

Before the Arbiter for Financial Services

Case ASF 010/2022

BL ('the Complainant')

vs

STM Malta Pension Services Limited

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

Sitting of 10 August 2023

The Arbiter,

Having seen the **Complaint** relating to the STM Harbour Retirement Scheme ('the Scheme'),¹ this being a personal retirement scheme licensed by the Malta Financial Services Authority ('MFSA'), established in the form of a trust and administered by STM Malta Pension Services Limited ('STM Malta' or 'the Service Provider'), as its current Trustee and Retirement Scheme Administrator.

The Complaint, in essence, relates to the claim that STM Malta, in its capacity of Trustee and Retirement Scheme Administrator ('RSA') of the Scheme, failed to operate in line with the applicable standards and regulatory obligations by allowing unsuitable high-risk and illiquid investments which were not reflective of the Complainant's true risk tolerance. In this regard, it was claimed that the Service Provider: (a) failed to undertake due diligence on the investments and allowed such investments despite their unsuitability (b) failed to conduct its business with due skill and care (c) failed to assess the Complainant's investment

¹ Page (P.) 1 - 37

knowledge, attitude to risk and personal circumstances (d) failed to pay regard to his best interests and treat him fairly.²

The Complaint

Through his legal advisor, the Complainant explained that his pensions with *The Royal Bank of Scotland Group Pension Fund* and *Abbey Life* were, on 2 June 2016 and 18 August 2016, valued in the sum of GBP 46,833.79 and GBP 16,119.28, in total amounting to GBP 62,953.07, when they were transferred to the Retirement Scheme.

His funds within the Retirement Scheme were subsequently invested into various investments which have now failed with the Complainant claiming that he lost the money invested.

It was claimed that STM Malta:

- a) Failed to meet its regulatory obligations and to conduct its business with due skill and care;
- b) Failed to assess the Complainant's investment knowledge and attitude to risk. The Complainant submitted that he had modest income and no real assets other than the family home;
- c) Undertook no adequate due diligence as otherwise, STM Malta would not have allowed the transfer of funds into the investments;
- d) Failed to pay regard to the Complainant's best interests and treat him fairly. It was noted that the Complainant is neither an experienced investor nor a high-net-worth investor. STM Malta should have realised the investments were high risk and should have refused to allow them or, at least, obtain appropriate clarification before proceeding.

It was claimed that there was no evidence that this was carried out with this resulting in the loss of his pension.

² Page (P.) 4

Reference was also made to the formal letter of complaint sent to the Service Provider.³ In the said letter, it was additionally submitted that:

- If due diligence was undertaken by STM Malta, then the Service Provider failed to act on it with due skill and care and continued to allow the investments to take place, despite their total unsuitability;
- STM Malta knew there was a significant risk that the investment would be illiquid and should have also taken into consideration what was fair, reasonable and good industry practice;
- STM Malta failed to act according to the standards expected of a regulated SIPP operator;
- The investments did not match the Complainant's true risk tolerance and the Service Provider failed to assess his personal circumstances;
- The Complainant relied on STM Malta's professional status when taking advice on the investments and he had placed his trust into STM Malta that his pension funds would be reasonably protected.

Remedy requested

The Complainant requested STM Malta to pay GBP 62,953.07 with interest at 8% since 2 June 2016 or the amount that the sum of GBP 62,953.07 would have been worth had it not been transferred whichever is greater.⁴

The Complainant also requested compensation for the stress and aggravation in the sum of GBP 1,000 and professional fees incurred with bringing this Complaint.⁵

³ P. 8

⁴ P. 4

⁵ *Ibid.*

In its reply, STM Malta essentially submitted the following:⁶

1. That preliminary, the Complaint is unfounded in fact and at law and accordingly should be rejected with costs, for the reasons outlined in its response.

Its reply was divided into four parts (Parts A to D) as follows:

Part A - Preliminary pleas:

- a. *The Complaint is filed too early as no material loss has been sustained*
 - b. *The Service Provider is not suited to reply to this Complaint.*
2. That preliminary, the Complaint has been filed too early as the Complainant has not suffered any material loss and the investment complained of is not a failed investment as further explained in part D of its response.
3. That preliminary, STM Malta is not suited as a defendant and cannot reply to the Complaint as the retirement scheme administrator and/or trustee against whom the Complainant seems to complain against is *Harbour Pensions Limited* ('Harbour Pensions') and not STM Malta. This can be evidenced from the application form signed by the Complainant and Harbour Pensions (as per 'Doc STM1' attached to its reply).⁷
4. That in his Complaint, the Complainant states that his pension '*with the Royal Bank of Scotland Group Pension and Abbey Life were transferred to STM Malta Pension Services Limited*' in 2016.⁸ This is factually incorrect as the transfer of funds was made to Harbour Pensions (as per 'Doc STM1' attached to its reply), as well as the statement submitted with the Complaint.⁹

It noted that the Complainant states that he invested GBP 62,593.07 (in total) which he has allegedly lost. STM Malta submitted that the Complainant, however, and in bad faith, fails to mention that between the year 2020 and 11 of February 2022, he has withdrawn a total of

⁶ P. 43 - 46

⁷ P. 48

⁸ P. 43

⁹ P. 14

GBP 31,109.24 from the amount invested. STM Malta submitted that his statement was, therefore, far from true.

5. That, on 31 August 2018, STM Malta substituted Harbour Pensions ('the former trustees), as pension scheme administrators and trustees who had previously administered the *Harbour Pension Scheme*.

It noted that, by virtue of Article 30(3) of the Trust and Trustees Act (Chapter 331 of the Laws of Malta), a '*trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person*'.

STM Malta submitted that, therefore, it is only liable for losses properly attributable to its fault and since the Complaint is based on the choice of investment made by the Complainant in 2016 then, STM Malta is not the proper defendant, and it is the former trustee who should respond to the allegations on breach of trust.

6. That, in addition, STM Malta makes reference to Article 1124D(g) of the Civil Code which further amplifies that where a fiduciary (in this case Harbour Pensions) ceases to act as fiduciary and is '*therefore replaced by another fiduciary*', the '*fiduciary who ceases to act as fiduciary shall not be released of his obligations towards the beneficiary*' for '*any breaches of fiduciary obligations when he was acting as fiduciary*'. STM Malta submitted that this, therefore, substantiates its argument that it is placed in the impossibility of defending itself on the allegations made prior to its takeover of the *Harbour Pension Scheme*.

Part B – Due skill and care

7. It noted that the Complainant alleges that '*STM failed to meet their regulatory obligations. They failed to conduct their business with due skill and care. They also failed to assess our client's investment knowledge to risk*'.¹⁰

STM Malta submitted that the reasons for such allegations are not stated in the Complaint and are unfounded both at law and at fact. The Service

¹⁰ P. 44

Provider denied such allegations and noted that it has always acted in the best interest of its members according to law.

8. Without prejudice to the preliminary pleas referred to in Part A of its reply, STM Malta further noted that, on its takeover as trustee from Harbour Pensions, it had no obligation to consider whether the advice given by the Complainant's investment adviser in 2016 was suitable or otherwise.
9. That, nonetheless, STM Malta notes that the Complainant filed a suitability report¹¹ prepared by *Felicitas Management Group Investment Services*. This document was signed by the Complainant and refers to the Harbour Scheme. It also details the fact that the Complainant himself agreed to the advice being given to him, in a language which he understands, as he signed the report together with a subsequent letter dated 15 April 2016.¹² The report specifically explains the content of *The Resort Group Investment* ('TRG') as chosen by the Complainant himself on the advice/recommendation of his investment adviser. The Complainant had also signed a declaration to Harbour Pensions in relation to his understanding of the risks in investing in TRG.

STM Malta further submitted that, on taking a look back at the Complainant's file, it was only possible for STM Malta to conclude that the former trustee did take account of the Complainant's risk profile when making the investments in the manner that it did. The Complainant was a customer adviser with the Royal Scottish Bank, had other sources of wealth and understood the documents being presented to him for signing.

10. That the role of a pension administrator is limited to administering the scheme in a manner so as to ensure that it meets the criteria of the said member pursuant to the investment advice received by the member from his chosen investment adviser. It submitted that STM Malta was not, and is not, in a position to provide investment advice and was not obliged to review the advice given to the Complainant in 2016 where it was clear that the Complainant wished to invest in the TRG investment. In reply to the Complainant's statement that '*STM should have realised the investments*

¹¹ P. 22

¹² P. 36

were high risk and refused to allow them, or at least obtain appropriate clarification before proceeding', the Service Provider noted that it was not able to refuse the investment as it was not the trustee at the time.

11. That STM Malta always acted and continues to act in the interest of its members, including the Complainant, by continuously seeking for updates on the investments and actively ensuring that any determination made is communicated to the member within a reasonable time.
12. It submitted that the allegations made by the Complainant are, therefore, untrue, unfounded and unsubstantiated both in law and in fact.

Part C - Lack of Due Diligence

13. Reference was made to the Complainant's statement that *'no adequate due diligence was undertaken, otherwise STM would not have allowed the transfer of funds into the investments'*.¹³

It submitted that, once again, this allegation is unfounded both at law and in fact and that, although it was not STM Malta who allowed the investment but Harbour Pensions, STM Malta shall prove throughout the proceedings, that the former trustee and STM Malta had carried out its due diligence according to the requirements at law and of the Scheme.

Part D - The Resort Group is not a failed investment

14. STM Malta noted that the Complainant alleges that his pension scheme made investments in various investments which have *'now failed and our client has lost the money invested'*.¹⁴ It submitted that this claim is once again without foundation, unsubstantiated and incorrect.
15. The Service Provider explained that, as the Complainant is aware through correspondence sent by STM Malta, the investment was impacted due to Covid-19 (which was not foreseeable or predictable), since it is tied to luxury hotels in Cape Verde and therefore bondholders (including the Complainant), were informed that the early redemption (the bonds had a 10-year maturity) is no longer available.

¹³ P. 45

¹⁴ *Ibid.*

It further noted that, as the Complainant is also aware, for reasons unknown to it, STM Malta, was not notified of the bondholder's meeting. STM Malta has forwarded its grievances to the administrator of the TRG bonds and it is its intention to try and persuade them to reconsider their position and satisfy the early redemption possibility, especially for smaller/non-institutional investors such as the Complainant.

It further noted that this was still being discussed and STM Malta is exploring all possible avenues to find the best solution for the members, including the Complainant, who are looking into liquidating their investment.

16. STM Malta submitted that accordingly, to date, the Complainant has not suffered any material loss and therefore the claim for GBP 62,953.07 (initial capital) is not real or due. In addition, it was important to also reiterate that the Complainant has withdrawn a total of GBP 31,109.24 and in assessing the extent of the alleged loss, the Complainant failed to consider the income that has been generated by the investment, which income has been disclosed in the statements attached to the Complaint.¹⁵
17. That, with regards to the interest being claimed by the Complainant, STM Malta notes that interest should not be due (as the Complainant is meant to be placed in the same financial status prior to the investment and not in a better position - *status quo ante*). It submitted that if the Arbiter thinks that it is fair, reasonable and equitable for the Complainant to be paid interest on the sum invested, then, the interest ought to be that found in bank deposits (1% per annum) or legal interest at 8% from the date of the Arbiter's final decision.
18. That the Arbiter should also not accede to the request for moral damages as this request has no legal basis.
19. For the reasons mentioned, it deemed the Complaint as being unfounded in fact and at law, and submitted that it should be rejected by the Arbiter with costs against the Complainant.

¹⁵ P. 14 & 15

Preliminary Pleas

The submission that the Complaint was filed too early as no material loss has been sustained

The Arbiter notes that in its reply, STM Malta claimed that the Complaint was premature as *'the Complainant has not suffered any material loss'* and that the disputed investment *'is not a failed investment'*.¹⁶

This is a matter which rather relates to the merits of the case. The Arbiter shall consider such aspect accordingly further on in this decision as part of the considerations involving the merits of this case.

The submission that STM Malta is not suited to reply to this Complaint and is accordingly not the correct defendant

In its reply, the Service Provider submitted that it:

'... is non-suited as a defendant and cannot reply to the Complaint as the retirement scheme administrator and/or trustee against whom the Complainant seems to complain against is Harbour Pensions Limited and not the Respondent'.¹⁷

STM Malta further explained that it had substituted *Harbour Pensions Limited* ('Harbour Pensions'), on 31 August 2018 as RSA and trustee of the Scheme. It referred to Article 30(3) of the Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') relating to the liability for a breach of trust committed by another person, and stated that STM Malta was:

'only liable for losses properly attributable to [its] fault and since the Complaint is based on the choice of investment made by the Complainant in 2016 then STM Malta is not the proper defendant, and it is the former trustees who should respond to the allegations on breach of trust'.¹⁸

In its reply, STM Malta also referred to Article 1124D(g) of the Civil Code (relating to the retirement of a fiduciary and appointment of his successor) to further substantiate its argument.

¹⁶ P. 43

¹⁷ *Ibid.*

¹⁸ P. 44

(i) Context

The Arbiter observes that Harbour Pensions was the initial Trustee and RSA in respect of the Complainant's Retirement Scheme.

Harbour Pensions was licensed by the MFSA as a Retirement Scheme Administrator until it voluntarily surrendered its licence with effect from 5 October 2018.¹⁹ Harbour Pensions is no longer in operation and was subsequently dissolved and struck off from the records held with the Malta Business Registry with effect from 31 January 2020.²⁰

Before Harbour Pensions ceased to exist (just one year and four months following surrender of its licence), STM Malta was the entity that took over as the Trustee and RSA of the Scheme. The substitution of the trustees came about as a result of an acquisition of business. The said acquisition also emerges from a public notice featuring on the STM Group plc's website which notice *inter alia* states that:

*'STM Malta Trust and Company Management Ltd signed a Sale and Purchase Agreement ("the Acquisition") with the shareholders of Harbour Pensions Limited ("Harbour") to acquire the entire issued share capital of the company and its related pension trust schemes'.*²¹

(ii) Provisions of the TTA and other pertinent aspects

At the outset, the Arbiter makes reference to Article 21 of the TTA relating to 'Duties of trustees' as well as to Article 30 of the TTA relating to 'Liability for breach of trust', which are considered particularly relevant to the aspect raised.

Article 21(1) and (2)(a) of the TTA, in particular, provide that:

'(1) Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias, act in utmost good faith and avoid any conflict of interest'.

¹⁹ <https://www.mfsa.mt/financial-services-register/>

²⁰ <https://registry.mbr.mt/ROC/index.jsp#/ROC/companiesReport.do?action=companyDetails&fKey=b8f98cfe-2e72-47bc-bb28-d5c36dd6f56c>

²¹ <https://info.stmgrouplc.com/acquisition-malta-based-harbour-pensions-limited/>

*'(2)(a) Subject to the provisions of this Act, **trustees shall carry out and administer the trust according to its terms; and subject as aforesaid, the trustees shall ensure that the trust property is vested in them or is under their control and shall, so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage ...**'*²²

With respect to Article 30 of the TTA, the Arbiter notes that in its reply, the Service Provider conveniently quoted only part of Article 30(3) where it highlighted in bold just part of the said article, namely, that *'a trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person'*.

The Arbiter however notes that Article 30(3) of the TTA further provides for an important aspect that was not quoted by the Service Provider. Article 30(3) of the TTA, indeed, actually provides the following:

*'(3) A trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person. **It shall, however, be the duty of the trustee on becoming aware of it to take all reasonable steps to have such breach remedied**'*²³

Moreover, the Arbiter also notes another relevant article, Article 30(8) of the TTA, which provides that:

*'(8) The court may relieve the trustee either wholly or in part from liability for a breach of trust **where it is satisfied that the trustee has acted honestly and reasonably and ought in fairness to be excused in the circumstances***²⁴

As specified by Article 19(3)(b) of Chapter 555 of the Laws of Malta, the Arbiter must treat each case on its particular circumstances. In this case, the Arbiter considers that a **key aspect that needs to be considered** is whether STM Malta - as the new trustee which replaced the original trustee, Harbour Pensions - **has**

²² Emphasis added by the Arbiter

²³ Emphasis added by the Arbiter

²⁴ Emphasis added by the Arbiter

acted properly, adequately, and reasonably once it took on its functions as Trustee and Retirement Scheme Administrator ('RSA') of the Scheme.

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

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

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

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

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

The first principle to be considered is that trustees are duty-bound to administer the retirement scheme and its assets to a high standard of diligence and accountability.²⁵

²⁵ The trustee has to deal with property under trust 'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'. As stated, 'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust' - Editor Max Ganado, 'An Introduction to Maltese Financial Services Law', Allied Publications 2009, p. 174 & 178.

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

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

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

Indisputably, the new trustee is ultimately responsible for its own actions and/or inactions during its own term as trustee.

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

This is given that the disputed investments still existed and remained within the Scheme's structure at the time of the new trustee. STM Malta indeed permitted, accepted and/or allowed, without question, the disputed investments during its tenure - the main key investments into *The Resort Group* ('the TRG investment'), which have a material bearing on the Complainant's pension, still existed and formed part of the Complainant's underlying investment portfolio at the time of STM Malta's appointment.

The Arbiter notes that it has not emerged that STM Malta itself made any reservations or expressed any concerns on the TRG investments when it took over as the new trustee. Nor were any such concerns raised thereafter.

The mere suggestion by the Service Provider of outrightly dismissing any possible liability by suggesting that it is not the correct defendant as it was not the original trustee at the time the investments were originally made, is

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

The Service Provider had also certain duties as RSA which will be also dealt with as part of the decision involving the merits of the case.

The Arbiter moreover notes that the Service Provider ultimately defended the original trustee's action indicating, in essence, in its submissions that its predecessor had acted properly.

In its reply, STM Malta itself submitted that:

'... On taking a look back at the Complainant's file, it was only possible for STM Malta to conclude that the former trustee did take account of the Complainant's risk profile when making the investments in the manner that it did ...'²⁶

*'... it shall be amply proven throughout the proceedings, that the former trustee and STM Malta had carried out its due diligence according to its requirements at law and the scheme'.*²⁷

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

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

Other Preliminary – Claim brought before the FSCS

During the proceedings of the case, the Service Provider filed an application where it *inter alia* submitted that the Complainant

*'has filed a claim before the Financial Services Compensation Scheme in the United Kingdom for losses sustained and for the same reasons for which this case has been filed'.*²⁸

²⁶ P. 45 -Emphasis added by the Arbiter

²⁷ *Ibid.*

²⁸ P. 151

In its application, STM Malta alleged that *'the claim seems to still be on-going though FSCS are reluctant to provide them with customer-specific information'*.²⁹

STM Malta requested the Arbiter *'to take cognisance'* of such matter and also asked:

'that the Arbiter adjourns the case sine die until the Arbiter receives the necessary communication from the Complainant with specific authorisation from the FSCS that the Complainant may continue proceedings'.³⁰

Following a decree of 22 June 2022, where the Complainant was notified of the said application and asked to respond to it, the Complainant clarified that the said claim was no longer being investigated by the Financial Services Compensation Scheme ('FSCS') and was actually rejected. Evidence was provided of such.³¹

In this regard, the Complainant presented a copy of a letter dated 2 November 2021, issued by the FSCS which outlined that the FSCS had completed its *'investigation of the claim against St Martin's Partners LLP formerly CUOX LLP'* and that the FSCS was *'unable to pay compensation'*.³²

By way of a decree, the Arbiter noted that the claim with FSCS was rejected and decided that he *'cannot accept the application filed by the Service Provider to adjourn the case sine die'*. In the said decree it was decided *'that the case continues as provided for during the sitting of the 31 May 2022'*,³³ where the parties were provided with the opportunity to file their final note of submissions with the case left for a decision.³⁴

Having considered the particular circumstances of the case, the Arbiter furthermore determines that he has the competence to consider this Complaint and exercise his powers under the Act - as he deems that there are no issues, with reference to Article 21(2)(a) of the Act, that question his competence in respect of this Complaint. This is *inter alia* when taking into consideration that:

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ P. 160 & 163

³² P. 162

³³ P. 166

³⁴ P. 135

- it has not emerged that the case before the FSCS was in respect of the conduct complained of in this Complaint;
- the claim before the FSCS was rejected; and
- neither it is deemed that *'the conduct complained of is or has been the subject of a lawsuit before a court or tribunal or is or has been the subject of a complaint lodged with an ADR entity in any jurisdiction'*.³⁵ This is given that the FSCS is not a court, nor tribunal and not even an ADR entity. The FSCS is rather a statutory compensation scheme that deals with particular scenarios - according to its website:

'FSCS protects customers of financial services firms that have failed. If the company you've been dealing with has gone bust and can't pay claims against it, we can step in to pay compensation'.³⁶

Having rejected the request made by the Service Provider in its application and after considering that he has the competence to deal with this case, the Arbiter shall accordingly 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.³⁷

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

The Scheme Account in respect of the Complainant

The Complainant's personal retirement scheme, in practice, involved a member-directed account, where an investment adviser was appointed to advise him on the investment decisions undertaken within the Retirement Scheme's structure.

³⁵ As stipulated under Article 21(2)(a) of Cap. 555 of the Laws of Malta.

³⁶ https://www.fscs.org.uk/about-us/?_gl=1*1wsy0th*_up*MQ..&gclid=CjwKCAjw_aemBhBLEiwAT98FMmJwQVypMSFXnRSodetBiD9xq4sABIUvfovwaiKkZQMw7ABTQudkzxoCmYIQAvD_BwE

³⁷ Cap. 555, Art. 19(3)(b)

The Retirement Scheme is operated and administered by the appointed trustee and RSA, whose specific roles and responsibilities shall be considered further in this decision.

The Complainant

The Complainant, born in 1965, of British nationality and residing in Scotland at the time, applied to become a member of the *Harbour Retirement Scheme* in 2016, as per the Application Form for Membership into the *Harbour Retirement Scheme* signed by the Complainant on 19 April 2016.³⁸

His occupation at the time of the Application Form for Membership was listed as '*Unemployed*' with his previous occupation indicated as '*Customer Adviser RSB*'.³⁹

In the Application Form for Membership, his '*Risk Profile*' was outlined as '*Medium Risk*' (out of five available risk categories of '*Lower risk*', '*Low risk*', '*Medium risk*', '*Medium enhanced risk*' and '*Enhanced risk*').

His risk profile of '*Medium Risk*' was described as follows in the said form:

'There is some risk to my capital which may go down as well as up and there is potential for growth in the long term'.⁴⁰

Investment Adviser

The Application Form for Membership indicates '*Felicitas Management Services*' ('*Felicitas*') as the appointed investment adviser.⁴¹

In the Sworn Declaration dated 20 May 2022, issued by the Managing Director Designate of STM Malta,⁴² it was explained that *Felicitas Management Limited* was regulated by the Cyprus Securities and Exchange Commission (CySEC). A copy of its previous authorisation with CySEC was presented by the Service Provider as part of its submissions.⁴³ The said authorisation was eventually withdrawn by CySEC as per its notice dated 19 May 2021.⁴⁴

³⁸ P. 74 - 87

³⁹ P. 76

⁴⁰ P. 85

⁴¹ P. 86

⁴² P. 70 - 72

⁴³ P. 90

⁴⁴ P. 94

Transactions

The Application Form for Membership indicated three transfers to be made into the Retirement Scheme. A transfer from an existing pension plan of *Abbey Life*, which had an 'Expected transfer value' of GBP 13,894.51, a transfer of 'The Royal Bank of Scotland Group Pension Fund' with an 'Expected transfer value' of GBP 45,413.57 and a transfer of the pension plan of 'Aegon' of GBP 9,257.46.⁴⁵

According to the statement of transactions produced by the Complainant (for the period 8 June 2016 till 30 November 2020), and the one produced by the Service Provider (for the period 8 June 2016 till 11 February 2022), the main transactions since membership into the Scheme include the following:^{46, 47}

- A transfer in from the *Royal Bank of Scotland* (RBS) pension of GBP 46,833.79 on 08 June 2016;
- A transfer out to 'Novia Global' (this being an investment platform selected in respect of the Scheme where certain underlying investments were held)⁴⁸ of GBP 25,563.54 on 15 June 2016;
- A transaction (investment) marked as 'Property'/'TRG CV Holding Ltd' of GBP 15,500 on 15 June 2016;
- A transfer in from the *Abbey Life* pension of GBP 16,119.28 on 23 August 2016;
- A transfer out to 'Novia Global' (the investment platform) of GBP 15,279.51 on 26 August 2016;
- A 'PCLS' (Pension commencement lump sum) payment (withdrawal) of GBP 15,737.38 on 14 February 2020;

⁴⁵ P. 81 & 82.

⁴⁶ The listed transactions exclude all the various material fees and other charges that were deducted along the years, as well as income/interest received from investments as reflected in the said statements.

⁴⁷ P. 14-15 & 98-101

⁴⁸ A general search over the internet on 'Novia Global' leads to the website of Novia-Global at <https://www.novia-global.com/>. Novia-Global is described on the said website as follows: 'Novia Global provides a platform service for Advisers, Private Banks, Trust Companies and their clients'.

- A 'Flexi Payment' (withdrawal) of GBP 9,245.17 on 23 March 2020;
- Another 'Flexi Payment' (withdrawal) of GBP 5,000 on 11 August 2020;
- An 'Inter ACC TrnFR' payment (withdrawal) of GBP 1,126.69 on 11 February 2022.⁴⁹

The said statements thus confirm:

- That a total of GBP 62,953.07 was indeed transferred into the Scheme for investment,⁵⁰ as also indicated by the Complainant in his complaint;⁵¹
- That the Complainant has actually withdrawn from the Scheme the sum of GBP 31,109.24.⁵² This, in essence, reflects the figure indicated by the Service Provider in its submissions as having been withdrawn by the Complainant from the Scheme.⁵³

The said amount withdrawn was ultimately, in essence, also confirmed by the Complainant during the hearing of 10 May 2022, during which he testified that:

*'I received a payment of £25,000, I received a payment of £5,000 and I received a payment of £1,100. That is what I received'.*⁵⁴

A difference of GBP 31,843.83 accordingly results from the original amount transferred into the Scheme and the amount in total already withdrawn by the Complainant from his Scheme.

Other Observations & Conclusion

The disputed investments

It is noted from the transaction statements provided by the Complainant and the Service Provider that, apart from the transfers made into the investment platform

⁴⁹ P. 100 & 134

⁵⁰ A transfer of GBP 46,833.79 from the *RBS pension* and a transfer of GBP 16,119.28 from the *Abbey Life pension*.

⁵¹ P. 4

⁵² A PCLS/ Flexi withdrawal of GBP 15,737.38 on 14.02.20; GBP 9,245.17 on 23.03.2020 and GBP 5,000 on 11.08.2020 as well as a transfer of GBP 1,126.29 on 11.02.2022.

⁵³ As per the Sworn Declaration of the Managing Director Designate of STM Malta - P. 71

⁵⁴ P. 60

of *Novia-Global*, (where certain investments were made and held),⁵⁵ the Complainant made a direct investment into The Resort Group (of GBP15,500 marked as '*Property*'/'*TRG CV Holding Ltd*' on 15 June 2016). This was made outside the investment platform of Novia-Global.⁵⁶

It is noted that in his Complaint, the Complainant only made a general reference to his funds being '*invested into various investments ... which have now failed*'.⁵⁷ The '*failed investments*' were not identified by name in his Complaint to the Arbiter, nor in his formal complaint with the Service Provider.

During the hearing of 10 May 2022, the Complainant however focused on, and only mentioned, '*The Resort Group*' ('TRG') investments.⁵⁸ Throughout the subsequent proceedings, the submissions made, particularly by the Service Provider indeed solely dealt with '*TRG*'.

In the circumstances, and in the absence of other submissions relating to the alleged failed investments, the Arbiter shall treat the investments into The Resort Group ('TRG') as the disputed investments for the purposes of this decision.

Investment into The Resort Group ('TRG')

The Arbiter notes that in the Investment Report issued by the Complainant's investment adviser, *Felicitas Management Group*, the Complainant was advised to *inter alia* have a 25% allocation of his investible amount into '*The Resort Group Property*', with another 25% into '*The Resort Group Corporate Bond*'.⁵⁹ The investment into the TRG property and the TRG bonds (that is, 'the TRG investment/s') are of a different nature and involve distinct investments albeit exposed to and issued by the same issuer, The Resort Group.

Half (50%) of the Complainant's funds transferred into the Scheme was accordingly to be invested and exposed to TRG.

⁵⁵ As per the '*Transaction History*' statement of Novia Global covering the period 02/01/2019 to 04/05/2021, that was presented by the Complainant as an attachment to his Complaint – P. 16-21

⁵⁶ P. 14 & 99

⁵⁷ P. 4

⁵⁸ P. 59 & 60

⁵⁹ P. 33

According to the statements produced by the parties, the Arbiter was only able to verify an investment of GBP 15,500 (on 15 June 2016) - made outside of the investment platform of Novia-Global as indicated above - into *'Property'/TRG CV Holding Ltd'*.^{60, 61} The said investment seems to relate to the TRG fractional holding in property.

During the proceedings of the case, no sufficient details were provided by the parties to, in turn, clearly trace the exact amount invested in the TRG bond (given that the investments made under the Novia-Global platform were not all indicated due to the incomplete statement provided for the Novia-Global platform).

The Arbiter however notes that the Service Provider has not contested, nor indicated that a different allocation was made into the TRG investments other than that specified in the investment adviser's report (i.e., where a 25% allocation into the *'The Resort Group Property'* and another 25% into *'The Resort Group Corporate Bond'* was recommended).⁶²

It has, furthermore, sufficiently emerged in respect of the TRG investments, that the Complainant held both:

- a TRG fractional holding; and
- a TRG bond holding.

As indicated in a letter drafted by STM Malta to its members invested into TRG and provided to the Complainant, the said letter stipulated that:

'As you may already be aware, your investment in TRG consists of a mixed holding of bonds and fractional ownership'.⁶³

Furthermore, in the email dated 30 May 2022, sent by a third party (BroadLeaf Assist ('Broadleaf'), to STM Malta in respect of the Complainant's exposure to

⁶⁰ P. 14 & 99

⁶¹ It is unclear whether any other investment into The Resort Group was made within the Novia-Global investment platform, as such information has not emerged from the 'Transaction History' statement of Novia-Global presented by the Complainant which only covered the period 02/01/2019 to 04/05/2021 – P. 16-21

⁶² An allocation of 50% of the total investible premium of GBP 62,953.07 equals GBP 31,476.54 which, in essence, reflects the remaining difference of GBP 31,843.83 resulting from the original amount transferred into the Scheme and amounts withdrawn, as calculated under the section titled *'Transactions'* above.

⁶³ P. 118

TRG, Broadleaf thanked STM Malta *'for providing the data relating to your member, Mr BL, in respect of his TRG fractional and TRG bond holdings'*.⁶⁴

Overview/features of the TRG Investments

In order to avoid repetition, the Arbiter makes reference to the analysis and review of the particular features of the TRG fractional investment and the TRG bond investment, which were already extensively considered in other previous decisions - namely in Case ASF 107/2021 and Case ASF 130/2021.⁶⁵

Particular reference is made to the features of the said investments as described under the sections titled *'Overview of the TRG investments'* in Case ASF 107/2021 and *'The TRG investments'* in Case ASF 130/2021.

The Arbiter applies, as applicable, the relevant emerging aspects about the specific features and developments of the TRG investments, as mentioned in the said sections, for the purposes of the case under review.

This is particularly so with respect to the emerging material difficulties arising in respect of such investments, including the illiquid nature of the investments, the convoluted and opaque structures involved, the problems in determining a fair value of the investments and the likelihood of material losses. Further observations are made in this regard later on in this decision, including, on the status of these investments.

Request/attempts to liquidate the TRG investments in 2021

During the hearing of 10 May 2022, the Complainant noted *inter alia* that

'In 2021, I sent paperwork back and asked for the complete funds to be released'.⁶⁶

An aspect that was also raised by the Complainant during the same hearing relates to the TRG bonds, where the Complainant *inter alia* noted that:

⁶⁴ P. 139 – Emphasis added by the Arbiter

⁶⁵ <https://financiararbiter.org.mt/sites/default/files/oafs/decisions/308/ASF%20107-2021%20-%20KR%20vs%20Optimus%20Fiduciaries%20%28Malta%29%20Limited.pdf>
<https://financiararbiter.org.mt/sites/default/files/oafs/decisions/378/ASF%20130-2021%20-%20GQ%20vs%20Integrated-Capabilities%20%28Malta%29%20Limited.pdf>

⁶⁶ P. 59

'Previously, I was under the belief that it was a five-year term. The term was amended to ten years without my knowledge, but I sent the paperwork to withdraw the balance of my pension before the term was amended. ... So, my argument is: why do I have to wait four or five years when I sent back the paperwork before TRG put in place the extension to ten years'.⁶⁷

Hereunder is a timeline based on the review of the copies of the communications presented during the case in respect of the request made by the Complainant for the redemption of his TRG investments and the attempts by the Service Provider to liquidate such:

- 17 June 2021 – Reminder by Complainant to STM Malta for him to receive the balance on his pension in his designated bank account, noting that he was advised that this was to be done in June 2021.⁶⁸
- 17 June 2021 – Email sent by STM Malta to the Complainant informing him that STM Malta is *'liaising with the entity responsible for administering the fractional ownership held with The Resort Group in order to see whether there are any possible avenues to liquidate the investment'* and that *'with regards to the bonds'*, STM Malta *'will get in touch with TRG directly to have a better understanding of the current liquidity situation'*.⁶⁹
- 18 June 2021 – Further exchanges between the Complainant and STM Malta, where the Complainant pointed out how the matter has been dragging on and that he had been in contact with *Novia Global* which had advised him that there was *'no reason for the suspension'*.⁷⁰ The Service Provider in return stated that they were looking into the situation.⁷¹
- 24/25 June 2021 – Reminder sent by the Complainant on the 24 June asking for updates regarding the release of the balance of his pension funds. The Service Provider replied on the 25 June 2021 informing the Complainant that they are still following up the matter.⁷²

⁶⁷ *Ibid.*

⁶⁸ P. 108

⁶⁹ P. 107

⁷⁰ *Ibid.*

⁷¹ P. 106

⁷² P. 110

- 21 July 2021 – Email sent by the Complainant to STM Malta asking for issues to be resolved and noting *inter alia* that:

*‘you had stated that I would have the funds in June of this year! Now this was related to me last year’.*⁷³

- 26 July 2021 – Email from STM Malta informing the Complainant about a letter it drafted to be distributed to all members invested in the TRG, noting also to the Complainant that STM Malta understood:

*‘...that this does not alleviate this situation, we are exploring all possible avenues to find the best solution for our members who are looking into liquidating their investment’.*⁷⁴

The (undated) letter drafted by STM Malta to its members invested into TRG, noted *inter alia* that:

*‘As you may already be aware, your investment in TRG consists of a mixed holding of bonds and fractional ownership. The bonds have a 10-year maturity with the possibility of an early redemption option after five years. Following a number of requests by some of our members to redeem the bond, we were notified in July 2021, that a bondholder meeting was carried out in January (six months earlier)⁷⁵ **and a vote was taken and approved to remove, amongst other things, the clause of early redemption from the bonds, meaning that the possibility to redeem after five years is no longer available ...***⁷⁶

‘... As for the investment in the Fractional Ownership, considering the fact that the hotels were closed for over a year, no rental income was received in 2020. We have spoken to Fractional Property Solutions (who acts as administrator of the fractional investment) and they have been assured that the hotels should resume operations in September. With that said, the fractional ownership remains an illiquid investment and we are exploring

⁷³ P. 116-117

⁷⁴ P. 116

⁷⁵ P. 118-119

⁷⁶ P. 118 – Emphasis added by the Arbitrator

ways of liquidating it. A return on the original amount invested cannot be guaranteed'.⁷⁷

The Arbiter further notes that in the said letter, STM Malta made reference to the meeting of TRG bondholders held in January 2021 which they were not aware of, nor notified about. STM Malta stated in this regard that:

'Neither Novia Global (the investment house) nor STM Malta (the trustee) were notified of this bondholders' meeting and hence we did not know about it until it was too late'.⁷⁸

It is further noted that during the said meeting of January 2021, the bondholders allegedly agreed to updated terms to their bonds, with the 'Chief Operating Officer' of 'The Resort Group plc' going even as far as claiming in his letter of 1 March 2021, that he was:

'... delighted to report how unified our investors are, with something over 98% of bondholders (by value) agreeing with the proposals and voting to amend the bond terms'.⁷⁹

- 27 April 2022 – Email sent by STM Malta to an outside third-party official handling the TRG fractional units ('@Fractional.net') where it was stated *inter alia* that:

'We have one particular member who is seriously ill and needs to urgently liquidate his investments in TRG. From my understanding, the contract signed by the member covers such circumstances and states that if certain parameters are met, TRG should buy back the investment ...'.⁸⁰

- 5 May 2022 – The official involved with the TRG Fractional units informed STM Malta of the following:

'In relation to your seriously ill member, I am aware of similar cases with other pension trustees where the necessary conditions have been met and the agreement terminated. In such circumstances, TRG are required to

⁷⁷ P. 119

⁷⁸ P. 118

⁷⁹ P. 122

⁸⁰ P. 114

return the purchase monies (provided that title to the property has not been conveyed to the fractional company).

I am also aware of the fact that there are significant outstanding sums owed to pension companies by TRG who have been unable to return the funds due to their own liquidity issues. So whilst there are contractual obligations on the part of TRG in these circumstances, they are, apparently, unable to satisfy them as things stand ...'.⁸¹

- 30 May 2022 – Email sent by *BroadLeaf Assist Ltd* (a company based in the UK)⁸² to STM Malta in respect of the Complainant's '*TRG fractional and TRG bond holdings*'.⁸³

In the said email, *BroadLeaf Assist* stated *inter alia* that:

'We have obtained a data set in relation to [the Complainant's] fractional holding from TRG and I have pleasure in attaching a report that we refer to as the Property Report. We produce this Property Report for clients (and their IFAs) of Broadleaf Assist who have signed an agreement with us to represent them in dialogue and recovery action with the issuer ...

... Regarding [the Complainant's] bond holding, we are also able to provide a cashflow analysis for this investment ...'.⁸⁴

The particular circumstances of the Complainant

It is noted that the Complainant used to work as a '*Customer Adviser*' with the Royal Bank of Scotland.

The Arbitrator, however, does not have details of the nature of the work actually undertaken with such entity, including whether this was a junior role, whether it related to or involved investments, and also for how long the Complainant worked in this area.

⁸¹ P. 112 – Emphasis added by the Arbitrator

⁸² According to its website, *BroadLeaf Assist Ltd* "*is a specialist company that works with unlisted debt securities such as loan notes, corporate mini bonds and fractional investments*", where it provides "*specialist services in Distressed Debt Securities, such as Loan Notes, Corporate Mini Bonds and Fractional Investments to both investors and issuers, especially those that are in distress*" - <https://www.broadleafassist.co.uk/about-broadleaf-assist/>

⁸³ P. 139

⁸⁴ *Ibid.*

From the testimony held during the sitting of 10 May 2022, the Arbiter further notes that there is nothing however sufficient to suggest that the Complainant can be deemed as a professional or experienced investor in investments. It is noted that, ultimately, neither has the Service Provider suggested such a classification.

Furthermore, **the Arbiter ultimately places emphasis on certain key important aspects that cannot be ignored or downplayed in this particular case.** One such aspect involves the fact that **at the time of his application with the Scheme, the Complainant was unemployed** as clearly emerging from the information provided in his Application Form for Membership into the Scheme.⁸⁵ Moreover, **the Investment Advisory Report issued by the adviser *Felicitas* also clearly indicated that the Complainant was ‘currently unable to work’.**⁸⁶

The Arbiter furthermore notes the unfortunate particular circumstances of the Complainant and his explanations regarding his continued ill health which span over a long period of time, even before his application into the Scheme, as testified during the hearing of 10 May 2022.⁸⁷

Such important aspects will be kept into consideration in the decision of this case.

Final Observations & Conclusion

The TRG Investments – Unsuitability of the investments

The Arbiter considers that the TRG Investments were unsuitable investments that were allowed and continued to be retained, without question, within the Complainant’s Scheme.

The Arbiter has no comfort that the TRG investments, and the extent to which the Complainant's scheme was exposed to The Resort Group, can in some way be considered suitable considering the scope of the Retirement Scheme as a pension product.

⁸⁵ P. 50

⁸⁶ P. 22

⁸⁷ P. 58 & 59

Neither does the Arbiter has comfort how such investments can be deemed as compatible with the Complainant's profile and medium-risk attitude, and this when also considering his particular status (as an unemployed person who was unable to work).

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

- (i) **The particular features and nature** of the TRG investments. The said investments did not emerge to be listed and/or regulated investments but were rather non-traditional, illiquid investments with a long and fixed investment term.
- (ii) **The lack of liquidity** of the TRG investments was clear and apparent. The bonds were '*issued for a term of 10 years with the option for Bond holders to redeem early at any time following the end of the fifth year*',⁸⁸ which option did not even materialise in practice. The product was, thus, by its very nature, illiquid and not easily and readily realisable.

Similarly, no evidence of adequate liquidity in respect of the fractional property ownership has either emerged during the proceedings of the case – on the contrary this seems rather to be more of an opaque structure where the redemption of the fractional holding is not easily or readily realisable. Indeed, the Investment Advisory Report had described the '*fractional resort property*' as '*Generally highly illiquid*'.⁸⁹ Furthermore, the lack of ease to redeem (which furthermore even if available will be '*likely ... at a deep discount*') has also even emerged in a Property Report (as shall be considered further on).⁹⁰

- (iii) **The high-risk investment element of the TRG investments**, as inherently reflected in the nature of such investments and the concentration risk to the same issuer, The Resort Group, and same location involving Cape Verde.⁹¹

⁸⁸ P. 31

⁸⁹ P. 30 & 31

⁹⁰ P. 146

⁹¹ P. 31

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

In addition, the Arbiter has not been provided with any comfort that there was adequate diversification either within the Scheme's overall portfolio of investments given the material position being allowed to the same issuer, The Resort Group.

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

- (v) **The lack of conformity of the TRG investments with the Complainant's risk profile.** As detailed in the Application Form for Membership, the Complainant's profile was indicated of being of '*Medium Risk*'.⁹²

The Arbiter has no comfort that there is a medium risk in having such exposure to the TRG investments, nor that the respective TRG investments were themselves of medium or moderate risk in view of the nature and features of such investments as considered above.

The Arbiter considers that **the above aspects all corroborate the claim of '*total unsuitability*'⁹³ of the TRG investments for the Complainant's Retirement Scheme.**

Moreover, the above are clearly against, and are not reflective in any way of the requirements to which the Retirement Scheme was subject to with respect to *inter alia* **diversification, prudence and liquidity**, which applied not only at the time of Harbour Pensions but also at the time of STM Malta acting both as Trustee and RSA, as detailed hereunder:

⁹² p. 85

⁹³ p. 9

- The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*', ('the Directives'). The said Directives applied from the Scheme's inception until its registration under the Retirement Pensions Act ('RPA').⁹⁴

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

SOC 2.7.2 in turn required that the assets of a scheme are '*invested in order to ensure the security, quality, liquidity, and profitability of the portfolio as a whole*'⁹⁵ and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.⁹⁶

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';⁹⁷ to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings*'⁹⁸ where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.⁹⁹

⁹⁴ The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

⁹⁵ SOC 2.7.2 (a)

⁹⁶ SOC 2.7.2 (b)

⁹⁷ SOC 2.7.2 (c)

⁹⁸ SOC 2.7.2 (e)

⁹⁹ SOC 2.7.2 (h)(iii) & (v)

- The Arbiter also notes that the Scheme eventually became subject to the *'Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act 2011'* (Pension Rules') when it was registered under the Retirement Pensions Act ('RPA').¹⁰⁰

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

'The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document'.¹⁰¹

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

It is further noted that SLC 3.2.1 (ii) and (iii) of the Pension Rules provided *inter alia* that the Retirement Scheme Administrator shall ensure that the assets of the scheme are: ***'... properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'***; and ***'... sufficiently liquid and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits'***.¹⁰²

The Arbiter has considered the TRG investments taking also the said requirements and the scope of the Scheme as a retirement product into consideration. In the circumstances of this case, the Arbiter cannot reasonably

¹⁰⁰ The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided any scheme/ person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

¹⁰¹ The same principle was reflected in Rule 2.7.1 of Part B.2.7 titled *'Conduct of Business Rules related to the Scheme's Assets'* of the *'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'* which applied to STM Malta as Scheme Administrator at the time it was subject to the *Special Funds (Regulation) Act*.

¹⁰² SLC 3.2.1 (ii) and (iii) of Part B of the Pension Rules.

conclude that the said investments, and high exposure thereto, were in line with, and reflective of, the applicable regulatory requirements.

Neither can the Arbiter reasonably conclude that such investments reflected the Complainant's risk profile, nor the prudence required to achieve the scope of the Scheme as a retirement product. This is even more so when taking the particular circumstances of the Complainant as outlined above.

Other aspects

Furthermore, the Arbiter notes the following in respect of the particular case in question:

Claim that TRG is not a failed or 'lost' investment

The Service Provider claimed that the TRG is not a failed investment. With respect to the TRG bonds, it noted that *'the losses (if any) cannot be quantified at this stage as the 10-year full term has not yet expired'*.¹⁰³ It even noted in its submissions that *'We have been recently informed that TRG is stable and looking to continue with its project'*.¹⁰⁴

It is, however, unclear on what basis such a claim, that TRG *'is stable'*, has been made. Apart that the basis of such claim was not really explained or elaborated upon, no clear nor sufficient evidence was either provided by the Service Provider to back such claims.

The Arbiter notes that the Service Provider only presented a notice issued by TRG itself, namely the *'TRG Update, February 2022'*,¹⁰⁵ which included some "positive" statements apart from highlighting various challenges and difficulties faced in respect of the said investment.

The Arbiter cannot reasonably rely on such notices to determine the alleged stability of such investment. Indeed, it is noted that there is no independent third-party data that was presented to back the claims of stability referred to by the Service Provider. Furthermore, even if these expectations were proven

¹⁰³ p. 72

¹⁰⁴ *Ibid.*

¹⁰⁵ p. 102-105

correct, the unsuitability due to over-exposure, lack of diversification and illiquidity would remain.

Nor any audited financial statements (past and recent), were even presented by the Service Provider to provide some comfort regarding the investment and its outlook. The Service Provider's claims accordingly cannot be given much weighting in the circumstances.

It is moreover noted that even the TRG Update of February 2022, included stark warnings including that *'the full financial impact of the loss of over one and a half years of operations will take a considerable time to address'*.¹⁰⁶

The Arbiter also notes that in an email of 5 May 2022 from the fractional unit, such unit itself noted that:

'I am also aware of the fact that there are significant outstanding sums owed to pension companies by TRG who have been unable to return the funds due to their own liquidity issues'.¹⁰⁷

It is also noted that from a review of the Property Report issued by *BroadLeaf Assist* ('the Property Report') in May 2022 in respect of the property fractional investment, it rather emerges that there are clearly certain difficulties and material issues also with the fractional investment of the Complainant.

The said Property Report noted that his *'ownership has yet to be fully registered with the Land Registry (according to TRG records) and is currently subject to Promissory Contract'*.¹⁰⁸ The Property Report also highlighted *inter alia* the illiquid nature of the investment and the lack of available options to readily redeem the investment – this is apart from the complexities surrounding this investment as outlined in the section titled *'What could this mean for you?'* in the said Property Report.¹⁰⁹

The Arbiter further notes that with respect to the potential option for the Complainant to sell his *'7.6% stake in the property to a third party'*, which was

¹⁰⁶ P. 103

¹⁰⁷ P. 112

¹⁰⁸ P. 143

¹⁰⁹ P. 145-146

already difficult in the first place as described in the said report, the Property Report also unequivocally stated that:

*‘You could find a buyer, which could include TRG, to sell your 7.6% stake to. You would need to understand the value of your 7.6% consideration, and it is likely that any sale value would be at a deep discount to the original purchase price you paid because of the forecast level of yield, co-ownership issues and Rental Agreement terms’.*¹¹⁰

It accordingly clearly emerges that there is lack of clarity regarding the actual worth (if any) of the TRG fractional investment, no readily available option for realising such investment at the moment or in the near future, and there are indications of the likelihood that capital losses have to be sustained.

The Arbiter shall keep the status of the TRG investments into consideration in arriving at his decision on this particular case.

The updates to the terms of the Bonds and actions taken

The Arbiter finds certain difficulty to understand how such a material negative update to the terms of the bonds - (that is, the original terms of the bonds of ‘a 10-year maturity with the possibility of an early redemption option after five years’ was updated by removing the ‘possibility to redeem after five years’)¹¹¹ – had such overwhelming approval ‘with something over 98% of bondholders’ as alleged by the Chief Operating Officer of the Resort Group plc.¹¹²

Despite the claim that bondholders ‘will receive a bonus payment of 5% of the nominal capital value of your Bonds’ however, there was *inter alia* other material negative matters – such as that ‘The long stop for the redemption of the Bonds will be fixed as 31 December 2027, there will be no option to redeem earlier than this’, apart from *inter alia* the ‘interest moratorium from 18 March 2020 until 31 December 2021’, as indicated and proposed in the ‘Invitation to Bondholder Meeting’ letter presented during the proceedings of the case.¹¹³

¹¹⁰ P. 146

¹¹¹ P. 118

¹¹² P. 122

¹¹³ P. 124-126

The Arbiter also finds it difficult to understand how such a material aspect, including STM Malta's claim that, together with Novia-Global, it was not notified nor made aware of such an important meeting of bondholders. During such bondholders meeting, changes that substantially negatively affected those wishing to redeem were discussed and allegedly approved. This notwithstanding, STM Malta appears to have not sufficiently challenged and adequately pursued such matter with TRG in its role of trustee and RSA of the Scheme to safeguard the interests of the Complainant.

The actions taken by STM Malta as explained in its letter (attached to its email to the Complainant of 26 July 2021),¹¹⁴ that:

'We have forwarded our grievances to Best Admin, who is the administrator of the TRG bonds, and it is our intention to try and persuade them to reconsider their position and satisfy the redemption requests for smaller/non-institutional investors (such as yourselves)',

appears to ultimately be too little and ineffective in the circumstances.

Conclusion

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

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

Upon becoming the new trustee and RSA of the Complainant's retirement scheme, STM Malta should have immediately realized the inappropriateness of the TRG investments which still featured, and were retained, into the Complainant's Retirement Scheme without question. Such realization should have emerged given *inter alia*:

¹¹⁴ P. 118

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

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

These investments clearly did not comprise, in any way, an allocation reflective of the scope of the Scheme as a retirement product, where the Scheme's assets were required to be *inter alia* invested in a prudent manner, be sufficiently liquid, and properly diversified.¹¹⁵

The Arbiter notes that STM Malta did not raise with the Complainant any concerns or issues with the TRG investments upon becoming the new trustee and RSA of the Scheme. It did not question the Scheme's compliance with the applicable regulatory framework, and it did not raise the clear breach of trust already committed by its predecessor given the unsuitability of the investments. Instead, it remained silent and took no action and even went as far as defending its predecessor in allowing such investments as highlighted earlier on in this decision.

As outlined above, not only such evident breach of trust committed by the previous trustee was not questioned and raised by STM Malta, but STM Malta ultimately itself accepted the disputed investments without question, and/or any reservations or qualifications. This, despite the requirements and standards applicable under both regulatory regimes with which STM Malta is duly familiar in view of the nature of its operations.

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

Neither can the Arbiter reasonably conclude that there was '*prudence, diligence and attention of a bonus paterfamilias*'¹¹⁶ in the execution of STM Malta's

¹¹⁵ As provided for under Standard Operational Condition 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA and eventually under Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA in January 2015.

¹¹⁶ As required under Article 21(1) of the TTA

duties and exercise of its powers and discretions when it itself allowed and retained without question the same inappropriate investments.

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

At the time of taking over as trustee/ RSA, a review of the Complainant's portfolio should have been done by STM Malta to *inter alia* ensure that the Complainant's Scheme was in order and in compliance with the applicable regulatory provisions, the conditions of the Trust Deed and the scope of the Retirement Scheme. This had to be done also to ensure ongoing compliance with applicable obligations/terms of the Scheme, *inter alia*, to:

- (i) act with '*the prudence, diligence and attention of a bonus paterfamilias*';¹¹⁷
- (ii) '*act with due skill, care and diligence ...*';¹¹⁸
- (iii) ensure that the Scheme's assets are '*invested in a prudent manner and in the best interest of Members and Beneficiaries*';¹¹⁹
- (iv) '*act diligently ... to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust*'.¹²⁰

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

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

¹¹⁷ As provided for in Article 21(1) of the TTA

¹¹⁸ As provided for under Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the Retirement Pensions Act ('RPA').

¹¹⁹ As provided for under Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA.

¹²⁰ Editor Max Ganado, '*An Introduction to Maltese Financial Services Law*', Allied Publications 2009, P. 178

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

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

Given that there were other parties who should also carry responsibility for the unsuitability of the underlying investments and the subsequent failure of the Scheme's objectives, this aspect shall be taken into consideration in the extent of compensation decided in this case.

Decision and Compensation

For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case,¹²¹ and is partially accepting it in so far as it is compatible with this decision.

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

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

- (i) only the loss in respect of the TRG investments has been considered;**
- (ii) the Complainant has already withdrawn a certain amount of money from his Retirement Scheme as determined above; and**

¹²¹ Cap. 555, Article 19(3)(b)

- (ii) other external parties, like the investment adviser were involved and also carried responsibility, with respect to the disputed investments,**

the Arbiter considers that, in the particular circumstances of this case, it is fair, equitable, and reasonable for STM Malta Pension Services Limited to compensate the Complainant for the amount of seventy percent (70%) of the total net contributions resulting into the TRG investments.¹²²

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

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

Given the particular status of the *TRG investments* as outlined above, the Arbiter further considers that any future proceeds that may be derived from the *TRG investments* are to be allocated as 30% to the Complainant with the remaining 70% retained by the Service Provider.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter is therefore, ordering STM Malta Pension Services Limited to pay the Complainant 70% of the total net contributions resulting in respect of the TRG investments as calculated above, whilst future proceeds (if any) in respect of

¹²² With reference to case ASF 107/2021, where a different allocation of 40% (instead of 70%) was attributed to the new trustee and RSA, the Arbiter notes that there are a number of material different aspects between the two cases. Each case is indeed treated on its own particular circumstances and merits. For example, cognisance was *inter alia* taken of the timing when the new trustee and RSA took over from the previous trustee and the actions undertaken by the trustee/RSA upon its appointment – which differ between the two cases.

the TRG investments are assigned accordingly between the parties to this Complaint as stipulated above.

Given the Complainant's particular circumstances and that the TRG investments are the only remaining investments within the Scheme, the Arbiter is also ordering, as part of the compensation provided to the Complainant in accordance with Article 26(3)(c)(iv) of the Act, that STM Malta fully refunds/waives its own fees charged or applicable to the Retirement Scheme since the period of the Complaint filed with the Office of the Arbiter for Financial Services until the Scheme is closed down (when the TRG investments are redeemed). This applies only for those periods in case where no new investments are held.

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

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

**Alfred Mifsud
Arbiter for Financial Services**