

Before the Arbiter for Financial Services

Case ASF 080/2021

FN

(‘the Complainant’)

vs

STM Malta Pension Services Limited

(C51028) (‘STM Malta’ or ‘the Service

Provider’)

Sitting of the 28 September 2022

The Arbiter,

Having seen **the Complaint** relating to The STM Malta Retirement Plan ('the Scheme'), this being a personal retirement scheme licensed by the Malta Financial Services Authority ('MFSA'), established in the form of a trust and administered by STM Malta Pension Services Limited ('STM Malta' or 'the Service Provider'), as its current Trustee and Retirement Scheme Administrator.

The Complaint involves, in essence, the claim that the Trustee and Retirement Scheme Administrator ('RSA') acted negligently and failed in its fiduciary duty to look after the Complainant's Scheme given (a) the alleged failures in the due diligence and acceptance of the Complainant's investment adviser (b) her scheme being allegedly allowed to be disproportionately exposed to an underlying investment, the Dolphin Loan Note, with the Complainant claiming that there was no diversification element and that this product was not an acceptable investment.

The Complaint

The Complainant claimed that STM Malta was negligent and failed in its fiduciary duty of client care.

She explained that the Dolphin Loan Note, (this being an underlying investment held within her Retirement Scheme), went into liquidation.

The Complainant submitted that STM Malta failed in its fiduciary duty of care to do due diligence on this investment.

She noted that after many attempts failing to get full documentation from STM Malta, she received a copy of a Suitability Letter from the FSCS in the UK. The Complainant claimed that the Suitability Letter was never provided to her, and she was unaware of its contents until 2021. The Complainant also alleged that this was the first ever correspondence she had seen from MPM CI Ltd (MPM Capital Investments Ltd), ('MPM Capital').

The Complainant alleged that STM Malta did not adhere to the requirements listed in the Suitability Letter, given the following:

- That there were certain statements on contingent liability where she claimed that STM Malta was not allowed to engage in transactions where the potential for loss was greater than the initial investment (Page 7 of the Suitability Letter).

She submitted that at year five, the value of her investment of GBP55,000 plus costs, would be GBP104,944.50, and the loss was therefore greater than the initial investment.

- That the weighting of the Dolphin Loan Note represented approximately 70% of the Complainant's pension. The Complainant submitted that it seemed disproportionate and unacceptable for such a portion of the pension to be invested in a single financial product with no diversification element.
- That the Dolphin Loan Note does not appear to be covered under acceptable investments.
- That the Complainant had no idea what the critical yield was or its relevance as they had never seen the document mentioned in the Suitability Report and had never been in contact with MPM Capital.

- The Complainant also questioned whether STM Malta had checked the rating of '1' in respect of the Dolphin Loan Note (page 8, para 5 of the Suitability letter), and whether it performed due diligence to verify the authenticity/credibility of the product.

It was further claimed that had STM Malta performed due diligence they would have found that the solicitor named in the documentation was in fact not working for Dolphin at the time of the transaction. She submitted that this made the documentation obsolete/useless and misleading.

- That as indicated in page 8 of the Suitability Letter, the investment had to be secured by way of first legal charge on the underlying assets of German listed buildings.

The Complainant submitted that STM Malta had a fiduciary duty of care to ensure the security of the transaction and that the legal charge was in place. She considered such failure to be an act of negligence.

- That STM Malta failed to monitor the end buyer stage payment risk of the Dolphin Loan Note described in page 10 and 11 of the Suitability Letter. The Complainant further submitted that she had been asking for clarification regarding her financial adviser for years, but STM Malta failed to answer the questions asked during the complaint process, only answering the initial questions raised in her original complaint of 18 January 2021.

The Complainant further submitted that she disagreed with the answers provided by STM Malta to its original complaint, noting that she felt that STM Malta brushed over the difficult questions and ignored her questions, treating her unfairly.

She also submitted that the Complaint against STM Malta involved the following:

- 1) STM Malta allowed MPM Capital to act fraudulently and failed to make adequate checks on the legitimacy of the transactions undertaken.

She further claimed that she was never contacted in any form by MPM Capital. After years of requesting the Suitability Letter, she read this in 2021 and spotted the obvious error of the signature page being manipulated and incorrectly numbered.

- 2) MPM Capital ghosted a number of pensions without STM Malta performing adequate checks on their legitimacy.
- 3) STM Malta indicated Serenus as her financial adviser, but she had not received the evidence to confirm this after specifically requesting such evidence. The Complainant claimed that she had numerous emails going back several years vehemently denying any knowledge of MPM Capital with STM Malta choosing to ignore her requests.
- 4) STM Malta informed her Serenus was no longer acting for her and had allocated MPM Capital to be her financial adviser. She submitted that STM Malta again failed to check the validity of MPM Capital and its ability to act competently.
- 5) MPM Capital has had its licence cancelled but she had not been informed of this and STM Malta was now breaching MFSA regulations by allowing her not to have a financial adviser.

In summary, the Complainant submitted that STM Malta failed to do due diligence on MPM Capital as she claimed that this person was, as far as she was concerned, a complete work of fiction. She submitted that STM Malta also failed to do due diligence on the Dolphin Loan Note and claimed that STM Malta failed to send her a copy of the Suitability Letter, instead only sending it to FSCS from whom she finally got a copy.

The Complainant further claimed that STM Malta failed to take any interest in resolving the matter of having no financial adviser even after several attempts at trying to get them to understand that MPM Capital was just a fiction and was unable to correspond with them.

Remedy requested

The Complainant requested STM Malta to put her back in the position she should be right now if the matter had been handled correctly, with correct due diligence and security of a first charge where the end buyer agreement was verified and monitored to the point of redemption.¹

¹ Page (P.) 6

She claimed that the investment should be worth GBP104,944.50 as at 1 May 2020, with a daily rate of GBP23 statutory interest at 8% p.a. to be added. The Complainant noted that as of 13 May 2021, this amounts to a further GBP8,694.

The Complainant accordingly claimed a total of GBP113,638.50 as of this date.²

In its reply, STM Malta essentially submitted the following:³

The Service Provider noted that the Complainant invested GBP55,000 of her QROPS into the Dolphin Capital Loan Notes (as per the copy annexed to its reply).⁴ It further noted that Dolphin Capital has now become insolvent and has failed to redeem at the expected time, being November 2019, with the Dolphin Group of companies being in liquidation.

In its reply, the Service Provider provided a summary of the Complaint and referred to the demands for compensation requested by the Complainant.⁵

It noted that the Complaint is that:

1. STM Malta permitted MPM Capital to act fraudulently.
2. MPM Capital ghosted a number of pension arrangements.
3. STM Malta claimed Serenus Consulting was the Complainant's financial adviser.
4. STM Malta advised the Complainant that Serenus Consulting was not the adviser and were replaced by MPM Capital.
5. STM Malta is permitting the Complainant to continue without an investment adviser as required by the regulations.

The Service Provider further noted that the Complainant claimed that she was let down in the following ways:

1. STM Malta failed to carry out due diligence on MPM Capital with the Complainant appearing to question whether MPM Capital actually exists.

² *Ibid.*

³ P. 62-69

⁴ P. 62 & 70

⁵ P. 62 & 63

2. STM Malta failed to carry out sufficient due diligence on the Dolphin Capital Loan Notes.
3. STM Malta failed to send the Complainant a copy of the Suitability Report prepared by MPM Capital.
4. STM Malta failed to comply with the 'requirements' listed in the Suitability Report detailed on page 5 of the Complaint.
5. STM Malta allowed a misstatement in due diligence to go unnoticed, in particular, by reference to a Royal Life pension.

The Service Provider submitted the following in respect of the said allegations:

1. That the Complainant's first complaint, that STM Malta permitted MPM Capital Investments to act fraudulently, is fundamental to the overall Complaint.

It submitted that in following the Complainant's directions to invest, STM Malta relied on the suitability report provided by MPM Capital. It noted that the Complainant claims that this report is fraudulent and has never been seen by her despite the final page bearing the Complainant's signature. It further noted that the Complainant claims to have never been contacted by MPM Capital.

STM Malta submitted that, taking the Complaint at face value, the Arbitration process is not the correct forum to consider the merits of a complaint of fraud or to allocate liability in respect of the consequences of such fraud. Nor does STM Malta have the powers of investigation or enforcement given to the police and judiciary in relation to allegations of fraud.

The Service Provider further submitted that, accordingly, the matter is not in fact a complaint about STM Malta, but a complaint about the behaviour of an unrelated third party and it is not within the scope of the Arbiter's functions to consider the Complaint further.

STM Malta nevertheless submitted that it was entitled to rely on the report as being genuine, noting that:

- MPM Capital was regulated by MFSA at the time the suitability report was prepared. Its regulatory history is a matter of public record, which record is available on MFSA's website (as per the MFSA's Financial Services Register). Whilst it noted that the firm's licences were cancelled in 2020 in relation to regulatory breaches detailed by MFSA, STM Malta cannot have known of any regulatory concerns in 2015.
- The report is signed by the Complainant. The Complainant denies having seen the report but does not explain how her signature was appended to the document.

Furthermore, MPM Capital is not related in any way to STM Malta, and the Service Provider cannot account for its behaviours or indeed comment on the basis or information it used to compile the suitability report.

2. The Complainant claims that MPM Capital ghosted a number of pensions. STM Malta noted that it is difficult to comment on this since it is not familiar with the term in this context. In its experience, a ghost pension arises where the relatives of a deceased pensioner continue to collect a pension without notifying the payer of the death of the pensioner. STM Malta doubts that the Complainant is using the term in this sense.

STM Malta further noted that it is aware that Ghost Writers are used in literature, for example, where an accomplished author ghost writes the autobiography of a celebrity to enhance the readability of the work. STM Malta speculates that the Complainant may be suggesting that MPM Capital may write reports on behalf of other pensioners.

It submitted that the Complainant has not produced evidence to support such an allegation. It noted that, in fact, the suitability report appears to be written by MPM Capital on its own account. MPM Capital, in any event, appears to have been regulated to give the advice given at the time, and so the suggestion that this was allowed without there being adequate checks is denied.

STM Malta further noted that given the lack of clarity in this Complaint, it cannot comment further.

3. That it is apparent from the documentation that the Complainant appointed Serenus Consulting as her investment adviser on 8 September 2017 (as per Annex 2 to its reply).⁶

It is also apparent from the Complainant's application to join the Retirement Scheme that she originally appointed MPM Capital Investments Ltd as her adviser within that application.⁷

In a letter dated 29 April 2018,⁸ Serenus Consulting wrote to the Complainant to inform her that they could no longer continue to advise her. It is clear that not only did the Complainant herself notify STM Malta of the appointment of Serenus Consulting which she initiated, but a copy of this letter was provided to her by STM Malta by email on 30 April 2021. The Complainant may not now complain that she knows nothing of the appointment or that she was never provided with the relevant correspondence.

4. That the Complainant has not submitted information to support the allegation that MPM Capital has been appointed as the Complainant's adviser. In fact, the Complainant has attempted to appoint a firm, Acklam Financial Ltd⁹ to be her financial adviser. Acklam Financial Ltd has not yet satisfied STM Malta's due diligence enquiries and, as a result, the appointment has not yet been accepted by STM Malta.
5. The cancellation of MPM Capital's licence is not relevant in relation to the Complainant's account. Serenus Consulting withdrew. It submitted that Section B.9 of the Rules for Personal Retirement Scheme are clear. The Complainant is the person to appoint an adviser or a manager. The Retirement Scheme Administrator ('RSA') has a negative power to prevent a person from giving advice where it believes that such adviser is not appropriately regulated. The RSA is not given the power to compel an uncooperative member to comply. Accordingly, the Complainant cannot

⁶ P. 71-72

⁷ P. 50

⁸ P. 73

⁹ P. 74

complain that STM Malta has failed to compel the Complainant to appoint an adviser.

6. That it is clear that the second, third, fourth and fifth complaints are unrelated to the relief claimed (although it noted that it may be that the second complaint is intended to be an expansion of the first complaint). Since the first complaint is that a third party has committed a fraud, and such fraud is so pervasive in what has gone on, STM Malta cannot equitably be called to account.

For clarity, the Complainant denies that she is aware of MPM Capital. STM Malta submitted that this firm is however named as the Complainant's investment adviser in the original application already referred to. It is also the firm which produced the suitability report that has been relied on in relation to the selection of the investment.

STM Malta further noted that the Complainant must be claiming that both these documents were fraudulently completed, since both bear her alleged signature. Without these, the pension transfer would not have taken place.

7. STM Malta explained that it will make further submissions in relation to the additional matters raised notwithstanding that it cannot be said to be liable since the fundamental cause of the Complainant's issue is the fraud of a third party.
8. STM Malta noted that in support of her claim, the Complainant claims that STM has let her down by failing to complete due diligence on the issuer.

It submitted that this however is not the case. Before any investment was made, STM Malta had satisfied itself that Dolphin Capital Group had the apparent resources to undertake the proposed transaction. By way of example, it attached a copy of the 2011 Financial Statements to its reply.¹⁰

STM Malta also noted that it had understood the nature of the proposed investment. Dolphin Capital proposed to develop a number of properties, in particular, listed buildings in Germany. Each development project would be

¹⁰ P. 79 - 96

carried out within a specific special purpose vehicle, which would issue 5-year fixed term loan notes with a specified interest rate. The specified interest rate would be different for each project but would be attractive for investors.

It further noted that not only would the project be ring-fenced from other projects by use of a special purpose vehicle, but the individual property was to be held by a Land Trustee, *Laden Intertrust* for the benefit of the note holders of the particular SPV.

It noted that it is attaching a copy of the offering document to its reply.

STM Malta further noted that, at that time, Dolphin had a track record of something like 8 years in managing and developing such projects.

Given that STM Malta was relying on the suitability report of MPM Capital, which was regulated to give such advice, STM Malta submits that its due diligence at the time was sufficient to satisfy itself *prima facie* that the Complainant had been advised in the suitability of the investment and that the investment was secured on physical land.

9. The Complainant alleged that STM Malta had not adhered to the requirements of the suitability report. Whilst STM Malta denies that it is in any way responsible for the content of the suitability report, which was produced without the knowledge or consent of STM Malta, and is not to be construed as in any way guiding the relationship between STM Malta and the Complainant, STM Malta provided the following clarifications:

- It respectfully submitted that to state that when any person makes an investment they are entering into a contingent liability borders on nonsense. This could only conceivably have any meaning in the context of geared or short investments where there is the potential for the investor to owe money to the counterparty. The Dolphin investment is not such an investment.
- The amount of money staked by the Complainant is GBP55,000. That is her maximum loss.

- The Complainant's reference to weighting is not quite clear.

STM Malta however submitted that the proposed investment was into a single project supported by a charge on a specific piece of land, and the residual value would at least be the value of the undeveloped land. In any event, to the knowledge of STM Malta, the weighting was given by the person who wrote the report, who presumably was satisfied that the weighting was correct. It further submitted that STM Malta was entitled to rely on the advice of MPM Capital.

- The Dolphin Note is a fixed interest security and so is explicitly permitted by the list supplied by MPM Capital.
- If there is a report missing from the Complainant's documentation in relation to the advice given to the Complainant, then the Complainant must apply to the adviser. STM Malta does not control the files of third parties.
- STM Malta also submitted that the Credit Rating of Dolphin Capital GmbH was not relevant. The Complainant intended to invest in a separate Special Purpose Vehicle whose security was a single piece of land held to the order of the SPV for the benefit of the note holders. This was the basis of the view of risk, not the risk rating ascribed to the management company.
- It should be noted that the investment made is in the form of a loan note. The individual note holders have no capacity to direct the management to do anything, whether that be managing the security or seeing to the application of the proceeds of sale. STM Malta does submit however that failure by management to register the security or to misdirect sales proceeds would be fraud by such persons and no fault can be ascribed to STM Malta for any such frauds.

10. STM Malta accepts that the Dolphin Group of companies has been placed into liquidation and confirms that it has filed its notice of claim with the liquidators.

It noted that, in practice, there is a large number of SPVs which are placed into liquidation. STM Malta submitted that it is difficult to contemplate a set of circumstances which would lead to such a large-scale failure that does not involve the management acting *ultra vires*, for example, in relation to the security over property or the ring fencing of projects.

STM Malta submits that any *mala fides* of the management could not have been predicted, and indeed the underlying root causes will be discovered over time, but such causes cannot be attributed to the fault of STM Malta, and no equitable liability for any investment losses could be attributed to STM Malta.

11. STM Malta submits that the Complainant could not have relied on STM Malta for investment advice. The Complainant claims that the documents submitted were done so fraudulently. STM Malta has acted on these documents in good faith.

It noted that if, in the alternative, the Complainant were to seek to rely on the documents, STM Malta would refer the Arbiter to the declarations made by the Complainant in the application at section 9 and, in particular, declaration 15 where the Complainant has declared '*STM Malta will not incur any liability in connection with the Plan's Investments except where this arises as a result of the fraud, wilful misconduct or gross negligence of STM Malta*'.¹¹

It submitted that the Complainant has not demonstrated that the investment losses arise from the fraud, wilful misconduct or gross negligence of STM Malta. On the contrary, STM Malta has acted in good faith and not acted without the Complainant having received advice from a duly regulated firm.

STM Malta further submitted that by her own submissions, the Complainant alleges that she is the victim of fraud. In the circumstances, the claim is beyond the scope of the arbitration process and no liability can equitably be attributed to STM Malta.

¹¹ P. 53

It submitted that the matter should be investigated by the appropriate authorities and any and all liability must be attributed to the fraudster. The Complainant's correct recourse is to make a claim against MPM Capital or failing that to the Malta Investment Compensation Scheme.

Without prejudice to STM Malta's submissions that the Complaint is about the fraud of a third party, STM Malta further submitted that the Complainant has not demonstrated any negligence on behalf of STM Malta which contributes to any investment losses. Accordingly, it submitted that there is no equitable award that can be made in favour of the Complainant.

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

Further Considers:

Preliminary Pleas

Plea raised in respect of the competence of the Arbiter

The Arbiter shall first consider the plea raised regarding his competence.

It is noted that in its reply, the Service Provider submitted that the Complaint before the Arbiter *'is not the correct forum to consider the merits of a complaint of fraud, or to allocate liability in respect of the consequences of such fraud'*.¹²

STM Malta argued, in essence, that the Complaint relates to the behaviour and alleged fraud committed by a third party, the investment adviser, and it was accordingly *'not within the scope of the Arbiter's functions to consider the complaint further'*.¹³

The Arbiter considers that whilst issues involving fraud indeed do not fall within the ambit of the Arbiter for Financial Services Act, Cap. 555 ('the Act'), and such matters are to be reported to the relevant competent authorities and considered by the police, the Complaint in question is however not limited to allegations of fraud by the adviser.

¹² P. 63

¹³ P. 64

Having reviewed the Complaint, the Arbiter accordingly does not agree with STM Malta that the Complainant's '*claim is beyond the scope of the arbitration process*'¹⁴ given that the Complaint includes other key elements which relate to the conduct of the Service Provider in respect of the roles it occupied on the Scheme.

In this decision, the Arbiter will indeed only consider and focus on those elements which fall within the ambit of the Act.

Furthermore, the role played by the investment adviser will be considered in the apportionment of responsibility and payment of any compensation later on in this decision.

Further to the above, it is also to be noted that whilst the Complainant could have structured and presented her Complaint before the Office of the Arbiter for Financial Services in a more articulate manner, the Arbiter would like to highlight that this is a Complaint filed by a retail consumer of financial services within the structure of Chapter 555 of the Laws of Malta.

The Service Provider should accordingly consider the Complaint made by the Complainant in such context and not expect the client, who chose to file the Complaint herself, as allowed within the parameters of the law, to reply in a legalistic manner or with the knowledge and expertise of a professional in the field.

Having considered the Complaint in question, the Arbiter considers the following as the relevant key alleged shortcomings in this Complaint for the purposes of its consideration under the Act:

- (a) The claim that STM Malta acted negligently and failed in its fiduciary duty to look after her Scheme given the alleged failures in the due diligence and acceptance of the investment adviser;**
- (b) The claim that STM Malta acted negligently and failed in its fiduciary duty to look after her Scheme given that her Scheme was allegedly allowed to be disproportionately exposed to an underlying investment, the Dolphin Loan Note, with the Complainant further claiming that there was '*no***

¹⁴ P. 68

diversification element and that this product was ***'not covered under acceptable investments'***.¹⁵

The Arbiter further notes that the Complainant also complained about the lack of or delays in, the submission of documentation and clarifications requested from STM Malta regarding their investment adviser and the disputed investment.

The Arbiter shall next consider the said matters as part of the merits of the case.

The Merits of the Case

The Arbiter is considering the Complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555¹⁶ which stipulates that he should deal with complaints in *'an economical and expeditious manner'*.

The Complainant

The Complainant, born in 1974 and of British nationality, applied to become a member of the Scheme on 31 March 2015.¹⁷

Her occupation was not listed in the Scheme's Application Form for Membership.¹⁸ However, she is involved in the education profession given her *'Teacher's Pension Scheme'* as outlined in the Suitability Report prepared by MPM Capital Investments Ltd.¹⁹ No indication was made or has emerged during the proceedings of this case that the Complainant was not a retail investor.

Investment Adviser

The Scheme's Application Form for Membership dated 31 March 2015, indicates MPM Capital Investments Ltd ('MPM Capital') as financial adviser.²⁰

According to the Financial Services Register on the website of the Malta Financial Services Authority ('MFSA'), MPM Capital was previously regulated by MFSA to

¹⁵ P. 3

¹⁶ Art. 19(3)(d)

¹⁷ P. 48 & 53

¹⁸ P. 48 – Field left empty

¹⁹ P. 34

²⁰ P. 50

provide investment services activities by virtue of its Category 2 Investment Services Licence (issued in June 2009) by the MFSA, until the MFSA cancelled its licence in 2020.²¹

It is noted that an application for the appointment of *Serenus Consulting Ltd* as the new investment adviser was filed in September 2017 as per the documentation presented by STM Malta.²² Accordingly, MPM Capital was still regulated by the MFSA by the time it was replaced by Serenus Consulting Ltd in 2017 as the new adviser.

It is further noted that in April 2018, the Complainant was informed by *Serenus Consulting Limited* that she had to appoint another adviser given that Serenus had applied '*to de-authorise its permissions with the Financial Conduct Authority (FCA) and will not be able to provide [her] with any further financial advice with regards to [her] QROPS pension*'.²³

A '*Change of Adviser*' form dated 15 February 2019, was subsequently signed by the Complainant for the appointment of *Acklam Financial Ltd* as the new adviser.²⁴

No evidence was provided, or emerged, during the case of MPM Capital being re-appointed after the departure of Serenus Consulting Limited. In any case, the disputed investment, the Dolphin Loan Note, was done at the time of MPM Capital's original appointment in 2015 as shall be seen in the next section.

The disputed underlying investment

According to the official documentation produced by the Service Provider, **the Complainant invested on 30 April 2015, the amount of GBP55,000 from its Retirement Scheme into a 'Secured Loan Note 2019', 'Dolphin Capital.80 Projekt GmbH & Co. KG' ('the Dolphin Loan Note'), which was indicated as having an 'Average 13.8% fixed rate'**.²⁵

The investment into the Dolphin Loan Note comprised 'a loan' where 'ultimately, the security of the interest payments, and capital repayments,

²¹ <https://www.mfsa.mt/financial-services-register/>

²² P. 71-72

²³ P. 73

²⁴ P. 75

²⁵ P. 70

depend on the success of Dolphin Capital's projects renovating German Listed Buildings'.²⁶ This was indeed described as one of the significant risks of such investment.²⁷

As specified in the '*Addendum to Opening of Account Form*' dated 27/03/2015 issued by MPM Capital, (referred to during the proceedings of this case by the parties as the '*Suitability Report*'), **the investment of GBP55,000 into the Dolphin Loan Note constituted 70% of the investible amount available within the Retirement Scheme.**

The amount invested of GBP55,000 indeed reflects approximately 70% of the '*Teacher's Pension Scheme £77,540.64*' which was the transfer value of the previous pension held by the Complainant.^{28, 29}

The remaining 30% allocation of the investible premium was divided 20% into *Brooks Macdonald Managed Portfolio Service* and 10% retained in cash according to the said *Suitability Report*.³⁰

The Dolphin Loan Note had a fixed term of a number of years. The *Suitability Report* specified *inter alia* that '*When investing into Dolphin Capital GmbH using a pension scheme, the 1-year investment term is not available. The investment must be for 3 or 5 years*'.³¹

The Complainant's investment into the Dolphin Loan note was indeed tied over nearly a five-year period from 30.04.2015 (date of issue)³² till November 2019 (the expected redemption date).³³

Observations & Conclusions

Claim relating to the shortcomings in the due diligence and acceptance of the investment adviser

²⁶ P. 41

²⁷ *Ibid.*

²⁸ P. 34

²⁹ 70% of GBP77,540.64 = GBP54,278

³⁰ P. 40

³¹ P. 41

³² P. 70

³³ P. 62

The Arbiter first considers that there is no basis on which he can accept and uphold the Complainant's claims that **STM Malta acted negligently and failed in its fiduciary duty to look after her Scheme with respect to MPM Capital's appointment as financial adviser. This is given that no alleged failures in the due diligence and acceptance of the investment adviser have emerged on the part of STM Malta and neither has such allegations been substantiated by the Complainant.**

This is also so when taking the following aspects into consideration:

- (i) The evidence emerging with respect to the appointment of the investment adviser was a regulated entity as outlined under the section in this decision titled '*Investment Adviser*' above.
- (ii) That no evidence has been produced or emerged that STM Malta allocated MPM Capital as the new adviser after Serenus Consulting was no longer in operation, (as alleged by the Complainant).³⁴ The only satisfactory evidence that has emerged in this case is that, as outlined above, MPM Capital was the original investment adviser prior to being replaced by Serenus Consulting.
- (iii) The apparent inconsistencies emerging during the hearing of 1 February 2022 in the testimony of the Complainant with respect to the timeline of the appointment of MPM Capital as their adviser.³⁵

For the reasons mentioned, the Arbiter is accordingly dismissing the Complainant's claim on such matter.

Alleged delays & Certain aspects raised in the Complaint

Apart from certain aspects which were not considered by the Arbiter (such as the allegation of fraud as outlined above), the Arbiter remarks that certain other aspects raised by the Complainant in her Complaint are deemed as outrightly not relevant or acceptable as a basis for the Complainant's claims for compensation

³⁴ Point 4 of her Complainant – P. 4

³⁵ During the hearing of 1 February 2022, the Complainant indicated that MPM Capital was nominated as adviser after the '*financial adviser [presumably Serenus Consulting] went bust in two or three years*' and after they attempted to nominate '*another financial adviser, Acklam Financial*'. (P. 102) However, the appointment of MPM Capital was only evidenced at the time of application of the Scheme in March 2015 (P.53) with the disputed investment, the Dolphin Loan Note, occurring also in April 2015 (P.70).

(such as, for example, the claim with reference to contingent liability and the claims relating to the monitoring of the actual operation of the Dolphin Loan Note which are both considered irrelevant and not applicable when considering the nature of the disputed product and the roles of STM Malta respectively).

With respect to the claims of delays by STM Malta in the submission of requested documentation (namely, the Suitability letter completed by the investment adviser) and delays in the submission of clarifications requested on their financial adviser, the Arbiter considers that he has no sufficient basis either on which he can consider such matters further given the lack of clarity relating to the allegations and lack of evidence to substantiate such claims from the Complainant's part.

Nevertheless, the Arbiter would like to point out that in terms of the obligations arising from STM Malta's roles as Trustee and Retirement Scheme Administrator and the applicable regulatory framework to which STM Malta is subject to, STM is duty bound to reply promptly, clearly and in a comprehensive manner to reasonable and valid requests made by a member in relation to his/her retirement scheme. Failure to do so would go against the obligations applicable to the Service Provider emanating from such roles including the requirement to act with 'due skill, care and diligence' as provided *inter alia* under the conduct of business rules.³⁶

In addition, Standard Licence Condition 5.1.8 of Part B.5 'Conditions relating to information for Scheme Members and Beneficiaries' of the 'Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011' clearly requires that:

'The Retirement Scheme Administrator shall provide any other relevant information, upon request by Members and Beneficiaries'.

Hence, a member of a retirement scheme has every right to demand and insist for proper responses from the trustee and scheme administrator to their valid requests, and in case of failure report such action to the relevant authority and/or file a formal complaint and take other appropriate action available in terms of law.

³⁶ E.g. – SLC 4.1.4 of the *Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011*

On a separate aspect, the Arbiter furthermore observes that it took nearly three and a half months for the Service Provider to reply to the Complainant's formal complaint of 18 January 2021.³⁷ A reply by email was sent by the Service Provider only on 30 April 2021.³⁸

The Arbiter does not see a valid reason why the Service Provider took so long to reply to the Complainant's formal complaint and deems it as highly unprofessional for a service provider to procrastinate and delay a complaint in such manner.

This is apart that such delay goes against the requirement for the '*reasonable and prompt handling of complaints*' required in terms of SLC 1.4.4 of the '*Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011*'.

Claims relating to the Dolphin Loan Note

In her Complaint, the Complainant claimed that '*the Dolphin Loan Note represented approximately 70% of [her] pension fund*' and that '*this would seem to be a disproportionate and unacceptable portion of the pension to be invested in a single financial product with no diversification element*'.³⁹

The Complainant also questioned that the '*Dolphin Loan note does not appear to be covered under acceptable investments*'.⁴⁰

The Arbiter considers that the staggering allocation of 70% of the Complainant's Retirement Scheme into just one single product was indeed not only disproportionate but clearly did not comprise in any way an allocation reflective of the scope of the Scheme as a retirement product that was '*established to provide a life-time income to its members*',⁴¹ and where the Scheme's assets were required to be '*invested in a prudent manner ...*'.⁴²

³⁷ p. 9

³⁸ p. 14

³⁹ p. 5

⁴⁰ *Ibid.*

⁴¹ p. 47

⁴² As provided for under Standard Operational Condition 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA and eventually under Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA in January 2015.

The Arbiter has also no comfort that the Dolphin Loan Note and the extent to which the Complainant's scheme was exposed to such product can be considered in some way acceptable for the Retirement Scheme given a number of factors including:

- (i) The particular features and nature of such product comprising a loan note, being an unlisted, unregulated, alternative or non-traditional illiquid investment product with a long-fixed investment term.**
- (ii) The high-risk investment element of the Dolphin Loan Note, where the high risk is reflected in the high rate of return of a *'minimum Investor Return offered by Dolphin'* of *'12% per annum'*⁴³ outlined in the Suitability Report and the *'Average 13.8% Fixed rate'* reflected in the product's certificate.⁴⁴**
- (iii) The lack of liquidity of the Dolphin Loan Note.**

It is noted that **one of the significant risks mentioned in the Suitability Report involved the liquidity risk of such investment which was clearly illiquid and tied for a long period of time.** The said report outlined that *'Investments are made over a fixed term of 1, 3 or 5 years. Investors' funds will be tied in during this period as the loan note is transferable only on death'*.⁴⁵

- (iv) The lack of diversification inherent in such product.**

No adequate comfort has emerged during the proceedings of this case that this product, which was **solely concentrated in one specialised sector involving the development/renovation of real estate in Germany**, was itself diversified neither within the German market itself let alone on the wider aspect. The concentration risk to Germany's real estate market was indeed listed as one of the significant risks.

In its reply, STM Malta noted that *'Each development project would be carried out within a specific special purpose vehicle, which would issue 5 year fixed term loan notes with a specified interest rate'*.⁴⁶ STM Malta further

⁴³ P. 40

⁴⁴ P. 70

⁴⁵ P. 43

⁴⁶ P. 66

noted that *'it is submitted that the proposed investment was into a single project supported by a charge on an specific piece of land...'*⁴⁷ This implies that the Complainant was only invested into a *'single project'* further confirming the lack of diversification within the Dolphin Loan Note itself.

- (v) In addition, there was **no diversification either within the Scheme's overall portfolio of investments** given the material position of **70% of the Scheme's investible amount** allowed to be **invested into one single product**. The **Dolphin Loan Note constituted the predominant investment of the Scheme** with this **heavily exposing the Scheme to the performance of this single investment and thus to material losses or near complete loss of the Retirement Scheme in case of failure of this sole product**. This clearly went against the requirements for *inter alia* diversification, prudence and liquidity.

Notwithstanding that the advice to invest in the Dolphin Loan Note was provided by a third party regulated investment adviser, STM Malta cannot claim that it had no responsibility. STM Malta clearly had a key and important monitoring function in respect of the Scheme to ensure that the Scheme was operated in line with its scope, the applicable requirements and *inter alia* to safeguard the Scheme's property.

It is noted that as outlined in the Suitability Report, *'The MFSA imposes strict restrictions on investments ...'* as to where a Retirement Scheme can invest in.⁴⁸

The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the *'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'*, ('the Directives'). The said Directives applied from the Scheme's inception until its registration under the Retirement Pensions Act ('RPA').⁴⁹

⁴⁷ P. 67

⁴⁸ P. 39

⁴⁹ The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

SOC 2.7.1 of Part B.2.7 of the Directives required *inter alia* that the assets were to *'be invested in a prudent manner and in the best interest of beneficiaries ...'*

SOC 2.7.2 in turn required that the assets of a scheme are *'invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole'*⁵⁰ and that such assets are *'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'*.⁵¹

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be *'predominantly invested in regulated markets'*;⁵² to be *'properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*⁵³ where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.⁵⁴

Despite the standards of SOC 2.7.1 and SOC 2.7.2, STM Malta allowed the Complainant's investment portfolio to predominantly comprise the investment into the Dolphin Loan Note.

The Arbiter also notes that following registration of the Scheme under the Retirement Pensions Act ('RPA')⁵⁵ the Scheme became subject to the *'Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act 2011'* (Pension Rules').

⁵⁰ SOC 2.7.2 (a)

⁵¹ SOC 2.7.2 (b)

⁵² SOC 2.7.2 (c)

⁵³ SOC 2.7.2 (e)

⁵⁴ SOC 2.7.2 (h)(iii) & (v)

⁵⁵ The *Retirement Pensions Act* (Cap. 514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

It is noted that Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules provided that:⁵⁶

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

The investment restrictions for member directed schemes under the RPA were outlined in Part B.2 titled '*Investment Restrictions of a Personal Retirement Scheme*' and Part B.9, '*Supplementary Conditions in the case of entirely Member Directed Schemes*' of the Pension Rules.

It is further noted that SLC 3.2.1 of the Pension Rules provided *inter alia* that '*the Retirement Scheme Administrator shall ensure that the assets of the scheme are sufficiently liquid and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits*'.⁵⁷

The high exposure to the Dolphin Loan Note and the particular features of such product for a pension investment as outlined above, not only did not reflect and clearly went against the investment standards and principles outlined above but neither can they be construed to reflect the prudence, diligence and attention of a *bonus paterfamilias* required out of the Trustee of the Scheme.

Article 21 (1) of the TTA which deals with the '*Duties of trustees*', *inter alia* stipulates that the trustee should act as a *bonus paterfamilias*, where '***Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias, act in utmost good faith and avoid any conflict of interest***'.

It is also to be noted that Article 21 (2)(a) of the TTA, further specifies that:

'Subject to the provisions of this Act, trustees shall carry out and administer the trust according to its terms; and, subject as aforesaid, the trustees shall ensure

⁵⁶ The same principle was reflected in Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*' of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*' which applied to STM Malta as Scheme Administrator at the time it was subject to the Special Funds (Regulation) Act.

⁵⁷ SLC 3.2.1 (iii) of Part B of the Pension Rules.

that the trust property is vested in them or is under their control and shall, so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage ...'

In their role as Trustee, STM Malta was accordingly duty bound to administer the Scheme to high standards of diligence and accountability.

It is further noted that as also outlined in the Scheme's Client Application Form, *'Members may indicate their preferred investment preferences **however the Plan Trustees shall retain the ultimate responsibility regarding the selection and ownership of the Plan's investments, which they will do on the basis of advice received from third party qualified and pre-approved investment advisers'***.⁵⁸

There were accordingly clear responsibilities as outlined above, which STM Malta failed to adhere to in its role of Trustee and Retirement Scheme Administrator in respect of the Complainant's Scheme.

Other observations - Attitude to Risk

Despite that the Complainant's attitude to risk was one indicated as 'High' in the Scheme's Application Form,⁵⁹ **this however cannot be construed as some sort of justification for the creation of a pension investment portfolio, where the risks taken, individually and within the whole portfolio, were to such an extent as to put into prejudice the achievement of the scope for which the Retirement Scheme was created, as has happened in this case.**

This is particularly so in the context of a pension scheme which, by its very nature, is not a speculative investment vehicle but a product 'established to provide a life-time income to its members'. Hence the risk profile indicated in the Application Form should be seen in the context of the pension product and not within the context of a regular investment account.⁶⁰

⁵⁸ P. 50 - Emphasis added by the Arbiter

⁵⁹ *Ibid.*

⁶⁰ P. 47

Other observations - Due diligence

STM Malta submitted in its reply that it *'had satisfied itself that Dolphin Capital Group had the apparent resources to undertake the proposed transaction'*.⁶¹ It attached a copy of the 2011 Financial Statements of the Dolphin Capital GmbH by way of example of its due diligence.

The Arbiter can however derive no comfort either from such statements not only because of the high counterparty risk emerging in the scenario in question involving the issuer of such product, but also because if STM Malta had truly relied on the 2011 Financial Statements then such due diligence was indeed lacking given that such statements are considered rather dated for the purposes of the investment into the Dolphin Loan Note done in April 2015, that is, over more than three years apart from the date of such statements.

Conclusion & Compensation

For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case⁶² and is partially accepting it in so far as it is compatible with this decision.

Being mindful of the key roles of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of the STM Malta Retirement Plan, and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, the Arbiter concludes that the Complainant should be compensated by STM Malta for the damages suffered by the Complainant as a result of the breaches allowed and committed in relation to her scheme and the lack of protection afforded to her to safeguard her pension.

Whilst the Arbiter does not accept the extent of compensation requested by the Complainant given that:

⁶¹ P. 66

⁶² Cap. 555, Article 19(3)(b)

- (i) reference needs to be made to the amount invested into the Dolphin Loan Note (of GBP55,000)⁶³ and not the value of the investment at some chosen point in time as done by the Complainant in her Complaint,⁶⁴ and**
- (ii) other external third parties, like the investment adviser, were involved and also carried responsibility,**

the Arbiter considers that in the particular circumstances of this case, it is fair, equitable and reasonable for STM Malta Pension Services Limited to compensate the Complainant for the amount of 70% of the value invested in the Dolphin Loan Note, with this being calculated to amount to GBP38,500.⁶⁵

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the Complainant the sum of GBP38,500 (thirty-eight thousand and five hundred pounds sterling).

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

The expenses of this case are to be borne by the Service Provider.

**Dr Reno Borg
Arbiter for Financial Services**

⁶³ p. 70

⁶⁴ The Complainant referred and requested the value of the Dolphin Loan Note she indicated as amounting to GBP104,944.50 as at 1 May 2020, apart from other interest (P.6.)

⁶⁵ 70% of GBP55,000