

Before the Arbiter for Financial Services

Case No. 129/2018

CN ('the Complainant')

vs

**STM Malta Trust and Company
Management Limited as substituted by
STM Malta Pension Services Limited
(C51028) ('STM Malta' or 'the Service
Provider')**

Sitting of the 15 September 2020

The Arbiter,

PRELIMINARY

The Office of the Arbiter for Financial Services ('OAFS') has discovered, through its own research, that STM Malta Trust and Company Management Ltd changed its name to STM Malta Pension Services Limited ('STM Malta' or 'the Service Provider') in June 2020. This results from the records filed with the Malta Business Registry relating to the change in name which was effective from 22 June 2020.¹

No notification was made by the Service Provider to the OAFS regarding such material development, but after a communication from the OAFS of the 10 September 2020, the Service Provider confirmed such a change in name and

¹ As per the documents filed on 22 June 2020 with the Malta Business Registry - https://registry.mbr.mt/ROC/index.jsp#/ROC/downloadDocument.do?companyId=C+51028&filename=C+51028%2FC_51028_D50_0.pdf&archiveid=3738958&anonEmailAddress=&anonConfirmEmailAddress=

confirmed that the MBR issued the change of name certificate on 13 July 2020. For all intents and purposes the records of this case have been accordingly updated to reflect the change in the name of the Service Provider.

The Case in question

The Complaint relates to The STM Malta Retirement Plan ('the Retirement Scheme' or 'Scheme'), this being a personal retirement scheme licensed by the Malta Financial Services Authority ('MFSA'), established in the form of a trust and administered by STM Malta, as the Trustee and Retirement Scheme Administrator of the Scheme.

The Complainant submitted that over the years, the value of the underlying investments within her account with the Retirement Scheme fell to around GBP20,000 from the original transfer value of over GBP70,000.² She noted that she was unable to withdraw payments from the Retirement Scheme from the third year since becoming a member, as the underlying investments had fallen in value.

The Complainant explained that in 2012 she was recommended a company called Continental Wealth Management ('CWM') to advise her on the best way to invest her pension through a QROPS.³ Following advice she received on her pension, the Complainant transferred her pension to the Retirement Scheme offered by the Service Provider. The Complainant further explained that she wanted to receive income from her Scheme but the regular withdrawals from the Scheme stopped after three years. The Complainant stated that after the payments had stopped, she contacted CWM herself and was informed that her money had been invested in oil, the prices of which had fallen drastically.

The Complainant pointed out that she has no other source of income and is now trying to make ends meet to pay a mortgage taken out on the strength of her pension with the Scheme. The Complainant explained that she had been chasing for the pension payments since 2016 but it was only in mid-2017 that she

² A fol. 4

³ A Qualifying Recognised Overseas Pension Scheme.

discovered that the problem was greater when she became aware that many people had been similarly scammed.⁴

The Complainant further explained that she discovered that CWM was not registered to operate in Spain and claimed that they were involved in all kinds of fraudulent transactions. The Complainant further claimed that the Service Provider was negligent in dealing with an unregistered company such as CWM.⁵ It was claimed that Old Mutual International ('OMI'), the issuer of the underlying policy into which the Retirement Scheme had invested, and which policy held the investments recommended by CWM, was also negligent in dealing with CWM.

The Complainant claimed that she never authorised certain dealing instructions executed within her Retirement Scheme and that her signature had been forged. The Complainant enclosed with her complaint form the said dealing instructions and pointed out that her signature on the indicated dealing instructions were 100% identical which she noted was impossible to achieve naturally.⁶

The Complainant further claimed that CWM had invested her money within the Retirement Scheme in high risk companies. The Complainant submitted that she never gave permission for such investments as she is a much more cautious investor.

As part of her complaint form, the Complainant attached various documentation including the original proposal by Premier Pension Solutions SL for the transfer of her UK pensions into a QROPS,⁷ the dealing instructions forms,⁸ her pension valuation as at 20 February 2018,⁹ a copy of her complaint to the Service Provider dated 15 November 2017 and the reply received,¹⁰ as well as a complaint sent to OMI on 8 March 2018 together with the reply received from OMI.¹¹

⁴ A fol. 4

⁵ *Ibid.*

⁶ *Ibid.*

⁷ A fol. 7-14

⁸ A fol. 15-22

⁹ A fol. 23-27

¹⁰ A fol. 28-33

¹¹ A fol. 35-42

The Complainant requested compensation for the losses incurred on her pension scheme which, she claimed, fell in value by around GBP50,000, and for the lack of cash withdrawals that she could not make from her pension Scheme amounting to GBP9,000.¹²

The Complainant asked to be put back in the position she would have been had the claimed negligence on the part of STM Malta not taken place, had the Service Provider not facilitated CWM's '*financial crime*', and had her pension remained with the preceding provider.¹³

In its reply, STM Malta essentially submitted the following:¹⁴

1. That, following a thorough review of the documentation received from the Complainant, it did not agree with the allegations made against it.
2. That the Complainant was advised by CWM on the transfer of her pension into the Retirement Scheme. The Service Provider highlighted that CWM was never an agent of STM Malta and acted independently. The Service Provider submitted that it is not accountable for the recommendations made by CWM.
3. That the Complainant had chosen CWM prior to her being introduced to STM Malta as part of the advice provided from her advisors, who could have chosen any other trustees for the transfer of her pension scheme into a QROPS.
4. That, whilst the Complainant claims that her signature was forged and that on no occasion did she authorise any dealing instruction, on the basis of the investigations undertaken by STM Malta, the Service Provider believed that the signatures were not forged. The Service Provider submitted that the most likely explanation is that, at some point, the Complainant would have given CWM a blank signed dealing instruction. It was further submitted that the only reason for this would have been for the Complainant to permit CWM to re-use the dealing instruction and submit instructions without the need to trouble her. The Service Provider also

¹² The Complainant noted that she was withdrawing approximately GBP4,500 a year – A fol. 4.

¹³ A fol. 64

¹⁴ A fol. 49-50

submitted that it would have not been possible for it to identify such behaviour since each instruction sent would have carried a facsimile of the Complainant's signature.

5. That with respect to the Complainant's claims that the money was invested in '*high risk companies*', STM Malta understood this to mean and refer to the structured notes which CWM had recommended. The Service Provider submitted that structured notes in general are designed so that within certain parameters they have less volatility than the underlying benchmark securities or indices. The Service Provider further submitted that any statement that these are all high risk products is not consistent with this feature and that STM Malta has taken the view, and continues to hold the view, that structured notes may be a suitable investment to be included in pension schemes, albeit, members must obtain advice from their financial advisor to confirm whether such product would be suitable and in-line with their risk attitude. The Service Provider pointed out that in its recent draft revised regulations, the MFSA has recognised explicitly that structured notes may be held in pension schemes. It was also pointed out that the UK FCA describes structured products as retail investments requiring advice.
6. That STM Malta does not accept liability for any claim that the Complainant is making against it. It was highlighted that whilst STM feels very sympathetic to the Complainant's position, STM Malta cannot be made to account for the potential claim of replication of blank forms of dealing instructions which may have been provided at the beginning of the Complainant's relationship with CWM.

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

Further Considers:

Basis of complaint

The Arbiter notes that in her additional submissions the Complainant highlighted new aspects which were not raised in the original complaint filed with the Office of the Arbiter for Financial Services. The Complainant cannot change the basis of her complaint and the Arbiter will accordingly only consider the complaint as originally filed.

Nature of certain additional allegations

In her additional submissions, the Complainant made *inter alia* allegations of a criminal nature when she alleged that ‘STM was systematically facilitating what was effectively financial crime (2012 to 2017)’ and ‘that STM had habitually contravened regulations in both Malta and Gibraltar’.¹⁵ Various circumstances allegedly involving STM were subsequently mentioned by the Complainant in her additional submissions.¹⁶ Besides not providing any evidence and not substantiating in any way such allegations, the Complainant has not explained either the relevance of the claims made in this regard to the case in question.

As stated above, the Arbitrator shall consider the Complaint as originally filed and take cognisance only of matters related and relevant to the issues raised by the Complainant in her Complaint.

Joinder request by the Service Provider

In its additional submissions, the Service Provider requested the joinder of Continental Wealth Management in Spain (‘CWM’) and Old Mutual International Isle of Man Limited in the Isle of Man, British Isles, (‘OMI’) as parties to the Complaint on the basis of the definition of ‘parties’ in Article 2 of the Arbitrator for Financial Services Act, Chapter 555.

STM Malta emphasised that, besides the Complainant and the financial Service Provider against whom the complaint is made, the definition of ‘parties’ in the said Article also makes reference to ‘and any other person who in the opinion of the Arbitrator should be treated as a party to the complaint’.¹⁷ The Service Provider *inter alia* argued that the Complaint is also directed towards CWM and OMI given that the Complainant claimed that CWM had invested her money into high risk companies for which she never gave permission and also claimed that OMI facilitated the fraud carried out by CWM.

STM Malta further argued *inter alia* that:

¹⁵ A fol. 60

¹⁶ Section titled ‘STM’s History’ in Complainant’s submissions refers.

¹⁷ A fol. 78

*'Noting the age-old maxim **fraus omnia corrumpit**, it is submitted that in the interest of justice CWM and OMI should answer for themselves in these proceedings in respect of the fraud which the Complainant is attributing to them. It would not be fair and equitable on the Respondent to have any responsibility imputable to it if this results from the fraud of a third party',¹⁸*

claiming also that STM Malta may itself have been a victim of the alleged fraud.

This issue was raised by the Service Provider in the additional submissions and, therefore, at a late stage of the proceedings. This issue should have been raised in the reply and not in the additional submissions. Since the joinder request was related to the issue of fraud allegations, and the Arbiter is not considering the issue for reasons already stated in this decision, there is no scope of treating CWM and OMI as a party to the complaint.

For the purposes of Article 22(1) of the Arbiter For Financial Services Act (Cap. 555) ('the Act'), it is noted that in Section C of its complaint form,¹⁹ the Complainant identified STM Malta as the financial services provider against whom the Complaint is being made in relation to the QROPS²⁰ scheme. It is further noted that, as emerging during the proceedings of the case, the Complaint made by the Complainant in essence relates to the alleged shortcomings of the Service Provider as Administrator and Trustee of the Scheme.

Moreover, both CWM and OMI are not financial service providers licensed or authorised by the MFSA and, therefore, do not fall within the jurisdiction of the Arbiter.

Having considered the particular circumstances of this case, in the Arbiter's opinion CWM and OMI should not be treated as a party to the Complaint presented before the Arbiter and, accordingly, the Service Provider's request cannot be upheld in this case.

¹⁸ *Ibid.*

¹⁹ *A fol. 3*

²⁰ Qualifying Recognised Overseas Pension Scheme – in this case, this being the STM Malta Retirement Plan, which the Complainant became a member of on 28 August 2012 (*A fol. 67*).

The Merits of the Case

The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.²¹

The Complainant

The Complainant stated that she is a *'1950s-born British National who has been resident in Spain since 2014'*.²² She described herself as a *'low/medium risk, retail investor'*.²³

As indicated in the report issued by Premier Pension Solutions SL, the Universities Superannuation Scheme was the previous UK pension of the Complainant prior to her pension transfer to the Retirement Scheme.²⁴ The Complainant's employment history accordingly involved universities and other higher education institutions.²⁵

It has not been indicated or proven during the case that the Complainant was a professional investor.

The Complainant became a member of the Retirement Scheme on the 28 August 2012.²⁶

The Service Provider

The Retirement Scheme was established by STM Malta.²⁷ STM Malta is licensed as a Retirement Scheme Administrator²⁸ and acts as the Retirement Scheme Administrator and Trustee of the Scheme.

²¹ Cap. 555, Art. 19(3)(b)

²² A fol. 58

²³ A fol. 28

²⁴ A fol. 7

²⁵ The Universities Superannuation Scheme Annual Report and Accounts for the year ended 31 March 2019 specifies that the *'Universities Superannuation Scheme (USS) was established in 1974 as the principal pension scheme for universities and other higher education institutions in the UK'* - <https://www.uss.co.uk/how-uss-is-run/running-uss/annual-reports-and-accounts>

²⁶ A fol. 75

²⁷ A fol. 8

²⁸ <https://www.mfsa.mt/financial-services-register/result/?id=204>

The Legal Framework

The Retirement Scheme and STM Malta are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta). The Retirement Pensions Act ('RPA') was published in August 2011 and came into force on the 1 January 2015.²⁹

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. 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 authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by the MFSA under the RPA.

The Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider as per Article 1(2) and Article 43(6)(c) of the TTA, in light of STM Malta's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

Article 1(2) of the TTA provides that:

'The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A',

with Article 43(6)(c) in turn providing that:

²⁹ Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - <https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/>

'A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes ...'.

Particularities of the Case

The Product in respect of which the Complaint is being made and other background information

The STM Malta Retirement Plan ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta authorised by the Malta Financial Services Authority ('MFSA') as a Personal Retirement Scheme ('the Scheme').³⁰ The Scheme was initially registered with the MFSA under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta).³¹

As indicated above, prior to transferring her pension into the Retirement Scheme, the Complainant had a UK pension, the Universities Superannuation Scheme.³² The Complainant noted that following advice received in 2012 from CWM and Premier Pension Solutions SL, she transferred her pension into the Retirement Scheme.³³ It was indicated that the initial transfer value made by the Complainant into the Scheme was of GBP81,446.81.³⁴

The assets held into the Retirement Scheme were used to purchase the Executive Investment Bond on the 2 October 2012. The Executive Investment Bond ('the Policy'), is a life policy investment wrapper issued by Old Mutual International (previously known as Royal Skandia).³⁵ The Policy had a total investible premium of GBP77,843.69.³⁶

The investible premium within the Policy was in turn invested, on the advice of CWM, into underlying investment instruments.

³⁰ <https://www.mfsa.mt/financial-services-register/result/?id=209>

³¹ A fol. 8

³² A fol. 7

³³ A fol. 58

³⁴ A fol. 61

³⁵ <http://www.isleofman.com/News/details/69075/royal-skandia-becomes-old-mutual-international>

³⁶ A fol. 24 & 75

The contested underlying investments within the said Policy included various investments into structured notes as emerging from the dealing instruction notes attached to the Complaint.³⁷

In her Complaint, the Complainant claimed that her money was invested in '*high risk companies*'³⁸ with the Service Provider noting that they take this to mean that she was referring to '*the structured notes which Continental Wealth had recommended*'.³⁹

In her formal complaint with the Service Provider, the Complainant specifically referred to the '*high-risk, professional-investor-only structured notes*' that she was invested into.⁴⁰

In addition to structured notes, the Complainant's portfolio also constituted investments in collective investment schemes as acknowledged by both parties to the Complaint.⁴¹

Underlying Investments

The Complainant enclosed a number of dealing instruction forms with her Complaint Form as follows:⁴²

- a) Dealing instruction dated 24 June 2014 to sell GBP 16,000 of the **RBC Biotech Income**;⁴³
- b) Dealing instruction dated 02 July 2014 to buy GBP 15,000 of the **Nomura 10% Energy**;⁴⁴
- c) Dealing instruction dated 15 July 2014 to sell all the units in the **RBC Biotech Income**;⁴⁵

³⁷ A fol. 15 - 22

³⁸ A fol. 4

³⁹ A fol. 50

⁴⁰ A fol. 33

⁴¹ A fol. 62 & 75

⁴² A fol. 15-22

⁴³ Security identifier/ISIN - XS0979786620 - A fol. 15

⁴⁴ Security identifier/ISIN XS1078774871 - A fol. 16

⁴⁵ Security identifier/ISIN XS0979786620 - A fol. 17

- d) Dealing instruction dated 25 July 2014 to buy GBP10,000 of **Nomura 10% Retail** and also to buy GBP5,000 of **RBC Cloud**;⁴⁶
- e) Dealing instruction dated 30 July 2014 to buy GBP 5,000 of the **RBC Online Large Caps**;⁴⁷
- f) Dealing instruction dated 02 April 2015 to sell 1,000 units of the **RBC Online Large Caps**;⁴⁸
- g) Dealing instruction dated 29 October 2015 to buy GBP 4,000 of the **Marlborough Multi Cap**;⁴⁹
- h) Dealing instruction dated 26 August 2016 to sell all the units of the **RBC Online Large Cap** and also to buy GBP 5,000 of the **RBC Online Large Cap**.⁵⁰

The said dealing instruction forms indicated by the Complainant thus cover transactions in structured notes with the exception of the Marlborough Multi Cap, this being a mutual fund.

It is noted that the dealing instruction forms presented during the case seem to only cover certain transactions in 2014, 2015 and 2016.

Valuation Statement

The Complainant submitted a valuation statement dated 20 February 2018 in respect of the Executive Investment Bond ('the Policy').⁵¹ The statement indicates the named policyholder as '*STM Malta Trust & Company Management Limited as trustee of STM Malta Ret Plan: CN*'.⁵²

The valuation statement indicates that a total premium of GBP77,843.69 was paid into the Executive Investment Bond and a total withdrawal of GBP15,845.86 was made from the Policy as at 20 February 2018.⁵³

⁴⁶ Their security identifier/ISIN being XS1089856824 and XS1078168876 respectively - A fol. 18

⁴⁷ Security identifier/ ISIN XS1092556452 - A fol. 19

⁴⁸ Security identifier/ ISIN XS1092556452 - A fol. 20

⁴⁹ Security identifier/ ISIN GG00BKM40874 - A fol. 21

⁵⁰ Their security identifier/ ISIN being XS1092556452 and XS1468789208 respectively - A fol. 22

⁵¹ A fol. 23

⁵² *Ibid.*

⁵³ A fol. 24

The statement also indicates that the total current market value of the Policy as at 20 February 2018, amounted to GBP20,540.81 with this figure comprising a cash balance of GBP16,619.46 (80.91% of the policy value as at that date) and an investment in a collective investment scheme, the *'Marlborough Intern Marlborough Multi Income F GBP'*,⁵⁴ of GBP3,921.35 (19.09% of the policy value as at that date).⁵⁵

The Executive Investment Bond accordingly experienced a reduction in value of GBP41,457.02⁵⁶ (net of withdrawals) over the 5-year period from commencement of the Policy in 2012 till 20 February 2018. This equates to a reduction in value equivalent to 53.257% of the total investible premium of the Policy.⁵⁷

The only remaining investment which featured in the valuation statement dated 20 February 2018, was the *'Marlborough Intern Marlborough Multi Income F GBP'* with a market value GBP3,921.35.⁵⁸ This investment has the same asset identifier no/ISIN GG00BKM40874 of the instrument indicated in the dealing instruction note of 29 October 2015 relating to an investment of GBP4,000 in the *'Marlborough Multi Cap'*.⁵⁹ The portfolio valuation statement as at 20 February 2018 thus indicates an unrealised paper loss of GBP78.65⁶⁰ on this investment.

The reduction in value on the Policy of GBP41,457.02⁶¹ accordingly features an unrealised loss of GBP78.65 on the only pending investment. The actual realised loss experienced by the Complainant on the underlying investments together with the fees paid within the overall Scheme's structure amounts to GBP41,378.37 according to the said statement. This reflects an actual realised

⁵⁴ A fol. 25

⁵⁵ A fol. 24

⁵⁶ Total premiums paid of GBP77,843.69 into the Executive Investment Bond less Total Withdrawals as at 20 February 2018 of GBP15,845.86 amounts to GBP61,997.83. The current market value as at 20 February 2018 is indicated as GBP20,540.81, with the total reduction in value after withdrawals thus amounting to GBP41,457.02 (GBP61,997.83 less GBP20,540.81) – A fol. 24

⁵⁷ GBP41,457.02 as a percentage of GBP77,843.69

⁵⁸ A fol. 24 & 25

⁵⁹ A fol. 21

⁶⁰ Book Cost of GBP4,000 less Market Value of GBP3,921.35

⁶¹ Total premiums paid of GBP77,843.69 into the Executive Investment Bond less Total Withdrawals as at 20 February 2018 of GBP15,845.86 amounts to GBP61,997.83. The current market value as at 20 February 2018 is indicated as GBP20,540.81, with the total reduction in value excluding withdrawals thus amounting to GBP41,457.02 (GBP61,997.83 less GBP20,540.81) – A fol. 24

loss (inclusive of fees paid to STM Malta and to other parties) equivalent to 53.155% of the total premiums paid by the Scheme into the Policy as at that date.⁶²

Responsibilities of the Service Provider

STM Malta is subject to the duties, functions and responsibilities applicable as a Retirement Scheme Administrator and Trustee of the Scheme.

Obligations under the SFA, RPA and directives/rules issued thereunder

The obligations of STM Malta as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the applicable conditions that at the time were outlined in the *'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'* ('the Directives').

Following the repeal of the SFA and eventual registration under the RPA, STM Malta became subject to the provisions relating to the services of a retirement scheme administrator under the RPA. As a Retirement Scheme Administrator under the RPA, STM Malta became subject to the conditions outlined in the *'Pension Rules for Service Providers issued under the Retirement Pensions Act'* ('the Pension Rules for Service Providers') and the *'Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act'* ('the Pension Rules for Personal Retirement Schemes').

One key duty of the Retirement Scheme Administrator emerging from the primary legislation itself is the duty to *'act in the best interests of the scheme'* as outlined in Article 19(2) of the SFA and Article 13(1) of the RPA.

From the various general conduct of business rules/standard licence conditions applicable to STM Malta in its role as Retirement Scheme Administrator under the SFA/ RPA regime respectively, it is pertinent to note the following general principles:⁶³

- a) Rule 2.6.2 of Part B.2.6 titled *'General Conduct of Business Rules applicable to the Scheme Administrator'* of the Directives issued under the SFA, which

⁶² GBP41,457.02 as a percentage of GBP77,843.69

⁶³ Emphasis added by the Arbitrator

applied to STM Malta as a Scheme Administrator under the SFA, provided that:

‘The Scheme Administrator shall act with due skill, care and diligence – in the best interests of the Beneficiaries ...’.

The same principle continued to apply under the rules issued under the RPA. 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 RPA, and which applied to MPM as a Scheme Administrator under the RPA, provided that:

‘The Service Provider shall act with due skill, care and diligence ...’.

- b) 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, which applied to STM Malta as a Scheme Administrator under the SFA, provided that:

‘The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries ...’.

The same principle continued to apply under the rules issued under the RPA. 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, provided that:

‘The Scheme’s assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document’.

Trustee and Fiduciary Obligations

As highlighted in the section titled *‘The Legal Framework’* above, the Trusts and Trustees Act (‘TTA’), Chapter 331 of the Laws of Malta, is also relevant for STM Malta considering its capacity as Trustee of the Scheme.

Article 21 (1) of the TTA which deals with the *‘Duties of trustees’*, stipulates a crucial aspect, that of the ***bonus paterfamilias***, which applies to STM Malta.

The said article provides that:

'(1) 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 its role as Trustee, STM Malta was accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property *'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'*.⁶⁴

As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'.⁶⁵

The fiduciary and trustee obligations were also highlighted by MFSA in a recent publication where it was stated that:

'In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract,

⁶⁴ Pg. 174, *'An Introduction to Maltese Financial Services Law'*, Editor Dr Max Ganado, Allied Publications 2009.

⁶⁵ Pg. 178, *'An Introduction to Maltese Financial Services Law'*, Editor Dr Max Ganado, Allied Publications 2009.

*quasi-contract or trusts. In particular, the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations’.*⁶⁶

Although this Consultation Document was published in 2017, MFSA was basically outlining principles established both in the TTA and the Civil Code which had already been in force prior to 2017.

The above are considered to be crucial aspects which should have guided STM Malta in its actions and which shall accordingly be considered in this decision.

Other relevant aspects

One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments.**

Whilst the Service Provider has not made reference to such function in this case, but chose to highlight other aspects instead, it is clear that such a duty applied to STM Malta in its role of Retirement Scheme Administrator and Trustee of the Scheme.

Other Observations and Conclusions

Claims relating to the signature on the dealing instructions & other important aspects

The Complainant claimed that her signature on the dealing instructions were forged stating that although the dealing instructions showed her signature, however, on no occasion did she authorise such instructions. The Complainant just explained in this regard that her signature was ‘100% identical, which is impossible to achieve naturally’.⁶⁷

The claim of forged signature is a serious allegation which had to be specifically proven by specific facts and in the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the

⁶⁶ Page 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.

⁶⁷ A fol. 4

allegation. However, the Complainant making this allegation did not provide enough evidence for the Arbiter to accept her allegation.

The Arbiter observes that the claim of forged signatures involves dealing instructions which span over two years, from June 2014 till August 2016. The allegations of false signatures over such a long period of time raises another aspect, that relating to the adequacy of the communications and reporting of the Service Provider.

Indeed, it is noted that during this case no details were presented of the type of ongoing reporting made by the Service Provider to the Complainant with respect to the Scheme, its performance and underlying investments.

It is noted that the Complainant claimed *inter alia* that:

'In fact, I had no direct correspondence with STM ... I received no annual statements which might have alerted me to downturns in my fund value ... I had never seen those dealing instructions before I requested them in 2017, so in five years I was never informed of the progress, or not, of my investments'.⁶⁸

The Service Provider did not refer to, nor present any statements and reports it issued to the Complainant on the status of the Scheme and its underlying investments. Neither did the Service Provider contest the above-mentioned statements made by the Complainant.

The claims made by the Complainant *inter alia*, thus, put into question the procedures used and methods of communications adopted by STM Malta with the Complainant.

The serious allegations about the false signatures on dealing instructions, which were alleged to have occurred over a long period of time, could have been easily avoided and/or at least addressed in a timely manner with simple measures and safeguards adopted by the trustee and scheme administrator if there were adequate communication and reporting.

⁶⁸ A fol. 63

In the context of member-directed schemes such measures could have involved, for example, accepting communications either from the Complainant or with the Complainant being in copy in certain communications involving dealing instructions/confirmation of execution; and/or the member being adequately and promptly informed by the Service Provider of the purchases and redemptions being made within the portfolio of investments.

The apparent lack of adequate controls and administrative procedures reasonably put into question the Service Provider's adherence with the requirements to have adequate operational, administrative and controls in place in respect of its business and that of the Scheme as it was required to do in terms of Rule 2.6.4 of Part B.2.6 of the Directives under the SFA⁶⁹ and Standard Condition 4.1.7, Part B.4.1 of the Pension Rules for Service Providers issued under the RPA⁷⁰ as well as Standard Condition 1.2.2, Part B.1.2 of the Pension Rules for Personal Retirement Schemes⁷¹ issued in terms of the RPA during the respective periods when such rules applied as outlined above.

Moreover, the Arbiter further notes that prior to being subject to the regulatory regime under the RPA, which also included requirements relating to the provision of information and ongoing reporting,⁷² the Service Provider was subject to regulatory requirements relating to *inter alia* the provision of adequate information to members.

The following provisions under the SFA framework are relevant in this regard:

⁶⁹ Rule 2.6.4 of Part B.2.6 titled 'General Conduct of Business Rules applicable to the Scheme Administrator' of the Directives issued under the SFA, which applied to STM Malta as a Scheme Administrator under the SFA provided that 'The Scheme Administrator shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative and financial procedures and controls in respect of its own business and the Scheme to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed ...'.

⁷⁰ Standard Condition 4.1.7, 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 RPA, provided that 'The Service Provider shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative and financial procedures and controls in respect of its own business and the Scheme or Retirement Fund, as applicable, to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed.'

⁷¹ Standard Condition 1.2.2, Part B.1.2 titled 'Operation of the Scheme', of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, required that 'The Scheme shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative and financial procedures and controls to ensure compliance with all regulatory requirements'.

⁷² Such as condition 9.3(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes of 1 January 2015.

- Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002⁷³ respectively already provided that:

'2.6.2 The Scheme Administrator shall act with due skill, care and diligence in the best interests of the Beneficiaries. Such action shall include:

...

- b) ensuring that contributors and prospective contributors are provided with adequate information on the Scheme to enable them to take an informed decision ...';*

'2.6.3 The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and not misleading. This shall include:

...

- b) reporting fully, accurately and promptly to contributors the details of transactions entered into by the Scheme ...'.*

The Arbiter has not been provided during the case in question with any comfort as to whether the Complainant was being adequately and promptly informed by STM Malta regarding the status of the Scheme, its performance and underlying investment portfolio, choosing also not to contest either the statements about the lack of adequate reporting made by the Complainant as indicated.

The above aspects relating to the apparent lack of adequate reporting as well as controls and administrative procedures will be given their due weight in the final decision after the Arbiter considers the remaining principal alleged failures which follow next.

⁷³ Condition 2.2 of the Certificate of Registration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives.

Other key considerations relating to the principal alleged failures

In addition to the issue of the signatures on the dealing instructions which has been already considered above, the Complainant raised the following principal alleged failures in respect of the Service Provider:

- (i) That STM Malta were negligent in dealing with an unregistered company with the Complainant claiming that CWM was not registered to operate in Spain;
- (ii) That the pension portfolio was invested in high risk companies when she is a much more cautious investor. Hence, this claim relates to the suitability of the portfolio of investments allowed within the Scheme.

General observations

On a general note, it is clear that STM Malta did not provide investment advice in relation to the underlying investments of the member-directed scheme. The role of the investment advisor was the duty of other parties, such as CWM.

This would reflect on the extent of responsibility that the financial advisor and the RSA and Trustee had in this case as will be later seen in this decision.

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested financial instruments, **STM Malta had nevertheless certain obligations to undertake in its role of Trustee and Scheme Administrator.**

The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial bearing on the operations and activities of the scheme and affect direct, or indirectly, its performance.

Consideration thus needs to be made as to whether STM Malta failed in any relevant obligations and duties and, if so, to what extent any such failures are considered to have had a bearing or otherwise on the financial performance of the Scheme and the resulting loss for the Complainant.

(i) Regulatory status of the investment advisor

The Complainant chose herself the appointment of Continental Wealth Management to provide her with investment advice in relation to the selection of the underlying investments and composition of the portfolio within her Scheme. The Retirement Scheme Administrator, from its part, allowed and/or accepted the investment advisor to provide investment advice to the Complainant within the structure of the Retirement Scheme.

The Complainant explained *inter alia* that:

'At the time I made the new arrangements to my pension, I assumed that Continental Wealth Management SL was a bona fide financial advisory firm which was legally licensed ...'.⁷⁴

The Complainant also explained that:

'CWM was, at the time, a tied agent of Inter-Alliance Worldnet, a firm in Cyprus which was regulated with the Cyprus Insurance Companies Control Service. Inter-Alliance had an insurance licence – however, this was only for Inter-Alliance and could not be passed on to another entity'.⁷⁵

The Complainant further explained that in 2016, Inter-Alliance folded and was replaced by a firm called Trafalgar International which was regulated in Germany for both insurance and investment advice. It was noted that such authorisation could not be passed to another separate legal entity and that CWM continued to be an entirely unlicensed corporate entity.⁷⁶

Whilst no evidence has emerged throughout the case indicating that CWM was a regulated party, it is noted that the Complainant has however not submitted any documentation related to the Scheme which indicated, or could have led her to assume, that her financial advisory firm, CWM, was legally licensed.

It is further noted that in its submissions, the Service Provider, from its part did not delve into the regulatory status of such party.

⁷⁴ A fol. 58

⁷⁵ *Ibid.*

⁷⁶ A fol. 59

The regulatory framework applicable to the Scheme and the Service Provider in Malta has been updated over the years. At the time of the Complainant's membership into the Scheme in August 2012, the regulatory framework seems to have allowed certain scenarios with respect to the appointment of an investment advisor until the coming into force and application of relevant provisions in section B9 of Part B of the Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011.⁷⁷

The said section of the latest rules includes *inter alia* the criteria that need to be satisfied in respect of investment advisors of member directed schemes. These include the requirement for the investment advisor to be subject to *inter alia* authorisation and regulation as is specified in standard licence condition 9.6 (b) of the said rules.⁷⁸

Such an equivalent condition has not been found in the framework under the SFA regime and indeed the MFSA allowed a transitional period, until 1 July 2019, for compliance with the rules indicated above stipulating the criteria to be satisfied in respect of investment advisors.⁷⁹

Hence, the Arbiter has no clear and sufficient evidence that the Retirement Scheme Administrator was prohibited, by the applicable regulatory framework at the time, from allowing the appointment of an unregulated investment advisor.

However, the appointment of an unregulated entity to act as investment advisor meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where a regulated advisor is appointed. An adequately regulated financial advisor is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory

⁷⁷ Pages 4/5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017/15-2018) issued in relation to the '*Consultation on Amendments to Pension Rules for Personal Retirement Schemes*' - <https://www.mfsa.com.mt/publications/policy-and-guidelines/feedback-and-statements/>; Page 9 of the MFSA's Consultation Document dated 16 November 2018 titled '*Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' (MFSA Ref. 15/2018) also refers - <https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/>.

⁷⁸ Last updated 28 December 2018 - <https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/#Pension%20Rules>

⁷⁹ Page 5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017 / 15-2018) issued in relation to the '*Consultation on Amendments to Pension Rules for Personal Retirement Schemes*'.

authority. The Retirement Scheme Administrator and Trustee of the Retirement Scheme, a regulated entity itself, should have been duly cognisant of this.

In the scenario where an unregulated advisor was allowed to provide investment advice to the member of a member-directed scheme, **one would reasonably expect the Service Provider, in its role of Retirement Scheme Administrator and Trustee of the Retirement Scheme, to exercise even more caution and prudence in its dealings with an unregulated party.**

This is even more so, when the activity in question, that is, one involving the recommendations on the choice and allocation of underlying investments, has a material bearing on the financial performance of the Scheme and the objective of the retirement scheme to provide for retirement benefits.

It would have accordingly been only reasonable to expect the retirement scheme administrator and trustee to have an even higher level of disposition in the probing and querying of the actions of such unregulated party in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances. This aspect shall be taken into account in the decision taken in this case.

(ii) The permitted portfolio composition

A general search over the internet on the underlying investments indicated in the dealing instructions notes presented by the Complainant yielded fact sheets for the RBC Biotechnology Income Note⁸⁰ and RBC Online Large Caps Income Note.⁸¹

The fact sheet for the RBC Biotechnology Income Note describes *inter alia* the product as a 'Reverse Convertible Notes linked to a selection of biotechnology stocks', and 'an investment providing fixed levels of income of 8.5% p.a. over a 2 year term, and linked to the performance of the Biotechnology sector'.⁸² The fact

⁸⁰ ISIN XS0979786620 - <https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-Income-Note-FACTSHEET.pdf>

⁸¹ ISIN XS1092556452 - <https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-10pa-Online-Large-Caps-Income-FACTSHEET.pdf>

⁸² <https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-Income-Note-FACTSHEET.pdf>

sheet for the RBC Online Large Caps Income Note describes *inter alia* the product as an 'Autocallable Fixed Income Notes linked to a selection of online companies specialised on retail and discretionary services', being 'an investment providing fixed levels of income of 10% p.a., over a 2 year term, and linked to the performance of online companies'.⁸³

Both fact sheets indicate, in the Key features section, that the target audience for these products were 'Professional Investors Only'.

The high rate of returns indicated on these products in themselves reflect the high level of risk as per the risk-return trade-off. The fact sheets of the said structured notes also highlighted a number of risks in respect of the capital invested into these products.

Apart from *inter alia* the credit risk of the issuer and the liquidity risk, the indicated fact sheets also highlighted risk warnings about the notes not being capital protected, warning that the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment.

A particular feature emerging in the indicated structured notes, involved the application of capital buffers and barriers. In this regard, the fact sheets described and included warnings that the invested capital was at risk in case of a particular event occurring. Such event comprised a fall, observed on a specific date of more than a percentage specified in the respective fact sheet, in the value of any underlying asset to which the structured note was linked.

The said fact sheets further both included a warning that:

'If any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity, and capital will be lost'.⁸⁴

⁸³ <https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-10pa-Online-Large-Caps-Income-FACTSHEET.pdf>

⁸⁴ <https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-2yr-RBC-Biotechnology-Income-Note-FACTSHEET.pdf>
<https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-10pa-Online-Large-Caps-Income-FACTSHEET.pdf>

It is clear that there were material consequences if just one asset, out of a basket of assets to which the said structured notes were linked, fell foul of the indicated barrier. The implication of such a feature should have not been overlooked nor discounted.

Whilst the fact sheets of other structured notes invested into were not presented or not traced, it is nevertheless clear that the portfolio of the Complainant indeed included structured notes which carried certain risks not reflective of a prudent approach as one would expect in a pension portfolio, and as ultimately required in terms of the rules (as outlined in the section titled 'Responsibilities of the Service Provider' above).

The Service Provider, on its part, argued *inter alia* that '*structured notes may be a suitable investment to be included in pension schemes*' noting that '*Structured notes in general are designed so that within certain parameters they have less volatility than the underlying benchmark securities or indices*'.

Nevertheless, STM Malta has not shown nor provided any details itself on what basis the structured notes invested into were considered suitable within the Complainant's pension scheme. Nor has the Service Provider demonstrated that the structured notes constituting the Complainant's portfolio carried less volatility or were not of high risk as it implied in its submissions.

The features of the structured notes outlined in the fact sheets sourced cannot be considered to have less volatility or not being of high risk in view of their particular features as outlined above. In the circumstances, it has transpired that the portfolio actually included investments which cannot be considered to reflect the arguments brought by the Service Provider as justification for the investment into structured notes.

In its submissions, the Service Provider noted that the MFSA had recognised the possible inclusion of structured notes in the portfolio of pensions schemes.

The Service Provider stated *inter alia* that:

'We note that the MFSA, in its recent draft revised regulations has recognised explicitly that structured notes may be held in pension schemes'.⁸⁵

Whilst the current pension rules issued by the MFSA indeed do allow a limited exposure to structured notes, it is nevertheless important to keep in mind and consider other relevant and appropriate aspects mentioned in the same MFSA rules. Indeed, the current Pension Rules for Personal Retirement Schemes also provide *inter alia* for the requirement to ensure that in case of a retail member the chosen investments are of a retail nature as per Standard Licence Condition 9.5(d)(ii)(bb) of the said rules.⁸⁶

Hence, the general statements made by the Service Provider do not provide any comfort whatsoever in the circumstances of this case, even more so, when it has been clearly determined that the Complainant's portfolio included investments not suitable for a retail member. The information found on the said products are indeed indicative of certain high risks being taken in the Complainant's portfolio.

Moreover, they indicate instances where STM Malta permitted investments targeted for professional investors within the Complainant's portfolio with such investments clearly not reflective of the Complainant's profile as a retail investor and, thus, cannot be construed as reflecting the principle of prudence or in acting in the best interests of the Complainant as was required in terms of the rules.

Excessive exposure to structured notes and single issuers

The Complainant claimed that 75% of her money was invested in structured notes (RBC) and that STM Malta did not query whether this was a wise investment.⁸⁷

⁸⁵ A fol. 50

⁸⁶ The said condition provides the following: *'(bb) unless a Member requests to be classified as a professional member, a Member may only invest in investments which can be classified as suitable for a retail member: Provided that the responsibility of the Retirement Scheme Administrator in assessing the investments chosen shall be limited to carrying out due diligence on the proposed investment, following which the Retirement Scheme Administrator is satisfied on reasonable grounds that the investment can be classified as suitable for a retail member'.*

⁸⁷ A fol. 63

Whilst such figure could not be verified from the documentation presented by the Complainant, the Service Provider has not, however, contested either such a statement that 75% of her money was invested into such products.

The dealing instruction notes presented by the Complainant nevertheless indicate various transactions in structured notes as listed in the section titled '*Underlying investments*' above.

The extent of losses experienced by the Complainant, where the statement as at 20 February 2018 indicated a realised loss of GBP41,378.37 inclusive of fees paid (equivalent to more than half of the total premiums paid into the Scheme), and a further unrealised loss on the remaining investment of GBP78.65, as indicated in the section titled 'Valuation Statement' above, is in itself indicative of the failure in achieving the Scheme's objective and ensuring adequate diversification and avoidance of excessive exposures. Otherwise, material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have not occurred.

Other observations

STM Malta did not help its case by not providing information on the underlying investments and not presenting any documentation relating to the Scheme. The Service Provider chose not only not to present any details on the investment portfolio, including charges and valuation, but it did not even submit copies of any documentation relating to the Scheme relevant to the case in question, opting instead to discretionally select and quote parts of documentation in its submissions, namely, various disclaimers and warnings relating to the Scheme, without actually presenting the actual and full documentation referred to.

Causal link

The actual cause of the losses experienced by the Complainant on her Retirement Scheme cannot just be attributed to the under-performance of the investments as a result of general market and investment risks and/or the alleged fraud by the investment advisor as argued by the Service Provider in its submissions.

There is sufficient and convincing evidence of deficiencies on the part of STM Malta in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above. At the very least, such deficiencies impinge on the diligence it was required and reasonably expected to exercise in such roles.

It is also evidently clear that such deficiencies prevented the losses from being minimised and, in a way, contributed in part to the losses experienced. The actions and inactions that occurred, as explained in this decision, enabled such losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.

Had STM Malta undertaken its role adequately and as duly expected from it in terms of the obligations resulting from the law, regulations and rules stipulated thereunder, as explained above, such losses would have been avoided or mitigated accordingly.

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with STM Malta being one of such parties.

The losses experienced on the Retirement Scheme is, in the case in question, ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which STM Malta was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainant.

Final remarks

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, and to select the underlying investments of the Retirement Scheme, the Retirement Scheme Administrator had a duty to check and ensure that the portfolio composition recommended by the investment advisor was *inter alia* in line with the applicable requirements and reflected the profile of the Complainant in order to ensure that the interests of the Complainant are duly safeguarded.

It should have also ensured that the portfolio composition was one enabling the aim of the Retirement Plan to be achieved with the necessary prudence as one would reasonably expect from a retirement plan. The Scheme Administrator and Trustee had to, in practice, promote the scope for which the Scheme was established by allowing a portfolio of investments which reflected such scope.

The principal purpose of a personal retirement scheme is ultimately that to provide retirement benefits. Such purpose is reflected under the primary legislation, the Special Funds (Regulation) Act ('SFA')⁸⁸ and the Retirement Pensions Act ('RPA').⁸⁹

It is considered that, had there been a careful consideration of the contested structured products, the Service Provider should have intervened and raised concerns at the very least on certain investments into structured notes forming part of the Complainant's portfolio. It should have not allowed risky investments as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others. Apart from being its duties as a Retired Scheme Administrator, the Service Provider was also the Trustee who had to act in the best interests of his client.

The Complainant ultimately relied on STM Malta as the Trustee and Retirement Scheme Administrator of the Scheme, as well as other parties within the Scheme's structure, to achieve the scope for which the pension arrangement was undertaken, that is, to provide for retirement benefits and also reasonably expect a return to safeguard her pension.

Whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension

⁸⁸ Article 2(1) of the SFA defined a 'scheme' to mean '*a scheme or arrangement which is registered under this Act under which payments are made to beneficiaries for the principal purpose of providing retirement benefits...*'.

⁸⁹ Article 2 of the RPA defines a 'personal retirement scheme' as: '*a retirement scheme which is not an occupational retirement scheme and to which contributions are made for the benefit of an individual*'. A 'retirement scheme' is, in turn, defined under Article 2 of the RPA, as '*a scheme or arrangement as defined in article 3*', where Article 3(1) stipulates that '*A retirement scheme means a scheme or arrangement with the principal purpose of providing retirement benefits*'. Article 2 of the RPA also defines 'retirement benefit' as meaning: '*benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death*'.

portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly, when it came to the oversight functions with respect to the Scheme and portfolio structure as well as the reporting to the Complainant on her underlying portfolio.

It is also considered that there are various instances which indicate non-compliance by the Service Provider with applicable requirements and obligations as amply explained above in this decision.

The Arbiter also considers that the Service Provider did not meet the *'reasonable and legitimate expectations'*⁹⁰ of the Complainant who had placed her trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case and is accepting it in so far as it is compatible with this decision.

However, cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment advisor to the member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be only partially held responsible for the losses incurred.

⁹⁰ Cap. 555, Article 19(3)(c)

Compensation

Being mindful of the key role of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of The STM Malta Retirement Plan and, in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by STM Malta for part of the realised losses on her pension portfolio.

In the particular circumstances of this case, considering the role of STM Malta as Trustee and Retirement Scheme Administrator of the Scheme and the extent of deficiencies determined, the Arbiter considers it fair, equitable and reasonable for STM Malta to be held responsible for seventy per cent of the realised losses sustained by the Complainant on her overall investment portfolio.

The Arbiter notes that the latest valuation is not current and during the proceedings no full details emerged of the realised losses on investments.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for the Complainant for the purpose of this decision.

Given that the Complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of Continental Wealth Management acting as advisor, compensation shall be provided solely on the investment portfolio constituted under Continental Wealth Management and allowed by the Service Provider.

The Net Realised Loss calculated on such portfolio shall be determined as at the date of this decision and calculated as follows:

- (i) For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Complainant's investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any**

realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised).

Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

- (ii) In case where an investment in (i) above is calculated to have rendered a profit after taking into consideration the amount realised (inclusive of any total interest or other total income received from the respective investment), such realised profit shall be accumulated from all such investments and netted off against the total of all the realised losses from the respective investments calculated as per (i) above to reach the figure of the Net Realised Loss within the indicated portfolio.**

The computation of the Net Realised Loss shall accordingly take into consideration any realised gains or realised losses arising within the portfolio, as at the date of this decision.

- (iii) In case where the remaining investment which was held by the Complainant as reflected in OMI's Valuation Summary dated 20 February 2018, is still held within the Scheme's portfolio of underlying investments as at, or after, the date of this decision such investment shall not be subject of the compensation stipulated above.**

This is without prejudice to any legal remedies the respective Complainant might have in future with respect to such investment.

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 indicated amount of compensation.

A full and transparent breakdown of the calculations made by the Service Provider in respect of the compensation as decided in this decision, shall be provided to the Complainant.

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

Because of the novelty of this case, each party is to bear its own legal costs of these proceedings.

**Dr Reno Borg
Arbiter for Financial Services**