Before the Arbiter for Financial Services

Case ASF 160/2021

JU

('the Complainant')

vs

Dominion Fiduciary Services (Malta) Limited (C 47259) ('DFSM' or 'the Service Provider')

Sitting of the 20 February 2023

The Arbiter,

Having seen **the Complaint** relating to the Dominion Malta Retirement Plan 2010 ('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 Dominion Fiduciary Services (Malta) Limited ('DFSM' or 'the Service Provider'), as its Trustee and Retirement Scheme Administrator ('RSA').

The Complaint, in essence, involves the claim that DFSM failed in its duties as trustee as allegedly it:

(i) failed to properly assess and perform due diligence, initially and on ongoing basis, in respect of the *Privilege Wealth One LP Loan Note*, this being an underlying investment of the Scheme, with regards to the insurance element related to the said investment;

(ii) failed to ensure that the financial adviser in respect of his Scheme was properly regulated.

The Complaint

The Complainant explained that in 2015, DFSM, in its role of trustee, invested GBP200,000 from his trust into the *Privilege Wealth One LP* ('PWL Loan Note' or 'the investment'). This was done after DFSM performed an initial due diligence check on the PWL Loan Note to accept it as a *bona fide* properly run investment.

He claimed that DFSM failed to properly check the lack of regulation of the investment adviser, *St James International*. The Complainant noted that he learned that the adviser was based in Moscow and had no professional indemnity insurance cover. DFSM now blames the adviser for the failed investment.

The Complainant also claimed that DFSM failed to perform its due diligence duties as trustee to monitor the investment on an ongoing basis despite charging fees of more than treble those charged by the average Maltese QROPS trustee.

He claimed that the failed investment was not properly assessed, both initially and on an ongoing basis.

It was noted that, other than the sophisticated investor declarations for his UK resident status, which was only generic to the broad type of investment, the Service Provider did not require any member indemnity declarations and was happy to allow the investment to proceed.

The Complainant accordingly claimed that DFSM let him down as it:

(i) failed to ensure the adviser was properly regulated by a recognised regulatory authority

(ii) failed to discover that high ranking staff administering the investment had previous links to failed investments and was wanted by the police

(iii) failed to make sure that the underlying investments that were listed to be made were actually undertaken by the managers of the PWL Loan Note

(iv) failed to ensure that the insurance premium covering 95% of the investment in the event of failure was kept up to date

(v) catastrophically failed to thus perform both initial and ongoing due diligence.

Remedy requested

The Complainant asked to receive back his GBP200,000 investment with the commensurate interest of 10% per annum since 2015. He calculated that, with compounding, this figure in total amounts to GBP292,820. [1]

In its reply, DFSM essentially submitted the following:[2]

The Service Provider noted that the investment into the Privilege Wealth One LP ('PWL') Loan Note was initially made by DFSM in 2015, and that the investment failed several years later as a result of PWL no longer being able to meet its contractual obligations to its loan note holders. PWL was subsequently placed into administration on 26 February 2018.

DFSM pointed out that the individual named in Section B to the Complaint Form, Darin Brownlee-Jones, who is the person designated by the Complainant to assist him in his Complaint, is the same person who introduced the Complainant to the PWL Loan Note and to *St James International* in the first instance.

The Service Provider considered that it may be helpful to summarise first the background in relation to the PWL investment as the facts were complicated. DFSM noted that the information in its reply is reproduced, in part, from the Joint Administrator's Report dated 15 March 2018 which was presented to the High Court of Justice in the UK (ref. CR-2018-000569) in respect of *Privilege Wealth Plc*, which was in administration.

DFSM provided the following background in its reply:

- That *Privilege Wealth plc* was incorporated and operated as a holding company. Its principal purpose was to assist in the raising of finance for its four overseas subsidiaries as well as the day-to-day management of its subsidiaries.

[1] Page (P.) 4
[2] P. 18-22

- That the business model of the group was to make a profit from borrowing money and in turn investing these funds in the form of high yielding pay day loans to individuals with low or no credit, primarily located in the United States or by buying portfolios of distressed debt.

  The interest differential, less operating costs, would represent the profit available for the group whilst the wide spread of risk, by way of low exposure to any one defaulting consumer, would mitigate risks for investors.

- One of the principal investors into *Privilege Wealth Plc* was PWL. PWL raised funds for this purpose from individual investors (such as the Complainant) who acquired loan notes issued by PWL.

- The main operations of the group were conducted by *Privilege Call Centres Inc*, a subsidiary of *Privilege Wealth Plc*, located in Panama City in the Republic of Panama. The subsidiary operated as a call centre which, at its peak in around October 2016, employed in excess of 150 Panamanian nationals.

- As a result of insufficient financial control within the group, cash flow issues were experienced by *Privilege Wealth Plc* and upon the directors' investigations into the financial stability of the subsidiaries located in Panama, it became evident that the subsidiaries liabilities were significantly higher than those detailed on the accounting records available.

  Moreover, it was also established that profits generated on the payday loans were not being paid to group companies, after operating costs, in order to settle intercompany loans.

- Both subsidiaries in Panama had ceased trading and commenced insolvency proceedings with significant inter-company balances due to *Privilege Wealth Plc* and ultimately PWL.

  Cash flow issues were compounded further during the autumn of 2016 when articles published by *Offshore Alert* suggested that the whole operation was an investor scam. These reports resulted in *Privilege Wealth Plc* pursuing the author of *Offshore Alert* for defamation and a judgement was obtained against him in the High Court in London on 9 March 2017.

- The financial irregularities within the group, the insolvency of the subsidiaries in Panama and the adverse publicity by *Offshore Alert* had a high impact on *Privilege Wealth Plc's* ability to trade, ultimately resulting in *Privilege Wealth Plc* being put into administration.

- DFSM claimed that this obviously had severe ramifications for PWL (resulting in PWL being put into administration) and also for the loan note holders in PWL who, as a result, have most likely lost all of their investment.

The Service Provider further replied and stated the following:

- That it did not provide investment advice to the Complainant. The Complainant instructed DFSM to make the investment into the PWL Loan Note following receipt, by him, of investment advice provided by David Sime of *St James International*.

  The Complainant chose to instruct *St James International* to provide him with this advice. He was not introduced to *St James International* by DFSM. It was Brownlee-Jones who introduced the Complainant to *St James* and, in doing so, earning considerable introducer fees. It noted that it appeared that Brownlee-Jones is now assisting the Complainant in relation to this complaint after putting the Complainant in this position in the first place.

- DFSM submitted that no evidence has been adduced to prove that *St James International* did not possess professional indemnity insurance and the Complainant's claim was therefore unsubstantiated.

  It also noted that if the Complainant's claim was correct, then this would have been known to Brownlee-Jones when he introduced the Complainant to *St James International*. DFSM was of the understanding that the adviser, David Sime, to whom the Complainant was introduced, was well known to Brownlee-Jones as both worked together in at least three UK advisory firms in the past.

- It further submitted that the Complainant appears to be of the view that due diligence conducted by DFSM prior to the time the investment was made on his instructions, should have been sufficient to enable the Service Provider to predict the investment was to fail several years after the event as a result

of facts and circumstances which could not reasonably have been known to DFSM at the time.

Due diligence in relation to the PWL Loan Note offering was undertaken by DFSM in late 2014 and early 2015. Such due diligence included, *inter alia*, the examination of all offering and contractual documentation pertaining to the investment together with gaining an understanding of the business model conducted by PWL with respect to the generation of the investment returns promised.

- DFSM further submitted that any investment whose performance depends on matters associated with the granting of loans in the retail marketplace to individuals with low or no credit, together with collection of interest and principal, carries with it a degree of credit risk.

- The Service Provider noted that this notwithstanding, it permitted the investment instruction to proceed because: (1) the investment direction submitted by the Complainant resulted from investment advice received beforehand from his appointed investment advisor and (2) the Complainant confirmed that he was to be treated as a sophisticated investor in respect of the investment, in which case it is reasonable to conclude that he had sufficient expertise to understand the risks associated with it.

- The PWL investment is not regulated in the UK (where the Complainant is domiciled) and as such, he had access to the investment under the UK private placement regulations which require a sophisticated investor declaration to be completed by the investor. For this reason, significant weight can be placed on the fact that the Complainant self-certified himself in this capacity as had he chosen otherwise then the investment would not have been placed by DFSM.

- The initial investment was made by DFSM in March 2015, for a fixed term of three years. The investment performed in accordance with its contractual conditions, with all interest payments paid in a timely manner until January 2018, when the last annual interest payment was not received.

- DFSM submitted that given the effluxion of time between the initial due diligence and investment (that is, March 2015 and the subsequent failure of

the investment, of which DFSM first became aware of following the non-receipt of the January 2018 interest payment), it was reasonable to conclude that events leading to the failure of the investment (as summarised in the reply), and to the subsequent insolvency of PWL could not reasonably have been known to, or otherwise foreseen, by DFSM at the time the investment was made.

In the circumstances, DFSM considers that the proximate cause of the loss suffered by the Complainant cannot be attributed to any of its failing to conduct due diligence prior to the investment in PWL being made.

The Service Provider pointed out that, moreover, it should be noted that the PWL investment was a fixed term loan note (that is, for a three-year period), which in light of its static nature could not be monitored in respect of its performance on an ongoing basis other than through the late receipt or non-receipt of contractual interest payments. It further submitted that this is an objective test which was deployed by it in monitoring the investment.

- It noted that the Complainant stated that in conducting initial due diligence, DFSM failed to notice that high ranking staff administering his investment had previous links with failed investments and were wanted by the police.

  DFSM submitted that while it is on the public records that a call centre manager in the Panamanian office was wanted by the police it is equally on the public records that this individual was operating under an alias and that his identity was unknown to all, including his employer, until an incident occurring several years after the initial due diligence was conducted.

  It submitted that moreover, there is no evidence to support the Complainant's claim that this individual, a call centre manager, had any involvement in administering the Complainant's investment.

  The Service Provider further submitted that the Complainant's claim was therefore unfounded and irrelevant as was his subsequent claim that DFSM failed to make sure that the investments listed to be made by the managers were actually undertaken.

- DFSM noted that the Complainant finally claims that it failed to ensure that the premiums on a fiduciary protection insurance policy, intended to protect some of the initial investment, were paid by the insured.

  It was however on public record that the policy was in force at the time DFSM conducted initial due diligence. It was also on public record that the insured party was not PWL, as PWL was a beneficiary under the policy.

  The insured was *Privilege Wealth plc*, which at the time was a UK resident public limited company and DFSM had no contractual relationship with *Privilege Wealth plc*, as its relationship in respect of the investment was with PWL.

  DFSM pointed out that it should also be noted that it was *Privilege Wealth plc*, as the insured party, who was responsible for paying the premiums in respect of the insurance.

  In the circumstances, it was difficult to understand by what means the Complainant expected DFSM to ensure that premiums were paid as they fell due, as DFSM had no contractual relationship with the insurer or the insured and, therefore, was not lawfully entitled to such information.

- In conclusion, the Directors of DFSM had previously dismissed claims for compensation made by the Complainant for the reasons mentioned. It noted that no further fresh evidence has since been adduced by the Complainant to support his contentions and consequently, the Directors' position remains (un)altered for the reasons stated.

  DFSM is also of the view that in this case, Brownlee-Jones (of *Holborn Assets*) who classifies himself as 'Professional Adviser' in respect of his relationship to the Complainant, referred the Complainant to *St James International* in the first instance to provide independent advice to the High-Net-Worth Investor and to direct the Trustees to make the investment.

  It submitted that Brownlee-Jones's (and/or *Holborn Assets*) motivation for this transaction was possibly the large amounts of commissions paid by way of introducers fees in respect of the investment advice provided to the Complainant by *St James International*.

Following the failure of the PWL Loan Note investment recommended by *St James International*, Brownlee-Jones has now persuaded the Complainant to seek redress against DFSM as trustee and administrator of the pension plan.

DFSM reiterated that given the effluxion of time between the date on which the Complainant was first advised in respect of the failure of his investment in PWL and the time he initially chose to write to DFSM seeking compensation (that is, over 3 years), it is also reasonable for the Directors to assume that attempts made by the Complainant to seek redress from *St James International* failed and it was for this reason that he has now directed his attention towards DFSM.

The Service Provider submitted that whilst the position in which the Complainant finds himself in is unfortunate, it considers the Complaint against it as being unjustified as it required knowledge of events which can only be determined with the benefit of hindsight.

Additionally, it submitted that the Complaint is also time barred by statute and, therefore, falls outside the jurisdiction of the Arbiter.

The Service Provider stated that the Complainant is moreover seeking more in compensation than he stood to gain had the investment performed throughout its tenure, matured and returned his capital in full. It accordingly claimed it would be unjust if the Complainant was successful in his claim.

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

Further Considers:

Preliminary

Plea that the Complaint is time barred

The Arbiter notes that in the concluding part of its reply, the Service Provider made a general remark that *'the complaint is also time barred by statute and, therefore, it falls outside of the jurisdiction of the Arbiter'*.[3]

[3] P. 21

The Service Provider did not however indicate the provision of the law on which basis it considered the Complaint as being time barred. Nor did the Service Provider explain the basis of its assertion and substantiate such a material claim. Other than the said general statement in its reply, the Service Provider did not even mention this aspect any further throughout its various subsequent submissions made during the case.

Given the circumstances and, also, in light that the Arbiter is *'… not entitled to raise the question of prescription of his own motion'* in terms of Article 19(3)(e) of the Arbiter for Financial Services Act, Chapter 555 of the Laws of Malta, the Arbiter cannot consider this matter any further.

The Arbiter is accordingly dismissing the said plea and shall proceed to consider the merits of the case next.

The Merits of the Case

The Arbiter is considering the Complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555[4] which stipulates that he should deal with complaints in '*an economical and expeditious manner'.*

The Complainant – Background and Classification

As described during the hearing of 8 February 2022, the Complainant is a *'GP working in a practice in South Kensington, London'*.[5]

In its reply, and throughout the proceedings of the case,[6] the Service Provider asserted that the Complainant was a *'sophisticated investor'* and had *'... made the initial investment direction on the basis that he was a sophisticated investor'*.[7]

The Complainant did not dispute this assertion but only submitted the following in his final submissions:

[4] Art. 19(3)(d)
[5] P. 23
[6] Such as in the sworn declaration by the director of Dominion - P. 31
[7] P. 35

'The issue of my "sophisticated investor" status is not relevant to a Malta trustee investment especially when the trustees had to perform extensive due diligence prior to agreeing to invest. They did not for example ask for an indemnity to be signed, presumably because they stood by their due diligence assessment'.[8]

The Complainant was indeed aware that he had signed declarations to the effect that he was a sophisticated investor. In his Complainant, he referred to such declarations himself, stating that:

'Other than sophisticated investor declarations for our UK resident status which was only generic to the broad type of investment, the trustees did not require any member indemnity declarations …'.[9]

The Complainant's classification as a sophisticated investor, which was left undisputed, will nevertheless be kept into its relevant context in this decision.

The disputed investment and its status

The Privilege Wealth One Limited Partnership (LP) Loan Note is the disputed investment. The said investment, which is an underlying investment of the Complainant's Retirement Scheme, amounted to GBP200,000 and was undertaken in 2015 as per the details provided by the Complainant in his Complaint.

Problems with the said investment initially emerged in February 2018, as per the communication from the General Partner of the PWL LP dated 6 February 2018 addressed to *'All Loan Note Holders'*.[10]

The issuer of the PWL Loan Note eventually went into liquidation.[11]

As described by the Service Provider in its reply, due to various factors including the *'financial irregularities'* within the PWL group, '*loan note holders in PWL … have most likely lost all of their investment*'.[12]

[8] P. 109
[9] P. 4
[10] P. 37 - 42
[11] P. 71
[12] P. 19

Nature of the Complaint

As outlined above, **the Complaint involves two main key allegations** that need to be considered:

a) **The claim that the Service Provider failed to ensure the Complainant's financial adviser was properly regulated**

b) **The claim that the Service Provider failed to properly assess and perform due diligence, initially and on ongoing basis, in respect of the PWL Loan Note with regards to the insurance element of this product.**

In his Complaint to the Arbiter, the Complainant particularly focused on the claim outlined in paragraph (b) above.

It is indeed noted that, during the hearing of 8 February 2022, the Complainant testified that:

*'**The principal reason for me going for this** [the PWL investment], … **was the insurance that protected 95% of the capital**.*

*So, **my theme is around the due diligence to do with the insurance** which, I think, Dominion did in great detail at the very beginning and was happy that the insurance policy was appropriate and had evidence that it was in place.*

*My concern is, given the loss of the whole fund, that **surely the due diligence should have proceeded beyond the initiation of this bond**, recognising, as [the Service Provider] has said, that it is a dead, three-year commitment, so, therefore, what's to monitor? But **my argument is that the Court deciding on this product, the key component part of this financial product, is the insurance**.*

*So, at the very least, I think **I had a right to expect that Dominion would notice that, know that and feel the same about that and make sure as best they could that the premiums were keeping up to date so that if something went pear-shaped, as it has now, there would be this 95% claim on the money that I have invested**.*

That is what I really want to say'. [13]

[13] P. 23-24 – Emphasis added by the Arbiter

In his final submissions, the Complainant again questioned why, as trustee, the Service Provider did not ensure *'the continued validity'* of the insurance policy of the PWL investment.[14]

Furthermore, with reference to the Service Provider's submission that it could have done nothing more to ensure that the insurance coverage was in place, he *inter alia* pointed out that:

'Clearly, an inability to monitor the policy and its terms/validity, is a fatal flaw to an investment that has, an integral part of it, a Capital Protection Insurance. Nevertheless, this was not reported outside of the Dominion trustee.

Even this therefore we can only assume they knew at outset. ***If they did not know they should have and if they did know, they should have raised it with both the adviser and ideally the introducer.***

They did not do this.

My complaint is not that the investment failed but that the protection insurance was not fit for purpose.

Neither am I contending that any insurance claim would have been guaranteed to have been successful, the overreaching point is that, had this flaw in the investment package been recognised at the time in the due diligence process, it would not have been introduced to me in the first place …'.[15]

Accordingly, apart from the allegation relating to the regulatory status of the investment advisor, the main basis of the Complaint is considered to involve the alleged deficiencies of the Service Provider in the due diligence of the PWL investment strictly with respect to the insurance element of the said investment.

The Arbiter will accordingly specifically consider these particular aspects as raised by the Complainant.

[14] P. 108
[15] P. 109 - Emphasis made by the Complainant

Final observations, considerations and conclusions

(a) *Claim relating to the regulatory status of the financial adviser*

The appointed investment advisor was '*St James International*'.[16]

The Complainant himself explained that he was advised *'by David Sime from St James International'*.[17, 18]

David Sime was authorised by the Complainant *'to make investment directions directly to RL360 ...'*.[19]

This emerges from the letter dated *'01/10/2014'* signed by the Complainant and addressed to David Sime of *'St. James's International'*, indicated as being based in *'Regus Lesnoy per 4, Moscow, 125047, Russian Federation'*.[20]

In his Complaint, the Complainant submitted that DFSM *'failed to properly check the lack of regulation of the investment advisers St James International'*, [21] as he learned that St James International *'had no PI cover and was based in Moscow'*.[22]

The Arbiter notes that it has not been claimed, nor emerged, that the Complainant was provided with incorrect or false information - which the trustee could possibly have knowledge of or could have queried or challenged and warned the Complainant about - regarding the regulatory status of St James International.

The letterheads presented during the proceedings of the case in respect of St James International do not indicate any regulatory status for such party, and it has not emerged in the first place whether the Complainant himself considered St James International as being regulated at the time of its appointment.

[16] P. 91 & 102-104
[17] P. 7
[18] David Sime held the post of Manager of St James international as reflected in the letters signed by St James International dated 23 October 2014 that were presented during the proceedings of the case - P. 102 & 103
[19] The *'RL360'* is a policy underlying the Retirement Scheme. The disputed investment, the PWL Loan Note, was purportedly in turn held within the RL360 policy.
[20] P. 104
[21] P. 4
[22] *Ibid.*

The Complainant was furthermore clearly aware that his advisor was based in Moscow as per his signed letter of 1 October 2014 which was addressed to St James International in Moscow as outlined above.[23]

In addition, the Arbiter also takes cognisance of the regulatory requirements specifically applicable with respect to the appointment of advisors at the time when the disputed advice was provided. No evident breaches of the rules applicable at the time with respect to the appointment of investment advisors, has emerged either in the particular circumstances of this case.[24]

The Arbiter notes that the Complainant considered DFSM to have failed to also properly check that St James International had professional indemnity insurance (PII) cover.

It has however not been proven, nor emerged, during this case that DFSM, in its capacity of trustee and Retirement Scheme Administrator, was obliged - as part of its due diligence checks in respect of the advisor appointed by the member - to verify and/or demand such PII cover from such party.

This also keeping in mind that PII cover may, at times, not necessarily be a mandatory regulatory requirement applicable even in the case of regulated investment advisors.[25]

The Arbiter accordingly considers that no adequate and sufficient evidence emerged in this case to justify the Complainant's claim that DFSM failed to ensure the investment advisor was properly regulated.

The Arbiter is therefore rejecting such claim.

(b) *Claim relating to the Service Provider's failures with respect to the insurance element of the PWL investment*

[23] P. 104

[24] This is with reference to the requirements relating to the appointment of advisors as stipulated in the regulatory framework applicable under the Special Funds (Regulation) Act, 2002, regime and the eventual implementation of Part B.9 titled *'Supplementary Conditions in the case of entirely Member Directed Schemes'* of the Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, where the latter specifically provided for the appointment of regulated investment advisors for member directed schemes. The latter requirements became effective upon the revised rules issued in 2018 (as outlined in Case OAFS 077/2020).

[25] https://www.mfsa.mt/publication/professional-indemnity-insurance-for-investment-services-licence-holders-3/

The Complainant claimed that the Service Provider failed to ensure that the insurance premium covering 95% of the investment in the event of failure was kept up to date.

He explained that DFSM undertook due diligence on the PWL Loan Note at the beginning of the investment and '*was happy that the insurance policy was appropriate'* and was in place, but then failed to verify on an ongoing basis that PWL kept the premiums in relation to the insurance policy related to the PWL Loan Note up to date.[26]

Another aspect that was raised by the Complainant was that if, as alleged by the Service Provider, the trustee could not monitor the insurance element of the PWL Loan Note on an ongoing basis, the Complainant submitted that the trustee should, in such instance, have informed him accordingly from the start as he *'would not have invested had this been known to [him]'*.[27]

The Complainant indeed emphasised the importance of the *'Capital Protection Insurance'* element of the PWL Loan Note and highlighted that this was *'the principal reason'* for him going for this product.[28, 29]

The Arbiter notes that that the insurance premiums due in respect of said capital protection insurance policy were not paid and kept up to date by Privilege Wealth.

As indicated in the communication from the General Partners of Privilege Wealth One Limited Partnership dated 6 February 2018, *'… no claims are possible under the capital shortfall insurance policy because not all premiums due for the year Dec 2016 to Nov 2017 were paid*'.[30]

The matters surrounding the difficulties with the insurance policy element of the PWL Loan Note were also the subject of investigations by the administrator of Privilege Wealth plc as outlined in the *Joint Administrators Progress Report* dated 20 August 2018.[31]

[26] P. 24
[27] P. 109
[28] P. 107
[29] P. 23
[30] P. 41
[31] P. 60

Having considered the said aspects, the Arbiter considers that in the particular circumstances of this case, there are no sufficient justifiable grounds on which he can accept the Complainant's claim for compensation in respect of the alleged failures of the Service Provider.

Such decision is based on various factors including the following:

(i) *Lack of evidence of breach of applicable legal provisions, rules and/or terms and conditions of the Scheme and services provided thereto*

Throughout the proceedings of this case, the alleged failures of the Service Provider with respect to the insurance element of the PWL Loan Note have not been substantiated with reference to any specific applicable legal provisions, rules and/or terms and conditions applicable in respect of the Retirement Scheme and the services provided thereto. The claims were just based on a general reference to DFSM's duties as trustee.

It is considered that the Service Provider's duty to act as a *bonus paterfamilias* in its role of trustee did not however reasonably extend, as part of its ordinary functions, to involve the monitoring of the internal operations of the disputed investment.

Neither has it been proven nor emerged that such specific monitoring of the insurance element of the PWL Loan Note was explicitly agreed to as part of its terms and conditions of appointment.

Whilst the Arbiter recognises that in its role of trustee and Retirement Scheme Administrator of the Scheme, the Service Provider had *inter alia* a key monitoring function with respect to the underlying investments,[32] such function however is not considered to stretch to the level demanded or expected by the Complainant.

In terms of the applicable legislative and regulatory framework applicable for personal retirement schemes,[33] the Service Provider was

[32] In terms of the applicable regulatory framework as highlighted in various of his previous decisions involving personal retirement schemes such as, for example, in Case No. 028/2018, Case No. 096/2018 and Case ASF 026/2021.

[33] The Special Funds (Regulation) Act, 2002 and directives issued thereunder as well as the Retirement Pensions Act and the pension rules issued thereunder.

reasonably required to undertake monitoring and oversight at the level of the Scheme and the underlying life policy (the RL360), and in the process consider the permissibility or otherwise of the investments held within the life policy with reference to the conditions of the Scheme and the applicable rules specified in the regulatory framework on investments.

It does not emerge that the Service Provider was obliged, in terms of the regulatory framework, to in turn also have another layer of monitoring or oversight function of the actual internal operations of the underlying disputed investment product as is, in essence, being argued by the Complainant.

The Service Provider was not a party within the governance or management structures of the disputed product.

DFSM did not have any formal role as to the monitoring of the actual internal operations of the PWL Loan Note or other parties within the Privilege Wealth group, which internal operations were ultimately the responsibility of the management and in-house governance structures within Privilege Wealth.

(ii) *Lack of evidence of any formal arrangement to monitor the internal operations of the PWL Loan Note*

As outlined above, it has not been proven nor emerged that there was any formal arrangement requiring the Service Provider to verify or monitor the payment of the premiums by PWL in respect of the capital shortfall insurance feature within Privilege Wealth.

(iii) *Lack of evidence that the trustee was informed that the capital protection insurance element was the Complainant's principal reason for the investment into the PWL Loan Note*

Whilst the Complainant has claimed that the *'capital protection insurance'* element was the principal reason for choosing the disputed investment, it has not emerged either that this was in some way communicated to the trustee prior to the initial investment.

Neither has it emerged that there were specific discussions with the trustee regarding the insurance element of such product and the importance being attributed to such feature by the Complainant.

The letter dated 23 October 2014, sent by St James International to Dominion with respect to *inter alia* the rationale for the PWL Loan Note investment, indeed does not include any emphasis or reference to the insurance element of the PWL Loan Note.[34]

(iv) *Insufficient details about the basis and specifics of the 'capital protection insurance'*

In his final submissions, the Complainant reiterated that:

'My decision to invest in this financial product, as opposed to similar higher risk schemes, was based on the associated Capital Protection Insurance which I was advised guaranteed that I would be entitled to 95% of my investment should the investment fail'.[35]

It has not however been substantiated that the PWL Loan Note was a capital guaranteed product in the first place. Nor any official documents were produced evidencing or implying such.

No official documentation detailing the terms of the said *'Capital Protection Insurance'* element was either produced during the proceedings of this case to substantiate the Complainant's claim.

The basis of the *'guarantee'* mentioned by the Complainant is therefore unclear given that the specific terms of the alleged insurance were not produced and adequately substantiated.

It has also not emerged that the Service Provider itself provided any such guarantee or was aware at the time of the investment that the Complainant was under an impression that such guarantee applied for his investment.

[34] P. 102
[35] P. 107

(c) *Other matters*

- Claim that the Service Provider failed to discover the problematic history of high-ranking staff

The Complainant claimed that the Service Provider *'failed to discover that high ranking staff administering the investment had previous links to failed investments and was wanted by the police'*.[36]

Whilst the Complainant did not elaborate nor raised this aspect any further, the Arbiter notes that the communication from the General Partner of the Privilege Wealth One Limited Partnership dated 6 February 2018, made reference to an individual who was *'on the run from European police due to an international arrest warrant'*.[37]

The said letter explained that the said individual was *'a call centre manager ... of Privilege Call Centres Inc'*, and that *'no one within PWPLC ... knew that'* the individual in question was using a different name, was on the run from police, *'was in Panama on a forged passport under another name ...'* and *'had past debts'* and *'people were looking for him'*. [38]

On the basis that:

(i) the only individual that emerged that was mentioned as being wanted by police is the one indicated in the said letter dated February 2018, which reveals that the person in question was only a call centre manager and occupied such role with one of the PWL group companies and thus not directly with the issuer (Privilege Wealth One Limited Partnership) of the disputed investment; and

(ii) not even PWPLC (a major debtor to Privilege Wealth One Limited Partnership) alleged it knew about the troubled history of the said individual as indicated in the said letter of February 2018,

[36] P. 4
[37] P. 39
[38] *Ibid.*

it is unclear how DFSM, as trustee, could have reasonably identified the problematic history of the said individual from its standard due diligence on the investment.

The Arbiter does not consider that the Complainant's claim about DFSM failing to discover the troubled history of the high-ranking staff can, in the circumstances, be accepted and is therefore dismissing this claim.

- *Claim that DFSM failed to ensure the underlying investments that were listed to be made were actually undertaken by Privilege Wealth*

No indication was provided of the listed investments that were meant to be made and no evidence has either been provided or emerged to substantiate the Complainant's claim on this matter.

As outlined above, the trustee was furthermore not obliged, in terms of its ordinary duties as trustee and RSA of the Scheme, to itself monitor the internal investments being made by the issuer of the PWL Loan Note.

The Arbiter accordingly considers that there is no reasonable and sufficient basis on which such claim can be accepted either.

Decision

In the particular circumstances of this case, and for the reasons amply mentioned, the Arbiter is not upholding the Complaint.

Since the Arbiter rejected the preliminary plea raised by the Service Provider, and due to the novelty of this case, each party is to bear its costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services