Before the Arbiter for Financial Services

Case No. 022/2017

CL ('the Complainant' or 'Member')

vs

Sovereign Pension Services Ltd.

(C 26143) ('the Service Provider')

Today, 28 November 2017

Having seen **the Complaint** which relates to The Centaurus Retirement Benefit Scheme ('the Scheme'), a Personal Retirement Scheme licensed by the MFSA and issued by the Service Provider, where the Service Provider is the Retirement Scheme Administrator and the Trustee of the Scheme.[1]

The situation occurred in 2016. The Complainant applied with the Service Provider to become a Member of the Scheme on 7 January 2016, as per Application Form submitted to the Service Provider bearing the same date.[2] The said Application Form indicates Belgravia Wealth Management as the Financial Advisor of the Complainant, as well as a preference to invest in the policy RL360 offered by Royal London 360 (an insurance company based in the Isle of Man)[3], as an underlying investment of the Scheme.[4]

The Complainant became a Member of the Scheme on 2 March 2016.[5] Funds from his other existing UK plans were transferred into the Scheme for these to

[1] https://mfsa.com.mt/pages/licenceholder.aspx?id=4643.
[2] Application form – Fol.68.
[3] Fol.60.
[4] 4 Fol.63 & 67.
[5] Fol.174.

be then invested in underlying assets under the Scheme. Such transfer of money was completed in two tranches with the first transfer from three schemes occurring between March and April 2016 and the last transfer from a remaining scheme occurring on 20 May 2016.[6]

The Complainant claims that his rights were compromised due to the late delivery by the Service Provider of the documentation in relation to his membership with the Scheme, and the investments made by the Scheme in RL360, as he was unable to avail of the cancellation notice applicable in relation to the investment in the RL360 as this had expired due to the late receipt of the documents.[7]

The Complainant noted that he had discovered another less costly investment and would have availed of the cooling-off period on the RL360 policy if he had received this in time.

The Complainant also claimed that:

- he did not receive any response from the Service Provider since January 2016 until he called at their office on 17 August 2016,[8] following which he received the welcome pack of documents by email on 17 August 2016, as he never received the original by post;
- the Service Provider proceeded with the investment in the RL360 on the basis of an incomplete application form (as the underlying investments within the RL360 had not yet been selected and there were no instructions as to where the funds were to be invested within the policy);
- the application was not precise as it only indicated his preferred investment choice and not his final choice besides requiring an additional form to be submitted;

[6] Fol.9.
[7] Ibid.
[8] Fol 53.

- the Service Provider should have clarified first with him or his investment advisor to confirm the investment choice prior to proceeding with the actual investment in RL360;
- that the trustee should have known that the terms/costs of the RL360 were not commercial;
- the costs of the RL360 were above market levels and he had received an offer from a similar investment with half the costs.

The Complainant thus claimed that for the reasons indicated, the Service Provider failed to inform him on a timely basis and proceeded on the basis of documentation and procedures which are not clear.

In a letter dated 2 February 2017, to the Office of the Arbiter for Financial Services (OAFS), the Complainant noted that had the Service Provider completed its duties in a more timely manner as Trustee, the situation would have been avoided.

The Complainant further highlighted that the right to cancel the RL360 investment was not made available to him and, in his opinion, the Service Provider had failed to follow the duty of a *bonus paterfamilias* in timely dealings with his fund and in sending him information as part of their duty as trustee.[9].

Complainant also remarked that contact with the Service Provider was poor and referred to the lack of communication with him for 7 months (from January 2016 till August 2016), besides claiming that he never received a Trust Deed from the Service Provider.

The Complainant is asking for the return of his funds invested in the RL360 so that these can be re-invested with a different party and if this is not possible, for the Service Provider to negotiate a 30% reduction in the annual costs of the RL360 or provide him with an equivalent benefit.[10]

[9] Fol.37/ 38.

[10] Fol.10.

Having seen the Reply by the Service Provider,

Where in reply to the formal complaint sent by the Complainant dated 5 September 2016,[11] the Service Provider highlighted the following main aspects:[12]

a) the transfer of funds from other schemes could take several weeks or months to complete with additional time needed for funds to be invested in the chosen investment product. The communication by the Service Provider during this time is directed through the Member's appointed Financial Advisor where the latter is the Member's point of contact who should have provided the Complainant with relevant updates;

b) any rights to cancellation belong to the Service Provider as trustee and legal holder of the RL360 policy as the Member is not a party to this policy;

c) communication with respect to investments was between the Service Provider as Trustee and the Complainant's appointed Financial Advisor. The Financial Advisor had yet to provide details of the investments to be placed within the RL360 but the Service Provider had proceeded with the investment into the RL360 on the basis of the Application Form;

d) the Service Provider does not provide investment advice nor does it review the appropriateness of such advice and it is the responsibility of the Financial Advisor to ensure the suitability of the investment and notify the Member of the fees involved with the particular investment. That the selection of the RL360 in the membership Application Form as the preferred investment vehicle indicated clearly the Complainant's agreement with the investment;

e) the wording of the Application Form is clear and should be read in the context of the declaration signed by the Member wherein it is *inter alia*

[11] Fol.13

[12] Letter of 20th October 2016. Fol.15

specified by the applicant that "*I hereby request that the funds transferred be invested in accordance with my preferences indicated above.*"

On the basis of the explanations provided, the Service Provider submitted that it has accordingly carried out its duties in line with the Application Form; that communications should have occurred between the Member and the Financial Advisor, unless instructions were given otherwise to the Service Provider; that the investment in the RL360 was clearly requested and the Service Provider had acted on such instructions and that if the Member felt that he was misadvised then such matter should be taken up with the Financial Advisor. The Service Provider also advised that they can assist with the surrender of the RL360 policy and re-investment with another preferred party, however, surrender penalties would apply.

In a letter dated 21 February 2017, to the OAFS the Service Provider highlighted that:[13]

- the complaint should be raised with the Independent Financial Advisor given that the concerns relate to the pension having been invested into the RL360;
- the Complainant and his Financial Advisor had jointly prepared the documentation and application form to join the Scheme;
- it was the Financial Advisor's responsibility to consider the various investment options and costs involved and explain the overall process of application to the Complainant;
- although they were not obliged to negotiate the reduction in costs with the RL360 they had asked for these to be revised as a sign of goodwill.

Having heard the evidence and seen all documents and submissions,

[13] Fol.23.

Considers

From the information submitted by the parties during this case, the product in respect of which the complaint is being made, points towards the Scheme being a Member Directed Scheme where the Scheme permits the Member to direct the investments *[as per condition 9.1(a) Section B.9 of the Pension Rules for Personal Retirement Schemes issued by the MFSA].*

This is on the basis that the Service Provider has allowed the Member of the Personal Retirement Scheme to appoint an investment advisor to advise the Member on the choice of investment decisions as per Rule 9.1 (b).

The Scheme allowed the Member to appoint an investment advisor to advise him on the choice of investment decisions. The application form for member-ship of the Scheme indicated Belgravia Wealth Management, a UK FCA licensed entity,[14] as Financial Advisor.

Facts of the Case and other considerations

The Complainant filed a Notice of Cancellation dated 26 August 2016, directly with RL360 himself. In his covering letter to RL360, the Complainant stated that on 17 August 2016, he had received by email from the Service Provider relevant documents relating to his pension scheme including the Notice of Cancellation. The Complainant noted that accordingly he was not able to submit the cancellation notice on time and requested RL360 to return the funds to the Scheme without delay.

In an email communication to the Complainant dated 31 August 2016, the Service Provider explained the documentation it requires to surrender the RL360 policy and to re-invest as well as the documents required to change the Financial Advisor. It was indicated that the following charges would apply:[15]

- The surrender charges from RL360 and a charge by the Service Provider of Eur250 to change the investment house;

[14] Fol.59 – affidavit of Melissa Buttigieg.
[15] Fol.28.

- For the transfer of funds to his bank account the surrender charges from RL360 and a charge by the Service Provider of Eur1,500 termination fees.

In reply to an email from the Service Provider dated 15 February 2017 to RL360 wherein the latter was asked whether a reduction of 30% of fees was possible, an administrator from RL360 indicated that the fees are not subject to amendment.[16]

During the hearing of 24 April 2017, the Complainant claimed that he received a better investment offer in early June 2016 (which was around GBP7,000 cheaper than RL360).

Complainant further claimed that the letter from the Service Provider dated 18 June 2016, was only received by him on 17 August 2016. The Notice of Cancellation in respect of RL360 was dated 23 May 2016, and had a 30-day validity period (and had to be sent on or before 22 June 2016).[17]

Under cross examination, the Complainant confirmed *inter alia* that there were discussions with his Financial Advisor regarding the investments to be made within the RL360 but nothing was agreed at that stage.

The Complainant also confirmed his understanding that the investment was being made through the Service Provider acting as trustee.

Complainant also confirmed that he had not contacted the Service Provider about the better option received in June 2016, also in view of the fact that he had no idea when the Service Provider had signed the agreement for the purchase of the RL360.[18] The Complainant further confirmed that he changed his Financial Advisor on 25 August 2016, on the basis of the better offer he received in June 2016.

In her affidavit dated 17 May 2017, Ms Melissa Buttigieg, Client Relationship Executive of the Service Provider, explained the lengthy process for the processing of the documentation for membership of the Scheme and the

[16] Fol.29/30.
[17] Fol.53/170.
[18] Fol.54-56.

transfer of the relevant funds from the existing plans into the Scheme for subsequent investment. Ms Buttigieg indicated *inter alia* that:[19]

- the transfer of funds from the existing plans into the Scheme occurred between 15 March 2016 and 28 May 2016;

- the application form for participation in the RL360 was submitted by the Service Provider in April 2016[20];

- the Service Provider exchanged various emails with the Financial Advisor between April and May 2016 regarding the transfer of funds including calculation of Pension Commencement Lump Sum (a feature chosen by the Complainant), which the Service Provider was required to calculate prior to effecting the investment in RL360;

- there were 4 pension transfers into the Scheme over the period March to May 2016 which were made in 2 tranches. Three transfers for the total amount of GBP161,094 ('the first tranche') was made between March and April 2016 and a transfer of around GBP20,509 ('second tranche') was further made on 20 May 2016;

- two payments in respect of the Pension Commencement Lump Sum was made by the Service Provider to the Complainant's bank on the 11 and 31 May 2016;

- after the deduction of the payment of the Pension Commencement Lump Sum the remaining funds were invested into the RL360. The first tranche of the funds received (less the payment of the commencement lump sum) was invested in the RL360 on 11 May 2016 with the second tranche invested in RL360 on the 1 June 2016;

- the Service Provider received two separate confirmations from RL360 of the investment made. The first confirmation was dated 26 May 2016 (for the first tranche) and the second confirmation was dated 30 June 2016 (for the second tranche);

[19] Fol.59.
[20] Fol.121

- the Confirmation letters dated 26 May and 30 June sent by RL360 included the Policy Documents and Cancellation Letter addressed to the Service Provider as trustee;

- the documentation was sent by the Service Provider to the Complainant by normal post on 1 July 2016;

- between the 1 June and 1 August 2016, the Service Provider was in contact with the Financial Advisor on the tax identification number and payment of the Pension Commencement Lump Sum;

- the Service Provider was contacted by the Complainant on the 11 August 2016, who queried whether his funds were held with the Service Provider or with an investment platform to which the Service Provider confirmed that they were held with RL360;

- subsequent communications ensued between the Complainant and the Service Provider where the former queried who instructed the Service Provider to proceed with the investment. In a communication on 17 August 2016, the Complainant advised that he had not received the Scheme's documentation by post and a copy of such was provided to him on the same date by email. Further communications ensued including on the cancellation notice, change in financial advisor and submission of a formal complaint.[21]

During the cross examination of Ms Buttigieg, during the hearing of 4 July 2017, Ms Buttigieg was unable to explain the delay in the submission by post of the letter dated 18 June 2016 (which included all the relevant documentation) and which was claimed to have been sent by the Service Provider to the Complainant on 1 July 2016.

She also confirmed that the welcome pack was sent to the Complainant and not to the Financial Advisor and that it was standard procedure to send such pack by standard post. She also confirmed that the Service Provider did not include the cancellation notice in the welcome pack for the Member to avail of

[21] Fol.62.

this notice as it is the Service Provider who is the policy holder and thus able to cancel the policy.[22]

Final Considerations and Conclusions

The issues which gave rise to this complaint revolve around whether the Member of a Personal Retirement Scheme was informed on a timely basis regarding the investment undertaken in relation to the Scheme and the cancellation notice applicable for the underlying investment, the fees and costs associated with the underlying investment, as well as whether the investment into the underlying investment of the Scheme was made by the Service Provider on the basis of documentation which was unclear and/or incomplete.

Various arguments have been raised by the Complainant and the Service Provider and explanations provided in this regard. These have been duly considered by the Arbiter.

The pertinent issue, which is considered crucial, relates to the notification of the purchase of the RL360 as an underlying investment in the Scheme and the notification of the cancellation notice applicable for such investment.

This notice provides one with the right to change his mind on the investment and cancel such investment within a thirty-day time period without incurring the surrender charges that would apply following the expiry of such cooling-off period.

The issue is thus ultimately one as to whether the Service Provider has acted within his obligations and duties applicable as the Retirement Scheme Administrator and Trustee of the Scheme and whether his actions or lack thereof has resulted in the Member of the Scheme being disadvantaged.

It is not disputed that the Service Provider as Trustee of the Scheme is the owner of the RL360 policy, this being the underlying investment of the Scheme; nor that the Service Provider did not have sufficient authority to purchase the RL360 given the completion of the Scheme's Application form

[22] Fol.219.

signed by the Complainant as well as the RL360 Application Form which was partly completed and signed by the Financial Advisor of the Complainant.

Neither is it disputed that the Service Provider is not the investment advisor and, hence, is not responsible for reviewing the advice provided or review the costs of the underlying investment or suitability thereof to the Complainant.

As Trustee and Retirement Scheme Administrator of the Scheme, the Service Provider is, however, subject to certain obligations and duties, where in his indicated roles the Service Provider has the obligation to act with the prudence, diligence and attention of a *bonus paterfamilias* and in the best interests of the Member of the Personal Retirement Scheme.

Rule 1.3.1 of Part B.1.3 titled '*Duties of Retirement Scheme Administrators*' of the '*Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011'*[23] issued by the MFSA and to which the Service Provider is subject to, specifically requires that:

"*The Scheme Administrator shall act in the best interests of the Scheme Members and Beneficiaries*".

The requirement for the Service Provider to act with due skill, care and diligence is also specified in Rule 4.1.4 of Part B.4 titled '*General Rules for Licensed Service Providers*' of the '*Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011*' by MFSA.

On the basis that the Service Provider has allowed the Member of the Personal Retirement Scheme to appoint an investment advisor to advise the Member on the choice of investment decisions as per Rule 9.1 (b) of Part B.9 titled '*Supplementary Conditions in the case of Member Directed Schemes*' of the '*Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011*' by the MFSA, the Service Provider is also deemed subject to Rule 9.3(b) of the said Pension Rules which also provides that "*members have the right to timely and fair execution of their invest- ment decisions and to written confirmation of these transactions. The right*

[23] https://mfsa.com.mt/pages/viewcontent.aspx?id=599

(or responsibility) to make and execute investment decisions should not be inhibited by the assessment of any unreasonable charges or fees."

The Arbiter wants to highlight that these Rules do not serve only a regulatory purpose but they have been drafted in order to assure the customer more protection. Article 19(3)(c) of Chapter 555 of the Laws of Malta make it amply clear, that the Arbiter, in his deliberations has to '*consider and have due regard, in such manner and to such an extent as he deems appropriate, to applicable and relevant laws, rules and regulations,* ***in particular those governing the conduct of a service provider,***[24] *including guidelines issued by national and European Union supervisory authorities, good industry practice and reasonable and legitimate expectations of consumers and this with reference to the time when it is alleged that the facts giving rise to the complaints occurred.'*

The Service Provider received confirmation of the investment made in the RL360 together with the Policy Schedule, Terms and Conditions of this policy and the cancellation notice on the 23 May 2016, wherein in such documents it was indicated that the Notice of Cancellation must be posted on or before 22 June 2016 to be valid.

A confirmation of an additional premium made into the policy was sent by RL360 to the Service Provider on 14 June 2016. As confirmed during the proceedings (point 9 of the affidavit of Ms Buttigieg, and point 7 of the Note of Submission of the Service Provider), the said information documents included in the welcome pack were only sent by the Service Provider by normal post to the Complainant on 1 July 2016, (after the expiry of the cooling-off period applicable in the Notice of Cancellation). It was also further confirmed during the hearing of 4 July 2017, that the welcome pack was only sent to the Complainant and not to the Financial Advisor.

There is unquestionably no justifiable reason why such key documents relating to the purchase of the policy submitted by RL360 to the Service Provider on the 23 May 2016, were not sent in a timely manner by the Service Provider to

[24] Bold by Arbiter

the Member and/or the Financial Advisor but were instead retained by the Service Provider who chose to await the finalisation of the additional premium and send all the documents together more than a month after the purchase of the investment and after the expiry of the cooling-off period.

Nor is it considered prudent for such key documents to have been only sent by normal post and not by courier and email, to ensure prompt submission and receipt by the Member/Financial Advisor. The Complainant has, from his end, consistently disputed receipt by post of such pack which resulted in the Complainant receiving the documents by email on the 17 August 2016.

In the scenario where a Retirement Scheme Administrator is not taking investment decisions and itself has no discretionary investment management mandate with respect to the underlying investments of the Personal Retirement Scheme, but is relying on the investment decisions being taken by the Member and/or his Financial Advisor/Manager, such Retirement Scheme Administrator has even more reason, (besides being duty bound as he has to act in the best interests of the Member), to notify the Financial Advisor/Manager and Complainant of the actual dates of the cooling-off period and option for cancellation.

Given that the Service Provider was relying on the directions given by the Complainant/Financial Advisor for the investments comprising the Scheme, the Service Provider cannot on one part claim that he is not authorised to give investment advice and, hence, is not part of the investment decisions, but then completely ignore the cancellation notice and not send this promptly to the Financial Advisor and/or the Complainant, who could have availed of such option and issued an instruction to the Service Provider to exercise the cancellation notice, an instruction which the Service Provider would have executed in terms of its role as Trustee and Retirement Scheme Administrator.

The argument that the Complainant would have had not enough time in any case to assess the costs and alternative solution with the new Financial Advisor which was appointed on 2 September 2016, is deemed superfluous as the issue relates to the discharge of duty in the best interests of the Member and provision of relevant notice of investments in a timely manner as required in the said Rules.

The responsibility on the use of the cancellation rights would have lied with the Financial Advisor in case where the Service Provider had informed, in a timely manner, the Financial Advisor of the execution of the underlying investment and the applicable cancellation notice relating to the cooling-off period, something which was not done by the Service Provider.

This is also in the context where the Trustee's communication with the Member is directed through his appointed Financial Advisor as indicated in the Service Provider's letter dated 20 October 2016.[25] As indicated in the documentation provided,[26] the communications between the Service Provider and the Financial Advisor during the period between 1 June and 1 August 2016, were on the Complainant's Tax Identification Number and the payment of his Pension Commencement Lump Sum, and, thus, not about the receipt of the Policy Document and Cancellation Notice.

The Financial Advisor and/or Complainant were ultimately in a position to get to know of the dates of the actual execution of the underlying investment and the applicable cancellation period only from the Service Provider, who as the entity executing the underlying investment and holder of such investment, was the recipient of the policy document and cancellation notice.

The fact that the Complainant has sought advice from the Financial Advisor and had previously signed the Application Form through the Financial Advisor, and/or the Financial Advisor signing the RL360 Application Form should not reduce in any way or lead to the relinquishment by an arbitrary decision of the Service Provider, the right for one to change his mind which was applicable for the investment in question.

For the reasons mentioned above, the Service Provider cannot be deemed to have discharged its duties properly with the due prudence and diligence expected in his role as Trustee and Retirement Scheme Administrator.

The Service Provider did not act in the best interests of the member due to the lack of timely confirmation of the investment and submission of relevant

[25] Fol.15.

[26] Point 10/11 of Ms Buttigieg's affidavit dated 17 May 2017 and Point 8 of the Note of Submissions of the Service Provider received by the OAFS on August 2017.

documentation including the cancellation notice applicable in respect of the underlying investment.

Decision

It is accordingly considered fair, equitable and reasonable to uphold the Complaint due to the highlighted shortfalls on the part of the Service Provider as follows:

The Arbiter, in accordance with Article 26 (3)(c)(i) of Chapter 555 of the Laws of Malta, is therefore ordering the Service Provider to arrange for the return of the funds from RL360 without any applicable surrender charges or penalties as would have been the case should the cooling-off period had been exercised on time.

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

Dr Reno Borg
Arbiter for Financial Services