Before the Arbiter for Financial Services

Case ASF 108/2021

VH

('the Complainant')

vs

STM Malta Pension Services Limited

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

Sitting of 8 June 2023

The Arbiter,

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

The Complaint, in essence, relates to the claim that STM Malta, in its capacity of Trustee and Retirement Scheme Administrator ('RSA') of the Scheme, failed to operate in line with the applicable standards and regulatory obligations by allowing unsuitable high-risk and illiquid 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 on the investments (d) pay regard to the Complainant's best interests.[1]

[1] Page (P.) 4, 25

The Complaint

Through his legal advisor, the Complainant explained that his pension with *Capita Life and Pensions* was valued GBP 54,544, on 24 March 2015, when it was transferred to STM Malta.

His funds were subsequently invested into various investments which have now failed with the Complainant claiming that he lost the money invested and holding STM Malta responsible for his losses.

It was claimed that STM Malta:

a) Failed to operate to the standards expected of a regulated SIPP[2] provider and professional trustee with such failure directly leading to the Complainant's losses.

b) Failed to conduct its business with due skill and care.

   It was claimed that STM Malta failed to assess the Complainant's investment knowledge and attitude to risk. The Complainant had a modest income and no real assets other than the family home. It was further alleged that had STM Malta complied with its duties and made attempts to assess his personal circumstances, it would have realised that the Complainant was not suitable to make this investment.

   It was further submitted that no adequate due diligence was undertaken, otherwise, STM Malta would have not allowed the transfer of funds into the investments. In the case where due diligence was undertaken, STM Malta failed to act on it with due skill and care and continued to allow the investments to take place, despite its total unsuitability.

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

   It was claimed that the Complainant is neither an experienced investor nor a high-net-worth investor. STM Malta should have realised the investments

[2] Self-invested personal pension (SIPP)

were high risk and refused to allow them or at least obtain appropriate clarification before proceeding.

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

It was further alleged that STM Malta knew that there was a significant risk that the investment would be illiquid and should also have taken into consideration what was fair, reasonable and good industry practice. It was also claimed that throughout the transaction, STM Malta did not consider the Complainant's best interests and failed to meet its regulatory obligations.

The Complainant further submitted the Service Provider failed to undertake due diligence on investments and act according to the standards expected of a regulated SIPP operator given 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 a SIPP.

Remedy requested

The Complainant requested STM Malta to pay GBP 54,544 with interest at 8% since 24 March 2015 or the amount that the sum of GBP 54,544 would have been worth had it not been transferred whichever is greater.[3]

The Complainant also requested compensation for the stress and aggravation in the sum of GBP 1,000 and professional fees incurred with bringing this complaint.[4]

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

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

1. Failed to operate to the standards of a SIPP operator and in particular:

    a. Failed to act with due skill and care

[3] P. 4
[4] *Ibid*.
[5] P. 25 - 31

b. Failed to assess the Complainant's investment knowledge

c. Failed to assess the Complainant's attitude to risk

d. Failed to conduct adequate due diligence into the investment, or alternatively permitted the investment despite it being unsuitable

e. Failed to take account of the fact that the investment was high risk and illiquid when permitting the investment

2. By its actions caused the loss of £ 54,544 in the Complainant's pension fund.

The Service Provider referred to the Complainant's claims for compensation and submitted that the Complainant has not presented any evidence to support his allegations. Accordingly, it argued that it was not possible for STM Malta to comment in respect of any evidence that the Complainant may hold, nor for it to comment on the subjective claims that were made.

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

- That the Complainant cannot claim that STM Malta did any of the things that are complained of. The Service Provider (formerly known as *STM Malta Trust and Company Management Ltd*) became a trustee of the *Harbour Retirement Scheme* by way of a deed of appointment on 31st August 2018, some three years after the matters complained of took place.

- STM Malta further submitted that it did not know about the matters and had no way of influencing the matters. It noted that the Complainant has not stated why a third party should be held to account for the acts of the former trustee. Accordingly, STM Malta rejects the Complaint in its entirety.

- Furthermore, and without prejudice to STM Malta's claim that it could not have been involved in the matters complained of, STM Malta respectfully submitted that the files inherited do not show the picture which the Complainant was seeking to paint, and it cannot be shown that the former trustee acted without regard to any duty of skill or care owned to the Complainant.

Background provided by STM Malta

The Service Provider explained that the Complainant applied to join the *Harbour Retirement Scheme* on 1 October 2014 as per Annex 1 to its reply.[6] He was born in 1966 and expected to retire at age 67. He was advised by *Servatus*, a firm in Ireland, as noted in the application form.

A copy of the advice provided by *Servatus* to *Harbour Pensions Limited* was attached to its reply.[7]

STM Malta further noted that on 14 May 2015, a transfer value of GBP 53,544 (not GBP 54,544 as alleged by the Complainant) was received from *Capita*. A net amount after fees of GBP 49,461.28 was then transferred to the Complainant's chosen investment platform, SEB for investment. Of this amount, 90% was invested into the *Core Strategy Balanced Fund* with the balance to be invested into the *JP Morgan Fusion Fund* as per Annex 3 to its reply.[8]

It noted that the Complainant signed a further form in respect of the investment into the *Core Strategy Balanced Fund*. For completeness' sake, it attached a copy of the letter from the former trustee,[9] which it noted echoes an advisory letter from the investment adviser in relation to the change of strategy in respect of the investment selection, explaining how the *Core Strategy Balanced Fund* would provide a similar investment allocation.

On 31 August 2018, STM Malta was appointed trustee of the Scheme and the former trustee, *Harbour Pensions Limited*, retired.

It submitted that, amongst other things, STM Malta inherited from the former trustee an investment that was locked in for a minimum of 5 years, which it could not have sold even had it been inclined to do so. Clearly, none of the acts or omissions complained of could have been the acts or omissions of STM Malta, and it cannot be said that STM Malta was aware of any of these acts or omissions, much less participated in them in any way.

The Service Provider explained that during 2019, it became apparent that the *Dolphin Loan Notes*, which form a portion of the investment of the *Core Strategy*

[6] P. 32-47
[7] P. 48-80
[8] P. 81-83
[9] P. 84

Balanced Fund were not repaying, and indeed, the *Core Strategy Balanced Fund* was struggling to complete its own audit because of the problems with the underlying investment.

It further explained that around September 2019, a liquidator was appointed in respect of the whole of what was now the *German Property Group* (formerly the *Dolphin Group*). The liquidation is ongoing and the likely value of any repayment to loan noteholders is not known at this time. It also noted that, in the meantime, the [remaining] portion of the *Core Strategy Fund* continues to be managed by *Rathbones Investment Management Limited*.

STM Malta explained that it is liaising with its advisers to establish its best course of action in terms of releasing funds from the *Core Balanced Strategy Fund*.

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, at the time, unrelated third party.

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

Without prejudice to its claim that it is not the correct person against whom the claim should be brought, STM Malta further submitted that there is nothing on the file acquired from the former trustee that would in any case support the claims brought by the Complainant. In particular, STM Malta noted the following:

Claim that the investment selection took place following an assessment of the client's risk profile

It noted that in the application form, the Complainant himself (it assumed with the assistance of his adviser), allocated a medium risk profile.

Furthermore, the extensive report submitted by *Servatus* clearly considered the selection of investments at the time to be suitable for the Complainant's risk

profile. Because of the Complainant's risk profile, the report recommends that the Complainant restricts the amount invested into the *Dolphin Loan notes*.

The file shows that *Servatus* has later recommended that the investment into the Dolphin investment should be made through another investment structure, in this case, the *Core Strategy Balanced Fund*, a Malta-based collective investment scheme.

The Service Provider explained that *Servatus* has clearly formed the view that the investment in this form is more suitable, and had recommended that, in any case, the total investment into the *Core Strategy Balanced Fund* should be restricted to ensure that the maximum total investment into the Dolphin investment is constrained within the limits recommended by the adviser.

STM Malta submitted that accordingly, it is only possible to conclude from the file that the former trustee did take account of the Complainant's risk profile when making the investments in the manner that it did. It limited the amount invested in the Dolphin loan notes and satisfied itself that the balance of the investment was in portfolio investments.

Submission that the former trustee carried out Due Diligence on the investment

The Service Provider asserts that the former trustee did carry out due diligence on the investment. It noted that, from the *Servatus* report on the file acquired by STM Malta from the former trustee, it is clear 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.

It submitted that the letter included in Annex 4 to its reply,[10] in particular, clearly shows that the former trustee had understood the nature of the *Core Balanced Strategy Investment*.

STM Malta claimed that accordingly, the Complainant may not assert that the former trustee failed to carry out due diligence on the investment.

[10] P. 84

Submission that the investment is not high risk

The Service Provider noted that the Complainant asserts that the investment selection is high risk without justifying the basis for that assertion.

It submitted that, however, it is quite clear that the investment (portfolio) must be broken down in parts to consider whether or not it is high risk. It noted in this regard that:

- *JP Morgan Fusion Fund* is a fund suitable for retail clients. STM Malta denies that this fund could in any sense be considered high risk.

- With respect to the *Rathbone Investment Management Portfolio* within the *Core Balanced Strategy Fund*, *Rathbone Investment Management Limited* is a discretionary fund manager. It submitted that if the Complainant is to assert that this element of his investment is high risk, then he must justify the claim. In the absence of any justification, STM Malta takes the position that the investment portfolio is a suitable form of investment for a retail pension scheme member.

- The Dolphin investment is an investment into a piece of German real estate via a special-purpose vehicle. The particular property in question is a former Post Office Building which is to be developed into flats and sold as individual units.

  It noted that the *Servatus* advice letter provides more information on how the project was to be handled. In particular, the investment was secured by a charge over the land registered to a security trustee. It, therefore, argued that, in principle, it cannot be said that an investment into a piece of land with that land itself as the security can be classed as a high-risk investment. Moreover, the Complainant has not submitted any assessment of why the investment would be considered high risk.

It submitted that, in the absence of any explanation, the Complainant may not allege that any of the investments were high risk.

Submission that the investment is not illiquid in terms of the Complainant's requirements

The Service Provider noted that the Complainant asserts that the investment is not liquid. It submitted that the liquidity of the investment is specifically covered in the advice letter produced by *Servatus*.

STM Malta submitted that *Servatus* advises explicitly that, in the context of the Complainant's time horizon, a five-year investment would be suitable.

It further submitted that it cannot, therefore, be said that the former trustee did not have regard to the liquidity in the context of the member when considering the advice to invest.

Submission that this was not a failed investment

The Service Provider noted that the Complainant alleges that his pension scheme made investments in various investments which have now failed. He claims that as a result, he has lost all the pension. STM Malta submitted that this claim is however without foundation, is unsubstantiated, is not borne out of facts, and accordingly is rejected by the Service Provider.

It claimed that the only possible doubtful investment is the Dolphin portion of the *Core Strategy Balanced Fund*, since the whole of the *German Property Group* has been placed into liquidation.

STM Malta is of the understanding that, at one point, up to €1bn may have been invested into projects under the management of the *German Group*, across a large number of properties managed through special purpose vehicles.

It noted that at this stage of the liquidation, STM Malta has no information in relation to the liquidator's preliminary findings, although it was seeking to be updated directly by the liquidator, notwithstanding that its interest in the investment is indirect through the fund.

STM Malta further understands that the manager of the *Core Strategy Balanced Fund* believes that effective security was given over the land when the investment was made in 2015. The Service Provider is not in a position to comment on whether the security continues, or what the realised value from the liquidation may be.

STM Malta accordingly cannot agree with the statement that the investment is a failed investment or that any loss can be calculated.

Furthermore, it claimed that should it transpire in future that the investment is a failed investment, it appears likely that any failure is due to the malfeasance of the *German Property Group* or its agents and representatives.

The Service Provider accordingly submitted that neither itself nor the former trustee could be found to be liable for the malfeasance of third parties in these circumstances.

Submission relating to the losses claimed

It noted that aside from the fact that the Complainant has overstated the transfer value received by the former trustee by £1,000, the Complainant has not shown any losses.

STM Malta accepts that the investment in the *Core Strategy Balanced Fund*, which it inherited from the former trustee does not produce a Net Asset Valuation, for the simple reason of the *Dolphin/German Property Group* investment. It claimed that however, this does not mean that there is no residual value to the investment.

It claimed that clearly, the portion of the investment managed by *Rathbone Asset Management Limited* has value, and subject to not prejudicing the Complainant's value, STM Malta will be seeking liquidation of this portion as soon as possible. It further claimed that until the outcome of the liquidation of the *German Property Group* is known, the losses, if any, will however not be known.

It accordingly argued that the Complainant cannot thus justify the losses claimed.

Concluding remarks by STM Malta

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

It claimed that, without prejudice to the fact that the Complaint cannot be brought against STM Malta, the Complainant has shown no basis for his

allegations based on the files received by STM Malta when it became trustee. In particular, it submitted that:

- The files show that the former trustee did take account of the Complainant's attitude to risk and that the investment was specifically structured to take this into account.

- There is no support for any allegation that the former trustee should have considered any of the investments as being too risky for the Complainant at the time that they were made. It submitted that it certainly appears from the file that the former trustee did consider the investment and concluded that it was suitable for the Complainant.

- The *Core Strategy Balanced Fund* cannot be described as a failed investment. It clearly has residual value, although the full and final value may not be known for some time. Accordingly, no losses could be calculated.

- The Complainant has no basis to claim the amount of losses claimed.

- Any losses sustained by the Complainant are more likely as a result of the malfeasance by other parties and not as a result of the former trustee's actions in reviewing and deciding that the investments made were suitable.

The Complainant cannot accordingly complain that it should have known there was something amiss with the way the investments were selected, since this is not apparent from the file and the Complainant is only now making it aware of his concerns, this being over 5 years after the events complained of and over 2 years after STM Malta became trustee of the *Harbour Retirement Scheme*.

The Service Provider submitted that there is accordingly no equitable basis for an order to be made against it.

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

Further Considers:

Preliminary Pleas

The submission that STM Malta is not the correct defendant

The Service Provider submitted that it:

'... became trustee of the Harbour Retirement Scheme by way of a deed of appointment on 31st August 2018, some three years after the matters complained of took place. [STM Malta] did not know about the matters, and had no way of influencing the matters. The Complainant has not stated why a third party should be held to account for the acts of the former trustee. Accordingly, [STM Malta] rejects the complaint in its entirety'. [11]

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.

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*** *…' .*[12]

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***

[11] P. 26
[12] Emphasis added by the Arbiter

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.'***[13]

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

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

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

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

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

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

[13] Emphasis added by the Arbiter

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

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.[14]

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

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

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

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

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

This is given that the disputed investment portfolio still existed and remained within the Scheme's structure at the time of the new trustee. STM Malta indeed

[14] 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.

permitted, accepted and/or allowed, without question, the disputed investment portfolio during its tenure - the main key investment which has a material bearing on the Complainant's pension, still existed and formed part of the Complainant's underlying investment portfolio at the time of STM Malta's appointment.

This is particularly so, with respect to the *Core Strategy SICAV plc – Dynamic Fund Class B GBP* ('the Core Strategy Dynamic Fund') which, as shall be explained further on in this decision, is considered to be the main investment forming part of the Complainant's investment portfolio.

It is also to be noted that the difficulties experienced by the *Dolphin Loan Notes* - which rather formed a substantial part of the investment of the *'Core Strategy Dynamic Fund'* - 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 ... In around September of that year a liquidator was appointed in respect of the whole of what was now the German Property Group (and formerly the Dolphin Group) …'*.[15]**

Moreover, the *Core Strategy Dynamic Fund* was suspended later, in January 2020, as emerging during the proceedings of this case.[16] STM Malta had been thus acting as trustee of the Scheme for quite some time by then.

The Arbiter notes that it has not emerged that STM Malta itself made any reservations or expressed any concerns on the portfolio composition nor on the key remaining material investment when it took over as the new trustee and nor even 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 the original trustee at the time the investments were originally made, is

[15] P. 27
[16] P. 176

considered to rather reflect a certain lack of appreciation of its duties as a trustee.

The Service Provider had 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.

Moreover, the Arbiter notes that ultimately the Service Provider itself defended the original trustee's action indicating, in essence, that its predecessor had acted properly. In its reply, STM Malta itself submitted *inter alia* that:

'... it cannot be shown that the former trustee acted without regard to any duty of skill or care owed to the Complainant ...'.[17]

'... the former trustee did take account of the Complainant's risk profile when making the investments in the manner that it did ...'.[18]

'... the Complainant may not assert that the former Trustee failed to carry out due diligence on the investment ...' .[19]

'... It cannot therefore be said that the former trustee did not have regard to the liquidity in the context of the member when considering the advice to invest ...'.[20]

'The files show that the former trustee did take account of the Complainant's attitude to risk, and that the investment was specifically structured to take this into account.

There is no support for any allegation that the former trustee should have considered any of the investments as being too risky for the Complainant at the time that they were made. It certainly appears from the file that the former trustee did consider the investment and concluded that it was suitable for the Complainant'. [21]

[17] P. 26
[18] P. 28
[19] *Ibid.*
[20] P. 29
[21] P. 30-31 – Emphasis added by the Arbiter

Therefore, there is no argument that STM Malta can now exonerate itself of responsibility by shifting it to the original trustee.

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

The Merits of the Case

The Arbiter is considering the Complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition.

The Complainant

The Complainant, born in 1966 and residing in the UK at the time, applied to become a member of the Harbour Retirement Scheme in 2014, as per his Application Form dated 1 October 2014.[22]

Investment Adviser

The Application Form for Membership dated 1 October 2014, indicates '*Geoff Whelan'* with an email address at *'Servatus.ie'* as the professional adviser.[23] In the said form, the adviser was indicated as being based in Ireland and regulated by the *'Central Bank of Ireland*'.[24]

The adviser's report issued by *'Servatus Ltd'* to the Complainant in respect of his investments underlying the *Harbour Retirement Scheme* was dated 20 August 2014.[25]

The disputed investments & claimed losses

A key aspect that needs to be considered in this case relates to the alleged losses.

[22] P. 47
[23] P. 42
[24] *Ibid.*
[25] P. 48 - 80

It is noted that the Retirement Scheme had originally acquired a life policy, the *'MT Asset Management Bond'* ('the policy') issued by *SEB Life International*.[26] A number of investment were then undertaken within the said policy.

It is noted that in his Complaint, the Complainant claimed that he *'lost the money invested'* as his funds were *'invested into various investments ... which have now failed'*.[27]

During the hearing of 22 November 2021, the Complainant testified *inter alia* that:

'I turned 55 this year and, then, all of a sudden, I was told it was in liquidation and I could not have anything at all. My main concern was that I wanted it back to England because I was not really told it was going to Malta. I was just told that it was going into, like, these holdings. The thing that they would not send it back to me, to England, was the worst thing. Now, obviously, I lost everything, like the £48,000 that I had left in has now gone'.[28]

In its reply, the Service Provider claimed that '*the Complainant has not shown any losses'* and that he *'cannot justify the amount of losses claimed'*.[29]

The Arbiter shall in this section consider first the investment portfolio composition of the Complainant.

In this regard, the Arbiter observed that, in its submissions, **the Service Provider confusingly and erroneously kept referring to the *'Core Strategy Balanced Fund'* within the Complainant's investment portfolio.** STM Malta explained in its reply that:[30]

*'During 2019, it became apparent **that the Dolphin Loan notes, which form a portion of the investment of the Core Strategy Balanced Fund** were not repaying, and indeed, **the Core Strategy Balanced Fund was struggling to complete its own audit because of problems with the underlying investment**. In around September of that year a liquidator was appointed in respect of the whole of what was now*

[26] P. 176
[27] P. 4
[28] P. 89
[29] P. 30
[30] P. 27

the German Property Group (and formerly the Dolphin Group). The liquidation is ongoing and the likely value of any repayment to loan noteholders is not known at this time. ***In the meantime, the portion of the Core Strategy Fund continues to be managed by Rathbones Investment Management Limited'.***[31]

It further stated that this fund *'does not produce a Net Asset Valuation, for the simple reason [of] the Dolphin/German Property Group investment'*.[32] In its final submissions, the Service Provider reiterated that:

'The only doubtful investment is the Dolphin portion of the Core Strategy Balanced Fund since the whole of the German Property Group has been placed into liquidation'.[33]

In order to better understand what investments were actually made within the policy underlying the Complainant's Retirement Scheme, and what has really occurred, the Arbiter carefully analysed the *'Policy Valuation'* statement of *'05 February 2021'* that was presented during the case by the Service Provider [as part of its documentary evidence filed with the Office of the Arbiter for Financial Services ('OAFS') following the hearing of 22 November 2021].

From the said Policy Valuation statement and other investigations made by the Arbiter,[34] it transpired that, in its submissions, the Service Provider made various material inaccuracies and erroneous statements with respect to the investments in question. In this regard, it is particularly noted that:

a) The Policy Valuation Statement of 5 February 2021 clearly indicates that **the *Core Strategy Balanced Fund*** (a sub-fund of the *Core Strategy SICAV plc*, a scheme licensed by the Malta Financial Services Authority), **was actually fully *"sold"* on 1 October 2015**.[35]

   The *Core Strategy Balanced Fund* not only does not form part of the Complainant's investment portfolio anymore (as it was "sold" on 1 October 2015) but is not even licensed (as it had surrendered voluntarily its license to MFSA on 28 March 2016 as per the Financial Services Register

[31] Emphasis added by the Arbiter
[32] P. 30
[33] P. 193 – Emphasis added by the Arbiter
[34] As he is empowered to do in terms of Article 19 (1) of Chapter 555 of the Laws of Malta.
[35] P. 177

of MFSA).[36] Furthermore, the *Core Strategy Balanced Fund* is not in existence anymore (as it had merged with another sub-fund way back in 2015).

Indeed, it transpired, from the Arbiter's investigations that, as outlined in the *Annual Report and Audited Financial Statements for the period ended 31 December 2015*, in respect of the *Core Strategy SICAV plc*: [37]

'... Effective from 1 October 2015, the Core Strategy Balanced Fund and the Core Strategy Conservative Fund were merged with the Core Strategy Dynamic Fund'.[38]

It is also noted that according to the said financial statements, the '*Core Strategy Balanced Fund and Core Strategy Conservative Fund (licensed by the MFSA on 31 July 2014) were launched on 13 April 2015 and closed on 30 September 2015'*.[39]

b) **The statements made that *'Rathbones Investment Management Limited'* was managing a *'portion of the Core Strategy Fund'* is furthermore confusing and unclear.**

This is particularly so, given that not only the *Core Strategy Balanced Fund* was no longer in the Complainant's portfolio/not in existence as outlined above, but the investment manager of the *Core Strategy SICAV plc* is rather a different entity.

This also clearly emerges from the Annual Report and Audited Financial Statements (of both the period ended 31 December 2015 and 31 December 2017) in respect of the *Core Strategy SICAV plc* which rather lists *'Altarius Asset Management Limited'* as the *'Investment Manager'* of the *Core Strategy SICAV plc*. The said financial statements do not include any reference to *'Rathbones Investment Management Limited'*.

[36] https://www.mfsa.mt/financial-services-register/

[37] A copy of which was sourced from the public records held at the Malta Business Registry – *https://registry.mbr.mt/ROC/index.jsp#/ROC/documentsList.do?action=companyDetails&companyId=SV%20323*

[38] Page 4 of the *'Annual Report and Audited Financial Statements for the period ended 31 December 2015'*, in respect of the Core Strategy SICAV plc.

[39] Page 5 of the said *'Annual Report and Audited Financial Statements for the period ended 31 December 2015'*.

c) With respect to *'Rathbone'* it is noted that this rather relates to a separate and distinct investment from that into the *Core Strategy SICAV plc*. The Policy Valuation Statement indeed actually indicates the *'Rathbone Multi-Asset Portfolio – Total Return Portfolio Class S Acc'*, as a distinct and separate investment fund (not involving the *Core Strategy SICAV plc*).[40]

d) The Policy Valuation Statement indicates a different fund, the *'Dynamic Fund Class B GBP'* (another sub-fund of the *Core Strategy SICAV plc*) as being the material investment within the Complainant's investment portfolio, which remains in existence and has been in suspension since *'Jan 2020'*.[41]

The Arbiter further notes that according to the *'Annual Report and Audited Financial Statements for the period ended 31 December 2015'*, the *'Core Strategy Dynamic Fund'* is the investment fund indicated as having the substantial and material exposure to the Dolphin investment.

In the *'Notes to the financial statements'* it was stated, in respect of the *Core Strategy Dynamic Fund*, this being the only remaining sub-fund of the *Core Strategy SICAV plc*,[42] that:

'68.91% of the Company's net assets is invested in the Alpha Real Estate Fund. This investee fund mainly invests in a loan note with Dolphin Capital 34 Project GmbH & Co KG ("Dolphin Capital"). Dolphin Capital invests in German real estate properties with the aim to reconstruct and subsequently sell these properties. The remaining investments representing 31.22% of the Company's net assets consists of another investee fund which in turn holds readily realizable investments'.[43]

It is somehow perplexing how such material information was not rather clearly and unequivocally explained by the Service Provider during the proceedings of this case, with the Arbiter being instead provided with confusing and inaccurate submissions in respect of the Complainant's investment portfolio and status.

[40] P. 176 & 177

[41] P. 176

[42] Page 5 of the *'Annual Report and Audited Financial Statements for the period ended 31 December 2015'* stipulates that *'As at 31 December 2015, the Company [i.e. Core Strategy SICAV plc] had one distinct sub-fund: Core Strategy Dynamic Fund'*.

[43] Page 20 of the *'Annual Report and Audited Financial Statements for the period ended 31 December 2015*'.

A careful consideration of the investment transactions emerging from the said Policy Valuation statement[44] indeed indicates the exact chronology of the transactions as summarised in Table A below.

Table A – Investment Transactions as per Policy Valuation of 05.02.2021

Name of Investment	Date bought	CCY	Purchase amount	Date sold	Maturity/ Sale price	Realised Capital Loss/ Profit	Realised Loss/ Profit as a % of Capital
Rathbone Multi-Asset Portfolio – Total Return Portfolio Class S Acc (Units purchased 5,818.90 @ GBP 1.249)	21/06/2018	GBP	7,270.62	28/10/2019 (Units sold 2,343.97 @1.365) - i.e. sold at a profit Units remaining in portfolio 3,474.93)*	3,200		
Paragon SICAV plc – Apollo Fund Class C GBP (Units purchased 75.07 @ GBP 96.847	01/10/2015	GBP	7,270.62	21/06/2018 (Units sold 75.07 @ GBP96.847)	7,270.62	0	0
SEB LI JPM Fusion Balanced Fund A – Net Accumulation (Units purchased 4,426.01 @ GBP 1.118)	27/05/2015	GBP	4,946.13	08/02/2016 (Units sold 3,981.64 @ GBP1.041) 13/02/2016 (Units sold 229.68 @ GBP1.047) 09/10/2015	4,145.84 240.48 156.82	-331.39	-6.7%

[44] P. 176 - 182

				(Units sold 148.23 @ GBP1.058) 09/07/2015 (Units sold 66.47 @ GBP1.077)	71.60		
Core Strategy SICAV plc – Core Strategy Balanced Fund B GBP (Units purchased 444.49 @ GBP 100.149	01/06/2015	GBP	44,515.15	01/10/2015 (Units Traded 444.49 @ GBP 97.608)	43,385.72	-1,129.43	-2.54%
Core Strategy SICAV plc – Dynamic Fund Class B GBP (Units purchased 366.86 @ GBP 98.696)	01/10/2015	GBP	36,207.91	Open position - Units remaining in portfolio 366.86)**			

*According to the 'Policy Valuation' Statement of 5 February 2021, the remaining units (3,474.935) of the *Rathbone Multi-Asset Portfolio – Total Return Portfolio Class S Acc* investment were valued at GBP 5,043.17 (price GBP 1.451) resulting in a Paper (Non-Realised) Gain of GBP 701.30 at the time of the said valuation.

**According to the 'Policy Valuation' Statement of 5 February 2021, the remaining units (366.863) of the *Core Strategy Dynamic Fund* was valued at GBP 40,019.15 (based on a price GBP 109.085 as at 31/07/19) resulting in a Paper (Non-Realised) Gain of GBP 3,811.24 at the time of the said valuation. This fund was however indicated as having been *'Suspended Jan 2020'* and accordingly the value indicated in the Policy Valuation of 5 February 2021 is misleading and not reflective of the true position of this fund.

Further to the above, it is also noted that at the time STM Malta became the new trustee and RSA of the Scheme, there were accordingly the following open positions within the Complainant's investment portfolio:

a) **An investment of GBP 7,270.62 into the *Rathbone Multi-Asset Portfolio – Total Return Portfolio Class S ACC*** (equivalent to 14.70% of the Total Premium of GBP49,461.28 paid into the policy);

b) **A material investment of GBP 36,207.91 into the *Core Strategy SICAV plc – Dynamic Fund Class B GBP*** (equivalent to 73.20% of the Total Premium paid into the policy).

It is to be noted that whilst the Policy Valuation statement of 05 February 2021 issued by *SEB Life International* (the issuer of the policy underlying the Scheme within which the investment portfolio was held), **indicated a *'Policy Value at 05/02/21'* of *'46,807.39 GBP'* such policy value is however misleading**.[45]

When comparing the said *'Policy Value at 05/02/21'* of *'46,807.39 GBP' with the 'Total Premiums'* of *'49,461.28 GBP'* and *'Total encashments'* of *'2,749.30 GBP'* as indicated in the same statement,[46] one may lead to the erroneous impression that no losses had occurred.[47] <u>This however does not reflect the true and realistic position for the reasons outlined below</u>:

a) Most (that is 85%) of the *'Policy Value at 05/02/21'* is based on a value of *'40,019.15 GBP'* attributed to the *Core Strategy Dynamic Fund* based on the price as at 31/07/19. This is thus the price applicable before this fund was suspended in January 2020 as indicated in the same statement.

b) As emerging from the latest Annual Report and Audited Financial Statements (for the year ended 31 December 2017) filed with the Malta Business Registry, in respect of the *Core Strategy Sicav plc,* the Core Strategy Dynamic Fund (which was the only remaining fund of the Core Strategy SICAV plc) had:

'68.73% (2016: 69.72%) of the Company's net assets are invested in the Alpha Real Estate Fund. This investee fund mainly invests in a loan note with Dolphin Capital 34 Project GmbH & Co. KG ("Dolphin Capital"). Dolphin Capital invests in German real estate properties with the aim to reconstruct and subsequently sell these properties ...'. [48]

c) The Service Provider itself indicated in its reply that, in or around September 2019, *'a liquidator was appointed in respect of the whole of what was now the German Property Group (and formerly the Dolphin Group)*.'[49] STM Malta

[45] P. 176
[46] *Ibid.*
[47] The Policy Value indicated at 05/02/21 (of GBP 46,807.39) together with the Total Encashment (of GBP 2,749.30) comes slightly higher in aggregate (to GBP 49,556.69) than Total Premiums of GBP 49,461.28.
[48] Page 27 of the *'Annual Report and Audited Financial Statements for the year ended 31 December 2017'* in respect of the Core Strategy SICAV plc.
[49] P. 27

noted in its submissions of August 2021, that *'The liquidation is ongoing and the likely value of any repayment to loan noteholders is not known at this time'*.[50]

The Arbiter has since not been informed of any material updates on the potential value.

d) It is further observed that according to the public records held at the Malta Business Registry ('MBR'), as at the date of this decision, the latest Annual Report and Audited Financial Statements in respect of the *Core Strategy SICAV plc* and its *Core Strategy Dynamic Fund* filed with the MBR, are only those for the year ended 31 December 2017.[51] Hence, no audited accounts for the subsequent five-year period (2018 to 2022) emerge from the records held with the MBR as at the date of this decision.

e) The Arbiter is aware, from the decision taken in another separate and distinct case involving the *Dolphin Capital Loan Notes*, that by end of December 2020, a decision was taken to attribute a 'zero' value to such loan notes for the purpose of policy valuation statements.[52]

Taking all the various factors altogether into consideration, the Arbiter has sufficient comfort to reach the conclusion that it is indeed highly likely that material (if not complete) losses shall emerge on the said investment.

As to the other investment forming part of the Complainant's underlying portfolio, it is noted that according to the Policy Valuation of 5 February 2021, the *Rathbone Multi-Asset Portfolio – Total Return Portfolio*, which is a relatively minor investment within the Complainant's investment portfolio, was experiencing an unrealised (paper gain) of GBP 701.30 at the time. The Arbiter shall accordingly not consider the Rathbone investment any further.

Other Observations & Conclusion

The Core Strategy SICAV plc – An unsuitable investment for the Complainant

[50] *Ibid*.

[51] *https://registry.mbr.mt/ROC/index.jsp#/ROC/documentsList.do?action=companyDetails&companyId=SV%20323*

[52] Case ASF 099/2021 in the name of Timothy Chapman vs STM Malta Pension Services Ltd

The Arbiter considers that the substantial investments undertaken in the *Core Strategy SICAV plc* were clearly unsuitable for the Complainant and were inappropriate investments to be held within the Scheme.

This should have become immediately evident to STM Malta when it took over as trustee and RSA of the Scheme whilst reviewing the Complainant's portfolio composition and background to his portfolio. This is so taking into consideration various factors including the following:

(i) *Excessive Exposure to single investment product* - It is evident that the portfolio composition should have immediately raised questions on various fronts, including on the nature of the investments and the extent of allocation to a single investment.

As summarised in Table A above, the investment portfolio permitted by the original trustee in 2015, comprised just three investments:

- an allocation of 14.70% of the Total Premium available for investment into the *Paragon SICAV plc – Apollo Fund Class*);[53]
- a 10% of the Total Premium into the *SEB LI JPM Fusion Balanced Fund*;[54] and
- a staggering sum of GBP44,515.15 into the *Core Strategy SICAV plc - Core Strategy Balanced Fund*.[55] This investment was held for just 4 months and replaced by the investment into the *Core Strategy SICAV plc – Dynamic Fund Class* (of GBP36,207.91).[56]

The excessive exposure to just one fund (initially 90% of the Total Premium into the *Core Strategy Balanced Fund*) and then into the *Core Strategy Dynamic Fund* (where the latter comprised more than 73% of the original Total Premium) should have already in itself raised questions on the grounds of *inter alia* prudence and diversification.

[53] GBP 7,270.62 of GBP 49,461.28
[54] GBP 4,946.13 of GBP 49,461.28
[55] GBP 44,515.15 of GBP 49,461.28
[56] GBP 36,207.91 of GBP 49,461.28

Indeed, the excessive allocation and exposure to just one single fund that was allowed by the original trustee and then subsequently accepted and left unquestioned and unchallenged by STM Malta at the time it took over, as trustee/RSA, went against the principle of prudence and diversification (and contrary to the regulatory principles applicable at the time as shall be seen later on).

This is also given that in addition to the excessive exposure to a single investment product, the chosen collective investment scheme was incompatible and inappropriate for the Complainant even when considering the target investors, nature of the fund and underlying composition.

In particular, the *Core Strategy Dynamic Fund* (which was still in existence within the Complainant's investment portfolio and accepted without question by STM Malta), was clearly not reflective of the Complainant's profile of a retail investor, his attitude to risk and his chosen investment objective as outlined in detail below.

(ii) *Incompatibility with the Target Investor of the permitted fund* - As detailed in the Annual Report and Audited Financial Statements for the period ended 31 December 2015, the:

'Core Strategy SICAV plc ... is a collective investment scheme established as a multi-fund public limited liability company (p.l.c.) with variable share capital (SICAV) under the laws of Malta and is licensed by the Mata Financial Services Authority, under the Investment Services Act (Chapter 370), ***as a Professional Investor Fund targeting Qualifying Investors****'*.[57]

It is further noted that the Memorandum & Articles of Association of the *Core Strategy SICAV plc* (filed with Registry of Companies in 2014),[58] stipulates *inter alia* that this was *'a multi-fund investment company with*

[57] P. 13 of the *'Annual Report and Audited Financial Statements for the period ended 31 December 2015'* – Emphasis added by the Arbiter

[58] Copy sourced from the website of the Malta Business Registry - *https://registry.mbr.mt/ROC/index.jsp#/ROC/documentsList.do?action=companyDetails&companyId=SV%20323*

variable share capital' and was *'constituted as a Professional Investor Fund ...'*.[59]

It is also noted that the Articles of Association of the *Core Strategy SICAV plc* defined *'Qualifying Investor'* as follows:

'... means an investor who meets one or more of the following criteria:

(a) a body corporate which has net assets in excess of EUR750,000 or USD750,000 (or the Euro equivalent in another currency) or which is part of a group which has net assets in excess of EUR750,000 or USD750,000 (or the Euro equivalent in another currency);

(b) an *unincorporated body of persons or association which has net assets in excess of EUR750,000 or USD750,000 (or the Euro equivalent in another currency);*

(c) a trust where the net value of the trust's assets is in excess of EUR750,000 or USD750,000 (or the Euro equivalent in another currency);

(d) an individual**, or in the case of a body corporate, the majority of its Board of Directors, or in the case of a partnership its General Partner, **who has reasonable experience in the acquisition and/or disposal of:

- ***funds of a nature or risk profile similar to those of the relevant Sub-Fund;***
- ***property of the same kind as the property, or a substantial part of the property, to which the Sub-Fund in question relates;***

(e) ***an individual whose net worth or joint net worth with that person's spouse, exceeds EUR750,000 or USD750,000** (or the Euro equivalent in another currency);*

(f) a senior employee or director of Service Providers to the Company;

[59] Cover Page / Page 1 of the Memorandum & Articles of Association of the Core Strategy SICAV plc.

(g) a relation or close friend of the Founder Shareholders limited to a total of 10 persons;

(h) an entity with (or which are part of a group with) EUR3,750,000 or USD3,750,000 (or the Euro equivalent in another currency) or more under discretionary management, investing on its own account;

(i) a collective investment scheme which qualifies as a professional investor fund promoted to Qualifying or Extraordinary Investors in terms of the Investment Services Act;

(j) an entity (body corporate or relationship) wholly owned by persons or entities satisfying any of the criteria listed above which is used as an investment vehicle by such persons or entities'.[60]

The Arbiter notes that the Complainant's occupation was listed in the Scheme's Application Form as *'warehouseman'*.[61]

In his Complaint to the OAFS, it was noted that the Complainant '*had a modest income and no real assets other than the family home'*.[62] This was not disputed by the Service Provider during the proceedings of the case.

The Complainant had also testified, during the hearing of 22 November 2021, that:

'I have never done any investments apart from my pension. Unfortunately, I do not know anything about investments'. [63]

The Complainant is clearly a retail investor. In view of his profile and background provided, he was evidently not an eligible investor in the *Core Strategy SICAV plc* in the first place.

Despite that the investment in the *Core Strategy SICAV plc* was done under the policy wrapper (and not directly in the name of the Complainant), it is clear that one should have taken the profile of the end investor in mind,

[60] Page 4-5 of the Articles of Association of the Core Strategy SICAV plc – Emphasis added by the Arbiter
[61] P. 33
[62] P. 4
[63] P. 90

that is, of the Complainant for whose benefit the investment was ultimately undertaken.

(iii) *Lack of adequate diversification throughout* –

Not only there is no comfort about the diversification in the Complainant's investment portfolio given the material exposure (of over than 70% of the Total Premium at the time) to just the *Core Strategy Dynamic Fund*, but even within the said fund, the Arbiter could derive no comfort of adequate diversification either.

This is also in view that it evidently and clearly emerges that the *Core Strategy Dynamic Fund* was in turn itself not a diversified fund, given the heavy exposure that this fund had to other investments, namely and ultimately to *Dolphin Capital*. Indeed, the majority of the investment portfolio of the ***Core Strategy Dynamic Fund*** was exposed to just one *'Real Estate Fund'* which was in turn mainly invested *'in a loan note with Dolphin Capital'*.[64]

As already outlined above the *'Notes to the financial statements'* for the year ended 2015, clearly stated in respect of the *Core Strategy Dynamic Fund*, that:

'68.91% of the Company's net assets is invested in the Alpha Real Estate Fund. This investee fund mainly invests in a loan note with Dolphin Capital 34 Project GmbH & Co KG ("Dolphin Capital"). Dolphin Capital invests in German real estate properties with the aim to reconstruct and subsequently sell these properties...'[65]

(iv) *Incompatibility with the Complainant's Risk Attitude and Investment Objective* – 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'*.[66] The 'Medium Risk' profile was described in the same form

[64] Page 20 of the *'Annual Report and Audited Financial Statements for the period ended 31 December 2015'* in respect of the Core Strategy SICAV plc.
[65] *Ibid.*
[66] P. 45

as meaning that '*There is some risk to your capital which may go down as well as up there is potential for growth over the longer term*'.[67]

In the same form, his Investment Objective was selected as being *'... willing to accept **a small amount of risk** to provide for potential growth over the medium to long term'*.[68]

The Complainant **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'.[69] (Even if he had selected the highest of the risk profiles, the trustee would have to keep this in the context and purpose of the Retirement Scheme).

The Arbiter considers that it accordingly amply and clearly emerges that the investment into the *Core Strategy Dynamic Fund* went also against the Complainant's Risk Attitude and Investment Objective.

The *Core Strategy Dynamic Fund* was indeed of a much higher risk than the risk attitude and level selected by the Complainant taking into consideration the following aspects:

a) **Close to 70% of the *Core Strategy Dynamic Fund* was invested into a *'Real Estate Fund'* which mainly invested *'in a loan note with Dolphin Capital'* exposed solely to *'German real estate properties'* as indicated in the Notes to the Financial Statements (both for the period ended 31 December 2015 and for the year ended 31 December 2017)[70] of the *Core Strategy SICAV plc*. This was indeed a predominant *'Financial risk' factor'* clearly highlighted in the said accounts.**

b) **The illiquid nature of the *Core Strategy Dynamic Fund*** was also highlighted in the Financial Statements (both for the period ended 31

[67] P. 45
[68] *Ibid*.- Emphasis added by the Arbiter
[69] *Ibid*.
[70] Respectively in the Core Strategy SICAV plc *'Annual Report and Audited Financial Statements for the period ended 31 December 2015'*, Page. 20, and Page 27 of *'Annual Report and Audited Financial Statements for the year ended 31 December 2017*'.

December 2015 and for the year ended 31 December 2017)[71] of the *Core Strategy SICAV plc* which stated that**:**

> *'... the Company invests in an investee fund that is not traded in an organised public market and which may therefore be illiquid. As a result, the Company may not be able to liquidate its investment in this investee fund at an amount close to its carrying value in order to meet its liquidity requirements.*
>
> *Redemption of investor shares is subject to the lock-in period of 5 years from the subscription date. No redemption request shall be accepted during the lock-in period ...'.*

c) Moreover, the ultimate predominant investment underlying the *Core Strategy Dynamic Fund* involved, as outlined above, the Dolphin Capital Loan note, which in turn was an unlisted, unregulated, alternative or non-traditional illiquid product with a long and fixed investment term of five years. It is further noted in this regard that:

- **The high-risk investment element of the Dolphin Capital Loan Note,** was highlighted in the report issued by the adviser (*Servatus*),[72] a copy of which was held on file by STM Malta. The said report indicated that ***'An investment in Loan Notes involves a high degree of risk'***.[73] The high-risk element is also reflected in the high rate of Annual Percentage Rate (APR) of 10.19% per annum reflected in the Loan Note Offer.[74]

  The submission by STM Malta that *'the investment was secured by a charge over the land registered to a security trustee'* and that *'In principle, it cannot be said that an investment into a piece of land with that land itself as the security can be classed as a high-risk investment'*,[75] reflects in itself the wrong and superficial assessment

[71] Page. 22 and Page 28 of the respective *'Annual Report and Audited Financial Statements* of the Core Strategy SICAV plc.
[72] P. 48-80
[73] P. 73 – Emphasis added by the Arbiter
[74] P. 72
[75] P. 29

made by the trustee and the misplaced comfort regarding the investment.

- **The Dolphin Capital Loan note lacked liquidity. One of the significant risks mentioned in the Adviser's Report involved the liquidity risk of the loan note which was clearly illiquid and tied for a long period of time of five years.** The said report 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'*. [76]

- **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.[77]

- The inadequacy of the exposure to the *Dolphin Loan Note* and its lack of compatibility and suitableness with the Complainant's attitude to risk and investment objective also emerges further when one notes other statements made in the *Servatus* Adviser's Report. The said report indeed specified that:

  'Dolphin will take great care to <u>only share the investment opportunity with those who accept that they have the ability to absorb the risks</u> associated with the investment'.[78]

  It emerges amply clear that the Complainant had no ability to absorb such risks with respect to his pension.

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 *inter alia* diversification, prudence and liquidity, which applied not only at the

[76] P. 75
[77] P. 74
[78] P. 72 – Emphasis added by the Arbiter

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').[79]

  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*'[80] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[81]

  SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[82] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*[83] 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

[79] 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.
[80] SOC 2.7.2 (a)
[81] SOC 2.7.2 (b)
[82] SOC 2.7.2 (c)
[83] 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.[84]

- 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').[85]

  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*'.[86]

  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'*.[87]

[84] SOC 2.7.2 (h)(iii) & (v)

[85] 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.

[86] 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.

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

The Arbiter has assessed the investments into the *Core Strategy SICAV plc* and the ensuing indirect exposure to the *Dolphin Capital Loan Note* taking into consideration also the said requirements and the scope of the scheme as a retirement product, and he cannot reasonably conclude that the said 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, his stated Investment Objective of being *'willing to accept a small amount of risk to provide for potential growth'*[88] nor of the prudence required to achieve the scope of the Scheme as a retirement product.

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.

It is noted that the Service Provider ultimately itself acknowledged, in its final submissions, that:

'It is apparent that a fiduciary may be held responsible for the breach of another fiduciary's duties if he or she (i) knowingly participates in or undertakes to conceal the other fiduciary's breach (ii) discharges his or her own responsibilities in a manner that enables the other fiduciary to commit a breach or (iii) has knowledge of the other fiduciary's breach and fails to make reasonable efforts to remedy it'.[89]

As outlined above, there is ample evidence indicating that STM Malta was, and should reasonably have had knowledge of the other fiduciary's breach for the various reasons mentioned. The defense raised by the Complaint that it *'did in fact act in the best interest of the member as it consistently updated the member with information on the chosen investments'* [90] is a rather poor excuse

[88] P. 45
[89] P. 190 – Emphasis added by the Arbiter
[90] P. 189

that reflects a lack of understanding of the situation in hand, and its important role and responsibility as Trustee and RSA of the Scheme.

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 material investment into the *Core Strategy SICAV plc* (and the substantial indirect exposure to the *Dolphin Capital Loan Note* investment). The said material investment 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,

as amply explained above.

The nature of, and risks associated with, the *Core Strategy Dynamic Fund* (and its indirect exposure to the *Dolphin Capital Loan Note*) as the staggering allocation of a majority of the Complainant's portfolio within the Retirement Scheme to this one single product was evidently inappropriate and 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.[91]

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

[91] 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.

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 *Core Strategy Dynamic Fund* (and its indirect exposure to the *Dolphin Capital Loan Note*) 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 as it inherently did in its reply. In doing so, STM Malta made the failures of the first trustee its own.

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'*[92] 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 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:

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

(i) act with *'the prudence, diligence and attention of a bonus paterfamilias'*;[93]

(ii) '*act with due* skill*, care and diligence …*';[94]

(iii) ensure that the Scheme's assets are *'invested in a prudent manner and in the best interest of Members and Beneficiaries'*;[95]

(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'*.[96]

If STM Malta had, at the time when it took over as trustees of the Scheme (in August 2018), raised issues with the investment portfolio, as it evidently should have done, the Complainant would have had the possibility to seek redress from the former trustee and consider also any other remedies to rectify the breach and try to remove/reduce the exposure to the remaining inappropriate investment. STM Malta could have also declined to accept the transfer/ disputed investment thus serving as a warning to the Complainant.

The Arbiter further notes that *Harbour Pensions Limited* was licensed by the MFSA as a Retirement Scheme Administrator until it voluntarily surrendered its licence with effect from 5 October 2018.[97] *Harbour Pensions Limited* is however no longer in operation and was subsequently dissolved and struck off from the records held with the Malta Business Registry with effect from 31 January 2020.[98]

It is also to be noted that the *Core Strategy Dynamic Fund* was suspended only in January 2020.

Adequate action would have thus avoided or mitigated the loss on the *Core Strategy Dynamic Fund* (in respect of its indirect exposure to the *Dolphin Capital Loan note*) and the material consequences arising on the Scheme from the

[93] As provided for in Article 21(1) of the TTA
[94] 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').
[95] 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.
[96] Editor Max Ganado, '*An Introduction to Maltese Financial Services Law*', Allied Publications 2009, P. 178
[97] https://www.mfsa.mt/financial-services-register/
[98] https://registry.mbr.mt/ROC/

failure of the *Dolphin Capital Loan note* investment which has materially prejudiced the achievement of the Scheme's objective.

It is furthermore to be noted that STM Malta has also 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.[99]

STM Malta accordingly 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 significant and unreasonable exposure to the *Core Strategy Dynamic Fund* (and its indirect exposure 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 significant and unreasonable exposure to the *Core Strategy Dynamic Fund* 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,[100] and is partially accepting it in so far as it is compatible with this decision.

[99] 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
(b) has full knowledge of all material facts; and
(c) has not been improperly induced by the trustee to give the relief or indemnity'
[100] Cap. 555, Article 19(3)(b)

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:

(i) only the unsuitability and issues in respect of the *Core Strategy Dynamic Fund* have been adequately and sufficiently substantiated in this case; 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 compensation to be calculated as detailed hereunder.

The extent of compensation is being determined as follows:

a) STM Malta Pension Services Limited is to compensate the Complainant and pay him the amount of 70% of the capital invested (of GBP 36,207.91) into the *Core Strategy Dynamic Fund*. The figure of the awarded compensation is thus calculated in this regard to amount to GBP 25,345.54.[101]

b) Given the particular status of the *Core Strategy Dynamic Fund* and taking into consideration that this fund had '*remaining investments representing 31.05% ...of the Company's net assets consist[ing] of another investee fund which in turn holds readily realisable instruments*' as stipulated in the Annual Report and Audited Financial Statements for the year ended 31 December 2017,[102] the Arbiter considers that any future proceeds that may be derived from the *Core Strategy Dynamic*

[101] 70% of (GBP36,207.91) = GBP 25,345.54

[102] Page 27 of the said report and financial statements

Fund **are to be allocated as 30% to the Complainant with the remaining 70% retained by the Service Provider.**

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 GBP 25,345.54 (twenty-five thousand, three hundred and forty-five-pounds sterling and fifty-four pence) with future proceeds (if any) in respect of the *Core Strategy Dynamic Fund* assigned as stipulated above.

In the circumstances, the Arbiter is also recommending to STM Malta that, at its discretion, it refunds and/or waives (fully or partially), its own fees applicable to the Retirement Scheme during the period of no active or few investments held within the Scheme as from the date of his Complaint.

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.

Alfred Mifsud
Arbiter for Financial Services