Before the Arbiter for Financial Services

Case ASF 160/2023

DM

('the Complainant')

vs

Sovereign Pension Services Limited

(C56627) ('SPSL' or 'the Service Provider')

Sitting of 12 April 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 licensed by the Malta Financial Services Authority ('MFSA'), established in the form of a trust and administered by SPSL as its Trustee and Retirement Scheme Administrator ('RSA').

The Complaint, in essence, relates to the Complainant's claims of significant losses suffered on his Retirement Scheme due to the alleged unsuitable investments allowed by the Service Provider on the advice of an unauthorised investment adviser. The Complainant claimed that the Retirement Scheme was invested in poor investments, which only benefitted his investment adviser, and that his pension plan was being eroded with fees. It was further alleged that the arrangement was a scam and that the trustee took no action to prevent his Scheme from falling in value. The Complainant also claimed that the trustee was not forthcoming with information and explanations regarding his Scheme.

The Complaint[1]

In his Complaint to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant submitted that he had been deceived and scammed with his pension fund and that his trustee, SPSL, allowed this to happen.

He submitted that SPSL was in complete control of his funds but had done nothing to prevent him from being scammed.

The Complainant explained that he contacted SPSL many times over the years since he was worried about how his pension was managed by Paul Cook, initially of *Howden Insurance Brokers LLC* ('Howden') and then of *Holborn Assets Ltd*.

He submitted that his pension plan consistently lost money from the poor investments which benefitted the adviser and not his pension fund. This is apart that his pension plan was being eaten away with fees.

The Complainant explained that he had initially agreed to move his final salary *Railway Pension Scheme* with *Gravitas,* who he claimed sold its client portfolio to *Howden*.[2] He noted that it was then that Paul Cook, his new financial adviser, contacted him and informed him about the new point of contact for his pension plan.

The Complainant submitted that despite complaining several times with SPSL via email and Paul Cook, there was no drive or feedback to help him rectify and recover the pension plan returns he had been promised.

The Complainant explained that, as a result, he started to look elsewhere in Australia to find out what he could do and where he stood legally. He was then informed that his financial adviser was not authorised to give financial advice in Australia (where the Complainant was based) and that the funds selected were poor, offering only benefits to his financial adviser. The Complainant further alleged that he was paying unnecessary fees when better-performing funds were available with cheaper fees.

He pointed out that SPSL is the trustee of his Scheme and that despite the many alarm bells and complaints, SPSL did nothing to stop what was happening. This

[1] Complaint Form on Page (P.) 1-7 with extensive supporting documentation on P. 8-148.
[2] The exact structure is rather clarified later on in this decision.

also despite SPSL's claims that it prevents pension scams and provides support whilst adopting principles of good practice.

The Complainant claimed that SPSL, as his trustee, did not prevent his Scheme from falling in value and allowed his pension balance to fall over GBP 44,000 during a seven-year period since 2016. This set him back years in retirement, and at 54 years of age, he noted that he could not get back those years. He added that one only needs to look at the statements to realise something is severely wrong with his pension plan.

The Complainant noted that while he received an official response to his formal complaint to SPSL within the required timeframe, the response was generic, and SPSL took absolutely no responsibility for what had happened.

He claimed that SPSL also made it extremely difficult for anyone trying to take over or obtain statements to find out exactly what was going on. He further claimed that the whole scheme was an absolute scam and that there was no advice or governance. It was further alleged that if he allowed his pension plan to continue as is, he would end up with zero balance on which to retire.

The Complainant claimed that SPSL did not address or answer the questions put to it, particularly why it allowed someone who is not authorised to give financial advice in Australia (to act as his investment adviser) and, also, why it allowed the poor practice to continue despite being aware of such situation. He claimed that in the process, the Service Provider allowed many pension funds to be ruined and years of hard work wasted.

The Complainant explained that he made no withdrawals and could not touch any monies whatsoever. He further noted that since his previous adviser (Paul Cook)'s departure, all the funds were changed on the advice of two independent financial advisers who had told him that his previous investments were only benefitting his former adviser. He claimed that none of the earlier funds were suitable and reiterated that SPSL, as his Trustee, had many opportunities to prevent this situation.

Remedy requested

The Complainant wishes to be compensated by being put back into the original position when he transferred the sum of GBP 124,380.54 from his previous pension, the *Railway Pension Scheme*, into the Scheme.

Having considered, in its entirety, the Service Provider's reply, including attachments,[3]

Where the Service Provider explained and submitted the following:

Preliminary Submission: Article 21(1)(c) Competence

1. SPSL referred to and quoted Article 21(1)(c) of the Arbiter for Financial Services Act, Chapter 555 of the Laws of Malta ('the Act'). It noted that the article grants the Arbiter authority to hear complaints regarding conduct occurring after the Act's enactment, provided the complaint is registered in writing within two years from the date the complainant becomes aware of the matters in question.

2. The Service Provider submitted that, pursuant to this article, the Complainant had a two-year timeframe to register a complaint with it, which timeframe began upon his awareness of the issues. It further submitted that this awareness is substantiated by the April and June 2020 email correspondence, which it explained in greater detail in its reply.

   Timeline and Applicability

3. SPSL explained that the Complainant became a member of the Scheme on 7 December 2016, and the holdings in question were acquired following the advice of his appointed investment adviser, Paul Cook, who at the time was an adviser with Howden as per the Scheme Application Form dated 8 November 2016.[4]

   It further explained that the investment instructions were submitted on 24 May 2017 and 30 September 2018, and all included the Complainant's signature. It submitted that the inclusion of the Complainant's signature

[3] P. 155-159, with attachments from P. 160-350
[4] P. 155 & 164

serves as a legally binding affirmation, indicating his explicit agreement with the provided instruction. SPSL noted that the act of signing implies a conscious acknowledgement and acceptance of the instructions stated.

4. SPSL explained that in June 2020, the Complainant included the Trustee in an email to his appointed investment adviser, Paul Cook, who at the time was an adviser with *Holborn Management Services SA Pty Ltd* ('Holborn') asking for further information and clarification regarding the performance of his chosen funds and the fees applicable to the underlying investment.[5]

   It added that in November 2020, the Complainant submitted queries to the Trustee concerning the same matter he previously raised with his adviser, which SPSL promptly addressed and offered assistance within the limits permissible under its licence conditions.[6]

   SPSL submitted that it was important to note that the correspondence exchanged in 2020 did not constitute a complaint against SPSL, but rather an expression of dissatisfaction by the Complainant with his adviser.

   It noted that the Complainant was furthermore granted viewing rights via online access to the portfolio held with *Gravitas Finance LLC* ('Gravitas') since the inception of the plan, where the performance and values could be monitored directly by the Complainant in real time.

   SPSL also explained that in April 2023, the Complainant enquired with it and sought guidance on fund withdrawals whilst requesting information about the performance of his investments.[7] Subsequently, SPSL received the first complaint from the Complainant on 29 May 2023.

   The Service Provider submitted that the above underscores that the complaint does not fall under the Arbiter's jurisdiction as per Article 21(1)(c) given the Complainant's awareness of the matters complained of since, at the very latest, June 2020 as corroborated in the email exchanges annexed to its reply.

[5] P. 155 & 184
[6] P. 155 & 188
[7] P. 156 & 196

Reply to the Complainant's concerns

5. SPSL noted that, notwithstanding its legal arguments, which it believes should lead to the dismissal of the Complaint, it remains committed to addressing the Complainant's concerns and provided a detailed response to the specific points raised by the Complainant.

6. The Service Provider explained that the Scheme is a member-directed scheme, which means that the member is required to appoint its own investment adviser to guide the member in the investment decisions. Alternatively, an investment manager can be appointed to handle the investments on a discretionary basis. SPSL submitted that it is not licensed or authorised to provide investment advice, and that the member must rely on its appointed investment adviser for such advice. It noted that the role of the investment adviser is to provide suitable advice to the member regarding investment decisions within the pension plan.

7. SPSL explained that at the time of the establishment of the Complainant's plan in 2016, Howden was appointed as his investment adviser. This was in accordance with the Complainant's instructions given to SPSL by completing their details on page 3 of the Scheme's Application Form, which bears the Complainant's signature. Howden was responsible for providing financial advice on transferring the pension to a Qualifying Recognised Overseas Pension Scheme and the investment of the funds within the plan following the transfer.

8. SPSL further explained that Howden was appointed as the Complainant's investment adviser from 6 December 2016 until 11 September 2017. It noted that a signed Change of Adviser instruction to appoint *Holborn Assets Insurance Brokers LLC* as Investment Adviser was then received on 10 October 2017.[8] A signed Letter of Authority dated 10 April 2020 was eventually received to appoint *Brite Advisors* as an Authorised Entity to obtain information only.[9] SPSL further noted that a Change of Adviser instruction form signed by the Complainant on 12 October 2022 was then received on 10 January 2023, appointing *deVere Australia Group Pty Ltd* as

[8] P. 156 & 200
[9] P. 156 & 201

Investment Adviser. It noted that this arrangement remained in effect at the time of its reply.[10]

9. SPSL submitted that the *Pension Rules for Personal Retirement Schemes* issued in terms of the *Retirement Pensions Act* ('the Pension Rules') was amended in 2019. It noted that these amendments introduced several requirements, including the necessity for appointed investment advisers to possess the required permissions in the Member's country of residence.

   It submitted that prior to the implementation of these changes in the Pension Rules, trustees were not bound by regulatory obligations to assess the regulatory status of advisers against the residency of the members. Consequently, *Howden Insurance Brokers LLC* and *Holborn Assets Insurance Brokers LLC* were permitted to serve as the Complainant's investment adviser during this period.

   Another change introduced by the Pension Rules was the requirement for fee and commission disclosure, which was not a pre-existing condition. SPSL elaborated that prior to this amendment, the trustee did not have access to information concerning fees and commissions paid to advisers, nor an obligation to collect such information. It added that before 2019, the trustee relied upon the members' declarations that all fees and commissions had been adequately explained to them by their appointed advisers.

10. The Service Provider pointed out that, when joining the Scheme, the Complainant agreed to the Terms and Conditions defined by SPSL in the Scheme's Application Form. It noted that Point 7 of this Declaration states that *'... I understand that my financial adviser may be remunerated by commission and/or trail fees payable by the bond issuer or investment house from charges to be deducted from my pension funds and I confirm that my financial adviser has fully explained to me the extent and nature of his fees.'*[11]

[10] P. 156 & 205
[11] P. 157

SPSL submitted that by virtue of this declaration, it was understood that the investment adviser chosen by the Complainant had provided him with a comprehensive explanation of the transfer process, including all associated fees and commissions, and that the Complainant proceeded based on this advice.

It submitted that any instructions received by SPSL from the appointed investment advisers, which also included the Complainant's signature, were accepted in good faith and on the understanding that the Complainant had been fully informed about the process and applicable fees.

11. SPSL further explained that in March 2017, it received the amount of GBP 124,380.54 from the Complainant's previous UK pension scheme, *Railways Pension Scheme DB Cargo (UK) Limited*. From this amount, SPSL's Establishment fee amounting to EUR 800 and the initial annual trustee fee of EUR 1,100 were deducted in accordance with the Scheme's applicable fee schedule. Subsequently, a total of GBP 122,700.32 was remitted to Gravitas in accordance with the instructions that SPSL had received.

    It noted that a comprehensive record of all fund movements and trustee fees in the Complainant's bank account held by the trustee was enclosed with its reply.[12] Additionally, a detailed transaction history was also provided with its reply. This detailed all movements, costs, charges, and deductions pertaining to the investment account held with Gravitas since its inception.[13]

12. The Service Provider also explained that before establishing the new account with Gravitas, SPSL received a duly signed Account Opening Application Form.[14] It noted that all the fees associated with the investment account are clearly outlined on Page 3 of this application form, which also bears the Complainant's signature.[15] SPSL further submitted that it is worth noting that on page 17 of the same form, the Gravitas charging structure is

[12] P. 157 & 215
[13] P. 157 & 216 - 227
[14] P. 157 & 228
[15] P. 230

clearly noted as having a 10-year establishment period, inclusive of a redemption fee initially set at 13%, gradually diminishing by 1.3% annually until reaching zero by the tenth year.

13. In relation to dealing instructions, SPSL explained that it is worth noting that all dealing instructions submitted by the investment adviser during the period spanning 2017 to 2018 were accompanied by the Complainant's signature.[16]

    SPSL submitted that the presence of the Complainant's signature on these forms serves as confirmation that the appointed adviser had conducted prior discussions regarding any relevant fees and commissions before initiating any new fund purchases. Additionally, every dealing instruction issued by the designated adviser underwent a thorough assessment against the Complainant's specified risk profile and the Investment Guidelines that were in effect at the time.[17] It added that these instructions were carefully reviewed and were found to be in full compliance with both the investment guidelines and the Complainant's risk profile, thereby rendering them permissible.

14. SPSL explained that the complaint submitted to it was addressed to the Complainant's previous adviser, Paul Cook, with SPSL in copy on 29 May 2023. The Service Provider noted that it had offered assistance in providing the information to the Complainant as best it could and it had clarified the role of the trustee accordingly on 19 June 2023, where it suggested that clarification is sought from his previously appointed advisers.[18]

15. SPSL emphasised that, as the Trustee and RSA, it consistently maintained transparency by providing the Complainant with detailed information regarding the composition of his portfolio on an annual basis and assisting with requests for information when contacted by the Complainant.[19]

    It was noted that the valuations provided detailed insights into the status and performance of the investments, ensuring that the Complainant was

[16] P. 259
[17] P. 173 & 174
[18] P. 312
[19] P. 318

kept informed about their progress. SPSL submitted that it is important to note that the Complainant also had online access to view the Gravitas account held by the trustee on his behalf since 2017, which further confirms that the Complainant was able to monitor the performance of his funds on an ongoing basis in real time.

16. The Service Provider noted that, additionally, in November 2020, SPSL extended an opportunity to the Complainant to transfer his pension fund to another plan administered by SPSL, featuring a reduced annual fee. This offer included the exclusion of customary termination and setup fees, which are typically applied to cover administration costs for this process.[20] However, despite this option being presented, no action was taken by the Complainant to proceed with the transfer.

17. SPSL also presented the following table in its reply:

Date		Value	Variance
09/03/2017	Amount invested	£ 122,700.32	
31/12/2017	End of year value	£ 110,281.37	-10%
31/12/2018	End of year value	£ 94,542.67	-14%
31/12/2019	End of year value	£ 101,107.99	+7%
31/12/2020	End of year value	£ 106,864.98	+6%
31/12/2021	End of year value	£112,194.40	+5%
31/12/2022	End of year value	£84,242.44	-25%
03/10/2023	Current value	£ 81,416.62	-3%

It noted that the portfolio's historical performance illustrates fluctuations, with both positive and negative trends. SPSL pointed out that while there were a number of declines in the fund value in certain years, for example, -10% in 2017, -14% in 2018, and -25% in 2022, there were also periods of recovery and growth, for example, 7% in 2019, 6% in 2020, and 5% in 2021.

SPSL explained that the variance in the investment performance, as evidenced by the data provided in the table, underscores the inherent risks associated with financial markets. It emphasised that it is crucial to recognize that the trustee does not have direct control over the investments within the Scheme.

[20] P. 342

The investment markets are influenced by a multitude of factors, including market volatility, economic conditions, and the specific investment strategies employed. As a result, the performance of the fund can fluctuate significantly over time.

It stated that it is vital to bear in mind that investments inherently carry a degree of risk, and losses can occur as a natural part of investing. SPSL reiterated that the trustee's role primarily involves overseeing and managing the Scheme in accordance with the Complainant's choices and investment decisions made by the appointed investment adviser. It further re-iterated that the trustee does not have the power to dictate market outcomes, eliminate market risks or offer any guarantees in relation to fund values.

18. SPSL concluded that, in summary, the Complainant had access to information about his portfolio composition since the inception of the plan and had submitted queries to his adviser and to SPSL in 2020, and the Complaint was lodged with SPSL in 2023.

It reiterated that since the inception of the plan, SPSL, in its capacity as trustee, consistently adhered to the Complainant's instructions and upheld a commitment to transparency. All forms and instructions received in relation to the Complaint included the Complainant's signature. SPSL further stated that the inclusion of the Complainant's signature serves as a legally binding affirmation, indicating his explicit agreement with the provided instructions. It reiterated that the act of signing implies a conscious acknowledgement and acceptance of the terms stated.

The Service Provider noted that, in addition, the Complainant had online access to view the performance of his investments. It further noted that detailed information concerning the composition and valuations of the Complainant's portfolio had been provided annually, in full compliance with both the Scheme's regulations and the Pension Rules. SPSL submitted that this ensured that the Complainant remained well informed about the financial progress of his pension fund. It further reiterated that given the

nature of investments in financial markets, it has neither the ability nor the inclination to offer guarantees in relation to fund values.

Preliminary

Competence of the Arbiter

In its reply, the Service Provider raised the preliminary plea that the Arbiter has no competence to hear this Complaint based **on Article 21(1)(c) of Chapter 555 of the Laws of Malta** (the 'Act'). The Service Provider claimed that the Complainant was aware of the matters complained of, at the very latest in June 2020, but only made a complaint with it on 29 May 2023, and thus beyond the two-year timeframe stipulated in the said article.

The plea relating to Article 21(1)(c) of Chapter 555 of the Laws of Malta was rejected by the Arbiter in his decree dated 7 November 2023 for the reasons stated therein.[21]

In essence, in the said decree, the Arbiter:

a) Referred to the complaint made by the Complainant on the losses allegedly suffered on his investment portfolio, where the Complainant claimed that the investments were unsuitable and that SPSL permitted such investments and allowed an allegedly unauthorised adviser.

b) Determined that the date of *'31/12/2016'* indicated by the Complainant in his Complaint Form to the OAFS[22] (in reply as to when he first became aware of the matters complained of), was an evident error or misunderstanding by the Complainant. This decision was based on the fact that the Complainant only became a member of the Scheme in December 2016.[23]

c) Did not accept that the Complainant first had knowledge of the matters complained of by June 2020 at the latest, as submitted by SPSL. The Arbiter referred to the table presented by the Service Provider in its reply and noted that the table clearly showed that the portfolio of investments made

[21] P. 351 - 354
[22] P. 2
[23] P. 155

a substantial recovery from 2019 to 2021. The Arbiter also noted that the Complainant was evidently hopeful that the recovery trend would persist. Consideration was also taken of the actual losses as emerging on the whole disputed portfolio after the year 2021 subsequent to the sale of the remaining investments.

d) Dismissed the plea of prescription raised by the Service Provider as the Arbiter determined that the Complainant first had knowledge of the matters complained of after 31 December 2021 and, accordingly, decided to proceed to hear the merits of the case.[24]

It is noted that during the hearing of 7 November 2023, the Complainant testified *inter alia* that:

> *'Asked to confirm that I was already aware in 2020 when I had already pointed out my concerns around the underlying investments, I say that I was aware of those poor investment choices way, way before then and I documented all that information and have given all that information to the Arbitration team; emails dating back years and years asking why is this happening and what could be done to change it and nothing has been provided …'*.[25]

In the ensuing submissions,[26] SPSL referenced the Complainant's testimony and reiterated its preliminary plea of prescription, claiming again that the Complaint was filed late.

Following the above, and as emerging in the proceedings of the case, the Arbiter would like to underline that the Complaint contains two key elements that were at times mixed together or not clearly distinguished by the Complainant for the purposes of this Complaint. One aspect concerns the investment platform through which investments were placed and held; the other concerns the disputed investment portfolio allowed by SPSL. These two particular aspects are considered in further detail below.

[24] P. 354
[25] P. 357-358
[26] P. 364 & 385

The Investment Platform

As indicated above, part of the Complainant's Complaint relates to the *International Investment Platform* (the 'IIP platform'), offered by *Gravitas Finance LLC* (based in Mauritius).[27] This is the platform used by the Retirement Scheme through which the disputed investment portfolio was made and held.[28]

The Complainant had applied for membership into the Scheme and for the IIP platform towards end 2016.[29]

The IIP platform offered prime brokerage services (which included execution, settlement, and custody services) with respect to the investments that were to be made by the Complainant within his member-directed pension plan arrangement.

The said platform had its own fee structure[30] (including *an 'Early Redemption Penalty'* applicable on the termination of the platform for the first ten years).[31] The aspect of fees was often pointed out and raised by the Complainant in his Complaint and throughout the proceedings of this case.

It is noted, for example, that even during the hearing of 7 November 2023, the Complainant stated (without specifically referring to the investment platform), that:

> *'Asked why, since I was concerned about the investment strategy, did I not speak to my investment adviser to change the investment strategy, I say I did many, many times. This is why I contacted Sovereign to ask what I had to do to get out of this, only to be told that I could get out of it, but … I was locked in for ten years'.*[32]

In his request for compensation, the Complainant indeed asked to be put back into the original position. This effectively means a request for compensation for all of the fees applied within the Scheme's structure, particularly the IIP platform

[27] P. 97
[28] The said platform was branded as the *'veri-platform'* as indicated in the Investor Summary Statement issued for the Complainant by Gravitas Finance LLC. - P. 216 - 227
[29] P. 72, 79 & 175
[30] P. 22 & 250
[31] P. 250
[32] P. 358

(which comprised the bulk of the fees applied within his pension plan arrangement as shall be considered further on in this decision), apart from compensation for the claimed losses on the investment portfolio.

The Arbiter would like to clarify and point out that the issue of fees is, however, a particular aspect that was specific to, and the Complainant had knowledge of, at the time of entry into the Scheme and the IIP platform, and thus way back in 2016. During the hearing of 7 November 2023, the Complainant himself testified that:

> *'I confirm that I was aware of the fees way back in 2016 and agreed to those fees including the penalties under the lock-in period of ten years which I signed up to'.*[33]

The Arbiter accordingly decides that a complaint about the fees and the suitability of the IIP platform (where the suitability of such platform was challenged principally in view of the fees materialising on such and the lack of ability to exit without incurring exit penalties), is an aspect which does not fall within his competence due to prescription.

This is given that in terms of Article 21(1)(c) of the Act, the Complainant had two years from 2016 to file a formal complaint with the financial services provider. Given that a complaint on the fees and the IIP platform was only done with the Service Provider in 2023, the Arbiter is accordingly accepting the Service Provider's plea of prescription, <u>but only limitedly as far as it relates to the IIP platform, and the application of fees agreed upon at the time of signing the pension plan arrangement</u>.

The disputed investment portfolio

As outlined in his decree of 7 November 2023, the Arbiter considers that the claims raised regarding the disputed investment portfolio clearly fall within his competence.

With respect to this aspect, the Arbiter would like to add that weighting has been given to the fact that the last two remaining investments within the said portfolio (that is, the *Marlborough Special Situations Cell F GBP* and *Kensington*

[33] P. 357

Diversified Growth Fund A GBP), comprised a material position of the portfolio (recommended by Paul Cook). These two remaining positions furthermore were significantly contributing to the recovery of his investment portfolio up until the year 2021.[34]

It cannot indeed be discounted that the disputed investment portfolio experienced a significant recovery trend from 2019 to 2021, as indicated by SPSL itself in the table provided in its reply.[35] The Complainant was indeed reasonably hopeful on the recovery of his portfolio and on the resulting effect the last two remaining investments would have on the performance of his Scheme. In the particular circumstances, the Complainant cannot be deemed to have had knowledge of the actual losses (if any) ultimately resulting overall on the disputed investment portfolio when there were material open positions which had yet to be closed and when the situation was thus still rather unpredictable.

As indicated by the Complainant in his email of 30 June 2020, which was referred to by SPSL as a basis for its claim of prescription, the Complainant had *inter alia* actually stated that:

> *'Obviously I can see the amount on the poor platform but not exactly how Marlborough & Kensington are achieving in this current climate'*.[36]

A consistent positive performance on the remaining investments (the *Marlborough Special Situations* and the *Kensington Fund*) would have had a material effect on the overall performance of the disputed portfolio undertaken at the time of Paul Cook. The recovery trend pushed by the indicated two remaining investments, however, stopped with the significant drop in their market value in the year 2022.[37]

By the time the remaining positions were redeemed in 2023, the losses on his disputed overall investment portfolio were clear and more evident. All his positions had crystallised by 2023 and the Complainant could tangibly determine the total realised losses arising from the disputed investment

[34] Table A further on in this decision refers.
[35] P. 158
[36] P. 184
[37] P. 375

portfolio overall. His formal complaint to the Service Provider of 29 May 2023 was indeed made close to the redemption of his last remaining positions.

The Arbiter accordingly decides that the formal complaint with the Service Provider involving the disputed investment portfolio was made within the two-year period outlined in article 21(1)(c) of the Act. The Service Provider's plea of prescription with respect to the disputed investment portfolio is thus being rejected for the reasons amply mentioned and the Arbiter shall proceed next to consider the merits of the case with respect to this particular key element of the Complaint.

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.[38]

The Complainant

The Complainant, born in 19X9, is of British nationality and resided in XXX at the time of his application for membership as per the details contained in SPSL's Application Form dated 8 November 2016.[39]

His occupation was listed as *'XXX XXX XXX'* in the said form.[40]

His risk profile was listed as *'Medium risk'* in the Scheme's Application Form with this defined as:

> '*Members in this category are balanced in their attitude towards risk. They don't seek risky investments but don't avoid them either. They are prepared to accept fluctuations in the value of their investment to try and achieve better long term returns. These portfolios will be subject to frequent and at times significant fluctuations in value'*.[41]

[38] Cap. 555, Art. 19(3)(b)
[39] P. 164 - 183
[40] P. 166
[41] P. 173

It is noted that in the annual portfolio valuation issued by SPSL for 31/12/2017 the Complainant's *'Initial Risk Score'* was indicated as *'Medium Risk'* with his then *'Current Risk Score'* indicated as *'Lower Risk'*.[42]

During the course of the proceedings, it was not indicated, nor has it emerged, that the Complainant was a professional investor. The Complainant can accordingly be regarded as a retail customer.

Particularities of the Case

The Retirement Scheme and the appointed Investment Advisor

The Centaurus Retirement Benefit Scheme ('the Retirement Scheme' or 'the Scheme') is a personal pension plan in the form of a trust domiciled in Malta authorised by the MFSA.[43]

Paul Cook of *Howden Insurance Brokers LLC* ('Howden') based in Dubai was indicated as the Complainant's appointed financial adviser in respect of his Scheme as per the Scheme's Application Form for membership.[44] Howden provided investment advice to the Complainant with respect to the selection and composition of the investments underlying his Scheme. Paul Cook (of Howden) was also indicated as the investment adviser in the application form in respect of the IIP platform which, as indicated above, is the platform through which the disputed investment portfolio was made and held.[45]

It is noted that a change of adviser form dated September 2017 (stamped as received on 10 November 2017) was sent to SPSL for Paul Cook of *Holborn Assets Limited* to act as the exclusive financial adviser.[46]

As indicated in the sworn declaration by the Managing Director of SPSL s filed during the proceedings of the case, *'During the period from 2017 to 2020 the member continued to seek Mr Paul Cook's advice … though Mr Cook had moved from Howden Insurance Brokers LLC to Holborn Management Services SA Pty'*.[47]

[42] P. 319
[43] https://www.mfsa.mt/financial-services-register/
[44] P. 166
[45] P. 77
[46] P. 200
[47] P. 365

The investments within his Scheme were accordingly directed by the member who received investment advice from Paul Cook (of Howden/Holborn) as his investment adviser, with the investments undertaken subject to the oversight and acceptance of SPSL as the trustee and RSA of the Scheme.

In April 2020, the Complainant appointed *Brite Advisors* ('Brite') based in the UK as an entity authorised to receive information on his pension plan.[48] The Complainant eventually signed a change of advisor form in October 2022, for the appointment of *deVere Australia Group Pty Ltd* ('deVere') as his new investment adviser instead of Paul Cook.[49] As indicated by SPSL, *'deVere were appointed in January 2023'*.[50]

It is further noted that during the sitting of 8 January 2024, SPSL's official testified *inter alia* that:

> *'To clarify, Brite were appointed just to receive information; deVere were appointed to give investment advice. The only change in the investment advisor was in 2023 when deVere were appointed'*.[51]

The Retirement Scheme's Underlying Investments

The Complainant's pension plan arrangement applied for was one where the Retirement Scheme was to make use of the IIP platform, as per the application signed by the Complainant dated 8 November 2016.[52, 53] The application form for the IIP platform was signed by both the Complainant and the trustee.[54] It was also signed by the financial adviser, Paul Cook.[55]

The money received into the IIP platform for investment amounted to GBP 122,675.32.[56] The said sum, received in March 2017, was used to purchase investment instruments and pay the fees applicable within the pension plan.

[48] P. 201
[49] P. 365
[50] P. 376
[51] *Ibid*.
[52] P. 71 – 97
[53] P. 72
[54] P. 76
[55] P. 79
[56] P. 105

Table A below provides a summary of the disputed investment portfolio set up by Paul Cook within the IIP platform, as emerging from the '*Investor Summary Statement*' issued by *Gravitas Finance LLC* covering the period *'2017-03-10 to 2023-09-22'*.[57] The table includes details of all the transactions relating to the said portfolio.

Table A

Type[58]	Name of Investment	Date bought	CCY	Purchase amount	Date sold or Matured	Sale price	Realised Capital Loss/ Profit (exclusive of dividend /interest)	Interest received	Realised Capital Loss/ Profit (inclusive of dividend /interest
Fd	*Emirates Active Managed Fund Cls C GBP Acc*	04 Apr 2017 05 Apr 2017	GBP	63,000 63,000.01	05 Apr 2017 2 Jun 2017	63,000 65,094.91	- +GBP2,094.90 Less Exit Fee[59] of GBP3,254.75 = -GBP1,159.85	n/a	-GBP1,159.85
Fd	*Emirates Balanced Managed Fund Class C GBP Acc*	04 Apr 2017 05 Apr 2017	GBP	21,000 21,000	05 Apr 2017 02 Jun 2017	21,000 21,504.17	- +GBP504.17 Less Exit Fee[60] of GBP1,075.21 = -GBP571.04	n/a	-GBP571.04
SN	*Commerzbank AG 6Y Quanto*	02 Jun 2017	GBP	40,000 40,000	06 Jun 2017	40,000 35,224	- -GBP4,776		

[57] P. 216 - 227

[58] Fd = Fund; SN = Structured Note

[59] An Exit Fee of GBP3,254.75 was applied to the *Emirates Active Managed Fund CLs C GBP Acc* on 02.06.2017 following the sale of this investment as indicated in the *'GBP Cash (Fee Account)'* of the Investor Statement (P.108 & 221). The said Exit Fee was deducted separately as indicated in the *'GBP Cash (Available for Investing)'* statement (P.105 & 218). Accordingly, in order to calculate the actual Realised Profit/ Loss resulting on this investment, the (gross) sale price indicated in the Investor Statement (P.105 & 218) should be net of the Exit Fee. This investment thus actually ended up with a Net Realised Loss of -GBP1,159.85.

[60] An exit fee of GBP1,075.21 applied to the *Emirates Balanced Managed Fund Class C GBP* on 02.06.2017 following the sale of this investment as indicated in the *'GBP Cash (Fee Account)'* of the Investor Statement (P.108 & 221). The said Exit Fee was deducted separately as indicated in the *'GBP Cash (Available for Investing)'* statement (P.105 & 218). Accordingly, in order to calculate the actual Realised Profit/ Loss resulting on this investment, the (gross) sale price indicated in the Investor Statement (P.105 & 218) should be net of the Exit Fee charged. This investment thus actually ended up with a Net Realised Loss of -GBP571.

Type[58]	Name of Investment	Date bought	CCY	Purchase amount	Date sold or Matured	Sale price	Realised Capital Loss/ Profit (exclusive of dividend /interest)	Interest received	Realised Capital Loss/ Profit (inclusive of dividend /interest
	Autocall-Phoenix Note	06 Jun 2017			12 Dec 2017			1,200	-GBP3,576
SN	*EFG Exp. Cert. 2.95% Conditional Coupon Amt Note*	02 Jun 2017 15 Jun 2017	GBP	40,000 40,000	15 Jun 2017 14 Dec 2017	40,000 34,128	- -GBP5,872	1,220	-GBP4,652
Fd	*Emirates Emerging Market Equity Fund Limited*	04 Apr 2017	USD	25,000.01 (equivalent to GBP 20,120.72)[61]	12 Dec 2017	27,503.62	+USD2,503.61 Less Exit Fee[62] of USD1,228.50 = +USD1,275.11	n/a	When converting the proceeds back into GBP, a net realised loss of -GBP 605.07, however, actually resulted on this investment[63]
Fd	*Marlborough Special Situations Cell F GBP*	04 Jan 2018	GBP	19,000.01	04 Jul 2023	16,410.02	-GBP2,589.98	n/a	-GBP2,589.99
Fd	*Marlborough Balanced Cell F GBP*	04 Jan 2018	GBP	55,000.01	15 Oct 2018	51,876.54	-GBP3,123.47	n/a	-GBP3,123.47

[61] The GBP figure is as reflected in the *'USD Cash (Available for Investing)'* account – P. 227

[62] An exit fee of USD 1,228.50 applied to the *Emirates Emerging Market Equity Fund Limited* on 12.12.2017 following the sale of this investment as indicated in the *'USD Cash (Fee Account)'* of the Investor Statement (P.117 & 227). The said Exit Fee was deducted separately as indicated in the *'USD Cash (Available for Investing)'* statement (P.116 & 227). Accordingly, in order to calculate the actual Realised Profit/Loss resulting on this investment, the (gross) sale price indicated in the Investor Statement (P.116 & 227) should be net of the Exit Fee charged. This investment thus actually ended up with a Net Realised Profit in USD of only +USD 1,275.11.

[63] As indicated in the *'USD Cash (Available for Investing)'* account (P. 227) a sale of GBP 20,120.72 was initially done to purchase USD 25,000 for the investment made into the *Emirates Emerging Market Equity Fund Ltd*. The proceeds from the sale of the said shares of USD 27,503.62 on 12 Dec 2017 was reduced by an exit fee of USD 1,228.50 applied on 19 Dec 2017, leaving the sum of USD 26,275.12 in the USD account. It is noted that the amounts of USD 26,120.12 and USD 149.59 (for a total of USD 26,269.71) were subsequently converted into GBP in Dec 2017 and June 2021 respectively (for GBP 19,405.74 and GBP 105.53, which in total amount to GBP 19,511.27). A balance of USD 5.41 remained in the USD account (whose value in GBP was indicated as GBP 4.38). The Complainant thus ended up with a Net Realised Loss in GBP of -GBP 605.07 (i.e., GBP 20,120.72 – GBP 19,511.27 – GBP 4.38) as per the Investor Summary Statement (P. 227).

Type[58]	Name of Investment	Date bought	CCY	Purchase amount	Date sold or Matured	Sale price	Realised Capital Loss/ Profit (exclusive of dividend /interest)	Interest received	Realised Capital Loss/ Profit (inclusive of dividend /interest
Fd	*Marlborough Adventurous Cell F GBP*	04 Jan 2018	GBP	19,000.01	9 Oct 2018	18,439.45	-GBP560.56	n/a	-GBP560.56
Fd	*Kensington Diversified Growth Fund A GBP*	15 Nov 2018	GBP	63,360	30 Dec 2021 1 Mar 2022 16 Jun 2023	5,534 2,939 58,093.06	+GBP3,206.06	n/a	+GBP3,206.06
	Total Net Realised Loss (inclusive of dividends/interest received) in GBP							**-GBP 13,631.92**	

The sale of the two last remaining investments forming part of the disputed portfolio occurred in 2023 under the new adviser, deVere. It is noted that the said Investor Statement indicates other new investments undertaken in 2023 under deVere such as the following:

a) An investment of GBP 17,288.24 into *Prov-C iShares MSCI World GBP Hedged UCITS ETF* on 24 July 2023;
b) An investment of GBP 17,689.23 into *Prov-C Fundsmith Equity Fund T* on 24 July 2023;
c) An investment of GBP 17,618.40 into *Prov-C Vanguard Life Strategy 60% Equity Fund A Acc* on 26 July 2023;
d) An investment of GBP 17,597.04 into *Prov-C Vanguard Life Strategy 100% Equity Fund A Acc* on 26 July 2023.

The above new investments undertaken under deVere are not considered to be the subject of this Complaint, and the Arbiter shall focus on and only consider the disputed portfolio of investments structured under Paul Cook as summarised in Table A above.

The claimed losses

It is undisputed that the Complainant has suffered a net loss on his investment portfolio structured under Paul Cook.

In his Complaint to the OAFS, the Complainant claimed that SPSL *'allowed my Pension Balance to fall over £44,000 since 2016 – 7 years'*.[64] The Complainant claimed that he lost money due to poor investments and fees on his pension but did not himself provide a breakdown of the alleged loss.

In its reply, SPSL provided a table detailing the value of the Complainant's pension over the years, where it indicated a value of GBP 122,700.32 as the amount invested in March 2017 with this amount reducing in value to GBP 81,416.62 as at 3 October 2023.[65] This equates to a reduction in value of GBP 41,283.70 which is close to the amount claimed by the Complainant.

The loss in value indicated by both parties of over GBP 40,000 is tied to net losses realised on investments, fees charged and paper loss (if any) on any remaining investments held as at October 2023. This is also in light of the Complainant's claim that he made no withdrawals from the Scheme[66] – a claim which was not disputed by SPSL during the proceedings of the case.

As to the net realised losses on investments, SPSL claimed that the realised loss on the investment portfolio undertaken by Paul Cook amounted to only GBP 6,200.[67] SPSL provided a breakdown of how it calculated such loss as per the document it presented during the proceedings of the case titled *'Transaction Log of investments purchased by Howden and Holborn'*.[68]

The Arbiter, however, points out that the Total Net Realised Loss, calculated by the OAFS (of GBP 13,631.92 as per Table A above) differs substantially from that calculated by SPSL (of just GBP 6,200).[69] Whilst various figures used by SPSL in its calculations tally with those summarised by the OAFS in Table A, certain key discrepancies emerge namely, as follows:

[64] P. 3
[65] P. 158
[66] P. 4
[67] P. 374
[68] P. 372-373
[69] P. 374

a) With respect to the three *Emirates Funds*, SPSL incorrectly did not take into account the hefty exit fees applied on these funds when calculating the profit/loss realised on these investments – the notes to Table A above particularly refer;

b) The *Emirates Emerging Market Equity Fund Ltd* actually resulted in a net realised loss when taking into account the actual transactions in GBP as described in detail in the notes to Table A above;

c) With respect to the *Marlborough Special Situations fund* SPSL took an incorrect higher sale figure - which figure was reversed as per the item marked as *'Unsettled Trade Reversal'* in the Investor Summary Statement.[70] Hence, the loss on this fund was actually higher than that claimed by SPSL.

With respect to fees, it is noted that over GBP 18,000 in fees were calculated as having been charged (in addition to the exit fees on the Emirate funds). This emerges from the *Investor Summary Statement's 'GBP Cash (Fee Account)'*.[71] The said cash fee account included Stockbroker Fees; Custody Fees; Administration fees; Bank charges and General Expenses (which comprised also the regular trustee fee).

It is further noted that following the transfer of the sum of GBP 122,675.32 into the IIP platform as per the *'GBP Cash (Available for Investing)'* account in March 2017, two transfers of GBP 13,494.28 and GBP 1,226.75[72] (in total amounting to GBP 14,721.03) were immediately made from the said account as a *'General Reserve'*.[73] [74] The said amount of GBP 14,721 was instantly taken from the cash available for investing and transferred to a *'GBP Surrender Charge Account'*[75] from which *'Amortisation of Initial Fees'* (of approx. GBP 370) was made on a quarterly basis. The amortisations reduced the balance on the '*GBP Surrender*

[70] P. 221
[71] P. 221 - 224
[72] Equivalent respectively to 11% and 1% of the initial value of the assets transferred into the IIP pletform of GBP 122.675.32
[73] P. 218
[74] The said two transfers seem to equate to the 11% '*Early Redemption Fee'* and 1% '*Establishment Fee'* referred to in the terms and conditions of the IIP pletform – P. 92
[75] At times also referred to as 'GBP General Reserve' – P. 115

Charge Account' (by GBP 8,925.38) to a balance of GBP 5,795.65 by September 2023 as per the details included in the *Investor Summary Statement*.[76]

The parties to the Complaint did not indicate whether the amount reserved for the redemption fee is to be returned in full to the Complainant (in case of no exit from the IIP), after the expiry of the ten-year period during which such fee applied. This matter is tackled in the Recommendation at the end of this decision.

Obligations & Responsibilities of the Service Provider

The Arbiter refers to the obligations and responsibilities of SPSL as trustee and RSA of the Scheme and legal framework applicable in respect of such functions as already considered in previous decisions issued by the Arbiter. Particular reference is made to the explanations and analysis made under the sections titled *'The legal framework'*; '*Responsibilities of the Service Provider'*; '*Trustee and Fiduciary obligations'**;*** and '*Other relevant aspects'* regarding the oversight and monitoring functions of the trustee/ RSA as outlined in Case ASF 009/2019 and similar sections in Case ASF 026/2021 decided by the Arbiter.[77]

For all intents and purposes, these same sections are relevant and are also being applied to the case in question with respect to the obligations and responsibilities of SPSL as trustee and RSA of the Scheme.

Observations and Conclusions - Unsuitability of the disputed investment portfolio

The Arbiter considers that the Complainant's claim about the unsuitability of the investment portfolio is justified. This position is based on various factors, including reference to the Complainant's profile and risk attitude (as outlined in

[76] P. 226

[77] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20009-2019%20-%20SP%20vs%20Sovereign%20Pension%20Services%20Limited.pdf
https://financialarbiter.org.mt/sites/default/files/oafs/decisions/120/ASF%20026-2021%20-%20BN%20vs%20Sovereign%20Pension%20Services%20Limited.pdf

the section titled 'The Complainant' above). The following factors are particularly highlighted:

i) *Lack of diversification and high exposure and concentration risks to single issuers/investments* –

It is noted that the initial investible amount of GBP 122,675.32 was transferred to the IIP platform in March 2017. As indicated above, the cash *'GBP Cash (Available for Investing)'* was instantly reduced following the transfer of GBP 13,494.28 and GBP 1,226.75 to the General Reserve account and another transfer of GBP 2,453.51 to the Cash Fee Account.[78] Hence, it is to be noted that the cash available for investing in March 2017, prior to the commencement of investments, actually amounted to GBP 105,500.

Table A above clearly indicates various high concentrations in the investment positions taken in 2017 and 2018.

For example, it is noted that significant investments (of GBP 84,000 in total, which amount to over 68% of the initial investible amount and 79.62% of cash available for investment at the end of March 2017) were made in April 2017 into just two investments. These involved a sum of GBP63,000 (equivalent to 51% of the initial investible amount and actually 59.7% of the cash available for investment at the time) invested into the *Emirates Active Managed Fund* and a sum of GBP 21,000 (equivalent to 17% of the initial investible amount and 19.9% of cash available for investment at the time) invested into the *Emirates Balanced Managed Fund*. These two investments were, in turn, sold (at a loss due to the applicable exit fees) within just two months.

After these two investments were sold in June 2017, a total of GBP 80,000 (equivalent to 65% of the initial investible amount and 75.8% of cash available for investment at the end of March 2017), was again invested into just two structured note investments. This comprised a sum of GBP40,000 (equivalent to 33% of the initial investible amount and 37.9% of cash available for investment as at the end of March 2017) into a structured note

[78] P. 218

issued by *Commerzbank AG* whilst another investment of GBP 40,000 into a structured note issued by *EFG*. The investments into these two structured notes were also redeemed at a loss in December 2017 within just six months.

It is also noted that an investment of GBP 93,000 (equivalent to 75% of the initial investible amount and 88% of cash available for investment as at the end of March 2017),[79] was thereafter made in January 2018 into a single Marlborough collective investment scheme structure as follows:[80]

- GBP 19,000 (equivalent to 15% of the initial investible amount and 18% of cash available for investment as at the end of March 2017) into the *Marlborough Special Situations Cell*;

- GBP 55,000 (equivalent to 45% of the initial investible amount and 52% of cash available for investment as at the end of March 2017) into the *Marlborough Balanced Cell*; and

- GBP 19,000 *Marlborough Adventurous Cell*.

The position in the latter two investments was closed by October 2018 (within just 9 months), again at a loss.

Subsequently, another material exposure of GBP 63,360 (52% of the initial investible amount and 60% of cash available for investment as at end March 2017),[81] was made in November 2018 by way of a single investment into the *Kensington fund*.

Thus, high-concentration risks were clearly and evidently being taken with respect to individual investments, as outlined above and, also, described in further analysis below.

[79] The percentage exposures would, in reality, be even higher when compared to the investible amount available at the time of the purchase of the investments (given that by then the initial investible amount was reduced by fees and losses previously incurred).
[80] Three cells of the *Marlborough International PCC Limited*.
[81] The percentage exposures would, in reality, be even higher when compared to the investible amount available at the time of the purchase of the investments (given that by then, the initial investible amount was reduced by fees and losses previously incurred).

The Arbiter accordingly has no comfort that this reflected the diversification and the prudence and balanced approach required out of a pension plan and neither that such exposures were in the best interests of the member.

Furthermore, it is considered that the high-concentration risks were not reflective of, and in line with, the requirements issued by the MFSA as outlined in the Pension Rules applicable at the time and the investment preferences in SPSL's application form.[82]

The Arbiter refers to the investment conditions applicable under the regulatory regimes (the SFA and RPA regime) as outlined under the section titled *'Diversification'* in case ASF 009/2019 referenced above. The Arbiter has no comfort that such conditions and principles were satisfied in light of the high exposures explained above.

ii) *Frequent redemptions within short periods* - The very short-term retention period of most of the investments made is also questionable. Losses were experienced when investments were recurrently being redeemed within very short periods of time (some within just 2 months, 6 months or 9 months from when they were purchased, as featured in Table A above). Indeed, out of the whole portfolio of investments, it is noted that only two[83] were retained for a period of between 3-5 years until they were redeemed in full by 2023.

No rationale has emerged for the frequent redemptions undertaken within such short periods of time. The quick redemption of various investments is indeed at odds with not just the medium to long-term nature of the investments made but also the long-term nature of the pension plan.

It is noted that the Fund Fact Sheets of the *Marlborough Balanced Cell F GBP* and *Marlborough Adventurous Cell Fee GBP* even included, for example, warnings that *'Investment in the Shares should be viewed as a*

[82] P. 174

[83] The investment into the *Marlborough Special Situations Cell F GBP* and *Kensington Diversified Growth Fund A GBP* as per Table A above.

medium to long term investment', but, yet were sold at a loss within less than a year.[84]

This, in itself, further raises questions regarding the suitability of the disputed portfolio and the adequacy of the transactions undertaken, which the trustee left unchallenged.

iii) *Other aspects – Further analysis*

a) *The Emirates (GBP) Funds* – The *Emirates Active Managed Fund Cis C GBP Acc* and the *Emirates Balanced Managed Fund Class C GBP Acc* both formed part of the same single collective investment scheme, this being the *Emirates NBD SICAV*, a collective investment scheme domiciled in Luxembourg.[85]

Apart from the high exposure where the predominant part of the investment portfolio was exposed to the same collective investment scheme, these funds were divested within just two months as outlined above, which actions are not typical for fund investment and/or in the context of a pension plan.

b) *The Structured Note Investments* – It is also clear that the portfolio permitted by SPSL as trustee and RSA included material positions to risky and unsuitable investments for retail investors.

It is sufficiently evident that SPSL had permitted structured products that, by their nature, were complex products and, hence, not compatible with the Complainant's profile as a retail investor.

As outlined, in the Fact Sheet of the *Commerzbank AG 6Y Quanto Autocall-Phoenix Note* (ISIN no. XS1535194804),[86] a structured note aimed for professional, corporate/institutional investors, this investment had a *'Full Capital at risk if the worst performing index falls*

[84] https://funds.marlboroughfunds.com/uploads/documents/BYT1FV7-factsheet.pdf
https://funds.marlboroughfunds.com/uploads/documents/BYT1G70-factsheet.pdf
[85] https://markets.ft.com/data/funds/tearsheet/summary?s=lu1060351308:gbp
https://markets.ft.com/data/funds/tearsheet/summary?s=LU1060353858:GBP
[86] Sourced from a general search over the internet

by 30% or more at maturity'.[87] It is unclear how the high exposure to such investment, which had such risk, could have been deemed suitable for inclusion in the pension portfolio.

The Fact Sheet presented with respect to the EFG note also features the application of barrier events, which would have had material negative consequences on the value of the note when such events were triggered. Indeed, the fact sheet warned *inter alia* that *'… the Investor could lose the total capital invested if the Barrier Event has occurred and if the value of the Underlying with the Worst Performance falls to zero'*.[88]

High exposure to structured notes, furthermore, resulted both individually and collectively at the time.

c) *The Marlborough Investments* - The three Marlborough funds[89] which comprised the sole investments within the Complainant's investment portfolio at the time, were also all cells of the same company, the *Marlborough International PCC Limited*,[90] as emerging from the Fact Sheets sourced over the internet for the said funds.[91] Hence, the *Complainant's* investment portfolio was fully exposed to the same single company, *Marlborough International PCC Limited*.[92]

It is noted that the Fact Sheets of the *Marlborough Adventurous Cell F GBP* and *Marlborough Balanced Cell F GBP* warned that *'Investment in the Company* [the Company being defined as the Marlborough International PCC Limited] *should only be undertaken as part of a diversified investment portfolio'*.[93]

[87] https://portman-associates.com/wp-content/uploads/2017/06/Commerzbank3PillarsFactSheet.pdf
[88] P. 271
[89] Which were feeder funds or fund of funds.
[90] According to the Fund Fact Sheets the *Marlborough International PCC Limited* is *'a protected cell company incorporated in Guernsey and authorised as a Class B Collective Investment Scheme under the terms of the Protection of Investors (Bailiwick of Guernsey) law … Regulated by the Guernsey Financial Services Commission*'.
[91] https://funds.marlboroughfunds.com/uploads/documents/BKM3ZP6-factsheet.pdf
https://funds.marlboroughfunds.com/uploads/documents/BYT1FV7-factsheet.pdf
https://funds.marlboroughfunds.com/uploads/documents/BYT1G70-factsheet.pdf
[92] Whilst each cell within the said Company would have had its own diversified portfolio, and separation of assets and liabilities should have been applied between cells, exposure still remained to the same single Protected Cell Company with risks concentrated to the single company accordingly.
[93] Emphasis added by the Arbiter

However, as indicated above, such investments comprised the sole investments in the Complainant's investment portfolio at the time - investments into other products only occurred from the proceeds of the redemption of two of the Marlborough funds as per Table A above).

Apart from the lack of diversification from the exposure of the investment portfolio to the same single PCC, the Arbiter can derive no comfort either that there was also adequate diversification and mitigation of exposure to specific sectors/jurisdiction even when taking into consideration the investment objective of such funds as follows:

- According to the Fund Fact Sheet of the '*Marlborough Balanced Cell F GBP'* its investment objective *'is to achieve capital growth in medium risk areas. The cell is a feeder fund and will aim to achieve its objective by investing in those Marlborough Master Funds predominately investing in UK and International equities with some investment into those Marlborough Master Funds which holds Bonds'*.

- The investment objective of the '*Marlborough Adventurous Cell F GBP'* as per its Fund Fact Sheet *'is to achieve capital growth by investing in medium to higher risk areas. The cell is a feeder fund and will aim to achieve its objectives by investing in those Marlborough Master Funds investing in UK and international equities'*.

- The Fund Fact Sheet of the *Marlborough Special Situations Cell F GBP* outlines *inter alia* that *'The Fund will be exposed to stock markets … The Fund will be exposed to smaller companies which are typically riskier than larger, more established companies … The Fund invests mainly in the UK …'*.

d) *The Kensington Fund Investment* – Whilst this is an open-ended investment company domiciled in Ireland, with its holdings primarily in *'Non-UK stock'* and a smaller holding in *'UK stock'*,[94] which resulted in a

[94] https://markets.ft.com/data/funds/tearsheet/holdings?s=IE00BD71CH72:GBP

net profit, the Arbiter cannot help but notice the heavy and predominant exposure to a single investment once again.

For the reasons amply mentioned, the Arbiter does not consider that the investment *'instructions were carefully reviewed and were found to be in full compliance with both the investment guidelines and the Complainant's risk profile, thereby rendering them permissible'* as claimed by SPSL.

A careful review, as should have been done, would have immediately highlighted the inadequate high-concentration risks and high exposure to single investments which were not in conformity with the applicable requirements; the structured note investments not being reflective of the retail profile of the Complainant and his attitude to risk; as well as the odd redemption requests and the material switches and complete restructuring of the portfolio occurring multiple times within just a few months.

Hence, the Arbiter accepts the Complainant's claim regarding the unsuitability of the investment portfolio permitted within his Retirement Scheme and considers that there were shortfalls on the part of the Service Provider in its monitoring obligations with respect to the Scheme's portfolio.

Other matters

Whilst the Arbiter has considered the other aspect raised by the Complainant in his Complaint regarding the regulatory status of the investment adviser, particular focus has been placed on the key determining aspect of the obligations of the Trustee and RSA to ensure that the advised investments were in conformity with the risk profile of the Complainant and applicable requirements.

Final Remarks

The wider aspects of SPSL's key role and responsibilities as a trustee and scheme administrator must be kept in context.

Whilst SPSL was not responsible for providing investment advice to the Complainant, SPSL had clear duties to check and ensure that the portfolio composition recommended by the investment adviser provided a suitable level of diversification and was *inter alia* in line with the applicable requirements **in**

order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme. The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

It is considered that, had there been a careful consideration of the portfolio and transactions, the nature and features of the structured notes, the extent of exposure and material positions being taken into single investment instruments, and the very short retention period of the investments, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition and transactions being recommended. The Arbiter is not satisfied that the portfolio composition and investment transactions were made in the Complainant's best interests.

It has also satisfactorily resulted that the permitted investment portfolio was not reflective of, and in conformity with the Complainant's profile and attitude to risk, nor in conformity with the applicable principles and parameters and the requirements and conditions specified in the rules and SPSL's own documentation.

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

Whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than reduce the original capital invested.

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

It is considered that the Service Provider ultimately failed to act with the prudence, diligence and attention of a *bonus paterfamilias.*[95]

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[96] of the Complainant who had placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

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

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

Compensation

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

[95] Cap. 331 of the Laws of Malta, Article 21(1)
[96] Cap. 555, Article 19(3)(c)

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, and taking into consideration the risk attitude of the Complainant, the Arbiter considers it fair, equitable and reasonable for Sovereign Pension Services Limited, to be held responsible for seventy per cent of the sum of the Net Loss incurred by the Complainant within his whole portfolio of underlying investments as calculated by the Arbiter in this decision.[97]

Further to the above, and in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter accordingly orders Sovereign Pension Services Limited to pay to the Complainant the sum of GBP 9,542.34 (nine thousand, five hundred and forty-two pounds sterling and thirty-four pence).[98]

Whilst the Arbiter is not accepting the Complainant's request for refund of all the fees and charges suffered on his Scheme in the calculation of the award of compensation, the Arbiter, however, considers that certain of SPSL's own fees ought to be waived or refunded.[99]

The Arbiter considers that when taking into consideration the extent of loss and the nature of the deficiencies identified on the part of the Service Provider as indicated above, it is, in the circumstances fair, equitable and reasonable for SPSL:

a) **To apply (from the year 2021 onwards) the lower annual trustee fee it had offered to the Complainant in November 2020.[100] The difference between the actual trustee fee paid and the lower trustee fee offered as applicable for the *Centaurus Lite Retirement Benefit Scheme* ('Centaurus Lite') should be refunded accordingly from the year 2021 onwards. The lower trustee fee of the *Centaurus Lite* should also remain applicable to the Complainant's Scheme as long as the Scheme's value is below the**

[97] A rate of seventy percent is, in this case, being applied in the computation of compensation taking into consideration the Complainant's Medium to Lower Risk profile (P. 319) which accordingly merited higher protection from the service provider.
[98] 70% of GBP 13,631.92
[99] This excludes any fee applicable with respect to the IIP platform which is subject to its own fee arrangement.
[100] P. 188

GBP100,000 threshold or other threshold applied for the *Centaurus Lite Scheme*;

and

b) To waive its own exit fee applicable on the Scheme.

In this regard, and in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter is directing Sovereign Pension Services Limited to undertake such refund and application of the revised trustee fee as explained above and waive its own exit fee applicable to the Retirement Scheme.

With interest at the rate of 5.25% p.a.[101] from the date of this decision till the date of payment.[102]

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

Recommendation

The Arbiter also recommends that the Service Provider reviews and verifies the correctness of the application of the General Reserve/Surrender Charge Account[103] within the IIP platform with reference to the applicable contractual provisions entered into regarding the said platform.

This is in view that an immediate transfer of GBP 13,494.28 and GBP 1,226.75 from the investible funds at the start of the investment portfolio within the IIP platform[104] was made to an Account referred to as *'GBP General Reserve'*[105] and at times as *'GBP Surrender Charge Account'*.[106] This cash reserve account was then charged with quarterly fees which seem to cater for the tariff of IIP charges in Schedule 1 referred to as *'Establishment Fee'* (of *'1% paid quarter over the nominated period of investing ... calculated on the initial value of all*

[101] Equivalent to the current Bank of England Bank Rate.
[102] 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.
[103] P. 115 & 226
[104] Equivalent to 11% and 1% respectively of the initial value of the assets transferred into the IIP platform of GBP 122,675.32.
[105] P. 115
[106] P. 226

***assets transferred into the International Investment Platform'*) and the '*Early Redemption Penalty'* (of '*11% reducing to nil after ten years'*).[107]**

The full and immediate transfer of such fees to the reserve account resulted in the denial of investment return potential for a not insignificant part of the investible funds.

The summary of fees signed by the Complainant on 8 November 2016 listing the *'Lite QROPS – Malta (100,001k+)'* includes no specific reference to the said Establishment Fee of the IIP but generally refers to an *'IIP charge of 1.7%'* where the IIP platform had '*an anticipated TER of 0.75% with the use of the fee mitigator'* and a redemption fee of '*13% reducing by 1.3% p.a. to zero'* over the course of 10 years for the IIP platform.[108] As indicated above, an amorisation of fees was done under the '*GBP Surrender Charge Account*' seemingly in respect of the Establishment Fee/Early Redemption Penalty. It is obvious that a redemption fee applies only in case of a redemption during the 10-year period, and the Complainant had not exited from the IIP platform at the time of this Complaint.

As the Complainant signed both the Terms and Conditions of the IIP platform and the Summary of Charges, which seem not fully congruent with each other, and in light of the apparent amortisation of the redemption fee, the Arbiter expects the Service Provider to investigate whether the Complainant has been properly charged in accordance with what was properly disclosed and signed for. If it results that he has been overcharged, a proper refund should be effected.

The Service Provider should report accordingly to the Complainant, explaining the basis of its review and conclusion. This should ideally be done within one month from the day of this decision.

The Arbiter is issuing this as a non-binding recommendation only because in accordance with this decision, the application of charges as agreed and signed for at the start of the relationship is considered beyond the Arbiter's competence due to prescription.

[107] P. 92
[108] P. 72

The above is, however, without prejudice to any right that the Complainant may have in terms of law to file another complaint before the Arbiter in case of disagreement about fees and charges which are considered to have not been applied according to the terms agreed upon at the time of signing of the pension plan.

Alfred Mifsud
Arbiter for Financial Services

Information Note related to the Arbiter's decision

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.

Costs of the proceedings

In terms of article 26(3)(d) of Cap. 555 of the Laws of Malta ('the Act'), the Arbiter has adjudicated by whom the costs of the proceedings are borne and in

what proportion, taking into consideration the particular circumstances of the case.

The costs of the proceedings are not limited to the payment of any applicable cost of filing the Complaint with the Office of the Arbiter for Financial Services (presently Eur25) but may also include any reasonable lawful professional and legal fees paid by the Complainant limited to the acts filed during the proceedings of the case. Such professional fees should not include any contingency judicial fees and charges.

The extent of tariffs and fees in respect of professional or consultancy services rendered to customers in relation to the claims or proceedings under the Act, that may be lawfully and reasonably requested as part of the said costs of proceedings, are not defined in the current provisions of the Act. However, the Arbiter expects these to be benchmarked on tariffs and fees as stipulated and applicable for Civil Court proceedings in Malta under the Code of Organization and Civil Procedure.