Before the Arbiter for Financial Services

Case ASF 081/2021

AC

('the Complainant')

vs

STM Malta Pension Services Limited

(C51028) ('STM Malta' or 'the Service Provider')

Sitting of 30 June 2023

The Arbiter,

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

The Complaint, in essence, relates to the claim that, in its capacity of Trustee and Retirement Scheme Administrator ('RSA') of the Scheme, STM Malta failed to execute its fiduciary duties and responsibilities and exercise its powers and discretions as required and expected in terms of the Scheme's Trust Deed and applicable Law.

In this regard, it was claimed that STM Malta acted grossly negligent and failed to act with the required due diligence, prudence and care of a *bonus paterfamilias*, and in the best interests of the Complainant, when:

a) It allowed and/or accepted material agreements and declarations which had a negative and serious impact on the Complainant's investments, without ensuring and/or validating the Complainant's prior awareness and consent to such documents and without the Complainant being notified prior to their execution;

b) It did not properly verify the authenticity of documentation and instructions purportedly signed and/or given by the Complainant despite reasonably suspicious and apparent fraudulent documentation and forged instructions, thus failing to adequately monitor the Scheme and carry out proper verifications to avoid the Complainant falling a victim of fraud;

c) It allowed and/or accepted substantial portions of his capital invested in complex instruments that were unsuitable and not compatible with the objectives of the Scheme and went contrary to ensuring an adequate level of diversification and prudence – and this when a substantial investment (which it was claimed amounted to almost half of the Complainant's contribution into the Scheme), was invested into a complex, experienced-investor only fund called *Prestige Alternative Finance Fund* ('the Prestige Fund');

d) It was not sensitive to, and mindful of, and failed to consider the implications of excessive fees within the whole structure of the Scheme without ensuring that such fees were reasonable, justified and adequate overall, and such that such fees did not result in excessive risks being taken for the attainment of the Scheme's objective;

e) It allegedly also failed to: provide material documentation (that is, the Scheme's Trust Deed and Rules) despite the Complainant's requests made in January 2021; fully disclose fees and commissions related to his Scheme; provide yearly performance reports relating to his investments and details about the parties to the Scheme and/or underlying policy; provide access to the online system relating to his investments; and monitor the fees charged by the Investment Manager/Advisor.

The Complaint

Through his legal advisors, the Complainant submitted the following in his Complaint to the Office of the Arbiter for Financial Services ('OAFS'):[1]

a) Following an application for membership into the *Harbour Retirement Scheme*, a retirement scheme set up by *Harbour Pensions Limited* ('HPL') by virtue of a trust deed dated 19 February 2013, the Complainant was admitted as a member of the said scheme. Glen Bastick was his professional adviser to whom an initial fee (but no ongoing annual fee) was payable.

b) The Complainant made a contribution of GBP 535,140.86 into the Scheme and in November 2013, he endorsed the *Harbour Pensions Fee Schedule*.

c) That the first RSA was HPL, which function was subsequently assumed by *STM Malta Trust and Company Management Limited* following the acquisition by *STM Malta Limited* of the entire shareholding in HPL and its related pension trust schemes with effect from 1 September 2018. *STM Malta Trust and Company Management Ltd* changed its name to *STM Malta Pension Services Limited* with effect from 22 June 2020.

d) That the Complainant sought clarity from *STM Malta* on what fees he was being charged and filed a formal complaint as to the manner it was exercising its duties. He claimed that it resulted:

    i. that an *Investment Wrap Service Agreement* ('Original Wrap Agreement') between HPL and *Guardian Asset Management Ltd* ('GAM') had been executed in December 2013 in relation to the Complainant's Scheme. This agreement purportedly gave instructions to GAM in respect of the acquisition and disposal of investments, appointed *Harbourside Capital PTY Ltd* ('Harbourside') as Investment Manager and authorised the payment of significant fees to GAM and the appointed Investment Manager. The Complainant declared that he was never informed that the said agreement was to be entered into and/or the terms included therein. He claimed that he only became aware of this agreement in July 2019;

[1] Page (P.) 7 - 15

ii. an application form for the opening of a *Harbourside Capital Managed Account* purportedly bearing the Complainant's signature, classified him as an experienced investor with a high-risk appetite. The Complainant denied ever endorsing the said application form and declared that he only became aware of this document on 21 March 2021 as part of the response provided by STM Malta to his complaint;

iii. an amendment to the Original Wrap Agreement ('the Supplemental Wrap Agreement') was allegedly executed in April 2015, pursuant to which the schedule of fees stipulated in Schedule 6 to the Original Wrap Agreement was amended to allow for the imposition of even higher fees for investments made by the new Investment Manager (Harbourside) to the Complainant's detriment. Although this Supplemental Wrap Agreement purports to include the Complainant's signature, the Complainant denies ever having signed same nor that he was aware of these changes until 11 June 2019.

iv. by virtue of an undated letter ('the Undated Letter') to Glen Bastick, the Complainant allegedly declared himself as being a *'professional investor'* and purportedly gave instructions to Glen Bastick as to the investments to be made with capital invested in the Scheme. Such allegation was refuted by the Complainant. The Complainant further denied having written or signed the said letter and/or ever having authorised Glen Bastick to give any instructions on his behalf both in respect of this undated letter as well as on an ongoing basis.

e) That as a result, the Complainant suffered inflated fees so much so that throughout the period 2013 until the second quarter of 2019, the Complainant was charged over GBP 86,000 in fees.

In addition, significant portions of the capital invested in the Scheme was re-invested in complex instruments unsuitable for the Scheme.

The accumulated effect thereof resulted in significant depletion of the Complainant's assets. From the latest annual valuation report as at June 2020, the investment value has reduced from GBP 535,140.86 to some GBP

477,526, thus suffering substantial losses in the Complainant's investment portfolio.

f) That in its capacity as RSA and Trustee and successor in title of HPL, which occupied the said capacity previously, STM Malta blatantly and systematically failed to execute its duties and responsibilities and exercise its powers and discretions as required and expected in terms of the Declaration of Trust and the Law. That the breaches of the Service Provider are clear and manifest as further detailed below:

1. Allegation of execution of agreements and/or declarations bearing significant negative and onerous impacts on the Complainant's investment without prior notice and/or consent of the Complainant and without disclosure of same to the Complainant even following the execution of said agreements/declarations

g) The Complainant submitted that he became aware of the execution of the Original Wrap Agreement entered into between HPL and GAM and their terms and conditions, particularly the fee schedule, some six years after. It was claimed that at no point was the Complainant party or privy to the contents of this agreement let alone having authorised it.

h) That Schedule 4 to this Agreement, which refers to the appointment of Harbourside as Investment Manager, is also signed by a representative of HPL and not by the Complainant - despite a schedule to the Original Wrap Agreement bears a date which is different to the date of execution of the said Agreement. The said Schedule 4 was in fact signed on 21 April 2014.

It was submitted that despite the fact that the said appointment grants Harbourside full powers to give instructions to GAM on behalf of the Complainant in respect of the investments to be made, the Complainant never granted his authorisation or instruction for the appointment of Harbourside as Investment Manager nor was he aware of this appointment until he received a copy of the Agreement.

i) That interestingly, after the appointment of the Investment Manager, an amendment to Schedule 6 of the said Agreement, the Supplemental Wrap

Agreement, which outlines the fees and charges payable, was executed in April 2015.

It was noted that although this Supplemental Wrap Agreement purportedly bears the Complainant's signature, the Complainant outrightly rejects having signed the said agreement and/or having knowledge thereof until it was made known to him on the 11 June 2019.

It was further noted that this amendment effectively introduced higher fees payable exclusively to Harbourside - the conveniently newly appointed investment manager - for certain investment decisions it might decide to take.

j) It was noted that STM Malta seems to claim that they had the authority to enter into this agreement on the Complainant's behalf and to impose the fees set out in its Schedule 6 (as amended) for the services of GAM and Harbourside. It was submitted that it is unclear on what basis STM Malta is making such a claim that it was entitled to enter into such agreements.

k) If so, and without prejudice to the Complainant's position that he did not himself sign the Supplemental Wrap Agreement, he claimed that it is indeed odd that despite STM Malta claiming that the RSA had full authority to enter into the Original Wrap Agreement, and despite the fact that the RSA did in fact sign and execute the said Agreement and Schedule 4 thereafter, when it came to amending the Original Wrap Agreement, the RSA did not itself execute same but for some reason needed that the Supplemental Wrap Agreement be shown to have been signed by the Complainant.

In fact, in its reply to the Complainant's formal complaint, and specifically the issue that the Complainant had no knowledge of the Original Wrap Agreement, STM Malta uses the Complainant's purported endorsement of the Supplemental Wrap Agreement as alleged evidence of the Complainant's knowledge of the original agreement.

l) It was submitted that even if, for the sake of argument, the RSA did indeed have the authority to execute such agreements, such authority certainly cannot be deemed to be unfettered. In its decisions and actions, the RSA is

obliged to act in the best interests of the retirement scheme and its members.

Furthermore, the RSA's fiduciary and statutory duties, including those of prudence, care and transparency would certainly militate towards the obligation of seeking prior approval, or as a minimum grant notice to the Complainant, prior to executing obligations having a lasting and significant impact on the Complainant's retirement scheme, as is for example the appointment of an investment manager who is given full powers to take investment decisions on behalf of the Complainant in respect of his funds.

m) Moreover, the RSA's breach is compounded by the fact that it failed to disclose to the Complainant the execution of such agreements. These were brought to the attention of the Complainant years later and only after significant prodding and enquiries with the RSA.

n) It was noted that in its reply to the Complaint, STM Malta argues that the Complainant had himself instructed the appointment of Harbourside as Investment Manager, relying on the *Harbourside Application Form* and the Undated Letter as alleged evidence for this.

Whereas the Complainant reiterated his position that he did not sign the said documents, it is to be observed that nowhere in the said documents does the Complainant appoint Harbourside as Investment Manager.

It was noted that the first document appears to be an application form intended to profile the investment personality of the Complainant, whereas the second undated document, purportedly gives instructions to deposit part of the funds with a *Harbourside Managed Account* and the rest with the *Guardian Platform*.

As is evident from the same said document relied upon, Harbourside is in no way being nominated to act as the Investment Manager for the Complainant, nor is it instructed to invest any funds in GAM.

It was further noted that the *Harbourside Application Form* is purportedly signed by the Complainant on the 18 December 2013 - it was questioned that, if as contended by STM Malta, this document offers evidence of the

Complainant's instructions to appoint Harbourside as Investment Manager, then why did it take the RSA four months to execute the said appointment (as Schedule 4 to the Original Wrap Agreement appointing Harbourside as Investment Manager is dated 21 April 2014), particularly when as at the 18 December 2013, the Original Wrap Agreement had not even yet been executed by GAM?

o) It was submitted that a thorough analysis of the said documents clearly show that the arguments and justifications offered by STM Malta just do not stack up and are irreconcilable and untenable.

p) It was further submitted that the sequence of events and the manner in which the execution of the aforementioned agreements was handled was suspicious and appears to have been carefully crafted.

The Complainant explains that it all starts with the execution of a seemingly innocuous Original Wrap Agreement whereby it may appear on the face of it that the RSA was simply carrying out its function, but in reality served as a precursor to the fabrication of a series of documents which resulted in the appointment of service providers and the execution of investments which rendered no benefit to the Complainant or the Scheme but which ultimately only served to take exaggerated fees to the Complainant's detriment.

The execution of the agreement with GAM and the appointment of Harbourside as investment manager is a blatant machination and a means to an end - that of carrying out certain investments which could command higher fees.

It was claimed that the Investment Manager was not needed nor was he approved, authorised or known to the Complainant and his appointment can only have been done with the ulterior motive to circumvent receiving directions from the Complainant and certainly not in the best interest of the Complainant and/or his Scheme.

2. Allegation of absence of any serious or proper verification of authenticity of relevant documentation and instructions on the basis of which investment decisions were purportedly taken and obligations assumed

despite said documentation being suspicious and at times manifestly fraudulent on the face of it.

q) Whereas the Complainant is clearly a victim of fraud, and whereas it may be unclear as to the extent HPL/STM Malta may be involved therein, there is little doubt that the RSA is at a minimum guilty of having failed to sufficiently monitor what was going on and carry out the expected verifications to avoid the Complainant falling victim of such fraud.

r) Reference was made to the Supplemental Wrap Agreement entered into in April 2015 and which purportedly bears the Complainant's signature. It was claimed it was suspicious that the RSA would suddenly require that the said agreement, which effectively amends the Original Wrap Agreement, was to be signed by the Complainant when the Complainant had never signed the original agreement in the first place.

s) The content of a letter which was recently furnished to the Complainant by STM Malta dated 20 February 2015, which is allegedly signed and sent by the Complainant and is purportedly intended to confirm that the signature on the Supplementary Wrap Agreement is that of the Complainant, is concerning but at the same time revealing.

Firstly, the Complainant denied ever having signed or sent this letter. Furthermore, the Complainant's accountant who was in copy, also asserts that he never received a copy of the letter.

t) The Complainant argued that the said letter appears to have served as some form of verification on the part of HPL /STM Malta that the signature of the Complainant on the Supplementary Wrap Agreement was authentic.

It was further submitted that the content of the said letter reveals without a shadow of doubt that the Complainant was a victim of a sham.

The alleged declaration made in the said letter that the signature of the Complainant *'varies'* and that the alleged reason for this is that *'sometimes, if I sign a form in the Reception area of my bank in a rush while resting the form on my leg my signature looks slightly different that if I sign a form*

leisurely in an office at my bank, while resting on a table'[2] was absurd and even just *prima facie*, a manifest fraud.

The content of the said letter certainly should have raised in the RSA a reasonable suspicion that something was seriously odd and that further investigations were required. It certainly lacks any credibility that HPL/STM Malta would believe that the Complainant could not have found a surface to sign the form on in the entire reception area of the bank and had to resort to signing this in a rush on his knee.

It was submitted that the reliance upon the said letter by the RSA is accordingly inconceivable. Considering the significance and effects of the agreements in question, one can hardly accept that the content of such a letter would be sufficient to allay any suspicions and/or doubts that the RSA may have had in respect of the authenticity of the Supplemental Wrap Agreement.

u) The Complainant submitted that by accepting the letter at face value and by failing to carry out a proper investigation, it is clear and manifest that HPL/ STM Malta not only failed to act with the required due diligence and care of a *bonus paterfamilias* but effectively abdicated from its duties.

It was claimed that the implications of HPL/STM Malta's failure to act on suspicion of forged instructions of their member account amounts *inter alia* to gross negligence and is clearly not in the best interest of the Complainant or his Scheme.

3. Allegation of execution of agreements and investment decisions incompatible with the objectives of the Scheme

v) The Complainant claimed that the conduct of STM Malta has resulted in him suffering exorbitant fees and having substantial portions of his capital invested in complex funds which are incompatible with the Scheme's objectives.

w) An established principle that it is an integral part of the inherent duty of the Trustee and the RSA was to act in the best interest of the member, to be

[2] P. 11 & 162

sensitive to, and mindful of, the implications and level of fees applicable within the whole structure of the retirement scheme and not just limit consideration to its own fees.

In its role of a *bonus paterfamilias*, the trustee is reasonably expected to ensure that the extent of fees applicable within the whole structure of a retirement scheme is reasonable, justified and adequate overall when considering the purpose of the scheme. Where there are issues or concerns these should be reasonably raised with the prospective member or members as appropriate.

In such capacity, STM Malta was obliged to continuously consider and evaluate the extent of fees and charges being levied on the Scheme and implications thereof within the whole structure to ensure the attainment of the Scheme's objective without taking excessive risks.

The level of fees charged in this case and the resulting substantial depletion of the Complainant's capital, is a clear indication that STM Malta has indeed failed its duty to make such consideration.

On the contrary, the agreements executed by the RSA are considered as the very cause for the levying of such excessive fees and a catalyst for risky investments and the construction of risky portfolios. It was submitted that therefore, STM Malta not only failed its duties by entering into agreements structured in such a way as to incentivise the charging of high fees, but also failed to intervene so as to minimise such fees and charges. Undoubtedly, such failure had a direct consequence on the operation and performance of the Scheme.

x) It was furthermore submitted that STM Malta, in its capacity as trustee and RSA, failed to reasonably safeguard the Complainant's interest when it allowed and/or failed to intervene when the sum of GBP 200,000 representing almost half of the Complainant's contribution in the Scheme, was invested in a complex fund named *Prestige Alternative Finance Fund* ('the Prestige Fund').

It was claimed that this was an experienced investor fund which seeks to focus on asset-based direct lending. It was further claimed that this was a

geographically and industry-focused, debt-based, fund and not a broader global equity-based fund which is normally characteristic of investments in personal retirement schemes.

As a result, the Complainant's portfolio was subjected to significant exposure which does not provide for the required comfort regarding the prudence that was to be achieved with respect to the investment portfolio, nor comfort regarding an adequate level of diversification being ensured or that such a portfolio composition was reflective and compatible to a portfolio of a retirement scheme which scope was to provide for retirement benefits.

The Complainant, in fact, is of the understanding that whereas there appears to be a deferred settlement for this fund going out to back-end 2023, it is likely that this will extend further, and that suspension/liquidation may likely occur, with the result that he may well lose the whole capital invested in the said fund.

It was claimed that this is manifestly in breach of the obligation of STM Malta to act prudently and safeguard the property vested by the Complainant under its control from loss or damage.

It was argued that diligence, due skill and care would have required STM Malta to dismiss any such investment as not in the interest of the Complainant and the Scheme. It was further noted that such an anticipated loss is certainly not reasonably expected to occur in a pension product whose scope is to provide for retirement benefits.

y) In its capacity of trustee of the Scheme and RSA, it had the power and authority, besides the duty, not to permit such portfolio composition to be undertaken within its Scheme, given that the portfolio was not reflective of the requirement, which it had to ensure, that assets were to be invested in a prudent manner and also reflective of the scope for which the Scheme was created - i.e. to provide for retirement benefits rather than being a speculative investment vehicle.

z) It was submitted that the fact that the Complainant may be profiled as an experienced investor does not grant STM Malta the right and/or justification

to create a pension investment portfolio where the risks taken are such as to put into prejudice the achievement of the scope for which the Scheme was created.

By its very nature, a pension scheme is not a speculative investment account/vehicle. Therefore, even if the member may have a high attitude to risk, STM Malta still had the obligation to ensure that the investments made are compatible with, and achieve, the overall objective and nature of the Retirement Scheme.

It was claimed that STM Malta should have realised that the nature of the fund is incompatible with the Complainant's pension scheme and certainly not in the best interests of the Complainant.

The Complainant submitted that it was thus clear that STM Malta permitted an investment portfolio that cannot be construed as reflecting the principle of prudence and in the Complainant's best interests.

4. Allegation of other general breaches

- *Alleged failure to disclose information*

aa) It was claimed that STM Malta failed to provide the Complainant with a copy of the relevant Deed and Rules upon request. Despite repeated requests to STM Malta in January 2021 for a copy of the Scheme Deed and Rules, STM Malta still failed to provide this document and eventually the Complainant had to resort to GAM to obtain a copy thereof.

bb) It was further claimed that STM Malta then failed to provide the Complainant with a full disclosure of all costs and commissions related to his Scheme on an ongoing basis but also before executing investment decisions.

cc) STM Malta allegedly also failed to provide the Complainant with yearly reports indicating the underlying investments and their respective value, the name of the investment manager and investment advisor and applicable charges, commissions and fees relating to the Complainant's Scheme.

Instead, the Complainant only received a valuation statement from STM Malta as at 31 December 2014, 2017 and 2019 which valuations lacked any

clear or comprehensible reference to fees, even those charged by STM Malta, let alone those charged by GAM and Harbourside.

Despite the fact that the Complainant enquired several times about this, he was informed, in May 2019, that the portal through which he could access statements no longer worked and a new 'share file' system was in place. Despite asking several times, STM Malta still failed to give the Complainant login details to access this information.

dd) Furthermore, STM Malta failed to provide the Complainant with details of any appointment of advisers engaged such as GAM or Harbourside and once again the Complainant had to discover this through his own investigations when he started to become suspicious of the whole scheme administration.

Alleged failure to monitor the fees charged

ee) It was claimed that another blatant breach of STM Malta concerns the imposition of excessive fees which resulted and continues to result in a loss of the Complainant's property.

Pursuant to Clause 4.1.4 of the Trust Deed, Harbour/STM Malta was obliged to provide the Complainant with details of all fees and charges levied on the Scheme.

The Complainant, however, was never even made aware of the involvement of GAM or Harbourside's with respect to his Scheme let alone the significant fees that they would each charge pursuant to the Wrap Agreement, as amended.

It was noted that the Complainant finally managed to get some information only by carrying his own time-consuming and costly investigations.

On seeking clarification from STM Malta, the Complainant was simply informed that STM Malta did not know what charges are deducted by GAM or Harbourside.

He submitted that, as at 30 June 2019, a total of GBP 86,132.62 in charges had been deducted by GAM and Harbourside from the Complainant's

scheme. Furthermore, the *'Management Fee'* and *'Initial Fee'* of GBP 5,000 paid to Harbourside appeared to have no contractual basis whatsoever.

ff) It was further submitted that it is apparent that STM Malta failed to monitor fees being charged and failed to ensure such charges were legitimate.

gg) STM Malta have *'overall responsibility'* for the Scheme and are obliged to ensure that the Scheme's assets are invested *'in the best interest of its beneficiaries and ensure the investment activity is carried out in the sole interest of beneficiaries'*.[3] The conduct of STM Malta, as detailed throughout the Complainant's complaint, falls short of STM Malta's obligations under its contractual arrangement and at law.

The Complainant submitted that STM Malta thus blatantly failed to execute its duties and responsibilities and exercise its powers and discretions with the required standards of skill, care, prudence, diligence, attention and accountability as required at Law including but not limited to the *Special Funds (Regulation) Act*, the *Retirement Pensions Act*, the *Trust and Trustees Act* as well as failed to properly execute its fiduciary obligations pursuant to Article 1124A et seq of Chapter 16 of the Laws of Malta.

It was further claimed that it is also sufficiently clear that such deficiencies not only prevented the losses from being minimised but contributed in part to the losses incurred by the Complainant. The actions and inactions that occurred, enabled such losses to result within the Scheme.

The Complainant claimed that had STM Malta undertaken its role adequately and as duly expected from it in terms of the obligations resulting from the law, regulations and rules, such losses would have been avoided or mitigated accordingly. It was therefore argued that the actual cause of the losses is linked to, and cannot be, separated from the actions and/or inactions of STM Malta.

It was also submitted that it was evident that the very foundation on which the relationship between the Complainant and STM Malta was based has been now irreparably damaged. The actions of STM Malta have led to a situation of complete lack of trust in the skills and professionalism of STM Malta. For this

[3] P. 14

reason, the Complainant believes he is justified to request that his investment portfolio be transferred out of the control of STM Malta and deposited with another reliable service provider.

Remedy requested

The Complainant requested the Arbiter:

1. To declare that STM Malta failed to execute its duties and responsibilities and exercise its powers and discretion with the required standards of skill, care, prudence, diligence, attention and accountability as required under the indicated Declaration of Trust and Law both in the general administration of the Complainant's Scheme and in carrying out its duties as trustee, which conduct has resulted and continues to result in losses and other damages, including the payment of excessive fees, suffered by the Complainant.

2. To order the rectification of STM Malta's conduct and mitigation of the consequences of that conduct by ordering it to:

    a) terminate the Original Wrap Agreement as well as the mandate of Harbourside as Investment Manager at STM Malta's expense;

    b) liquidate the investment in the *Prestige Fund* at STM Malta's expense.

3. To compensate the Complainant for losses and damages sustained as a result of the deficiencies of STM Malta by:

    a) refunding the sum of GBP 86,000 representing the fees and charges sustained for the period 2013 until the second quarter 2019, as well as additional fees and charges incurred until the date of the Arbiter's decision, or such other amount as the Arbiter may deem reasonable;

    b) pay compensation in the amount of GBP 200,000 or any lesser amount representing the actual capital losses sustained in the amount invested into the *Prestige Fund* following liquidation thereof.

4. To order STM Malta to transfer out, at no expense to the Complainant, his retirement scheme, to a service provider as may be designated by him.

His requests were with costs and interests for the Service Provider.[4]

In its reply, STM Malta essentially submitted the following:[5]

It first provided a summary of the Complainant, where it outlined that the Complainant alleges that the investment arrangements, including a *'wrap'* agreement and management of the underlying assets, were entered into in respect of his pension scheme without his knowledge or consent.

As a result: (a) charges were incurred which would not have been incurred (b) investments were selected which were not suitable for the Complainant (c) illiquid investments were now being held and (d) investment losses have arisen.

It noted that the Complainant alleges that these arise as a result of the Service Provider's failure to carry out its duties in the Complainant's interest and referred to the requests made by the Complainant.

Representations made by STM Malta

1. STM Malta became Trustee and Administrator of the *Harbour Retirement Scheme* as a result of a Deed of Retirement and Appointment dated 31 August 2018 as per Annex 1 to its reply.[6]

   Harbour Pensions Limited notified the Complainant of its intention to resign in favour of *STM Malta Trust and Company Management Limited* on 6 August 2018. The Complainant did not object to such appointment.

   It submitted that the Complainant seeks to ascribe to STM Malta knowledge of events and responsibility for actions that took place in 2014. STM Malta however could not have had any knowledge of the said matters and no responsibility should be attributed to it from actions carried out by the former trustee, prior to STM Malta's appointment on 31 August 2018.

   The Service Provider submitted that, in any case, pursuant to S.30 (3) of the Trust and Trustees Act, STM Malta shall not be liable for the breaches of

[4] P. 15
[5] P. 185 - 192
[6] P. 193 - 195

trust of a former trustee, other than to take reasonable steps to remedy such breach of trust on becoming aware of it.

It argued that it cannot thus be found liable for losses arising in respect of the actions of the former trustee.

2. Notwithstanding the Service Provider's representation that it cannot be held liable for the actions of the former trustee, STM Malta noted that, in any case, the Complainant identifies the underlying cause leading to the use of the investment wrap, the appointment of the investment manager, and the selection of the investments as being a fraud.[7]

It submitted that it is unclear from the Complaint, who the Complainant is accusing of perpetrating such fraud. It considered the attempt to imply that STM Malta could have been involved in any such fraud as outrageous.

STM Malta reiterated that it could not have known the Complainant's state of mind, his advisers or the former trustees at the time when the documents complained of were submitted.

Furthermore, on receipt of the files from the former trustee, absent any complaint from the Complainant at the time, STM Malta would have had no requirements to launch a fraud investigation into the documents supplied which the Complainant now alleges were completed fraudulently.

It submitted that it does not have the investigatory or enforcement powers of the Police or the Courts representing the judicial system and therefore, even if it were suspicious (which it does not claim it was), it is not within its powers to reach a definitive conclusion that he is the victim of a fraud.

The Service Provider further submitted that the Arbitration process is not the correct forum for a proxy fraud investigation to be carried out. Accordingly, it requested the Arbiter not to consider the Complaint which is entirely predicated on the allegation of fraud.

3. Without prejudice to its earlier representations, STM Malta further submitted that the files received by it do not automatically lead to the

[7] P. 186 & para. 21 of the Complaint (P. 11)

conclusion that there was anything amiss in the appointment of an investment wrap platform or an investment manager and noted that:

a. Investment Wrap Platform

The Service Provider expects, in normal circumstances, member funds will be invested in securities. The Complainant does not appear to be an exception. The *Harbour Retirement Scheme* is not an investment platform in itself, and on a member-by-member basis an investment platform will normally be selected by the investment adviser, which will be able to hold the types of investment contemplated by the investment adviser/manager. The investment wrap platform serves a clear purpose.

b. Investment Manager

It submitted that, far from being an unnecessary component, it is imperative that investments within a personal pension scheme are reviewed for ongoing suitability and changes made as necessary.

The former trustee never represented that it was able to carry out the role of Investment Manager or Investment Adviser, and it was never regulated for the provision of such advice. It was therefore of no surprise that an Investment Manager was appointed, and the appointment of any such Investment Manager would not give cause for further inquiry.

It noted that *Harbourside Capital PTY Ltd* is listed with the Australian regulator, ASIC, as an authorised representative of *HLK Group Pty* which is itself authorised by ASIC. This is thus not an arrangement that would have merited further detailed investigation by STM Malta on the acquisition of the file from the Former Trustee.

4. STM Malta submitted that whilst reserving the right to comment on other documentation which has been presented to it as bearing the Complainant's signature, whether or not the authenticity of any such signatures is disputed by the Complainant, however the Application Form dated 30 July 2013,[8] bears the Complainant's signature. Together with other documentation

[8] P. 78 - 92

(such as the letter signed by the Complainant on 20 February 2015),[9] and notwithstanding the Complainant's assertion that the signatures were not valid, STM Malta is entitled to rely on it as being authentic and cannot be found to have acted negligently in behaving as if the document is genuine.

Furthermore, it noted that the Complainant is not disputing that the original transfer of the pension was intended. It is accordingly only possible to conclude that the document is genuine and gives effect to the Complainant's intentions which (at section 8 and 10 respectively) include:

- an initial adviser fee of 5% and an ongoing adviser fee of 1% p.a.;
- a direction to use the Guardian/Jersey Platform; to use a GBP base currency; a selection of an enhanced risk profile; and an acceptance that higher volatility may be associated with higher risk investments.

It submitted that the Complainant had never suggested the application should be doubted prior to 31 August 2018 and STM Malta is entitled to have relied on its authenticity.

Furthermore, the letter signed by the Complainant on 20 February 2015 serves only to support STM Malta's view that the Complainant was aware of the choice of investments, investment adviser, platform and fees associated thereto.

STM Malta further submits that nothing may be inferred from the fact that the Complainant did not sign application forms for the Wrap Platform. The documentation shows that this is what the Complainant wanted, and the former trustee gave effect to his wishes.

5. The Service Provider submitted that the investments including the *Prestige Fund* were selected by a properly regulated investment manager, namely *Harbourside Capital Pty*. Such investments were selected prior to the involvement of STM Malta as Trustee of the *Harbour Retirement Scheme*. Not only has the Complainant failed to show that the former trustee did not act diligently in accepting the investment management decisions of a properly regulated firm but given that STM Malta was not involved at the

[9] P. 150

time it is not possible to ascribe to it liability in relation to the selection of the investments.

6. STM Malta further submitted that the Complainant has failed to show an investment loss attributable to it. In 2015, the Former Trustee had provided the Complainant an annual statement which showed an investment loss for the period of GBP 62,372.98. Not only did these investment losses occur at a time many years before STM Malta was aware of the Complainant and his pension, but the investment losses were explicitly notified to him in 2015.

   It accordingly submitted that the Complainant should have immediately raised his concerns with the former trustee. In order for the Complainant to be able to bring the matter to the Arbiter, he must bring his complaint to the financial service provider within 2 years of being aware of the matter as per S21(1)(c) of the Arbiter for Financial Services Act, Cap. 555. STM Malta thus argued that the Complainant was out of time to bring his Complaint about investment performance.

7. It was further submitted that apart that STM Malta cannot be made accountable for the selection of the *Prestige Fund*, the Complainant cannot say that any loss has been made in respect of the said fund.

   STM Malta noted that the most recent valuation in hand,[10] shows that the holding has a current value of GBP 274,000 against a book value of approx. GBP 197,000 - thus a positive unrealised gain of GBP 77,000.

   The Complainant speculates that the restriction on redemptions imposed by the *Prestige Fund* means that the Scheme will be wound up at a loss of GPB 200,000 to him, and he should therefore be compensated for this amount. It submitted that this is mere speculation, and there could be no award based on some speculative view of what might happen in the future, even if the fault could be ascribed to STM Malta, which it reiterated should not be.

   It also submitted that, furthermore, the decision by the *Prestige Fund* to delay redemptions for any period is not a matter within STM Malta's control. It noted that STM Malta has inherited the investment from the former

[10] P. 196

trustee, which had, *prima facie*, appointed a qualified investment manager in good faith.

8. Apart from its submission that, as far as it is aware, the former trustee selected the GAM Wrap with the Complainant's full knowledge and consent, and therefore no liability can be ascribed to it for the selection of the GAM Wrap, the Complainant makes no case to support his view that the platform fees are not justified.

   It noted that where investments are made, there must be an investment platform. So, the Complainant must calculate his loss, if any, by reference to an alternative suitable platform. In order to do so, the Complainant would need to find not just any platform, but a platform that could be utilised by his chosen investment manager. This might create a restricted set of platforms to choose from.

   STM Malta attached for illustrative purposes only and as an example, the terms and conditions for an investment platform that has been used by many advisers - the *Horizon Portfolio Bond* issued by *Provident Life Limited*.

   It noted that the fees for such platform include, for example, a 1% annual management fee and a 1% annual marketing fee for the first 8 years together with a GBP 100 per quarter administration charge. Had the Complainant invested GBP 500,000 (used as an approximation and for ease of illustration only), it noted that for 7 years, between 2014 and 2020 inclusive, the fees deducted by such platform would have been GBP 142,800.

   STM Malta did not suggest that the Complainant would or should have been offered this platform, since it did not offer advice, and it may be that the platform could not have worked with the Complainant's chosen investment manager. However, it noted that the said example illustrated two points:

   - that the fee applied by the GAM wrap is not obviously excessive when compared with alternatives available in the market;

   - even a small annual charge in relative terms can be made to look like a large amount if it is presented as an absolute amount accumulated over many years.

STM Malta thus submitted that the Complainant has failed to show that the charges levied for the platform were excessive and unjustified.

9. It noted that the Complainant has made various allegations about the Service Provider's behaviour, at the section dealing with '*General Breaches'*. STM Malta noted that these allegations were not substantiated with any specific documentation, and it was therefore impossible for it to make any specific responses. It invited the Arbiter to ignore such complaints.

Concluding remarks by STM Malta

The Service Provider submitted that it is clear that the Complainant believes he is the subject of a fraud, and that the arbitration process is not the appropriate forum to determine the merits of such a claim. It submitted that in any event, he has no basis to claim that STM Malta is in any way involved in the fraud.

It reiterated that the matters complained of occurred long before STM Malta was trustee of the *Harbour Retirement Scheme* and therefore STM Malta cannot be held liable in respect of the activities of third parties, which cannot be attributed in any way to it. The Complainant cannot claim that STM Malta is liable for breaches of trust (if any were committed by a former trustee).

The Complainant was aware of the investment losses as long as 2015 but did not object at that time. He cannot now bring a complaint before the Arbiter in respect of those investment losses (incurred before STM Malta's appointment).

The Complainant has failed to show that the Wrap fees are not justified, or not competitive, or that STM Malta was in any way at fault for concluding that such fees were well understood and accepted by him at the time when the former trustee acted on his instructions. Subject to the restrictions arising, because the Investment Manager has selected an investment that may not be liquid, STM Malta can only act on his instruction to liquidate the GAM Wrap platform.

It submitted that the selection and status of the *Prestige Fund* are out of its control and whilst STM Malta can give instructions for the investment to be redeemed at the earliest opportunity, at the Complainant's request, without the need for any direction from the Arbiter, there is however no basis to suggest that

STM Malta should incur the costs of such redemption. It accordingly submitted that:

1. The Complaint is not for the Arbiter's consideration due to the Complainant's unproven allegation that he is the subject to a fraud. As a result, there can be no basis for an equitable award to be made against it.

2. The acts complained of are acts of a former trustee. There is no basis to ascribe fault to STM Malta and there is no basis for the Arbiter to declare that it has failed in its duties.

3. An instruction can be given to wind up the GAM Wrap platform without the Arbiter's intervention. The Complainant merely needs to give instructions to STM Malta, although the capacity for the GAM Wrap Platform to be terminated may depend on being able to liquidate the Prestige Fund.

4. Nor is there any need for the Arbiter to give instruction for the Prestige Fund to be disposed of. The Complainant may give instructions to STM Malta nut there is no equitable basis to suggest that it should be liable for the costs. The investment was selected by a suitably regulated investment firm many years before STM Malta became involved and, in any case, appears to be a result of the fraud alleged and its earlier submissions apply.

5. There is no basis to suggest that the Complainant has been overcharged in respect of the fees for the GAM Wrap (notwithstanding that the arrangement appears to derive from the alleged fraud and is therefore outside the scope of the arbitration process). STM Malta has shown that alternative, more expensive, platforms might have been selected. It accordingly argued that no equitable aware can be made against STM Malta.

6. The Complainant has not shown any loss in respect of the Prestige Fund. No equitable order could be made against STM Malta in this regard.

7. There is no need for the Arbiter to make any order to transfer to another scheme. The Complainant can request such a transfer at any time, subject to the receiving scheme being prepared to accept the assets of the transfer. Given that no fault can be ascribed to STM Malta, no equitable order can be made that STM Malta should absorb any costs associated with the transfer.

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

Further Considers:

Preliminary Pleas – Competence of the Arbiter

Plea relating to the nature of the Complaint

In its reply to the Complaint, the Service Provider submitted *inter alia* that:

> *'... the Arbitration process is not the correct forum for a proxy fraud investigation to be carried out. Accordingly, the Respondent respectfully requests the Arbiter does not consider the complaint which is entirely predicated on the allegation of fraud'*.[11]

STM Malta accordingly questioned the Arbiter's competence to hear this case given the nature of the Complaint which involves material allegations of fraud.

The Arbiter notes that the key allegations of this Complaint, as summarised at the start of this decision, intrinsically involve and are based on allegations of various material documents that purportedly bore the Complainant's signature but which the Complainant alleged he never signed nor was he aware of.

The Complainant explained that he became a member of the *Harbour Retirement Scheme*[12] in 2013. He submitted that there were a number of documents that purportedly bore his signature which, however, he had never himself signed and became aware of only in 2019. The Arbiter particularly notes the Complainant's claims in this regard:

- That he only became aware in July 2019, and was never informed prior to that of a material agreement ('the Investment Wrap Service Agreement') executed in December 2013 in respect of his Scheme, which agreement appointed certain parties and authorised the payment of significant fees to such parties;[13]

[11] P. 187
[12] Which retirement scheme eventually changed its name to the STM Harbour Retirement Scheme after STM Malta became its new Trustee and Retirement Scheme Administrator in August 2018 – P. 104/105.
[13] P. 122- 146

- That an amendment to the said agreement of December 2013 was done in April 2015, ('the Supplementary Agreement') which allowed for the imposition of even higher fees. The Complainant claimed he never signed the Supplementary Agreement and only became aware of this document also in June 2019;[14]

- That the Complainant never signed, or sent, a letter dated 20 February 2015, that was intended to confirm that the signature on the supplementary agreement was that of the Complainant;[15]

- That the Complainant never endorsed an Application Form for the opening of a managed account, becoming aware of this document only in March 2021;[16]

- That the Complainant also never signed an undated declaration and/or authorisation form to his adviser that he was a professional investor, and which gave instructions on the investments to be made.[17]

It is noted that the Complainant submitted that as a result of such undisclosed documents, he suffered excessive fees between 2013 and 2019 and that furthermore significant investments into complex and unsuitable investments were also made into his Scheme which resulted in a significant depletion of his Scheme assets.

Whilst matters of fraud do not fall within the ambit of the Arbiter for Financial Services Act, Cap. 555 ('the act'), and such matters are to be reported by the Complainant to the relevant authorities and considered by the police, the Arbiter notes that there are certain aspects of the Complaint which are not limited to allegations of fraud.

In this decision, the Arbiter shall accordingly only consider and focus on those elements of the Complaint which fall within the ambit of the Act. Such matters are considered to involve:

[14] P. 147 - 149
[15] P. 150 - 151
[16] P. 153 - 156
[17] P. 157

(i) The claim that STM Malta allowed and/or accepted an allegedly unsuitable investment, the Prestige Fund, within the Scheme's portfolio that was *inter alia* not compatible with the Scheme's objective and went against the principle of diversification and prudence;

(ii) The other alleged general breaches as summarised under paragraph (e) above at the start of this decision to the extent they are relevant and affect the remedy requested.

The Arbiter considers that the allegations relating to the payment of excessive and/or unauthorised fees is intrinsically tied and linked to the allegations of fraud relating to the signatures of material agreements. Hence, such aspect will not be delved into as part of this decision for the reasons mentioned.

Plea pursuant to Article 21(1)(c) of Cap. 555

The Service Provider raised the plea that the Complainant was out of time to make his Complaint *'about investment performance'*[18] with the Office of the Arbiter for Financial Services, in terms of Article 21(1)(c) of the Arbiter for Financial Services Act, Chapter 555 of the Laws of Malta ('the Act').

Article 21(1)(c), which deals with the competence of the Arbiter, provides that:

> *'(c) An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act, if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of'.*

The Service Provider explained in its reply that in 2015, the Former Trustee provided the Complainant with an Annual Statement which showed an investment loss of GBP 62,372.98.[19]

STM Malta accordingly claimed that the claimed losses not only occurred *'many years'* before the time that STM Malta became trustee and RSA of the Scheme (in

[18] P.189
[19] P. 95

August 2018), but *'the investment losses were explicitly notified to the Complainant in 2015'*.[20] It submitted that *'The Complainant should have immediately raised his concerns with the former Trustee'*.[21]

The Complainant filed his formal complaint in writing with STM Malta by way of his email dated 22 February 2021.[22]

The Arbiter however outrightly dismisses the arguments brought forward by the Service Provider in respect of its plea that the Complaint is *'out of time'*[23] in terms of Article 21(1)(c) of the Act.

This is so for various reasons, particularly the following:

i. in his Complaint to the OAFS, the Complainant claimed losses and damages for *'GBP 86,000 representing the fees and charges sustained for the period 2013 until second quarter 2019'*, as well as *'the amount of GBP 200,000 or any lesser amount representing the actual capital losses sustained in the amount of capital invested in the Prestige Fun following the liquidation thereof ...'*.[24]

   The said loss/claim for damages is materially different to the extent of loss referred to by STM Malta in the Annual Statement of 2015 (of - GBP 62,372.98);

ii. the *'Gains/(losses) from investments'* indicated in the said Annual Statement of 2015 included *'both realised and unrealised movements'*.[25] Indeed, the subsequent *'Annual Statement for the period ending 31 December 2016'* included a much lower figure of loss (i.e. of -GBP 39,193.16) than that previously quoted in the preceding statement of 2015);[26]

[20] P. 189
[21] *Ibid.*
[22] P. 167
[23] P. 189
[24] P. 15
[25] Footnote 3 as per the Annual Statement for the period ending 31 December 2015 – P. 95
[26] P. 97

iii. the said Annual Statement of 2015 did not even detail the underlying investments nor provided a breakdown of the investments on which the Complainant experienced the realised or unrealised loss;

iv. the disputed investment, the *Prestige Fund*, was still in existence and held within the Complainant's investment portfolio within his Scheme's structure at the time of his Complaint (as also acknowledged by the Service Provider in its reply).[27] Indeed, the conduct complained of in respect of the *Prestige Fund* is considered as still continuing in nature as per Article 21(1)(d) of the Act.

Hence, the Annual Statement for the period ended December 2015, cannot reasonably be considered as the date when the Complainant first had knowledge of the matters complained of for the purposes of Article 21(1)(c) of the Act as argued by STM Malta. The Service Provider's claim in terms of the said article is thus being rejected.

The submission that STM Malta is not the correct defendant

In its reply, the Service Provider submitted *inter alia* that it:

> *'... became Trustee and Administrator of the Harbour Retirement Scheme as a result of a Deed of Retirement and Appointment dated 31 August 2018. Harbour Pensions Limited notified the Complainant of their intention to resign in favour of STM Malta Trust and Company Management Limited on 6th August 2018. The Complainant did not object to the appointment ... no responsibility for the outcomes from actions carried out by the former trustee, prior to the appointment of the Respondent on 31 August 2018 ...*
>
> *The Respondent submits, that in any case, pursuant to S.30(3) of the Trust and Trustees Act the Respondent shall not be liable for the Breaches of Trust of a former trustee, other than to take reasonable steps to remedy such breach of trust on becoming aware of it.*

[27] P. 189 & 196

Accordingly, the Respondent cannot be found liable for losses arising in respect of the actions of the former trustee.'[28]

The Service Provider made further extensive submissions on this point as also outlined in its final submissions.[29]

The Arbiter makes reference to Article 21 of the TTA relating to *'Duties of trustees'* as well as to Article 30 of the Trusts and Trustees Act (Chapter 331 of the Laws of Malta)('TTA') relating to *'Liability for breach of trust'*, which are considered particularly relevant to the aspect raised.

Article 21(1) and (2)(a) of the TTA, in particular, provide that:

'(1) ***Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias,*** *act in utmost good faith and avoid any conflict of interest'.*

'(2)(a) Subject to the provisions of this Act, ***trustees shall carry out and administer the trust according to its terms; and, subject as aforesaid, the trustees shall ensure*** *that the trust property is vested in them or is under their control and shall,* ***so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage*** *…'*[30]

Article 30(3) and (8) of the TTA, in particular, also provide that:

'(3) A trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person. ***It shall, however, be the duty of the trustee on becoming aware of it to take all reasonable steps to have such breach remedied****'*

….

(8) The court may relieve the trustee either wholly or in part from liability for a breach of trust ***where it is satisfied that the trustee has acted***

[28] P. 186
[29] P. 396 - 408
[30] Emphasis added by the Arbiter

honestly and reasonably and ought in fairness to be excused in the circumstances.'[31]

As specified by Article 19(3)(b) of Chapter 555 of the Laws of Malta, the Arbiter must treat each case on its particular circumstances.

In this case, the Arbiter considers that a **key aspect that needs to be considered** is whether STM Malta - as the new trustee which replaced the original trustee, *Harbour Pensions Limited* - **has acted properly, adequately, and reasonably once it took on its functions as Trustee and Retirement Scheme Administrator in the particular circumstances of the case.**

The Arbiter considers that **Article 30(3) of the TTA does not provide some form of blanket waiver of liability for an incoming trustee in respect of breaches of trust committed by another person**. **Indeed, there is an obligation in terms of the said article on the new trustee to take all reasonable steps for such a breach to be remedied upon the new trustee becoming aware of it, as also ultimately acknowledged by the Service Provider itself.**

However, it would be inconceivable that the legislator included a provision that enables a **possible grave abuse in the financial system as would happen if this article had to be construed in a way that completely exonerates an incoming trustee from liability from a breach of trust committed by a previous trustee, in the manner that the Service Provider seems to be suggesting in its submissions.**

The Service Provider cannot attempt to exclude its potential liability by hiding after the fact that it was not the original trustee and, in the process, try to exonerate its own specific actions or inactions on the matter as it is trying to do.

The Arbiter considers that the aspects raised by the Complainant need to be carefully considered in order to determine whether the incoming trustee, STM Malta, is liable or not with respect to the claims made that will be considered in this decision.

Furthermore, since the Service Provider is acting in a dual capacity of a Trustee and Retirement Scheme Administrator (RSA), the Arbiter has to examine whether the Service Provider fulfilled its regulatory duties also as an RSA.

[31] Emphasis added by the Arbiter

The first principle to be considered is that trustees are duty-bound to administer the retirement scheme and its assets to a high standard of diligence and accountability.[32]

As to a breach of trust committed by some other person, the Arbiter considers that if the incoming new trustee ought to, for example, have reasonably identified or been reasonably aware of a breach committed by its predecessor and the new trustee overlooked, ignored and/or remained silent and took no action on its part to raise this matter and have the said breach remedied, then the incoming trustee cannot expect to avoid liability by just stating that it was not the trustee at the time.

It would not be fair, equitable, nor reasonable (and thus contrary to Article 19(3)(b) of Cap. 555 of the Laws of Malta) if a different stance had to be taken.

It is indeed considered that any such inaction on the part of the incoming trustee would undoubtedly further go against the duties of a trustee as per Article 21(1) and (2)(a) of the TTA mentioned above.

It is indisputable that the new trustee is ultimately responsible for its own actions and/or inactions during its own term as trustee.

Consideration certainly needs to be made of STM Malta's own actions and/or inactions as trustee given also that the matters do not just relate or should be limited to the time of when the disputed investments were purchased but are rather of a continuous nature.

This is given that the disputed investment, the Prestige Fund, still existed and remained within the Scheme's structure at the time of the new trustee. STM Malta indeed permitted, accepted and/or allowed, without question, the disputed investment to form part of the Complainant's investment portfolio during its tenure.

[32] The trustee has to deal with property under trust *'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'*. As stated, *'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'* - Editor Max Ganado, '*An Introduction to Maltese Financial Services Law*', Allied Publications 2009, p. 174 & 178.

The Arbiter notes that it has not emerged that STM Malta itself made any reservations or expressed any concerns on this investment (The Prestige Fund) forming part of the Complainant's portfolio composition when it took over as the new trustee nor thereafter. STM Malta cannot just state that it *'inherited the investment from the former trustee, which had, prima facie, appointed a qualified investment manager in good faith*',[33] and just leave this investment to that.

The mere suggestion by the Service Provider of outrightly dismissing any possible liability by suggesting that it is not the correct defendant as it was not the original trustee at the time the investment was originally made, is considered to rather reflect a certain lack of appreciation of its duties as a trustee and its monitoring function in such capacity and also as Retirement Scheme Administrator.

The Service Provider had indeed certain duties as a Retirement Scheme Administrator.

Moreover, in its reply, STM Malta inferred that the former trustee acted diligently in respect of the disputed investment when it noted that:

> *'Not only has the Complainant failed to show that the former trustee did not act diligently in accepting the investment management decisions of a properly regulated firm ...'*[34]

STM Malta cannot exonerate itself of responsibility by shifting it to the original trustee, especially when it is defending the original trustee against claims of acting indiligently.

For the various reasons mentioned, the Arbiter is accordingly dismissing the Service Provider's claim that it is not the correct defendant and the relevant aspects raised in this section shall be further and adequately considered as part of the merits of the case.

[33] P. 190
[34] P. 189

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.

The Complainant

The Complainant, born in 1967, having a US passport and residing in the UK at the time, applied to become a member of the Harbour Retirement Scheme in 2013, as per his Application Form dated 30 July 2013.[35]

The Complainant's occupation in the said form was indicated as *'Banker'*.[36]

During the hearing of 9 November 2021, the Complainant testified that he is:

> *'a Chief Executive Office of a publicity company in Germany. At the time I filled in the application for the investment, I was in investment banking with JP Morgan working on financing technology companies'*.[37]

In the same sitting of November 2021, the Complainant further clarified that:

> *'... the kind of investment banking that I did was advisory, so I helped companies that were issuing public offerings, I helped companies who were raising debt, doing mergers and acquisitions'*.[38]

The Complainant's attitude to risk was indicated in the Application Form for Membership into the Harbour Retirement Scheme, as *'Enhanced Risk'* defined as:

> *'There is a potential for significant growth but that potential should be balanced with the increased chance that your investment value may decline more aggressively'*.[39]

His investment objective as specified in the same form was as follows:

> *'I am comfortable with a higher risk and accept that there may be volatility in the investments in order to achieve higher returns over the long term'*.[40]

[35] P. 267
[36] P. 78
[37] P. 352
[38] P. 354
[39] P. 265
[40] *Ibid.*

Investment Adviser/Investment Manager

The Application Form for Membership of the Harbour Retirement Scheme indicates '*Glen Bastick'* of *'FPSS Tax Consultants'* as the professional adviser.[41] In the said form, the adviser was indicated as being based in London and regulated by the *'FSA'*.[42]

A disputed *'Investment Wrap Service Agreement'* dated December 2013 was entered into between Harbour Pensions Limited in respect of the Complainant's Harbour Retirement Scheme and *Guardian Asset Management Limited* ('GAM') (a company indicated as regulated by the Jersey Financial Services Commission, whose role as *'Nominee'* was *'to hold the investments ... purchased or acquired from time to time'*).[43, 44] Schedule 4 of the said agreement indicates *'Harbourside Capital Pty Ltd'* based in Sydney, Australia, as the *'Appointed Investment Manager'*,[45] where the Investment Manager has:

> *'full powers to act on behalf of the Owner [Harbour Pensions Limited] in the provision of investment management and the giving instructions to [GAM] in respect of the acquisition and disposal of the investments'.*[46]

Another disputed agreement, the *'Supplementary Agreement re: Amended Terms'* entered into with GAM in 2015, was also produced during the proceedings.[47]

The investment portfolio

A total of GBP 535,140.86 was transferred into the Harbour Retirement Scheme (as detailed in the Annual Statements issued by Harbour Pensions).[48]

It is noted that a disputed, undated letter on the letterhead of the professional adviser ('*FPSS-Financial Planning Ltd'*, based in London), was also produced during the case.[49] The said letter, purportedly signed by the Complainant,

[41] P. 262
[42] *Ibid.*
[43] P. 122
[44] P. 122 - 149
[45] P. 138
[46] P. 122
[47] P. 158 -161
[48] P. 93, 95 & 97
[49] P. 157

included *inter alia* a confirmation that he *'should be classed as a professional investor'*, and gave instructions to:

> *'invest £250,000 into a Harbourside Managed account. Please could you then put £260,000 onto the Guardian Platform and then invest £200,000 into the Quantum IMS Managed FX fund from the platform'.*[50]

Other than a Portfolio Valuation statement as at March 2021, no breakdown of the investment portfolio held by the Complainant over the years was provided by the parties during the proceedings of the case.

The said Portfolio Valuation statement as at 31 March 2021, issued by *FCJ Fiduciaries Limited* (previously known as *Guardian Asset Management Ltd*),[51] indicated the following holdings as at the date of the statement:[52]

- a holding of 2,404.4012 units (at a book cost of £197,476.11) held into the *Prestige Alternative Finance Fund GBP*, (with ISIN no. KYG722711283) whose *'Market Value'* based on the NAV (Net Asset Value) as at 28 February 2021 (of £114.02 per unit), amounted to £274,149.82.

- a cash holding with *FCJ Fiduciaries Ltd* of USD 274,947.57 (equivalent to GBP 199,261.63).

The total *'Market Value'* of the Complainant's holdings as at 31 March 2021 was accordingly indicated as GBP 473,411.45.

According to the said statement, there is a difference of -GBP 61,729.41 between the initial transfer value (of GBP 535,140.86) and the total market value as at 31 March 2021 (of GBP 473,411.45).

The Prestige Alternative Finance Fund ('the Prestige Fund')

The Prestige Fund is an open-ended collective investment scheme set up as a limited liability exempt company in the Cayman Islands whose Investment

[50] P. 157
[51] https://opencorporates.com/companies/je/EXTUID_118326
[52] P. 196 & 361

Manager is Prestige Fund Management Limited, with the fund being *'regulated under the Mutual Funds Act (Revised) of the Cayman Islands'*.[53]

The Complainant's investment into the Prestige Fund of GBP 197,476.11 actually constituted 36.90% of the sum of GBP 535,140.86 that was transferred into the Harbour Retirement Scheme for investment.

The following are some salient features emerging from the Information Memorandum in respect of the Prestige Fund presented by the Service Provider during the proceedings of the case:[54]

> *'THE PURCHASE OF PARTICIPATING SHARES IS SPECULATIVE AND IS NOT INTENDED AS A COMPLETE INVESTMENT PROGRAM AND INVOLVES A HIGH DEGREE OF RISK. THERE IS NO ASSURANCE THAT THE FUND WILL BE PROFITABLE AND IS DESIGNED ONLY FOR EXPERIENCED AND SOPHISTICATED PERSONS WHO ARE ABLE TO BEAR THE RISK OF THE SUBSTANTIAL IMPAIRMENT OR TOTAL LOSS OF THEIR ENTIRE INVESTMENT IN THE FUND'.*[55]
>
> *'THE SHARE CLASSES OFFERED IN THIS FUND HAVE BEEN DEEMED AS BEING SUITABLE ONLY FOR EXPERIENCED INVESTORS AND/OR INSTITUTIONAL INVESTORS. AS SUCH, THE FUND IS NOT SUPERVISED TO THE SAME DEGREE AS FUNDS WHICH ARE AIMED AT OTHER TYPES OF INVESTORS. THEREFORE, THE FUND SHOULD BE VIEWED AS AN INVESTMENT SUITABLE ONLY FOR INVESTORS WHO CAN FULLY EVALUATE AND BEAR THE RISKS INVOLVED...'*[56]
>
> *'The investment objective of the Fund is to achieve steady long term capital growth through investments (directly or indirectly) in finance lease, hire purchase contracts and loans ... which are typically (but not always necessarily) secured against assets. These assets may be highly diversified and often very specialist in nature'.* [57]

[53] P. 289 & 297
[54] P. 283 – 351. The Service Provider only presented a copy of the Offering Memorandum of the Prestige Fund dated 29 March 2021 – this version superseded *'the previous information memorandum of the fund dated April 2020'* (P. 285).
[55] P. 285
[56] P. 286
[57] P. 289

'The initial minimum investment per investor is USD 100,000 ...' [58]

'Valuation Date: The last Business Day of each calendar month.' [59]

'Subject to the applicable redemption notice period, redemptions of Participating Shares can be made with effect from the first Business Day after the Valuation Date of every month ... at the net asset value per Participating Share of the relevant class on the Valuation Date immediately preceding such Monthly Redemption Day'.[60]

'... For Shareholders that subscribed for Participating Shares prior to 1 March 2021, a redemption request in respect of Participating Shares must be received by the Administrator not less than 30 days prior to the relevant Valuation Date. For all other Shareholders a redemption request in respect of Participating Shares must be received by the Administrator not less than 90 days prior to the relevant Valuation Date. However, the Directors in their discretion may increase or reduce the period of notice generally or in regards to individual redemptions...'.[61]

Further details about the Investment Objective of the Prestige Fund are outlined in Section 3 of the Information Memorandum which also specifies in bold at the end of the said section that:

'THE FUND'S INVESTMENT PROGRAMME IS SPECULATIVE AND ENTAILS SUBSTANTIAL RISKS. MARKET RISKS ARE INHERENT IN ALL INVESTMENTS TO VARYING DEGREES. THE PRACTICES OF LEVERAGE AND ENGAGING IN FINANCE TRANSACTIONS, CAN, IN CERTAIN CIRCUMSTANCES, INCREASE THE ADVERSE IMPACT TO WHICH THE FUND'S INVESTMENT PORTFOLIO MAY BE SUBJECT...'.[62]

Further details about the risks associated with the Prestige Fund are outlined in Section 13, titled *'Risk Factors'* of the Information Memorandum[63] wherein the *'General Risks of Investing'*, *'Liquidity Risk'* and *'Risk of Leverage'* (where *'a*

[58] P. 292
[59] P. 293
[60] P. 294
[61] P. 316
[62] P. 302
[63] P. 336 - 342

maximum permitted leverage of 50% of the Fund NAV in relation to directly held investments' were *inter alia* highlighted.[64]

It is further noted that according to a Fact Sheet sourced by the OAFS from a general search over the internet, the Prestige Fund was described *inter alia* as: [65]

> *'an experienced investor Fund seeking to focus on asset-based direct lending by investing in a diversified portfolio consisting of rural, commercial and industrial loans, leases and finance agreements in the UK'.*

According to the Portfolio Valuation statement produced as at 31 March 2021, the Prestige Fund investment had experienced an unrealised capital gain of £76,673.71 (based on the quoted price of £114.02 per unit at the time).[66]

According to information obtained from Bloomberg,[67] the Prestige Fund continued to have an appreciation in value (ranging above £114.02 to £117.1058) between 26 February 2021 till 29 April 2022, and then experienced a sharp drop in value between the end of April 2022 to October 2022.

The last available NAV of the Prestige Fund, as also indicated on the website of the *Prestige Fund*, is indicated at £82.99 at 31 October 2022.[68] (At the latest available price of £82.99, an unrealised capital gain of £2,065.15 would be calculated).[69]

It is further noted that the monthly performance of the Prestige Fund over the years since its commencement of activities in April 2009 to August 2022, is summarised in a table included in the fund's Fact Sheet dated 08/2022 (also sourced by the OAFS following a general search over the internet).[70]

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[64] P. 338

[65] https://www.open-funds.ch/sites/default/files/2023-03/PALTF-USD-Factsheet-English-08-2022.pdf

[66] £274,149.82 - £197,476.11 = £76,673.71

[67] As sourced by the OAFS

[68] https://www.prestigefunds.com/latest-fund-prices/

[69] 2,404.4012 units x £82.99 = £199,541.26 (Market Value based on NAV as at 31.10.2022). Book Value of £197,476.11 less Market Value based on NAV as at 31.10.2022 = Unrealised gain of £2,065.15

[70] https://www.open-funds.ch/sites/default/files/2023-03/PALTF-USD-Factsheet-English-08-2022.pdf - Factsheet includes reference to the same ISIN number of the Complainant's Prestige Fund investment.

The only information provided by the Complainant as to the status of the fund was an affidavit dated October 2021, from his Wealth Manager at *MASECO Private Wealth* (a company indicated as based in the UK), wherein in the said affidavit the Wealth Manager explained that:[71]

> *'I confirm that while conducting research into the Prestige Fund ... it resulted that the Prestige Investment ... consisted of illiquid student loans which would generally not be considered as compatible underlying assets suitable for investments for retirement purposes due, inter alia, to the high risk posed by said underlying assets, complex structure of such investments and illiquid nature of such investments ...*
>
> *... In the course of my research ... I further discovered that there is no suspended fund but there is a deferred settlement timeline for the Prestige holding going out to back-end 2023. On the basis of history and experience, it is very likely that this will extend further out and it is also very likely for suspension liquidation to occur.'*

The Complainant did not provide any official communication that may have been communicated by the Prestige Fund regarding any deferred redemptions, suspension or other material aspects relating to the fund.

It is further noted that the Fact Sheet sourced in respect of the Prestige Fund dated '08/2022', only included the following *'Important Information'* with respect to redemptions:[72]

> *'Investors should note redeeming their holdings from this Fund may be subject to restrictions as set out in the Fund's Information Memorandum. Redemptions can be subject to a maximum amount determined by the Fund per dealing period. These amounts may vary from time to time if this is deemed in the best interest of the Fund and this may delay new redemption requests to ensure alignment with variable portfolio liquidity. In certain circumstances redemptions may also be suspended until excess liquidity can be generated'.*[73]

[71] P. 279

[72] https://www.open-funds.ch/sites/default/files/2023-03/PALTF-USD-Factsheet-English-08-2022.pdf

[73] Page 3 of the Prestige Fund Fact Sheet dated 08/2022. Page 4 of the said Fact Sheet includes the ISIN Code KYG722711283 indicated for the Complainant's investment.

Other Observations & Conclusion

It is noted that during the hearing of 9 November 2021, the Complainant testified that:[74]

> *'It is being said that my quest for the fees started when I saw a negative performance; and, in the valuations presented, pages 95-97, for example, the valuation of 2016 shows that the fund made an actual gain and not a loss. If we look at today's valuation (which is going to be presented by the service provider after this hearing), it shows that the total amount that I invested in 2014 was circa GBP 535,000, and if we look at today's valuation it is GBP 475,000 and that there was a loss of GBP60k, and asked why am I claiming a loss of GBP 200K in my complaint, I say because there are two parts to my complaint.*
>
> *One part is that 50% of this investment was made into the Prestige Fund where I think I will never see that money back. Half of the GBP 147 million [of the Prestige Fund?] is in a fund which is illiquid; I just want that money to put it in a normal fund and I asked for that; and it seems that the distribution of that fund has been delayed and unlikely that it would be paid out. If it gets paid out, it gets paid out in a very small amount.*
>
> *The other portion of my complaint is about the GBP 80,000+ of excessive fees which I was charged beyond the standard fees; and I should receive back those fees ...'*

There are accordingly two key elements, as also confirmed by the Complainant, - namely, the aspect relating to the payment of fees and the matter involving the Prestige Fund - which really form the basis for the remedy requested by the Complainant.

With respect to the claim of excessive fees paid, the Arbiter has already remarked above that this aspect shall not be considered any further given that this is intrinsically related to the fraud allegations.

[74] P. 354 - 355

Indeed, it is observed that as outlined and acknowledged in the Complainant's final submissions, *'... the agreements executed by the RSA are indeed the very cause for the levying of such excessive fees ...'*.[75]

The Arbiter has considered the investment into the Prestige Fund in order to determine whether compensation can be granted in respect of the alleged losses on this Fund given its alleged unsuitability and lack of conformance with the Scheme's objective and applicable requirements.

Whilst the Service Provider accepted without question the Prestige Fund which featured in the Complainant's investment portfolio and failed to query and challenge such fund and the high exposure thereto when it took over as trustee, however, **having carefully considered the case in question, the Arbiter concludes that, in the particular circumstances of this case, there is no sufficient and satisfactory basis on which it would be fair, equitable and reasonable to award compensation on the said investment. This conclusion is reached when taking various pertinent factors into consideration particularly the following:**

(i) *The Complainant's profile*

The Complainant's profile and his experience considered relevant to investments cannot be ignored and/or overlooked. As outlined above, the Complainant had worked as an investment banker with JP Morgan where he worked on *'financing technology companies'* and *'helped companies that were issuing public offerings ... were raising debt, doing mergers and acquisitions'*.[76]

Whilst it is true that this does not mean that he was qualified as an asset manager or investment advisor, however, it is felt that such background reasonably enabled him to be in a position to understand the disputed investment, that is, the Prestige Fund and the implications thereof apart from the importance of having sight of the documentation involving the Scheme and underlying investments.

[75] P. 372
[76] P. 352 & 354

The Arbiter also notes that the Complainant did not claim, throughout the proceedings of the case, that he was not an experienced investor, nor did he claim that he was a retail investor either.

In his Complaint, it was actually noted that *'The fact that Complainant may be profiled as an experienced investor does not grant STM ...'*.[77]

Such matter is thus attributed its due weighting in the outcome of this decision with the events and developments involving this case being kept into its relevant context.

(ii) *Aspects emerging from the financial statements of the Prestige Fund*

The OAFS sourced copies of the following financial statements (for the years ended 2018 to 2021) of the *Prestige Fund* following searches undertaken over the internet:

- The *'Prestige Alternative Finance Fund Limited Audited Consolidated Financial Statement for the year ended 31 December 2018'*;[78]
- The *'Prestige Alternative Finance Fund Limited Audited Consolidated Financial Statement for the year ended 31 December 2019'*;[79]
- The *'Prestige Alternative Finance Fund Limited and its Subsidiaries Audited Consolidated Financial Statements for the year ended 31 December 2020'*;[80]
- The '*Prestige Alternative Finance Fund Limited and its Subsidiaries Audited Consolidated Financial Statements for the year ended 31 December 2021'*.[81]

The following pertinent matters are *inter alia* particularly noted from the said statements:

[77] P. 13
[78] https://www.prestigefunds.marketing/wp-content/uploads/PALTF-Audit-31-12-2018.pdf
[79] https://www.prestigefunds.marketing/wp-content/uploads/PALTF-Audit-31-12-2019.pdf
[80] https://iiplt.com/download?idx=10938
https://www.prestigefunds.marketing/wp-content/uploads/PALTF-Audit-31-12-2020.pdf
[81] https://www.prestigefunds.marketing/wp-content/uploads/PALTF-Audit-31-12-2021.pdf

a) The Prestige Fund Net Asset Value (USD) was reported as standing at: '*USD 747,408,627'* as at end 2018;[82] '*USD 641,553,250*' as at end 2019;[83] *'USD 572,831,812'* as at end 2020;[84] and '*USD 504,823,827'* as at end 2021.[85]

b) The respective financial statements included a Qualified Auditors Opinion with respect to the value of certain underlying assets. Since the financial statements for the year ended 2018 onwards, reference was made to the fair value of '*a non-performing loan from a related party ... for a consideration of £43.7M'*. From the financial statements for the year ended 2019 onwards, reference was also made to the fair value of an investment in an underlying fund reported at over/or around £30M. The financial statements for the year ended 2021 further included reference to the fair value of another underlying fund investment of around £3M.

c) All of the said financial statements stated there was *'movement in the number of Participating Shares'* with both *'Subscription of Participating Shares'* and *'Redemption of Participating Shares'* occurring in the respective periods (for the GBP Class, the same class of shares held by the Complainant) as described in detail in Note 11 to the respective Financial Statements;

d) In the Investment Manager's Report of the Financial Statement for the year ended 31 December 2018, it was remarked that *'During the year, all the Fund's share prices (Net Asset Value per Share) rose to their highest ever level since inception of the Fund and represent the tenth consecutive year of positive operating results'*.

Similarly, in the Financial Statements for the year ended 31 December 2019 and year ended 31 December 2020, it was remarked that *'During the year, all the (Company's/Fund's) share prices (Net Asset Value per Share) rose to their highest level since inception of the (Company/Fund) in 2009'*.[86]

e) The Investment Manager's Report for the year ended 31 December 2021, however, specified that:

[82] Page 4 of the Financial Statements as at 31.12.18.
[83] Page 7 of the Financial Statements as at 31.12.19.
[84] Page 8 of the Financial Statements as at 31.12.20.
[85] Page 8 of the Financial Statements as at 31.12.21.
[86] Page 4 of the respective Financial Statements.

> ***'The Fund received significantly fewer new subscriptions during the year and continued to see an elevation of investors submitting redemption requests which projected out to Q1/2025, totalling approximately 50% of NAV (as at 06/2022)****.*
>
> *This means that the Fund's Net Asset Value reduced in size during the year and is expected to do so for at least the next two and a half years. The increase in redemption requests requires the Fund to prioritise liquidity generation over absolute performance; meaning that more non-performing assets need to be more aggressively 'worked out' and recovered or ultimately impaired. During 2021 expected credit losses on non-performing loan assets were approximately 2.4% of NAV'.*[87]

It accordingly emerges from the above that the Prestige Fund was still in operation at the time of the Complaint and during the proceedings of this case. During the years 2018 to 2020, the fund units kept increasing in value and there were no apparent material restrictions on redemptions as subsequently becoming evident in the Investment Manager's Report for the year ended December 2021.

(iii) *Formal complaint to the Service Provider did not mention the disputed fund*

The Complainant stated in his Complaint Form to the OAFS that he first had knowledge of the matters complained of on 11 June 2019.[88]

Despite being aware of the matters since June 2019, the Arbiter notes that in his formal complaint to the Service Provider of 22 February 2021, the Complainant, however, had not even mentioned or highlighted the Prestige Fund which he now disputed in his Complaint to the Arbiter filed later, on 21 June 2021.[89]

His complaint to the Service Provider of 22 February 2021,[90] solely focused on, and only covered the aspect of the fees, the issues involving the signatures and consent to/awareness of the material agreements and documents, and the

[87] Page 4 of the Financial Statements for the year ended 31 Dec 2021 – Emphasis added by the Arbiter.
[88] P. 3
[89] P. 1
[90] P. 167 - 169

appointment of parties within the Scheme's structure, as mentioned earlier in this decision.

In his formal complaint to the Service Provider, the Complainant indeed only asked the following as a remedy, with no references made to, or demands for, compensation on the Prestige Fund:

> *'I am seeking reimbursement from STM Malta of all fees charged by each of GAM and Harbourside pursuant to the Wrap Agreement (as amended) which was entered into without my knowledge and without my authority.*
>
> *...*
>
> *I am also seeking a declaration that the Wrap Agreement (as amended) is null and void. I have recently asked STM Malta how to transfer out my scheme and have been told that, in order to do so, GAM will charge me £6,675 in fees pursuant to the Wrap Agreement. This is unacceptable'.*[91]

The Complainant seems to have accordingly only raised issues on the Prestige Fund in the subsequent months after February 2021.

(iv) Lack of substantiation of losses and/or actions to limit such losses

The above sequence of events further indicates that the Complainant does not seem to have had issues with the Prestige Fund prior to February 2021 (the date of his formal complaint to the Service Provider).

It also infers a lack of action taken by the Complainant to redeem the Prestige Fund prior to this date, despite his claim that he was aware of the matters complained of (in June 2019) and despite that the Prestige Fund was still operational and entertaining redemption requests in the years 2019 and 2020 and experiencing a positive performance as considered above.

Throughout the proceedings of this case, the Complainant has indeed not demonstrated that he had filed a redemption request for the Prestige Fund either prior to the date of his formal complaint to the Service Provider, nor even thereafter.

[91] P. 169

It is also noted that **at the time of the Complaint, the Complainant had also not adequately and sufficiently substantiated either his claimed loss on the Prestige Fund. No official documentation or communication was presented about material problems involving the Prestige Fund (other than due to the investment nature of this fund), or that that this fund was suspended or was in liquidation or had stopped operation.**

The only aspect raised by the Complainant to corroborate his claim for compensation on alleged losses on this fund was an affidavit from his current UK Wealth Manager (made in October 2021), who highlighted the illiquid nature of the Prestige Fund and who had confirmed *'that there is no suspended fund but there is a deferred settlement timeline for the Prestige holding going out to back-end 2023'*.[92]

The Wealth Manager further stated that *'On the basis of history and experience, it is very likely that this will extend further out and it is also very likely for suspension/liquidation to occur'*.[93]

The Arbiter considers that whilst this could possibly end up being the case, such a declaration is however not sufficient to substantiate the alleged loss – and the claim to pay '*compensation in the amount of GBP 200,000 or any lesser amount representing the actual capital losses sustained in the amount of capital invested in the Prestige Fund following the liquidation thereof'* as requested by the Complainant – **when the fund was still operational as emerging from the said financial statements and considering the length of period since when the Complainant could have himself taken action when he claims he has discovered this investment**.

Furthermore, the Arbiter considers that timing to exit the Prestige Fund was key to avoid or limit losses.

The Arbiter has indeed no comfort that the Complainant had taken adequate and timely action with his advisor to avoid or limit losses on this fund when it seems he was able and had the opportunity to do so – that is, even at the time,

[92] P. 279
[93] *Ibid.*

or shortly after he claimed that he became aware of the matters complained of in June 2019, or even in the subsequent year 2020, when the Prestige Fund unit price was still appreciating in value (and there was no apparent material deferred settlement as subsequently emerging in the year 2021 as considered above).

Indeed, throughout the proceedings of this case, the Complainant did not indicate and/or provide details as to when the substantially pro-longed deferred settlement had been implemented by the management of the Prestige Fund and neither did he indicate whether he was prohibited or materially restricted from redeeming this fund in the year 2019 and/or 2020.

Neither has any evidence been produced that a request has actually ever been filed by the Complainant for the redemption of the Prestige Fund.

The Arbiter considers that, in the particular circumstances and taking into consideration the context of the various pertinent factors of the case as mentioned throughout this decision, no adequate and sufficiently strong basis emerges for the nexus between the actions or inactions of STM Malta and the alleged capital loss on the Prestige Fund to be satisfactorily determined.

An experienced investor and someone familiar with complicated contracts involving the capital raising on quoted markets and deals involving mergers and acquisitions needs to prove his case to a much higher degree of comfort than an average retail investor, when it comes to alleged unsuitability of the investments or lack of knowledge of the actual investments, in order for such claims to be upheld. An experienced investor who invests a quite high six-digit sum is also expected to keep a close tab on where his money is being invested.

Whilst the Arbiter can understand the distress caused and consequences of fraud, as alleged by the Complainant in this case, the Arbiter however has no competence upon issues of fraud as outlined above and cannot consider such matter, nor keep such context, in arriving to his decision under the Act.

Conclusion and Decision

The Arbiter is accordingly dismissing this case for the reasons amply explained.

Given the refusal of the Service Provider's preliminary pleas and considering the circumstances of the case, each party is to bear its own costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services