capital Management Natural Resources Fund, the Fund was closed with the price suspended and had zero value.

In order to reach an objective conclusion, the Arbiter must first establish important facts about the two investments being the subject of this complaint.

Montreux Natural Resources Fund (Montreux)

The sum of £40,000 was invested in Montreux in two transactions - £16,000 in August 2013 and £24,000 in November 2014.

As noted in the documentation[21] held on file, the Montreux Natural Resources Fund is an open-ended Fund which trades physical commodities, domiciled in the Cayman Islands with a feeder fund domiciled in the Isle of Man.

The Complainant's money was invested in the feeder fund which invests substantially all of its assets in the Master Fund. The Fund commenced its operations in 2013.

The Fund operates in a way that buys contracts at a discount and sells with a margin and is so not exposed to the risks or the fluctuating prices of the underlying commodity. Its trading strategy also ensures that returns can be made regardless of which way the market is moving.

Contrary to what has been alleged by the Complainant, it results that she was being continuously advised by the Service Provider about the Fund updates.[22] On 9 April 2018, the Complainant was informed[23] that Montreux had decided to close the Fund completely and sell the assets in order to return funds to investors. The decision by the directors to close the Fund was not suggesting that a loss would be incurred. Based on the documentation held on file, the latest correspondence[24] to the Complainant was dated 29 August 2019, whereby

[21] *A Fol.* 106
[22] For example*, a Fol.* 115, 138, 143, 149
[23] *A Fol*. 155
[24] *A Fol.* 176

she was advised that Montreux released up-to-date NAV pricing, and despite the fact that the fund was not trading, the value of the investment at the current NAV was £49,463.90. This is contrary to what has been stated by the Complainant that its value is zero.

To note further that as at January 2020, the Fund remains suspended:

'From an investor perspective, the priority of the Board of the Fund (the "Board") remains to protect the value of assets attributable to investors and to ensure the Fund remains in a liquid position while the Investment Manager works towards realising the value of these assets. As a result, the Board has deemed that distributions are not appropriate at the moment, as this would impact the ongoing liquidity of the Fund.

The intention of the Board is to seek repayment of all outstanding amounts at the earliest possible date and to start making distributions to investors as soon as practicable with the ultimate intention of having all available funds fully distributed by the end of 2020 and this Fund wound up.

Please be aware that revenue being generated and accrued by existing outstanding loans is more than sufficient to cover the ongoing running costs of the Fund and investors should not see their current value diminished by the operating costs of the Fund.'[25]

This implies that the loss alleged to be sustained is not quantified, further implying that this is an inconclusive matter and has not yet been established that the Complainant has suffered a loss. Therefore, the Arbiter is not in a position to decide that the Complainant has suffered a loss and, therefore, the complaint in this regard cannot be accepted.

Premier New Earth Recycling Fund (New Earth)

The investment in New Earth – was done in March 2013. No contract note has been provided in relation to this transaction.

According to the Fund's Fact Sheet as presented by the Service Provider, its investment objective was aimed '*to provide long term growth by investing*

[25] https://edale.co/wp-content/uploads/2020/02/2020-02-01-09-58.pdf

directly or indirectly in Recycling Facilities in the United Kingdom and in the development of such facilities.'[26]

The Fact Sheet also claims a *'+68.30% net growth of the sterling sub-fund since launch in July 2008'.*

The fund was a sub-fund of The Premier Investment Opportunities Fund Protected Cell Company p.l.c. ("PIOF") and was registered in the Isle of Man as a Qualifying-Type Experienced Investor Fund.

The Premier New Earth Fund is now closed and is being liquidated. There are little prospects that investors will get their money back.[27]

At the time the investment had been sold to the Complainant and her husband, MiFID 1 (Directive 2004/39/EC on markets in financial instruments, now substituted by MiFID 2) was in force and in essence this Directive was transposed into Maltese law by the MFSA which issued the *Investment Services Rules for Investment Services Providers: Standard Licence Conditions (SLC).*

According to Rule 2.16 a suitability assessment of the client was expected to be carried out by the service provider as part of the process of advice to investors.

This assessment had to establish whether the investment in question:

a. meets the investment objectives of the client in question;

b. the client could bear the loss;

c. it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

The Suitability or otherwise of the New Earth

The first requisite that needed to be established was whether this investment met *the investment objectives of the client in question.*

[26] *A Fol.* 177
[27] http://www.premiernewearthfund.com/.

According to the 2003 Fact Find, the purpose for which the Complainant and her husband invested was '*capital growth'.*[28] Their risk profile is consistently indicated to be in the *'medium'* range.

A Confidential Client Fact[29] that was drawn up on 8 January 2014 provides an indication of categories of investment products that the Complainant and her husband had held with the Service Provider. At the time the Confidential Fact Find was compiled, no new investment appears to have been made.

Page 13 of this Fact Find[30] includes a 'Questionnaire' which asks whether the investor/s have '*gained an understanding of complex and/or Experienced/ Professional Funds'.* To the question whether the Complainant and her late husband had '*gained adequate knowledge of such instruments in my/our current or previous profession*', their reply was in the negative.

To the contrary, they both answered in the affirmative to the question:

'I/We have invested in 'complex products' in the past'.

The Fact Find supplements this with the following details:

'*You first invested into structured notes in 2008 through your Royal Skandia portfolio and have done so regularly ever since through the Royal Skandia and more recently Nedbank portfolios. The types of notes invested into have been income, phoenix and autocall notes. These have been linked to individual equities, commodities and indices. Your portfolio presently have ten active structured notes in total. You have had maturities during this period which have been reinvested.*

In addition, you have also invested into New Earth Recycling, Coral Student, Coral Prime, two Curzon funds, Montreux Gold and Darwin Leisure Funds – all of which are deemed experienced investor funds.[31]

You have therefore gained sufficient experience over the last five years to continue to invest into all of these types of instruments. In particular your

[28] *A Fol.* 41, Fact Find compiled in 2003.
[29] *A Fol.* 45
[30] *A Fol.* 57
[31] Arbiter's emphasis.

investments into structured income notes has increased in the last 1-2 year to generate additional income.'

The investment in New Earth and Montreux were not the only '*experienced investor fund'* that the Complainant and her late husband held. The Complainant and her husband also invested *inter alia* in the Friends Provident International portfolio (which was incepted in 1989) and was termed as *'aggressive'* by the Service Provider. That stated, the latter portfolio was part of a range of other investments that were held by the Complainant and her late husband. All things equal, the investment in the New Earth fund was, or appears to be, consistent with the Complainant and her late husband's requirement of '*capital growth'*.

As to the second requisite, namely, that the Complainant had the necessary knowledge and experience to understand the risks involved in the transaction, the Complainant stated that her late husband was in charge of the investments but she always accompanied him. This means that she was aware of what her husband was doing, and she gave her blessing to the investments in question.

It is not disputed that the Complainant and her late husband had accumulated years of experience in investing. The Friends Provident International portfolio, which was one of five portfolios that were incepted between 1989 and 2003 prior to their relationship with the Service Provider, clearly indicates so.[32] The 2014-compiled Fact Find gives a broad indication not only of the various categories of investments held by the investors (such as '*structured notes'*) but also the year when investing in such products commenced (2008). The investors also held a number of '*experienced investor funds'*, according to this Fact Find. In terms of '*knowledge and experience'*, no evidence has been produced that contradicts the Service Provider's assessment in the 2014-compiled Client Fact Find.

Lastly, as to financial bearability of the clients, there is sufficient evidence to prove that the portfolio of the Complainant and her late husband was not insignificant.

The Service Provider claims that:

[32] See *A Fol.* 95, para 4

'*Excluding property assets, this investment represented around 3.5% of spouses VA's invested wealth (excluding cash and property investments). Their overall wealth at the time was approximately GBP 1.1 million and therefore the investment in New Earth represented 1.25% of their patrimony*'.[33]

The Complainant and her late husband were able to absorb the loss from their investment in New Earth.

On the basis of information as presented, there is no evidence to suggest that the investment in New Earth was not consistent with other investments and portfolio strategies that were pursued by the Complainant and her late husband over the years.

For the above-stated reasons, the Arbiter cannot conclude that this investment was not suitable for the Complainant and her late husband.

Finally, the Arbiter notes that the Complainant's son submitted that, at the time of the purchase of these investments, the Complainant's husband was suffering from dementia. However, apart from a photocopy of a medical certificate,[34] which was not confirmed by the doctor allegedly issuing it, the Arbiter has no conclusive evidence in this respect to conclude that the Complainant's husband had this medical condition. Moreover, if in reality her husband had such condition, it was also her responsibility to inform the Service Provider of such condition, or seek the help of other members of her family or other professionals in order not to allow her husband to enter into contracts to which she seems to be now objecting.

For all the above reasons given in this decision, the Arbiter cannot uphold the complaint.

Since the Arbiter has declined the preliminary pleas filed by the Service Provider, each party is to bear its own costs of these proceedings.

[33] *A Fol.* 34
[34] *A Fol.* 7

Dr Reno Borg
Arbiter for Financial Services