

## Before the Arbiter for Financial Services

**Case ASF 005/2022**

**BN**

**(‘the Complainant’)**

**vs**

**STM Malta Pension Services Limited**

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

### **Sitting of 17 May 2023**

#### **The Arbiter,**

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

The Complaint, in essence, relates to the alleged failure by STM Malta to act in his best interests as a Scheme Member and to undertake its fiduciary responsibility as trustee, given that he claimed that STM Malta:

- (i) failed to disclose in its Scheme Application Form the 1% marketing fee that was charged on his underlying policy;
- (ii) failed to notify him of any proposed changes in fees in advance as per the Declaration section included in the Scheme's Application Form;

(iii) allowed the Marketing Fee to be charged despite not being shown in the paperwork that the Complainant had completed at the time when joining the Scheme.

### *The Complaint*

The Complainant explained that in March 2013 he commenced the process to transfer his UK pension to the Scheme. His application was accepted, and he became a member of the Scheme in 2013. A policy with the number PLL200271 was subsequently held within his Scheme.

A few years after, in November 2020, he transferred his Retirement Scheme to one administered by STM Gibraltar.

When his advisor requested a Surrender Quote from STM Gibraltar in September 2021, he and his advisor were surprised to find an additional 1% Marketing Fee that had been unexpectedly charged as a lump sum fee for the total amount of GBP 14,468.95. He noted that the fee charged in total was 2.75% on his policy.<sup>1</sup>

The Complainant submitted that the fee structure that was clearly stated in Section 7 of the STM application form only confirmed total charges of 1.75% p.a. in respect of the costs associated with administering the Scheme and the *Portfolio Bond* (the latter being his underlying policy within the Scheme).

He explained that the 1.75% charges were to be taken in January each year and did not mention a *Horizon Bond*. Furthermore, para. 9 of Section 8 titled Declaration of the STM application indicated that STM Malta would notify him of any proposed fee changes in advance. He claimed that he has however never received any such notification.

The Complainant explained that he raised the discrepancy directly with STM Malta and STM Gibraltar on 11 September 2021 as he had opened his policy through STM Malta and then moved it to STM Gibraltar.

STM Gibraltar wrote to him on 5 November 2021 regarding the '*PLL Bond Valuation Error*' notifying him that the 1% Marketing Fee had '*nothing to do with*

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<sup>1</sup> This reflects the 1.75% annual management charge together with the 1% Marketing Fee.

STM'.<sup>2</sup> The Complainant however disputed this and noted that there has been no further communication from STM on the matter.

He noted that STM Malta has not replied directly to the Complainant despite several reminders but had replied to his advisor's complaint with regard to his policy in December 2021. He further noted that STM stated that their joint venture partner had made a system error and was to charge him fees on the *Horizon Bond* on top of the agreed total fees that were already taken.

The Complainant submitted that the total fees agreed for the Scheme were 1.75% per annum as shown in STM's application form.

He further submitted that he was told that the 1% marketing fee would only be taken if he cashed in the policy during the first eight (8) years as a redemption penalty and that this charge would not be taken if the policy ran through the first 8-year period.

The Complainant submitted that given that he has not cashed in the policy within the first 8 years, he considered that the 1% marketing fee is not chargeable to him.

It was further submitted that he would certainly not have joined the Scheme if the total fees were 2.75% per annum. He claimed that he only joined the Scheme as STM confirmed to him on their application form that the total fees to be charged were 1.75% per annum, which covered all fees associated with administering the Pension Scheme and the *Portfolio Bond*.

The Complainant submitted that he was challenging STM's claim that the additional Marketing Fee had nothing to do with them because he considered that:

- a) STM Malta as the pension trustee and administrator failed to act in his best interests as a member of the Scheme;
- b) STM Malta as trustee failed in its fiduciary responsibility as it confirmed in its application form that the total fees were 1.75% p.a. for administering the Scheme and Portfolio Bond;

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<sup>2</sup> Page (P.) 3

- c) STM has indicated that the additional charge was from the underlying policy provider and as such had nothing to do with STM. The Complainant submitted that this was however a combined product as was shown on the paperwork which clearly referred to STM along *Providence Life*.

He further argued that by joining the STM Malta Retirement Plan he was automatically enrolled in the PLL QROPS Bond and that this was a joint structure.

- d) The paperwork he reviewed and completed before joining the Scheme had no reference to a Horizon Bond.

Moreover, the Complainant failed to understand why STM could allow the Marketing Fee to be taken when it was not shown on its paperwork that he completed when joining the Scheme.

He reiterated that the total 1.75% fees agreed were clearly shown on the paperwork of STM and that if the total charges for STM Malta's Retirement Scheme had been 2.75% then he would not have joined the Scheme. The Complainant submitted that he only agreed to a 1.75% when joining the Scheme.

#### *Remedy requested*

The Complainant requested the additional 1% p.a. Marketing Fee of GBP 14,468.95 to be completely removed from the Surrender Quote and corrected on the value of his policy.

He, therefore, requested the additional 1% marketing fee not to be ever taken from his pension scheme so that the total fees he is charged that are associated with the administration of the Scheme and the Portfolio Bond shall only be 1.75% per annum.

**In its reply, STM Malta essentially submitted the following:<sup>3</sup>**

#### *Summary of complaint and compensation claimed*

STM Malta noted that the Complainant submitted evidence that he had requested a surrender quote in relation to the termination of his account which

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<sup>3</sup> P. 120 – 123

included a marketing fee of 1% amounting to GBP 14,468.95. It further noted that the Complainant claims that this fee was not notified to him by way of disclosure in STM Malta's application documents.

The Service Provider noted that the Complainant asserts that he understood that the marketing fee was taken if the policy was cashed in during the first 8 years of the policy, and therefore he considered that the fee should not be payable. He claimed that STM's fee disclosure represents all fees to be charged for the administration of the Pension Scheme and the underlying insurance policy.

It noted that the Complainant asserts that he only applied for a QROPS and was not aware of the *Horizon Bond*. This occurred despite the contradictory claim that he was at least aware of the early encashment penalty in the event that the insurance bond was encashed early.

STM Malta noted that the Complainant is being advised in this Complaint by Mr John Shirrefs, his 'Adviser' who had also advised him with respect to the original pension transfer. For the purposes of its reply, STM Malta was thus assuming that the comments in his submissions were reviewed by the Adviser and reflect the recollection of the advice and application process at the time.

The Service Provider noted that the Complainant is now requesting that no Marketing Fee should be applied to his policy.

*Background information provided by the Service Provider*

STM Malta noted that the Complainant, born on 28 March 1974, was working in the United Arab Emirates in 2013. He took advice from the Adviser based on a fact-finding exercise which formed part of the Complainant's submissions. It pointed out that the Complainant does not argue that the advice or the products were not suitable.

The Service Provider observed that after the provision of advice, the Adviser submitted an application for membership of the Scheme, completed by, or on behalf of, the Complainant and signed by the Complainant. This was sent together with an application for a *Providence Life QROPS Bond* application form that was in turn completed by, or on behalf of, the Complainant and signed by both the Complainant and the Agent.

A total of GBP 117,291.44 was transferred from the Complainant's UK pensions with the sum of GBP 117,176.64 sent to *Providence Life* for investment.

It further noted that in January 2021, the Complainant requested that his pension be transferred to a different pension scheme administered in Gibraltar by *STM Fidecs Life Health and Pensions Limited*, which is a distinct legal entity but a member of the STM Group of companies. The transfer was completed by assigning the Insurance Policy to the Complainant's selected trustee and the transaction was completed by 15 March 2021.

STM Malta explained that in, or around August 2021, *Providence Life Limited* advised policyholders, including STM Malta, that it had identified a system error whereby the Marketing Fee had not been reflected in its valuations and that it was investigating how to rectify the issue. In the Complainant's case, it appeared this have been achieved by applying the full marketing fee on the surrender of the policy.

#### *Response of the Service Provider*

STM Malta submitted that it was not tenable for the Complainant to argue, after having referred to the Adviser, that he was not aware that there were two separate products.

The Complainant signed a separate application form for each product and the Adviser explicitly signed the Application Form for the *Providence Life Bond*.

The wording of both the QROPS and the *Providence Life* Application Forms state that they are '*for use with ...*'.<sup>4</sup> It submitted that this wording cannot accordingly be interpreted to mean that there is only one product. One may only infer that the terms and conditions contained within that particular application may not be available if the respective products are not used together. Nor can the wording be used to infer any form of Joint Venture arrangement between STM Malta and *Providence Life Limited*.

STM Malta submitted that it was also not tenable for the Complainant, after referring to the Adviser, to claim that he was not aware of the separate Marketing Fee that *Providence Life Limited* was applying.

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<sup>4</sup> P. 121

The Service Provider agreed that STM Malta's fee scale refers to the administration fee. However, it referred to the Policy Charges section of the Terms & Conditions section of the *Providence Bond* application form (a copy of which was included as Annex 2 to its reply).<sup>5</sup>

STM Malta stated that it was not entirely clear why the said document was not produced to the Arbiter with the Complaint. This is in view that an incomplete version of the document, together with a version of the application which the Complainant did not sign, were included instead.

It noted that a copy of the document held on STM Malta's file was sent to the Adviser on 9 December 2021 and submitted that the charge was explicitly disclosed by *Providence Life Limited* at paragraph 6.6.

STM Malta furthermore noted that, in the document titled '*Code of Conduct (QROPS)*'<sup>6</sup> of the Complainant's submissions, the Adviser had asked the Complainant to confirm that there has been full disclosure of all fees in relation to the product. It submitted that the Adviser cannot now assert that this should be interpreted to mean '*all the fees except those in application forms which I have myself signed*'.<sup>7</sup>

The Service Provider understands that the Complainant may wish to query whether, after the lapse of such a long time since the inception of the policy, it is proper for the insurer to now reflect a fee even if, at the time the policy was taken out the Complainant had, on the face of it, accepted the fees in the application form.

It submitted that if it still was the Policyholder, STM Malta would gladly take up this matter with *Providence Life Limited*. However, STM Malta is now not the Policyholder, and it is the current policyholder who must take the matter up with *Providence Life Limited*.

STM Malta further submitted that the requested redress could not be granted as the Marketing Fee complained about is a fee of *Providence Life Limited*. It was *Providence Life* which issued the surrender quote and STM Malta may not direct

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<sup>5</sup> P. 183-200

<sup>6</sup> P. 45

<sup>7</sup> P. 122

*Providence Life Limited* as this was an unrelated company over which STM Malta had absolutely no control.

In conclusion, STM Malta stated that it has shown that, despite the potentially misleading documentation submitted by the Complainant as assisted by the Adviser, the Complainant completed separate applications for the QROPS pension and the Insurance Bond and must have known about the contents of those applications and in particular the fees set out therein.

It submitted that even if the Complainant did not know from his own study of the documents presented, he must have known from the advice given by the Adviser, which the Complainant acknowledges extended to full disclosure of the fees and must have included disclosure of fees in documents which the Adviser had himself signed.

STM Malta further submitted that based on a review of the documentation, the Complainant cannot assert that he thought, after having taken the advice of the Adviser, that the only fees chargeable were those disclosed in STM Malta's application form. He cannot either assert that he thought the Marketing Fee would not apply after a period of time.

The Service Provider reiterated that it cannot now assist the Complainant to seek redress from *Providence Life Limited* since the current issues have arisen at a time after STM Malta ceased to be the Policyholder, at the Complainant's request.

STM Malta, therefore, submitted that there is no equitable remedy that can be imposed on it in favour of the Complainant.

## **Preliminary**

### *STM Malta no longer provides services to the Complainant*

In its reply, the Service Provider highlighted that it was no longer the trustee and RSA of the Scheme given that a transfer out from the Scheme occurred in 2021. It noted that the Complainant's pension and underlying policy were transferred to a different retirement scheme in Gibraltar, administered by a sister entity within the STM Group.

STM Malta *inter alia* submitted in this regard that:

*'The Respondent may not now assist the Complainant to seek redress from Providence Life Limited since the current issues have arisen at a time after the Respondent has ceased to be policyholder at the request of the Complainant'.<sup>8</sup>*

The Service Provider accordingly inferred that it was not the correct or legitimate defendant in respect of this Complaint.

In its final submissions, the Service Provider indeed stated that:

*'... STM Malta submits that the current trustees are STM Gibraltar (which is a separate and independent entity to STM Malta with a different licence, regulator and jurisdiction) and therefore the complaint by the Complainant about the PLL Marketing Fee should be addressed to STM Gibraltar and not STM Malta'.<sup>9</sup>*

Whilst it is true that STM Malta is no longer the trustee and the RSA of the Retirement Scheme and that the Complainant was *'informed of the 1% PLL marketing fee in late 2021 that is when STM Gibraltar were his appointed trustees'*<sup>10</sup> as submitted by the Service Provider, the Arbiter however notes that **the Complaint mainly deals with failures alleged on the part of STM Malta at the time it occupied its functions in respect of the Scheme.**

**Consideration thus needs to be made of the alleged failures of STM Malta at the time it occupied the role of trustee and RSA of the Scheme and was acting as the policyholder of the underlying *Providence Life* policy.**

**This is particularly so with respect to the Complainant's claims that STM Malta:**

- (i) failed to disclose in its Scheme Application Form the 1% marketing fee that was charged on his underlying policy; and**
- (ii) failed to notify him of any proposed changes in fees in advance as per the Declaration section included in the Scheme's Application Form.**

**The Arbiter further notes that whilst the disputed marketing fee is being only now reflected in the valuation statements by *Providence Life* as a charge on the**

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<sup>8</sup> P. 123

<sup>9</sup> P. 357

<sup>10</sup> *Ibid.*

**underlying policy, the said charge has been however applied retrospectively. Accordingly, the disputed fee covers the period of time when STM Malta occupied the said roles.**

**For the reasons mentioned, the Arbiter refutes any claim that STM Malta is not the correct or legitimate defendant in respect of the matters raised and shall hence proceed to consider the merits of the case next.**

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

**The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.<sup>11</sup>**

### **Facts of the Case**

#### *The Complainant*

The Complainant, a British national, born in 1974 and resident in the United Arab Emirates at the time, applied to become a member of The STM Malta Retirement Plan by way of his '*Client Application Form For Use With The Providence Life Bond*' ('Application Form for Membership'),<sup>12</sup> signed and dated 5 June 2013.<sup>13</sup>

#### *Membership of the Scheme and acquisition of the underlying policy*

STM Malta provided the Complainant with the Scheme's Plan Schedule as part of the welcome letter dated 13 September 2013.<sup>14</sup> The said schedule indicated the '*Commencement date*' of the Retirement Scheme being the '*5<sup>th</sup> June 2013*' with the initial '*Transfer value*' into the Scheme of '*£2,554.50*' and '*£46,637.81*'.<sup>15</sup>

The Schedule also listed an '*Investment option*' into a '*Whole of life*' policy issued by '*Providence Life*' dated '*9<sup>th</sup> July 2013*'.<sup>16</sup>

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<sup>11</sup> Cap. 555, Art 19(3)(b)

<sup>12</sup> P. 124

<sup>13</sup> P. 130

<sup>14</sup> P. 245

<sup>15</sup> P. 247

<sup>16</sup> *Ibid.*

The '*Providence Life Assurance Bond*' ('PLL WOL 1112')('the policy') that was acquired by the Scheme for the Complainant '*is a life assurance policy*' issued by *Providence Life Limited*, PCC based in Mauritius.<sup>17</sup>

According to the '*Policy Document Whole of Life Policy*', bearing '*Policy No: PLL200271*', the '*Issue Date*' of the policy is '*31st July 2013*'.<sup>18</sup>

The same document and policy schedules indicate the '*Policyholder*' as '*STM Malta Trust & Company Management Ltd*' with the Complainant being listed as the '*Principal Life Assured*'.<sup>19</sup>

The '*Total premium at inception*' paid into the policy amounted to '*£49,142.31*' as indicated in the same documents.<sup>20</sup> (It is noted that an '*Additional Investment Amount*' of £68,034.13 was also eventually made into the policy as per the statement issued by *Providence Life*).<sup>21</sup>

In the Key Features Document provided, the policy was also referred to as the '*Providence Life Portfolio Bond*'.<sup>22</sup>

It is further noted that during the proceedings of the case, reference was also made to the '*Horizon Portfolio Bond*' or '*Horizon Bond*'. Whilst no evidence was produced regarding a change in name of the policy, it is however sufficiently clear that this refers to the same underlying policy. Indeed, in the '*Estimated Surrender Quote*' issued by *Providence Life*, the '*Product Name*' of the policy (bearing the same policy number PLL200271) is indicated as '*Horizon Portfolio Bond*'.<sup>23</sup>

Hence, the same policy must have eventually changed its name to '*Horizon Portfolio Bond*'.

#### *Investment advisor*

The Complainant's appointed Financial Adviser, as indicated in the Application Form for Membership, was '*PIC*' based in '*UAE*'.<sup>24</sup>

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<sup>17</sup> P. 275

<sup>18</sup> P. 252

<sup>19</sup> P. 263-272

<sup>20</sup> P. 262

<sup>21</sup> P. 114

<sup>22</sup> P. 273

<sup>23</sup> P. 114

<sup>24</sup> P. 42 & 126

The full name of the adviser is *'Professional Investment Consultants-Middle East Ltd'*, an entity *'Affiliated to deVere Group'*, with John Shirreffs being at the time its Senior Wealth Manager.<sup>25</sup>

#### *Transfer out from the Scheme and assignment of the underlying policy*

In October 2020, the Complainant applied for a transfer out of the Retirement Scheme into *'The STM G.I.B. Pension Transfer Plan'*, whose trustee was indicated as *'STM Fidecs Pension Trustees Limited'*.<sup>26</sup>

The underlying *Providence Life* policy was eventually also assigned to the new Gibraltar plan on 4 March 2021 as per the documents presented during the proceedings of the case.<sup>27</sup>

Hence, STM Malta ceased to occupy its roles of trustee, RSA of the Scheme and policyholder of the *Providence Life* policy accordingly.

#### *System error in the Providence Life policy valuations*

The Complainant noted that *'STM Gibraltar have written to me on 5<sup>th</sup> November 2021 titled 'PLL Bond Valuation Error'*.<sup>28</sup>

It is noted that in a frequently asked question ('FAQ') document issued by *Providence Life* titled *'Horizon Portfolio Bond System Error FAQ'*, *Providence Life* that was produced by STM Malta during the case, the said document explained *inter alia* that:

*'A system error has been identified which has affected the reflection of policy charges on Horizon Portfolio Bond valuations. This means that the Marketing Fees have been deducted from the Policy but not reflected on the policy valuations.'*

*'...The system error was discovered in April 2021 ...'*

*'...To rectify this error, the balance of any non-reflected Marketing Fees will be taken from the policy as an encashment charge together with any accrued fees and charges (all fees and charges are clearly stated in the Horizon Portfolio Bond*

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<sup>25</sup> P. 289

<sup>26</sup> P. 215 - 216

<sup>27</sup> P. 217 - 218

<sup>28</sup> P. 3

*Terms and Conditions). The company can confirm that no policies will be adversely affected by these actions, the charge shown merely reflects the true position of each policy'.*

*'...The Horizon Portfolio Bond Terms and Conditions clearly state the fees and charges ... Your appointed Financial Adviser as part of the application stage should have explained the terms and conditions to you together with the applicable fees and charges..*

*'...The Marketing Fee should have been reflected on policy valuations, via unit cancellations at a rate of 1% per annum for 8 years. This has not been reflected correctly on policy valuations in the past. As these initial units have been reflected on the policy valuation incorrectly in the past, any growth that these units may have attracted has been allocated incorrectly to the policy as well. In short, this growth did not exist and must be removed to reflect the correct current policy valuation.'*

*'... We are obliged to treat all Policyholders fairly and equally, in accordance with our regulatory guidelines and this means applying any accrued fees and charges due for each policy ... these adjustments are legal and compliant and are covered under our non-waiver of rights provision contained in the Horizon Portfolio Bond Terms and Conditions.'*<sup>29</sup>

The next section shall consider the charges as disclosed to the Complainant in respect of the underlying policy.

#### *Disclosure of the Providence Life policy charges*

(A) Application Form for Scheme Membership (signed in June 2013) - The Application Form for Membership into the Retirement Scheme, titled '*The STM Malta Retirement Plan, Client Application Form For Use With The Providence Life Bond*', signed by the Complainant on '*5 June 2013*' included a section detailing the '*Charging Structure*'.<sup>30</sup>

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<sup>29</sup> P. 309-310

<sup>30</sup> P. 124-131

The said section (*'Section 7, Charging Structure'*), outlined the following fees in respect of the Scheme and the underlying policy (the portfolio bond).<sup>31</sup>

- (i) An *'Annual Management Charge'* which *'covers the costs associated with administering the pension scheme and portfolio bond'*, based on the trust value. The Annual Management Charge for a QROPS trust value of *'Between GBP 40,000 and GBP 199,999'* – this being the value applicable for the Complainant - was *'1.75% per annum'*.<sup>32</sup>

(The Annual Management Charge was specified as 1.40% in case of a lower QROPS trust value of *'Between GBP 200,000 and GBP 499,999'* or 1.25% in case of a higher QROPS trust value of *'Greater than GBP 500,000'*).<sup>33</sup> The said charges also included *'two pension transfers'* with additional transfers *'charged at £100 each'*.

- (ii) A *'Providence Life Bond – fund dealing charge'* which consisted of a *'2.75% subscription fee'* applicable upon the first purchase of funds or switch of funds or additional purchases.

- (iii) An administration charge of GBP500 that *'will be deducted during the first year of operation of the bond'*.<sup>34</sup>

- (B) *Providence Life Policy Key Features Document* - As part of the welcome pack issued by STM Malta as attached to its letter dated 13 September 2013, the Complainant was provided with a two-page *'Providence Life Portfolio Bond Key Features'* document.<sup>35</sup>

The said Policy Key Features document specified the following policy charges in the section titled *'Providence Life Portfolio Bond Charging Structure'*:<sup>36</sup>

- *Annual management charge of 1%*
- *Discounted subscription fee of 2.75% on Providence Life Fund Platform*

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<sup>31</sup> P. 129

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> P. 273-274

<sup>36</sup> P. 274

- *Early encashment charge of 8% in year 1, decreasing to zero by the end of year 8’.*

(C) The Providence Life Policy Application Form of June 2013 - One of the documents presented during the proceedings of the case was titled the *‘Providence Life QROPS Bond Application For use with STM Malta Retirement Plan’*, this being the application form for the underlying *Providence Life* policy (‘the Policy Application’).<sup>37</sup>

The said document was signed by both the *‘Life Assured’* (that is, the Complainant), and the *‘Trustee Applicant’* (that is, STM Malta), in June 2013.<sup>38</sup> It also included the advisor’s signature (under *‘Financial adviser details’*).<sup>39</sup>

**The Policy Application form included *‘Terms & Conditions’* which constituted and formed an integral part of the said application form.**

The *‘Terms & Conditions’* indeed formed part of the said Policy Application form as also reflected in the use of the same footer (reading *‘Providence Life Bond Application’*) and in the continuation of the page numbering throughout the whole document.<sup>40</sup>

*‘Section 6, Policy Charges’* of the mentioned Terms & Conditions detailed the applicable charges.<sup>41</sup> The said charges as reflected in the Terms & Conditions forming part of the Policy Application form signed in June 2013 shall be considered in further detail in part (E) below.

(D) The Policy Document issued in July 2013 - The *‘Policy Document Whole of Life Policy’* issued by *Providence Life*, bearing Policy No. PLL200271 and issue date of 31<sup>st</sup> July 2013,<sup>42</sup> included a section dealing with the *‘Policy Charges’*. The said section, (section 3.11), specified that:<sup>43</sup>

*‘Policy charges could include:*

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<sup>37</sup> P. 225-242

<sup>38</sup> P. 233

<sup>39</sup> *Ibid.*

<sup>40</sup> P. 234-242

<sup>41</sup> P. 239

<sup>42</sup> P. 252 - 261

<sup>43</sup> P. 259

- *Annual management charge*
- *Dealing charge*
- *Any other costs and or expenses incurred in managing the unitised Funds*
- *Any stock broking fees incurred on behalf of the policyholder*
- *Any marketing expenses incurred in the marketing of either the unitised portfolio or the policy*

*Any taxes and/or regulatory charges and/or similar costs incurred, but not taken into account, elsewhere.'*

The specific details of the charges were then included in a Terms & Conditions document issued with the policy of July 2013 which shall be considered in the next section.

(E) Comparison between the Terms & Conditions forming part of the Policy Application Form and the Terms & Conditions issued with the actual Policy

The Office of the Arbiter for Financial Services ('OAFS') compared the Policy Charges section as featured in:

- the Terms & Conditions document forming part of the Policy Application form of June 2013,<sup>44</sup> and
- the Terms & Conditions document issued in respect of the *Providence Life* policy of July 2013 (as sent with the welcome pack of STM Malta dated 13 September 2013).<sup>45</sup>

Further to the said comparison, the following was particularly noted:

- (i) With respect to the exit fee, the Terms & Conditions sent to the Complainant in July 2013 state, under the section titled '*Policy Charges*' that:

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<sup>44</sup> P. 234-242

<sup>45</sup> P. 275-284

*'If the Policyholder requests to cash-in any policy during the initial period or additional initial period(s), PLL will pay the Policyholder the cash sum, less any early encashment charges which may apply'.<sup>46</sup>*

**This same clause about the exit fee is not reflected in the same 'Policy Charges' section of the Terms & Conditions forming part of the Policy Application of June 2013.**

- (ii) **With respect to the disputed Marketing Fee, it is noted that in the 'Policy Charges' section of the Terms & Conditions forming part of the Policy Application Form (signed in June 2013)<sup>47</sup> and the Terms & Conditions issued with the actual Policy (in July 2013)<sup>48</sup> both stipulate that:**

*'PLL charges an annual marketing establishment fee of 1% each year for the first 8 years of the policy to cover the costs of distributing the policy'.<sup>49</sup>*

**Hence, no difference emerged in the respective Terms & Conditions of the Policy with respect to the disputed Marketing fee.**

**In this particular case, the disputed Marketing Fee does not differ between the mentioned two Terms & Conditions documents as outlined above. It has clearly transpired that the disputed Marketing Fee is however not mentioned in the Scheme's Application Form for Membership and neither in the *Providence Life* Key Features document as outlined above.**

## **Obligations of the Service Provider**

### *Trustee and Fiduciary obligations*

The Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is particularly relevant for STM Malta considering its role as Trustee of the Scheme.

Article 21(1) of the TTA which deals with the '*Duties of trustees*', *inter alia* stipulates that the trustee should act as a ***bonus paterfamilias***.

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<sup>46</sup> P. 280

<sup>47</sup> P. 239

<sup>48</sup> P. 280

<sup>49</sup> P. 239

The said article provides 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'.***

It is also to be noted that Article 21 (2)(a) of the TTA, further specifies that:

***'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 ...'.***

In its role as Trustee, STM Malta was accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property *'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'*.<sup>50</sup>

As has been authoritatively 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'***.<sup>51</sup>

The fiduciary and trustee obligations were also highlighted by MFSA in one of its publications where it was stated that:

***'In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract,***

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<sup>50</sup>Editor Max Ganado, *'An Introduction to Maltese Financial Services Law'*, Allied Publications 2009, p. 174

<sup>51</sup>*Op. Cit.*, p. 178

*quasi-contract or trusts. In particular, the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations’.*<sup>52</sup>

Although this Consultation Document was published in 2017, MFSA was basically outlining principles established both in the TTA and the Civil Code which had already been in force prior to 2017.

**The above are considered to be crucial aspects which should have guided STM Malta in its actions as trustee.**

#### *Obligations as a Retirement Scheme Administrator*

One key duty, which emerges from the primary legislation itself, applicable to STM Malta as the Retirement Scheme Administrator, is the duty to *‘act in the best interests of the scheme’*.

This is outlined in Article 19(2) of the Special Funds (Regulation) Act, 2022 (‘SFA’) - which was the first legislative framework that applied to the Scheme and the Service Provider until this framework was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) (‘RPA’) which eventually came into force on the 1 January 2015. The duty to act in the best interests of the scheme is also outlined in Article 13(1) of the RPA.

Apart from the main legislation itself, there are various principles and conditions outlined in the general conduct of business rules/standard licence conditions issued by the Malta Financial Services Authority (‘MFSA’) under the SFA/RPA regime respectively applicable to the Service Provider in its role as Retirement Scheme Administrator.

With respect to this case, it is pertinent to particularly note the following rules:<sup>53</sup>

- a) Rules 2.6.2 and 2.6.3 of Part B.2.6 titled *‘General Conduct of Business Rules applicable to the Scheme Administrator’* of the *‘Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special*

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<sup>52</sup> Page 9 – *‘Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act’* [MFSA Ref: 09-2017], dated 6 December 2017.

<sup>53</sup> Emphasis added by the Arbitrator.

*Funds (Regulation) Act, 2002* ('the Directives'), which applied to STM Malta as a Scheme Administrator under the SFA, provided that:

*'2.6.2 The Scheme Administrator shall act with due skill, care and diligence in the best interests of the Beneficiaries. Such action shall include:*

...

*b) ensuring that contributors and prospective contributors are provided with adequate information on the Scheme to enable them to take an informed decision ...'*

*'2.6.3 The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and not misleading ...'*

The same principles continued to apply, in essence, under the rules issued under the RPA.

Rules 4.1.4 and 4.1.5, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011 dated 1 January 2015 issued in terms of the RPA, and which applied to STM Malta as a Scheme Administrator under the RPA, provided that:

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

*'4.1.5 The Service Provider shall ensure the adequate disclosure of relevant material information in a way which is fair, clear and not misleading ...'*

## Final Observations and Conclusion

### *Implications of the disputed Marketing Fee*

**The damage alleged from the contested marketing fee is clear and quantifiable,** as emerging from the ‘*Estimated Surrender Quote*’ issued by *Providence Life* dated 1 September 2021.<sup>54</sup>

The said quote indicates the application of a ‘*Marketing Fee*’ for the amount of GBP 14,468.95. This is equivalent to 8.82% of the ‘*Current Estimated Policy Value*’ (of GBP 164,028.51) that was listed in the same quote.

### *The alleged failures*

**The Arbiter shall consider next the key alleged failures raised by the Complainant against STM Malta as follows:**

- a) ***The allegation that STM Malta failed to disclose in its Scheme Application Form the 1% marketing fee that was charged on his underlying policy***

**As outlined above, it has clearly emerged that the Scheme’s Application Form did not include a reference to and/or details of such marketing fee despite that the said form covered the fees of the Scheme and the underlying policy.**

**The Arbiter accordingly accepts the Complainant’s claim and considers that STM Malta has indeed failed to ensure that the charging structure of the *Providence Life* policy was clearly and adequately disclosed to the Complainant in its own form together with the other fees of the *Providence Life* policy that were stipulated in the said form. The following aspects and other factors highlighted later in this decision are also being taken into consideration on this aspect:**

- i. ***Context of the Application Documents; Material Divergences in respect of the policy charging structure emerging in key documentation; and Lack of Disclosure of such divergences***

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<sup>54</sup> P. 114

The Arbiter notes that **the Service Provider itself listed the charging structure in respect of the Scheme and the underlying *Providence Life* policy in its own Application Form for Scheme Membership (signed by the Complainant in June 2013).**<sup>55</sup>

Whilst the **Retirement Scheme and the underlying policy are two separate and distinct products issued by separate providers** - where the Scheme issued by STM Malta acquired the underlying policy issued by *Providence Life* - the Arbiter observes that **the Complainant was however offered a package for the whole structure in question.**

It is evident that the main parties **STM Malta** (as trustee and RSA of the Scheme) and ***Providence Life*** (the issuer of the underlying policy), **had come together to offer a packaged structure. This clearly emerges from the way the Scheme and Policy application forms had been drafted.**

**STM Malta's own application for membership into the Retirement Scheme was indeed one specifically tailored for use with the policy. The cover page of the Scheme Application Form specifically stated and highlighted that the form was '*For use with the Providence Life Bond*'.**<sup>56</sup>

Furthermore, the charging structure outlined in the Scheme's Application Form included the fees of the pension scheme and underlying policy.

Similarly, the *Providence Life* Policy Application Form stipulated on the cover page that this was '*For use with STM Malta Retirement Plan*' and already featured details of STM Malta as trustee of the QROPS, as well as details of the Retirement Scheme, in Section 2 of the said form under '*Trust Details*'.<sup>57</sup>

**The Complainant and STM Malta** (the latter in its capacity of Scheme trustee), **together signed the application for the purchase of the *Providence Life* policy (in July 2013).**

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<sup>55</sup> P. 129-130

<sup>56</sup> P. 124

<sup>57</sup> P. 225 & 227

**The said policy application was signed on the basis of the Policy Terms & Conditions that formed an integral part of the policy application form.<sup>58</sup>**

**The said Policy Terms & Conditions signed by STM Malta as trustee contained the disputed Marketing Fee which clearly and categorically did not feature in the charging structure of the policy detailed in the Scheme's Application Form for Membership.**

**There is accordingly validity to the Complainant's claim that the Scheme's application form issued by STM Malta did not disclose the disputed fee.**

**Apart from the discrepancies emerging in the documentation provided to the Complainant, the Arbiter notes that no evidence emerged that the Complainant was adequately notified about, and properly made aware of, the said omission and divergence emerging from the fee structure stipulated in Policy Terms & Conditions which had a material bearing on his interests.**

**As outlined in detail in the section titled '*Obligations of the Service Provider*' above, STM Malta ultimately had clear obligations, which the Arbiter considers it has failed, when it did not ensure that the documentation (particularly its own form) was current and up to date and when it did not promptly notify and bring to the attention and consideration of the Complainant the said material divergence.**

- ii. Inconsistent information as part of the welcome pack – As part of the welcome pack provided by STM Malta through its letter dated 13 September 2013,<sup>59</sup> the Complainant was furthermore provided with a *Providence Life* Key Features document which did not include reference to the Marketing Fee.**

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<sup>58</sup> P. 234-241

<sup>59</sup> P. 245

**The said Key Features document of the *Providence Life* Portfolio Bond,<sup>60</sup> however, included information not reflective of, and inconsistent with, the Policy Terms & Conditions included with the same welcome pack.**

Indeed, the said '*Key Features*' document did not include any reference to the Marketing Fee but only details of the policy charges as outlined in part (B) of the section titled '*Disclosure of the Providence Life Policy Charges*' above.

**b) *The allegation that STM Malta failed to notify him of any proposed changes in fees in advance as per the Declaration section included in the Scheme's Application Form***

It is clear that STM Malta had a certain level of business interaction with *Providence Life* (and possibly even terms of business) in order to enable it to include details of the *Providence Life* policy in its own forms.

As mentioned above, STM Malta clearly had a duty to ensure that any fees communicated to the member, even more so in its own forms, were current and up to date.

**The Arbiter considers that the retrospective application of the Marketing Fee where such policy charge was not reflected, due to a system error, in policy valuations issued over an eight-year period had material implications which negatively affected the interests of the Complainant.**

As outlined by *Providence Life* in its FAQ document, the '*Marketing Fee should be reflected on policy valuations, via unit cancellations at a rate of 1% per year for the first 8 years, but this has not happened*'.<sup>61</sup>

**The non-reflection of the disputed Marketing Fee in policy valuations implies that, in practice, the Complainant has been rather provided, and issued with, incorrect policy valuation statements not reflective of the true position of the policy. His policy was thus seemingly over-valued (up to**

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<sup>60</sup> P. 273-274

<sup>61</sup> P. 67

the amount of any due fees not deducted) in each year, during an eight-year-long period.

Although the policy valuations were issued by *Providence Life*, STM Malta should have however been aware of the fees applicable on the underlying policy. Such awareness should have arisen in its role of trustee and RSA of the Scheme and itself being the policyholder of the underlying policy.

Whilst the Complaint in question does not involve *'any proposed fee changes'* and hence there is no alleged failure with reference to the Declaration section quoted by the Complainant (as this captures a different context), it is considered that there is however a failure on the part of STM Malta to act in the Complainant's best interests in the circumstances.

This particularly arises in respect of STM Malta's failure to ensure clear and complete disclosure of the fee structure in its own form and in bringing to the Complainant's attention and consideration the discrepancies arising in the documentation used as outlined above. Such discrepancies and non-disclosure ultimately had a material negative bearing to the Complainant.

c) ***The allegation that STM Malta allowed the Marketing Fee to be charged despite not being shown in the paperwork that the Complainant had completed at the time when joining the Scheme***

With respect to the claim that STM Malta allowed the Marketing Fee to be charged despite not being shown in the documentation the Complainant completed at the time when he applied to join the Scheme, the Arbiter accepts the Service Provider's submission that this matter should primarily be handled by the current trustee, that is, STM Gibraltar given that the latter has the authority over the *Providence Life* policy in its capacity as the existing policyholder of the said policy and trustee of the Gibraltar retirement scheme.

Nothing precludes, however, STM Malta and STM Gibraltar, (one in its capacity as the previous trustee and RSA of the Scheme and policyholder of the *Providence Life* policy and the other as the current entity occupying such

roles), to discuss between them and also with *Providence Life* the particular unfortunate situation which has prevailed.

This is even more so when the disputed fee is to be applied retrospectively by *Providence Life*, which would thus cover the period when STM Malta was the trustee and RSA of the Scheme and policyholder.

Furthermore, the collaboration and liaison between the two entities is clearly facilitated and easier given they are part of the same Group. In the circumstances, one would reasonably expect the two entities to effectively co-ordinate and assist accordingly.

*Other observations – Key important roles*

**The Service Provider cannot minimise its key functions and roles. Apart from acting as the trustee/RSA of the Scheme at the time of the alleged failures, STM Malta was also the Policyholder of the *Providence Life* policy.<sup>62</sup>**

**Hence, it itself had to be duly aware and conscious of any material divergences arising from the Policy Terms & Conditions it had itself applied and signed for in July 2013 and the features of the policy it itself outlined in its own form.**

**Any such divergences should have not emerged in the first place and should have also eventually been reasonably discovered and highlighted accordingly for consideration by the relevant parties.**

**Whilst it is true that the disputed Marketing Fee is not a fee imposed or applied by STM Malta, as it is a fee applied by *Providence Life* on the underlying policy, this however does not exonerate STM Malta from the obligations it had as trustee and RSA of the Scheme and Policyholder of the underlying policy.**

*Other observations - Reference to an alleged similar decision*

The Arbiter notes that in its final submissions, the Service Provider referred to a decision bearing case number 039/2018 where it claimed that '*the same issue of fees arose*'.<sup>63, 64</sup>

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<sup>62</sup> P. 263-272

<sup>63</sup> P. 356

<sup>64</sup> <https://financiarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20039-2018.pdf>

STM Malta quoted parts of this decision and noted that in such case the Arbiter had decided not to uphold the compensation requested in respect of the charges paid. The Service Provider claimed that *'This is precisely the same case here'*.<sup>65</sup>

**The Arbiter however refutes the Service Provider's claims and considers that the quoted case and the case under consideration deal with completely dissimilar and unrelated issues and entirely involve different contexts.**

**The particular circumstances, the matters raised and context of the complaints in the two distinct cases are indeed totally dissimilar for a number of reasons including the following:**

- Case 039/2018 involves not only different parties and products, but the subject matter dealt with is completely different and unrelated to the case under consideration.

The former case actually involved the alleged excessive charges imposed by the investment advisor.

- The particular context in Case 039/2018 is also different in that there is no new or different fee structures emerging in the documentation provided to the complainant as has happened in the case under consideration.

Neither does case 039/2018 deal with, or involve, the lack of disclosure of fees in valuation statements issued by the policy provider (and which are to be reflected after eight years of non-disclosure), as emerging in the case under consideration.

Hence, the matters considered in the mentioned cases in no way involve the same or similar circumstances. For the reasons mentioned, the Arbiter rejects the submissions made by the Service Provider on this point.

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<sup>65</sup> P. 186

*Other observations - Emerging discrepancies and convoluted structure of the fee structure*

The Arbitrator ultimately considers that the discrepancy in fees emerging in the documentation produced, particularly with respect to the exit fee<sup>66</sup> and the disputed Marketing Fee<sup>67</sup> as indicated in the section titled '*Disclosure of the Providence Life policy charges*' above have contributed to and resulted in a convoluted and unclear fee structure to the Complainant's detriment.

The apparent confusion about the exit fees and the marketing fees was further noted throughout the proceedings of the case. In the reply provided by the Complainant's adviser to the questions posed to him during the proceedings of the case, the adviser noted *inter alia* that:

*'The key features document is a two-page doc which shows the portfolio bond charges and there is no mention of a marketing fee ... When the new forms came out showing the marketing fee this was challenged as it did not match the fees in the STM app. We were told that this was only a charge that would be taken if the client moved within the first 8 years as part of the redemption penalty. The fees taken annually were therefore 1.75% p.a.'*<sup>68</sup>

The Arbitrator notes that the '*Early encashment charge of 8% in year 1, decreasing to zero by the end of year 8*',<sup>69</sup> was however clearly an exit fee (an encashment charge) which was only applicable if there was an exit from the policy during the first eight years as also reflected in clause 5.5 of the Policy Issue document.

On the other hand, the Marketing Fee, which was separately dealt with in clause 5.4 of the Policy Issue document, was '*an annual marketing establishment fee of 1% each year for the first 8 years of the policy*'.<sup>70</sup>

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<sup>66</sup> The exit fee was mentioned in the two-page Key Features document and in the Policy Issue document but not mentioned in the '*Policy Charges*' section of the Terms & Conditions forming part of the Policy Application Form and neither mentioned in the Scheme's Application Form.

<sup>67</sup> Albeit the Marketing Fee was mentioned in the Policy Application Form (Terms & Conditions) and also reflected in the Policy Issue Document (Terms & Conditions), no mention of the Marketing Fee was made in STM Malta's Scheme Application Form and neither in the Providence Life (2 page) Key Features Document.

<sup>68</sup> P. 315

<sup>69</sup> P. 274

<sup>70</sup> P. 280

It is thus amply clear that the exit fee and the Marketing Fee were two separate and distinct fees that should have been treated and considered separately and not mixed or somehow unbelievably construed as being the same fee.

Hence, in the circumstances, the Arbiter cannot ignore the deficiency on the part of other parties which failed to explain and clearly disclose to the Complainant the applicable fee structure. Such failure of other parties will be reflected in the extent of compensation granted to the Complainant.

### ***Decision & Concluding Remarks***

The Complainant relied on STM Malta as the Trustee of the Scheme to act with the diligence and attention of a *bonus paterfamilias*, to account to him and provide him with information and highlight material aspects in relation to his Scheme, protect his interests and safeguard his property from loss or damage.

STM Malta had also to act with due skill, care and diligence and ensure disclosure of relevant material information in a clear and not misleading way. STM Malta was also ultimately the Policyholder of the *Providence Life* policy and was thus itself in full control of this policy.

For the reasons amply explained, it is considered that there was a clear lack of diligence by the Service Provider in the administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee and RSA of the Scheme and policyholder of the *Providence Life* policy.

It is also considered that the Service Provider failed to act with the prudence, diligence and attention of a *bonus paterfamilias* to safeguard the Complainant's interests.

The Arbiter considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'<sup>71</sup> of the Complainant who had placed his trust in the Service Provider, believing in its professionalism and its duty of care and diligence.

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<sup>71</sup> Cap. 555, Article 19(3)(c)

### ***Conclusion***

For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case<sup>72</sup> and is accepting it in so far as it is compatible with this decision.

Cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying policy. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the damages incurred.

The claims of the Complainant are not being met in full to reflect the failure by his financial advisor to note, for example, the distinction between the encashment fee and the Marketing Fee in the policy documentation produced and the discrepancies emerging in the overall documentation as outlined above.

In deciding the extent of compensation to be awarded to the Complainant, consideration is also being made of the fact that the Complainant had himself signed the Policy Application Form which included the disputed Marketing Fee but which however was not included in the application for Scheme Membership.

### ***Compensation***

Being mindful of the key role of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of The STM Malta Retirement Plan and Policyholder of the *Providence Life* policy, the Arbiter concludes that the Complainant should be compensated by STM Malta for damages suffered as a result of the lack of protection it afforded to safeguard his property and protect his interests.

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

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<sup>72</sup> Cap. 555, Article 19(3)(b)

**Complainant the amount of 50% (fifty percent) of the amount of any Marketing Fee that may be charged and paid on his underlying policy.**

**The extent of compensation in this case has been determined (and may differ from other cases which may be considered to have similar elements), on the basis of the particular circumstances of this case as indicated earlier on in this decision.**

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

**Each party is to bear its own costs of these proceedings.**

**Alfred Mifsud  
Arbiter for Financial Services**