Before the Arbiter for Financial Services

Case ASF 063/2023

OH

('the Complainant')

vs

Sovereign Pension Services Limited

(C 56627)

('SPSL' or 'the Service Provider')

Sitting of 22 March 2024

The Arbiter,

Having seen **the Complaint** made against Sovereign Pension Services Limited ('SPSL' or 'the Service Provider') relating to *The Centaurus Retirement Benefit Scheme* ('the Retirement Scheme' or 'Scheme'), this being a personal retirement scheme established in the form of a trust and administered by SPSL as its Trustee and Retirement Scheme Administrator.

Preliminary

In his extensive Complaint to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant, in essence and in summary, alleged:[1]

a) That SPSL failed to exercise its duty of care when it allowed and did not notify him beforehand about the premature sale of the *Darwin Leisure Property Fund* ('the Darwin Fund').[2] The Complainant claimed that this

[1] Page (P.) 1 to 15 with supporting documentation from p. 16 to p. 426

[2] An investment of GBP40,000 into the *Darwin Leisure Property Fund* was held within the RL360 policy underlying his Retirement Scheme.

sale, which was requested by his discretionary investment manager, *deVere* (based in Spain/Mauritius), occurred at a time when:

(i) There was a complaint (Case 096/2020)[3] about his Retirement Scheme and underlying investments which was still being considered by the Arbiter;

(ii) The Darwin Fund was the sole investment remaining within his investment portfolio;

(iii) The said fund was generating a regular profit and was still a sound and stable investment when it was sold in 2021, and

(iv) He had never expressed any wish for the Darwin Fund to be sold nor were there any discussions for such fund to be sold on its fifth year anniversary.

The Complainant claimed that he was not aware of the dealing instruction issued on 22 September 2021, (by deVere), for the sale of the Darwin Fund. All the shares of this fund were sold by 1 December 2021, and he was only notified (by deVere Spain) about the sale on 8 December 2021. He claimed he would have immediately instructed SPSL to stop the sale had he been made aware of such an order.

b) The Complainant further alleged that the appointment of deVere in 2019 as his discretionary investment manager (rather than as an investment advisor with no discretionary mandate) was done at the insistence and demands of SPSL.

He claimed that the discretionary mandate was aimed at limiting SPSL's liability for poor investment advice. Furthermore, he alleged that SPSL, as trustee, did not educate him about why he had to appoint a discretionary manager. Nor did SPSL provide him with an adequate explanation of the consequences of such an appointment.

[3] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20096-2020%20-%20OH%20vs%20Sovereign%20Pension%20Services%20Limited.pdf

The Complainant further claimed that as soon as he discovered that the Darwin Fund was sold without his knowledge, he requested to change the discretionary investment mandate to a non-discretionary one.

c) The Complainant referred to the Arbiter's decision on Case 096/2020, issued on 8 February 2022, in which SPSL was ordered to pay him compensation in view of the deficiencies identified in its role as trustee and RSA of his Scheme.

The Complainant claimed that SPSL, however, delayed the compensation calculation and provided him with details of the calculations only on 3 March 2022, by which time he could not request clarification from the Arbiter[4] on the compensation granted. Furthermore, he disagreed with the way SPSL calculated the compensation decided in Case 096/2020.

The Complainant claimed that the sale of the Darwin Fund in 2021 adversely affected the compensation he received. He considered that the sale of the Darwin Fund should not have been taken into account in calculating the compensation awarded in Case 096/2020.

He also alleged that SPSL used incorrect figures (in the forex conversion rates) in respect of one of the investments, (the *Notenstein Express Certificate*), in calculating compensation. He claimed that the incorrect figures chosen by SPSL in respect of this investment also resulted in him receiving a further lower compensation than what he expected to receive according to the Arbiter's decision in Case 096/2020.

The Complainant further claimed that, in Case 096/2020, the Arbiter had directed all fees paid to *Chase Belgrave* to be documented and repaid to him.[5] He claimed that this did not happen and that the order to investigate and refund fees paid to *Chase Belgrave* was not satisfactorily handled and still needs to be dealt with by SPSL.

[4] Article 26(4) of Cap. 555 of the Laws of Malta provides that: *'(4) Within fifteen days from the date when the decision of the Arbiter is notified to the parties, either party, with notice to the other party, may request that the Arbiter give a clarification of the award, or request the Arbiter to correct any errors in computation or clerical or typographical errors or similar error contained in the decision of the Arbiter. The Arbiter shall give such clarification or make any necessary correction within fifteen days from the receipt of a party's request.'*

[5] Chase Belgrave was his previous adviser prior to deVere's appointment.

d) The Complainant explained that he decided to keep the compensation sum received from Case 096/2020 in a cash account separate from the proceeds received from the sale of the Darwin Fund as he was unwilling to channel the compensation sum to an account from which fees could continue to be paid to SPSL and the Scheme's underlying policy, the RL360.

He claimed that he is losing investment revenue from the lack of investments and that the ongoing payment of fees applicable to his Scheme and underlying policy (at a time when there are no investments) is further depleting his remaining funds.

The Complainant also claimed that, given the low amount remaining in his Scheme, he is having difficulty finding another service provider willing to take over his pension.

He further stated that SPSL is refusing to allow his money to be withdrawn, to close his accounts and to pay the money into a private (personal) account. The Complainant stated that the justification provided by SPSL in this regard, (that this was due to restrictions in view of his money originating from Ireland), was not adequate.

He submitted that he is stuck in a situation where he cannot get out from his Scheme and underlying policy, whilst his pension pot is not generating the required returns for his pension whilst being depleted with ongoing fees.

The Complainant claimed that the trustee failed to protect his lifetime pension payments and noted that he no longer has faith that SPSL, as his trustee, will work in his best interests and assist him in returning his Scheme to a state where it will generate a reasonable income.

The remedy sought by the Complainant, as outlined in the attachment to his Complaint Form to the OAFS,[6] is, in summary, as follows:

[6] P. 13 & 218

- *'all contracts between myself and SPSL, RL360 and DeVere (Spain, Mauritius, Dubai) become null and void on the date of the Arbiter's decision, and*

- *That the amounts currently held in my SPSL and RL360 accounts plus the amounts (losses) listed below be paid into a non SPSL account defined by [the Complainant]'*.[7]

The Complainant requested the Arbiter to decide whether these sums can be paid into a private bank account. He also calculated the following losses:

> *'● Losses due to errors in SPSL's 096/2020 Decision Calculations*
>
> *1. The Darwin Losses*
>
> *GBP 7,990.24 (the 70% figure) plus loss of yield until cash is re-invested*
>
> *2. The Notenstein Losses*
>
> *GBP9,178 (the 70% figure)*
>
> *● Losses identified in this complaint*
>
> *1. CE1232 Investment Fund Losses*
>
> *GBP 95,872 (100% figure)'*.[8]

Hearing of October 2023

During the hearing of 31 October 2023, the Arbiter pointed out that certain issues raised by the Complainant in his new complaint had already been decided in Case 096/2020.[9]

The Complainant explained the essence of his complaint during the said hearing, raising again many of the issues summarised above.

[7] P. 218
[8] *Ibid.* – No breakdown provided of the claimed figure of GBP 95,872 indicated as investment fund losses on his Scheme.
[9] P. 582 - 586

He noted that there is a connection between his previous and current complaint, and furthermore *inter alia* pointed out that one of his requests was:

> *'… that I be released from the contract with Sovereign, RL360, DeVere etc., etc., and that my money is put under some sort of covenant in line with the regulations under which it was released from Ireland in 2013/2014'*.[10]

He also requested

'… first of all … a recalculation of the sum awarded'.[11]

At the end of the hearing, the Arbiter requested the Complainant to present a recast complaint strictly on issues not involving matters regarding Case 096/2020.

The Service Provider was also provided with the opportunity to provide its submissions on the recast complaint.[12]

Recast Complaint

In his recast complaint,[13] the Complainant reiterated the same issues, in essence, highlighting again:

- the delayed publication of the compensation calculation by SPSL following the decision on Case 096/2020, which delay denied him the ability to appeal such calculations;
- the incorrect and lower sum of compensation received from SPSL following the decision on Case 096/2020, where he claimed that the compensation received from SPSL was 30% less than he should have received. (In his calculations, the Complainant considered that the profit of GBP 11,414.63 arising on the Darwin Fund, which SPSL netted against the overall Net Realised Loss figure, should have been omitted from SPSL's calculations.)

[10] P. 584
[11] P. 585
[12] P. 586
[13] P. 588 – 593

The Complainant also calculated a higher loss arising on the *Notenstein Express Certificate* compared to that calculated by SPSL); [14,15,16]

- the sale of the Darwin Fund was undertaken without his knowledge and with no prior notification by SPSL. He also highlighted that such sale was done at a time when Case 096/2020 was still *sub-judice* and claimed that the *'unethical sale'* benefited SPSL as it reduced the amount of compensation due to him;[17]
- the lack of potential for his pension plan to generate an income and the ongoing fees and costs (which he claimed were being charged for a non-existent service), continue to deplete his pension fund.

The Complainant also claimed that when deVere informed him about the sale of the Darwin Fund in December 2021, they recommended an investment portfolio made up of investments marketed by deVere-related companies that involved hidden commissions only to deVere's benefit.

The Complainant remarked that there was also negative press on deVere and other concerns on RL360 and stated that accordingly,

'… I cannot consider leaving my remaining investment and compensation sums in the hands of SPSL/RL360/ deVere and I hereby submit a claim against SPSL/RL360/deVere for compensation'.[18]

Remedy requested - as per his recast complaint and in his final submissions

As to the remedy requested in his recast complaint, the Complainant (provided a revised computation) and requested SPSL to pay:

[14] The Complainant calculated the resulting loss on the *Notenstein Express Certificate* as amounting to GBP 42,919 (mistakenly marked in Euros in his table) as compared to a loss of GBP 29,827.91 indicated by SPSL – the difference being an additional loss of GBP 13,091.09 calculated by the Complainant (GBP 42,919 – GBP 29,827.91 = GBP 13,091.09). The figure of GBP 29,827.91 was calculated by SPSL using a different conversion method with the complainant indicating that *'SPSL calculation includes currency movement issues …'* (P. 589).
[15] The Complainant argued that his Net Realised Loss for the purposes of Case 096/2020 should have amounted to GBP 73,668.20 and not GBP 49,162.67 (as calculated by SPSL). Workings included in recast Complaint - P. 589
[16] The Complainant submitted that he should have received GBP 51,567.74 as compensation for Case 096/2020 (i.e., 70% of GBP 73,668.20) but he only received GBP 34,413.87 from SPSL (i.e., 70% of GBP 49,162.67).
[17] P. 590
[18] P. 591

- a sum of GBP 54,853 as compensation for the losses caused by SPSL's unacceptable handling of his Scheme and underlying policy;[19] plus
- the cash value held in his Scheme's account; plus
- the cash value held in the RL360 policy account.

The Complainant also included a note outlining that his original investment decision was based on a proposed 7% (net) yield, which was never achieved and unlikely to be achieved. He noted that despite this, both the Scheme and RL360 continued to deduct their fees, particularly pointing out the onerous RL360 fees that he pays of 1.26% of his initial investment. He claimed that if such fees had to be taken into account, his losses would increase further (by approximately GBP 34,000), but he agreed not to include such fees in his compensation calculation.

He stated that he *'no longer [has] any confidence that the 3 party collective (SPSL, RL360 and deVere) will handle [his] account with the degree of care it deserves'*,[20] and accordingly requested, as part of his *'Detailed compensation claim'*:

> *'1. payment of compensation of GBP 54,853 …, and*
>
> *2. cancellation of all contracts with SPSL and their underlying third parties RL360 (account PM 10003817) and deVere Group Limited (Spain Malaga) and deVere Mauritius, and*
>
> *3 a) penalty free transfer out of my SPSL/RL360/deVere contracts to another QROPS provider*
>
> *Transferred sum is total of SPSL CE1232 cash + RL360 PM10003817 + GBP54,853 (all values as at time of [his new complaint in case 063/2023]).*

[19] This figure was reached by the Complainant as per the explanations and workings he provided in his recast complaint (P. 592). In essence, the Complainant calculated the figure of GBP 54,853 by taking the initial figure of the total sum invested into his RL360 policy (of GBP 230,260) less the total withdrawals that he calculated (of GBP 119,589) and less the remaining value on his Scheme cash account and policy a/c (of GBP30,485 & GBP 25,333). The resulting figure of GBP 54,853 was indicated as the negative 'performance' of his Scheme (P. 592).
[20] P. 593

ALTERNATIVELY

b) penalty free transfer (sum as in 3a) above) out of my SPSL/RL360/deVere contract to:

- *a UK or Irish SIPP policy or to a German based equivalent, or*
- *a European bank account'.*[21]

In his final submissions, the Complainant further pointed out that *'now my expectations are that … I be released from this contract without penalties. This should be back-dated to the 8th February 2022'* and also *'be adequately compensated for the losses incurred due to SPSL's lack of duty of care and diligence'*, where he referred to the requested compensation as detailed in his recast complaint.[22]

Having considered SPSL's reply where it was essentially submitted the following:[23]

Reply of 6 June 2023

SPSL submitted, in essence and summary that:[24]

- It fulfilled its obligations by complying with the compensation order in Case ASF 096/2020 and had provided a comprehensive response and explanation to the Complainant who still chose to submit another complaint to the Arbiter.

- In 2019, SPSL received an email instruction to appoint deVere Spain S.L. as the Complainant's investment adviser. SPSL informed the Complainant that, in line with the updated *Pension Rules for Personal Retirement Schemes* issued by the MFSA in 2019 ('the Pension Rules'), it was not possible to appoint deVere Spain as investment adviser since they lacked the appropriate license to give investment advice.

[21] *Ibid*.
[22] P. 618
[23] P. 435 - 449 & 596 - 599
[24] P. 435 - 449

It noted that as per the Pension Rules, advisers had to be regulated under MiFID regulations (or equivalent) but in this case, deVere Spain only held a license under the Insurance Distribution Directive ('IDD'). SPSL submitted that, as per point 2.1.12 of the MFSA's Feedback Statement dated 4 January 2019, in such situations, members were required to appoint a discretionary fund manager ('DFM') along with their adviser. It noted that this was communicated to deVere Spain.[25] An instruction bearing the Complainant's signature to appoint *deVere Investment Ltd* (Mauritius), ('deVere Mauritius) as DFM was received on 4 December 2019 by email from deVere Spain. It explained that deVere Mauritius was appointed as DFM on the Complainant's plan on 5 March 2020. Forms and letters instructing the appointment of deVere Spain as financial adviser and deVere Mauritius as DFM were submitted to RL360 on 6 March 2020.

- As to the sale of the Darwin Fund, SPSL explained that dealing instructions for the sale were submitted by deVere Mauritius, in their capacity as DFM, on 21 October 2020 for the amount of GBP1,050, then on 7 December 2020 for the amount of GBP8,750. A final dealing instruction was then submitted by deVere Mauritius on 22 September 2021 for the full redemption of the Darwin Fund.[26]

  SPSL noted that copies of Fund Updates received from the Darwin Fund dated May, June and September 2020 were forwarded to the Complainant and deVere Spain on 19 May 2020, 2 July 2020 and 5 November 2020, confirming that redemption requests received by the fund manager will be deferred and staggered.[27]

  It was further explained that the settlement of the first two instructions to sell were received in the RL360 policy's cash account in small tranches on a monthly basis between 23 December 2020 and 17 June 2021 with the sale of the remaining holding of the Darwin Fund settled on the 1 December 2021, at a profit.

[25] P. 468 - 477
[26] P. 512 - 519
[27] P. 527 - 528

Once the holdings in the Darwin Fund were fully redeemed, no further buy instructions were submitted by deVere Mauritius and the RL360 policy has therefore been only held in cash since. SPSL also referred to a letter dated 11 December 2021 from the Complainant that was received on 23 December 2021, where the Complainant *inter alia* requested *'All dealing instructions, either for purchase or sale, on my policy are to be authorised by myself by a printed dealing instruction that has been signed by myself and returned to you by post*'.[28]

SPSL explained that upon receiving such instruction, it attempted to contact the Complainant multiple times over the course of four months to seek clarification and confirm his intentions, with most calls unanswered. The Service Provider also pointed out that multiple reminders were sent throughout 2022 requesting clarifications, but no feedback was received regarding the investment adviser's appointment.

It noted that due to the pending clarifications from the Complainant, SPSL eventually revoked the discretionary authority granted to deVere Mauritius from the RL360 on 7 January 2022. SPSL explained that this action was taken to ensure that all instructions received are reviewed by SPSL and forwarded to the Complainant for authorisation in accordance with his instructions.

- As to the Complainant's assertion that it was obvious that the Darwin Fund was to remain within his portfolio, SPSL rebutted such claim and *inter alia* pointed out: that it had no record of any intention for the fund to be retained; that it was not privy to any conversations between the Complainant and his DFM nor to any instructions given by the Complainant to his adviser/DFM; highlighted the subjectivity of such a claim and pointed out that SPSL did not have authority to make investment decisions.

- SPSL submitted that the instructions to sell the holding were sent by deVere Mauritius directly to RL360 in their capacity as DFM. It explained the nature of a discretionary fund management appointment and that it was permissible for such discretionary manager to submit trade instructions

[28] P. 436 - 437 & P. 546

without the obligation to inform SPSL or the Complainant of the specific trades placed. SPSL further noted that as per MFSA's Feedback Statement, the RSA was not required to approve every instruction executed by a DFM.[29]

- SPSL further submitted that the trades executed by deVere Mauritius did not breach its assessment of the investment guidelines and were deemed permissible. It highlighted that the sale also resulted in a profit.

- The Service Provider further noted that a review of the historical prices of the Darwin Fund (from the period 30 September 2021 to 30 April 2023) indicates that the share price of this investment had reduced since the holding was sold.[30]

- SPSL highlighted that the Complainant himself confirmed that he did not inform his appointed DFM or SPSL that he had a preference or intention to retain the Darwin Fund.[31] It referred to Article B.1.3.3(s) of the *Pension Rules for Service Providers* issued in terms of the Retirement Pensions Act, 2011 regarding the duties of the Scheme Administrator and reiterated that it acted in full compliance with the requirements. It pointed out that no breach was identified in respect of the sale of the Darwin Fund since the sale was instructed by the appointed DFM and this was deemed to be part of the investment strategy.

- As to the Complainant's claim that the trustee made no effort to educate him on why he was to assign a financial adviser on a discretionary basis, SPSL stated that on 11 November 2019, it sent an email to the Complainant to inform him of the requirement to have a DFM appointed and had explained the rationale behind this requirement:

> *'I've copied in your administration advisors for their reference. Unfortunately, we can't appoint deVere Italia (sic) without a Discretionary Fund Manager, as they have an insurance license and*

[29] P. 439
[30] P. 439 - 440
[31] P. 440

won't be able to cover the investment aspect of the advice. Can you please liaise with deVere to advice on the way forward?' [32]

SPSL submitted that the email also directed the Complainant to his appointed adviser for the adviser to provide him the necessary guidance on available options and make recommendations on the most suitable course of action based on the Complainant's specific circumstances.

- With reference to the Complainant's claim that he had signed the form (of the appointment of the adviser (without being given explanation by the trustee of the consequences of this selection), SPSL submitted that the said form contained self-explanatory notes and SPSL was available to address any questions or concerns which the Complainant might have had before signing the form.

  It noted that no questions or queries were, however, raised by the Complainant. SPSL submitted that the receipt of the signed form was considered as an instruction received after the Complainant had thoroughly read the notes on the form, received advice from his appointed adviser and DFM and ensured his understanding before signing.

- As to the allegation that the DFM was done at the insistence and demands of SPSL, and that he had been *'surreptitiously convinced by SPSL to select deVere on the discretionary basis'*, with such appointment allegedly aimed at limiting SPSL's liability for poor investment advice, SPSL strongly refuted such claims.[33]

  SPSL requested the Complainant to provide evidence supporting his allegations and explained that throughout the process it acted in accordance with instructions received, clearly explained the position and diligently communicated the applicable Pension Rules to the Complainant. It submitted that, additionally, suggestions were offered on how to ensure compliance with the Pension Rules.

[32] P. 441
[33] *Ibid.*

SPSL submitted that it is important to note that there was no obligation for the Complainant to appoint deVere Mauritius. The Complainant always had the option to appoint any suitably licensed MiFID adviser on his plan or select another DFM.

SPSL reiterated that no external pressure was exerted, and the decision to sign the DFM form was entirely voluntary. It submitted that it was important to stress the significance of assuming personal responsibility for carefully reviewing and comprehending any forms before affixing a signature. Furthermore, it noted that it was crucial to clarify that SPSL had no vested interest or affiliation whatsoever with deVere or any associated companies.

SPSL explained that the Pension Rules issued by the MFSA in September 2019, required all appointed investment advisers to hold a license to provide investment advice in the country of residence of the member appointing them. It noted that this geographical limitation is not imposed on a DFM, in which case a valid DFM license which is verified by the RSA will allow them to be appointed to manage funds within a member's plan.

The Service Provider further explained that the Complainant's chosen investment adviser (deVere Spain) only held an IDD licence – which meant that they only had the authority to advise on insurance products and the appointment of a DFM is required in these instances. It submitted that this is confirmed unequivocally by the MFSA in the Pension Rules 8.6(b)(i)(bb)(i) (which SPSL reproduced in its reply), and point 2.1.12 of the MFSA's Feedback Statement.[34]

- As to the reference that SPSL did not obey normal *sub-judice* rules, SPSL submitted *inter alia* that the Complainant's plan remained active and was administered by it accordingly.

- Regarding the fees incurred, SPSL explained that RL360 charges a 1.075% fee for the retention and administration of the life policy, which the

[34] P 442, 443 & 462

Complainant was informed of, and agreed to, at inception. It noted that the only fee paid to SPSL was the fixed annual trustee fee of Eur1,200.

- SPSL explained that on 23rd February 2023, the Complainant requested SPSL withdraw funds from the RL360 policy for his income payments until the value reached nil. It noted that SPSL contacted RL360 to determine the maximum withdrawal amount available. RL360, in turn, responded that it would not permit additional partial withdrawals and that the only option would be to fully surrender the policy. SPSL noted that the Complainant was informed accordingly.

- Regarding the valuation of the loss of the Notenstein note, SPSL vehemently refuted the Complainant's allegation of some strategy or intention to reduce the compensation value. It noted that this specific matter was never raised with it prior to the complaint made by the Complainant to the Arbiter and SPSL, therefore, was not given an opportunity to address and clarify this matter.

  SPSL further explained that it had provided the Complainant with an Excel spreadsheet with all the calculations and explanations of the FX rates used, as per its email of 3 March 2022.[35]

  SPSL submitted that the FX rates utilised were the rates applied at the time by RL360 and were reflected in the policy's transaction history whenever possible. It further noted that where the FX rate was not available, it used the one obtained from the ECB website.

- As to the alleged denial to the appeal process, SPSL submitted *inter alia* that the Complainant had ample opportunities to raise queries or concerns and to reject the calculations but had never contested such. It noted that in his first email response received after several months in November 2022 the Complainant solely requested the transfer of compensation funds to his bank account. Moreover, the date the compensation calculation was provided did not impact his ability to appeal the Arbiter's decision.

[35] P. 569

- Regarding the Complainant's calculation for compensation, SPSL *inter alia* submitted that the Complainant's intention in this new Complaint is to restore the original value of his investments.

- With respect to the fees paid to Chase Belgrave, SPSL submitted that according to the full transaction history of the RL360 policy since inception, no adviser fees were paid out to Chase Belgrave out of the funds held on behalf of the Complainant.

- SPSL noted that the Complainant's initial investment in the RL360 was GBP 230,260. The cash held with the trustee's bank account was GBP 30,462.61 and the RL360 policy was at the time valued at GBP 26,616.86, totalling GBP 57,079.47.

  The Service Provider further noted that the Complainant had taken a PCLS[36] of GBP 60,000 and income payments of GBP 59,595.49. Fees and charges deducted by RL360 since inception amounted to GBP 26,604.16 whilst fees paid to SPSL amounted to approx. GBP 6,900 as per the table included in its reply.[37]

- Regarding the Complainant's request to have the compensation paid to the Complainant's personal account, SPSL explained that full commutation was not permitted under the Maltese Pension Rules taking into consideration the source of funds originating from an Irish pension plan. It noted that in the Complainant's case only programmed withdrawals were permitted in terms of the Pension Rules.

- SPSL refuted any claims for further compensation and reiteratedthat it always acted in good faith and in full compliance with the Pension Rules.

Reply of 20 December 2023 to the recast complaint

SPSL submitted, in essence and in summary, that:[38]

[36] Pension Commencement Lump Sum
[37] P. 447
[38] P. 596 - 599

- The points raised in the recast complaint unequivocally still pertain to complaint ASF 096/2020 and accordingly refrained from providing a direct response to the details listed in the calculations provided by the Complainant.

- SPSL submitted that its reply of 6 June 2023 amply and comprehensively addressed all matters raised. It noted that, in addition, it will not address grievances regarding third parties as these should be directed to them through the appropriate channels.

- It noted that as per the previous appendices provided, the Complainant never made any form of attempt to seek clarification or question the calculation provided to him, despite the numerous attempts made by SPSL to contact him (by phone and email).

- SPSL submitted that it received the Complainant's first response to its calculations only several months after, in November 2022, where the Complainant only requested the transfer of the compensation funds to his bank account without raising any issues or concerns regarding the calculations. The Service Provider considered this as a tacit acceptance by the Complainant and an implicit acknowledgement and approval of the calculations. Given the pattern of the Complainant's communication, SPSL also raised doubt about the likelihood of the Complainant appealing the calculation if it had been provided earlier.

- SPSL categorically refuted any deliberate collusion and engagement with third parties in untoward actions regarding the sale of the Darwin Fund. It formally requested the Complainant to provide evidence to support his claims and pointed out that it has no authority to make investment decisions, which decisions lie with the manager appointed by the Complainant himself.

- It reiterated that there was no specific legal provision governing *sub-judice* proceedings and requested clarification regarding the Complainant's statement that the action to sell the Darwin Fund during the time of consideration of his complaint (Case 096/2020) was an illegal act.

SPSL noted that during the time when Case 096/2020 was being reviewed by the Arbiter, the Complainant's plan remained active and was administered by the RSA accordingly, including the continued payment of the Complainant's regular pension income; recalculations of the maximum allowance; reporting to regulators and tax authorities; and oversight of the underlying investments. It further submitted that the trustee and RSA's obligations remain in force even during an ongoing complaint and SPSL duly observed and fulfilled these obligations.

- The Service Provider noted that the Complainant does not dispute that the sale was initiated by his appointed discretionary fund manager ('DFM') and he, therefore, must recognise that when he appointed the DFM he granted them explicit authority to exercise discretion as per his signature on the DFM's appointment form. Reference was also made to the declaration included in the said form.[39]

  SPLS submitted that the Complainant's expectation for pre-sale approval contradicts the fundamental purpose of the DFM appointment. It noted that the Complainant's subsequent unusual request not to process any investment instructions submitted by his appointed DFM without his approval was only accommodated as an exception and deviation from standard processes.

- With reference to the requested compensation, SPSL submitted that the Complainant once again makes it amply clear that his intention in the new complaint is to restore the original value of his initial investment, effectively expecting SPSL to reimburse fees, costs and charges deducted by RL360 for which he signed for.

  It further pointed out that the regular income payments paid out to the Complainant had an impact on the value of the plan.

  SPSL highlighted that the Complainant was not only now attempting to raise the same concerns but was also seeking additional redress,

[39] P. 603

disregarding the Arbiter's previous decision, in which cognisance was taken of the responsibilities of other parties.

- As to the transfer of the Complainant's plan to his personal bank account which would lead to the closure of the plan, SPSL submitted that the transfer of funds from his formerly Irish pension plan to his personal bank account is subject to the *Pension Rules for Personal Retirement Schemes* issued in terms of the Retirement Pensions Act, 2011 in Malta ('the Pension Rules').

  SPSL reiterated that according to section B.4.6.8 of the Pension Rules, full commutation is only permitted for UK relevant transfer funds, as the rules specifically allow payments consistent with UK regulations. It submitted that given that the funds held did not originate from the UK but from an Irish pension, this option was not applicable.

  It also noted that section B.4.6.3 of the Pension Rules allows for programmed withdrawals and that the RSA is mandated to ensure that drawdown rates are based on actuarial principles. SPSL explained that since there are no GAD rates in Malta, it employs Gilt rates provided by the UK, a method approved by MFSA.

  SPSL explained that the most recent GAD-based calculation confirming the maximum annual income entitlements was provided to the Complainant on 22 February 2023. The Service Provider noted that it understood the Complainant's desire to transfer funds to another plan and reiterated that such a transfer can be facilitated within the confines of the Pension Rules as a full and final settlement.

- In summary, SPSL rejected the Complainant's request for additional compensation given that:

  - The instruction to sell the Darwin Fund instructed by the appointed DFM was in accordance with published investment guidelines, resulted in a profit and did not breach the Pension Rules. It submitted that any suggestion of intentional miscalculation, collusion,

unlawfulness or any other term alleged by the Complainant is unfounded and refuted in the strongest possible terms.

- SPSL had no record of instructions or requests from the Complainant to retain the Darwin Fund as he himself confirmed.

- SPSL made numerous attempts to contact the Complainant for clarification and to address any concerns he may have had on the compensation calculation but no response was received for nine months until submission of his complaint in December 2022.

SPSL reiterated that it has consistently acted in good faith and in full compliance with the Pension Rules and remained committed to facilitating the Complainant's desired plan transfer within the boundaries of the Pension Rules.

It submitted that its rejection of additional compensation is based on adherence to established guidelines, effective communication efforts and compliance with the applicable DFM appointment procedures.

Preliminary – Competence of the Arbiter

Complaint against other parties

The Arbiter notes that, at times, the Complainant inferred or indicated that his Complaint is not just against SPSL and the Retirement Scheme but against other parties, namely, the RL360 policy and deVere.

As noted above, even in his recast Complaint, the Complainant stated that:

> *'… I cannot consider leaving my remaining investment and compensation sums in the hands of SPSL/RL360/deVere and* ***I hereby submit a claim against SPSL/RL360/deVere for compensation****'*.[40]

The Arbiter would like first to state that he has no competence to hear a complaint against RL360 and/or deVere.

[40] P. 591 – Emphasis added by the Arbiter

In terms of article 19(1) of the Act, the Arbiter's functions and powers are limited to complaints filed by an *'eligible customer'* who is a consumer of a *'financial services provider'*, as both defined in article 2 of the Arbiter for Financial Services Act, Chapter 555 of the Laws of Malta ('the Act').

Neither 'RL360' nor deVere is licensed or authorised by the Malta Financial Services Authority ('MFSA'), and the said parties do not accordingly fall within the definition of a *'financial services provider'* as stipulated in article 2 of the Act.

The Arbiter, therefore, has no jurisdiction in relation to the RL360 policy[41] and neither on deVere Spain and/or deVere Mauritius.

Given that SPSL and the Retirement Scheme are both licensed by the MFSA and thus fall within the definition of *'financial services provider'* under the Act (and were also identified in the OAFS Complaint Form as the parties against which the Complaint is being made), the Arbiter is, in the case under review, only considering a complaint filed against SPSL and the Retirement Scheme.

Matters considered and/or related to Case ASF 096/2020

As outlined during the hearing of 31 October 2023, the Arbiter is also declining to exercise his powers to consider matters which were already the subject of a complaint and decision issued under Case ASF 096/2020.[42]

The Arbiter is also not in a position to give any clarifications of the award or correct any computation contained in the Arbiter's decision for Case 096/2020 given that the period within which such clarifications and/or corrections had expired in terms of article 26 (4) of the Act.

The Arbiter shall furthermore not delve into any disagreements relating to the computation of the compensation as calculated by SPSL under Case ASF 096/2020. This is without prejudice to any right the Complainant may have to seek redress before another court or tribunal competent to hear such particular aspects.

[41] An insurance policy issued in the Isle of Man

[42] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20096-2020%20-%20OH%20vs%20Sovereign%20Pension%20Services%20Limited.pdf

In this Complaint, the Arbiter shall accordingly limit his consideration solely to new aspects that were not dealt within, nor the subject of, the said Case ASF 096/2020.

The aspects which shall be considered in this decision are thus namely limited to the alleged failures in the conduct of the Service Provider with respect to:

a) the sale of the Darwin Fund;

b) deVere's appointment as the investment adviser/discretionary manager;

c) the current status of his pension plan and request to transfer out and surrender of the Scheme.

Nature of certain remedy requested

The Arbiter would like to add that certain remedies requested by the Complainant outrightly cannot be considered for the reasons indicated. This is particularly so with respect to:

a) his request for a recalculation of the sum awarded under Case ASF 096/2020;[43]

b) his request for compensation involving conduct of the Service Provider already considered in, and subject to, Case ASF 096/2020;

c) the requested closure of the RL360 account and *'cancellation of all contracts with … underlying third parties RL360 (account PM 10003817) and deVere Group Limited (Spain Malaga) and deVere Mauritius'* made in his recast complaint;[44]

d) cancellation of any third-party fees (such as those applicable on the RL360).

It is further pointed out that the Arbiter's powers of adjudication are limited to those provided in article 26(3) of the Act.

[43] P. 585
[44] P. 593

The Arbiter shall next proceed to consider the merits of the case in respect of the specific matters subject to this Complaint as highlighted above.

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

Considers:

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.[45]

The sale of the Darwin Fund

It is noted that, as explained by the Service Provider there were three redemption instructions issued by deVere in respect of the Darwin Fund – in October 2020 (for GBP1,050),[46] December 2020 (for GBP 8,750)[47] and a full redemption request in September 2021.[48]

The full redemption request was undertaken at a time after no exit fees applied on this investment as it was being *'sold after 5 years'* as also indicated in the email of 22 September 2021.[49]

Whilst the Complainant was not copied in the said redemption instructions, cognizance is however taken of the fact that such redemptions were made in the context of a discretionary management agreement entered into with deVere earlier on 5 March 2020.

By the very nature of a discretionary mandate, the manager and/or adviser who has such discretion is not required to seek the approval of the customer prior to undertaking the purchase/sale of an investment.

[45] Cap. 555, Art. 19(3)(b)
[46] P. 512 - 513
[47] P. 514 & 516
[48] P. 520 & 522
[49] P. 520

Indeed, this had been made amply clear in the discretionary mandate agreement signed by the Complainant on 4 December 2019, which agreement clearly and amply highlights the discretionary nature of the arrangements being entered into. The said agreement also included a declaration on the Complainant's part that:

'I understand that my appointed DFM will be entitled to manage the investments without prior reference to me …'.[50]

It is further noted that even in the RL360 investment adviser form, signed also by the Complainant on 4 December 2019, it is also clearly indicated that:

'I confirm that my investment adviser will be acting on a discretionary basis. Dealing instructions may be forwarded to RL360 without my prior consultation …'.[51]

It is also noted that in an email communication of 22 January 2019, presented by the Complainant during the proceedings of the case, SPSL had notified the Complainant *'… regarding enhancements to our procedure for processing dealing instructions we receive from your appointed financial adviser …'*.[52]

In the said communication, SPSL stated *inter alia* that

'With effect from 1 February 2019, in order to increase the transparency of the investment/dealings process, you will be copied into the email that we submit to your chosen investment provider, to execute the dealing instruction we received from your appointed financial adviser'.

The said email, however, clarified that

'… These changes will not apply if you have appointed a discretionary investment manager who operates under a discretionary mandate'.[53]

The Complainant nevertheless expected the trustee to notify him before such redemptions were made and/or to stop the redemption transactions given that

[50] P. 603 – Emphasis added by the Arbiter
[51] P. 606 – Emphasis added by the Arbiter
[52] P. 374
[53] *Ibid.*

his previous complaint Case ASF 096/2020 (filed with the OAFS in September 2020) was *sub-judice.*

No evidence has, however, been provided, nor has it satisfactorily emerged during the proceedings of the case that SPSL, as trustee/RSA, was required to notify and query beforehand with the Complainant such redemption instructions. This is particularly in the context of the discretionary investment mandate and the declarations previously signed by the Complainant as explained above.

It is furthermore also noted that the *Policy Transaction Statement* produced by the Complainant (available from the online services of RL360), covering the transactions between 21 October 2014 and 30 April 2023, already indicated various staggered sales of the Darwin Fund over the period 4 January 2021 to 1 June 2021 (prior to the disputed full redemption later in 2021).[54] The Complainant had not queried such sales (undertaken from Jan to June 2021) at the time, either.

The Arbiter also notes that the Darwin Fund was fully redeemed soon after the exit fees applicable for the first five years on this investment had lapsed with the intention to then restructure his investment portfolio.

In the above context, and in the absence of the Complainant suspending his DFM arrangement prior to the said redemption requests[55]and/or any evidence of specific instructions given by the Complainant for the Darwin Fund not to be sold until his further instructions, the Arbiter finds no sufficient basis on which he can attribute fault to SPSL, for failing as trustee and RSA, to halt or refuse the said transactions as alleged by the Complainant.

It is considered that the fact that a complaint was made to the OAFS (in case 096/2020) in September 2020, did not affect nor should have affected the discretionary investment mandate given to the newly appointed investment

[54] P. 424

[55] The only evidence emerging during the proceedings of the case is of a letter dated 11 December 2021 in which the Complainant instructed SPSL for him to personally authorise and sign all dealing instructions (P. 83), with this occurring after the full redemption.

adviser/manager. Indeed, such mandate remained in force and the discretionary powers could be exercised accordingly.

Whilst the Arbiter is not entering into the merits as to whether the redemption of the Darwin Fund was justified at the time of redemption, the Arbiter, cannot take any comfort either from the Complainant's assertion that the Darwin Fund *'… was obviously, in 2021, a sound, stable investment'*.[56]

Apart that such assertion was not corroborated, it is unclear on what basis the Complainant made such claim considering the nature of this investment,[57] the specific risks as outlined in its Prospectus and Fund Fact Sheet,[58, 59] and even its performance.

It is also noted that although the Darwin Fund (ISIN no. GG00B7K3QR67)[60] continued to appreciate in value during the year 2022 after its full redemption in December 2021, it however experienced a steady continuous and consistent drop in value as from March 2023 throughout 2023 (with its price remaining below that at which it was sold during such period).[61] It is noted that as of 29 February 2024, the fund indeed had a much lower NAV of GBP 1.50 as compared to that applicable at the time it was sold in 2021.[62]

It appears that the Complainant is rather disputing the sale of the Darwin Fund (which sale in itself ultimately yielded a profit on such investment), only in view of the impact such a sale had in the ensuing calculation of the compensation awarded in Case 096/2020 which occurred a few months after.

At the time of the said redemption, the decision for Case 096/2020 had not been communicated yet, and there were no assurances about the outcome of such a case at the time.

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[56] P. 11

[57] A property fund *'only available to Institutional and Professional Investors'* - https://www.darwinleisurepropertyfund.com/

[58] Page 4 and Section on Risk Factors (Page 13-16) of the Prospectus relating to Darwin Leisure Property Fund - https://www.darwinleisurepropertyfund.com/literature

[59] As outlined in the Darwin Fund Fact Sheet presented by the Complainant, *'Investments in property carry specific risks and may not guarantee a return, and the value and the income on them may go up or down, so that you may not realise the amount originally invested'* (P. 333)

[60] P. 365

[61] P. 439 & 440 - https://www.morningstar.co.uk/uk/funds/snapshot/snapshot.aspx?id=F00000WRE2

[62] https://www.morningstar.co.uk/uk/funds/snapshot/snapshot.aspx?id=F00000WRE2

The Complainant alleged that there was a deliberate attempt to reduce the compensation in Case ASF 096/2020[63] (by selling the fund at a profit prior to the decision of case 096/2020 to reduce the amount of compensation that might be awarded to him). This is merely considered a baseless assertion. The alleged *'SPSL's unethical sale'* of the Darwin Fund is unsubstantiated and cannot reasonably be taken into account in determining failure in relation to the conduct of the financial service provider.[64]

In the circumstances, the Arbiter is not accepting the Complainant's claims and alleged failures of SPSL regarding the sale of the Darwin Fund.

deVere's appointment as the investment adviser/discretionary manager

The Arbiter notes the following timeline and key communications arising with respect to deVere's appointment:

- Sept 2019 – Communication by SPSL that Chase Belgrave (the previous adviser prior to deVere) did not meet or failed to respond to the new regulatory criteria for the appointment of advisers.[65]

- Oct/Nov 2019 – The Complainant sent SPSL a letter dated 30 October 2019, wherein he informed SPSL with details of his new financial adviser, *'deVere Spain SL'*.[66]

- 11 Nov 2019 – SPSL informed the Complainant that *'Unfortunately we can't appoint deVere Italia (sic) without a Discretionary Fund Manager, as they have an insurance license and won't be able to cover the investment aspect of the advice. Can you please liaise with deVere to advise on the way forward?'*[67]

- 11 Nov 2019 – In reply to a query about the inclusion of the reference to deVere Italia, SPSL clarified that *'… it was a geographical oversight. deVere Spain still need a DFM though'*.[68]

[63] P. 590
[64] *Ibid.*
[65] P. 43 - 45
[66] P. 39
[67] P. 42
[68] P. 94 & 95

- 11 Nov 2019 – deVere Spain contacted SPSL by email stating that *'To enable us to complete and implement the DFM, we first need details of Mr OH's policy. As soon as we are recognised/registered as his broker we will arrange for the relevant documents to be completed and submitted, until then there will be no activity on Mr OH's account until DFM is in place*'.[69]

- 14 Nov 2019 – In another email sent by deVere Spain to SPSL, deVere stated that *'… Once we have the policy details and valuation, we will complete the DFM documentation and Risk Profile Questionnaire with Mr OH in order to comply with current regulatory requirements*'.[70]

- 28 Nov 2019 – SPSL sent an email to the Complainant asking him *'Is there an update on the DFM documentation please?'*.[71]

- Dec 2019 – The Complainant signed the *'Discretionary Fund Manager Appointment Form'* and the RL360 investment advisor (on a discretionary basis) appointment form, both dated 4 December 2019.[72] The said forms indicated the appointment of *'deVere Investment Limited'* based in Mauritius as the party appointed in such role.[73]

As indicated above, it is noted that, soon after the full redemption of the Darwin Fund in December 2021, the Complainant sent a communication on 11 December 2021, requesting *inter alia* all dealing instructions (purchase/sale of investments) on his policy to be authorised by himself, effectively removing deVere's discretion.[74]

SPSL eventually notified the Complainant by email in January 2022, that they *'removed Devere's ability to trade on the RL360 account'* and *'… since deVere Spain S.L have an Insurance Licence, if deVere Investment Limited are completely removed as DFM, you are required to nominate a new appropriate regulated and licensed Investment Adviser.'* [75]

[69] P. 93
[70] P. 92
[71] P. 104
[72] P. 49 - 52 & 54 - 55
[73] P. 51 & 54
[74] P. 83
[75] P. 179

In its reply (of 6 June 2023), the Service Provider justified its communication to the Complainant for the requirement to appoint a discretionary fund manager by referring to the MFSA's Pension Rules and the MFSA's Feedback Statement on the *'Consultation on Amendments to Pension Rules for Personal Retirement Schemes'*) dated 4 January 2019.[76]

It is noted that the quoted MFSA's Feedback Statement, specified that:

'… However the MFSA would like to point out that where an investment advisor is registered under the Directive 2016/97 (Insurance Distribution Directive), a Discretionary Fund Manager who is licensed under Directive 2014/65/EU, would need to be appointed in order to manage the underlying funds, unless the investment advisor is authorised under the Directive 2016/97 (Insurance Distribution Directive) and also authorised under Directive 2014/65/EU.'[77]

It is further noted that in its reply (of 6 June 2023), the Service Provider referred to, and quoted, Rule 8.6(b)(i)(bb)(i) of the Pension Rules as providing *inter alia* that:

'… (ii) where the investment advisor is fully authorised in accordance with Directive (EU) 2016/97, ***a discretionary fund manager or an investment advisor authorised under Directive 2014/65/EU****, shall be appointed to manage the underlying funds'.*[78]

Having considered the timeline and the communications exchanged as summarised above, as well as the changes to the regulatory framework relating to the regulatory status of investment advisors, the Arbiter considers that there is a certain deficiency on the Service Provider's conduct, in that SPSL failed to clearly and fully explain the options available to the Complainant when he had approached it with the proposed appointment of deVere Spain in November 2019.

According to the updated regulatory framework applicable at the time,[79] retail members of a member-directed personal retirement scheme had to appoint

[76] P. 436
[77] P. 462
[78] P. 443 – Emphasis added by the Arbiter
[79] Section B dealing with the *'Supplementary Conditions in the case of entirely Member Directed Schemes'* of the Pension Rules for Personal Retirement Schemes.

either an investment advisor to advise the member on the choice of investments and/or appoint an investment manager to manage the member's investments on a discretionary basis.[80]

Investment advisors appointed to provide advice on investment instruments had to be (i) licensed to provide investment advice under the Investment Services Act ('ISA'), in case of advisors based in Malta, or (ii) in the case where the advisor is established in EU/EEA, it had to be licensed in accordance with Directive 2014/65/EU (that is the *MiFID Directive*), or (iii) in the case where the advisor is based in a non-EU/ EEA state, it had to be considered subject to an equivalent level of regulatory supervision for such advice.[81]

If the member wanted an investment advisor to advise him on insurance-based investment products, such an advisor would have been authorised in accordance with Directive (EU) 2016/97, the *Insurance Distribution Directive* ('IID').

Depending on the member's exigencies one could have had an investment advisor authorised under both the IID and MiFID (or equivalent), or just an investment advisor authorised under MiFID (or equivalent) if the underlying investments just involved investment instruments.

It was only logical that if the member demanded or required to have an advisor authorised under the IID for insurance-based investment products (and such advisor only held an authorisation under the IID), but the pension arrangement involved/ required the provision of advice in relation to investment instruments, then, in such circumstance one had to appoint either a discretionary fund

[80] As per Rule 9.2 (a) & (b) of the *Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011* (version Dec 2018/2020) – in later versions re-numbered as rule 8.2.

[81] Rule 9.6(b)(i)(aa) to (cc) of the *Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011* issued on 7 January 2015, Versions *'Last Updated: December 2018'* and *'Last Updated: December 2020'* provided that:

'… (i) the investment advisor may either be: (aa) a person licensed to provide investment advice under the Investment Services Act, 1994; (bb) a person established in a Member State or EEA State and duly authorised for this activity in that Member State or EEA State and where the services related to this activity are being provided in another Member State or EEA State, the person is duly authorised to provide such services in accordance with Directive 2014/65/EU and/or Directive 2016/97 (in the case of insurance-based investment products), as amended from time to time, and is carrying out its activities in relation to the Member pursuant to the respective Directives, as applicable; or (cc) in the case of a person established in a non-Member State or non-EEA State, a person who is considered by the Retirement Scheme Administrator to be subject to an equivalent level of regulatory supervision in the jurisdiction where its operations take place, for it to undertake investment advice;…'

manager **or** an investment advisor authorised under Directive 2014/65/EU (or equivalent) to cover the advice provided in respect of investment instruments. This was the position reflected in the same Pension Rules quoted by the Service Provider itself in its reply (of 6 June 2023), as indicated above.[82]

The appointment of a discretionary fund manager was thus not a necessity unless so requested or chosen by the member.

SPSL, in its role as trustee to act as a *bonus paterfamilias*, should have accordingly better guided and explained the different options available to the Complainant at the time so that he could make an informed decision depending on his exigencies.

The Service Provider, however, just indicated to the Complainant that a discretionary fund manager had to be appointed if he wanted deVere Spain, when this was not necessarily the case as there were other arrangements it could have alerted him to, as explained above.

The Arbiter, however, acknowledges that the Feedback Statement quoted by the Service Provider could possibly have been misinterpreted accordingly. There are ultimately both pros and cons to the appointment of a discretionary investment manager, and it is noted that the Complainant never refuted or expressed any disagreement with the appointment of a discretionary manager at the time of its appointment.

The Arbiter shall duly take the said matters into consideration in reaching his decision on this case.

Current status and request to transfer out/ surrender of the Scheme

The Arbiter understands and sympathises with the Complainant's situation regarding the current status of his Retirement Scheme and the continued

[82] P. 442 - 443

erosion of his pension plan through the ongoing fees applicable to his plan,[83] even more so in the absence of any current investments, which can bring returns to counter such charges and provide for his retirement.

However, in the case under consideration, the Arbiter finds no justifiable and legal basis for cancelling the Scheme's contract and releasing the Complainant from his contractual obligations with the Scheme, as the Complainant requested. There is also no basis on which the Arbiter can order for all the balances on his pension plan to be sent to his personal account and for the effective closure of his Scheme and underlying policy. Any transfer out of the Scheme must be made in accordance with the Scheme's trust deed and the applicable Pension Rules. In this case, it has not been demonstrated nor emerged that SPSL, as trustee and RSA of the Scheme, is inhibiting such transfer in contravention of any applicable conditions or rules.

Decision

For the reasons explained, the Arbiter is dismissing the Complainant's claims and is only accepting that SPSL's explanation of the requirements applicable to the appointment of the investment adviser/discretionary manager was lacking.

The Arbiter, however, finds it difficult to determine the nexus between the losses claimed by the Complainant and the said shortfall, particularly when the discretionary manager's sale of the Darwin Fund resulted in a profit on the investment.

Moreover, other alleged losses on the value of his Scheme are considered to relate to matters already the subject of another case already decided upon, as indicated above, and/or fees and charges on his pension arrangement which are subject to the respective contractual arrangements entered into.

The lower sum of compensation received by the Complainant as a result of the profit acquired on the Darwin Fund is an aspect which relates more to the

[83] Particularly, the hefty fees on the underlying policy (comprising of the 'Percentage Administration Fee' of approx. GBP 620 and 'Flat Administration Fee' of approx. GBP 110 payable quarterly and thus of approx. GBP2,900 annually). An annual fee of Eur1,200 further applies as a trustee fee on the Scheme as indicated by SPSL (P. 444).

incidental impact on the calculation of compensation awarded in case ASF 096/2020 decided months after the order for the redemption of the Darwin Fund was executed. The compensation awarded in terms of such decision benefitted the Service Provider from the profit realised from sale of the Darwin Fund, but there is nothing to suggest that this is a result of some devious plan or was anything but an incidental matter.

In fact, had the sale of the Darwin Fund been disclosed at the time of the decision on Case 096/2020, its profits would have been included in the calculation of losses in the said decision.

The Arbiter finds no adequate basis to justify the claims for the monetary compensation requested by the Complainant and/or the cancellation of the Scheme's contract so requested.

The Arbiter, however, notes that the trust between the Complainant and the Service Provider has deteriorated further and in view of the deficiency identified above, namely, the lack of proper explanation of the regulatory requirements for the appointment of investment advisors, **the Arbiter is directing the Service Provider, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, to waive or refund SPSL's own exit fee applicable to the Retirement Scheme.**

If a refund (rather than a waiver) is due in respect of the Scheme's exit fee, (such as in the case where an exit from the Scheme has already occurred), the payment of such refund of the said exit fee is with interest at the rate of 5.25% p.a. from the date of this decision until the date of effective payment.[84]

As the Arbiter has rejected most of the Complainant's claims and in light of the shortfall identified on SPSL as outlined in this decision, each party is to bear its own costs of these proceedings.

Recommendations

[84] It is to be noted that in case this decision is appealed, should this decision be confirmed on appeal, the interest is to be calculated from the date of this decision or from the date of exit from the Scheme as applicable.

In view of the particular circumstances of this case and the matters raised in this decision, the Arbiter wishes to recommend, in a non-binding manner and without prejudice and obligation, for the Service Provider to consider on its own will and as a sign of goodwill:

(a) To refund and/or reduce by 50% the trustee fee paid from the year 2022 onwards (after the last sole investment within the Scheme was redeemed in December 2021), till the period the Scheme and its underlying policy are left without investments;

(b) To contact RL360 and (as a measure of goodwill) discuss the possibility by the policy provider of a partial refund or re-negotiation of the applicable fees on the RL360 policy during, and limited to, the period when no underlying investment instruments feature within the policy. Any possible reduction or waiver of the exit fee, in view of the Complainant's particular situation and the status of his pension plan, could also be considered in such discussion with the aim of assisting him accordingly.

The said recommendations are without prejudice to the decision stipulated above.

Alfred Mifsud
Arbiter for Financial Services

<u>Information Note related to the Arbiter's decision</u>

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of

a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.