

## Before the Arbiter for Financial Services

**Case ASF 099/2021**

**FT**

**(‘the Complainant’)**

**vs**

**STM Malta Pension Services Limited  
(C51028) (‘STM Malta’ or ‘the Service  
Provider’)**

### **Sitting of the 5 December 2022**

#### **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 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, involves the claim that the Trustee and Retirement Scheme Administrator ('RSA') of the Scheme failed to operate in line with the applicable standards and regulatory obligations by allowing inappropriate investments and in this regard failed to (a) conduct business with due skill and care (b) assess the Complainant's knowledge and attitude to risk (c) undertake adequate due diligence with respect to the investments (d) pay regard to the Complainant's best interests.<sup>1</sup>

#### *The Complaint*

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<sup>1</sup> Page (P.) 4, 25

The Complainant explained that his pension with *Powys Council* was, on 21 August 2014, valued in the sum of GBP49,241.29, when it was transferred to STM Malta. The Scheme's funds were subsequently invested into various investments which have failed with the Complainant losing the money invested.

The Complainant submitted that he held STM Malta responsible for the losses given that STM Malta failed to operate to the standards expected of a regulated SIPP provider and professional trustees.

It was further submitted that these failures led to the Complainant's losses.

The Complainant claimed that STM Malta failed to meet regulatory obligations given that STM Malta:

1. Failed to conduct their business with due skill and care.
2. Failed to assess the Complainant's investment knowledge and attitude to risk.

It was noted that the Complainant had a modest income and no real assets other than his family home. Had the Service Provider complied with its duties and made any attempts to assess the Complainant's personal circumstances, STM Malta would have realised that he was not in a position to make this investment.

3. Failed to undertake adequate due diligence as otherwise STM Malta would not have allowed the transfer of funds into the investments.

It was further submitted that if due diligence was undertaken, the Service Provider failed to act on it with due skill and care and continued to allow the investments to take place, despite its total unsuitability.

4. Failed to pay regard to the best interests of the Complainant and treat him fairly.

The Complainant submitted that he is neither an experienced investor nor a high-net-worth investor. He claimed that STM Malta should have realised the investments were high risk and refused to allow them or at least obtain appropriate clarification before proceeding.

It was submitted that there is no evidence that this was carried out and this has resulted in the loss of his pension. The Complainant further submitted that STM Malta knew that there was a significant risk that the investment would be illiquid and should have also taken into consideration what was fair, reasonable and good industry practice. It was submitted that throughout the transaction, STM Malta did not consider the Complainant's best interests.

5. Failed to undertake due diligence on investments.
6. Failed to act according to the standards expected of a regulated SIPP operator.

The Complainant submitted that SIPP providers have discretion to refuse to carry out instructions, should they consider an investment is generally not suitable to be held in a SIPP.

In his Complaint to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant referred to his formal letter of complaint to STM Malta, *'for the complaint in full'*.<sup>2</sup> The said letter, in summary, further outlined the following:<sup>3</sup>

- That STM Malta failed to meet its regulatory obligations in accordance with the FCA's Principles of Business, namely Principle 2 that *'A firm must conduct its business with due skill, care and diligence'* and Principle 6, *'A firm must pay due regard to the interests of its customers and treat them fairly'*.<sup>4</sup>

(The alleged failures listed earlier above were basically reflected in the said formal letter of complaint with respect to the quoted Principles).

- In addition, with respect to the alleged failure to undertake due diligence on investments, reference was made to the case of *'Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Limited [2018] EWHC 2878'*, where it was noted that the Financial Ombudsman Service found

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<sup>2</sup> P. 4

<sup>3</sup> P. 8 - 10

<sup>4</sup> P. 8

that SIPP providers should undertake due diligence on investments and that this had been confirmed by the High Court.

It was also noted on this point that COBS 11.2.19R specifically concerned the manner in which instructions should be executed in that a firm should '*... take all reasonable steps to obtain the best possible result for a client...*'.<sup>5</sup> It was submitted that, therefore, SIPP providers have discretion to refuse to carry out instructions should they consider an investment is generally not suitable to be held in a SIPP.

- In summary, the Complainant submitted that STM Malta failed to carry out adequate due diligence about the Complainant and the failed investments. It was further submitted that, alternatively, if STM Malta alleges that it did carry out such due diligence, it then failed to act with due skill and care and, despite knowing that the investments were unsuitable, continued to allow the investments to be made.

It was further submitted that investments were high risk and did not match with the Complainant's true risk tolerance, with STM Malta failing to assess his personal circumstances and best interests.

The Complainant noted that he relied on STM Malta's professional status when taking advice into making the investments and had put his trust in STM Malta that his pension funds would be reasonably protected.

### *Remedy requested*

The Complainant requested STM Malta to return the original sum of GBP49,241.29, as well as interest payment at 8%, since 21 August 2014 or the amount that the GBP49,241.29 would have been worth had it not been transferred to STM Malta, whichever is the greater.<sup>6</sup>

The Complainant also requested compensation for the stress and aggravation in the sum of GBP1,000 and professional fees incurred with bringing this complaint.<sup>7</sup>

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<sup>5</sup> P. 9

<sup>6</sup> P. 4

<sup>7</sup> *Ibid.*

**In its reply, STM Malta essentially submitted the following:<sup>8</sup>**

That the basis of the Complaint relates to the claim that STM Malta has:

1. Failed to meet regulatory obligations where he listed a number of regulatory obligations which he claims apply to STM Malta. It noted that the Complainant claims, in particular, that STM Malta failed to adequately classify the investment objectives of the Complainant and, in particular, assess the Complainant's attitude to risk and thereby allowing inappropriate investments to be selected for the Complainant.
2. Failed to undertake due diligence on the investments, thereby allowing inappropriate investments to be selected for the Complainant.

STM Malta highlighted the following, as a summary, of its response:

It noted that it was quite clear that the Complainant's solicitor has failed to investigate the matter with any diligence and as a result produced a complaint which is flawed at every stage and contains such significant mistakes as to make it impossible for the Arbiter to make any ruling in relation to the Complaint presented.

STM Malta submitted, in particular:

- That the Complainant is mistaken as to the role that the Service Provider has played in the matters complained of. STM Malta became trustee of the Harbour Pension Scheme on 31 August 2018, almost 4 years after the events complained of took place. STM Malta could not possibly have known about the matters complained of, let alone committed any actions or omissions in respect of them.
- That the Complainant is mistaken as to the law and regulations that are to be applied. The Complainant is not a SIPP provider and is not governed by UK Regulations in relation to the Scheme. The only applicable framework is the Trust Deed, the Malta Special Funds Act and the Malta Trust and Trustees Act. The behaviour of the Trustee at the time can only be measured against this framework and no other.

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<sup>8</sup> P. 25 - 31

- That the Complainant is mistaken to suggest that the Former Trustee carried out no due diligence on the investment.
- That the Complainant is mistaken to suggest that the Former Trustee did not consider the risks of the investment and, indeed, has made no analysis of which investments he considers were too risky.
- That [STM Malta] does not support the allegation that the selected investments were not suitable for his risk profile. It noted that the investment structure consists of a portfolio of liquid investments, managed by a reasonably well-known discretionary manager, W H Ireland and a discretionary investment manager based in the UK and an investment in a loan note secured by land in Germany.

STM Malta submitted that it was open to the Former Trustee to conclude that an investment secured on a specific piece of real estate would have a risk profile that sits within the risk appetite of most pension investors.

It further submitted that it was not clear from the Complaint itself whether the Complainant is alleging that some or all of the investments are inappropriately risky or whether the allegation is that some/only part of the investments are inappropriately risky.

- That the Complainant has overstated any alleged losses. STM Malta submitted that the Complainant has omitted to declare that:
  - He has received GBP12,310.32 in pension benefits from the Scheme;
  - The residual investment in the W H Ireland portfolio was currently valued at approximately GBP11,800.
  - That the loan note may have a residual value.
- That the Complainant is mistaken to state that the investment has failed. STM Malta further submitted that this could not be said at all in respect of the WH Ireland investment portfolio. In respect of the Loan Note, it was correct to say that a group of related companies has been

placed into liquidation, and that this has impacted the Complainant's investment in the loan note, which has been valued at zero by the investment platform, out of caution, and not as an expression of a view about any residual value that the investment may have.

The Service Provider noted that it does not speculate about what complaint, if any, the Complainant should have brought against it, but it was clearly something quite different to the complaint which has been drafted. STM Malta respectfully submitted that it is not the role of the Arbiter to guess what complaint the Complainant should have made and then consider the merits of that complaint.

It further submitted that the Arbiter must consider only the complaint as made to him. The Service Provider also respectfully submitted that the complaint contains mistakes of such magnitude, particularly, given that the Complainant is relying on the advice of UK solicitors, as to the correct Service Provider, as to the applicable legal and regulatory framework, as to the facts, and as to the alleged losses, that the Arbiter cannot reasonably be asked to make any equitable award in respect of the complaint that has been presented.

STM Malta further submitted that, in any case, the allegations are without foundation and therefore even if the mistakes within the Complaint were not so grave as to make it impossible to consider, there would be no basis for the Arbiter to make an equitable award against the Service Provider.

*Background provided by STM Malta*

It noted that the Complainant applied to join the Harbour Retirement Scheme on 3 May 2014. He was born in 1958 and would have been 55 at the time of joining the Scheme and therefore able to commence drawing benefits. He was advised by *Servatus*, a firm in Ireland, noted in the application form.<sup>9</sup>

A copy of the advice provided by *Servatus* to Harbour Pensions Limited was attached to its reply.<sup>10</sup>

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<sup>9</sup> Annex 1 to its reply – P. 32-47

<sup>10</sup> Annex 2 to its reply – P. 48-88

STM Malta further noted that on 21 August 2014, a transfer value of GBP42,241.29 was received from the *Powys CC* pension scheme. On 12 September 2014 a pension commutation of GBP12,310.32 was transferred to the Complainant. A net amount after fees of GBP32,454.76 was transferred to SEB for investment. Of this amount, GBP16,220.24 was invested into a Loan Note with Dolphin Capital, with the balance to be invested in two funds.

Copies of relevant forms were attached to its reply.<sup>11</sup>

In March 2017, there was a change of investment strategy and the two fund holdings were transferred to a managed portfolio strategy with *W H Ireland*, which manages an investment strategy for a number of clients. This investment approach continued consequently.

On 31 August 2018, STM Malta Pension Services Limited (then STM Malta Trust and Company Management Limited) was appointed trustee of the Scheme and the former trustee, Harbour Pensions Limited, retired.

During 2019, it became apparent that the Dolphin Loan Notes were not repaying, and, in around September of that year, a liquidator was appointed in respect of the whole of what was now the *German Property Group*. The liquidation is ongoing and the likely value of any repayment to loan note holders is not known at this time.

A copy of the scheme valuation as at 31 December 2020,<sup>12</sup> together with information from *WH Ireland* in relation to the investment portfolio<sup>13</sup> was provided.

#### *STM Malta's submission that it is not the correct defendant*

The Service Provider submitted that it was clear from the timeline that it was not the trustee at the time that the matters complained of occurred. It further submitted that the Complainant is simply wrong to suggest that STM Malta was in some way responsible for the acts or omissions of an unrelated third party.

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<sup>11</sup> Annex 3 & 4 to its reply - P. 89-92

<sup>12</sup> Annex 5 to its reply - P. 99

<sup>13</sup> Annex 6 to its reply – P. 100-102

STM Malta submitted that accordingly there is no basis to make an equitable reward against it.

*STM Malta's claim that the investment selection took place following an assessment of the client's risk profile*

The Service Provider submitted that without prejudice to its claim that it is not the correct defendant, it notes that in the application form the Complainant himself, (it assumes with the assistance of his adviser), has allocated himself a medium risk profile.

It noted that furthermore, the extensive report submitted by *Servatus* has clearly considered the selection of investments at the time to be suitable for the Complainant's risk profile, and the investments ultimately were made in line with the recommendation.

The file that STM Malta received shows clearly that the former trustee did consider the member's risk profile and concluded, based on specific advice, that the investments selected were suitable.

It further noted that the Complainant has not submitted any information to support the allegation that the Former Trustee failed to consider the Complainant's risk profile and, as already stated, the Complainant cannot complain that STM Malta did or did not act since STM Malta was not involved at the time.

*STM Malta submission that the former trustee carried out Due Diligence on the investment*

Without prejudice to its claim that it is not the correct defendant, STM Malta asserted that the former trustee did carry out due diligence on the investment.

It noted that it was clear from the *Servatus* report on the file acquired by STM Malta from the former trustee that *Servatus* had reached the conclusion that the former trustee had reviewed the investment, and both *Servatus* and the former trustee had concluded that the investment was suitable for inclusion in principle within a pension portfolio.

STM Malta asserts that it is only possible to argue that the Dolphin Loan note could be categorised as a failed investment, and that any other assets currently or previously held within the portfolio could not possibly be categorised as failed investments.

It further asserted that there could be no basis to allege that the current or previous investments other than the Dolphin Loan Note could not possibly be the subject of a discussion about their suitability for inclusion in the Complainants portfolio. It argued that there is therefore no basis on which the Arbitrator could make an equitable award against the Complainant in respect of these assets.

In relation to the Dolphin Loan Note, it submitted that not only does the file acquired by STM Malta show that even the third-party adviser concludes that the former trustee had carried out due diligence on the investment, but that due diligence was ongoing. The former trustee had satisfied itself that the Dolphin Group had established an eight-year track record of successful investment in German Property Developments, and that the investment would be made into a loan note issued by a special purpose vehicle and a specific piece of property would be held for the benefit of the note holders by a security trustee.

STM Malta attached, by way of example, extracts from the former trustee's file showing that assets were charged for the benefit of the note holder,<sup>14</sup> a valuation of the referenced property,<sup>15</sup> and financial statements in respect of the note issuing company.<sup>16</sup>

It noted that these documents clearly show that the former trustee was performing ongoing due diligence in respect of the investments, and the documentation acquired by STM Malta very clearly gives the impression that there is property held for the benefit of the note holders and that the investment appears on track to produce the projected returns.

That based on the information in hand, STM Malta concludes that the most likely course of action that has led to the failure to repay loan notes when due, and the subsequent appointment of liquidator in respect of this and a large number of

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<sup>14</sup> Annex 7 to its reply – P. 103

<sup>15</sup> Annex 8 to its reply – P. 104-123

<sup>16</sup> Annex 9 to its reply – P. 124-126

other projects involves malfeasance on behalf of the managers and/or the security trustees. STM Malta awaits relevant updates from the liquidators.

That the Complainant has failed to show that the former trustee failed to carry out due diligence on the investment and given the track record of the manager and the apparent availability of sufficient security, it is not possible to attribute any alleged loss to the failure of due diligence carried out by the former trustee.

STM Malta submitted that it would not be possible in the circumstances to make any equitable award in respect of any alleged failure to carry out due diligence and given that STM Malta was not involved at the time, no award could be made against it.

*STM Malta's submissions relating to the losses claimed*

The Service Provider submitted that the Complainant cannot claim any losses. The only asset where there is uncertainty about the residual value is the Dolphin Loan note. This is valued by SEB as zero, because they have no other information to support any value. This does not mean that the investment has no residual value, and STM Malta awaits updates from the liquidator in this regard.

That the maximum loss that the Complainant could claim is however GBP16,220.40. STM Malta noted that it has already demonstrated that any such loss arises not because of lack of diligence on the part of the former trustee, or indeed failure of the investment itself, but most likely from the malfeasance of the managers of the Dolphin investment and/or the trustees. The matters complained of occurred before STM Malta was trustee of the Scheme. There was accordingly no equitable award that could be made against STM Malta.

That there is no basis within the terms of the Arbitration for Financial Services Act to make awards other than for actual losses. STM Malta therefore submitted that claims for alternative investment returns are not possible, nor is an award in relation to stress and aggravation.

That the Arbitrator is at liberty to make an award for costs. In light of the errors in the Complaint, STM Malta makes the unusual observation that it would be wholly inequitable for any award to be made against STM Malta in respect of the Complainant's costs.

*Concluding remarks by STM Malta*

The Service Provider submitted that it has shown that it was not responsible for any acts or omissions and could not have been as it was not the trustee at the time when the alleged acts or omissions took place.

In any case, the Complainant has not supported his allegations that the former trustee acted without diligence, and STM Malta has shown that the former trustee did in fact act with due care and diligence, and that any losses that might have arisen or arise in the future cannot have arisen out of any lack of due care and diligence on the part of the former trustee.

Accordingly, it considers that no equitable award may be made in respect of the matters complained of, and certainly, no award could be made against STM Malta.

Furthermore, the Complainant has alleged losses that cannot be justified by the facts. STM Malta has not commented specifically in the body of the response, but it notes that the Complainant has not made any allegation of breach of the terms of the trust or any rule of law or regulation in Malta.

It accordingly submitted that the Complaint should be dismissed in its entirety, and no award against STM Malta should be made.

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

**Further Considers:**

***Preliminary Pleas***

The Arbiter notes that in its reply, the Service Provider claimed that the Complaint *'... is flawed at every stage and contains such significant mistakes as to make it impossible for the Arbiter to make any ruling in relation to the Complaint presented'*.<sup>17</sup>

STM Malta mentioned various reasons in an attempt to justify its claim, stating *inter alia* that *'... the complaint contains mistakes of such magnitude, particularly*

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<sup>17</sup> P. 26

*given that the Complainant is relying on the advice of UK solicitors, as to the correct Service Provider, as to the applicable legal and regulatory framework, as to the facts, and as to the alleged losses, that the Arbiter cannot reasonably be asked to make any equitable award ...'.<sup>18</sup>*

Whilst some of the reasons raised by STM Malta relate to the merits of the case, there are **some aspects that the Arbiter considers should be dealt with first as part of the preliminary pleas. These involve the following three main areas:**

- (i) the nature of the Complaint**
- (ii) the applicable legal and regulatory framework and**
- (iii) whether STM Malta is the correct defendant.**

*Submissions relating to the nature of the Complaint*

It is noted that in its reply, STM Malta submitted that it:

*'... does not speculate about what complaint, if any, the Complainant should have brought against [it] ... but it is clearly something quite different to the complaint which has been drafted'.<sup>19</sup>*

It further submitted that:

*'... it is not the role of the Arbiter to guess what complaint the Complainant should have made ...' and that the Arbiter 'must consider only the complaint as made to him'.<sup>20</sup>*

The Arbiter however dismisses the submissions made by STM Malta relating to the nature of the Complaint and its admissibility. The nature of the Complaint is considered as being amply clear contrary to what is being suggested.

In his work, the Arbiter does not guess or speculate but proceeds to consider the respective case based on the complaint filed, the submissions made to him by the respective parties, and the documents, facts, and evidence as produced and emerging in the respective case.

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<sup>18</sup> p. 27

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

As outlined above, the nature of the Complaint, which was ultimately in essence even summarised by STM Malta itself in its reply under the title of '*Basis of the Complaint*'), is the following:<sup>21</sup>

- **The claim made by the Complainant that STM Malta failed to operate in line with the applicable standards and regulatory obligations by allowing inappropriate investments and failing, in this regard, to:**
  - (i) conduct business with due skill and care**
  - (ii) assess the Complainant's knowledge and attitude to risk**
  - (iii) undertake adequate due diligence with respect to the investments**
  - (iv) pay regard to the Complainant's best interests.**

The Service Provider's submissions relating to the nature of the Complaint are accordingly rejected, and the Arbiter shall consider the Complainant's alleged claims as summarised above.

*Submissions relating to the applicable legal and regulatory framework*

STM Malta submitted that it '*is not a SIPP provider*<sup>22</sup> and '*is not governed by UK Regulations ...*'<sup>23</sup>

It further submitted that the

*'behaviour of the Trustee at the time can only be measured against ...'*, the applicable framework being only '*the Trust Deed, the Malta Special Funds Act, and the Malta Trust and Trustees Act*'<sup>24</sup>

The Service Provider further submitted that

*'... the Complainant has not made any allegation of breach of the terms of the Trust or any rule of law or regulation in Malta*'<sup>25</sup>

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<sup>21</sup> P. 4, 25

<sup>22</sup> P. 26; SIPP - Self-invested personal pensions

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> P. 31

Whilst STM Malta is not a SIPP provider<sup>26</sup> for the purposes of UK Regulations but is rather a QROPS provider as pointed out by the Service Provider,<sup>27</sup> the Arbiter considers that there are however various similarities between the two given that in the case in question the Scheme involves a member-directed personal pension plan with the trustee of such plan having clear oversight obligations including with respect to the underlying investments to ensure compliance of the Scheme with applicable requirements.<sup>28</sup>

**Hence, the inaccurate reference made by the Complainant to a SIPP provider rather than to a QROPS provider is considered rather insignificant for the purposes of the Complaint. Such incorrect reference does not disqualify nor discredit the Complaint filed with the OAFS.**

With reference to the matters raised in respect of the applicable framework, the Arbiter further notes that in its formal complaint to STM Malta, (which was specifically referred to in the Complaint filed with the OAFS), the Complainant mentioned two specific principles from the *'Financial Conduct Authority, Principles of Business'* as to the regulatory obligations which STM Malta allegedly failed to meet.<sup>29</sup>

The said principles were indicated as the principle that, *'A firm must conduct its business with due skill, care and diligence'* (referred to by the Complainant as Principle 2), as well as the principle that *'A firm must pay due regard to the interests of its customers and treat them fairly'*, (referred to as Principle 6).<sup>30</sup>

Whilst the regulatory framework of the *'FSA/FCA'* in the UK does not apply to STM Malta and to the Scheme as argued by the Service Provider, however, **the same principles indicated by the Complainant are categorically reflected in the Maltese regulatory framework applicable to the Service Provider and the Scheme.**

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<sup>26</sup> Described as follows: *'A self-invested personal pension (SIPP) is a pension 'wrapper' that allows you to save, invest and build up a pot of money for when you retire. It is a type of personal pension and works in a similar way to a standard personal pension. The main difference is that with a SIPP, you have more flexibility with the investments you can choose'* - <https://www.moneyhelper.org.uk/en/pensions-and-retirement/pensions-basics/self-invested-personal-pensions>

<sup>27</sup> P. 11

<sup>28</sup> <https://investmentsforexpats.com/whats-the-difference-between-qrops-and-sipps/>

<sup>29</sup> P. 4 & 8

<sup>30</sup> P. 8

**Indeed, the principles mentioned by the Complainant have, in essence, and substance, always been reflected and applied in the local regulatory framework such as through the following conditions:**

- Rule 2.6.2 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued by the Malta Financial Services Authority ('MFSA'),<sup>31</sup> under the Special Funds (Regulation) Act, 2002 ('the SFA'),<sup>32</sup> which applied originally, provided that

***'The Scheme Administrator shall act with due skill, care, and diligence – in the best interests of the Beneficiaries ...'***

The same principle continued to apply under the rules issued under the Retirement Pensions Act (Chapter 514 of the Laws of Malta), ('RPA') which eventually replaced the SFA after coming into force in 2015. Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, stipulated that

***'The Service Provider shall act with due skill, care, and diligence ...'***

- Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA provided that:

***'The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries ...'***

The same principle continued to apply under the rules issued under the RPA. Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provided that:

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

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<sup>31</sup> The regulatory authority of the Scheme and Scheme Administrator.

<sup>32</sup> This being the first regulatory framework in Malta applicable to personal retirement schemes and retirement scheme administrators until such framework was repealed and replaced by the Retirement Pensions Act ('RPA') which subsequently came into force on 1 January 2015.

Despite the incorrect references made by the Complainant to the applicable regulatory obligations, it is accordingly **abundantly clear that the principles described by the Complainant do, in essence, and substance, apply to the Scheme Administrator and Scheme. There is accordingly a clear basis on which to consider the substance of the claims made.**

The submissions made by STM Malta on this point are, for the reasons mentioned, considered frivolous and are thus also being rejected. The Arbiter shall consider the behaviour and responsibilities of the Service Provider **in its dual capacity of Trustee and Retirement Scheme Administrator with regard to the principles as applied in the local regulatory framework**

*The submission that STM Malta is not the correct defendant*

The Service Provider submitted that it

*'became a trustee of the Harbour Pension Scheme on 31 August 2018, almost 4 years after the events complained of took place. STM Malta could not possibly have known about the matters complained of, let alone committed any actions or omissions in respect of them'.<sup>33</sup>*

It also submitted that

*'... the Complainant is simply wrong to suggest that STM Malta was in some way responsible for the acts or omissions of an, at the time, unrelated third party'.<sup>34</sup>*

In its reply, STM Malta further reiterated

*'... that it was not responsible for any acts or omissions and could not have been as it was not the trustee at the time when the alleged acts or omissions took place'.<sup>35</sup>*

At the outset, 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.

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<sup>33</sup> P. 26

<sup>34</sup> P. 28

<sup>35</sup> P. 30

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 ...**'<sup>36</sup>*

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 honestly and reasonably and ought in fairness to be excused in the circumstances.***<sup>37</sup>

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<sup>38</sup> - **has acted properly, adequately, and reasonably undertook its functions as Trustee and Retirement Scheme Administrator in the particular circumstances of the case.**

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<sup>36</sup> Emphasis added by the Arbiter

<sup>37</sup> Emphasis added by the Arbiter

<sup>38</sup> p. 47

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.**

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.**

The Arbiter considers that such an aspect needs to be considered first in order to determine whether an incoming trustee is liable or not with respect to the claims made. Furthermore, since the Service Provider was 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.

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.**<sup>39</sup>

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 such 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

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<sup>39</sup> 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.

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, and reasonable if a different stance had to be taken. It is further considered that any such inaction on the part of the incoming trustee would undoubtedly go against the duties of a trustee as per Article 21 (1) and (2)(a) of the TTA mentioned above.

It is also 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 any 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 investments still existed and remained within the Scheme's structure at the time of the new trustee. STM Malta indeed permitted and allowed, without question, the disputed investments during its tenure.

It is further noted that the difficulties experienced by the Dolphin Capital Loan Note - a major disputed underlying investment - became evident during 2019, this being sometime after STM Malta was appointed as trustee on 31 August 2018.

In its reply, STM Malta itself stated, that:

*'During 2019, it became apparent that the Dolphin Loan notes were not repaying, and in around September of that year a liquidator was appointed ...'*<sup>40</sup>

STM Malta had been thus acting as trustee of the Scheme for quite some time by then.

It has not emerged that STM Malta itself made any reservations or expressed any concerns on the portfolio composition and the disputed investments when it took over as the new trustee and/or thereafter.

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

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<sup>40</sup> P. 28

**the original trustee, reflects a certain lack of appreciation of the duties of a trustee.**

**Moreover, the Service Provider had also certain duties as a Retirement Scheme Administrator which will also be dealt with in the section of this decision dealing with the merits of the case.**

**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.

### **The Merits of the Case**

The Arbiter is considering the Complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555<sup>41</sup> which stipulates that he should deal with complaints in '*an economical and expeditious manner*'.

#### *The Complainant*

The Complainant, born in 1958 and residing in the UK at the time, applied to become a member of the Scheme<sup>42</sup> in 2014, as per his Application Form dated 3 May 2014.<sup>43</sup>

His occupation was listed in the Scheme's Application Form as '*H.G.V. Driver*'.<sup>44</sup>

During the hearing of 2 November 2021, the Complainant also testified that:

*'I did not have any financial experience; I am a lorry driver and finance is nothing that I really know about. I was advised and I just took advice from people whom I thought knew what was happening. So, I rely completely and utterly on the various bodies offering these investments and I really do not have any personal understanding of them'*<sup>45</sup>

The Complainant is clearly a retail investor.

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<sup>41</sup> Art. 19(3)(d)

<sup>42</sup> Then known as Harbour Retirement Scheme – P. 33

<sup>43</sup> P. 47

<sup>44</sup> P. 33

<sup>45</sup> P. 128

In his Application Form for membership, the Complainant's risk profile was indicated as '*Medium risk*' out of five categories of risk profiles - ranging from '*Lower risk*', '*Low risk*', '*Medium risk*', '*Med/Enhanced risk*' and '*Enhanced risk*'.<sup>46</sup>

In the same form, his Investment Objective was selected as being '*comfortable with risk over the longer term and acknowledge that this may mean the investments fluctuate in the medium term*'.<sup>47</sup>

He did not select the investment objective with '*higher risk*' and with having '*volatility in the investments in order to achieve higher returns over the long term*' which was listed in the same section of the 'Investment Objectives'.<sup>48</sup>

It is further noted that, at the time, the Complainant was indicated as '*currently unemployed*' in the Pension Review Report prepared by *Servatus*, the Complainant's professional adviser.<sup>49</sup>

#### *Investment Adviser*

The Application Form for Membership dated 3 May 2014, indicates *Servatus* as the professional adviser.

In the said form, *Servatus* was indicated as being based in Ireland and regulated by the '*Central Bank of Ireland*'.<sup>50</sup>

#### *The disputed investments*

According to the Application Form for Membership, the Complainant had a final salary pension scheme, from the *Powys Country Council*, which had an approximate value of GBP42,254.67 and which was to be transferred into the Harbour Retirement Scheme.<sup>51</sup>

On the advice of the Complainant's professional adviser, *Servatus*, the proceeds from *Powys Country Council* were to be invested under a policy issued by *SEB Life*

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<sup>46</sup> P. 45

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> P. 87

<sup>50</sup> P. 42

<sup>51</sup> P. 36 & 87

*International, into '...Dolphin Capital and SEB Internationals Investment Platform, through a QROPS administered by Harbour Pensions in Malta'.<sup>52</sup>*

This emerges from the *Pension Review Report* prepared by *Servatus*.<sup>53</sup>

As detailed in the said Pension Review Report, the allocation of the pension pot of GBP42,254.67 was to be invested and allocated, after applicable fees, amongst three investments, (a loan note and two funds) as follows:<sup>54</sup>

- an investment of GBP20,621.70 (equivalent to 50% of the overall portfolio) into *Dolphin Capital*;
- an investment of GBP12,373.02 (equivalent to 30% of the overall portfolio) into *SEB Balanced*;
- an investment of GBP8,248.68 (equivalent to 20% of the overall portfolio) into *SEB Secure*.

It is further noted that the *SEB Life International Dealing Form*, dated 15 October 2014 and signed by the policyholder (that is, the trustee at the time), indicates an allocation of 50% of the policy into the *Dolphin investment*, 30% in *SEB JPM Fusion* and 20% into the *SEB Jupiter Merlin*.<sup>55</sup>

According to other documentation provided, namely the *Dolphin Capital GmbH Expression of Interest Form* dated 3.5.14 signed by the Complainant, interest was expressed for a 5-year investment of GBP20,621.70 into the *Dolphin Capital GmbH note*.<sup>56</sup>

This amount is also reflected in the '*Loan Note Offer*' of *Dolphin Capital*.<sup>57</sup>

It is noted the Annual Policy Valuation dated 31 December 2020, indicates that the number of units invested into the '*Dolphin Capital Loan Note Fixed Interest 10.2% (Average) 2019 GBP*' was of 16,220.40 units with Total Premiums (since

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<sup>52</sup> P. 59

<sup>53</sup> P. 48 - 88

<sup>54</sup> P. 73

<sup>55</sup> P. 89

<sup>56</sup> P. 92

<sup>57</sup> P. 93

date of commencement of the underlying policy) being indicated as GBP32,454.76.<sup>58</sup>

In its reply, the Service Provider indicated that

*'A net amount after fees of £32,454.76 was transferred to SEB for investment. Of this amount, £16,220.24 was invested into a Loan note with Dolphin Capital ...'*<sup>59</sup>

STM Malta further stated that the maximum the Complainant could claim on the Dolphin Capital Loan Note is GBP16,220.40.<sup>60</sup>

The amount of GBP16,220.40 indicated by the Service Provider as being invested into the Dolphin Capital Loan Note was not contested by the Complainant during the proceedings of the case.

**It is clear that the investment into the Dolphin Capital Loan Note was 50% of the investible amount as emerging from both the report prepared by the adviser *Servatus* and also the Annual Policy Valuation of 31 December 2020.**<sup>61</sup>

**The Dolphin Capital Loan Note was thus a major investment within the Retirement Scheme - not only at the time of purchase - but it remained a major investment within the Retirement Scheme continuously, even at the time when STM Malta became the new trustee of the Scheme.**

#### *Claimed losses*

It is noted that, in his Complaint, the Complainant indicated that he transferred *'the sum of £49,241.29'* and that he *'has lost the money invested'*. He requested compensation of *inter alia* the original sum invested of GBP49,241.29.<sup>62</sup>

In its reply, STM Malta submitted that *'the Complainant cannot claim any losses'*, given that *'The only asset where there is uncertainty about the residual value is the Dolphin Loan note'*.<sup>63</sup>

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<sup>58</sup> p. 99

<sup>59</sup> p. 28

<sup>60</sup> p. 30

<sup>61</sup> According to the adviser's report, the Dolphin Capital Loan Note was to have a weighting of 50% of *the 'Total funds available to invest'* (i.e., GBP20,621.70 of GBP41,243.40) – P.73.

According to the Annual Policy Valuation Statement presented, the Dolphin Capital Loan Note comprised 49.9% of *'Total Premiums'* (i.e., 16,220.40 of GBP32,454.76) – P. 99.

<sup>62</sup> p. 4

<sup>63</sup> p. 30

The Service Provider confirmed that the Dolphin Capital Loan Note was '*valued by SEB as zero, because they have no other information to support any value*'.<sup>64</sup> It further submitted that it '*does not mean that the investment has no residual value*' and was waiting for '*updates from the liquidators*'.<sup>65</sup>

The Arbiter notes that the exact loss experienced by the Complainant in respect of his Retirement Scheme and its underlying investments was not clearly documented and substantiated by the Complainant.

**During the proceedings of the case, however, it has clearly emerged that there were issues with one of the substantial investments undertaken within the Scheme, namely in respect of the Dolphin Capital Loan note, which as outlined above was a major investment.**

The Arbiter shall accordingly focus on this investment, on which the Complainant has clearly experienced a material loss.

The substantial investment into the Dolphin Capital Loan Note was valued as '*0.00 GBP*' in the Annual Policy Valuation dated 31 December 2020. This statement indicated the number of units of 16,220.40 held into the '*Dolphin Capital Loan Note Fixed Interest 10.2% (Average) 2019 GBP*', as having its '*Asset Value*' as '*0.00GBP*'.<sup>66</sup>

The said statement further indicated that the Dolphin Capital Loan was '*in Administration 24.07.2020*'.

The Annual Policy Valuation dated 31 December 2020 further indicated, under '*Policy Summary*', a '*Loss (before Policy Charges)*' of '*-16,618.98GBP*' as at the date of the statement.

With reference to the fixed interest of 10.2%, it is further noted that as emerging from the adviser's Pension Review Report,

*'The investors' interest from each year is not paid out during the term but instead rolled into the investors' capital ...'*<sup>67</sup>

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> p. 99

<sup>67</sup> p. 75

**The loss on the Dolphin Capital Loan note reflects the extent of loss mentioned above under ‘Policy Summary’ in the Annual Policy Valuation statement. It is accordingly clear that the Complainant has suffered a material loss on his Retirement Scheme with the failure of the Dolphin Capital Loan note being a major contributor to such loss.**

**Given that the value of the note has indeed been reduced to ‘zero’ by SEB in its valuation, as confirmed by the Service Provider itself in its reply, this demonstrates that it is highly likely that the Complainant has lost all of the capital invested or substantially thereof on this note.**

### **Final Observations & Conclusion**

#### *The Dolphin Capital Loan Note – An inappropriate investment*

**The Arbiter considers that the Dolphin Capital Loan Note was clearly an inappropriate investment undertaken within the Complainant’s Scheme. The Arbiter has no comfort that the Dolphin Capital Loan Note and the extent to which the Complainant's scheme was exposed to such product (that is, 50% of the portfolio), can be in some way considered acceptable for the Retirement Scheme.**

**This is taking into consideration various factors including the following:**

- (i) The particular features and nature of the Dolphin Capital note – which comprised a loan note, this being an unlisted, unregulated, alternative or non-traditional illiquid product with a long and fixed investment term of five years.**
- (ii) The high-risk investment element of the Dolphin Capital Loan Note, where the high risk was highlighted in the adviser’s Pension Review Report which indicated that ‘An investment in Loan notes involves a high degree of risk’.<sup>68</sup> The high-risk element is also reflected in the high rate of return of 10.2% per annum reflected in the Loan Note Offer.<sup>69</sup>**
- (iii) The lack of liquidity of the Dolphin Capital Loan note. It is noted that one of the significant risks mentioned in the Pension Review Report involved**

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<sup>68</sup> p. 82

<sup>69</sup> p. 93

**the liquidity risk of the loan note which clearly was illiquid and tied for a long period of time of five years.** The Pension Review Report further highlighted that *'The Loan Notes are unquoted, and no plans exist or are likely to be made to provide a trading platform or quotation for them'*.<sup>70</sup>

- (iv) **The lack of diversification inherent in such product.** No adequate comfort has emerged during the proceedings of this case that this product, which was **solely concentrated in one specialized sector involving the real estate market in Germany**, was itself diversified - neither within the German market itself let alone on the wider aspect. The concentration risk to Germany's real estate market was indeed listed as one of the significant risks.<sup>71</sup>

A document filed by the Service Provider itself<sup>72</sup> indicated that **the loan note in question was actually highly concentrated on just one particular project, in one particular location**, Bielefeld. According to the said document, the project involved a residential park in Bielefeld where *'Twenty-two structures offering a total of 91 residential units and 10,916m<sup>2</sup> of living space are planned for the 23,000m<sup>2</sup> plot'*.<sup>73</sup>

Hence, **there was no diversification at all inherent within the loan note itself, given the high exposure to such a single project and concentration of units in one place.**

In addition, there was **no diversification either within the Scheme's overall portfolio of investments given the material position, of 50% of the Scheme's investible amount, allowed to be invested into one single product. The Dolphin Capital Loan Note constituted half of the Scheme's assets with this heavily exposing the Scheme to a single issuer and the performance of a single investment and thus to material losses of the Retirement Scheme in case of failure of this sole product.**

The above aspects went clearly against and are not reflective in any way of the requirements to which the Retirement Scheme was subject to with respect to

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<sup>70</sup> P. 93 & 78

<sup>71</sup> P. 77 & 104

<sup>72</sup> P. 104-123

<sup>73</sup> P. 109

*inter alia* diversification, prudence and liquidity, which applied not only at the time of Harbour Pensions Limited **but also at the time of STM Malta acting both as Trustee and RSA, as detailed hereunder:**

- The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*', ('the Directives'). The said Directives applied from the Scheme's inception until its registration under the Retirement Pensions Act ('RPA').<sup>74</sup>

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

SOC 2.7.2 in turn required that the assets of a scheme are '*invested in order to ensure the security, quality, liquidity, and profitability of the portfolio as a whole*'<sup>75</sup> and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.<sup>76</sup>

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';<sup>77</sup> to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings*'<sup>78</sup> where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which

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<sup>74</sup> The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

<sup>75</sup> SOC 2.7.2 (a)

<sup>76</sup> SOC 2.7.2 (b)

<sup>77</sup> SOC 2.7.2 (c)

<sup>78</sup> SOC 2.7.2 (e)

themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.<sup>79</sup>

- The Arbiter also notes that the Scheme eventually became subject to the '*Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act 2011*' (Pension Rules') when it was registered under the Retirement Pensions Act ('RPA').<sup>80</sup>

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

***'The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document'***<sup>81</sup>

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

It is further noted that SLC 3.2.1 (ii) and (iii) of the Pension Rules provided *inter alia* that the Retirement Scheme Administrator shall ensure that the assets of the scheme are: '**... properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole**'; and '**... sufficiently liquid and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits**'.<sup>82</sup>

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<sup>79</sup> SOC 2.7.2 (h)(iii) & (v)

<sup>80</sup> The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided any scheme/ person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

<sup>81</sup> The same principle was reflected in Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*' of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*' which applied to STM Malta as Scheme Administrator at the time it was subject to the *Special Funds (Regulation) Act*.

<sup>82</sup> SLC 3.2.1 (ii) and (iii) of Part B of the Pension Rules.

**The Arbiter has assessed the Dolphin Capital Loan Note investment taking into consideration also the said requirements and the scope of the scheme as a retirement product, and he cannot reasonably conclude that the Dolphin Capital Loan Note investment and high exposure thereto was in line and reflective of the applicable requirements.**

**Neither can the Arbiter reasonably conclude that such investment reflected the ‘Medium risk’ profile of the Complainant, nor the prudence required to achieve the scope of the Scheme as a retirement product.**

*Other observations - Due diligence*

STM Malta submitted in its reply that the former trustee ‘*did carry out due diligence on the investment*’ noting also that ‘*due diligence was ongoing*’.<sup>83</sup>

It even attached a copy of ‘*Draft of the Annual Financial Statement (income statement and balance sheet according to German GAAP) as of 31<sup>st</sup> December 2016 for Dolphin Capital 5. Projekt GmbH & Co. KG, Langenhaegn*’, by way of example of the due diligence undertaken.

**The Arbiter however derives no comfort from such financial statements, not only because of the issues already raised about this note but also because it is incomprehensible how a Trustee and Retirement Scheme Administrator could truly rely on such statements to have comfort on the investment when:**

- (i) the said Financial Statement was only a DRAFT version;**
- (ii) the Financial Statement was only in respect of the year ended 2016, and no other accounts were presented for subsequent years despite STM Malta becoming the new trustee on 31 August 2018;**
- (iii) the said Financial Statement indicated a zero ‘Net Profit’ for both the years 2015 and 2016,**
- (iv) the ‘Preliminary Balance Sheet’ indicated a deficit not covered by equity for the General and Limited Partners.**

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<sup>83</sup> p. 29

**Other documentation produced by STM Malta does not prove the adequacy of the due diligence on the Dolphin Capital Loan Note and/or provide reasonable and sufficient comfort on this investment either.**

**The ‘Advisory Opinion on Determining Market Value’ commissioned by Dolphin Capital 5. Project GmbH & Co KG,<sup>84</sup> should have rather raised more questions by the trustee and RSA as to the adequacy of the investment, given the clear exposure to a single issuer and the high concentration risk of the single project.**

### *Conclusion*

**Notwithstanding that there were other parties involved in the Scheme as amply explained above in this decision, STM Malta cannot claim that it has no responsibility.**

**STM Malta clearly had a key and important function in respect of the Scheme to ensure that the Scheme was operated in line with its scope, the applicable requirements and *inter alia* to safeguard the Scheme's property.**

**Upon becoming the new trustee and RSA of the Complainant’s retirement scheme, STM Malta should have immediately realized the inappropriateness of the Dolphin Capital Loan Note investment which still featured, and was retained, into the Complainant’s Retirement Scheme. Such realization should have emerged given:**

- (i) the nature of, and risks associated with, such product; and**
- (ii) the extent of exposure to such product.**

**The nature of, and risks associated with, the Dolphin Capital Loan Note and the staggering allocation of half of the Complainant's portfolio within the Retirement Scheme to this one single product was inappropriate and disproportionate.**

**This clearly did not comprise in any way an allocation reflective of the scope of the Scheme as a retirement product, where the Scheme's assets were required**

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<sup>84</sup> P. 104 - 123

to be *inter alia* invested in a prudent manner, be sufficiently liquid, and properly diversified.<sup>85</sup>

Despite the said requirements and standards applicable under both regulatory regimes, with which STM Malta is duly familiar in view of the nature and history of its operations, STM Malta did not see anything wrong with the composition of the portfolio when it took over as trustee and neither did it question the Scheme's compliance with the applicable frameworks.

It has indeed not emerged during the proceedings of this case that STM Malta raised any concerns or questioned the Dolphin Capital Loan Note investment and the high exposure the Scheme had to such investment.

Not only such evident breach of trust committed initially by the previous trustee not questioned and raised by STM Malta, but STM Malta itself accepted the disputed investment and retained the portfolio composition without question. It even went as far as defending the actions of the previous trustee in these proceedings.

The Arbiter cannot conclude that STM Malta has taken all reasonable steps to have an unequivocally evident breach of trust remedied.

Neither can the Arbiter reasonably conclude that there was '*prudence, diligence and attention of a bonus paterfamilias*'<sup>86</sup> in the execution of STM Malta duties and exercise of its powers and discretions when it itself allowed and retained without question the same inappropriate investment.

The Arbiter considers that STM Malta, as the new trustee and RSA, should have become aware of the issues and non-compliance of the Complainant's portfolio with applicable requirements at the time when it took over the role of Trustee and RSA duties in 2018.

At the time of the replacement of the trustee, a review of the Complainant's portfolio should have been done by STM Malta to *inter alia* ensure that the

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<sup>85</sup> As provided for under Standard Operational Condition 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA and eventually under Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA in January 2015.

<sup>86</sup> As required under Article 21 (1) of the TTA

**Complainant's Scheme was in order and in compliance with the applicable regulatory provisions, the conditions of the Trust Deed and the scope of the Retirement Scheme. This had to be done also to ensure ongoing compliance with applicable obligations/terms, *inter alia*, to:**

- (i) act with *'the prudence, diligence and attention of a bonus paterfamilias'*,<sup>87</sup>**
- (ii) *'act with due skill, care and diligence ...'*,<sup>88</sup>**
- (iii) ensure that the Scheme's assets are *'invested in a prudent manner and in the best interest of Members and Beneficiaries'*,<sup>89</sup>**
- (iv) *'act diligently ... to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'*.<sup>90</sup>**

**If STM Malta had, at the time when it took over as trustees of the Scheme, raised issues with the disputed investment, as it evidently should have done, the Complainant would have had the possibility to seek redress from the former trustee and consideration also made of any other remedies to rectify the breach and try to remove/reduce the exposure to the inappropriate investment.**

**This would have avoided or mitigated the subsequent loss emerging on the Dolphin Capital Loan note and the material consequences arising on the Scheme from the failure of this investment which has materially prejudiced the achievement of the Scheme's objective.**

**It is also noted that STM Malta has not sought to be indemnified or relieved from a breach of trust already committed as it possibly could have done in terms of Article 30 (7) of the TTA.<sup>91</sup>**

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<sup>87</sup> As provided for in Article 21(1) of the TTA

<sup>88</sup> As provided for under Rule 4.1.4, Part B.4.1 titled *'Conduct of Business Rules'* of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the Retirement Pensions Act ('RPA').

<sup>89</sup> As provided for under Standard Condition 3.1.2, of Part B.3 titled *'Conditions relating to the investments of the Scheme'* of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA.

<sup>90</sup> Editor Max Ganado, *'An Introduction to Maltese Financial Services Law'*, Allied Publications 2009, P. 178

<sup>91</sup> Article 30(7) of the TTA which deals with 'Liability for breach of trust' provides that: *'(7) A beneficiary may, in respect of a liability to him for a breach of trust already committed, relieve a trustee of, or indemnify him against, such liability, but only if the beneficiary - (a) has legal capacity; and*

**STM Malta cannot, in the particular circumstances of this case, be excused from the liability arising from its inadequate performance of its duties as trustee, resulting from:**

- (i) its inaction in respect of the clear breach of trust of the former trustee with respect to the Dolphin Capital Loan Note, and, also**
- (ii) its own breach of trust in accepting and retaining without question the composition of the Complainant's portfolio and the Dolphin Capital Loan Note investment within the Retirement Scheme.**

**In the circumstances, the Arbiter cannot consider that STM Malta has acted properly and reasonably in line with the applicable requirements in its role of Trustee and Retirement Scheme Administrator and, in fairness, cannot be excused from liability in the circumstances.**

#### **Decision and Compensation**

**For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case,<sup>92</sup> and is partially accepting it in so far as it is compatible with this decision.**

**Being mindful of the key roles of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator, and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, the Arbiter concludes that the Complainant should be compensated by STM Malta for the damages suffered by the Complainant in relation to his scheme.**

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

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*(b) has full knowledge of all material facts; and  
(c) has not been improperly induced by the trustee to give the relief or indemnity'*

<sup>92</sup> Cap. 555, Article 19(3)(b)

- (i) only the loss in respect of the Dolphin Capital Loan Note, has been adequately substantiated; and**
- (ii) other external third parties, like the investment adviser, were involved and also carried responsibility, with respect to such investment,**

**the Arbiter considers that in the particular circumstances of this case, it is fair, equitable, and reasonable for STM Malta Pension Services Limited to compensate the Complainant for the amount of 70% of the maximum loss of GBP16,220.40.<sup>93</sup>**

**The figure of the awarded compensation is thus calculated to amount to GBP11,354.28.<sup>94</sup>**

**Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the Complainant the sum of GBP11,354.28 (eleven thousand, three hundred and fifty-four-pounds sterling and twenty-eight pence).**

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

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

**Dr Reno Borg  
Arbiter for Financial Services**

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<sup>93</sup> P. 30 The Service Provider indicated this amount of GBP16,220.40

<sup>94</sup> 70% of GBP16,220.40 = GBP11,354.28