



MALTA

**QORTI TAL-APPELL**  
**(Sede Inferjuri)**

**ONOR. IMĦALLEF**  
**LAWRENCE MINTOFF**

Seduta tal-10 ta' Lulju, 2024

Appell Inferjuri Numru 66/2023 LM

**L-Avukat Dr. Martin Fenech u l-P.L. Peter Paul Sammut ġew maħtura bħala kuraturi deputati b'digriet tad-19 ta' Ottubru, 2023, biex jirrapreżentaw lil Robin Sangster (bil-karta tal-passaport Ingliż 562061161) u b'digriet tal-31 ta' Jannar, 2004, l-istess kuraturi deputati ġew estromessi**  
*(‘l-appellat’)*

**vs.**

**STM Malta Pension Services Limited (C 51028)**  
*(‘l-appellanta’)*

**Il-Qorti,**

**Preliminari**

1. Dan huwa appell magħmul mis-soċjetà intimata **STM Malta Pension Services Limited (C 50128)** [minn issa ‘l quddiem ‘is-soċjetà appellanta’] mid-deċiżjoni tal-Arbitru għas-Servizzi Finanzjarji [minn issa ‘l quddiem ‘l-Arbitru’]

mogħtija fis-17 ta' Mejju, 2023, [minn issa 'l quddiem 'id-deċiżjoni appellata'], li permezz tagħha ddecieda li jilqa' parzjalment l-ilment tar-rikorrent **Robin Sangster (Detentur tal-Passaport Ingliż nru. 562061161)** [minn issa 'l quddiem 'l-appellat'] kif ġej:

***“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 (fn. 72 Cap. 555, Article 19(3)(b)) and is accepting it in so far as it is compatible with this decision.***

***Cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying policy. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the damages incurred.***

***The claims of the Complainant are not being met in full to reflect the failure by his financial advisor to note, for example, the distinction between the encashment fee and the Marketing Fee in the policy documentation produced and the discrepancies emerging in the overall documentation as outlined above.***

***In deciding the extent of compensation to be awarded to the Complainant, consideration is also being made of the fact that the Complainant had himself signed the Policy Application Form which included the disputed Marketing Fee but which however was not included in the application for Scheme Membership.***

***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 Policyholder of the Providence Life policy, the Arbiter concludes that the Complainant should be compensated by STM Malta for damages suffered as a result of the lack of protection it afforded to safeguard his property and protect his interests.***

***Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the Complainant the amount of 50% (fifty percent) of the amount of any Marketing Fee that may be charged and paid on his underlying policy.***

***The extent of compensation in this case has been determined (and may differ from other cases which may be considered to have similar elements), on the basis of the particular circumstances of this case as indicated earlier on in this decision.***

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

***Each party is to bear its own costs of these proceedings.”***

## **Fatti**

2. Il-fatti tal-każ odjern jirrigwardaw *marketing fee* ta' £14,468.95, li tnaqqset minn polza ta' assigurazzjoni tal-ħajja miżmuma mill-appellat, wara li huwa f'Ottubru 2020 kien applika għat-trasferiment tal-investment tiegħu. L-imsemmija polza kienet inħarget minn Providence Life Limited bħala investment sottostant ta' skema tal-irtirar [minn issa 'l quddiem 'l-Iskema'] amministrata mis-soċjetà appellanta, fejn din il-miżata skont l-imsemmija soċjetà appellanta kellha titnaqqas bir-rata ta' 1% fis-sena mill-investment tiegħu. Madankollu huwa kien gie mgħarraf mingħand Providence Life Limited li għalkemm imnaqqsa mill-polza, it-tnaqqis relatat ma kienx gie rifless fil-valutazzjoni tagħha minħabba żball fis-sistema tagħha. B'hekk skont l-appellat is-soċjetà appellanta kienet qiegħda tippretendi li titħallas drittijiet b'percentwali komplessiv ta' 2.75%, meta fl-applikazzjoni tiegħu sabiex jissieheb fl-imsemmija Skema l-percentwali tal-miżata kienet ta' 1.75% fis-sena rappreżentanti l-ispejjeż għall-amministrazzjoni tagħha.

## **Mertu**

3. L-appellant ippreżenta lment quddiem l-Arbitru fis-17 ta' Jannar, 2022, fil-konfront tas-soċjetà appellata, fejn issottometta fost affarijiet oħra, li huwa ma

kienx jissieħeb fl-Iskema fl-eventwalità li d-drittijiet tas-soċjetà appellanta kellhom jitħallsu bil-perċentwali ta' 2.75% fis-sena. Filwaqt li kif diġà ngħad, huwa rrileva li fl-applikazzjoni tas-sħubija l-indikazzjoni dwar id-drittijiet kienet fil-perċentwali ta' 1.75% fis-sena, qal li ma kien hemm l-ebda riferiment għall-investment, u li hekk kif huwa kien issieħeb fl-Iskema, huwa kien awtomatikament gie rreġistrat taħt l-imsemmi investment. Għalhekk talab sabiex id-dritt addizzjonali ta' 1% jitneħħa mis-*Surrender Quote*.

4. Is-soċjetà appellanta wiegħbet fl-24 ta' Jannar, 2022, billi eċċepiet li (a) wara li l-appellat kien saħansitra irrikorra għand konsulent finanzjarju, huwa ma setax jargumenta li ma kienx jaf li kien hemm żewġ prodotti distinti, u li kien hemm ukoll *marketing fee* separata; (b) it-titolari tal-polza prezenti kellha titlob għal spjegazzjoni mingħand Providence Life Limited; (ċ) hija m'għandha l-ebda kontroll fuq Providence Life Limited. Għaldaqstant hija ma kellhiex tinzamm responsabbli lejn l-appellat.

### **Id-deċiżjoni appellata**

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

#### ***"Preliminary***

STM Malta no longer provides services to the Complainant

*In its reply, the Service Provider highlighted that it was no longer the trustee and RSA of the Scheme given that a transfer out from the Scheme occurred in 2021. It noted that the Complainant's pension and underlying policy were transferred to a different retirement scheme in Gibraltar, administered by a sister entity within the STM Group.*

*STM Malta inter alia submitted in this regard that:*

*'The Respondent may not now assist the Complainant to seek redress from Providence Life Limited since the current issues have arisen at a time after the Respondent has ceased to be policyholder at the request of the Complainant'. (fn. 8 P. 123)*

*The Service Provider accordingly inferred that it was not the correct or legitimate defendant in respect of this Complaint.*

*In its final submissions, the Service Provider indeed stated that:*

*'... STM Malta submits that the current trustees are STM Gibraltar (which is a separate and independent entity to STM Malta with a different licence, regulator and jurisdiction) and therefore the complaint by the Complainant about the PLL Marketing Fee should be addressed to STM Gibraltar and not STM Malta'. (fn. 9 P. 357)*

*Whilst it is true that STM Malta is no longer the trustee and the RSA of the Retirement Scheme and that the Complainant was 'informed of the 1% PLL marketing fee in late 2021 that is when STM Gibraltar were his appointed trustees' (fn. 10 Ibid.) as submitted by the Service Provider, the Arbiter however notes that **the Complaint mainly deals with failures alleged on the part of STM Malta at the time it occupied its functions in respect of the Scheme.***

***Consideration thus needs to be made of the alleged failures of STM Malta at the time it occupied the role of trustee and RSA of the Scheme and was acting as the policyholder of the underlying Providence Life policy.***

***This is particularly so with respect to the Complainant's claims that STM Malta:***

- (i) failed to disclose in its Scheme Application Form the 1% marketing fee that was charged on his underlying policy; and***
- (ii) failed to notify him of any proposed changes in fees in advance as per the Declaration section included in the Scheme's Application Form.***

***The Arbiter further notes that whilst the disputed marketing fee is being only now reflected in the valuation statements by Providence Life as a charge on the underlying policy, the said charge has been however applied retrospectively. Accordingly, the disputed fee covers the period of time when STM Malta occupied the said roles.***

***For the reasons mentioned, the Arbiter refutes any claim that STM Malta is not the correct or legitimate defendant in respect of the matters raised and shall hence proceed to consider the merits of the case next.***

### **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. (fn. 11 Cap. 555, Art 19(3)(b))***

### **Facts of the Case**

#### **The Complainant**

*The Complainant, a British national, born in 1974 and resident in the United Arab Emirates at the time, applied to become a member of The STM Malta Retirement Plan by way of his 'Client Application Form For Use With The Providence Life Bond' ('Application Form for Membership'), (fn. 12 P. 124) signed and dated 5 June 2013. (fn. 13 P. 130)*

#### **Membership of the Scheme and acquisition of the underlying policy**

*STM Malta provided the Complainant with the Scheme's Plan Schedule as part of the welcome letter dated 13<sup>th</sup> September 2013. (fn. 14 P. 245) The said schedule indicated the 'Commencement date' of the Retirement Scheme being the '5<sup>th</sup> June 2013' with the initial 'Transfer value' into the Scheme of '£2,554.50' and '£46,637.81'. (fn. 15 P. 247)*

*The Schedule also listed an 'Investment option' into a 'Whole of life' policy issued by 'Providence Life' dated '9<sup>th</sup> July 2013'. (fn. 16 Ibid.)*

*The 'Providence Life Assurance Bond' ('PLL WOL 1112') ('the policy') that was acquired by the Scheme for the Complainant 'is a life assurance policy' issued by Providence Life Limited, PCC based in Mauritius. (fn. 17 P. 275)*

*According to the 'Policy Document Whole of Life Policy', bearing 'Policy No: PLL200271', the 'Issue Date' of the policy is '31<sup>st</sup> July 2013'. (fn. 18 P. 252)*

*The same document and policy schedules indicate the 'Policyholder' as 'STM Malta Trust & Company Management Ltd' with the Complainant being listed as the 'Principal Life Assured'. (fn. 19 P. 263-272)*

*The 'Total premium at inception' paid into the policy amounted to '£49,142.31' as indicated in the same documents. (fn. 20 It is noted that an 'Additional Investment*

*Amount' of £68,034.13 was also eventually made into the policy as per the statement issued by Providence Life). (fn. 21 P. 114)*

*In the Key Features Document provided, the policy was also referred to as the 'Providence Life Portfolio Bond'. (fn. 22 P. 273)*

*It is further noted that during the proceedings of the case, reference was also made to the 'Horizon Portfolio Bond' or 'Horizon Bond'. Whilst no evidence was produced regarding a change in name of the policy, it is however sufficiently clear that this refers to the same underlying policy. Indeed, in the 'Estimated Surrender Quote' issued by Providence Life, the 'Product Name' of the policy (bearing the same policy number PLL200271) is indicated as 'Horizon Portfolio Bond'. (fn. 23 P. 114)*

*Hence, the same policy must have eventually changed its name to 'Horizon Portfolio Bond'.*

Investment advisor

*The Complainant's appointed Financial Adviser, as indicated in the Application Form for Membership, was 'PIC' based in 'UAE'. (fn. 24 P. 42 & 126)*

*The full name of the adviser is 'Professional Investment Consultants-Middle East Ltd', an entity 'Affiliated to deVere Group', with John Shirreffs being at the time its Senior Wealth Manager. (fn. 25 P. 289)*

Transfer out from the Scheme and assignment of the underlying policy

*In October 2020, the Complainant applied for a transfer out of the Retirement Scheme into 'The STM G.I.B. Pension Transfer Plan', whose trustee was indicated as 'STM Fidecs Pension Trustees Limited'. (fn. 26 P. 215 – 216)*

*The underlying Providence Life policy was eventually also assigned to the new Gibraltar plan on 4<sup>th</sup> March 2021 as per the documents presented during the proceedings of the case. (fn. 27 P. 217 -218)*

*Hence, STM Malta ceased to occupy its roles of trustee, RSA of the Scheme and policyholder of the Providence Life policy accordingly.*

System error in the Providence Life policy valuations

*The Complainant noted that 'STM Gibraltar have written to me on 5<sup>th</sup> November 2021 titled 'PLL Bond Valuation Error'. (fn. 28 P. 3)*

*It is noted that in a frequently asked question ('FAQ') document issued by Providence Life titled 'Horizon Portfolio Bond System Error FAQ', Providence Life that was produced by STM Malta during the case, the said document explained inter alia that:*

'A system error has been identified which has affected the reflection of policy charges on Horizon Portfolio Bond valuations. This means that the Marketing Fees have been deducted from the Policy but not reflected on the policy valuations.'

'...The system error was discovered in April 2021 ...'.

'...To rectify this error, the balance of any non-reflected Marketing Fees will be taken from the policy as an encashment charge together with any accrued fees and charges (all fees and charges are clearly stated in the Horizon Portfolio Bond Terms and Conditions). The company can confirm that no policies will be adversely affected by these actions, the charge shown merely reflects the true position of each policy'.

'...The Horizon Portfolio Bond Terms and Conditions clearly state the fees and charges ... Your appointed Financial Adviser as part of the application stage should have explained the terms and conditions to you together with the applicable fees and charges.

'...The Marketing Fee should have been reflected on policy valuations, via unit cancellations at a rate of 1% per annum for 8 years. This has not been reflected correctly on policy valuations in the past. As these initial units have been reflected on the policy valuation incorrectly in the past, any growth that these units may have attracted has been allocated incorrectly to the policy as well. In short, this growth did not exist and must be removed to reflect the correct current policy valuation.'

'... We are obliged to treat all Policyholders fairly and equally, in accordance with our regulatory guidelines and this means applying any accrued fees and charges due for each policy ... these adjustments are legal and compliant and are covered under our non-waiver of rights provision contained in the Horizon Portfolio Bond Terms and Conditions.' (fn. 29 P. 309-310)

*The next section shall consider the charges as disclosed to the Complainant in respect of the underlying policy.*

Disclosure of the Providence Life policy charges

(A) Application Form for Scheme Membership (signed in June 2013) - *The Application Form for Membership into the Retirement Scheme, titled 'The STM Malta Retirement Plan, Client Application Form For Use With The Providence Life Bond', signed by the Complainant on '5 June 2013' included a section detailing the 'Charging Structure' (fn. 30 P. 124-131)*

*The said section ('Section 7, Charging Structure'), outlined the following fees in respect of the Scheme and the underlying policy (the portfolio bond): (fn. 31 P. 129)*



- (i) An 'Annual Management Charge' which 'covers the costs associated with administering the pension scheme and portfolio bond', based on the trust value. The Annual Management Charge for a QROPS trust value of 'Between GBP 40,000 and GBP 199,999' – this being the value applicable for the Complainant - was '1.75% per annum' (fn. 32 Ibid.)

*(The Annual Management Charge was specified as 1.40% in case of a lower QROPS trust value of 'Between GBP 200,000 and GBP 499,999' or 1.25% in case of a higher QROPS trust value of 'Greater than GBP 500,000')(fn. 33 Ibid.) The said charges also included 'two pension transfers' with additional transfers 'charged at £100 each'.*

- (ii) A 'Providence Life Bond – fund dealing charge' which consisted of a '2.75% subscription fee' applicable upon the first purchase of funds or switch of funds or additional purchases.
- (iii) An administration charge of GBP500 that 'will be deducted during the first year of operation of the bond'. (fn. 34 Ibid.)

- (B) Providence Life Policy Key Features Document - As part of the welcome pack issued by STM Malta as attached to its letter dated 13 September 2013, the Complainant was provided with a two-page 'Providence Life Portfolio Bond Key Features' document. (fn. 35 P. 273-274)

*The said Policy Key Features document specified the following policy charges in the section titled 'Providence Life Portfolio Bond Charging Structure': (fn. 36 P. 274)*

- Annual management charge of 1%
- Discounted subscription fee of 2.75% on Providence Life Fund Platform
- Early encashment charge of 8% in year 1, decreasing to zero by the end of year 8'.

- (C) The Providence Life Policy Application Form of June 2013 - One of the documents presented during the proceedings of the case was titled the 'Providence Life QROPS Bond Application For use with STM Malta Retirement Plan', this being the application form for the underlying Providence Life policy ('the Policy Application').(fn. 37 P. 225-242)

*The said document was signed by both the 'Life Assured' (that is, the Complainant), and the 'Trustee Applicant' (that is, STM Malta), in June 2013. (fn. 38 P. 233) It also included the advisor's signature (under 'Financial adviser details'). (fn. 39 Ibid.)*

***The Policy Application form included 'Terms & Conditions' which constituted and formed an integral part of the said application form.***

*The 'Terms & Conditions' indeed formed part of the said Policy Application form as also reflected in the use of the same footer (reading 'Providence Life Bond Application') and in the continuation of the page numbering throughout the whole document. (fn. 40 P. 234-242)*

*'Section 6, Policy Charges' of the mentioned Terms & Conditions detailed the applicable charges. (fn. 41 P. 239) The said charges as reflected in the Terms & Conditions forming part of the Policy Application form signed in June 2013 shall be considered in further detail in part (E) below.*

(D) *The Policy Document issued in July 2013* - *The 'Policy Document Whole of Life Policy' issued by Providence Life, bearing Policy No. PLL200271 and issue date of 31<sup>st</sup> July 2013, (fn. 42 P. 252 -261) included a section dealing with the 'Policy Charges'. The said section, (section 3.11), specified that:*<sup>43</sup>

*'Policy charges could include:*

- Annual management charge*
- Dealing charge*
- Any other costs and or expenses incurred in managing the unitised Funds*
- Any stock broking fees incurred on behalf of the policyholder*
- Any marketing expenses incurred in the marketing of either the unitised portfolio or the policy*

*Any taxes and/or regulatory charges and/or similar costs incurred, but not taken into account, elsewhere.'*

*The specific details of the charges were then included in a Terms & Conditions document issued with the policy of July 2013 which shall be considered in the next section.*

(E) *Comparison between the Terms & Conditions forming part of the Policy Application Form and the Terms & Conditions issued with the actual Policy*

*The Office of the Arbiter for Financial Services ('OAFS') compared the Policy Charges section as featured in:*

- the Terms & Conditions document forming part of the Policy Application form of June 2013, (fn. 44 P. 234 -242) and*

- *the Terms & Conditions document issued in respect of the Providence Life policy of July 2013 (as sent with the welcome pack of STM Malta dated 13 September 2013). (FN. 45 p. 275 -284)*

*Further to the said comparison, the following was particularly noted:*

- (i) *With respect to the exit fee, the Terms & Conditions sent to the Complainant in July 2013 state, under the section titled 'Policy Charges' that:*

*'If the Policyholder requests to cash-in any policy during the initial period or additional initial period(s), PLL will pay the Policyholder the cash sum, less any early encashment charges which may apply'. (fn. 46 P. 280)*

***This same clause about the exit fee is not reflected in the same 'Policy Charges' section of the Terms & Conditions forming part of the Policy Application of June 2013.***

- (ii) ***With respect to the disputed Marketing Fee, it is noted that in the 'Policy Charges' section of the Terms & Conditions forming part of the Policy Application Form (signed in June 2013) (fn. 47 P. 239) and the Terms & Conditions issued with the actual Policy (in July 2013) (fn. 47 P. 239) both stipulate that:***

***'PLL charges an annual marketing establishment fee of 1% each year for the first 8 years of the policy to cover the costs of distributing the policy'. (fn. 49 P. 239)***

***Hence, no difference emerged in the respective Terms & Conditions of the Policy with respect to the disputed Marketing fee.***

***In this particular case, the disputed Marketing Fee does not differ between the mentioned two Terms & Conditions documents as outlined above. It has clearly transpired that the disputed Marketing Fee is however not mentioned in the Scheme's Application Form for Membership and neither in the Providence Life Key Features document as outlined above.***

### ***Obligations of the Service Provider***

Trustee and Fiduciary obligations

*The Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is particularly relevant for STM Malta considering its role as Trustee of the Scheme.*

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

*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'. (fn. 50 Editor Max Ganado, 'An Introduction to Maltese Financial Services Law', Allied Publications 2009, p. 174)*

*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'. (fn. 51 Op. Cit., p. 178)**

*The fiduciary and trustee obligations were also highlighted by MFSA in one of its publications 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, 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’.** (fn. 52 Page 9 – ‘Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act’ (MFSA Ref: 09-2017), dated 6 December 2017)

*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 as trustee.***

Obligations as a Retirement Scheme Administrator

*One key duty, which emerges from the primary legislation itself, applicable to STM Malta as the Retirement Scheme Administrator, is the duty to ‘act in the best interests of the scheme’.*

*This is outlined in Article 19(2) of the Special Funds (Regulation) Act, 2022 (‘SFA’) - which was the first legislative framework that applied to the Scheme and the Service Provider until this framework was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) (‘RPA’) which eventually came into force on the 1<sup>st</sup> January 2015. The duty to act in the best interests of the scheme is also outlined in Article 13(1) of the RPA.*

*Apart from the main legislation itself, there are various principles and conditions outlined in the general conduct of business rules/standard licence conditions issued by the Malta Financial Services Authority (‘MFSA’) under the SFA/RPA regime respectively applicable to the Service Provider in its role as Retirement Scheme Administrator.*

*With respect to this case, it is pertinent to particularly note the following rules: (fn. 53 Emphasis added by the Arbiter)*

- a) *Rules 2.6.2 and 2.6.3 of Part B.2.6 titled ‘General Conduct of Business Rules applicable to the Scheme Administrator’ of the ‘Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002’ (‘the Directives’), which applied to STM Malta as a Scheme Administrator under the SFA, 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 nor misleading ...'.**

*The same principles continued to apply, in essence, under the rules issued under the RPA.*

*Rules 4.1.4 and 4.1.5, Part B.4.1 titled 'Conduct of Business Rules' of the Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011 dated 1 January 2015 issued in terms of the RPA, and which applied to STM Malta as a Scheme Administrator under the RPA, provided that:*

**'4.1.4 The Service Provider shall act with due skill, care and diligence ...'**

**'4.1.5 The Service Provider shall ensure the adequate disclosure of relevant material information in a way which is fair, clear and not misleading ...'**

#### ***Final Observations and Conclusion***

Implications of the disputed Marketing Fee

***The damage alleged from the contested marketing fee is clear and quantifiable, as emerging from the 'Estimated Surrender Quote' issued by Providence Life dated 1<sup>st</sup> September 2021. (fn. 54 P. 114)***

*The said quote indicates the application of a 'Marketing Fee' for the amount of GBP 14,468.95. This is equivalent to 8.82% of the 'Current Estimated Policy Value' (of GBP 164,028.51) that was listed in the same quote.*

The alleged failures

***The Arbiter shall consider next the key alleged failures raised by the Complainant against STM Malta as follows:***

- a) **The allegation that STM Malta failed to disclose in its Scheme Application Form the 1% marketing fee that was charged on his underlying policy**

***As outlined above, it has clearly emerged that the Scheme's Application Form did not include a reference to and/or details of such marketing fee despite that the said form covered the fees of the Scheme and the underlying policy.***

***The Arbiter accordingly accepts the Complainant's claim and considers that STM Malta has indeed failed to ensure that the charging structure of the Providence Life policy was clearly and adequately disclosed to the Complainant in its own form together with the other fees of the Providence Life policy that were stipulated in the said form. The following aspects and other factors highlighted later in this decision are also being taken into consideration on this aspect:***

- i. Context of the Application Documents; Material Divergences in respect of the policy charging structure emerging in key documentation; and Lack of Disclosure of such divergences***

***The Arbiter notes that the Service Provider itself listed the charging structure in respect of the Scheme and the underlying Providence Life policy in its own Application Form for Scheme Membership (signed by the Complainant in June 2013). (fn. 55 P. 129-130)***

***Whilst the Retirement Scheme and the underlying policy are two separate and distinct products issued by separate providers - where the Scheme issued by STM Malta acquired the underlying policy issued by Providence Life - the Arbiter observes that the Complainant was however offered a package for the whole structure in question.***

***It is evident that the main parties STM Malta (as trustee and RSA of the Scheme) and Providence Life (the issuer of the underlying policy), had come together to offer a packaged structure. This clearly emerges from the way the Scheme and Policy application forms had been drafted.***

***STM Malta's own application for membership into the Retirement Scheme was indeed one specifically tailored for use with the policy. The cover page of the Scheme Application Form specifically stated and highlighted that the form was 'For use with the Providence Life Bond'. (fn. 56 P. 124)***

***Furthermore, the charging structure outlined in the Scheme's Application Form included the fees of the pension scheme and underlying policy.***

***Similarly, the Providence Life Policy Application Form stipulated on the cover page that this was 'For use with STM Malta Retirement Plan' and already featured details of STM Malta as trustee of the QROPS, as well as details of the Retirement Scheme, in Section 2 of the said form under 'Trust Details'. (fn. 57 P. 225 & 227)***

***The Complainant and STM Malta (the latter in its capacity of Scheme trustee), together signed the application for the purchase of the Providence Life policy (in July 2013).***

***The said policy application was signed on the basis of the Policy Terms & Conditions that formed an integral part of the policy application form. (fn. 58 P. 234-241)***

***The said Policy Terms & Conditions signed by STM Malta as trustee contained the disputed Marketing Fee which clearly and categorically did not feature in the charging structure of the policy detailed in the Scheme's Application Form for Membership.***

***There is accordingly validity to the Complainant's claim that the Scheme's application form issued by STM Malta did not disclose the disputed fee.***

***Apart from the discrepancies emerging in the documentation provided to the Complainant, the Arbiter notes that no evidence emerged that the Complainant was adequately notified about, and properly made aware of, the said omission and divergence emerging from the fee structure stipulated in Policy Terms & Conditions which had a material bearing on his interests.***

***As outlined in detail in the section titled 'Obligations of the Service Provider' above, STM Malta ultimately had clear obligations, which the Arbiter considers it has failed, when it did not ensure that the documentation (particularly its own form) was current and up to date and when it did not promptly notify and bring to the attention and consideration of the Complainant the said material divergence.***

- ii. ***Inconsistent information as part of the welcome pack – As part of the welcome pack provided by STM Malta through its letter dated 13 September 2013, (fn. 59 P. 234-241) the Complainant was furthermore provided with a Providence Life Key Features document which did not include reference to the Marketing Fee.***

***The said Key Features document of the Providence Life Portfolio Bond, (fn. 60 P. 273-274) however, included information not reflective of, and inconsistent with, the Policy Terms & Conditions included with the same welcome pack.***

***Indeed, the said 'Key Features' document did not include any reference to the Marketing Fee but only details of the policy charges as outlined in part (B) of the section titled 'Disclosure of the Providence Life Policy Charges' above.***



**b) The allegation that STM Malta failed to notify him of any proposed changes in fees in advance as per the Declaration section included in the Scheme's Application Form**

*It is clear that STM Malta had a certain level of business interaction with Providence Life (and possibly even terms of business) in order to enable it to include details of the Providence Life policy in its own forms.*

*As mentioned above, STM Malta clearly had a duty to ensure that any fees communicated to the member, even more so in its own forms, were current and up to date.*

***The Arbiter considers that the retrospective application of the Marketing Fee where such policy charge was not reflected, due to a system error, in policy valuations issued over an eight-year period had material implications which negatively affected the interests of the Complainant.***

*As outlined by Providence Life in its FAQ document, the 'Marketing Fee should be reflected on policy valuations, via unit cancellations at a rate of 1% per year for the first 8 years, but this has not happened'. (fn. 61 P. 67)*

***The non-reflection of the disputed Marketing Fee in policy valuations implies that, in practice, the Complainant has been rather provided, and issued with, incorrect policy valuation statements not reflective of the true position of the policy. His policy was thus seemingly over-valued (up to the amount of any due fees not deducted) in each year, during an eight year-long period.***

***Although the policy valuations were issued by Providence Life, STM Malta should have however been aware of the fees applicable on the underlying policy. Such awareness should have arisen in its role of trustee and RSA of the Scheme and itself being the policyholder of the underlying policy.***

***Whilst the Complaint in question does not involve 'any proposed fee changes' and hence there is no alleged failure with reference to the Declaration section quoted by the Complainant (as this captures a different context), it is considered that there is however a failure on the part of STM Malta to act in the Complainant's best interests in the circumstances.***

***This particularly arises in respect of STM Malta's failure to ensure clear and complete disclosure of the fee structure in its own form and in bringing to the Complainant's attention and consideration the discrepancies arising in the documentation used as outlined above. Such discrepancies and non-disclosure ultimately had a material negative bearing to the Complainant.***

**c) The allegation that STM Malta allowed the Marketing Fee to be charged despite not being shown in the paperwork that the Complainant had completed at the time when joining the Scheme**

*With respect to the claim that STM Malta allowed the Marketing Fee to be charged despite not being shown in the documentation the Complainant completed at the time when he applied to join the Scheme, the Arbiter accepts the Service Provider's submission that this matter should primarily be handled by the current trustee, that is, STM Gibraltar given that the latter has the authority over the Providence Life policy in its capacity as the existing policyholder of the said policy and trustee of the Gibraltar retirement scheme.*

*Nothing precludes, however, STM Malta and STM Gibraltar, (one in its capacity as the previous trustee and RSA of the Scheme and policyholder of the Providence Life policy and the other as the current entity occupying such roles), to discuss between them and also with Providence Life the particular unfortunate situation which has prevailed.*

*This is even more so when the disputed fee is to be applied retrospectively by Providence Life, which would thus cover the period when STM Malta was the trustee and RSA of the Scheme and policyholder.*

*Furthermore, the collaboration and liaison between the two entities is clearly facilitated and easier given they are part of the same Group. In the circumstances, one would reasonably expect the two entities to effectively co-ordinate and assist accordingly.*

Other observations – Key important roles

***The Service Provider cannot minimise its key functions and roles. Apart from acting as the trustee/RSA of the Scheme at the time of the alleged failures, STM Malta was also the Policyholder of the Providence Life policy. (fn. 62 P. 263-272)***

***Hence, it itself had to be duly aware and conscious of any material divergences arising from the Policy Terms & Conditions it had itself applied and signed for in July 2013 and the features of the policy it itself outlined in its own form.***

***Any such divergences should have not emerged in the first place and should have also eventually been reasonably discovered and highlighted accordingly for consideration by the relevant parties.***

***Whilst it is true that the disputed Marketing Fee is not a fee imposed or applied by STM Malta, as it is a fee applied by Providence Life on the underlying policy,***

***this however does not exonerate STM Malta from the obligations it had as trustee and RSA of the Scheme and Policyholder of the underlying policy.***

Other observations - Reference to an alleged similar decision

*The Arbiter notes that in its final submissions, the Service Provider referred to a decision bearing case number 039/2018 where it claimed that ‘the same issue of fees arose’. (fn. 63 P. 356) (fn. 64 <https://financiararbiter.org.mt/sites/default/files/oafs-decisions/ASF%20039-2018.pdf>)*

*STM Malta quoted parts of this decision and noted that in such case the Arbiter had decided not to uphold the compensation requested in respect of the charges paid. The Service Provider claimed that ‘This is precisely the same case here’. (fn. 65 P. 186)*

***The Arbiter however refutes the Service Provider’s claims and considers that the quoted case and the case under consideration deal with completely dissimilar and unrelated issues and entirely involve different contexts.***

***The particular circumstances, the matters raised and context of the complaints in the two distinct cases are indeed totally dissimilar for a number of reasons including the following:***

- *Case 039/2018 involves not only different parties and products, but the subject matter dealt with is completely different and unrelated to the case under consideration.*

*The former case actually involved the alleged excessive charges imposed by the investment advisor.*

- *The particular context in Case 039/2018 is also different in that there is no new or different fee structures emerging in the documentation provided to the complainant as has happened in the case under consideration.*

*Neither does case 039/2018 deal with, or involve, the lack of disclosure of fees in valuation statements issued by the policy provider (and which are to be reflected after eight years of non-disclosure), as emerging in the case under consideration.*

*Hence, the matters considered in the mentioned cases in no way involve the same or similar circumstances. For the reasons mentioned, the Arbiter rejects the submissions made by the Service Provider on this point.*

Other observations - Emerging discrepancies and convolution of the fee structure

***The Arbiter ultimately considers that the discrepancy in fees emerging in the documentation produced, particularly with respect to the exit fee (fn. 66 The exit fee was mentioned in the two-page Key Features document and in the Policy Issue document but not mentioned in the 'Policy Charges' section of the Terms & Conditions forming part of the Policy Application form and neither mentioned in the Scheme's Application Form) and the disputed Marketing Fee (fn. 67 Albeit the Marketing Fee was mentioned in the Policy Application form (Terms & Conditions) and also reflected in the Policy Issue Document (Terms & Conditions), no mention of the Marketing Fee was made in STM Malta's Scheme Application Form and neither in the Providence Life (2 page) Key Features Document) as indicated in the section titled 'Disclosure of the Providence Life policy charges' above have contributed to and resulted in a convoluted and unclear fee structure to the Complainant's detriment.***

***The apparent confusion about the exit fees and the marketing fees was further noted throughout the proceedings of the case. In the reply provided by the Complainant's adviser to the questions posed to him during the proceedings of the case, the adviser noted inter alia that:***

*'The key features document is a two-page doc which shows the portfolio bond charges and there is no mention of a marketing fee ... When the new forms came out showing the marketing fee this was challenged as it did not match the fees in the STM app. We were told that this was only a charge that would be taken if the client moved within the first 8 years as part of the redemption penalty. The fees taken annually were therefore 1.75% p.a.'* (fn. 68 P. 3150)

***The Arbiter notes that the 'Early encashment charge of 8% in year 1, decreasing to zero by the end of year 8', (fn. 69 P. 274) was however clearly an exit fee (an encashment charge) which was only applicable if there was an exit from the policy during the first eight years as also reflected in clause 5.5 of the Policy Issue document.***

***On the other hand, the Marketing Fee, which was separately dealt with in clause 5.4 of the Policy Issue document, was 'an annual marketing establishment fee of 1% each year for the first 8 years of the policy'. (fn. 70 P. 280)***

***It is thus amply clear that the exit fee and the Marketing Fee were two separate and distinct fees that should have been treated and considered separately and not mixed or somehow unbelievably construed as being the same fee.***

**Hence, in the circumstances, the Arbiter cannot ignore the deficiency on the part of other parties which failed to explain and clearly disclose to the Complainant the applicable fee structure. Such failure of other parties will be reflected in the extent of compensation granted to the Complainant.**

#### **Decision & Concluding Remarks**

***The Complainant relied on STM Malta as the Trustee of the Scheme to act with the diligence and attention of a bonus paterfamilias, to account to him and provide him with information and highlight material aspects in relation to his Scheme, protect his interests and safeguard his property from loss or damage.***

***STM Malta had also to act with due skill, care and diligence and ensure disclosure of relevant material information in a clear and not misleading way. STM Malta was also ultimately the Policyholder of the Providence Life policy and was thus itself in full control of this policy.***

***For the reasons amply explained, it is considered that there was a clear lack of diligence by the Service Provider in the administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee and RSA of the Scheme and policyholder of the Providence Life policy.***

***It is also considered that the Service Provider failed to act with the prudence, diligence and attention of a bonus paterfamilias to safeguard the Complainant's interests.***

***The Arbiter considers that the Service Provider did not meet the 'reasonable and legitimate expectations' (fn. 71 Cap. 555, Article 19(3)(c)) of the Complainant who had placed his trust in the Service Provider, believing in its professionalism and its duty of care and diligence."***

### **L-Appell**

6. Is-soċjetà appellanta ħasset ruħha aggravata bid-deċiżjoni appellata u ntavolat appell quddiem din il-Qorti fil-5 ta' Ġunju, 2023, fejn talbet sabiex

***"...din l-Onorabbli Qorti jogħgobha: tirrevoka, tħassar jew tvarja s-sentenza li ttieħdet mill-Arbitru għas-Servizzi Finanzjarji fis-17 ta' Mejju 2023 u dan salv dawk li jidhrilha xieraq u opportun din l-Onorabbli Qorti.***

*Bl-ispejjeż”.*

Tgħid li l-aggravji tagħha huma li (a) l-Arbitru applika u interpreta żaġin il-liġi, għaliex skont il-liġi kien hemm biss obbligu ġenerali tal-amministratur tal-iskema tal-irtirar li jiżvela l-miżata f’dik il-kwalità u bħala *trustee*, u mhux ukoll tal-polza sottostanti bħal dik ta’ Providence Life Limited; u (b) mingħajr preġudizzju għall-ewwel aggravju, l-Arbitru applika u nterpreta żaġin il-liġi meta ddeċieda li hija naqset mid-dmirijiet tagħha bħala *trustee* meta ma żvelatx il-miżata ta’ terzi fl-applikazzjoni ta’ sħubija, u anki li hija għandha tħallas 50% tal-kumpens.

7. Wara li ġew estromessi l-kuraturi deputati rappreżentanti l-appellat fuq talba tiegħu stess, dan tal-aħħar ippreżenta r-risposta tiegħu fis-7 ta’ Frar, 2024, fejn talab lil din il-Qorti sabiex tiċhad l-appell odjern, u tikkonferma d-deċiżjoni appellata fl-intier tagħha, bl-ispejjeż kontra s-soċjetà appellanta.

### **Konsiderazzjonijiet ta’ din il-Qorti**

8. Il-Qorti ser tgħaddi sabiex tikkunsidra l-aggravji tas-soċjetà appellanta, u dan fid-dawl ta’ dak li ġie kkunsidrat u deċiż fid-deċiżjoni appellata, u meħudin ukoll in konsiderazzjoni s-sottomissjonijiet tal-appellat. Tagħraf li ż-żewġ aggravji tagħha huma pjuttost marbutin flimkien, u saħansitra t-tieni aggravju jitlaq minn punt li s-soċjetà appellanta tqajjem fl-ewwel aggravju. Għalhekk tgħid li jkun utli li l-imsemmija aggravji jiġu ttrattati flimkien.

9. L-aggravju prinċipali tas-soċjetà appellanta huwa li l-Arbitru applika żaġin il-prinċipji legali assoċjati, u dan filwaqt li ma tax il-piż dovut lil numru ta’ konsiderazzjonijiet materjali. Tiddikjara li l-miżata addizzjonali tas-soċjetà

Providence Life Limited ma ngabritx mis-soċjetà appellanta, u lanqas kienet dovuta lilha, u dan kien jafu anki l-Arbitru meta qal iktar minn darba li “*whilst it is true that the disputed Marketing Fee is not a fee imposed or applied by STM Malta, as it is a fee applied by Providence Life on the underlying policy...*”. Iżda xorta waħda huwa ordnalha tħallas kumpens fejn il-miżata wara kollox giet applikata minn soċjetà terza. Is-soċjetà appellanta rrilevat li kien irrizulta mill-provi li s-soċjetà Providence Life Limited kienet bagħtet ittra lit-titolari tal-polza, fejn waħda minnhom kienet proprju hi, u infurmathom li kien hemm ħsara fil-funzjonijiet tas-sistema interna tagħhom, u għalhekk il-*marketing fee* ma kienitx qiegħda tidher fid-dikjarazzjoni tal-valur tal-portafoll tal-membri li kien qiegħed jintbagħat kull sena. B’riferiment għall-istess ittra li ntbagħtet mis-soċjetà Providence Life Limited, hija tissottometti li jirrizulta li l-*marketing fee* giet imposta minn dik is-soċjetà, u din saħansitra irċevietha ukoll. Għalhekk mhux loġiku li hija għandha tħallas kumpens għall-iżball li sar. Tgħid li hawnhekk il-Qorti għandha tikkunsidra s-segwent: (i) il-*marketing fee* kienet giet indikata fl-applikazzjoni li l-appellat iffirma fis-sena 2013, u anki fil-polza li ntbagħtet lilu taħt is-sezzjoni 5 intestata ‘*Policy Charges*’, fejn l-imsemmija dokumenti nħargu mis-soċjetà Providence Life Limited, u mhux minnha stess; (ii) is-*Surrender Quote*, fejn tnaqqset il-*marketing fee* li kienet inħarget mis-soċjetà Providence Life Limited, u mhux minnha stess; (iii) fit-termini u l-kundizzjonijiet tal-formola għall-applikazzjoni li kien iffirma l-appellat, kien hemm indikat li s-soċjetà Providence Life Limited kienet qegħda ttippretendi ħlas ta’ 1% rappreżentanti *marketing fee*, u dan flimkien ma’ miżati oħra. Dwar it-tieni punti, hija tissottometti li t-termini u l-kundizzjonijiet jagħmlu parti mill-kuntratt kummerċjali bejn l-appellat, is-soċjetà appellanta u Providence Life Limited, u d-dokument li permezz tiegħu l-

appellat gie mgħarraf dwar il-*marketing fee*, jagħmel parti minnu. Filwaqt li tagħmel riferiment għall-każistika tal-Qorti tal-Appell tal-Ingilterra, tikkontendi li fil-każ odjern it-termini u l-kundizzjonijiet kienu annessi mal-applikazzjoni, fejn fuq in-naħa ta' wara kien hemm il-kundizzjonijiet dwar il-prodott, u anki t-tariffi. Is-soċjetà intimata tissottometti li hawnhekk il-kwistjoni kienet tirrigwarda investiment sostanzjali fi skema tal-irtirar, u għalhekk hija kellha kull dritt li tassumi li l-appellat kien qara l-applikazzjoni li ffirmat u ndaga dwar il-kontenut tagħha. Tinsisti li l-appellat huwa bniedem ta' ċertu edukazzjoni li seta' japprezza l-konsegwenzi tad-dokument li kien qiegħed jiffirma, flimkien mat-termini u l-kundizzjonijiet annessi mal-kuntratt. Is-soċjetà appellanta hawnhekk tirrileva t-tielet punt tagħha, li huwa dwar il-ligi applikabbli fiż-żmien li l-appellat issieħeb fl-iskema, u l-ħtieġa li jiġu mfissra l-mizati marbutin mal-polza sottostanti. Tissottometti li dak iż-żmien il-ligijiet u r-regoli kienu maħsuba għal pjanijiet tax-xogħol, iżda peress li kienu wkoll bdew jinħarġu liċenzji għal pjanijiet personali, l-aktar pjanijiet QROPS, il-MFSA addottat il-Kap. 450 jew l-Att li Jirregola Fondi Speċjali flimkien mal-*Standard Operating Conditions applicable to pension schemes licenced under the Special Funds (Regulation) Act of 2002* [minn issa 'l quddiem 'SOC'] ippubblikati minnha stess. Tirrileva li r-regoli kollha fiż-żmien in kwistjoni kienu jitrattaw l-iżvelar tat-tariffi tal-Amministratur ta' Skema u mhux ukoll dawk ta' partijiet terzi bħal Providence Life Limited. Tgħid ukoll li l-Kap. 450 ma kienx jipprovdi għall-iżvelar tat-tariffi, iżda kien jittratta l-aktar il-ħolqien ta' qafas ġenerali għall-iskemi u l-fondi tal-irtirar. Is-soċjetà appellanta tagħmel riferiment għar-regola B2.5.3, B.1.1.14 u B1.2.1(hh) tal-iSOC, u ttenni għal darb'oħra li madankollu ma kien hemm l-ebda gwida jew regola dwar l-iżvelar tat-tariffi tal-poloż sottostanti. Tgħid li anki t-termini u d-dokumenti tal-iskema



kif approvata mill-MFSA, kienu l-aktar ikkoncentrati fuq il-ħlasijiet tal-Amministratur tal-Iskema u tal-kustodji u l-*investment managers*. Hija tirrileva li dak iż-żmien, u l-aktar fis-snin 2015 u 2016, kien hemm diskussjonijiet konsiderevoli sabiex jiġi deċiż x'tip ta' żvelar ta' tariffi kellu jsir, u l-MFSA u l-parteċipanti fl-industrija tal-iskemi tal-irtirar, kienu qablu li l-membri għandhom jingħataw firxa ta' tariffi sabiex applikant ikun jista' jifhem l-istruttura ġenerali tal-miżati applikabbli tal-iskema. Is-soċjetà appellanta tgħid li mingħajr l-ebda ħtija, hija kienet ipprovdiet valutazzjonijiet li ġew għandha mingħand Providence Life Limited, u li ma kienux korretti. Tinsisti li hija kienet imxiet skont il-qafas regolatorju ta' dak iż-żmien, għaliex (i) indikat fl-applikazzjoni l-miżata tagħha bħala Amministratriċi u *Trustee*; (ii) indikat ukoll il-miżata fit-termini u l-kundizzjonijiet tal-*Policy Application Form* u fil-*Policy Documents*; (iii) aċċertat li l-membru kien irċieva d-dokumenti tal-investment, fosthom il-*Policy Documents*, permezz ta' ittra fl-indirizz personali tal-appellat; (iv) aċċertat li l-membru kien jaf bil-miżati, billi bagħtet ukoll l-istess *Policy Documents* permezz ta' ittra elettronika, li l-appellat waqt il-preżenti proċeduri kkonferma li huwa kien irċieva. Għalhekk tgħid li l-Arbitru kien sab li hija kienet naqset mill-obbligi tagħha mhux bħala Amministratriċi tal-Iskema, iżda mill-obbligi ġenerali tagħha bħala *Trustee*. Tikkontendi li d-dinamika u l-iskop tal-iskemi tal-irtirar li huma diretti mill-membri stess jew '*member directed*', huma sew differenti minn dawk ta' *trust*. Is-soċjetà appellanta tirrileva ukoll li ma kienitx taf bil-problema fis-sistema ta' Providence Life Limited, u għalhekk ma setgħet qatt tavża lill-membri tagħha biha. Filwaqt li hija tiċċita dak li qal l-Arbitru fid-deċiżjoni appellata, issostni li hija ma kellha l-ebda kontroll fuq is-sistema ta' Providence Life Limited,

u saħansitra l-ebda aċċess u mod kif setgħet tkun taf b'tali problema, kif xehed Andrew Gardner fl-*affidavit* tiegħu.

*It-tieni aqgravju* tas-soċjetà appellanta jittratta iktar fil-fond l-allegat nuqqas tagħha bħala *trustee*, meta ma żvelatx il-mizata ta' terzi. Tikkontendi li l-interpretazzjoni tal-obbligi ġenerali ta' *trustee* li straħ fuqha l-Arbitru, kienet waħda pjuttost wiesgħa u ingusta. Filwaqt li tgħid li hija mhijiex qiegħda tikkontesta l-obbligu ġenerali ta' *trustee* li jaġixxi fl-aħjar interess tal-benefiċjarju, u li kull *trustee* għandu l-obbligu li jaġixxi bħala *bonus paterfamilias* fil-konfront tal-benefiċjarju ta' *trust*, itteni għal darb'oħra li d-dinamika u l-iskop ta' skema tal-irtirar, li hija *member-directed*, huma differenti minn dawk ta' *trust* fil-kuntest ġenerali. Tisottometti li mhuwiex korrett li l-Arbitru jippretendi li hija bħala Amministratriċi tal-Iskema, għandha tibgħat id-dokumenti li fihom hemm indikati l-mizati kollha, u anki tindika fl-applikazzjoni dawk il-mizati marbuta mal-polza sottostanti, meta dan l-obbligu qatt ma kien jeżisti. Tgħid li anki fejn l-Arbitru ppretenda li Amministratur ta' Skema għandu jaċċerta li l-konsulent finanzjarju tal-membri jkun għamel ix-xogħol tiegħu sew, billi fisser ukoll il-mizati applikabbli, dan kien qiegħed jaġhti interpretazzjoni wiesgħa u d-dmir wara kollox kien tal-imsemmi konsulent finanzjarju u mhux tal-Amministratur. Tikkontendi li l-Amministratur huwa kuncett *ad hoc* intiż prinċipalment sabiex jiġu eżegwiti l-istruzzjonijiet, u sabiex jinżammu protetti l-assi tal-membri. Izda l-obbligu ġenerali ta' *trustee* ma setax jiġi mifhum li jitlob ukoll li jiġu mistħarrġa l-pariri finanzjarji li jirċievi l-membri mingħand il-konsulent finanzjarju magħżul minnu stess, meta dan l-obbligu ma kien joħroġ minn ebda liġi, regola jew gwida. Hija tiċċita dak li qal l-Arbitru li l-*exit fee* u l-*marketing fee* kellhom jinżammu distinti u separati, u li dan kien sab li hija għandha tinzamm responsabbli fejn l-

*marketing fee* ma ġietx żvelata, minkejja li hija kienet uriet li l-konsulent finanzjarju tal-appellant kien tah parir ħażin. Tirrileva li dan tal-aħħar kellu l-kariga ta' *senior wealth manager* ma' *deVere*, u tikkontendi li huwa għandu jħallas għal għemilu. Is-soċjetà appellanta tispjega li peress li l-Arbitru kien inbidel fil-mori tal-proċeduri, huwa ma kienx prezenti għas-seduti fejn il-konsulent finanzjarju msemmi kien insista li huwa kien spjega fid-dettal it-tariffi ta' Providence Life Limited, u fejn irriżulta li: (i) il-prijorità kienet li jinbiegħ il-prodott sabiex b'hekk jirċievi l-*commission*; (ii) ma ngabet l-ebda prova dwar dak li qal il-konsulent finanzjarju, li *"the policy documents are not the same as the key features. Obviously for me to continue using the STM PLL scheme we needed clarification that the charges were only 1.75% as was shown on the STM app. This was confirmed by all parties involved at the time"*. Tispjega li l-argument tagħha huwa li m'għandhiex tinzamm responsabbli għall-problema ta' valutazzjonijiet ta' Providence Life Limited. Is-soċjetà appellanta tgħid li l-Arbitru ddecieda li hija għandha tħallas nofs il-miżata bħala kumpens dovut lill-appellat, iżda tikkontendi li hija qatt ma kienet ħadet l-imsemmija miżata, u għalhekk ma setgħet tagħmel l-ebda rimbors. Tgħid li madankollu jekk il-Qorti jidhrilha li hija għandha terfa' r-responsabbiltà, din għandha tkun inqas minn dik ta' min ta l-parir, jew tal-appellat stess, għaliex proprju kien hemm tliet partijiet involuti fit-tranzazzjoni. Hija ssostni li fejn jirriżultaw danni, dawn għandhom jiġu diviżi ugwalment meta r-responsabbiltà ma tistax tiġi maqsuma b'ċertezza. Tissottometti li l-kwantifikazzjoni ta' kumpens hija mħollija fid-diskrezzjoni tal-Qorti, fejn il-prinċipji applikabbli mhumiex assoluti. B'riferiment għall-prinċipju ġenerali li Qorti tal-Appell ma tiddisturbax faċilment id-diskrezzjoni eżerċitata minn tribunal jew qorti tal-ewwel istanza, tissottometti li fil-fehma tagħha l-provi prodotti ma

setgħu qatt wasslu għall-konklużjoni tal-Arbitru. Tgħid li meħud in konsiderazzjoni dan kollu, l-aggravji tagħha kien jisthoqqilhom li jiġu milqugħa.

10. L-appellat jissottometti li kif osserva korrettement l-Arbitru, is-soċjetà appellanta, taħt l-obbligu ġenerali tagħha ta' *trustee*, kellha taġixxi bil-prudenza, diligenza u attenzjoni ta' *bonus paterfamilias* kif rikjest mis-subartikolu 21(1) tal-Kap. 331. Huwa hawnhekk jagħmel riferiment u jiċċita diversi sentenzi ta' din il-Qorti in sostenn tal-argument tiegħu, u jikkontendi li minn dawn jidher ċar li din ma kienitx l-ewwel darba li s-soċjetà appellanta sabet diffikultà fir-responsabbiltajiet tagħha bħala *trustee*. Jgħid li anki minn dawn is-sentenzi, jirrizulta ċar li s-soċjetà appellanta kellha l-obbligu li tikkomunika l-miżati tagħha, imma anki dawk relatati mal-istruttura sħiħa, inkluż dawk ta' Providence Life. Għas-sottomissjoni tal-imsemmija soċjetà appellanta, li l-miżati kienu ndikati fit-termini u l-kundizzjonijiet meħmużin mal-applikazzjoni ta' sħubija, b'riferiment għal dak li jipprovdi dak id-dokument f'sezzjoni numru sebgħa (7) tiegħu, huwa jwieġeb li għalhekk l-miżata annwali kellha tkun ta' 1.75% fis-sena, filwaqt li l-*marketing fee* ma giet indikata mkien, u li kieku huwa kien jaf biha, ma kienx ser jiffirma l-applikazzjoni. L-appellat jgħid li l-Arbitru għaraf li s-soċjetà appellanta bħala *Trustee* u Amministratriċi tal-Iskema kellha r-responsabbiltà li tiżvela l-miżati mposti. Dwar il-liġi applikabbli, l-appellat jissottometti li filwaqt li l-Kap. 450 jirregola l-amministraturi tal-iskemi tal-irtirar, it-*Trustee* huwa regolat permezz tal-Kap. 331, li ġie korrettement applikat mill-Arbitru fid-deċiżjoni appellata. Jgħid li s-soċjetà appellanta konvenjentement iċċitat il-liġijiet applikabbli bejn is-sena 2012 sas-sena 2016, sabiex b'hekk warrbet il-*'Consultation on Amendments to the Pension Rules Issued under the Retirement Pensions Act'*, li nħareġ mill-MFSA fis-6 ta' Diċembru, 2017. Huwa jiċċita dak li

qal l-Arbitru dwar dan id-dokument, liema fehma jgħid li sussegwentement kienet għet ikkonfermata minn din il-Qorti fis-sentenza tagħha fl-ismijiet **June Doris Burleston vs. STM Malta Trust and Company Management Limited**.<sup>1</sup> L-appellat jicċita wkoll dak li jgħid l-imsemmi dokument fir-rigward tal-obbligi fiduċjarji ta' amministratur ta' skema tal-irtirar. Għal dak li jirrigwarda l-argument tas-soċjetà appellanta li huwa wkoll kien responsabbli għad-danni li kien ikkaġuna lilu nnifsu, jissottometti li hawnhekk għal darb'oħra għandu jagħmel enfazi fuq l-irwol tat-*trustee* u anki dak tal-konsulent finanzjarju, filwaqt li jissottometti li huwa m'għandux jaħti għan-nuqqasijiet tal-partijiet l-oħra, għaliex huwa kien poġġa l-fiduċja tiegħu fihom, u kien stenna mingħandhom il-prudenza, diligenza, u attenzjoni għad-dettalji ż-żgħar ukoll. B'riferiment għad-deċiżjoni appellata fejn l-Arbitru saħaq li s-soċjetà appellanta bħala *Trustee* u Amministratriċi tal-Iskema u saħansitra bħala titolari tal-polza sottostanti, kellha tkun taf bil-mizati in kwistjoni, jikkontendi li dan l-argument huwa wieħed tassew frivolu għaliex hija b'hekk kienet qiegħda tistenna li l-klijent tagħha jkun jaf bil-mizati ta' Providence Life Limited, meta hija stess bħala esperta fis-settur ma kienitx indikathom, u qalet li saħansitra lanqas kienet taf bihom.

10. Il-Qorti mill-ewwel tgħid li l-Arbitru kien ġust, imma anki korrett fattwalment u legalment fid-deċiżjoni tiegħu. L-Arbitru jibda bis-solita dikjarazzjoni li m'hemm l-ebda dubju jew kontestazzjoni dwarha, jiġifieri li huwa kien ser jiddeċiedi l-ilment skont dak li fil-fehma tiegħu kien ġust, ekwu u raġjonevoli fic-cirkostanzi partikolari, u meħudin in konsiderazzjoni l-merti sostantivi tal-każ. Imbagħad, wara li huwa għamel diversi konstatazzjonijiet fir-

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<sup>1</sup> 14.09.2022.

rigward tal-informazzjoni li huwa seta' jieħu dwar l-appellat mill-Applikazzjoni għas-Sħubija esebita fl-atti<sup>2</sup>, l-Arbitru għadda sabiex għamel l-osservazzjonijiet tiegħu fir-rigward tal-isħubija fl-Iskema u l-akkwist tal-polza sottostanti, u anki fir-rigward tal-konsulent finanzjarju tal-appellat. Il-Qorti ssib li dawn kollha huma korretti u anki f'lokhom, u tinnota li m'hemm l-ebda kontestazzjoni dwarhom.

11. L-Arbitru kkunsidra li f'Ottubru 2020, l-appellat kien applika sabiex jittrasferixxi l-investment tiegħu mill-Iskema għal '*The STM G.I.B. Pension Transfer Plan*', fejn it-*Trustee* kienet STM Fidecs Pension Trustees Limited, u b'hekk is-soċjetà appellanta ma baqgħetx tokkupa ir-rwol ta' *trustee*, Amministratriċi tal-Iskema u titolari tal-polza. Ikkunsidra dak li qal l-appellat fir-rigward tal-ittra tal-5 ta' Novembru, 2021, mibgħuta minn STM Gibraltar, fejn huwa kien gie avżat li kien sar żball fil-valutazzjoni tal-*bond*, fejn ma kienux tnaqqsu l-*marketing fees*. Minn hawnhekk għadda sabiex eżamina d-diversi dokumenti, fejn kienu mfissra l-miżati li kellhom jithallsu mill-appellat fir-rigward tal-polza sottostanti. Beda billi kkunsidra li l-applikazzjoni għal sħubija li kienet ġiet iffirmata f'Ġunju 2013, kellha sezzjoni ntitolata '*Charging Structure*', fejn kien hemm indikati l-miżati li kellhom jithallsu mill-appellat, u għadda sabiex elenkahom. Qies ukoll dak li kien hemm imniżżel fil-*Providence Life Policy Key Features Document* u l-*Providence Life Policy Application Form*, fejn kien hemm imfissra l-miżati applikabbli taħt is-sezzjoni 6. Ikkunsidra wkoll il-*Policy Document* li nħareġ f'Lulju 2013 minn Providence Life bil-polza nru. PLL200271, fejn kien hemm sezzjoni ntestata '*Policy Charges*', u din għażel li jiċċitaha. L-Arbitru rrileva li d-dettalji dwar dawn il-miżati ġew inklużi f'dokument ieħor intestat '*Terms &*

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<sup>2</sup> Ara a fol. 124 et seq.

*Conditions'*, li nħareġ flimkien mal-polza, u għadda sabiex għamel paragun bejn it-termini u l-kundizzjonijiet li nħarġu flimkien mal-*Policy Application Form*, u dawk li kienu meħmuża mal-*Policy Document* innifsu. Huwa sab li l-*marketing fee* in kwistjoni ssemmiet f'dawn iż-żewġ dokumenti, iżda mkien ma giet indikata fl-applikazzjoni għal sħubija, u lanqas fil-*Providence Life Key Features Document*.

12. L-Arbitru kkunsidra wkoll il-kariga tas-soċjetà appellanta bħala *trustee*, u rrileva li hawnhekk kienu applikabbli l-provedimenti tal-Att dwar *Trusts and Trustees* (Kap. 331), li l-Qorti tirrileva li kien ġie fis-seħħ fit-30 ta' Ġunju, 1989, kif sussegwentement emendat, u jagħmel riferiment partikolari għas-subartikolu 21(1), il-para. (a) tas-subartikolu 21(2). L-Arbitru rrileva li fil-kariga tagħha ta' *trustee*, is-soċjetà appellanta kienet tenuta li tamministra l-Iskema u l-assi tagħha skont diligenza u responsabbiltà għolja. In sostenn ta' dan kollu, huwa jiċċita l-pubblikazzjoni *An Introduction to Maltese Financial Services Law*<sup>3</sup>, u mill-pubblikazzjoni aktar riċenti tal-MFSA tas-sena 2017 fejn din ittrattat prinċipji diġà stabbiliti qabel dik id-data, permezz tal-Att dwar *Trusts* u *Trustees* (Kap. 331), u anki permezz tal-Kodiċi Ċivili. F'dan kollu l-Arbitru tajjeb għaraf l-importanza tagħhom, u li s-soċjetà appellanta fihom kellha ssib gwida fil-funzjoni tagħha ta' *trustee*.

13. L-Arbitru aċċenna fuq l-obbligu tal-Amministratur tal-Iskema tal-Irtirar sabiex dan jaġixxi fl-aħjar interessi tal-Iskema, u dan kif jirrikjedi s-subartikolu 19(2) tal-Att li Jirregola Fondi Speċjali (Kap. 450), u s-subartikolu 13(1) tal-Att dwar Pensjonijiet għall-Irtirar (Kap. 514). Il-Qorti iżżid tgħid li m'hemmx dubju li s-soċjetà appellanta hawnhekk kellha obbligi daqstant ċari li timxi fl-aħjar

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<sup>3</sup> Ed. Max Ganado.

interess tal-Iskema, kemm fiż-żmien li sar l-investment fis-sena 2013 meta kienu applikabbli d-disposizzjonijiet tal-Kap. 450, u anki sussegwentement meta gie fis-seħħ l-Att dwar Pensjonijiet għall-Irtirar fis-sena 2015, u l-appellat kienet għadu membru tal-Iskema.

14. Minn hawnhekk l-Arbitru għadda sabiex elenka diversi prinċipji li kienu applikabbli fil-konfront tas-soċjetà appellanta skont il-*general conduct of business rules/standard licence conditions* applikabbli taħt ir-reġim tal-Kap. 450 kif imħassar, u tal-Kap. 514 li ssostitwih. Għal darb'oħra l-Qorti tirrileva li jirriżulta li s-soċjetà appellanta bħala Amministratriċi tal-Iskema, kienet tenuta li timxi b'kull ħila dovuta, kura u diligenza fl-aħjar interessi tal-benefiċjarji tal-Iskema. L-obbligi legali tagħha jirriżultaw ċari u inekwivoċi, tant hu hekk li l-Qorti tirrileva li minn dan li ngħad diġà, jirriżulta li d-difiża tagħha li hija qatt ma setgħet tinzamm responsabbli għaliex ma kellha l-ebda obbligu fil-konfront tal-appellat, ma tistax tirnexxi.

15. L-Arbitru mbagħad għadda sabiex għamel l-osservazzjonijiet tal-aħħar tiegħu, li l-Qorti ssib ferm utli u rilevanti. Ikkunsidra li d-danni riżultanti kienu ċari u faċilment komputabbli, kif evidenti mill-*Estimated Surrender Quote*, li nħarġet minn Providence Life Limited fl-1 ta' Settembru, 2021. Huwa ttratta l-allegati nuqqasijiet tas-soċjetà appellanta, billi qal kif ġej:

(a) *Dwar in-nuqqas taqħha li tindika fl-applikazzjoni l-marketing fee in kwistjoni.*

Kien ċar li ma kien hemm l-ebda riferiment għaliha jew dettalji dwarha, u għalhekk l-ilment tal-appellat kellu jintlaqa', filwaqt li osserva s-segwent i) għalkemm l-Iskema u l-polza sottostanti kienu prodotti distinti, l-appellat kien gie offrut pakkett sħiħ fejn fl-applikazzjoni għal sħubija kien hemm indikat l-mizati



tal-Iskema u anki dawk tal-polza sottostanti, filwaqt li l-applikazzjoni tal-polza kellha ndikat fuqha *'For use with the STM Malta Retirement Plan'*, u kienet tagħmel riferiment għas-soċjetà appellanta bħala *trustee* tal-Iskema, u tat dettalji dwar l-Iskema nnifisha. Imbagħad kienu l-appellat flimkien mas-soċjetà appellanta, li ffirmaw l-applikazzjoni għax-xiri tal-polza, li kellha bħala l-bażi tagħha t-termini u l-kundizzjonijiet tal-imsemmija polza, li għalhekk kienu jagħmlu parti mill-istess applikazzjoni. Hawnhekk qal li kien hemm indikat il-*marketing fee* ikkontestata, li ma kienitx dehret fl-applikazzjoni għas-sħubija fl-Iskema, u għalhekk l-appellat kien korrett fl-allegazzjoni tiegħu. L-Arbitru għalhekk qal li jirrizultaw diversi diskrepanzi fid-dokumenti li ġew mgħoddija lill-appellat, u li qatt ma ngibditlu l-attenzjoni dwarhom. Għalhekk ikkunsidra li s-soċjetà appellanta kienet iddekadjet mill-obbligi tagħha kif imfissra iktar 'il fuq; (ii) il-*marketing fee* ma ssemmietx fil-*Providence Life Key Features Document*, li kien fih informazzjoni li ma kienitx tidher jew li kienet inkonsistenti mat-termini u l-kundizzjonijiet fl-istess pakkett ta' dokumenti mgħoddija lill-appellat.

(b) Dwar l-allegazzjoni li s-soċjetà appellata kienet naqset li tinforma lill-appellat dwar it-tibdil propost fil-miżati, skont is-sezzjoni 'Declaration' fl-applikazzjoni għas-sħubija fl-Iskema.

L-Arbitru stqarr li s-soċjetà appellanta kellha relazzjoni kummerċjali ma' Providence Life, sabiex hija setgħet iżżid dettalji tal-polza fil-formoli tagħha stess, iżda qies li hija kellha l-obbligu li taċċerta li l-informazzjoni dwar il-miżati kienet dik kurrenti u aġġornata. Qal li l-fatt li minħabba żball fis-sistema, il-*marketing fee* ma kienitx dehret fil-valutazzjoni tal-polza għal tmien snin sħaħ, kellha mpatt negattiv fuq l-interessi tal-appellat. Dan fejn is-soċjetà appellanta fir-rwol tagħha

ta' Amministratriċi u *Trustee* tal-Iskema, iżda anki bħala titolari tal-polza, kellha tkun konxja tal-mizati applikabbli taht l-imsemmija polza. Għalhekk fil-fehma tal-appellat, is-soċjetà appellanta kienet naqset li taġixxi fl-aħjar interessi tiegħu, u dan ħalla konsegwenzi materjali.

(ċ) *Dwar l-allegazzjoni li s-soċjetà appellanta kienet ippermettiet l-impożizzjoni tal-marketing fee fejn din ma dehritx fid-dokumenti li kien iffirma l-appellat meta ssieħeb fl-Iskema.*

L-Arbitru aċċetta l-argument tas-soċjetà appellanta li din il-kwistjoni kienet ir-responsabbiltà tat-*Trustee* sussegwenti, jġigifieri STM Gibraltar li għandha awtorità fuq il-polza.

16. L-Arbitru mbagħad tenna li bħala l-Amministratriċi u t-*Trustee* tal-Iskema, u anki bħala t-titolari tal-polza, is-soċjetà appellanta kellha tkun taf dwar id-diverġenzi fid-dokumenti li hija stess iffirmit f'Lulju 2013, u anki kellha tkun konxja tal-aspetti tal-polza stess li hija kienet fissret. Qal li għalkemm il-*marketing fee* ma kienitx giet imposta jew applikata minnha, hija ma kienitx meħlusa mill-obbligi tagħha fir-rwoli appena msemmija.

17. L-Arbitru mbagħad għadda sabiex għamel diversi osservazzjonijiet fir-rigward tar-riferiment li s-soċjetà appellanta kienet għamlet fin-nota ta' sottomissjonijiet tagħha għal deċiżjoni oħra tiegħu partikolari, u fisser għaliex huwa ma kienx jaqbel magħha li ż-żewġ każijiet kienu simili.

18. Imbagħad l-Arbitru irrileva li d-diskrepanzi fid-dokumenti relatati mal-mizati kienu rriżultaw f'informazzjoni konvoluta u nċerta dwar l-istess mizati għad-detriment tal-appellat, u dan kollu ħareġ f'dak li qal il-konsulent finanzjarju

tiegħu fit-twegibiet għall-mistoqsijiet li sarulu. Ikkunsidra li huwa ma setax iwarrab in-nuqqas tal-partijiet l-oħra li naqsu li jispjegaw b'mod ċar lill-appellat il-mizati applikabbli, u dan in-nuqqas qal li kien ser jiġi rifless fil-kumpens li kien ser jingħata lill-appellat.

19. B'hekk l-Arbitru għalaq dawn il-konsiderazzjonijiet kollha tiegħu, billi korrettement għaraf li l-appellat kien straħ fuq is-soċjetà appellanta bħala *trustee* tal-Iskema sabiex din tagħxi b'diligenza u l-attenzjoni ta' *bonus paterfamilias*, tipprovdilu l-informazzjoni, u tispjegalu l-aspetti materjali tal-Iskema, iżda anki sabiex tipprotegi l-interessi u l-assi tiegħu minn telf jew dannu. Wara kolloxx, l-Arbitru sewwa rrileva li hija kienet fl-aħħar mill-aħħar it-titolari tal-polza u għalhekk kellha kontroll assolut fuqha. Għar-raġunijiet li huwa kien spjega iktar 'il fuq, l-Arbitru stqarr li s-soċjetà appellanta kienet uriet nuqqas ta' diligenza fl-amministrazzjoni tal-Iskema fir-rigward tal-appellat, u fit-twettiq tal-obbligi tagħha ta' *Trustee* u Amministratriċi tal-Iskema, iżda anki ta' titolari tal-polza. Hija kienet naqset milli tilħaq l-aspettativi raġonevoli u legittimi tal-appellat li kien qiegħed il-fiduċja tiegħu fiha.

20. Il-Qorti tgħid li tikkondividi r-raġunament tal-Arbitru, u tagħmel tagħha wkoll il-konsiderazzjonijiet mirquma tiegħu, fejn fisser tassew tajjeb in-nuqqasijiet u r-responsabbiltajiet tas-soċjetà appellanta. Għalhekk hija ma ssibx l-aggravji tagħha ġustifikati, u sejra tiċhadhom.

**Decide**

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

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

Moqrija.

**Onor. Dr Lawrence Mintoff LL.D.  
Imħallef**

**Rosemarie Calleja  
Deputat Registratur**