Before the Arbiter for Financial Services

Case No. 484/2016

BK

vs

STM Malta Trust & Company Mgt. Ltd.

(C51028) (the Service Provider)

Today, 28 November 2017

The Arbiter,

Having seen the complaint,

Having seen the reply by the service provider,

Having heard the parties and their submissions,

Having seen all the documentation of the case,

Considers

Summary of the facts and the positions of both parties

The Complainant raises a complaint against STM Malta Trust & Company Management Ltd. ('STM' or 'Service Provider'), an entity regulated by the MFSA, involving a retirement plan, the STM Malta Retirement Plan ('the Retirement Plan') issued by STM.

Product was sold to the Complainant by DeVere Group (Abu Dhabi) who convinced the Complainant to take out the Retirement Plan, including the Friends Provident International Reserve Bond as an underlying investment of

the Plan[1] ('the Policy' or 'Bond' as referred to interchangeably in the documentation provided).

The Complainant had applied for the Retirement Plan on 25 November 2015,[2] and he was admitted as a member of the Retirement Plan on 18 December 2015.[3]

The policy was issued by Friends Provident on 22 February 2016,[4] and was received by STM - as the Trustee and Administrator of the Plan[5] acting on the Complainant's behalf and named itself as the Policy Holder[6] - on the 5 March 2016 (12 days after the Policy was issued). The Policy was submitted to the Complainant by STM on 29 March 2016, 23 days after the documents were received by STM, and 7 days before expiry of the cooling-off period on 5 April 2016.[7]

The Complainant had identified an error in the Policy in relation to his source of funds on 4 April 2016, with such error being indicated as a typo by STM as their records were correct[8] and with the updated corrected Policy documents sent by STM to the Complainant on 6 April 2016, beyond the cancellation notice period.[9]

The Policy issued by Friends Provident allowed the recipient 30 days cooling-off period within which to cancel the policy. STM interprets the 5 April 2016, as the end of the cooling-off period, this being 30 days following receipt by STM (and not by the Complainant) of the Policy.[10]

The Complainant decided to change his advisor DeVere, with which he was not happy after also discovering high costs associated with the Policy,[11] but when he eventually ordered the cancellation of the Policy invoking the cooling-off period, he was informed that the 30 days' period had already expired and

[1] Fol. 6
[2] Fol. 17
[3] Fol. 18
[4] Fol. 19
[5] Fol. 17 pt. 11
[6] Fol. 8 & 21
[7] Fol. 8 & 64
[8] Fol. 95
[9] Fol. 97
[10] Fol. 8 & 64
[11] Fol. 6

surrender charges amounting to GBP33,082.64, now applied for the cancellation of the policy.[12]

STM were only notified by the Complainant that he was unhappy with his advisor De Vere, the costs of the Policy and of his wish to cancel the Policy on 20 April 2016, (22 days after receipt by him of the original policy). He indicated that this was within the 30 days' period of his sight of the Policy.[13] The cooling-off period was, however, determined to have ended on the 5 April 2016 and so the Policy surrender charges were deemed to apply at that stage.[14]

The Complainant complained about the way STM performed in relation to his Retirement Plan[15] highlighting *inter alia* that STM did not fulfil their 'duty of care' in making him aware of the cooling-off period dates in relation to the Policy which contained GBP346,595.32 of his pension funds as STM did not provide him with the policy documents in a timely manner and left him little time to review its contents and consider the option to cancel. He only had less than 7 days after policy docs. were submitted to him by STM, before cooling-off period ended. The Complainant claimed that no explanations were provided by STM for the delays in sending the Policy documents, their responsibilities with respect to the applicable timelines and notification of the final date for his right to cancel the Policy.[16]

The Complainant further stated that STM were very slow to advise him about the terms of surrender of the Policy as STM advised him of costs of cancellation on 21 July 2016, after more than 3 months from his request to cancel (during which period STM unsuccessfully sought a reduction in the surrender charges applied by Friends Provident).[17] The Complainant had expressed his frustration at the lack of communications by STM regarding his complaint.[18] There were a number of reminders sent by the new advisors of BK (Killik & Co.) requesting status updates about the case.[19]

[12] Fol. 8
[13] Fol. 97
[14] Ibid.
[15] Fol. 8
[16] Fol. 9 & 103
[17] Fol. 8, 104 & 105
[18] Fol. 99
[19] Fol. 101 & 102

STM accepted no responsibility for the delays and gave no admission of liability to cover all or part of the surrender costs for which the Complainant was deemed to be fully responsible,[20] but only offered to waive their own surrender charges if the Complainant wishes to surrender the Policy and leave the Retirement Plan[21] and waive the annual trust fee for 2017 (which amounts to GBP890) if the Complainant decides to retain his investment in the Policy.[22]

1. In his complaint to the Arbiter[23] the Complainant asked for STM to:

a) pay costs of cancellation of the Policy (GBP33,082.64);

b) compensate for loss of investment earnings over one quarter (GBP 3,465.95) as he ended up losing income on his pension funds which remain un-invested – calculated by BK as 1% of his funds (GBP 346,595) with the 1% being claimed by BK to be a conservative growth by a typical managed fund over the period April-July 2016;

c) recovery of costs of investment in Policy for one quarter (GBP866.48) – calculated as 0.25% of his investment (GBP346,595); which in all amount to a total of GBP37,415.07

The Service Provider submits that:[24]

- the Complainant was aware of cooling-off period for 8 days prior to its expiry;

- the timeline of events was expressed to the Service Provider after expiration of the cooling-off period and for reasons totally unconnected with the Service Provider;

- that the suitability report signed in November 2015 clearly outlined the applicable early surrender charges – email from Graham Sciberras dated 14 November 2016;

- between Nov 2015 and 5 April 2016, Complainant never expressed any concerns in relation to FPIRB;

[20] Fol. 9
[21] Ibid
[22] Ibid
[23] Fol. 10
[24] Fol. 113 et seq.

- the Complainant only raised issue with FPIRB after new advisors, Killik & Co. were appointed, later in April 2016, so argued that even if the Complainant would have received bond documentation a day after Service Provider has received it would have made no difference;

- the Service Provider still tried to negotiate the exit fee with FRIP to get the best exit deal for Complainant.

During the hearing of the 15 February 2017, the following main points emerged:

- The Complainant reiterated his claim that the administration of paperwork was slow and that he had barely time to take advantage of the cooling-off period. Claims also that there were errors in paperwork;

- The Complainant's second claim related to the amount of time the Service Provider took to recognise the complaint – over 3 months he had no news of how his complaint was being dealt with. There was significant delay in appointing someone to deal with his complaint.

- The Complainant claims he was not aware he had only 7 days to take advantage of the cooling-off period and that the Service Provider did not advise him of this limited time. The Complainant further confirmed that the Service Provider had not made him specifically aware of when the cooling-off period was to expire.

- The Complainant pointed out that although he accepted the terms of the bond in November 2015 he was only advised about costs of transacting through the bond and some very significant commission fees on transactions through the bonds only at the very end.

- The Complainant confirmed that in his emails to DeVere in April 2016, he understood that the fees would be charged every time he took out investments through the bond and that these, together with the initial cost of opening the bond, were very high.

- The Complainant clarified that the concerns raised in his email of 3 April 2016, were in relation to a number of unanswered questions about transfer of funds into the bond, the timeline of creation of bond and

about costs of transacting through the bond. Claimed he had been presented with new information about significant upfront commissions to be paid to DeVere to open investments in the bond.

- The Complainant remarked that he is not an experienced investor in pensions but a professional advisor in healthcare.

- The Complainant again confirmed under cross examination that he did not know from which date the 30 days were being counted.

The Service Provider maintained its position and filed two affidavits, one by James Witchell-Jones,[25] and the other by Graham Sciberras[26] explaining its position; and continued to refute the claims raised by the Complainant in its answers to the various questions made by the Complainant by way of cross-examination which have been carefully considered by the Arbiter.

Further Considerations and Conclusions

1. The case in question involves a Personal Retirement Plan (the STM Malta Retirement Plan), issued by the Service Provider (STM Malta Trust and and Company Management Limited) to the Complainant who was admitted as a member of the Retirement Plan on 18 December 2015.

2. On the advice of a third party financial advisor, DeVere in Abu Dhabi, the Complainant was to invest in the Friends Provident International Reserve Bond ('the Policy') as an underlying investment of the Retirement Plan. A Suitability Report related to the advice provided to the Complainant by the third party financial advisor was signed between the Complainant and the advisor on 25 November 2015.

3. The Policy was issued by Friends Provident on 22 February 2016, and was received by the Service Provider, as the Trustee and Administrator of the Retirement Plan, on the 5 March 2016. The Service Provider was itself named as the Policy Holder in respect of the said Policy in its capacity as the Trustee and Administrator of the Retirement Plan.

[25] Fol. 144 et seq
[26] Fol. 154 et seq

4. The Policy issued by Friends Provident allowed the recipient 30 days cooling-off period within which to cancel the policy. As confirmed by the Service Provider, the 5 April 2016, was the end of the cooling-off period, this being 30 days following receipt of the Policy by the Service Provider.

5. The Policy was submitted to the Complainant by the Service Provider only on the 29 March 2016, twenty-four (24) days after the documents were received by the Service Provider and seven (7) days before expiry of the cooling-off period, that is, the 5 April 2016.

6. The Service Provider was notified by the Complainant that he was unhappy with his financial advisor, the costs of the Policy and of his wish to cancel the Policy and his wish to appoint new advisors on 20 April 2016, (22 days after receipt by him of the original policy). The Complainant considers that this was within the 30 days' period of his sight of the Policy but by then the cooling-off period had already ended and so the Policy surrender charges were deemed to apply at that stage.

The Arbiter has to decide this case by reference to what in his opinion is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.[27]

Moreover, the Arbiter 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,***[28] *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.'*[29]

Having taken account of the information and documentation provided, and the representations made by the Complainant and the Service Provider during the proceedings and hearings relating to the case in question, the Arbiter concludes that:

[27] CAP 555, Art 19 (3)(b)
[28] Bold by Arbiter
[29] Ibid, Art 19(3)(c)

(a) There is an undisputed failure by the Service Provider to submit, in a timely manner, the Policy documents to the Complainant. The Policy document was not only not sent to the Complainant within the ideal timeframe of one day from receipt of the said document by the Service Provider, which timeframe was acknowledged by the Service Provider itself as being ideal in such scenarios during the hearing of 25 April 2017,[30] but was instead only submitted after a lengthy period of 24 days of receipt of the Policy document which resulted in the Complainant only receiving the documents a mere seven days before the actual expiry of the cooling-off period related to the Policy;

(b) The Service Provider has, moreover, failed to provide the Complainant with relevant details to enable him to be aware of the specific date of the expiry of the cooling-off period and hence, the Complainant did not even know of the short timeframe remaining in this regard. Failure to disclose relevant information to the Complainant, at the time of the submission of the Policy documents, meant that the Complainant was not in a position to know or determine the expiry date of the cooling-off period, and, hence, the Complainant was not able to reasonably know by when the benefit of the cooling-off period, to which there was an entitlement which the Complainant or through his Financial Advisor could indirectly exercise by giving relevant instructions to the Service Provider as Trustee. In the circumstance where the nature of the Scheme is one where it is Member Directed, as provided for in Part B.9 of the MFSA's Rules for Personal Retirement Schemes, and where thus the Service Provider is not authorised to provide investment advice to members and has no discretion on the investment decisions but is relying on the investment decisions being taken by the Complainant and his Financial Advisor, the Service Provider had an obligation to notify the Complainant of the option for cancellation so that this can be considered by the Complainant and his Financial Advisor as part of their investment considerations at that specific point in time. Condition 1.3.1 of Part B.1.3 titled '*Duties of Retirement Scheme Administrators*', of the Pension Rules for Retirement Scheme Administrators dated January 2015 issued by the MFSA specifically requires that "*The Scheme Administrator shall act in*

[30] Fol. 287.

the best interests of the Scheme Members and Beneficiaries". As a Retirement Scheme Administrator, the Service Provider was also subject to *inter alia* Condition 9.3 (b) of Part B.9 titled '*Supplementary Conditions in the case of Member Directed Schemes*' of the Pension Rules for Personal Retirement Schemes issued by the MFSA, which also provides that "*members have the right to timely and fair execution of their investment decisions and to written confirmation of these transactions*";

(c) The said shortcomings of timely notification of the execution of the investment and provision of adequate details relating to the cooling-off period, thus had material implications on the right, which could have been invoked by the Complainant or his Financial Advisor within the provisions of a Member Directed Scheme, to cancel the investment within the cooling-off period without incurring the surrender charges on the Policy;

(d) As a member of the Retirement Plan, the Complainant has a right to the disclosure of relevant information relating to the Plan. Clause 19.1 of the Declaration of Trust, also specifically provides that "*The Retirement Scheme Administrator shall provide to Members and Beneficiaries at such time or times as the Retirement Scheme Administrator reasonably considers necessary and at such other times as any applicable law requires such information in writing in relation to:…..19.1.2 the rights, entitlements and obligations of Members and Beneficiaries of the Scheme*";

(e) In its capacity as Trustee and Administrator of the Retirement Plan and being the named Policyholder and recipient of the Policy for the purposes of the cooling-off period, the Service Provider is ultimately reasonably expected and had the duty to submit, in a timely fashion, a copy of the Policy document to the Complainant and provide the Complainant with details relating to the entitlement of the cooling-off period applicable on the underlying investment of the Plan together with relevant information for one to determine by when such benefit could be exercised in order to be considered to act within the

obligations required in terms of the Pension Rules and the overriding condition to act in the best interests of the members;

(f) In its capacity as Trustee and Administrator, the Service Provider is also bound to *inter alia* act with the prudence, diligence and attention of a *bonus paterfamilias*, and in the best interests of the Member of the Retirement Plan;

(g) The argument that the Complainant had signed certain documentation for the investment in the Policy prior to receipt of the Policy document and had never raised issues before, should not be used as an excuse to reduce or do away with the benefit arising out of the cooling-off period, firstly because such benefit ultimately applies upon submission of the Policy document, secondly because there was a clear entitlement to such benefit which albeit could only be exercised by the Service Provider as Policyholder, the Service Provider was acting on the instructions of the Scheme Member/Financial Advisor with respect to his investment decisions, and thirdly because it is the duty of the Service Provider to act in the best interests of the Scheme members and hence to ensure that any applicable benefits are actually secured and communicated and not diminished or not applied by taking certain assumptions;

(h) The fact that the Service Provider was not the Financial Advisor and that a complaint should have been lodged with the Financial Advisor if there were concerns by the Complainant regarding his investment and that it should have been the advisor who should have advised the Complainant about any applicable cancellation notices and charges, is also not considered either to exonerate or reduce the duty of the Service Provider to disclose relevant information to the Member of the Retirement Plan and/or his Financial Advisor as may be provided in terms of the Scheme documentation, regarding the actual execution of the investment and the period for the applicable right to exercise the cooling-off period, even more when, as the named Policyholder, the Service Provider is the one receiving the Policy and is, thus, the one who is effectively in a position to communicate to the relevant parties when the Policy is received;

(i) The argument raised by the Service Provider that the Complainant was aware about the cooling-off period and surrender charges given that the Suitability Report signed in November 2015 included a statement reading "*Cancellation during the cooling-off period (if applicable) may result in you not getting back the full investment amount,*" is irrelevant as this is only a warning being made in the context of an investment in respect of which cancellation is exercised during the cooling-off period;

(j) The argument brought forward that even if the Complainant had received the Policy document a day after the Service Provider had received it would not have made any difference to the Complainant as he had chosen to exit the Policy upon the recommendation of new third party advisors which were appointed in late April 2016, seems somewhat baseless as these are mere assumptions and the Complainant had, nevertheless, at the time already concerns and issues on the Policy as evidenced in his communications with the third party financial advisor on 3, 4 and 5 April 2016.

In accordance with the Pension Rules to which it is subject to, the Service Provider did not notify, in a reasonable and timely way, relevant details about the investment and the applicable cooling-off period regarding the underlying investment.

For the above-stated reasons, the Arbiter concludes that the Service Provider did not observe the MFSA's Rules as stated above as he was bound to do.

After the enactment of Chapter 555 of the Laws of Malta, these rules do not serve only regulatory purposes but are important juridical norms that the Arbiter considers to reach a final conclusion. Moreover, in accordance with Article 19(3)(c) of CAP 555 of the Laws of Malta, the Service Provider did not satisfy '*the reasonable and legitimate expectations of the consumer*'[31] and had not acted in the best interests of the Complainant.

[31] Ibid

Decision:

For all the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable and upholds it in so far as it is compatible with this decision.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Trust and Company Management Limited (C51028) to refund the Complainant the claimed costs of cancellation of the Policy, that is, GBP33,082.64, as well as the recovery of costs of investment in the Policy amounting to GBP866.48, therefore, the total amount of GBP33,949.12.

The Complainant's request for the compensation for loss of investment earnings is, however, refuted on the basis that there were no assurances of earnings on the investments, which could have actually reduced in value during the period in question, with this being a risk which is also acknowledged and applicable during the cooling-off period as reflected in the cancellation notice itself.

The legal costs of this case are to be borne as to one-fifth by the Complainant and four-fifths by the Service Provider.

Dr Reno Borg
Arbiter for Financial Services