Before the Arbiter for Financial Services

Case ASF 049/2022

BL & FL ('the Complainants')

vs

STM Malta Pension Services Limited

(C 51028)

('STM Malta' or 'the Service Provider)

Sitting of 10 November 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 failures in respect of their Retirement Scheme and underlying policy given that, in essence, the Complainants claimed that they were not aware of the disputed marketing fee applicable on the Scheme's underlying policy and the implications of such fee. They claimed in this regard:

a) That a Marketing Fee charged on the policy underlying their Scheme was excessive and should have been highlighted to them when taking their retirement plans.

b) That they were provided with no indications that the Marketing Fee needed to be paid or had to be deducted from the policy.

c) That they were sold a policy without being given the full facts on how the policy would run and without details of what were the financial drawbacks.

d) That there was negligence when they were not informed of the rationale and cost of the Marketing Fee.

e) That there was negligence when they were not advised that the Marketing Fee was not being applied.

f) That there was negligence in the due diligence relating to their policies.

The Complaint

The Complainants explained that in 2013 they were advised by deVere (UAE) as financial advisers to move their UK-frozen pensions to an offshore QROPS.

They explained that whilst the disputed marketing fee may be contractual, the fee itself is however excessive irrespective of its deduction method. The Complainants submitted that this was something that should have been highlighted to them when taking out their plans.

They questioned what the actual reason for the marketing fee was and submitted that given the high cost of the fee, this should have been discussed with clients in depth rather than being buried in the policy.

The Complainants explained that they were disappointed and shocked when they were informed, not by deVere but by direct email from STM Malta, that due to recent investigations a system error was 'discovered' and a marketing fee had not been reflected in the policy valuations which they were now liable for. They claimed that the payments for the marketing fee amounted to GBP 26,580 for BL and GBP 8,800 for FL.

The Complainants submitted that there was no indication, during their annual meetings, that these fees needed to be paid or even that they had not been deducted from the policy. They were aware of other fees applicable on an annual basis for the management of the policies, but these were relatively small in comparison to the marketing fee. The Complainants noted that they had three

deVere fund advisers in the UAE and two within the UK, none of whom ever mentioned the 10% figure over 8 years that they are now faced with.

The Complainants submitted that they were advised badly and sold a policy without being given the full facts on how the policy would run and what were the financial drawbacks.

They claimed that there was:

1. Negligence in them not being informed of the marketing fee rationale and its cost;

2. Negligence in them not being advised of the fee not being applied (during their 6 or 12 monthly meetings);

3. Negligence in not performing due diligence concerning STM Malta and the subsequent recommendation with regard to their policies.

Remedy requested

The Complainants asked for a refund of the marketing fee, or at least, the vast majority of the fee.[1]

They claimed that the fee seemed to be for *'doing nothing at all'* and submitted that no-one should be charged the huge fees that they were now incurring. The Complainants asked for either the full repayment or, at least, a 75% refund on the fees of GBP 26,580 for BL and GBP 8,800 for FL.[2]

In its reply, STM Malta essentially submitted the following:[3, 4]

Basis of the Complaint

1. STM Malta submitted that the basis of the Complaint is that the Complainants allege that a 1% marketing fee imposed by *Providence Life*

[1] Page (P.) 4
[2] *Ibid.*
[3] P. 199 – 203
[4] During the hearing of 26 September 2022, it was stipulated that *'The service provider is contumacious and is going to file a note before the 11 October 2022 justifying its contumacy'* (P. 299). Following the submission of the said note by the Service Provider, (P. 302-305), the Arbiter appointed at the time, decided, during the hearing of 18 October 2022, to accept the reply of the Service Provider (P.306).

Limited ('PLL') to the policies, which they have both selected for the investments, is excessive and that they claim:

(a) *'… though it may be contractual the fee itself is excessive irrespective of its deduction method and something that should have been highlighted to us when taking out these plans'*;[5]

(b) That deVere was negligent in not:

(i) informing the Complainants of the marketing fee rationale and its cost;

(ii) advising the Complainants that the fee was not being applied in the 6 or 12 monthly meetings; and

(iii) performing due diligence concerning STM and the subsequent recommendation, with regards to clients' policies.

2. As to the claimed compensation, STM Malta noted that the Complainants want a full or partial (75%) refund of the Marketing Fee as they deemed it to be superfluous.

Preliminary Pleas

3. STM Malta submitted that the Complainants are out of time to bring their Complaint to the Arbiter.

It noted that the Complainants first became aware of the quantum of the marketing fee on 26 of September 2013, when STM Malta sent by email copies of the policy documents issued by PLL.

It submitted that in order for the Arbiter to have the competence to hear the matter, the Complaint would have needed to be brought within two years of the coming into force of the Arbiter for Financial Services Act (Cap. 555). STM Malta claimed that the Complaint was however not brought within that time period and, consequently, the Arbiter should rule that he is not competent to decide on that matter.

[5] P. 199

STM Malta noted that the Complainants have not complained to it about its behaviour. The Complainants have brought to STM Malta's attention, a number of concerns they have with the behaviour, principally, of their adviser whilst also complaining that the fee they have been charged by PLL is excessive.

STM Malta submitted that it has dealt with the matter as if it were a complaint and passed on PLL's response. It further submitted that it is clear that the Complainants do not have a complaint with STM Malta since they have approached PLL and agreed on an alternative fee-charging structure. It further claimed that the Complaint brought in front of the Arbiter does not itself refer to a Complaint about STM Malta as it only refers to the behaviour of third parties, namely deVere and PLL.

STM Malta also submitted that since the Complainants have not communicated the substance of their complaint to it, then STM Malta has not had the opportunity to deal with the Complaint, prior to the Complaint filed with the Arbiter.

It further noted that the product complained about is the *Providence Life Limited Horizon Portfolio Bond*, which is not a product offered by STM Malta.

4. The Service Provider claimed that, in any event, the Complainants have reached a separate resolution (as per page 56 and 59 of the Complaint filed with the Arbiter) in writing, amending the fee arrangement with PLL with effect from the 14 November 2021, without STM Malta's consent.

   It submitted that in accepting the amendment, the Complainants have accepted the current terms and conditions for the *Horizon Bond* applying to their policies. It further submitted that in doing so, the Complainants have resolved their complaint (that the charges are excessive) and the Complainants accordingly have no complaint to make.

   STM Malta also submitted that, without prejudice to the fact that the Complainants have not brought a complaint to STM Malta then, by reaching a resolution with PLL, the Complainants have denied STM Malta any opportunity to deal with the Complaint.

It accordingly requested the Arbiter to decline to exercise his powers under the Act, pursuant to Article 21(2) of the Arbiter for Financial Services Act.

Background information provided by STM Malta

5. The Service Provider explained that the Complainants were introduced to STM Malta on the advice of Andrew Davies, in his capacity as agent of *deVere* (UAE). Mr Davies duly advised the Complainants to transfer their pensions out of the UK to STM (QROPS), which took place in February 2013, for the amounts of GBP 77,840.42 for FL and GBP 223,667 for BL respectively.

6. STM Malta further explained that the Complainants completed their application forms for the STM QROPS and separate application forms for the *Providence Life* policies on 24 June 2013 and 26 September 2013, again for both respectively. STM Malta sent a copy of the policy documents to the Complainants, which included the terms and conditions linked to the policies on 29 September 2013. The said terms and conditions did include the marketing fees in question (as per Annex A to the investment applications).

7. It noted that 8 years later, in 2021, PLL notified STM Malta claiming to have identified that a system error has occurred which affected the reflection of their policy charges on valuations appertaining to the *Horizon Portfolio* policies. This was transmitted to the Complainants.

   The Service Provider noted that the Complainants submitted complaints to *Fidelius Group* (which claims not to be the correct party to receive such complaints). It further noted that the relevant chain of correspondence is covered in the supporting documentation to the Complaint.

   STM Malta explained that the Complainants thereafter formally submitted a copy of a complaint to STM Malta on 12 November 2021 without however stating what complaint they had with STM Malta. This was submitted to STM Malta two days after an agreement had been proposed to settle with PLL, although STM Malta was not, at the time made aware of this proposed agreement.

The Service Provider noted that it treated the matter as if it were a complaint, although it could find no issue arising from its own actions or omissions that might have led to the Complaint, and it submitted a response to the Complainants on 30 November 2021.

Summary of STM Malta's Response

8. STM Malta submitted that given that there exist separate application forms for QROPS and for *Providence Life*, the Complainants cannot state that they thought that the terms and conditions in the QROPS application extended to their selected policies. Mr Davies, as the Complainants' adviser, was at the time obliged to familiarise himself fully with the terms and conditions of the products he was selling and explain these including the fee structures.

9. The Service Provider explained that it had provided the Complainants with the explicit terms and conditions provided therein. In the meantime, the Complainants never objected to this during the 8 years, and they are only now complaining because *Providence Life* notified them officially that it is belatedly seeking to reflect these charges in its valuations. STM Malta submitted that given the Complainants' clear on-going reliance on their adviser, it is not clear why they did not originally address the issue with the terms and conditions, way back in 2013.

10. STM Malta further submitted that the Complainants are mistaken to conflate STM Malta with *Providence Life*. These are inarguably, separate firms. Consequently, STM Malta may not direct the actions of *Providence Life*, and indeed, may on occasions like this, need to put itself in conflict with PLL.

11. That it is clear that the Complainants consider that their adviser at the time was negligent. STM Malta submitted that it cannot be held to account for the negligence of third parties outside its control. It provided copies of the terms and conditions to the Complainants and noted that it cannot make the Complainants read the documents it sends to them. It noted that indeed, even within the outline of the Complaint, the Complainants have accepted that they are bound contractually by the terms.

12. STM Malta submitted that in reaching an agreement with PLL, the Complainants have made it impossible for STM Malta to now negotiate alternative or potentially better terms with PLL. The Complainants have specifically accepted that the current terms of the *Horizon Bond* apply except as varied by the terms of the agreements they have signed. Objectively, over time, given that a pension is intended as a lifetime product, the reduction by 50% of the annual fees charged by PLL that the Complainants have negotiated should result in a lower overall charge than the Complainants consider that they were originally contractually bound to.

Concluding remarks by STM Malta

13. The Service Provider submitted that the marketing fee is not a fee that is levied by STM Malta. PLL charged the fee without STM Malta's permission and the Service Provider could not have, by an act or omission, prevented PLL from doing what it did.

14. The Complainants chose to complain to *Fidelius* (deVere). They chose to negotiate and agree a solution without notice to STM Malta. Then they chose to bring their concerns to the attention of the Service Provider only once they had reached a resolution.

15. STM Malta reiterated that the negligence complained of is that of an unrelated third party.

16. It submitted that the settlement that the Complainants have reached with PLL has resolved any question about the fee.

17. The Service Provider further pointed out that the Complainants indicated no act or omission on its part. It submitted that, in the circumstances, the only possible finding is that the Complainants have resolved the matter themselves and in doing so removed any power that STM Malta may have had to intervene. STM Malta accordingly considers that no equitable award may therefore be made in favour of the Complainants.

Preliminary

Plea relating to the competence of the Arbiter – Claim that the Complaint is out of time

In its reply, the Service Provider claimed *'that the Complainants are out of time to bring the complaint to the Arbiter'*.[6] STM Malta claimed that the Complainants were first aware of *'the quantum of the marketing fee on 26th of September 2013'* when they received email copies of the Policy documents issued by PLL.[7] The Service Provider submitted that the Arbiter has no competence on the Complaint as this was not brought against it *'within two years of the coming into force of the Arbiter for Financial Services Act (Cap. 555)'*.[8]

The Arbiter notes first that the Service Provider did not mention any specific article of the Arbiter for Financial Services Act (Chapter 555 of the Laws of Malta) ('the Act'), as the basis on which it was claiming that the Arbiter has no competence on this Complaint. STM Malta only referred to the lapse of a two-year period within which to file a complaint against it from the time it considered that the Complainants first became aware of the marketing fee.

The onus falls on the Service Provider to adequately prove any plea it raises with respect to the competence of the Arbiter. Taking into consideration the plea and submissions made by the Service Provider, the Arbiter considers that there is no sufficient and adequate basis on which he can accept the plea raised by STM Malta regarding his competence as outlined above. This is for various reasons, including that:

a) STM Malta failed to identify the specific article of the Act in terms of which it considers that the Arbiter has no competence to hear this complaint.

b) In any case, even if, for the sake of the argument only, the Arbiter had to consider that the Service Provider's plea is one made in terms of Article 21(1)(c) of the Act - which deals with the *'Competence of Arbiter'* and includes reference to a two year period from when the complainant first had knowledge - the Arbiter however, still finds no adequate basis on which he can accept such a plea.

   Article 21(1)(c) of the Act stipulates that:

[6] P. 200
[7] *Ibid.*
[8] *Ibid.*

> *'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'*

The Arbiter notes that the Service Provider considers that the Complainants first had knowledge of the matters complained of on 26 September 2013, this being the date of the 'Welcome Letter' sent by STM Malta to BL which letter included a copy of the *'Providence Life documentation'*.[9]

Such letter, however, cannot reasonably be taken as the date when the Complainants first had knowledge of the matters complained of for various reasons, including taking into consideration that:

(i) The Welcome Letter did not identify any discrepancies in documentation relating to the disputed marketing fee (which discrepancies shall be considered in more detail later on in this decision);

(ii) The disputed marketing fee was not applied and/or reflected in the valuation statements in subsequent years from the year of the acquisition of the policy in 2013 up until the year 2021; and

(iii) The Complainants were informed only post-July 2021 (that is, after the letter dated 5 July 2021 that *Providence Life* had sent to STM Malta), about the system error involving the disputed fee and about such fee not being reflected in their valuation statements.[10]

Furthermore, the matters complained of involve the disclosure of the marketing fee at the time of the acquisition of the Scheme/underlying policy and also the application of the disputed marketing fee after a failure to reflect such fee over an eight-year period.

[9] P. 246
[10] P. 16

Hence, the indicated date of 26 September 2013 cannot reasonably and justifiably be in any way taken as '*the day on which the complainant first had knowledge of the matters complained of*' for the purposes of Article 21(1)(c) of the Act.

c) The same would apply, if for argument's sake, the two-year period was meant by the Service Provider to refer to Article 21(1)(b) of the Act which is only applicable if the conduct complained of occurred before the entry into force of Chapter 555 (i.e., on 18 April 2016). The conduct complained of did not occur before 18 April 2016 for the reasons already explained. In terms of Article 21(1)(d), the conduct complained of is indeed considered to have continued well after this date.

Further comments in the next section below with respect to the competence of the Arbiter also refer. The Service Provider's plea is accordingly being rejected by the Arbiter.

Plea relating to the competence of the Arbiter – Nature of Complaint

In its reply, the Service Provider also submitted that *'the Complainants have not complained to the Respondent about its behaviour'*,[11] where it further highlighted in essence, the following main aspects:

i. That the Complainants did not file a complaint with STM Malta about STM Malta's faults but only just made STM Malta aware of the concerns they had on the marketing fee and on the behaviour of their financial adviser/ *Providence Life*.

ii. That even in *'the complaint brought in front of the Arbiter itself'* the behaviour of STM Malta was not put into question, but what was put into question was rather *'the behaviour of third parties, namely deVere and Providence Life'*.

iii. That the Complainants *'have not communicated the substance of their complaint to the Respondent'* and that STM Malta accordingly *'has not had*

[11] P. 200

> *the opportunity to deal with the complaint, prior to the complaint being filed with the Arbiter'*.[12]

Although the complaint filed by the Complainants with STM Malta by way of their email dated 12 November 2021,[13] indeed includes concerns about the behaviour of *Providence Life* and their financial adviser, *deVere/Fidelius deVere*, however, the said email raised general aspects which directly involved the Service Provider.

In particular, the Complainants highlighted, in the said email, the point that they *'were not informed at any stage, during sign up or the subsequent annual review from De Vere, Fidelius De Vere or Providence that we would be eligible for what is now effectively a 10% charge on the investments*'.[14]

Hence, there are clear implications on the Service Provider arising from the claim that they were not informed of the disputed marketing fee at the early stages (of the sign-up process), which the Service Provider was involved in by way of its role as Trustee and administrator of the Retirement Scheme as well as policyholder of the *Providence Life* Policy (as shall be seen later on), and subsequently from the annual reviews, that is annual valuations, issued by *Providence Life*, which the Service Provider was also in receipt and control of.

Furthermore, the Service Provider itself ultimately accepted the Complainant's complaint as a complaint filed against it, so much so that it issued a formal response on 30 November 2021,[15] rebutting the Complainants' claims.[16] Indeed, in the said response, STM Malta itself referred to the email of November 2021, and stated that:

> *'…I can confirm that we have conducted a thorough investigation into each of the concerns you raised in the complaint email dated 12 November 2021 and have outlined our findings below…*
>
> *…*
>
> *In conclusion, the matter arises from a system error with Providence Life Limited, recommended to you by your financial adviser. STM acted properly*

[12] *Ibid.*
[13] P. 8
[14] *Ibid*.
[15] P. 202
[16] P. 9-10 & 666-667

> *in notifying you of the charges at the outset of our relationship, and it appears that these charges are in line with the charges notified to you. Accordingly, whilst sympathizing with your frustration, we do not agree that there is any basis for a complaint against STM and have no offer to make in this regard'.*[17]

In its response to the Complainants' email of 12 November 2021, it even directed the Complainants to pursue a formal complaint with the Office of the Arbiter for Financial Services in case they were not satisfied with the outcome of their investigation.[18]

The Service Provider cannot accordingly now claim that the Complainants did not file a complaint about their behaviour in light of the said response. Neither can it claim, in the circumstances, that the substance of their complaint was not communicated to it nor that it did not have a reasonable opportunity to deal with the Complaint before being filed with the Arbiter.

For the reasons amply mentioned, the Arbiter accordingly dismisses the pleas of the Service Provider summarised in paragraphs (i) and (iii) above. For the avoidance of doubt, the Arbiter further decides that there are no issues with reference to Article 21 (2)(b) of the Act[19] and considers that there is no reason for him to decline to exercise his powers under the Act with respect to this Complaint.

With respect to the aspect raised in paragraph (ii) above, the Arbiter is also dismissing the said plea. Whilst the Complaint to the OAFS could have been better articulated it is sufficiently clear that the Complainants are also attributing faults to the Service Provider, primarily for them not being adequately informed at the point of sale about the marketing fee applicable on the underlying policy acquired by the Scheme and neither for them not being informed, during the initial eight years following the policy acquisition, that the marketing fee was not being applied on such policy.

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[17] *Ibid.*

[18] P. 10 & 667

[19] Article 21(2)(b) of the Act provides that *'(2) An Arbiter shall decline to exercise his powers under this Act where: … (b) it results that the customer failed to communicate the substance of the complaint to the financial service provider concerned and has not given that financial service provider a reasonable opportunity to deal with the complaint prior to filing a complaint with the Arbiter …'*

Plea relating to settlement already achieved by the Complainants

The Arbiter notes that the Service Provider further claimed that *'the Complainants do not have a complaint with the Respondent, since they have approached Providence Life Limited and agreed an alternative fee charging structure'*.[20]

Whilst the Complainants claimed that the arrangement of revised fees entered into with PLL was not a form of settlement, STM Malta however disputed this.

In the Declaration signed by a senior official of the Service Provider reference was *inter alia* made to an addendum to the *'Horizon Portfolio Bond Charging Policy'* where it was claimed by the Service Provider that this constituted a settlement on the disputed marketing fee. In its declaration, the Service Provider stated *inter alia* that:

> *'Although STM Malta were not directly involved in the negotiation discussions held between the members and PLL, STM Malta are of the understanding that this addendum reflects changes in the current pricing model (from 1% per annum to 0.5% per annum), as a form of settlement following the dispute. STM Malta has signed the said addendum…and prior to signing PLL informed STM Malta that PLL had proposed a deduction in fees (going forward since a refund was not possible), which the Complainants accepted as, in the long run, the deduction in fees will recoup the amount 1% marketing fee which has been deducted during the past 8 years. Thus, it is STM Malta's understanding that the grievance has been addressed and a remedy has been found.*
>
> *Further to the above, on the 13th of December 2021, we had received an email from Providence Life … informing us that the complaint filed by the Ls 'had been resolved as we have offered a reduction in the Annual Management fee' and hence the matter was closed. STM Malta therefore hold firm on the fact that the Complainants have sought and were given a remedy from PLL in settlement of the disputed 1% Management Fee which is the same fee in dispute in this complaint'*.[21]

[20] P. 200
[21] P. 318

The Arbiter further observes that during the hearing of 14 November 2022, the Service Provider highlighted that:

> *'Mr and Mrs L have an agreement with the provider to pay discounted fees, so, the position of the provider, which we understood and took to be true, is that they agreed to the charges. And they agreed to reduce the said charges for the remaining of their policies with the provider which is Providence Life.*
>
> *So, they have agreed to this. What we have been waiting for is confirmation because the terms and conditions which were referred to in the agreement that they have signed, and which was submitted to the OAFS, do not match the terms and conditions that they sent me by email last week'*.[22]

During the same sitting, one of the Complainants testified *inter alia* on this aspect that:

> *'… It was not an agreement. It was something to help us. It was not an agreement that we accepted what was going on. There was no word of settlement at all. It was not a settlement.*
>
> *We signed a document saying that they would change the charges, some of the PLL charges, not the marketing fee. That still stands. It was some of the ongoing annual charges and they reduced them slightly …*
>
> *We do not see that as being a settlement or an agreement as to what is going on …*
>
> *It was just something that was done to help us as good customer service to make us feel a bit better about what was going on. That is all it was.'*[23]

The Arbiter further notes that in an email dated 13 December 2021, sent by *Providence Life* to the Service Provider, *Providence Life* confirmed that the Complainants' complaint with *Providence Life '… is resolved as we have offered a reduction in the Annual Management fee for policy PLL200328 and PLL200326. Hence, we will now proceed to close this complaint*'.[24]

[22] P. 597
[23] P. 598
[24] P. 417

It is further noted that, during the proceedings of the case, the Complainants provided a copy of an email their adviser (*Fidelius deVere*) received from *Providence Life* as proof that *'It was only as a good will gesture to appease the situation and not a settlement against the marketing fees being applied*'.[25]

The said email of 2 September 2021, stated *inter alia* that:

> *'As a senior representative of Providence, I am authorised to propose a discount to the Horizon policies held by your clients Mr & Mrs L. Specifically, we would like to offer a 50% reduction to their ongoing Bond costs starting January 2022 when the next deduction is due. Furthermore, that reduction will remain based on the original incoming pension transfers…*
>
> *It is worthwhile to recap that the Horizon Bond does not charge any further costs to your clients. There are no policy fees, dealing or custody charges and simply put, your clients would pay 0.5% per annum on the original values transferred to the Bonds without any further costs.*
>
> *I am afraid I cannot adjust or offset the overstated units in their plans that represent the Marketing Fee but it's our intention to have this resolved during the months of October & November this year. We are of course very sorry for the issues surrounding this IT failure and our proposal to reduce Bond costs I hope, is a signal to your clients that we very much wish to fix this error, reduce their costs and retain them as clients'*.[26]

The Arbiter observes that the discussions with *Providence Life* were considered by the Complainants as not being a final resolution of the matter, so much so that even shortly after the said exchanges of emails with *Providence Life* regarding the discount of fees of September 2021, the Complainants proceeded to file complaints with their financial adviser on 4 October 2021,[27] and STM Malta on 12 November 2021.[28]

Having considered the particular circumstances of the case including the pertinent submissions as summarised above, the Arbiter considers that there is no sufficient and satisfactory basis on which the Service Provider's plea - that '*the*

[25] P. 311
[26] P. 312
[27] P. 12
[28] P. 8

Complainants do not have a complaint with the Respondent, since they have approached Providence Life Limited and agreed an alternative fee charging structure'[29] - can be considered acceptable.

This is primarily given that it has not been adequately proven, nor emerged, that the arrangement to pay discounted fees was in full and final settlement on the disputed issue.

By way of a decree dated 24 October 2023, the Arbiter requested the Service Provider to *inter alia* produce *'a copy of the correct/final Terms and Conditions of the agreement relating to the reduction in fees of the Providence Life policy as referred to during the hearing of 14 November 2022'*.[30]

The only *'Agreement relating to reduction of fees'*[31] that was presented during the proceedings of the case,[32] was just a copy of an *'Addendum to Horizon Portfolio Bond Charging Policy …'*, signed by the Complainants in November 2021, as well as by the Trustee as Policyholder which, in essence, only indicates that from '*1st January 2022 until the bond is redeemed'* the *'Current pricing model'* of the annual management fee, *'AMF of 1% per annum'* is being revised to *'AMF of 0.5% per annum'*.[33] A *'Policy Endorsement'* reflecting the said change was to be effective and issued upon acceptance of the signed addendum by PLL.[34]

It is also noted that in an email dated 30 October 2023, sent by *Providence Life* to STM Malta, the Customer Service official of *Providence Life* noted that:

> *'I wanted to also take this opportunity to remind you that, for these particular members,* ***as a gesture of goodwill****, we agreed at the end of 2021 to reduce the Annual Management Fee by 50%. I attach the endorsement for the addendums that were* ***signed and dated by all parties, including STM Malta at that time****'*.[35]

[29] P. 200
[30] P. 600
[31] Doc I and Doc J to STM Malta's email of 31 October 2023 – P. 601A
[32] P. 56-59 & 792-793
[33] P. 56, 59, 792, 793
[34] *Ibid.*
[35] P. 665 – Emphasis added by the Arbiter

In the particular circumstances, the Arbiter considers that no reasonable justification has emerged to sufficiently validate the plea raised by the Service Provider.

It is noted that no contractual arrangement signed by the parties involved, confirming that an arrangement was being accepted by the Complainants in full and final settlement of the issue relating to the marketing fee, has been presented as evidence of the final resolution of this matter in the first place.

In the absence of the presentation of a valid legally binding contractual agreement confirming the final resolution of the matter, the Service Provider's claim is therefore considered to be without substance.

Moreover, the arrangement about the discount in fees was ultimately more of a concession made by *Providence Life* to keep the custom of the Complainants and appease them for being informed of the application of the disputed marketing fees so late after a full 8 years after they were to be deducted and possibly also taking into account that these fees were not properly disclosed in certain documentation, as shall be considered later on in this decision.

The Service Provider's argument that the agreement/settlement reached between the Complainants and *Providence Life* was *"without STM Malta's consent"* and that *"by reaching a resolution with PLL, the Complainants have denied STM Malta any opportunity to deal with the Complaint"*[36] is also considered without basis.

There is no evidence that STM Malta had actually contested the disputed charges with *Providence Life* when, or soon after, this matter was raised by *Providence Life* in its letter of 5 July 2021.[37] Furthermore, the Service Provider actually was a signatory to the agreements reached between the Complainants and *Providence Life* and it has not been indicated nor emerged that it had raised any issues at the time about the possible withholding of their consent or prejudice of their dealings with *Providence Life* prior to signing the agreements.

[36] P. 201
[37] P. 16

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.

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.[38]

Facts of the Case

The Complainants

The Complainants, both of British nationality, born in 1962 and 1965 respectively were resident in the United Arab Emirates at the time of their membership of The STM Malta Retirement Plan.[39]

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 February 2013.[40]

The Scheme's Plan Schedule was attached as part of STM Malta's welcome letter dated 26 September 2013 (for BL) and 24 June 2013 (for FL).[41]

The Scheme Plan Schedule attached to their respective welcome letter indicated the *'Commencement date'* of the Retirement Scheme being the *'18th February 2013'* for both of the Complainants.[42] Their respective Schedule also indicated an initial *'Transfer value'* into the Scheme of *'£223,687'* and *'£11,513.03'* for BL and *'£40,802'* for FL.[43] An additional Scheme Plan Schedule was issued for FL in respect of an additional investment (of *'£24,430.02'* and *'£12,744.48'*) amounting in total to *'£37,058.42'*.[44]

[38] Cap. 555, Art 19(3)(b)
[39] P. 605 & 616
[40] P. 70 & 124
[41] P. 65 & 119
[42] P. 67 & 121
[43] *Ibid.*
[44] P. 163

The Scheme acquired a *Providence Life* policy respectively for the Complainants. The Scheme's Plan Schedule listed the *'Investment option'* being a *'Whole of life'* policy issued by *'Providence Life'* with policy number *'PLL200326'* for BL (with premiums of *'£223,667'* and *'£11,478.03'* in March and July 2013 for the total amount of *'£235,145.03'*), and with policy number *'PLL200328'* for FL (with premium of *'£40,782'* in March 2013).[45] An additional investment into the same policy of FL was also made in July and August 2013 (of *'£24,348.94'* and *'£12,709.48'*) for the total amount of *'£37,058.42'* as indicated in an additional Scheme Plan Schedule issued in her regard.[46]

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.[47]

According to the *'Policy Document Whole of Life Policy'*, the *'Issue Date'* of both policies was *'30th April 2013'*.[48]

The same respective document and policy schedules issued for each of the Complainants indicate the *'Policyholder'* as *'STM Malta Trust & Company Management Ltd'* with the Complainants being respectively listed as the *'Principal Life Assured'*.[49]

It is noted that the policy was referred to by the name of the *'Providence Life Portfolio Bond'* – as featured in the (two-page) Key Features Document provided in respect of the policy.[50]

It is further noted that during the proceedings of the case, reference was made to another different name of the policy as 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 name refers to the same underlying policy (as has also been considered in other similar cases by the Arbiter).[51]

[45] *Ibid.*
[46] P. 163
[47] P. 107 & 150
[48] P. 73 & 127
[49] P. 83 - 104, 137 - 147 & 164 - 185
[50] P. 105 & 148
[51] For example, *OAFS Case ASF 022/2022 … vs STM Malta Pension Services Ltd*.

Investment adviser

The Complainants' appointed Financial Adviser, as indicated in their respective Application Form for Membership, was *PIC deVere* based in Abu Dhabi.[52]

System error in the Providence Life policy valuations

In a letter dated 5 July 2021, *Providence Life* explained to STM Malta that it identified *'a system error ... which has affected the reflection of policy charges on Horizon Portfolio Bond valuations'*.[53]

In the said letter, *Providence Life* explained *inter alia* that:

> *'This means that the Marketing Fees have been deducted from the Policy but not reflected on the policy valuations.*
>
> *As stated in the Horizon Portfolio Bond Terms and Conditions, the Marketing Fee is taken at policy inception as initial units and is used to fund the costs of distributing the policy through the Independent Financial Advisor and Broker channel. 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.*
>
> *To rectify this error, policies which remain in force will reflect the cancellation of the initial units to correct the error at the rate of 1% of the initial premium per year for 8 years and the appropriate fee will be shown on the annual policy valuation generated each January ...'*.[54]

Further details on the matter were provided in a frequently asked question document issued by *Providence Life* titled *'Horizon Portfolio Bond System Error FAQ'*.[55]

In the said FAQ document, *Providence Life* explained *inter alia* that:[56]

> *'A system error has been identified which has affected the reflection of policy charges on Horizon Portfolio Bond valuations. This means that the Marketing*

[52] P. 605 & 616
[53] P. 16
[54] *Ibid.*
[55] P. 23 - 25
[56] *Ibid.*

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, policies which remain in force will reflect the cancellation of the initial units to correct the error and the appropriate fee will be shown on the annual policy valuation generated each January. This reflection will be calculated and commence in December 2021 and reflected on the policy valuation in the January thereafter. Should a policy surrender (or partially surrender) before the policy valuation has been corrected, 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 charges ... Your appointed Financial Adviser as part of the application stage should have explained the terms and conditions to you together with the applicable fees and charges.'

'... The Marketing Fee should have been reflected on policy valuations, via unit cancellations at a rate of 1% per annum for 8 years. This has not been reflected correctly on policy valuations in the past. To correct this matter, upon the surrender of any Horizon Policies the company is obligated to reflect any accrued fees, including but not limited to the Marketing Fees which had not previously been reflected … 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.'

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

Disclosure of the Providence Life policy charges

(A) Application Form for Scheme Membership (signed in February 2013)[57]

The Application Form for Membership into the Retirement Scheme (version *'V.1//May 2012'*), titled *'STM Malta Retirement Plan, QROPS – Application Form & Fee Schedule, For use with the Providence Life Bond'*, signed by the Complainants on *'18/02/13'* included a section detailing the *'Charging Structure'*.[58]

The said section (*'Section 7, Charging Structure'*), outlined the following fees in respect of the Scheme and the underlying policy (the portfolio bond):[59]

(i) An *'Annual Management Charge'* which *'covers the costs associated with administering the pension scheme and portfolio bond'*, based on the trust value.[60]

The Annual Management Charge was specified as 1.75% p.a in case of a QROPS trust value of *'Between GBP 50,000 and GBP 199,999'*; or 1.40% p.a. in case of a value of *'Between GBP 200,000 and GBP 499,999'*; or 1.25% p.a. in case of a higher QROPS trust value of *'Greater than GBP 500,000'*).[61]

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

(iii) An administration charge of GBP500 that *'will be deducted during the first year of operation of the bond'*.[62]

[57] P. 610 & 621
[58] P. 604 & 615
[59] P. 608 & 619
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*

It is noted that, as already considered in other previous decisions of the Arbiter which dealt with the same subject matter of the marketing fee, the Annual Management Charge was made up of a fee payable to *Providence Life* and a portion payable to STM Malta.[63]

(B) *Providence Life* Policy Key Features Document

As part of their respective Policy Issue Documents, the Complainants were provided with a two-page *'Providence Life Portfolio Bond Key Features'* document.[64]

This document formed part of the welcome pack letters of 24 June 2013 and 26 September 2013.[65]

The said Policy Key Features document specified the following policy charges in the section titled *'Providence Life Portfolio Bond Charging Structure'*:[66]

> *'*
> - *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 February 2013)

The application document in respect of their respective policy, titled the '*Providence Life QROPS Bond Application*[67] ('the Policy Application'), was signed by both the *'Life Assured'* (that is, the Complainants respectively), and

[63] E.g. Page 9 of 35 of *OAFS Case ASF 163/2021 …vs STM Malta Pension Services Ltd* - https://financialarbiter.org.mt/sites/default/files/oafs/decisions/475/ASF%20163-2021%20-%20AW%20vs%20STM%20Malta%20Pension%20Services%20Limited.pdf
[64] P. 712-713 & 754-755
[65] P. 322, 351-352, 364, 404-405
[66] P. 352, 405, 713, 755
[67] P. 623-639 & 643-659

the *'Trustee Applicant'* (that is, STM Malta), on February/March 2013.[68] It also included the advisor's signature (under *'Financial adviser details'*).[69]

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

The *'Terms & Conditions'* indeed formed part of the said Policy Application form as also reflected in the use of the same footer (reading *'Providence Life Bond Application'*) and in the continuation of the page numbering throughout the whole document.[70]

'Section 6, Policy Charges' of the mentioned Terms & Conditions detailed the applicable charges.[71] The said charges as reflected in the Terms & Conditions forming part of the Policy Application form signed in 2013 shall be considered in further detail in part (E) below.

(D) <u>The Policy Document issued in April 2013</u>

The respective *'Policy Document Whole of Life Policy'* issued by *Providence Life*, bearing Policy No. PLL200326 and Policy No. PLL200328 both with issue date of 30th April 2013,[72] included a section dealing with the *'Policy Charges'*.

The said section, (section 3.11), specified that:[73]

> *'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*

[68] P. 630 & 650
[69] *Ibid.*
[70] P. 631-639 & 651-659
[71] P. 636 & 656
[72] P. 680 & 733
[73] P. 687 & 740

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 2013 which shall be considered in the next section.

(E) Differences in the Policy Charges as emerging between the Terms & Conditions forming part of the Policy Application Form and the Terms & Conditions actually issued with the Policy -

A comparison is made below between the Policy Charges as featuring in:

- the Terms & Conditions document forming part of the Policy Application forms of February 2013 and

- the Terms & Conditions document that formed part of the Policy upon issue by *Providence Life* on 30 April 2013 (included with the respective Welcome Letters of STM Malta of 24 June 2013 and 26 September 2013).

Apart from a change in section numbering, the following key differences emerge between the two documents with respect to the respective section titled *'Policy Charges'*:

(i) The Terms & Conditions forming part of the Policy Application form of February 2013 stipulate *'an annual management charge of 1.75% per annum'*.[74, 75] The Terms & Conditions sent to the Complainants following the issue of the policy in April 2013, stipulate *'an annual management charge of 1% per annum'*.[76]

(ii) The wording relating to the dealing charges between the respective Terms & Conditions documents is slightly different. The Terms & Conditions forming part of the Policy Application of February 2013 stated in this regard that:

[74] P. 636 & 656

[75] As indicated in part A, *'Disclosure of the Providence Life policy charges'* in this decision, the annual management charge of *Providence Life* that applied to the Complainants depended on the QROPS trust value as reflected in the Scheme's Application Form of February 2013.

[76] P. 719 & 761

> *'PLL will deduct a dealing charge each time you instruct PLL to purchase a fund on your behalf. The charge is 2.75% for unitised funds. Structured Notes, individual stocks and other derivatives may have higher charges'*.[77]

The Terms & Conditions sent to the Complainants respectively with their Welcome Letters (of June and September 2013) use slightly different wording as follows:

> *'PLL will deduct a dealing charge each time you request PLL to effectuate the purchase of any underlying assets. The charge is 2.75% per transaction'.*[78]

(iii) Whilst the Terms & Conditions forming part of the Policy Application of February 2013 stipulates that *'A one-time charge of GBP 500.00 will be deducted from the policy when it is established'*,[79] no such statement was included in the same section (titled *'Policy Charges'*) of the Terms & Conditions sent respectively to the Complainants following the issue of the respective Policy in April 2013.

(iv) The Terms & Conditions sent to the Complainants following the issue of the respective Policy in April 2013 state 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'*.[80]

This is not reflected in the same section of the Terms & Conditions forming part of the Policy Application of February 2013.

(v) **The Terms & Conditions sent respectively to the Complainants following the issue of the Policy in April 2013 include a new material provision stipulating that:**

[77] P.636 & 656
[78] P. 719 & 761
[79] P. 636 & 656
[80] P. 719 & 761

> ***'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'***.[81]
>
> **No such charge is mentioned in the Terms & Conditions forming part of the Policy Application form of February 2013**.[82]

The disputed Marketing Fee is indeed a key difference emerging between the mentioned two Terms & Conditions documents as outlined above.

Obligations of the Service Provider

Trustee and Fiduciary obligations

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

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

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.

[81] P. 719 & 761
[82] P. 636 & 656

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*'.[83]

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'.***[84]

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 paterfamilias in the performance of his obligations**'.*[85]

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

[83] Editor Max Ganado, '*An Introduction to Maltese Financial Services Law*', Allied Publications 2009, p. 174
[84] *Op. Cit*., p. 178
[85] 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 Retirement Scheme Administrator, is the duty to *'act in the best interests of the scheme'.*

This is outlined in Article 19(2) of the Special Funds (Regulation) Act, 2002 ('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 applicable to the Service Provider in its role as Retirement Scheme Administrator.

With respect to this case, it is pertinent to particularly note the following rules:[86]

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 ...'***

[86] Emphasis added by the Arbiter.

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

The alleged failures

The Arbiter shall not comment upon or consider the matter regarding the appropriateness, or otherwise, of the Marketing Fee applied by *Providence Life* on the Scheme's underlying policy given that he has no jurisdiction on the policy nor on *Providence Life* for the reasons already outlined.

The Arbiter shall however consider the key alleged failures raised by the Complainants against STM Malta, which, in essence, involve the following:

a) ***The allegation that STM Malta failed to adequately disclose and/or ensure the adequate disclosure of the charging structure relating to the Providence Life underlying policy***

Having considered the pertinent matters of this case, **the Arbiter considers that STM Malta indeed failed to ensure that the charging structure of the *Providence Life* policy was clearly and adequately disclosed to the Complainants. This is for the reasons outlined hereunder and other factors highlighted later in this decision**:

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 February 2013).[87]

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 whole structure in question.**

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

STM Malta's own application for membership into the Retirement Scheme was indeed one specifically tailored for use with the policy. The cover page of **the Scheme Application Form specifically stated and highlighted that the form was *'For use with the Providence Life Bond'*.[88]**

The Scheme's Application Form even included the logo of *'deVere Group'* on the cover page.[89]

Furthermore, the charging structure outlined in the Scheme's Application Form included the fees of the pension scheme and underlying policy. Indeed, the fees of the annual management charge disclosed in the Scheme's Application Form were split between *Providence Life* and STM Malta as outlined in part A of the section titled **'***Disclosure of the Providence Life policy charges'* above.

[87] P. 608 & 619
[88] P. 604 & 615
[89] *Ibid.*

Similarly, the *Providence Life* Policy Application Form 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'*.[90]

The Complainants and STM Malta (the latter in its capacity of Scheme trustee), **together signed the application for the purchase of the *Providence Life* policy** (in February/March 2013).[91]

The said policy application was signed on the basis of the Policy Terms & Conditions that formed an integral part of the policy application form.[92]

During the proceedings of this case, **it has clearly emerged that the Complainants were issued, in April 2013, with a *Providence Life* policy which had different Policy Terms & Conditions to those contained in the Policy Application Form.**

The Terms & Conditions of the *Providence Life* Policy issued in April 2013 were provided to the Complainants as part of the welcome pack documentation sent by STM Malta in June and September 2013.[93]

The said Policy Terms & Conditions (of April 2013) contained the disputed Marketing Fee which clearly and categorically did not feature in the charging structure of the policy detailed in the Scheme's Application Form for Membership, nor in the Policy Application Form signed in February/March 2013, and not even in the two-page Key Features Document which was part of the Policy Issue documentation as considered earlier above.

It is clear that this had material negative implications. During the hearing of 18 October 2022, the Complainants testified *inter alia* that:

> *'We were not advised of this marketing fee which has now brought into play eight years later. We were advised that it was an oversight*

[90] P. 624 & 644
[91] P. 630 & 650
[92] P. 631-639 & 651-659
[93] P. 672 & 725

on someone's behalf. Now, if we were advised in the first place, we may not have gone with those policies. That was unacceptable …

…

I would like to add that over these eight years, if we had known at the beginning that we would have to pay this money, we may have not signed up as Dave quite rightly said. However, there have been eight years, any time where anyone who has had dealings with this, could have told us that this amount of money was coming out and that may well have happened, that might actually have made an impact on where we would invest our money and how we decided to invest our money.

We never had the opportunity to be able to do that because we were never told, so we feel it had a detrimental impact …' [94]

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 material changes and differences transpiring in the revised Policy Terms & Conditions which had a material bearing on their interests.

It is noted that the Complainants were only provided with a copy of new Policy Terms & Conditions, as part of the welcome pack in June and September 2013.

The fact that the Complainants were not alerted to, and adequately informed about, the revised charging structure and the material differences to the terms and conditions they were somehow made subject to (which were materially different from those they originally signed for), is evidently a material shortfall on the part of STM Malta as the trustee/RSA of the Scheme and the actual policyholder of the *Providence Life* policy.

The mere provision, as part of the welcome pack sent by STM Malta to the Complainants in June and September 2013, of a Policy Terms &

[94] P. 307

Conditions document (which contained material divergences to those signed in the respective application forms and Key Feature document), cannot in any way be reasonably considered as some form of adequate notification, nor of proper action reflective of the duties of STM Malta as trustee/RSA of the Scheme.

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) reflected the same terms of the policy issue document, and also when it did not promptly notify and bring to the attention and consideration of the Complainants the material divergences arising between the actual policy documentation and the documents used and considered by the Complainants at the time of application**.

Financial services practitioners are aware that even in case of changes to existing terms and conditions of a product held by a consumer, it is customary to follow certain procedures (involving for example prior advance notification and the possibility of an opt-out).[95]

The Service Provider was accordingly duty-bound to take the right actions on such sensitive and material aspects.

ii. *Inconsistent information as part of the welcome pack* - **As part of the welcome pack provided by STM Malta through its letters dated 24 June 2013 and 26 September 2013,**[96] **the Complainants were furthermore provided with a *Providence Life* Key Features document which did not include reference to the Marketing Fee**.

The said Key Features document of the *Providence Life* Portfolio Bond,[97] **included information not reflective of, and inconsistent with, the Policy**

[95] For example, before a material change is done to the terms and conditions of a financial product, the consumer is normally first duly formally informed beforehand and provided with relevant details prior to the changes being implemented. A consumer is, in such circumstances, also typically provided with a period of time to consider the changes and opt out of the product should s/he so desires prior to the changes taking effect.

[96] P. 672 & 725

[97] P. 712-713 & 754-755

Terms & Conditions issued in April 2013 despite being included with the same welcome pack.

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

b) ***The allegation that STM Malta failed to highlight the non-application of the marketing fee for over eight years***

It is noted that in his sworn declaration, the senior official of the Service Provider stated *inter alia* that:

> *'The documentation issued by PLL (such as the policy documents, the key features document etc) were all issued by PLL and STM Malta had nothing to do with their content but ensured that the PLL documentation is communicated to each Member who had invested in PLL and was a member of the Trustee …'.*[98]

From a consideration of the documentation produced, namely, the nature and form of the STM Malta and *Providence Life* Application Forms, it is clear however that STM Malta had a certain level of business interaction with *Providence Life* in order to enable it to include details of the *Providence Life* policy in its own forms.

As mentioned above, **STM Malta clearly had a duty to ensure that any fees communicated to the member, even more so in its own forms, were current and up to date and that the member was then not made subject to different terms and conditions not reflective of the terms they originally signed for. The mere provision of a 'revised' Policy Terms & Conditions without any communication that such Policy Terms & Conditions differed materially with respect to the Marketing Fee is by no means considered appropriate, professional nor meeting the legitimate expectations of a consumer of financial services**.

[98] P. 319

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

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*'.[99]

The non-reflection of the disputed Marketing Fee in policy valuations implies that, in practice, the Complainants were rather provided, and issued with, incorrect policy valuation statements not reflective of the true position of their respective policy. 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, however, have been aware of the fees applicable on the underlying policy. Such awareness should have arisen in its role of trustee and RSA of the Scheme and itself being the policyholder of the respective underlying policy of the Complainants.

Hence, it is considered that, **in the case in question, there was negligence on the part of the Service Provider with respect to the issue of the marketing fee both at the time of the acquisition of the policy and on an ongoing basis**. This is also for the reasons outlined below in this decision.

Other factors

i. *Lack of consent sought from the member to proceed with revised terms and conditions and the lack of opportunity provided to them to decline the revised terms*

The Arbiter considers that, as trustee and RSA of the Scheme (and being also the co-signatory to the policy application form), **STM Malta should**

[99] P. 23

have reasonably sought the member's consent as to whether to proceed with the revised Terms & Conditions.

The Complainants should indeed have been given the opportunity to change their mind and decline to proceed with the revised fee structure and terms and conditions. They could have availed of the cooling-off period applicable with the purchase of the underlying policy at the time.

No evidence has emerged, however, that the Complainants were adequately informed of the change in the Terms & Conditions, let alone that their consent was sought and/or opportunity provided to decline to proceed with the purchase of the policy.

ii. *STM Malta being the trustee of the Scheme and Policyholder*

The Service Provider cannot minimise its key functions and roles. Apart from being the trustee/ RSA of the Scheme, STM Malta was also the Policyholder of the *Providence Life* policy as outlined above.

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 and those issued with the actual policy. As mentioned above, any such divergences had to be adequately considered 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.

The importance of the Policyholder's role in reviewing or analysing the policy was even highlighted in the Policy Application form which included a disclaimer in bold as follows:

'IMPORTANT NOTICE: The Policyholder must analyse the policy to ensure that the cover meets his/her requirements and this policy and all its accompanying documentation should be kept in a safe and secure place, as duplicate copies cannot be provided'.[100]

STM Malta was ultimately itself in control of the policy and it had a duty to ensure, in the first place, that there were no material divergences from what was applied for and accepted by the Complainants in the respective application forms.

iii. *Lack of action in the best interests of the Complainants*

The Service Provider did not offer valid explanations as to why, and on what basis, the issuer of the policy has accepted the Policy Application Form of February/March 2013 and then issued a policy with materially different terms and conditions to those included in the Policy Application Forms that were accepted at the time.

This is clearly an aspect which STM Malta should have reasonably followed and carefully considered with *Providence Life*, in order to ensure the best interests of the Complainants prevail and safeguard their assets.

Such lack of action and intervention on the Service Provider's part not only occurred at the time of the issue of the policy and delivery of the welcome pack documentation to the Complainants' but even at the time when *Providence Life* approached STM Malta, through their letter of 5 July 2021, about the system error it discovered with respect to the Marketing Fee.[101]

STM Malta just informed the Complainants about such development. No evidence has been provided that they took any immediate action at the time to dispute such fees. The manner with which this was handled, despite the prevailing circumstances and evident material shortfalls which

[100] P. 630 & 650
[101] P. 16

all were to the Complainants' detriment, shows lack of effective action by the Service Provider to protect the interest of their members (the Complainants) who had to take the initiative to get some clawback from *Providence Life*.

Decision & Concluding remarks

As unsophisticated retail clients, the Complainants cannot be faulted for not reading the whole policy document line by line just in case their Advisor, Trustee and RSA fail to check the policy document properly.

In its capacity as trustee and RSA of the Scheme and policyholder of the Complainants' respective *Providence Life* policy, STM Malta ultimately had the duty to ensure that the policy issued was subject to the same or no lesser favourable terms and conditions to those it applied for together with the Complainants respectively.

It also had the duty and obligation in such roles to properly inform the Complainants of any material change in the terms and conditions of the product actually acquired and seek the relevant consent and direction from the Complainants in the circumstances.

STM Malta ignored or overlooked that there was a material change in the terms and conditions of the *Providence Life* policy which were different to those it applied for with respect to the marketing fee. It accepted the *Providence Life* policy with the new terms and conditions, and it did not highlight and raise this material aspect at the proper time with the Complainants.

Not only did it not itself raise any issues at the time of the receipt of the policy documentation, but it even did not take any action to safeguard the interests of the Complainant at the time when *Providence Life* decided to retrospectively apply a Marketing fee for over an eight-year period, which marketing fee was not reflected in the Scheme Application Form, nor in the Policy Application Form accepted by *Providence Life* and not even in the Key Features document forming part of the policy issue documentation.

The failure to take appropriate action at the time of the acquisition of the policy and at later stages as outlined above had a material adverse implication on the Complainant's respective Retirement Scheme.

After the discovery of the system error by *Providence Life,* they were unexpectedly charged a material fee, which fee did not even feature in any of the documentation used to apply for the structure in question as explained above.

Furthermore, the Complainants appear to have received policy valuation reports which did not reflect the true value of their respective policy.

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 the Complainants' respective policy.

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

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, including from being applied different and less favourable terms and conditions to those which formed the basis of the original policy application made by the Complainants and the trustee.

The Arbiter considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[102] of the Complainants who had placed their trust

[102] Cap. 555, Article 19(3)(c)

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 case[103] and is accepting it in so far as it is compatible with this decision.

Cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying policy. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the damages incurred. The claims of the Complainants are not being met in full to *inter alia* reflect the failure by their financial advisor to note, for example, the difference in policy terms at issue from those in the application forms and key features document, and the failure of Provident Life to issue a Policy with terms and conditions aligned to those signed for in the policy application.

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 afforded by it 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 the amount of 70% (seventy percent) of the amount of any Marketing Fee that may be or has been charged to their respective underlying

[103] Cap. 555, Article 19(3)(b)

policy irrespectively of whether these charges are actually reflected in the valuation statements.

A schedule explaining the amount paid in compensation in terms of this decision is to be filed within 15 days with the OAFS by the Service Provider with a copy to the Complainants who will have 15 days from its receipt to contest its computation in terms of Article 26(4) of Chapter 555 of the Laws of Malta.

With legal interest from the date of submission of the computation in terms 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