

Before the Arbiter for Financial Services

Case ASF 128/2021

NM

(‘the Complainant’)

vs

STM Malta Pension Services Limited

**(C 51028) (‘STM Malta’ or ‘the Service
Provider’)**

Sitting of 18 April 2023

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 Trustee and Retirement Scheme Administrator.

The Complaint, in essence, relates to the extent of compensation expected and demanded by the Complainant from the Service Provider following a fraudulent withdrawal from his Retirement Scheme.

The Complaint

The Complainant explained that in June 2020, his financial adviser became aware of an unauthorised withdrawal made from his pension. His adviser enquired with the Service Provider regarding the said transaction, with STM Malta being initially reticent to provide information notwithstanding the inquiry was from the

Complainant's duly appointed adviser. The adviser however discussed the matter with the Complainant and continued to liaise with STM Malta on his behalf.

Around 26 August 2020, the Service Provider confirmed that a report was lodged with the police and the Financial Intelligence Analysis Unit with respect to the said transaction.

Through an email dated 6 October 2020, the Complainant requested further clarifications and information from STM Malta regarding the matter.¹

On 9 October 2020, STM Malta made an offer for compensation.² The Complainant submitted that the offer, however, did not cover the amount of funds paid in respect of the fraudulent withdrawal, nor did it compensate him for out-of-market losses due to the cash not being invested.

On 11 November 2020, STM Malta advised the Complainant that the sum of the actual fraudulent withdrawal was finally returned to his investment account.

The Complainant submitted that a request for compensation was made due to the time his funds were not invested and thus for not providing growth.

He claimed that from 25 November 2020 to 20 January 2021, the Service Provider failed to respond to his request for compensation. He noted that a reply was forthcoming on 22 January 2021 with details of the complaint procedure.

The Complainant further claimed that the fraudulent activity was facilitated by the lack of adequate security protocols at STM Malta and that he was not paid full compensation.

He submitted that, as trustee, STM Malta has a fiduciary duty to administer his pension with care and apply an expected level of security in case of withdrawal requests.

It was further submitted that the withdrawal should have not been undertaken in the first place given that he was not at the required age to receive the payment.

¹ Page (P.) 7-8

² P. 9

The Complainant also claimed that it was the Service Provider's lack of diligence which caused the processing and payment of the fraudulent withdrawal from his pension.

Remedy requested

The Complainant expected STM Malta to acknowledge its fault and provide full compensation by paying:

- all charges levied by it and the underlying policy provider in respect of the fraudulent withdrawal; as well as
- out-of-market compensation, in respect of the time the withdrawn funds spent out of the market when there was a potential for growth.³

The Complainant further sought to transfer out his portfolio to an alternative trust without incurring any exit penalties from STM Malta.

The Complainant indicated two bank charges that were applied - one for USD 25.21 applied on 27 May 2020, and another one for USD 27.17 applied on 5 August 2020.

The Complainant requested the amount of USD 5,875.92 in respect of the market growth lost due to the time he was out of the market.

The total compensation sought by the Complainant was accordingly indicated to amount to USD 5,928.30.

In its reply, STM Malta essentially submitted the following:⁴

That notwithstanding the Complainant's representation that he made a complaint and received a final response, the Service Provider did not consider this to be the case.

STM Malta submitted that despite the Complainant's reference to a request for compensation, it was however unable to find supporting documentation in respect of such a request.

³ P. 4

⁴ P. 104 - 105

It further submitted that it has not recorded the receipt of a complaint and therefore had not given consideration to the matters outlined in the complaint detailed in the Complaint Form filed with the Office of the Arbiter for Financial Services ('OAFS'). STM Malta argued that it has therefore not given a final response.

It explained that the Service Provider's process in responding to a complaint is to expressly state in the final response that it is such. STM Malta submitted that it was not able to identify any such statement sent by it from a review of the documents filed by the Complainant.

Therefore, it was of the view that the Arbiter is to decline to exercise his powers pursuant to Article 21 (2)(b) of the Arbiter for Financial Services Act (Cap. 555).

STM Malta respectfully requested that the Arbiter declines to consider the matter, in order for the Complainant to submit his complaint for consideration.

It also requested that the document which is considered to represent the Complaint and the response of the Service Provider should be identified to it accordingly should the Arbiter considers that the documents show that a complaint was submitted to STM Malta.

The Service Provider further requested the Arbiter to suspend the time for submission of the response to the Complaint, pursuant to Article 22 (3)(c) of the Act. It submitted that if the Arbiter does determine that he should not decline to act, the time for submission of the response should run from the date such determination is notified to it.

The Service Provider explained that the approach it was taking was not intended, in any way, to undermine the Complainant's rights.

It was however of the view that it should be given the opportunity to deal with the Complaint through its own internal procedures before the process with the Arbiter is commenced.

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

Further Considers:

Plea pursuant to Article 21(2)(b) of Cap. 555

The Service Provider raised the plea that, in terms of Article 21(2)(b) of the Arbitrator for Financial Services Act, Chapter 555 of the Laws of Malta ('the Act'), the Arbitrator should decline to exercise his powers under the Act, as the Complainant had not filed a formal complaint with STM Malta.

The Service Provider submitted that it had '*not given a final response*',⁵ as it did not have on record a formal complaint by the Complainant which outlined his grievances and remedy requested.

Article 21(2)(b), which deals with the Competence of the Arbitrator, provides that:

'(2) An Arbitrator shall decline to exercise his powers under this Act where:

...

(b) it results that the customer failed to communicate the substance of the complaint to the financial service provider concerned and has not given that financial service provider a reasonable opportunity to deal with the complaint prior to filing a complaint with the Arbitrator'.

The Arbitrator notes the following timeline of relevant key communications and filings as emerging from the documents produced during the proceedings of this case:

- a) 17 June 2020 - The '*redemption of \$15650.29*' (undertaken in May 2020) from the Complainant's pension was first queried by the Complainant's adviser, (Raymond Gombera of Carrick-Wealth, South Africa), through an email sent to STM Malta dated 17 June 2020.⁶

Subsequent exchanges occurred between the Complainant's adviser and STM Malta regarding the transaction.⁷

- b) 30 Sep 2020 – STM Malta sent the Complainant's adviser a copy of a draft communication that it was considering sending the Complainant in order to

⁵ P. 104

⁶ P. 18

⁷ Emails dated 18 June 2020 from Raymond Gombera to STM Malta for example refer – P. 28 & 29. Other emails exchanged during August 2020 refer (P. 65 – 73).

confirm whether the adviser was *'in agreement'* before *'proceeding in sending the communication and reimbursing the money'*.⁸

The said draft communication also included details of the amount of money to be reimbursed, where it was stated that STM Malta *'propose to refund the full US\$ 15,517.25 to your account'*.⁹

- c) 1 October 2020 – The Complainant's adviser informed STM Malta that it did not agree with the intended communication as the compensation quoted was *'less than what was paid out to the impersonator'*, given that *'there were 2 separate payments made totalling circa \$20,000 ...'*.¹⁰

It is noted that in the said email, the Complainant's adviser further stated:

'... funds were sold to cater for these withdrawals, it would be paramount to bring the client back in line with where his portfolio should be if he had remained invested during this time'.¹¹

- d) 2 October 2020 – STM Malta confirmed to the Complainant's adviser that it agreed that the Service Provider *'need to compensate both amounts that we withdraw'*.¹²

- e) 6 October 2020 – The Complainant sent an email to STM Malta requiring urgent action on his pension and requested the provision of detailed information on the *'recent fraud/mismanagement of client policy'*.¹³

- f) 9 Oct 2020 - STM Malta sent the Complainant an email dated 9 October 2020 wherein it acknowledged that the request for redemption was done by an impersonator and that it proposed to issue a refund. In the said email to the Complainant, STM Malta *inter alia* stated that:

'On review of the events, we believe that despite the mistake in your email address, it should have been possible for us to identify the impersonator from

⁸ P. 57 - 58

⁹ P. 58

¹⁰ P. 56

¹¹ P. 57

¹² P. 56

¹³ P. 7-8

*our security checks. We therefore propose to refund the full US\$15,517.25 to your account plus the US\$4,701.83 held in our account’.*¹⁴

- g) Oct/Nov 2020 - By way of an email dated 29 October 2020, the Complainant’s advisor requested STM Malta to provide an *‘update on this case’* and questioned whether the corrections had been made and funds reflected in his client’s account.¹⁵

Throughout November 2020, the Complainant’s advisor sent various follow-up emails to STM Malta querying the time when the funds were to be credited back into the client’s accounts. This is evidenced in the adviser’s emails of 11, 13, 16, and 24 November 2020.¹⁶

In its email of 11 November 2020, the adviser queried when they *‘can expect these funds to be available to be reinvested’.*¹⁷

In the subsequent email of 13 November 2020 sent to STM Malta, the adviser noted that *‘the funds you said were to be credited back into the client’s plan have not arrived’* and highlighted that *‘The majority of my client’s money is sitting in cash at a disadvantage because of this matter taking so long’.*¹⁸ The adviser also questioned how his client will *‘be compensated for all this time his funds have been out of market’.*¹⁹

It is noted that in its email of 16 November 2020, STM Malta notified the Complainant’s advisor that Providence Life, the underlying policy of the Scheme, had confirmed *‘that the funds hit their account on the 12th November 2020’* and that Providence Life *‘are currently working on investing the amount back to the policy’.*²⁰

The adviser replied to STM Malta on the same day, 16 November 2020, querying *‘when we can expect the funds to reflect on the client’s policy ...’*

¹⁴ P. 9

¹⁵ P. 41

¹⁶ Email dated 11 Nov 2020 - P.51; Email dated 13 Nov 2020 – P.50-51; Email dated 16 Nov 2020 – P. 47; Email dated 24 Nov 2020 – P. 46.

¹⁷ P. 51

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ P. 48

given that '*... the client is heavily in cash ...*', and the matter accordingly required to be given '*the highest priority*'.²¹

A further request for an update was sent by the adviser through his email dated 24 November 2020.²²

- h) 20 January 2021 - In an email dated 20 January 2021 sent by the Complainant's advisor to officials of STM Malta, the advisor asked for urgent feedback noting that '*We have not heard from either one of you for 2 months regarding progress on this client's pension*'.²³
- i) 22 January 2021 – The Complainant's advisor asked for a copy of STM Malta's '*formal complaints procedure*'.²⁴
- j) 22 January 2021 – In an internal email exchanged between officials of the Complainant's advisor it was confirmed that the Complainant was '*happy to lay a complaint with the regulator*'.²⁵

As testified by the Complainant during the hearing of 22 February 2022, '*the matter has gone to the regulator*'.²⁶

- k) September 2021 – A Complaint Form dated 1 March 2021, was registered with the Office of the Arbiter for Financial Services.²⁷

The Arbiter considers that the timeline summarised above clearly reflects multiple and ongoing communications exchanged between the Complainant/his representative, and the Service Provider involving the matter of the Complaint.

The substance of the complaint indeed relates to the fraudulent withdrawal that was allowed by the Service Provider and the extent of compensation expected and demanded by the Complainant.

²¹ P. 47-48

²² P. 46

²³ P. 81

²⁴ P. 80

²⁵ P. 77

²⁶ P. 108

²⁷ P. 1 - 6

The remedy requested by the Complainant in his Complaint particularly involves the request for compensation in respect of the time out of the market.

Such requested payment is in addition to the amount already reimbursed. As testified by the Complainant's adviser during the hearing of 22 February 2022, *'The amount reimbursed was +/- \$ 20,400 ... that was the total amount that had been hacked from the account that was paid back'*.²⁸

The Arbiter notes that, in its communication of 9 October 2020, STM Malta admitted its shortcomings with respect to the fraudulent transaction as it acknowledged that *'... it should have been possible for us to identify the impersonator from our security checks'*. In the said communication, STM Malta stated that *'We therefore propose to refund the full US\$15,517.25 to your account plus the US\$4,701.83 held in our account'*.²⁹

The compensation expected had been first indicated by the Complainant's adviser even prior to STM Malta's communication of 9 October 2020. In his email of 1 October 2020, the Complainant's adviser *inter alia* stated that:

'... funds were sold to cater for these withdrawals, it would be paramount to bring the client back in line with where his portfolio should be if he had remained invested during this time'.³⁰

It is further noted that the concerns regarding the time taken to receive back the money fraudulently withdrawn and the implications for such delays,³¹ as well the questioning about compensation for being out of the market, had been further raised after STM Malta's email of 9 October 2020. The adviser's emails of 11, 13 and 16 November 2020 most notably refer, as outlined above.

Whilst the Complainant's grievance and request could have been formalized with the Service Provider in a more cohesive and structured manner, **the Arbiter however decides that there are grounds for accepting the Service Provider's plea made in terms of Article 21(2)(b), in light of the communications as outlined above and in the particular circumstances of this case.**

²⁸ P. 109 – It was indicated during the same sitting that *'The amount reimbursed was +/- \$20,400'*.

²⁹ P. 9

³⁰ P. 57 – Emphasis added by the Arbiter

³¹ i.e., the Complainant's position being heavily exposed to cash

In reaching the said decision, the Arbiter also takes cognizance of the following:

- a) That the Service Provider has been sufficiently aware of the substance of the Complainant's complaint as explained above. Moreover, STM Malta also had ample and reasonable opportunity to deal with the complaint not only since the time of the advisor's communications of November 2020, but also throughout the initial stages of the Complaint filed with the OAFS, where recourse was also available to the mediation process at the OAFS.
- b) That the testimony of the Complainant's advisor, during the hearing of 22 February 2022, highlighted the lack of feedback from STM Malta in respect of the key aspect of the Complaint – that is, the compensation for time out of the market. During the said hearing, the advisor testified that:

'The amount reimbursed was +/- \$20,400 ...

But when we went to the period of time when the client was going to be reimbursed for time out of market considering it was an error on the trustees' side of things, we got only silence from that. We never got any feedback. It was copious amounts of emails going back and forth between ourselves and STM ...'³²

The lack of feedback by STM Malta in respect of the matter of compensation for the time out of the market was further pointed out in the internal communications of the Complainant's advisor. In an email dated 22 January 2021 sent by Raymond Gombera to his colleague (Director-Operations of Carrick-Wealth), it was confirmed that STM Malta has not compensated for the time out of the market, and it was further noted the following:

'... just the withdrawal amount was re-imbursed plus some admin fees. I have inquired with them on compensation a few times ... but it seems they just ignore it'.³³

³² P. 109-110 – Emphasis added by the Arbiter

³³ P. 78

- c) That it has emerged that the Service Provider had reasonable opportunity to deal with the Complaint so much so that it made an offer as outlined during the hearing of 22 February 2022.³⁴

In his final submissions, the Complainant also stated that he was adjusting his calculations for compensation, *'after reviewing the settlement offer'* made to him. It was further indicated in the said submissions that *'the settlement offer letter was dated the 02/11/2021'*.³⁵

STM Malta did not dispute, in its final submissions, that such an offer was not made. There is accordingly no doubt that STM Malta had reasonable opportunity to properly consider and deal with the complaint.

- d) That in the particular circumstances, no credibility and validity can be attributed to the Service Provider's submissions on this point, including those it incredulously made in its final submissions, where it *inter alia* submitted that:

'... it would be unjust for the Arbiter to reach a decision against it (which decisions will be in the public record), given that STM would have been willing, had it been provided with the proper opportunity, to negotiate to reach a mutually agreed solution.

The proper course of action for the Arbiter is to refuse to hear the complaint until STM has properly considered the complaint and given its final decision'.³⁶

Such statements cannot indeed be taken seriously nor are they considered genuine when taking into consideration the various aspects as raised above.

- e) That the particular case in question cannot accordingly be really considered as a genuine case fitting the scope for, and purpose of, Article 21(2)(b) of the Act.

³⁴ P. 107 – Emphasis added by the Arbiter

³⁵ P. 114

³⁶ P. 124

It would indeed not be fair nor just, if the Arbiter had to dismiss and unnecessarily delay and prolong this case any further, as the Service Provider seems to be frivolously attempting to do through its plea.

For the reasons amply mentioned, the Arbiter is accordingly dismissing the Service Provider's plea and will continue to consider the Complaint and exercise his powers under the Act.

Plea pursuant to Article 22(3)(c) of Cap. 555

STM Malta requested the Arbiter to suspend the time for submission of its response to the Complaint pursuant to Article 22(3)(c) of the Act.

Article 22 (3)(c) provides that:

'(3) An Arbiter shall not proceed to deal with a complaint unless the Arbiter has:

...

(c) provided the respondent with an opportunity to submit a reply to the complaint. Such reply shall be forwarded to the Arbiter within twenty days from when the Arbiter communicates the complaint to the respondent'.

The Service Provider's plea pursuant to Article 22(3)(c) of the Act is being similarly dismissed by the Arbiter for the reasons mentioned in the preceding plea. STM Malta is furthermore indeed considered to have been provided with adequate opportunity to reply to the complaint within the timelines stipulated by the said article. STM Malta had also sufficient details and information to be able to comprehensively reply to the Complaint.

Throughout the proceedings of this case, STM Malta has also been provided with sufficient opportunities to make its submissions, including during the multiple hearings held (such as of 22 February 2022 and 22 March 2022) as well as in its final submissions (which it did submit through its email of 20 April 2022).³⁷

³⁷ P. 106, 113 and 124-126

There is accordingly no adequate basis and justification for the Service Provider's plea, and the Arbiter shall accordingly proceed to consider the merits of the case next.

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 555³⁸ which stipulates that he should deal with complaints in '*an economical and expeditious manner*'.

Further background and pertinent matters

Amount of reimbursement

As described by the Service Provider in its email to the Complainant of 9 October 2020, '*a payment of US\$ 15,517.25*' was made '*on 8th June 2020*' to an individual who impersonated the Complainant.³⁹

The same impersonator '*also requested an additional income payment of US\$ 4,701.83*' but this was still in the Service Provider's account and was withheld once the Complainant's advisor notified the Service Provider of the issue.⁴⁰

As communicated in its email of 9 October 2020, STM Malta proposed '*to refund the full US\$ 15,517.25 to [the Complainant's] account plus the US\$ 4,701.83 held in [their] account*'.⁴¹ According to the said email, the amount to be refunded thus totalled USD 20,219.08.⁴²

It is noted that during the hearing of 22 February 2022, the Complainant's advisor testified that '*The amount reimbursed was +/- \$20,400*'.⁴³

Such amount was in essence corroborated by the Service Provider where, in its final submissions, it stated that '*... the total of \$20,244.08 was returned to the*

³⁸ Art. 19(3)(d)

³⁹ P. 9

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² US\$ 15,517.25 + US\$ 4,701.83 = US\$ 20,219.08

⁴³ P. 109

investment platform on 10 November 2020. A further small compensatory payment of \$241.72 was transferred to the investment platform on 1 December 2020.⁴⁴ In total, this amounts to \$20,485.80.

The *Policy Cash Movements* listed under the *Policy Valuation* statement dated 8 Mar 2023, indicates three payments marked as *'Returned funds for the Partial Withdrawal dated 27/05/2020 and 05/08/2020'* of USD 20,206.67 on 12/11/2020, USD 219.34 on 3/12/2020 and USD 55.31 on 21/12/2020 which in altogether amount in total to USD 20,481.32.⁴⁵

Date of reimbursement

It is noted that during the hearing of 22 February 2022, the Complainant's adviser testified that:

'If I go back to my records here, the funds, since the time when the fraud was done, were only reimbursed on the 12 November'.⁴⁶

This reflects also the confirmation provided by STM Malta in its email of 16 November 2020, where it was stated by STM Malta that *'the funds hit [Providence Life] account on the 12th November 2020*'.⁴⁷

Redemption of investments

It is noted that certain investments held within the Complainant's Retirement Scheme were sold for the payment of the fraudulent withdrawal. As stated by the Complainant's advisor in his email of 1 October 2020, *'funds were sold to cater for these withdrawals'*, with the advisor also noting that it was *'paramount to bring the client back in line with where his portfolio should be if he had remained invested during this time*'.⁴⁸

According to the information emerging during the proceedings of the case, the following investments were redeemed from the Complainant's Retirement Scheme account:

⁴⁴ P. 124

⁴⁵ P. 143

⁴⁶ P. 109

⁴⁷ P. 85

⁴⁸ P. 57

Table A – Redemptions indicated in May 2020⁴⁹

Fund Name	Units	Unit selling price - USD	Total - USD
<i>PLL Fundsmith Global Equity Fund Feeder</i>	206.705	25.1324	5,194.99
<i>PLL Marlborough Balanced Cell P USD</i>	5110.015	1.318	6,735
<i>ishares Core Growth Allocation ETF USD</i>	166.337	43.959	7,312.01
		Total	USD 19,242

Table B - Other redemptions of same instruments undertaken in July 2020⁵⁰

Fund Name	Units	Unit selling price - USD	Total - USD
<i>PLL Fundsmith Global Equity Fund Feeder</i>	31.032	27.71290	859.99
<i>PLL Marlborough Balanced Cell P USD</i>	581.474	1.479	860
<i>ishares Core Growth Allocation ETF USD</i>	18.278	47.0511	860
		Total	USD 2,579.99

The above-mentioned redemptions in Tables A and B amount, in total, to USD 21,821.99.

It is noted however, that according to the *Policy Cash Movements* listed under the *Policy Valuation* statement dated 8 Mar 2023, the total of USD 2,579.99 from the redemptions of the investments summarised in Table B above, was re-invested (exactly on the same respective dates of the redemptions of the indicated instruments in July 2020), into the *PLL Fidelity Liquidity Fund*.⁵¹

Computations of the Complainant's requested compensation

As part of the attachments filed with his Complaint, the Complainant provided a table detailing how the amount of 'USD 5,875.92' indicated in his Complaint to

⁴⁹ P. 34, 92, 116 -120. The said redemptions are also evidenced in the *Policy Cash Movements* listed under the *Policy Valuation* statement dated 8 Mar 2023 issued by Providence Life Ltd, PCC (P.142)

⁵⁰ P. 33, 92, 114, 116, 121-123. The said redemptions are also evidenced in the *Policy Cash Movements* listed under the *Policy Valuation* statement dated 8 Mar 2023 issued by Providence Life Ltd, PCC (P.142)

⁵¹ P. 142

the OAFS as compensation requested for *'Market growth lost due to time out of the market'*, was calculated.⁵²

The said table listed the investment funds that were sold as summarised in Table A and B above and compared the value of the said funds at the *'Sell Unit Price'* against the value at the *'Current Unit Price'*.⁵³

The Complainant did not substantiate and provide details of the date at which the quoted *'Current Unit Price'* was taken at that stage.

The difference between the total value of the investments sold (amounting to USD 21,821.99) and the value of the same units of funds at the *'Current Unit Price'* (which the Complainant calculated as amounting in total to USD 27,697.90 as per the table his advisor produced),⁵⁴ amounts to USD 5,875.91. This equates to the figure mentioned in the Complaint form as compensation requested for *'Market growth lost due to time out of the market'*.

Further explanations of the computations in respect of the requested compensation were provided by the Complainant's advisor during the hearing of 22 February 2022.

In the said sitting the advisor explained that *'we compared the performance of those funds that were sold as if those funds did not sell over the period'*.⁵⁵

The advisor further stated that:

'Asked on which date we started calculating, I say the date we used was based on the time of the sale instructions or the sale on [the Complainant's] account which was on the 15 May 2020. So that was the starting day that we used up until we submitted the complaint in January 2021, so it was between that period sitting in cash, since the 15 May 2020 up until the time we made the submissions to the regulator'.⁵⁶

⁵² P. 92

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ P. 110

⁵⁶ P. 110

It is noted that, in his final submissions, the Complainant revised the amount of requested compensation and increased it from the original requested amount of USD 5,928.30⁵⁷ to USD 6,703.91.⁵⁸

The newly revised figure of requested compensation of '\$6,703.91', demanded by the Complainant's advisor in the Complainant's final submissions, was indicated as being the figure for '*Values Outstanding (as at 02-Nov-2021)*'. The latter was calculated by multiplying the '*Units outstanding as at 12 Nov 2020*' in respect of the redeemed investments and the '*Unit Price on Day of Settlement Offer (02-Nov 2021)*'.⁵⁹

Final Observations and Conclusion

Having considered the submissions made, documents presented and testimony of the parties, **the Arbitrator considers that there is no sufficient and satisfactory basis and evidence on which he can fairly, reasonably and justifiably accept the Complainant's request for compensation and subsequent waiver of exit penalties. The Arbitrator is accordingly refusing the Complainant's requests.**

Such a decision is also based taking into consideration a number of factors, including the following:

- a) **The Complainant has not adequately and satisfactorily substantiated his claim of '*loss of capital or income or damages*' suffered by him '*as a result of the conduct complained of*' for the purposes of Article 26 (3)(c)(iv) of the Act.**

It has not been substantiated and determined, in the first place, that the Complainant purchased back the units he previously held in the same investments. No adequate proof of any such purchase and at what price has been provided.

The Arbitrator further notes that, as outlined by the Service Provider in his final submissions:

⁵⁷ USD 5,875.92 (requested compensation for '*market growth lost due to time out of the market*') + Bank charges of USD 25.21 and USD 27.17

⁵⁸ P. 114 & 116

⁵⁹ Bank charges of USD 25.21 and USD 27.17 was also added – P. 116

'It should be noted that [the Complainant] made no attempt to invest the funds repaid'.⁶⁰

Indeed, it is noted that the ***Policy Cash Movements*** listed under the ***Policy Valuation*** statement dated 8 March 2023 issued by ***Providence Life Ltd*** (which indicated the redemption of the investments in May and July 2020 as summarised in Tables A and B above), **does not indicate any purchase of the same investments subsequent to the refund received from STM Malta in November and December 2020.**

The said statement only indicates a purchase of USD 11,580.12 in the *PLL Fundsmith Global Equity Fund Feeder* only on 10/12/2021 and actually a sale of USD 4,365.93 in the *ishares Core Growth Allocation ETF* and a sale of USD 3,946.17 in the *PLL Marlborough Balanced Cell P* both in December 2021.⁶¹

Moreover, with respect to the redemptions undertaken in July 2020, the said *Policy Cash Movements* statement indicates that the equivalent amount of the redemptions listed in Table B above were all re-invested into another investment, the *PLL Fidelity Liquidity Fund USD*, in July 2020.⁶²

- b) **Lack of clarity as to the nature and extent of compensation expected and requested by the Complainant emerged even at the time of the initial discussions relating to the reimbursement.**

This is particularly so during the communications exchanged between the Complainant's advisor and STM Malta from 30 September 2020⁶³ up to November 2020 as outlined in the timeline of events summarised above.

As emerging from the said communications, the discussions involved an overall payment amount back into the Retirement Scheme rather than the Service Provider being requested to re-introduce back the same number of units of the wrongfully redeemed investments which would have truly reverted the Complainant back into his original position.

⁶⁰ P. 125

⁶¹ P. 145

⁶² P. 142 - 143

⁶³ P. 57

From the extensive exchange of communications presented, it has not emerged that the Complainant's advisor contested the type of reimbursement suggested at the time by STM Malta and did not clearly and categorically request and insist for the actual purchase of units to be made.

The discussions at the time oddly focused on a sum of money being re-instated into the Retirement Scheme when the discussions should have rather been on the reinstatement of the exact number of units of the wrongfully redeemed investments, back into his portfolio.

Despite the advisor's email of 1 October 2020, where the advisor highlighted that *'it would be paramount to bring the client back in line with where his portfolio should be if he had remained invested during this time'*,⁶⁴ **it appears that a payment was rather accepted instead - with the advisor awaiting the outcome of such payment to leave options open at the time rather than outrightly demanding the same amount of units to be re-instated in the first place.**

- c) **Lack of clarity also emerged in respect of the computation of the requested compensation. The Arbiter is furthermore not sufficiently convinced about the validity and reasonableness of such computation either.**

As indicated above, no details were provided of the date used for the *'Current Unit Price'* in the table presented by the Complainant when calculating the market growth lost due to time out of the market.⁶⁵

Such lack of clarity and the validity for the basis of the benchmarks taken in the calculation of the requested compensation also persisted in the additional information provided during the testimony of the Complainant's advisor who, during the hearing of 22 February 2022, testified that:

'We took an estimation of dates up until the 5 of August 2020, and we have used those days as an estimate to calculate the total market performance. So, in summary, we looked at the value of the individual's funds that were

⁶⁴ *Ibid.*

⁶⁵ P. 92

*sold and looked at the performance over the period as if it were not sold, and the answer we have come up with is the calculated amount as in the complaint form of USD5,875.92, as an estimation.*⁶⁶

- d) **The Complainant's advisor kept changing the requested amount of compensation and also the basis of the computations even during the proceedings before the Arbiter.**

Whilst the sum of 'USD5875.92' was first requested in his Complaint, a different amount of '\$6,703.91' was then requested in his final submissions using even a different methodology as outlined in the section titled '*Computations of the Complainant's requested compensation*' above.⁶⁷

- e) The fund investments that were ultimately redeemed had a varying net asset value and their value could accordingly vary. The price at which the funds could have been sold and/or re-purchased could be higher or lower than the price at which the investments were redeemed or re-purchased.

The Complainant has ultimately not indicated what was his exact preference and/or intention – including (i) whether he actually intended to hold on to, or redeem, all or parts of the investments liquidated and any timings; (ii) whether he wished to have the exact same units re-instated or partially reinstated; or (iii) whether he wanted to retain cash from the liquidated funds and/or buy any other investments with the refunded amount.

A clear benchmark for compensation should have been agreed to between the parties at the very start of the discussions. The comparisons being made at this late stage with potential dates of purchase, such as the quoted '*Current Unit Price*' or '*Unit price on Day of Settlement Offer*' in the computations for compensation provided, cannot either be construed as right benchmarks at this stage.⁶⁸

⁶⁶ P. 110 – Emphasis added by the Arbiter

⁶⁷ P. 4

⁶⁸ P. 92 & 116

Decision

The Arbiter is not upholding the Complaint for the reasons amply mentioned.

In the particular circumstances of this case, the Arbiter is, without prejudice and obligation on the parties, recommending that any settlement offer previously discussed between them is concluded.

Since the Arbiter rejected the preliminary pleas raised by the Service Provider, and due to the novelty of this case, each party is to bear its costs of these proceedings.

**Dr Reno Borg
Arbiter for Financial Services**