

Before the Arbiter for Financial Services

Case ASF 022/2022

CH & VH ('the Complainants')

vs

STM Malta Pension Services Limited

**(C 51028) ('STM Malta' or 'the Service
Provider')**

Sitting of 26 October 2023

The Arbiter,

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

The Complaint, in essence, relates to the alleged failure by STM Malta to act in the best interests of the Complainants, as members of the Retirement Scheme, given that the Complainants claimed that:

- (i) STM Malta marketed an arrangement involving a different fee structure applicable to the underlying policy than the one they are being requested to pay on the same policy (now held under a distinct and separate retirement scheme).

The Complainants claimed in this regard that STM Malta failed to disclose in its Scheme Application Form, an extra 1% per annum marketing fee

applicable on the underlying policy which the issuer of the policy has, in 2021, decided to back-date and reflect on their policy.

- (ii) STM Malta failed to provide them with a copy of the policy documents after joining the Scheme.

The Complaint

The Complainants explained that in 2013 they decided to transfer their pensions to a QROPS arrangement and applied to join the Scheme.

They submitted that the Scheme was not a stand-alone trust and investment vehicle but a joint, all-in-one product, which combined the STM trust with the *'Providence Life QROPS Bond.'*

The Complainants claimed that the total charges were of 1.75% per annum as shown on the STM Application form, section 7, page 6. They further claimed that this section clearly stated that the charges covered the costs associated with administering the pension scheme and the portfolio bond.

The Complainants explained that they were however now being told that there was a *'systems error'* with the *'Horizon Bond'* and that they had to pay an extra 1% per annum for 8 years backdated.

They emphasised that this was not what they had agreed to, and was not what STM Malta had presented in their own application form. They claimed that if the charges had indeed been 2.75% per annum, they would most certainly not have joined the Scheme.

The Complainants explained that STM Malta asserts that it has nothing to do with the said fees even though it was the Administrator and Trustee of the Scheme. They questioned why the said charges were not made clear by STM Malta at the outset.

The Complainants reiterated that the charges are those shown in section 7, page 6 of the Application Form that was used to join the Scheme. They noted that STM Malta continues to mention a *'Horizon Bond'* even though this was never mentioned on any of the paperwork when they joined the Scheme. The Complainants questioned how reference was now being made to a *Horizon Bond*

when, at the time they joined the Scheme, reference was made to the *Providence Life QROPS Bond*.

They explained that STM Malta is insisting that they were sent policy documents after joining the Scheme. The Complainants had, however, no recollection of receiving such documents by email and claimed that neither did they receive any original policy documents in hard copy. They explained that they had indeed no way of receiving hard copies by mail as at the time of purchasing the policy they were based overseas with no postal address.

The Complainants accordingly claimed that STM Malta had not acted in their best interests as members of the Scheme and asked for the Arbiter to uphold their Complaint.

In summary, their request was being made as they claimed that STM Malta clearly marketed the Scheme with total charges of 1.75% which covered the costs associated with administering the pension scheme and portfolio bond. They claimed that a marketing fee was only to be taken if they moved out from the Scheme within 8 years, as a redemption penalty reducing by 1% per annum. The Complainants emphasised that the 1.75% fee per annum was the only charge that was stated and certainly not a fee of 2.75% per annum.

Remedy requested

The Complainants asked that no backdated charges are applied to their policies. They asked for all the units cancelled to pay for the marketing fee to be credited back to their plans with immediate effect.¹ Further comments on the remedy requested are included later on in this decision.

In its reply, STM Malta essentially submitted the following:²

Preliminary Plea – (a) STM Malta is non-suited to reply to the Complaint

1. That preliminary, STM Malta is non-suited as a defendant and cannot reply to the Complaint as the Complainants are both no longer members of the Retirement Scheme as they have been transferred, and their policies

¹ Page (P.) 4

² P. 101 – 104

reassigned, to a new trustee *STM Fidecs Pension Trustees Limited* (in Gibraltar) whose trustee work is administered by *STM Fidecs Life, Health and Pensions Limited* ('STM Gibraltar'). The Complainants thus no longer fall within the administration of STM Malta.

STM Malta noted that the transfer took effect in March 2021, and submitted that any form of complaint or application for redress must be filed with, and against, STM Gibraltar, the latter being a separate trustee independent from STM Malta.

2. That, subsequent to the said transfer, STM Malta has not in any way permitted the charge to be levied by *Provident Life Limited PCC* ('PLL'), this being a life company regulated in Mauritius which provides a life wrapper that the members had opted to invest in.

STM Malta submitted that it has no power to prevent PLL from levying the fee since the Complainants terminated their relationship with STM Malta and transferred their pension to other schemes with different trustees.

It noted that, on 26 March 2021, PLL notified STM Malta that the Complainants' policies were reassigned to STM Gibraltar.

STM Malta further noted that PLL's valuation error (as detailed further below) was spotted by PLL in July of 2021, and the disputed amended valuations were made in November 2021. Therefore, the charge being complained of was not taken during the period in which the Complainants were members of the Retirement Scheme.

3. That, without prejudice to the submissions made, STM Malta contends, at the outset, that the charge being complained of is not levied by STM Malta. It is PLL who advised STM Malta that the Marketing Fee (which STM Malta believes is the fee in dispute), is taken at policy inception as initial units and is used to fund the costs of distributing the policy through the Independent Financial Adviser and broker channel.

STM Malta further contends that the fees charged were clearly disclosed to the Complainants. The fees were disclosed as Marketing Fees on page 13, Section 6.6 of the application form submitted by the Complainants and signed by them.

4. That, in addition, the policy documents attached to the Complaint also refer to the Marketing Fees on page 36, Section 5.4.

STM Malta submitted that it has therefore complied with the rules at the time of the investment which rules focused on the disclosure of fees of STM Malta as a Retirement Scheme Administrator ('RSA').

It further submitted that it understands that members need to be able to find information about costs and charges to satisfy themselves that their pension will meet their needs for future retirement. It noted that as trustee, it has a duty to ensure that information on costs and charges is provided.

STM Malta claimed that the documentation provided to the Complainants did indeed clearly state the fees and charges levied by PLL as stated in the Complaint.

All the rules at the time were focused on the disclosure of fees of the RSA and not of third parties such as PLL. STM Malta further submitted that there was nothing specific on fee disclosures in the Special Funds Regulation Act, 2002 (Chapter 450 of the Laws of Malta), which focused on creating a general framework for retirement schemes and funds.

5. That, according to the Standard Operating Conditions applicable to pension schemes licensed under the Special Funds (Regulation) Act of 2002, which is the legal framework that was applicable at the time the investment was made, no mention or specific reference was made to the fees of any underlying investments. It submitted that STM Malta, therefore, acted according to its legal obligations in their entirety.

STM Malta referred to the case of *Mr W vs Suffolk Life Pensions* (DRN 1831160) before the UK Financial Services Ombudsman, which it submitted was very similar to the case at hand. It noted that, in the mentioned case, the learned ombudsman concluded the following:

'In summary, I understand Mr W is likely to be disappointed with my decision. I was sorry to learn that he hadn't appreciated his fees were accumulating – I can see how this resulted in him feeling the fees were unfair. But I have to be fair to both parties and I can see that Suffolk Life

provided the relevant information to Mr W. Therefore, for the reasons I've explained, I will not be asking Suffolk Life to do anything further'.³

Preliminary Plea – (b) No loss has been suffered

6. That, according to Article 26(3)(iv) of the Arbitration for Financial Services Act, Chapter 555 of the Laws of Malta ('the Act'), the Arbitrator's competence is that of awarding compensation for *'any loss of capital, or income or damages suffered by the complainant ...'*. STM Malta submitted that, in this case, the Complainants have not suffered any loss or income or damages.

It explained that according to the information at hand, PLL, through an administrative error, did not reflect that they reduced the marketing fee of 1% from the pension assets in the valuations which were communicated to the Complainants. PLL then effectively amended the current valuations in order to amend this 'error'.

STM Malta submitted that the Complainants are therefore mistaken in their understanding and cannot request the Arbitrator to stop *'a backdated charge applied to our policies and all units cancelled to pay for this to be re-credited to our plans with immediate effect'*.⁴

It claimed that this remedy is inadmissible as the fees have already been taken by PLL as these were levied by them. It further claimed that the error is simply in the reflection of the marketing fee in valuations. STM Malta accordingly contends that this 'error' in valuations is not STM Malta's error but rather an error by PLL over which it has no control.

7. That, without prejudice to the submissions made, STM Malta further contends that the fees have been fully disclosed. It referred to a recent case decided by the UK Financial Ombudsman (*Mr H vs Investor Trading Limited* – DRN 2841439) in which it was stated that:

'In determining the outcome of this complaint, there are two key issues which I need to decide:

³ P. 102

⁴ P. 103

- *Was it reasonable for Interactive Investor to introduce the fee which Mr B is now complaining about?*
- *Did Interactive Investor take reasonable steps to make Mr B aware of the fee?*

I have no reason to doubt that Mr B did not see the letter and emails that Interactive Investor says it sent. But it does not necessarily follow that Interactive Investor can reasonably be held responsible for Mr B not being aware of its introduction of a quarterly fee. I need to consider the overall circumstances, including whether Interactive Investor made adequate efforts to tell Mr B it was introducing the charge.⁵

STM Malta submitted that the fees were disclosed in a clear manner and that it took all reasonable steps to amplify the fee structure which was being charged by PLL with this being done according to law.

8. That, in view of the above, STM Malta considers that the Complaint is unfounded in fact and at law and should be rejected by the Arbiter with costs against the Complainants.
9. STM Malta reserved its right to bring forward any additional pleas whether preliminary or otherwise according to law. It submitted that this right was being reserved due to the ambiguity of the Complaint and the vague wording used therein.

Preliminary

STM Malta no longer provides services to the Complainants

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

⁵ *Ibid.*

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

'... The transfer has taken effect in March 2021 and, as the Complainants are aware, any form of complaints or redress applications must be filed with and against STM Gibraltar, the latter of which is a separate trustee independent from the Respondent'.⁶

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

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

'... STM Malta is not the right defendant in this case as the Complainants are no longer members of the respondent's scheme as they have voluntarily chosen to transfer their policies (including the PLL policy in dispute) to a new trustee STM Fidecs Pension Life Health and Pensions Limited ('STM Gibraltar') which is a completely separate entity to the defendant entity and thus the Complainants do not fall under the administration of the respondents ...'.⁷

The Service Provider further stated in its final submissions that:

'... STM Malta submits that the current trustees are STM Gibraltar (which is a separate and independent entity to STM Malta with a different licence, regulator and jurisdiction) and therefore the complaint by the Complainants about the PLL Marketing Fee should be addressed to STM Gibraltar and not STM Malta'.⁸

It is true that STM Malta is no longer the trustee and the RSA of the Complainants' retirement scheme and underlying policy. It is also true that the Complainants had already transferred out of the Retirement Scheme and assigned the underlying policy to another scheme by the time the issue of the marketing fee '*... was spotted by PLL in July of 2021 and the disputed amended valuations were made in November 2021*'⁹ as submitted by the Service Provider. This notwithstanding, the Arbiter however notes that **the Complaint mainly deals**

⁶ P. 101

⁷ P. 253

⁸ P. 258

⁹ P. 101

with key alleged failures on the part of STM Malta at the time it occupied its functions in respect of the Scheme.

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

This is particularly so with respect to the Complainants' claims that STM Malta:

- (i) marketed to them a Scheme arrangement with a different fee structure applicable to the underlying policy, which excluded the 1% marketing fee that the issuer of the policy has, in 2021, decided to back-date and reflect on their policy; and**
- (ii) failed to provide them with a copy of the policy documents after joining the Scheme.**

The Arbiter further notes that whilst the disputed marketing fee is being only now reflected in the valuation statements by *Providence Life* as a charge on the underlying policy, the said charge has been however applied retrospectively. Accordingly, the disputed fee covers the period of time when STM Malta occupied the said roles.

With respect to other aspects raised by STM Malta on this point, it is noted that the Service Provider also highlighted in its submissions that given the assignment of the policy to STM Gibraltar, it is the latter that has *inter alia* 'the right or 'power' to represent the member in any dispute relating to PLL'.¹⁰ The Service Provider has also referred to a case, *OAFS Case 032/2021 SP vs Sovereign Pension Services Limited*, highlighting that the Arbiter had accepted and acknowledged the legal effect of an assignment.¹¹

The Arbiter however points out that the legal effect of the assignment is not in dispute in the case under consideration, nor is it particularly relevant to the key matters arising in this case. Further relevant comments are made in a separate section below with respect to the nature of the remedy requested by the Complainants.

¹⁰ P. 258

¹¹ *Ibid.*

It is also noted, that in its final submissions, the Service Provider mentioned a ‘*specific declaration*’ that was signed by the Complainants in the ‘*Transfer Out Discharge Form*’ wherein STM Malta claimed that the Complainants confirmed that they:

*‘... authorise STM Malta Trust and Company Limited to release the assets’ and ‘understand that, on finalisation of the transfer, STM Malta Trust and Company Limited will cease to have any liability to me (the Hs) in respect of the transferred benefits and that neither I nor my dependants, or other beneficiaries will have further claim on the STM Malta Retirement Plan in respect of said benefits’.*¹²

Apart from the fact that this aspect was only raised in the final submissions and not earlier in its reply, STM Malta provided no evidence of such declaration during the proceedings of the case (despite claims to the contrary that such evidence was being provided).¹³

In any case, the said declaration ultimately cannot reasonably be deemed as providing some form of blanket waiver of liability to the Service Provider for breaches of trust or duties it committed at the time of its appointment. Indeed, the interpretation of such declaration, as seems to be suggested by STM Malta, would give rise to unfair terms, given that a member cannot be made to sign a complete waiver of liability in the case of a transfer of his Scheme to another party with respect to the duties previously undertaken. Such declaration can only reasonably be construed to refer to the waiver from liability/responsibility of assets no longer under its control and not a waiver of liability that may result from the previous responsibilities and obligations which the party had during its terms of office.

For the reasons mentioned, the Arbiter refutes the claims that STM Malta is not the correct or legitimate defendant in respect of the matters raised.

¹² P. 258

¹³ In its final submissions (P. 258), STM Malta referred to ‘*the discharge form (DOC STM 1 – Transfer Out Discharge Form – page 1 of 2 point 2 and 4 (bottom of page)*’. However, the copy of the ‘Transfer Requisition Form’ produced by STM Malta during the proceedings of the case (P. 175 & 180) did not feature the claimed statement/declarations and accordingly STM Malta’s claims could not be verified.

Nature of the remedy requested & Claim that Complainants suffered no loss or damage

In their Complaint filed with the Office of the Arbiter for Financial Services ('OAFS'), the Complainants asked, as a remedy, for *'there to be NO backdated charge applied to our policies and ALL units cancelled to pay for this to be Re-credited to our plans with immediate effect'*.¹⁴

It is noted that, as part of its preliminary pleas, the Service Provider first claimed in its reply, that no loss has been suffered and claimed that *'In this case the Complainants have not suffered any loss or income or damages'*.¹⁵

Furthermore, STM Malta submitted that the Complainants cannot make the above-mentioned request to the Arbiter. The Service Provider submitted in this regard that:

'This remedy is inadmissible as the fees have already been taken by PLL as these were levied by them. The error is simply in the reflection of this fee in valuations. The Respondents contend that this 'error' in valuations is not STM Malta's error but rather an error by PLL over which it has no control'.¹⁶

The Arbiter notes that during the hearing of 14 June 2022, one of the Complainants testified that:

'The remedy that I am asking for in my complaint is that, "We would like there to be no back-dated charge applied to our policies and ALL units cancelled to pay for this to be re-credited to our plans with immediate effect"'.

Asked what units I am talking about, I say what has been taken to pay for this marketing fee. Asked who would have issued these units, I say that I do not understand, I do not know ...'.¹⁷

¹⁴ P. 4

¹⁵ P. 102

¹⁶ P. 103

¹⁷ P. 240

It is further noted that in their final submissions, sent by John Shirreffs (of *Deeside Capital Ltd* in Malaysia), who assisted the Complainants in their Complaint to the OAFS as a ‘*professional adviser*’,¹⁸ it was submitted that:

*‘To conclude, the agreed 1.75% per annum charge of GBP 2,195.22 (CH) GBP 1,944.17 (VH) were taken by STM every year on the 1st day of January. Now, a further GBP 14,134.19 (CH) and GBP 12,431.23 (VH) has been taken from their plans for backdated ‘Marketing charges’. CH and VH contest this charge and requests that STM Malta be responsible for reimbursing their policies with the amount which has been taken’.*¹⁹

On its point, the Service Provider stated in its final submissions that:

*‘Apart from the fact that these figures have not been evidenced throughout the proceedings, the latter contested amounts were not paid to, withdrawn by or pocketed by STM Malta ergo STM Malta cannot refund the Complainants with requested amount’.*²⁰

Firstly, with respect to the claim that the Complainants ‘*have not suffered any loss or income or damages*’ for the purposes of Article 26(3)(iv) of Cap. 555, the Arbiter remarks that this is an aspect that will be considered as part of the merits of, and the decision taken in, this case.

The Arbiter however, outrightly states that the retrospective application of a fee, which previously was not reflected in the statements issued by the policy provider and/or not adequately disclosed as claimed, indeed does give rise to damages given that the application of such fees will negatively affect the value of the policy thereof.

It is noted that the ‘*Estimated Surrender Quote*’ issued by *Providence Life* dated 1 September 2021 issued in respect of the Complainants’ respective policy, indeed clearly indicates the application of GBP 12,413.99 charge (on VH’s policy), and GBP 14,085.64 charge (on CH’s policy) as a ‘*Marketing Fee*’ deductible from the

¹⁸ As per Section B of the Complaint Form sent to OAFS – P. 2.

John Shirreffs was previously a ‘*Senior Wealth Manager*’ of *PIC, Professional Investment Consultants-Middle East Ltd*, ‘*a deVere Group company*’, based in UAE as per his letter dated 24 March 2013 (P. 230). He was also indicated as the Complainant’s ‘*Financial adviser*’ in their respective *Providence Life* Application Forms (P. 198 & 216).

¹⁹ P. 250

²⁰ P. 253

'Current Estimated Policy Value'. Hence, there is clearly the issue of damages arising from the application of the disputed fee.²¹

Furthermore, from a review of their Complaint and submissions made throughout the proceedings of the case, it emerges rather clear that the Complainants are, in essence, disputing the requested payment of the Marketing Fee. Their interest and the scope of the Complaint is, understandably, for them not to ultimately pay the disputed Marketing Fee. This further emerges following the testimony of one of the Complainants and more categorically in the Complainants' final submissions as outlined above.

The Arbiter further observes that whilst the underlying policy, and/or issuer of such policy do not fall within the competency of the Arbiter in terms of Cap. 555 of the Laws of Malta ('the Act') - as they do not fall within the definition of a *'financial service provider'* in terms of Article 2 of the Act - the Arbiter, however, has the power to direct STM Malta *'to pay an amount of compensation for any loss of capital or income or damages suffered by the complainant as a result of the conduct complained of ...'*, in the case where *'the complaint is found to be wholly or in part substantiated'* as provided for under Article 26(3)(c)(iv) of the Act.

Accordingly, whilst the Arbiter cannot issue any direction in respect of the policy and/or its issuer, the Arbiter has the competency to consider the merits of this case with respect to the Service Provider's conduct complained of by the Complainants. The fact that the fee is charged by another party does not in itself exonerate STM Malta's responsibilities and potential liabilities arising with respect to its own conduct.

For the reasons amply mentioned, the Arbiter is therefore rejecting the said pleas made by STM Malta and shall proceed to consider the merits of the case next.

²¹ P. 94 & 95

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.²²

Facts of the Case

The Complainants

The Complainants, both of British nationality, born in 1962 and 1957 respectively were resident in the United Arab Emirates at the time of their application to become members of The STM Malta Retirement Plan.²³

Membership of the Scheme and acquisition of the underlying policy

The Complainants respectively applied to become members of the Retirement Scheme by way of their Application Form for Scheme Membership duly signed and dated by them on 18 March 2013 (by CH) and 27 May 2013 (by VH).²⁴

STM Malta attached the Scheme's Plan Schedule as part of the welcome letter dated 24 June 2013 (for CH) and 17 October 2013 (for VH).²⁵ The Scheme Plan Schedule attached to their respective welcome letter indicated the '*Commencement date*' of the Retirement Scheme being the '*18th March 2013*' for CH and '*27th May 2013*' for VH. This also indicated an the initial '*Transfer value*' into the Scheme of '*£22,917.32*' and '*£43,840.49*' for CH and '*£111,130.38*' for VH.²⁶

The respective Scheme of the Complainants acquired a respective Providence Life policy. The Scheme's Plan Schedule indeed listed the '*Investment option*' being a '*Whole of life*' policy issued by '*Providence Life*' with policy number '*PLL200041*' dated '*22nd April 2013*' for the amount of '*£66,707.81*' for CH, and with policy number '*PLL200239*' dated '*12th July 2013*' for the amount of '*£111,095.38*' for VH.²⁷

²² Cap. 555, Art 19(3)(b)

²³ P. 193 & 211

²⁴ P. 16 & 57

²⁵ P. 12 & 53

²⁶ P. 14 & 55

²⁷ *Ibid.*

The *'Providence Life Assurance Bond'* ('the policy') acquired for each of the Complainants by their respective Scheme *'is a life assurance policy'* with the insurer being *Providence Life Limited*, PCC based in Mauritius.²⁸

According to the *'Policy Document Whole of Life Policy'*, bearing *'Policy No: PLL200041'*, the *'Issue Date'* of the policy is actually *'30th April 2013'* whilst for *'Policy No: PLL200239'*, the *'Issue Date'* of the policy is actually *'31st July 2013'*.²⁹

The same respective document and policy schedules issued for each of the Complainants indicate respectively the *'Policyholder'* as *'STM Malta Trust & Company Management Ltd'* with the Complainants being listed as the *'Principal Life Assured'* respectively.³⁰

The *'Total premium at inception'* paid into the policy amounted to *'£66,707.81'* for CH and *'£111,095.38'* for VH as indicated in the same documents.³¹

In the respective Key Features Document provided, the policy was referred to also by the name of the *'Providence Life Portfolio Bond'*.³²

It is further noted that during the proceedings of the case, reference was also made to the *'Horizon Portfolio Bond'* or *'Horizon Bond'*. Whilst no evidence was produced regarding a change in name of the policy, it is however sufficiently clear that this refers to the same underlying policy. Indeed, in the *'Estimated Surrender Quote'* issued by *Providence Life* for the Complainants, the *'Product Name'* of the policy - (bearing the same policy number PLL200239 for VH and the same policy number PLL200041 for CH) - is actually indicated as *'Horizon Portfolio Bond'*.³³

Hence, the same policy that is, the *'Providence Life Assurance Bond'*, must have eventually changed its name to *'Horizon Portfolio Bond'*. During the hearing of 19 September 2022, a senior official of STM Malta indeed testified that Providence Life *'... have a Providence Life Bond and that was rebranded as the Horizon Bond'*.³⁴

²⁸ P. 42 & 83

²⁹ P. 19 & 60

³⁰ P. 30-39 & 71-80

³¹ P. 29 & 70

³² P. 40 & 81

³³ P. 94 & 95

³⁴ P. 243-244

Investment adviser

The Complainants' appointed Financial Adviser, as indicated in their respective *'Providence Life QROPS Bond Application For use with STM Malta Retirement Plan'*, was the company called *'PIC'* based in *'UAE'*, with the individual adviser identified as John Shirreffs.³⁵

The full name of the adviser, PIC, is *'Professional Investment Consultants-Middle East Ltd'*, an entity *'Affiliated to deVere Group'*, with John Shirreffs being at the time an appointed *'Senior Wealth Manager'* of the said entity.³⁶

Transfer out from the Scheme and assignment of the underlying policy

In early 2021,³⁷ the Complainants respectively applied for a transfer out of their Retirement Scheme and the assignment of their *Providence Life* policy from the *'STM Malta Pension Services Limited (STM Malta Retirement Plan) to STM Fidecs Pension Trustees Limited (STM GIB Pension Transfer Plan)'*.³⁸ This was completed on 22 February 2021 and 25 March 2021 respectively, as per the documents presented during the proceedings of the case.³⁹ Hence, STM Malta ceased to occupy its role of trustee, RSA of the Scheme and policyholder of the *Providence Life* policy accordingly.

System error in the Providence Life policy valuations

The Service Provider explained that *Providence Life* informed STM Malta *'that it has identified a systems error in relation to the reflection of policy charges applicable to the Horizon Bond'*⁴⁰ as per the letter dated September 2021 sent to it by *Providence Life*.⁴¹

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

³⁵ P. 198 & 216

³⁶ P. 228

³⁷ P. 175 & 180

³⁸ P. 176 & 181

³⁹ P. 176-179 & 181-184

⁴⁰ P. 171

⁴¹ P. 185

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

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

'... To rectify this error, the balance of any non-reflected Marketing Fees will be taken from the policy as an encashment charge together with any accrued fees and charges (all fees and charges are clearly stated in the Horizon Portfolio Bond Terms and Conditions). The company can confirm that no policies will be adversely affected by these actions, the charge shown merely reflects the true position of each policy'

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

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

'... We are obliged to treat all Policyholders fairly and equally, in accordance with our regulatory guidelines and this means applying any accrued fees and charges due for each policy ... these adjustments are legal and compliant and are covered under our non-waiver of rights provision contained in the Horizon Portfolio Bond Terms and Conditions'.⁴²

The next section shall consider the charges as disclosed to the Complainants in respect of their respective underlying policy. The said section applies to both of

⁴² P. 186-188

the Complainants' respective Schemes and underlying *Providence Life* policy unless specified otherwise.

Disclosure of the Providence Life policy charges

(A) Application Form for Scheme Membership (signed in March and May 2013 respectively) - The Application Form for Membership into the Retirement Scheme, signed by the Complainants on '18 March 2013' and '27 May 2013' included a section detailing the '*Charging Structure*'.⁴³

The said section ('*Section 7, Charging Structure*'), only outlined the following fees in respect of the Scheme and the underlying policy (the portfolio bond):⁴⁴

(i) An '*Annual Management Charge*' which '*covers the costs associated with administering the pension scheme and portfolio bond*', based on the trust value. The Annual Management Charge for a QROPS trust value of '*Between GBP 40,000 and GBP 199,999*' – this being the value applicable for the Complainants - was '*1.75% per annum*'.⁴⁵

(The Annual Management Charge was specified as 1.40% in case of a lower QROPS trust value of '*Between GBP 200,000 and GBP 499,999*' or 1.25% in case of a higher QROPS trust value of '*Greater than GBP 500,000*').⁴⁶

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

(iii) An administration charge of GBP 500 that '*will be deducted during the first year of operation of the bond*'.⁴⁷

(B) Providence Life Policy Key Features Document - A two-page '*Providence Life Portfolio Bond Key Features*' document⁴⁸ was included as part of the

⁴³ P. 15-16 & 56-57

⁴⁴ P. 15 & 56

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ P. 40-41 & 81-82

welcome pack issued by STM Malta attached to its letters dated 24 June 2013 and 17 October 2013 addressed respectively to the Complainants.⁴⁹

The said Policy Key Features document only specified the following policy charges in the section titled '*Providence Life Portfolio Bond Charging Structure*':⁵⁰

- *Annual management charge of 1%*
- *Discounted subscription fee of 2.75% on Providence Life Fund Platform*
- *Early encashment charge of 8% in year 1, decreasing to zero by the end of year 8.'*

(C) The Providence Life Policy Application Form of March & May 2013 –

One of the documents presented during the proceedings of the case was titled the '*Providence Life QROPS Bond Application For use with STM Malta Retirement Plan*', this being the application form for the underlying *Providence Life* policy ('the Policy Application').⁵¹

The said document was signed by both the '*Life Assured*' (that is, the Complainants), and the '*Trustee Applicant*' (that is, STM Malta), respectively in May/June 2013 and March/April 2013.⁵² It also included the adviser's signature (under '*Financial adviser details*').⁵³

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

The '*Terms & Conditions*' indeed formed part of the said Policy Application form as also reflected in the use of the same footer (reading '*Providence Life*

⁴⁹ P. 12 & 53

⁵⁰ P. 41 & 82

⁵¹ P. 191-205 & 209-225

⁵² P. 198 & 216

⁵³ *Ibid.*

Bond Application’) and in the continuation of the page numbering throughout the whole document.⁵⁴

‘*Section 6, Policy Charges*’ of the mentioned Terms & Conditions detailed the applicable charges.⁵⁵ The said charges as reflected in the Terms & Conditions forming part of the Policy Application form signed in March and May 2013 respectively shall be considered in further detail in part (E) below.

- (D) The Policy Document issued in April & July 2013 - The ‘*Policy Document Whole of Life Policy*’ issued by *Providence Life*, bearing Policy No. PLL200041 and issue date of 30th April 2013 and Policy No. PLL200239 with issue date of 31st July 2013,⁵⁶ included a section dealing with the ‘*Policy Charges*’. The said section, (section 3.11), specified that:⁵⁷

‘Policy charges could include:

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

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

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

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

⁵⁴ P. 199-205 & 217-225

⁵⁵ P. 202 & 222

⁵⁶ P. 19-39 & 60-80

⁵⁷ P. 26 & 67

The OAFS compared the Policy Charges section as featured in:

- the Terms & Conditions document forming part of the respective Policy Application Form of March and May 2013,⁵⁸ and
- the Terms & Conditions document issued in respect of the respective *Providence Life* policy of April and July 2013 (as attached to the welcome pack of STM Malta dated 24 June and 17 October 2013).⁵⁹

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

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

'If the Policyholder requests to cash-in any policy during the initial period or additional initial period(s), PLL will pay the Policyholder the cash sum, less any early encashment charges which may apply'.⁶⁰

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

- (ii) **With respect to the disputed Marketing Fee, it is noted that in the '*Policy Charges*' section of the Terms & Conditions forming part of the Policy Application Form (of March and May 2013)⁶¹ and the Terms & Conditions issued with the actual Policy (in April and July 2013)⁶² all stipulate that:**

'PLL charges an annual marketing establishment fee of 1% each year for the first 8 years of the policy to cover the costs of distributing the policy'.⁶³

⁵⁸ P. 199-205 & 217-225

⁵⁹ P. 42-51 & 83-92

⁶⁰ P. 47 & 88

⁶¹ P. 199-205 & 217-225

⁶² P. 42-51 & 83-92

⁶³ P. 47, 88, 202 & 222

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

In this particular case, the disputed Marketing Fee does not differ between the mentioned two Terms & Conditions documents as considered above. **It has clearly transpired, however, that the disputed Marketing Fee is not mentioned in the Scheme's Application Form for Membership and neither in the Providence Life Key Features document as explained above.** Moreover, certain discrepancies and lack of clarity about the applicable exit fees (as shall be considered further on) also emerged.

Obligations of the Service Provider

Trustee and Fiduciary obligations

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

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

The said article provides that:

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

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

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

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

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property *'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'*.⁶⁴

As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'.⁶⁵

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

'In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus pater familias in the performance of his obligations'.⁶⁶

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

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

Obligations as a Retirement Scheme Administrator

⁶⁴Editor Max Ganado, *'An Introduction to Maltese Financial Services Law'*, Allied Publications 2009, p. 174

⁶⁵ *Op. Cit.*, p. 178

⁶⁶ Page 9 – *'Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act'* [MFSA Ref: 09-2017], dated 6 December 2017.

One key duty, which emerges from the primary legislation itself, applicable to STM Malta as the RSA, is the duty to *'act in the best interests of the scheme'*.

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

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

With respect to this case, it is pertinent to particularly note the following rules.⁶⁷

- a) Rules 2.6.2 and 2.6.3 of Part B.2.6 titled *'General Conduct of Business Rules applicable to the Scheme Administrator'* of the *'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'* ('the Directives'), which applied to STM Malta as a Scheme Administrator under the SFA, provided that:

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

...

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

'2.6.3 The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and nor misleading ...'

⁶⁷ Emphasis added by the Arbitrator.

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

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

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

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

Final Observations and Conclusion

Implications of the disputed Marketing Fee

The damage alleged from the contested marketing fee is clear and quantifiable, as emerging from the 'Estimated Surrender Quote' issued by Providence Life dated 1 September 2021.⁶⁸

As mentioned above, the said quote indicates the application of a '*Marketing Fee*' for the amount of GBP 12,413.99 (in respect of the policy of VH) and GBP 14,085.64 (in respect of the policy of CH). This is respectively equivalent to 11.70% and 8.96% of the '*Current Estimated Policy Value*' (of GBP 106,076.01 in respect of the policy of VH and GBP 157,184.74 in respect of the policy of CH) listed in the same quote.

The alleged failures

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

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

⁶⁸ P. 94 & 95

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

The Arbiter accordingly accepts the Complainants' claim and considers that STM Malta has indeed failed to ensure that the charging structure of the *Providence Life* policy was clearly and adequately disclosed to the Complainants in its own form together with the other fees of the *Providence Life* policy it itself chose to stipulate in the said form.

The following aspects and other factors highlighted later in this decision are also being taken into consideration in arriving to the said decision on this aspect:

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

The Arbiter notes that **the Service Provider itself listed the charging structure in respect of the Scheme and the underlying *Providence Life* policy in its own Application Form for Scheme Membership** (signed by the Complainants in March and May 2013).⁶⁹

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

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

⁶⁹ P. 16 & 57

STM Malta's own application for membership into the Retirement Scheme was seemingly one specifically tailored for use with the policy as similarly was the *Providence Life* Application Form in respect of the underlying policy which stipulated, in large font, on the cover page, that it was '*For use with STM Malta Retirement Plan*').⁷⁰

(As also emerging from similar cases already considered by the Arbiter on the same disputed matter and involving the same parties - such as *OAFS Case ASF 005/2022, ... vs STM Malta Pensions Services Ltd*⁷¹ - the cover page of the Application Form in respect of the Scheme for the mentioned arrangement indicated that the scheme's form was '*For use with the Providence Life Bond*'.⁷²

Whilst a copy of the cover page of the Complainants Scheme Application Form was not produced in the case under review, the Arbiter has however no reason to doubt that this was also not the case for the Complainants. This is when taking into consideration the format and contents of the Charging Structure as featured in the extracts of the Scheme's Application Form produced during the case and also the format of the *Providence Life* Policy Application Form as mentioned above).⁷³

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

The *Providence Life* Policy Application Form stipulated on the cover page that this was '*For use with STM Malta Retirement Plan*' and already featured details of STM Malta as trustee of the QROPS, as well as details of the Retirement Scheme, in Section 2 of the said form under '*Trust Details*'.⁷⁴

⁷⁰ P. 191 & 209

⁷¹ <https://financiarbiter.org.mt/sites/default/files/oafs/decisions/441/ASF%20005-2022%20-%20BN%20vs%20STM%20Malta%20Pension%20Services%20Limited.pdf>

⁷² P. 22 of 31 Case ASF 005/2022

⁷³ P.

⁷⁴ P. 191,192, 209 & 210

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

The said policy application was signed on the basis of the Policy Terms & Conditions that formed an integral part of the policy application form.

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

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

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

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

ii. *Inconsistent information as part of the welcome pack* –

Furthermore, a *Providence Life* Key Features document, which was attached as part of the welcome pack provided by STM Malta through

its letters dated 24 June 2013 and 17 October 2013, did not include reference to the Marketing Fee.⁷⁵

The said Key Features document (issued by *Providence Life*) in respect of the *Providence Life Portfolio Bond*,⁷⁶ included information not reflective of, and inconsistent with, the Policy Terms & Conditions included with the same welcome pack.

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

b) Claim that the Complainants did not receive a copy of the Policy documents

It is noted that the Complainants claimed that they did not receive copies of the Policy documents. This was further reiterated during the hearing of 23 May 2022 during which it was declared that '*Neither my husband nor I received any physical documentation*'.⁷⁷

On this point, the Arbiter however considers that no sufficient evidence has emerged during the proceedings of this case to justify the said claim.

The Arbiter notes that the Welcome Letters issued by STM Malta dated 24 June 2013 and 17 October 2013, which enclosed various documentation including '*A copy of the Providence Life documentation ...*' were addressed to '*No 70, Al Thanya Street, Umm Sequim 3, Dubai, PO Box 61490, UAE*' and '*Villa 70, Al Thanyast, Umm Sequim 3, Dubai UAE*'.⁷⁸

It is noted that the said address is the one which features in their respective '*Providence Life QROPS Bond Application For use with STM Malta Retirement Plan*'.⁷⁹ It is also, in essence, the same address indicated in the confirmation

⁷⁵ P. 12 & 53

⁷⁶ P. 40-41 & 81-82

⁷⁷ P. 106

⁷⁸ P. 12 & 53

⁷⁹ P. 193 & 211

of their residential address issued in the letter dated 24 March 2013 by their 'Senior Wealth Manager' at PIC.⁸⁰

During the hearing of 23 May 2022, one of the Complainants further testified that:

'Being referred to a letter from STM Malta addressed to my husband, CH, of the 24 June 2013 (page 12 of the process), I confirm that the address, No. 70, Al Thanya Street, Umm Sequim 3, Dubai (the address we inserted in the application form) is correct ...

... Reference is made to page 53 of my complaint which is a letter addressed to me, again, to the same address which I included in the application form myself, and asked to confirm the address, I say that, yes. That was my address at the time. There was no mail delivery in Dubai. We did not have a P.O. Box in Dubai. I confirm that that was the address that I included in my application form'.⁸¹

It is also noted that during the same hearing, one of the Complainants further testified that:

'It is the correct address but there was no mail service at that time. We would have to have gone to a P.O. Box. You could receive mail by courier or by email but not physical mail unless it was to a P.O. Box, which we did not have.

Asked did I not indicate the address on the application form (when I decided to invest for Providence Life) as my mailing address I say that that was the only address I had'.⁸²

Furthermore, in his Sworn Declaration, the Managing Director of STM Malta declared that the same communication letters including the Providence Life Portfolio Key Features Document, were also sent to the Complainants by email on 24 June 2013 and 17 October 2013 respectively.⁸³

⁸⁰ P. 228

⁸¹ P. 106

⁸² P. 107

⁸³ P. 172

During the hearing of 14 June 2022, one of the Complainants subsequently testified that:

'It is being said that the service provider submitted an email sent by STM to the email address that I have just confirmed. Asked if I received this documentation, I say that honestly I do not remember by email; we definitely did not have a hard copy'.⁸⁴

In the circumstances, the Service Provider cannot be found to be at fault for sending the documentation in hardcopy to the same address that ultimately the Complainants themselves indicated in their respective Application Form.

It has not satisfactorily emerged either that the Complainants did not receive the emails of 24 June and 17 October 2013 indicated by the Service Provider.

The Arbiter, accordingly, considers that it was through no fault of the Service Provider that the Complainants have not received the policy documentation as alleged. Their claim regarding STM Malta's failure to submit the policy documents is accordingly being rejected by the Arbiter.

Other observations – General aspects

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

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

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

⁸⁴ P. 241

As outlined by *Providence Life* in its FAQ document, the ‘*Marketing Fee should be reflected on policy valuations, via unit cancellations at a rate of 1% per year for the first 8 years, but this has not happened*’.⁸⁵

The non-reflection of the disputed Marketing Fee in policy valuations implies that, in practice, the Complainants have been rather provided, and issued with, incorrect policy valuation statements not reflective of the true position of the policy at the time when STM Malta was trustee and RSA of their Scheme. Their policy was thus seemingly over-valued (up to the amount of any due fees not deducted) in each year, during an eight-year-long period.

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

It is considered that STM Malta, accordingly, failed to act in the Complainants’ best interests in the circumstances.

This particularly arises in respect of STM Malta’s failure to ensure clear and complete disclosure of the fee structure in its own form (once it itself decided to also include the fees of the underlying policy in its form), and in bringing to the Complainants’ attention and consideration the discrepancies arising in the documentation used as outlined in this decision. Such discrepancies and non-disclosure ultimately had a material negative bearing to the Complainants.

Other observations – Party who can challenge the matter with PLL

It is noted that the Service Provider emphasised the point that it is not the current trustee and policyholder of the *Providence Life* policy and accordingly cannot assist with the aspect of the marketing fee. In the Sworn Declaration by the Managing Director of STM Malta, it was *inter alia* stated that:

‘... In subsequent correspondence with PLL it has become clear that PLL will only deal with the current policyholder. It is a plain and unarguable fact that the current trustee of the scheme and the policyholder is the only person who

⁸⁵ P. 186

can actively resolve and challenge the matter with PLL and the current trustees for the Complainants are STM Gibraltar.’⁸⁶

The Arbiter accepts the Service Provider’s submission that STM Gibraltar has the authority over the *Providence Life* policy in its capacity as the existing policyholder of the said policy and trustee of the Gibraltar retirement scheme.

However, nothing precludes STM Malta and STM Gibraltar, (one in its capacity as the previous trustee and RSA of the Scheme and previous policyholder of the *Providence Life* policy and the other as the current entity occupying such roles), from discussing between them, and also with *Providence Life*, the particular unfortunate situation which has prevailed.

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

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

Other observations - Key important roles

The Service Provider cannot minimise its key functions and roles. Apart from acting as the trustee/RSA of the Scheme at the time of the alleged failures, STM Malta was also the Policyholder of the Complainants’ respective *Providence Life* policy.⁸⁷

Hence, it itself had to be duly aware and conscious of any material divergences arising from the Policy Terms & Conditions it had itself applied and signed for in April and June 2013⁸⁸ and the features of the policy it itself outlined in its own form as well as other Policy documentation, such as the Key Features document.

⁸⁶ P. 171

⁸⁷ P. 30-39 & 71-80

⁸⁸ P. 198 & 216

Any such divergences should have not occurred in the first place and having occurred should have been discovered and highlighted accordingly for consideration by the relevant parties.

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

Other observations – Reference to other cases

It is noted that, in its reply, the Service Provider made reference to a decision by the UK Financial Services Ombudsman on a case - *Mr W vs Suffolk Life Pensions (DRN 1831160)* - which it claimed 'was very similar to the one at hand'.⁸⁹

The Arbiter however considers that this is by no means a similar case as it cannot be considered that STM Malta has provided the relevant information to the Complainants given the discrepancies and inconsistencies emerging in key documentation as indicated above, which were not identified at the time nor brought to the Complainants' attention.

In its reply, STM Malta also referred to another case before the UK Financial Services Ombudsman – that of *Mr H vs Investor Trading Limited (DRN 2841439)*.⁹⁰ This is also considered by the Arbiter as not relevant for the case under consideration given that the fees were not fully and clearly disclosed given the material discrepancies and inconsistencies arising.

It is further noted that, in its final submissions, the Service Provider also made reference to another case before the Financial Services Ombudsman, namely that of *Mr A vs Fairstone Financial Management (City) Limited (DRN 2991289)*. Again, this is however not relevant to the case under consideration given that it has been satisfactorily determined that the Complainants did not have sufficient information to be exactly aware of the fees and charges given also the inconsistencies and discrepancies as indicated in this decision.

Other observations - Reference to an alleged similar decision

⁸⁹ P. 102

⁹⁰ P. 103

The Arbiter notes that, in its final submissions, the Service Provider also referred to a decision bearing case number 039/2018 where it claimed that *'the same issue of fees arose'*.^{91, 92}

STM Malta quoted parts of the decision noting that the Arbiter had decided that *'no evidence has emerged that the Service Provider did not provide the Complainant with sufficient and clear details in a timely manner regarding the applicable fees ...'*.⁹³

The Arbiter however refutes the Service Provider's claims that these are similar cases and involve similar issues. This given that the quoted case and the case under consideration deal with completely dissimilar and unrelated issues and involve entirely different contexts.

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

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

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

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

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

⁹¹ P. 257

⁹² <https://financiarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20039-2018.pdf>

⁹³ P. 257

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

Other observations - Emerging discrepancies and convolution of the fee structure

The Arbiter ultimately considers that the discrepancy in fees emerging in the documentation produced, particularly with respect to the exit fee⁹⁴ and the disputed Marketing Fee⁹⁵ as indicated in the section titled ‘Disclosure of the Providence Life policy charges’ above have contributed to, and resulted in, a convoluted and unclear fee structure to the Complainants’ detriment.

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

*‘The appearance of a marketing charge in the revised PLL STM paperwork in 2013 was challenged at the time as it was not consistent with the STM application form. We were told that the charges had not changed. The total charge was still 1.75% per annum and that the newly mentioned marketing charge would only be taken if the member surrendered the plan within the first 8 years. This was confirmed by the charges shown in the ‘PLL Bond Key Features’ document, STM App Section 7 ‘Charging Structure’ and was also in line with the workings of other bonds available in the marketplace’.*⁹⁶

No evidence of the said ‘challenge’ was however produced and this claim was left unsubstantiated.

The Arbiter notes that the ‘Early encashment charge of 8% in year 1, decreasing to zero by the end of year 8’,⁹⁷ referred to in the two-page Key features

⁹⁴ The exit fee was mentioned in the two-page Key Features document and in the Policy Issue document but not mentioned in the ‘Policy Charges’ section of the Terms & Conditions forming part of the Policy Application Form and neither mentioned in the Scheme’s Application Form.

⁹⁵ Albeit the Marketing Fee was mentioned in the Policy Application Form (Terms & Conditions) and also reflected in the Policy Issue Document (Terms & Conditions), no mention of the Marketing Fee was made in STM Malta’s Scheme Application Form and neither in the Providence Life (2 page) Key Features Document.

⁹⁶ P. 250

⁹⁷ P. 41 & 82

Document was however clearly an exit fee (an encashment charge) which was only applicable if there was an exit from the policy during the first eight years. Reference to encashment charges (albeit more generally without mention of any figures or percentages or terms of such charge) was made in clause 5.5 of the Policy Issue document.⁹⁸

On the other hand, the Marketing Fee, which was separately dealt with in clause 5.4 of the Policy Issue document, was *'an annual marketing establishment fee of 1% each year for the first 8 years of the policy'*.⁹⁹

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

The Arbiter further notes that during the hearing of 14 June 2022, one of the Complainants testified that:

'Asked whether the Terms and Conditions attached to the application forms were explained to us, I say that I understood that that 1% was only taken as an early release fee.

It is being said that even though it says that '1% each year for the first 8 years', I thought it was a one-time fee, I say that I understood that if it was within the eight years then we would have to pay back that marketing fee, that 1%.

Asked whether this was the advice given to me by my financial advisor, I say, yes'.¹⁰⁰

Hence, in the circumstances, the Arbiter cannot ignore the deficiency on the part of other parties which failed to explain and clearly disclose to the Complainants the applicable fee structure, nor identify the discrepancies in the documentation as listed above. Such failure of other parties will be reflected in the extent of compensation granted to the Complainants.

⁹⁸ P. 47 & 88

⁹⁹ *Ibid.*

¹⁰⁰ P. 240

Decision & Concluding remarks

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

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

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

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

The Arbiter considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'¹⁰¹ of the Complainants who had placed their trust in the Service Provider, believing in its professionalism and its duty of care and diligence.

Conclusion

For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case¹⁰² and is accepting it in so far as it is compatible with this decision.

Cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying policy. Hence, having carefully considered

¹⁰¹ Cap. 555, Article 19(3)(c)

¹⁰² Cap. 555, Article 19(3)(b)

the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the damages in question.

The claims of the Complainants are not being met in full to reflect the failure of other parties – such as the failure by their financial adviser to note, for example, the distinction between the Encashment Fee and the Marketing Fee in the policy documentation produced and the discrepancies in the documentation as outlined above.

In deciding the extent of compensation to be awarded to the Complainants, consideration is also being made of the fact that the Complainants, whilst having valid expectations that the charges should be those disclosed to them at the point of joining as members of the Scheme, they had themselves signed the Policy Application Form which included the disputed Marketing Fee but which however was not included in the application for Scheme Membership nor in the *Providence Life* Key Features document.

Compensation

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

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the Complainants respectively the amount of 50% (fifty percent) of the amount of any Marketing Fee that may be or have been charged and paid on their respective underlying policy.

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

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

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

**Alfred Mifsud
Arbiter for Financial Services**