Before the Arbiter for Financial Services

Case ASF 107/2021

KR

('the Complainant')

vs

Optimus Fiduciaries (Malta) Limited

(C 90147) ('Optimus' or 'the Service Provider')

Sitting of the 13 February 2023

The Arbiter,

Having seen **the Complaint** relating to *The Optimus Retirement Benefit Scheme No 1* ('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 Optimus Fiduciaries (Malta) Limited ('Optimus' or 'the Service Provider'), as its current Trustee and Retirement Scheme Administrator.

In essence, the Complaint involves the claim that the Service Provider failed to act in the best interests of the Complainant and to conduct its business with due skill and care given that it allowed unsuitable investments within his Retirement Scheme which were of high risk, illiquid and not in conformity with his attitude to risk.

The Complaint

The Complainant claimed that on 14 August 2015 his pension *with St James's Place Wealth Management plc,* was valued in the sum of GBP46,246 when it was transferred to Optimus.

His pension was then invested into various investments which, he claimed, have now failed. The Complainant alleged that he has accordingly lost the money invested and held Optimus responsible for his losses.

He submitted that Optimus failed to operate to the standards expected of a regulated pension provider and professional trustee, and that such failures directly led to his losses.

The Complainant alleged that the Service Provider:

(i) *Failed to meet regulatory obligations*

He claimed that Optimus failed to conduct its business with due skill and care and that Optimus failed to assess his knowledge and attitude to risk.

Had the Service Provider complied with its duties and made any attempts to assess his personal circumstances, Optimus would have realized that he was not able to make the investments.

The Complainant further claimed that no adequate due diligence was undertaken as, otherwise, Optimus would have not allowed the transfer of funds into the investments.

Alternatively, in the instance where 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 their total unsuitability.

He accordingly submitted that Optimus failed to act in his best interests and treat him fairly.

The Complainant further claimed that Optimus should have realized that the investments were of high risk and should have refused to allow them or, at least, obtain appropriate clarification before proceeding.

He alleged that there is no evidence that this was carried out and this resulted in the loss of his pension.

It was further claimed that Optimus knew that there was a significant risk that the investment would be illiquid, and the Service Provider should have taken into consideration what was fair, reasonable, and good industry practice.

(ii) *Failed to undertake due diligence on the investment*

The Complainant alleged that Optimus failed to act in accordance with the standards expected of a regulated SIPP operator.

It was noted that SIPP providers have the discretion to refuse to carry out instructions should they consider an investment is generally not suitable to be held in the SIPP.

The Complainant made also reference to his formal complaint filed with the Service Provider, as attached to his Complaint Form. [1]

In addition to the aspects raised above, the Complainant also highlighted, in his formal complaint with Optimus, that the investments did not match his true risk tolerance and alleged that the Service Provider failed to assess his personal circumstances.

He noted that he relied on the professional status of the Service Provider when taking advice on making the investments and he had placed trust in Optimus that his pension would be reasonably protected.

Remedy requested

The Complainant requested the sum of GBP46,246 (less any potential financial services compensation scheme award), as well as interest at 8% since 14 August 2015 or the amount that the sum of GBP46,246 would have been worth had it not been transferred to Optimus, whichever is the greater.

[1] Page (P.) 7

The Complainant further claimed compensation in the sum of GBP1,000 for the stress and aggravation as well as payment of the professional fees incurred with respect to his Complaint.[2]

In its reply, Optimus essentially submitted the following:[3]

The Service Provider noted that there were various points raised by the Complainant that were factually incorrect and that he repeated the same incorrect statements despite its reply to his complaint.

Optimus further submitted the following in respect of the points raised:

1. With respect to the statement that the Complainant's UK pension was transferred to Optimus, it explained that it was not in existence as an entity at the time.

   Optimus was granted a licence by the MFSA on 4 February 2019, and it took over the trusteeship of the Scheme only on 29 May 2020.

   This was explained in its reply to his complaint but the Complainant ignored this fact by repeating the same incorrect statements in his submissions to the Arbiter.

   Optimus reiterated that the UK pension was transferred to the *Optimus Retirement Benefit Scheme No 1* at the time when they were not the trustees of this scheme.

2. That whilst the Complainant referred to failed investments, he did not however state which investments had failed and did not provide any supporting evidence confirming such.

   Optimus reiterated that, as an entity, it was not in existence at the time. It submitted that it took the trusteeship of the Complainant's scheme only several years after the Complainant joined as a member of the Scheme and after the funds transferred were invested into investments that were advised upon by an adviser appointed by him at the time.

[2] P. 4
[3] P. 51

3. That the Complainant incorrectly referred to Optimus as a SIPP provider. It submitted that it only acted as the Retirement Scheme Administrator of the Scheme since 29 May 2020. The Scheme was not a UK SIPP, but a personal retirement scheme set up in Malta known as a QROPS.

4. That the Complainant did not address the comments made in respect of the adviser who provided advice to him in respect of the investments.

   Optimus noted that it considers it to be in the Complainant's best interest that he should be assisted in seeking proper explanations from the advisory firm that provided the advice at the time when he joined the Scheme.

   The Service Provider further submitted that the Complainant did not provide any feedback or comments to its response to his formal complaint. Neither did the Complainant explain why he was not satisfied with the Service Provider's response.

Optimus considered all statements made by the Complainant in terms of its responsibility and alleged failures as incorrect and/or invalid, given that Optimus did not exist as an entity and was not the trustee of the Scheme at the time.

It further submitted that if the Complainant has any complaint or issues related to decisions made by it as trustees post 29 May 2020, that is, from the time when it took over the trusteeship of the Scheme then, the Complainant should inform the Service Provider what these are so that it can reply accordingly.

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

Further Considers:

Preliminary Plea

The claim that Optimus is not responsible as it was not the original trustee

As to the claim that the Service Provider is not responsible as it was not the trustee of the Scheme at the time the investments were made, the Arbiter would like, at the outset, to make reference to Article 21 of the Trusts and Trustees Act (Chapter 331 of the Laws of Malta)('TTA') relating to *'Duties of trustees'* as well

as to Article 30 of the TTA relating to *'Liability for breach of trust'*, which are considered particularly relevant to this aspect.

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*** *…'* [4]

Furthermore, 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****.'* [5]

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**.

[4] Emphasis added by the Arbiter
[5] Emphasis added by the Arbiter

In this case, the Arbiter considers that a **key aspect that needs to be considered** is whether Optimus - as the new trustee which substituted the original trustee, Integrated-Capabilities (Malta) Ltd - **has acted properly, adequately, and reasonably undertook its functions as Trustee and Retirement Scheme Administrator in the particular circumstances of the case.**

The Arbiter does not agree with the submissions of the Service Provider that on becoming the Trustee and RSA of the scheme it does not have any liability and 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, in terms of the said article, there is an obligation 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.**

The Service Provider cannot thus attempt to exclude its potential liability by hiding after the fact that it was not the original trustee.

The Arbiter notes that in his final submissions, the Complainant stated the following with respect to the aspect relating to the liability of the Service Provider

'… for the failings of Integrated Capabilities (Malta) Ltd':

> *'The breaches referred to thus far were committed at a time when Integrated Capabilities (Malta) Ltd ("ICML") were acting as trustees for our client's scheme, not Optimus. It is acknowledged that Optimus have asserted they are not responsible for the failings of ICML as they were not the pension trustees at the time. Should the Arbiter take the view that this assertion is correct, due consideration should also be paid to the fact that Optimus were obligated to rectify any errors committed by the previous trustees. It is not obvious that Optimus have taken reasonable steps in this area as [the Complainant's] pension monies are still tied up in the failing TRG investment*

which Optimus have arbitrarily claimed to be worth 70% of the initial amount …' [6]

The Arbiter considers that the above-mentioned aspects need to be duly considered in order to determine whether the 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.[7]

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 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.

[6] P. 78-79

[7] 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.

Consideration needs to be made of the own actions and/or any inactions of Optimus 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. Optimus indeed permitted and allowed, and it has not resulted that it questioned the suitability of the disputed investments during its tenure of trustee and RSA.

Although Optimus highlighted the illiquidity and financial difficulties of certain investments featuring within the Scheme's portfolio shortly after taking over as trustee and RSA, as shall be considered further on in this decision, **it has however not emerged that Optimus itself made any reservations or expressed any concerns on the suitability of the portfolio composition as permitted by the previous trustee at the time when, or after, it took over as the new trustee.**

The Service Provider cannot accordingly outrightly dismiss any possible liability by implying that it is not the correct defendant as it was not the original 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 relevant aspects raised in this part of the decision shall accordingly be further considered by the Arbiter as part of the merits of the case.

For the above-stated reasons the Arbiter cannot uphold this plea.

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

[8] Art. 19(3)(d)

The trustee and administrator of the Scheme

Integrated-Capabilities (Malta) Limited ('Integrated-Capabilities'), was the original trustee and Retirement Scheme Administrator ('RSA'), of the Scheme.[9]

As explained by the Service Provider in its reply, *Optimus Fiduciaries (Malta) Limited* ('the Service Provider' or 'Optimus') took over as the new Retirement Scheme Administrator and trustee of the Scheme on 29 May 2020.[10]

The Complainant

The Complainant was accepted as a member of the Scheme on 2 July 2015 as emerging from the *'Annual Statement for the year ending 31 December 2015'* issued by Integrated Capabilities in respect of the *'Optimus Directus – Optimus Retirement Benefit Scheme No. 1'*.[11]

His UK pension was transferred to the Retirement Scheme in August 2015 as confirmed by the Service Provider during the hearing of 1 February 2022.[12]

As indicated in the report dated 18 May 2015, issued by his adviser *Strategic Wealth Limited* situated in Gibraltar, the Complainant was resident in England and of 53 years of age at the time.[13] In the said report, the Complainant was indicated as being a Company Director.[14]

It is further noted that during the hearing of 17 January 2022, the Complainant explained that:

'At the time that I transferred my pension … I was a Project Manager for a construction/civil company'.[15]

Accordingly, no indication was made, or has emerged during the proceedings of this case which indicates that the Complainant was not a retail investor.

[9] P. 55, 58, 64 & 78
[10] P. 51
[11] P. 64
[12] P. 57
[13] P. 24
[14] *Ibid*.
[15] P. 55

As to the Complainant's attitude to risk, this was stated as being *'Moderate to Speculative'* (grade 6) in the adviser's report dated 18 May 2015, on a 10-grade rating ranging from *'Very cautious'* to *'Ultra Speculative'*.[16]

The risk rating *'Moderate to Speculative'* was described as follows in the said report:

'You are prepared to take a moderate risk with your money. It is likely that around 70% of your pension fund would be invested on the stock market the balance could be in cash, fixed interest securities, bonds and property as well as emerging markets or private equity'. [17]

It is also to be noted that the Complainant testified the following, during the hearing of 17 January 2022, with respect to his attitude to risk:

'My attitude to risk was medium to speculative, which I know, as stated in the letter, that about 70% of my pension fund would be invested, but it would appear that more than that was actually invested. Or it seems to be that the risk profile actually ended up being invested higher than that ...' .[18]

It is further noted that in both the *'Annual Statement for the year ending 31 December 2015'* issued by Integrated-Capabilities and the *'Annual Statement as at 30th June 2020'* issued by Optimus, the Complainant's attitude to risk was specified as:

'Balanced Risk – Some risk to capital – potential for growth over longer term'.[19]

Investment Advisor/s

During the proceedings of the case, the Complainant presented an advisor's report dated 18 May 2015 issued by *Strategic Wealth Limited*.

In the said report, Strategic Wealth Limited was indicated as being based in Gibraltar and *'licensed by the Gibraltar Financial Services Commission Ref: FSC1175B'*.[20]

[16] P. 25
[17] *Ibid*.
[18] P. 56
[19] P. 64 & 67
[20] P. 24

The said document further stipulated that the Complainant engaged the services of Strategic Wealth Limited *'on a limited advice basis'*, *'further to [his] decision to transfer [his] UK paid up pensions to the … Malta based Qualifying Recognised Overseas Pension Scheme (QROPS)'*.[21]

According to the *'Annual Statement for the year ending 31 December 2015'* issued by Integrated-Capabilities, the *'Appointed Advisor'* in respect of the Scheme was indicated as *'Strategic Wealth UK Limited'*.[22]

It is further noted that in the *'Annual statement as at 30th June 2020'* issued by Optimus, the *'Appointed Adviser'* was indicated as being *'Templar EIS Ltd'*.[23]

The Scheme's underlying assets

The Complainant specified, in his Complaint to the Arbiter, that he had transferred the sum of GBP46,246 into the Retirement Scheme in 2015.[24]

This figure was also confirmed by the Service Provider, during the hearing of 1 February 2022, where an official of Optimus testified that:

'I confirm that the complainant transferred his pension to the Retirement Scheme on 14 August 2015. The amount deposited was £46,246' [25]

The Scheme's underlying assets, as emerging from the three valuation statements presented during the case (namely, for the year ending 31 December 2015, as of 30 June 2020 and as of 31 January 2022), are summarised in Table A below:[26]

[21] *Ibid*.
[22] P. 64
[23] P. 67
[24] P. 4
[25] P. 57
[26] P. 64, 68 & 70

Table A

Asset	Market Value (GBP) as at 31 December 2015	Market Value (GBP) as at 30 June 2020	Market Value (GBP) as at 31 January 2022
The Resort Group Direct (TRG) plc – Commercial/ Fractional Property	10,000	7,000	7,000
TRG Plc Corporate Bonds (7%pa) or 'TRG Bond I'	9,809.77	6,866.84	6,866.84
Platform/ IIP Cash Account	683.68	827.39	608.75
Prudential International Fund Cautious	22,256.98	23,156.99	23,593.77
Scheme Cash Account	46.65	79.28	1,004.75
Total Market Value	**42,797.08**	**37,930.50**	**39,074.11**

The disputed investments

In the Complaint Form filed with the Office of the Arbiter for Financial Services ('OAFS'), the Complainant did not mention the specific investments which were being disputed but referred generally to *'various investments … which have now failed'*.[27]

Similarly, in his formal complaint filed with the Service Provider, reference was also generally made to *'the failed investments'*.[28]

As to the requested compensation, the Complainant asked *inter alia* for the full transfer value of his pension to be refunded.

Whilst his Retirement Scheme includes a number of investments as detailed in Table A above, during the hearing of 17 January 2022, the Complainant

[27] P. 4
[28] P. 7

specifically referred to the *'overseas property investments'* where he highlighted that:

'The reasons for initially wanting to transfer my pension into Integrated-Capabilities Pension Scheme were that when I met with the advisor, he said that it was an attractive investment property overseas which gives good returns, illustrated with fact figures, glossy brochures and paid to the upside and paid to the downside, So, yes, that was the reason for transferring it at the time'. [29]

The *'overseas property investments'* involve *The Resort Group* ('TRG') investments as featured in the said table.

In the subsequent hearing of 1 February 2022, the Service Provider indeed confirmed that

'The losses are mainly attributed to the fact that, basically, after we took over the administration of the scheme, we acknowledge that there were difficulties in The Resort Group'. [30]

The cross-examination of the official of the Service Provider during the same hearing as well as the hearing of 8 March 2022, undeniably focused on the matters pertaining to the TRG investments.[31]

As clearly emerging from the summary of investments provided in Table A above, the loss in value in respect of the Scheme's investments does result in respect of the TRG investments.[32]

The Complainant himself ultimately mentioned and only focused on the investments into *The Resort Group plc* in his final submissions.[33]

Accordingly, the Arbiter shall treat the TRG investments as the disputed investments for the purposes of this decision.

[29] P. 55
[30] P. 57
[31] P. 58-59; 72-75
[32] In the valuations of 30 June 2020 and 31 January 2022, the TRG investments were portrayed at 70% of their value as also confirmed by the Service Provider during the hearing of 1 February 2022 - P. 58
[33] P. 78-79

Overview of the TRG investments

The TRG investments comprise the following two separate, but related, investments:

(i) a direct investment in property (consisting of a fractional real estate investment) in *The Resort Group plc*;

(ii) an investment into corporate bonds issued by *The Resort Group plc*.

According to the Annual Statement for the year ended 31 December 2015, the fractional real estate investment amounted to GBP10,000 (this being 23.37% of the Scheme's assets at the time), whilst the investment in the TRG plc corporate bonds comprised GBP9,809.77 (22.92% of the Scheme's asset value at the time).

(a) <u>The TRG Bond I</u>

With respect to the bonds, the report by *Strategic Wealth Limited* dated 18 May 2015 specified *inter alia* that:

'The Resort Group Corporate Bonds will receive a yield of 7% per annum', with these being *'issued for a term for 10 years with the option for Bond holders to redeem early at any time following the end of the fifth year'*.[34]

It was also noted that the *'Investments in The Resort Group Corporate Bonds are secured over real estate assets in Cape Verde'*.[35]

A few months after taking over the trusteeship of the Scheme (in end May 2020), Optimus sent an email dated 12 November 2020 to the Complainant about his asset holding of The Resort Group (TRG). The said email also included an Annual Statement in relation to his Scheme as at 30 June 2020.[36]

In the said email, Optimus noted that *'These bonds have an original 10-year maturity so are classed as illiquid'*.[37]

Furthermore, it noted that:

[34] P. 32
[35] *Ibid*.
[36] P. 65-69
[37] P. 66

'This investment is classed as illiquid and at present redemptions are not possible. The early redemption option (after 5 years) which was promised when these debt securities were issued is no longer available' [38]

It was also pointed out by the Trustee at the time that *'Interests* payments *on TRG bonds are at present frozen and remain unpaid. Unpaid interest will still continue to accrue to the principal bond amount'.* [39]

Optimus also informed the Complainant in the same email that a proposal was being considered where the TRG bond will have *'no provision for early redemption but the bonds may be redeemed in December 2027…'* instead.[40]

(b) <u>The TRG Fractional Property Ownership</u>

The report by *Strategic Wealth Limited* of May 2015, explained *inter alia* that

'TRG's proposition is that of an asset backed, hotel managed commercial property investment, generating touristic revenues and the potential for capital appreciation for the benefit of the unit holders and The Resort Group'.[41]

With respect to liquidity, the said report by Strategic Wealth stated:

'Real-Estate may be sold at any time. ***Generally illiquid****, although an active secondary market exists for completed operational Resort property via UK and Overseas agents and distributor, who will market the sale of the property…'* .[42]

As to the corporate structure of The Resort Group, it was *inter alia* noted in the same report that:

'Incorporated in 2007, TRG is a Gibraltar based company … TRG is the ultimate holding company for each of the individual Resort/operational company',[43] where its investment strategy was *'focused on developing*

[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid*.
[41] P. 30
[42] *Ibid*. – Emphasis added by the Arbiter
[43] P. 30

Resort property in the Cape Verde Islands …'.[44] The Resort Group was also described as *'a leading developer of luxury resort properties …'*.[45]

In the email of November 2020 that Optimus sent to the Complainant in respect of the Scheme's Annual Statement as at 30 June 2020,[46] the Service Provider indicated that the *'TRG Fractional Property Ownership'*, which formed part of the Complainant's pension fund, as being an illiquid asset.

In the said email it explained that the assets in the fractional ownership '*include holdings in Dunas beach, Llana Beach, White Sands Hotel & Spa properties'*,[47] and further described that the:

'TRG Property holdings are illiquid as there is no secondary market for these assets currently, hence selling your holdings is not possible at present. From our communication with The Resort Group, no redemptions from the issuer will be possible in 2020'.[48]

It is also noted, from general searches undertaken on the internet by the OAFS with respect to the fractional shares of The Resort Group, that the fractional shares membership possibly involve an ownership in an English Limited Company, where:

'membership is just like a shareholding in a company. Each limited company is contracted to own an individual property on one of the TRG's resorts'.[49]

It is not clear whether the Complainant has a direct ownership of one of the Cape Verde properties or whether his fractional holding is a *'membership of an English Limited Company'*.[50] The illiquidity of such holdings was nevertheless pointed out by the new trustee in November 2020 as explained above.

[44] P. 31
[45] P. 37
[46] P. 65-69
[47] P. 66
[48] *Ibid*.
[49] https://www.trgfractions.com/fractional-structure/
[50] *Ibid*.

Devaluation done by Optimus, warning and current status

Shortly after Optimus took over as trustee and RSA of the Scheme in May 2020, Optimus itself devalued both TRG investments by 30%, as reflected in the *'Annual Statement as at 30th June 2020'* issued by Optimus.

The devaluation was done by Optimus as it was '*encountering challenges … in terms of obtaining a fair value'* on the TRG investments and Optimus wanted to *'act as prudent and as cautious as possible'*.[51]

In its email of 12 November 2020, Optimus informed the Complainant that given the *'TRG's financial difficulties'*, it was of the opinion *'that the market value of the investment is probably lower than the carrying amount'*.[52] Optimus accordingly proceeded to record *'a decrease in fair value of 30% … due to the issuer's financial difficulties'*.[53] This applied in respect of both investments.

With regards to the bond investment, Optimus noted that this was done *'in line with the viability plan prepared by an independent third party which was engaged by TRG'*,[54] and that the devaluation of 30% for the fractional property ownership was done *'similar to that applied to the TRG bonds'*.[55]

The trustee further warned the Complainant at the time that:

'For these types of non-standard investments, we cannot reasonably provide you with an accurate valuation, as such companies are not providing the assurances required. These investments do not have a realisable value at this stage and may be valued lower or even of no value if or as and when they become realisable. Non-Standard investments are investments that cannot be valued or sold or realised within thirty days' [56]

During the hearing of 1 February 2022, the Service Provider testified *inter alia* that when they became trustees, *'It was clear that there were financial*

[51] P. 57
[52] P. 66
[53] *Ibid*.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid*.

difficulties' with the TRG Group which had *'stopped paying rental income from the TRG direct property investments and, also the coupons from the TRG bonds'*.[57]

It was further testified that after the trustee communicated directly with the top management of the TRG Group the trustee was informed that '*they were entering into a restructuring plan'* and *'have also extended the maturity of the bonds by 5 years … that was also part of the restructuring'*.[58]

During the same sitting, the Service Provider also noted that the TRG Group *'had recently communicated to [Optimus] that [the TRG Group] have reopened the resorts in September 2021'*, and the Service Provider was *'following up to assess the progress of the restructuring plan'*.[59]

In his testimony, the Service Provider further stated the following:

'I confirm that the bond has been increased in its term by five years. Asked if the intention is to hopefully bring it back to its former level, I say, yes. Obviously, we are not the investment providers ourselves. This is coming from TRG directly; the intention is that by extending the bond term and by previously stopping the coupons and the rental income, they should be in a position to safeguard the investment. As trustees, our priority is that the investments are safeguarded. That is our priority. We will continue to monitor; however, this will be tested in relation to the bond when the new maturity date is due which is at 2027'. [60]

It is further noted that during the hearing of 8 March 2022, the Service Provider confirmed that TRG was asking to pay certain additional fees or contributions, such as *'management fees on top of the administration fees'* as *'the owners of the properties … were required to contribute'* in terms of conditions of the agreements they entered into at the time.[61]

Such contributions were being asked given *'the financial difficulties'* they were encountering as further testified during the same sitting.[62]

[57] P. 58
[58] *Ibid*.
[59] *Ibid*.
[60] P. 59
[61] P. 74
[62] *Ibid*.

Final Observations & Conclusion

The TRG Investments – Unsuitability of the investments

The Arbiter considers that the TRG Investments were unsuitable investments that were undertaken and allowed within the Complainant's Scheme.

The Arbiter has no comfort that the TRG investments, and the extent to which the Complainant's scheme was exposed to The Resort Group, can in some way be considered suitable considering the scope of the Retirement Scheme. Neither does the Arbiter has comfort how such investments can be deemed as being reflective of the Complainant's profile and risk attitude.

The above conclusions are reached taking into consideration various factors including the following:

i. **The particular features and nature** of the TRG investments. The said investments did not emerge to be listed and/or regulated investments but were rather non-traditional, illiquid investments with a long and fixed investment term as outlined in the section titled *'Overview of the TRG investments above'*. The Service Provider itself classified the TRG investments as '*non-standard investments'* as detailed above.

ii. **The lack of liquidity** of the TRG investments was indeed highlighted by Optimus itself. The bonds had *'an original 10-year maturity'* with *an 'early redemption option'* only after 5 years, which option, did not even materialise in practice.

Similarly, no evidence of adequate liquidity in respect of the fractional property ownership has either emerged during the proceedings of the case – on the contrary this seems rather to be more of an opaque structure where the redemption of the fractional holding is not easily or readily realisable.

iii. **The high-risk investment element of the TRG investments,** as inherently reflected in the nature of such investments and the concentration risk to the same issuer, The Resort Group, and same location involving Cape Verde.

iv. **The lack of diversification and concentration risks inherent in such products**. No adequate comfort has emerged during the proceedings of this case that the TRG investments, which were solely concentrated in one specialized sector involving real estate/touristic sector in Cape Verde, was itself diversified.

In addition, there was no adequate diversification either within the Scheme's overall portfolio of investments given the material position, of 46% of the Scheme's investible amount, being allowed to the same issuer, The Resort Group.

The TRG investments resulted in the Scheme being heavily exposed to the performance of The Resort Group and the immovable property located in Cape Verde and thus to material losses of the Retirement Scheme in case of failure of the Group and/or projects in Cape Verde.

v. **The lack of conformity of the TRG investments with the Complainant's risk profile.** As detailed in the Annual Statements in respect of the Scheme issued by both Integrated-Capabilities and Optimus, the Complainant's profile was indicated of being of *'Balanced Risk'*.

The Arbiter has no comfort that there is a balanced risk in having nearly half of the investible premium invested in the TRG investments, nor that the respective TRG investments were themselves of balanced or moderate risk in view of the nature and features of such investments as considered above.

The Arbiter considers that **the above aspects all corroborate the claim of unsuitability of the TRG investments for the Complainant's Retirement Scheme**. **Moreover, the above are clearly against and are not reflective in any way of the requirements to which the Retirement Scheme was subject to with respect to *inter alia* diversification, prudence and liquidity, which applied** not only at the time of Integrated-Capabilities but **also at the time of Optimus 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').[63]

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*'[64] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[65]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[66] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*[67] where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.[68]

- The Arbiter also notes that the Scheme eventually became subject to the '*Pension Rules for Personal Retirement Schemes issued in terms of the*

[63] 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.
[64] SOC 2.7.2 (a)
[65] SOC 2.7.2 (b)
[66] SOC 2.7.2 (c)
[67] SOC 2.7.2 (e)
[68] SOC 2.7.2 (h)(iii) & (v)

Retirement Pensions Act 2011' (Pension Rules') when it was registered under the Retirement Pensions Act ('RPA').[69]

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*'.[70]

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'.*[71]

The Arbiter has considered the TRG investments taking also the said requirements and the scope of the Scheme as a retirement product into

[69] 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.

[70] 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.

[71] SLC 3.2.1 (ii) and (iii) of Part B of the Pension Rules.

consideration. In the circumstances of this case, the Arbiter cannot reasonably conclude that the said investments, and high exposure thereto, was in line with and reflective of the applicable regulatory requirements.

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

Conclusion

The Arbiter appreciates that the investments were undertaken under the advice of an unrelated third party and that Optimus was not the trustee and RSA of the Scheme at the time the said investments were undertaken and introduced within the Complainant's Scheme.

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

Upon becoming the new trustee and RSA of the Complainant's retirement scheme, Optimus should have immediately realized the inappropriateness of the TRG investments which still featured, and were retained, into the Complainant's Retirement Scheme. Such realization should have emerged given:

(i) the nature of, and risks associated with, such products; and

(ii) the extent of exposure to The Resort Group.

The nature of, and risks associated with, the TRG investments and the staggering allocation of nearly half of the Complainant's portfolio within the Retirement Scheme to The Resort Group was inappropriate and unsuitable.

These investments 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 to be *inter alia* invested in a prudent manner, be sufficiently liquid, and properly diversified.[72]

Whilst the Arbiter notes that a few months after it took over its functions as the new trustee and RSA of the Scheme, Optimus notified the Complainant of certain issues arising with the TRG investments - namely it referred to the financial difficulties of The Resort Group, the illiquid nature and the difficulty in the fair valuation of such investments **- the Arbiter however considers that Optimus fell short of raising its concerns to the Complainant on the suitability of the investments and the clear breach of trust already committed by its predecessor due to such unsuitability of the investments.**

Instead, Optimus itself accepted the portfolio composition without reservation or any qualification.

Despite the requirements and standards applicable under both regulatory regimes, with which Optimus is duly familiar in view of the nature of its operations, Optimus did not raise the unsuitability of the said investments when it took over as trustee/RSA and neither did it question the Scheme's compliance with the applicable frameworks.

As outlined above, not only such evident breach of trust committed by the previous trustee was not questioned and raised by Optimus, but Optimus itself accepted the disputed investments without question and/or reservations.

The Arbiter cannot thus conclude that Optimus 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'*[73] in the execution of Optimus duties and exercise of its powers and discretions when it itself allowed and retained without question and no reservations the same inappropriate investments.

[72] 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.

[73] As required under Article 21 (1) of the TTA

The Arbiter considers that Optimus, 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 May 2020.

At the time of taking over as trustee/ RSA, a review of the Complainant's portfolio should have been done by Optimus to *inter alia* ensure that the 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 of the Scheme, *inter alia,* to:

(i) act with *'the prudence, diligence and attention of a bonus paterfamilias*';[74]

(ii) '*act with due* skill*, care and diligence …*';[75]

(iii) ensure that the Scheme's assets are '*invested in a prudent manner and in the best interest of Members and Beneficiaries'*;[76]

(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'*.[77]

If Optimus had, at the time when it took over as trustee and RSA of the Scheme, raised issues with the disputed investments, as it evidently should have done, the Complainant would, for example, have had the possibility to seek redress from the former trustee and RSA of the Scheme as part of the remedy to rectify the breach.

Optimus 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:

[74] As provided for in Article 21(1) of the TTA

[75] 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').

[76] 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.

[77] Editor Max Ganado, '*An Introduction to Maltese Financial Services Law*', Allied Publications 2009, P. 178

(i) its inaction in respect of the clear breach of trust of the former trustee with respect to the TRG investments, and, also

(ii) its own breach of trust in accepting and retaining without question the composition of the Complainant's portfolio and the TRG investments within the Retirement Scheme.

In the circumstances, the Arbiter cannot consider that Optimus 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 completely excused from liability in the circumstances.

Extent of Liability

The Arbiter however notes and takes cognisance of the particular circumstances of this case which are considered to impinge on the extent of liability of Optimus as the new trustee and RSA of the Scheme.

As has already been highlighted above in this decision there were other parties who also should carry responsibility for the unsuitability of the underlying investments and the subsequent failure of the Scheme's objectives. Therefore the Service Provider can only be held **partially** responsible.

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,[78] and is partially accepting it in so far as it is compatible with this decision.

Being mindful of the key roles of Optimus Fiduciaries (Malta) 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 given

[78] Cap. 555, Article 19(3)(b)

compensation by Optimus 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:

(i) only the loss in respect of the TRG investments has resulted; and

(ii) other external parties, like the investment adviser and the previous trustee and RSA of the Scheme were involved and also carried responsibility, with respect to the disputed investments,

the Arbiter considers that in the particular circumstances of this case, it is fair, equitable, and reasonable for Optimus Fiduciaries (Malta) Limited to compensate the Complainant for the amount of forty per cent (40%) of the total net contributions resulting in respect of the TRG investments.[79]

Given that the Arbiter does not have the exact figure of the total net contributions resulting in respect of the TRG investments, the Arbiter shall stipulate how this is to be calculated. In this regard, the total net contributions resulting in respect of the TRG investments is to be calculated as the sum of the following:

(i) The amount initially invested into the TRG fractional property holding plus any management and administration fees or fractional payments paid directly from the Scheme's account in respect of the fractional holding, less any income already paid into the Scheme from the investment throughout the term of the holding up to the date of this decision; and

(ii) The amount initially invested into the TRG bonds less any income received from the investment throughout the term of the investment up to the date of this decision.

[79] P. 30 The Service Provider indicated this amount of GBP16,220.40

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter is therefore, ordering Optimus Fiduciaries (Malta) Limited to pay the Complainant 40% of the total net contributions resulting in respect of the TRG investments as calculated above.

The above is without prejudice to any action in terms of law that the Complainant may be entitled to take with respect to other parties to the Scheme.

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