Before the Arbiter for Financial Services

Case ASF 092/2022

RH ('the Complainant')

vs

STM Malta Pension Services Limited

(formerly STM Malta Trust and Company Management Limited) (C51028) ('STM' or 'the Service Provider')

Sitting of 1 September 2023

The Arbiter,

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

The Complaint, in essence, relates to the claim that STM, in its capacity of Trustee and Retirement Scheme Administrator ('RSA') of the Scheme, failed to operate in line with the applicable standards and regulatory obligations by allowing unsuitable high-risk investments which were not reflective of the Complainant's true risk tolerance.

[1] [1] Page (P.) 1 - 91

The Complaint

The Complainant explained that her Private Teachers Pension was transferred from UK to Spain in 2012 where she was residing. A director of the school where she was employed as a teacher introduced her to Investment Advisors known as *Continental Wealth Management* (CWM), specifically, to Neil Hathaway.

Following a tick-box exercise whereby she was categorised as a low-risk investor, she agreed to invest GBP 101,069.03 through a Malta-registered Trust managed by the Service Provider to be invested in a Skandia bond which later became *Old Mutual Insurance* (OMI) and now *Quilter International*.

She complains that in the space of 5 years, the value of her investment dropped by approximately GBP 60,000[2] and rather than being invested in low-risk instruments she got invested in high-risk structured bonds, of which she claims she was totally unaware. She claims that her signature was used to justify the investment which she claims she never approved. She further claims there were serious irregularities/infringements which, in her opinion, STM should have picked up earlier.

As a remedy, she is seeking compensation for GBP 107,000 as the loss she claims to have suffered after considering the current value of her investments at GBP 27,000, and also after including a compound return of 4% p.a. from November 2012 till June 2022, bringing the total supposed notional value of her investment to GBP 134,000 at the time of the complaint.[3]

The Reply and Other Submissions of the Service Provider - Preliminary Pleas

In their reply, the Service Provider raised various preliminary pleas which would challenge, if accepted, the competence of the Arbiter to hear this case.

[2] According to her claim, the residual value of her investment was GBP 27,000 which gives a capital loss of GBP 63,402 after taking into account a withdrawal in 2017 of GBP 10,667 – P. 3

[3] P. 3

Preliminary Plea raised in the first Official Reply of 03 August 2022[4]

1. STM submitted that the Complaint is time barred by virtue of Article 21(1)(b) of Chapter 555 of the Laws of Malta.

Preliminary Plea raised in the second Official Reply of 11 October 2022[5]

2. The Service Provider further submitted that the Complainant breached the provisions of Article 21(2)(a) of Chapter 555 as she had joined a class action against *Quilter International Isle of Man Limited* and others in relation to her investment which is the subject matter of her complaint.

   STM submitted that this could lead to unjustified enrichment as the Complainant is seeking a double remedy and, accordingly, it requested the Complainant to withdraw her complaint before the Office of the Arbiter for Financial Services ('OAFS') and if not, it requested the Arbiter to suspend this case *sine die* until the class action is decided.

Preliminary Plea raised in the final submissions not previously raised[6]

In its final submissions, the Service Provider also raised, for the first time, the following additional pleas:

3. That the Complaint is also time barred by virtue of 'Article 21(c)'.[7]

4. That the Complaint was filed with the Arbiter four years after the apparent complaint to the Service Provider.[8]

The Arbiter will deal with these preliminary pleas before proceeding to consider the reply of the Service Provider on the merits of the Complaint.

<u>Consideration of the Preliminary pleas raised</u>

[4] P. 97 -100
[5] P. 101 - 104
[6] P. 116 - 120
[7] P. 118
[8] *Ibid.*

The Arbiter notes that pleas 3 and 4 were only raised in the final submissions and, therefore, the Arbiter cannot consider them given that in terms of the provision stipulated under Article 19(3) of Chapter 555 of the Laws of Malta ('the Act'),

'… the financial services provider may only raise the plea of prescription in the first written submissions provided for by article 22(3)(c) unless otherwise authorised by the Arbiter giving reasons for that authorisation'.

No such authorisation was requested nor issued.

As to the other preliminary pleas raised, the Arbiter considers the following:

1. *Plea that Complaint is time barred by virtue of Article 21(1)(b) of Chapter 555 of the Laws of Malta*

   Article 21(1)(b) of Chapter 555 states that:

   'An Arbiter shall 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 which occurred on or after the first of May 2004:

   Provided that a complaint about conduct which occurred before the entry into force of this Act shall be made by not later than two years from the date when this paragraph comes into force'.

   The Act, Chapter 555, came into force on 18 April 2016 and, so, in terms of the above, for valid complaints regarding events occurring before this date, such a complaint had to be submitted to the OAFS by 18 April 2018.

   The Service Provider maintains that the Complainant had knowledge of the *'alleged losses or the possibility of loss prior to 2017'*[9] but only filed the complaint with the OAFS in 2022. On this basis, it claimed that the Arbiter has no competence to hear and adjudge this Complaint. In its final submissions, it further highlighted the dates when the disputed transactions took place.

[9] P. 97

In various previous decisions, the Arbiter has ruled that the date when the transaction was executed is not the date when the conduct has actually occurred as the conduct could be of a continuing nature which goes beyond the 18 April 2016 when the Act came into force.

As emerging from the *'Historical Cash Account Transactions'* statement covering the period 08/11/2012 to 08/05/2018, various disputed investments were still in existence well beyond April 2016 and STM was still the trustee and RSA of the Scheme beyond such date.[10]

As to the losses, it is further noted that the Service Provider themselves mention *'the Nomura note realised a substantial loss on the 15th of May 2017'.*[11] Consequently, it is evident that the nature of the conduct complained of continued well after the entry into force of 18 April 2016.

Given that the Complaint involves the conduct of the Service Provider during its tenure as trustee and administrator of the Scheme, which conduct goes beyond the period when the Act came into force, the Arbiter considers that Article 21(1)(b) is therefore not applicable to the case in question.

The Arbiter accordingly dismisses the preliminary plea based on Article 21(1)(b) as there is ample evidence that the matter complained of continued after 18 April 2016.

2. *Plea that the Complainant breached the provisions of Article 21(2)(a) of Chapter 555 as she had joined a class action against Quilter International Isle of Man Limited and others in relation to her investment which is the subject matter of her complaint.*

Article 21(2)(a) states:

'(2) An Arbiter shall decline to exercise his powers under this Act where:

(a) the conduct complained of is or has been the subject of a lawsuit before a court or tribunal or is or has been the subject of a

[10] P. 68-91
[11] P. 118

complaint lodged with an ADR entity in any other jurisdiction, initiated by the same complainant on the same subject matter'.

The class action referred to does not involve *'the conduct complained of'*, that is, the conduct of the Service Provider, but the conduct of a third party which may also have contributed to the loss, where each party has its own distinct and different responsibilities and roles. The Arbiter therefore dismisses this preliminary plea as, if anything, any recoveries under the class action would contribute to reduction of the claimed loss, potentially resulting of benefit to the Service Provider.

On the other hand, the Arbiter is sensitive to the risks of unjustified enrichment by pursuing double remedies and, in his decision, the Arbiter will make provisions for such risks.

The Arbiter furthermore notes that, in the hearing of 28 November 2022, it was already decided that the case should proceed as the said Article 21(2)(a) of Chapter 555 makes no provision for the suspension of the hearings purely because the Complainant is pursuing rights against third parties.[12]

The Arbiter shall next proceed to consider the Service Provider's reply on the merits of the case.

The Service Provider's reply on merits

STM made their defence by stating:[13]

- that on the merits, it asks the Arbiter to humbly take note of the fact that the allegations made by the Complainant are mainly addressed to her regulated financial advisor and not to STM who are mainly custodians of the assets.

  It noted that the Complainant seems to indicate that she was given wrong advice by her financial advisor and that the chosen investment was not suitable for her investment objectives. STM submitted that it cannot answer

[12] P. 105
[13] P. 97-100

to such allegations as its role is that of custodian, i.e., to hold the assets pertaining to the Complainant. Its obligation is, according to applicable law, to note the records of the regulated financial advisor (the client fact-find, execution only letter, disclaimer forms, etc.) and proceed with the chosen investment according to the Complainant's instructions.

It further submitted that any recommendation to invest in an alternative product or any suggestion in relation to the investment chosen by the member would trigger a licence requirement and a regulatory breach for STM since it is not licensed to give investment advice.

The Service Provider also submitted that it acted according to its legal obligations, and it is the regulated financial advisor who should be held responsible for its advice and not STM who has acted, and continues to act, in the best interest of its Members to the extent expected as trustees/ custodians.

It noted that the Complainant knows this and, in fact, has filed a complaint with *Old Mutual Fund* (previously known as Skandia bondholder) requesting an investigation on the type of investments and authorisations[14] given by her and her regulated financial advisor. It submitted that it is evident that this Complaint has been filed against STM not because of any wrongdoing from their end but based on efficiency (of the Office of the Arbiter), minimal cost (to the Complainant) and because STM are the easiest targets since Cyprus may be more of an unknown territory for the Complainant. It stated that this cannot accordingly be considered as fair, just or reasonable.

- that on the merits, the Complainant deliberately chose not to disclose information that was pertinent to the financial advisor in seeking to understand the Complainant's investment objectives.

[14] P. 47

Reference was made to the (C)WM Partners Client Fact Find dated 18 September 2012,[15] wherein the investment advisor, Neil Hathaway, declared that

'Client did not wish to discuss certain aspects regarding income and expenditure, and I advised that this could affect the overall advice given we discussed the need to make sure that there is sufficient life cover to pay off the mortgage in the event of death'. [16]

STM submitted that the Complainant therefore made a conscious decision not to disclose information to her financial advisors which the Complainant knew that she should disclose. It further submitted that this imports an element of dishonesty/mistake as the Complainant knew of particular facts and deliberately failed to disclose them. Such non-disclosure is shorthand for a breach of the consumer's legal obligation to disclose all relevant material to her advisor who is tasked with reviewing the customer's investment objectives and exposure to risk.

It submitted that it would thus be unfair, unjust and unreasonable for the Arbiter to uphold this Complaint as it was the Complainant herself who chose to carry the risk of her chosen investment when she deliberately chose not to disclose material information that was pertinent to her investment objectives.

STM noted that, as shall be evidenced, the non-disclosure of information precluded advisors from analysing the customer's investment objectives and/or risk profile as detailed in the Client Fact Find and, in fact, this was recorded in the said Fact Find report.

- That, also, on the merits and further to the matters raised in the Client Fact Find,[17] the investment advisor noted the following:

[15] P. 39
[16] P. 42
[17] P. 42

'Her intention is to use her 30% tax free lump sum to pay off the mortgage when possible. The balance is to remain to provide a pension in future. She wishes to transfer the balance of £101,000 into a Skandia Executive Investment Bond for Capital Growth. She wishes to do this by using structured products with differing levels of guarantee on the capital. These will be done at a later date once the bond is issued'.[18]

STM also noted that following her instructions, the Complainant proceeded to sign an *'execution only'* letter[19] wherein she confirmed that she has chosen not to seek or receive any advice from her advisor in relation to this product. The Service Provider pointed out that her instructions were execution only, meaning that: (i) she herself has identified the product she wanted (ii) she selected the fund and (iii) she has specifically declared that she will not rely on any financial advice relating to the product chosen by her and, in fact, this was recorded in the client file in accordance with Standard Licence Condition 3.03(a) which states that:

'when acting on an execution only basis (i.e. processing a transaction in circumstances where the customer is reasonably believed not to be relying on the Licence Holder to advise him or exercise any judgement on his behalf as to the transaction's suitability), a note should be maintained in the client's file indicating that no advice was provided. This note should also be signed by the client'.[20]

This note was retained on file. STM noted that, in addition, the Complainant also signed a Client Confirmation Form[21] by means of which she confirms that *'the fund selection is of my own choice'*.[22]

[18] P. 98
[19] P. 44
[20] P. 99
[21] P. 43
[22] P. 99

STM submitted that this is an additional confirmation that the Complainant chose the said investment, and that it was her intention to request that her pension is invested in the *Skandia Investment Bond*.

STM questioned how, as custodians, it can be held responsible for the alleged losses when it was the Complainant herself who asked her advisors to execute her instructions and her investment choices. It submitted that it is always disappointing when an investment does not render the expected profit but that does not mean that the trustees should be held responsible for such loss especially when such loss is a result of market movements and nothing else.

The Service Provider claimed that the Complainant took the risk and carried the risk of any possible losses when she demanded that her investment instructions are executed according to her choices. This is also evident from the fact that she also signed a Client Disclaimer Form[23] by means of which she made it amply clear that she is ready to carry any investment risk particularly because she knew that her chosen investment was a non-regulated product within the EU (which includes hedge funds, private equity funds, real estate funds and a wide range of other types of high risk funds), and yet she confirmed that she wanted to proceed with the said purchase.

It submitted that on the said basis, it would be unjust, unreasonable and unfair for the Arbiter to consider that STM could be responsible for investment losses specifically chosen by the Complainant herself together with its associated risks. It would be unjust for STM to be held responsible for any breach of regulatory obligations (as is being alleged) when there were none.

[23] P. 45

- that, on the merits of the Complaint, and without prejudice to the matters already raised, the Complainant is claiming more than what the investments are worth at this point in time.

  That, whilst it is always disappointing that an investment loses out on its value, however, this could never be taken to imply responsibility on the part of the Service Provider or that STM is bound to make good for any loss when such loss is not linked to any negligence from STM. It noted that nonetheless, this is what seems to be the underlying basis of the Complaint.

  It further submitted that this approach indeed presupposes a guarantee for what is known as a moral hazard that burdens the Service Provider in favour of the investor which is neither just and equitable nor does it exist at law.

  STM claimed that any loss in the value of the investments complained of was the result of an inherent credit risk which it could not have had any control of.

  It noted that the Arbiter is also to consider the fact that the Complainant seeks to demand that she is repaid the full premium paid amounting to £101,069.03 whilst including a 4% annual increase (without any substantiation on why this 4% increase should be added).

  STM contends that, when quantifying the loss (if any), the Arbiter should deduct the amount withdrawn by the Complainant, that is, £10,667 and deduct the remaining amount which is still in her portfolio, and which amounts to £27,000. It argued that the 4% increase should be dismissed in its entirety as it is nonsensical, illogical and absolute fantasy as this increase does not emanate from any documentation whatsoever.

- The Service Provider reserved the right to produce further oral and documentary proof and to make additional submissions both oral and also in writing during the sittings before the Arbiter to substantiate its indicated position.

- For the reasons mentioned, STM considers that all of the Complainant's demands are to be rejected with costs borne by the Complainant.

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.[24]

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

The Scheme Account in respect of the Complainant

The Complainant's personal retirement scheme, in practice, involved a member-directed account, where an investment advisor was appointed to advise her on the investment decisions undertaken within the Retirement Scheme's structure. The Retirement Scheme is operated and administered by the appointed trustee and RSA, whose specific roles and responsibilities shall be considered further in this decision.

The Complainant

The Complainant, born in 1958, of British nationality and residing in Spain, applied to become a member of the *STM Malta Retirement Plan* in 2012.[25]

Her occupation, at the time of the application for membership was listed as teacher with a monthly salary of €2,000.[26]

As part of her submissions, the Complainant noted that she had *'requested continual advice and low risk investments only'*.[27]

[24] Cap. 555, Art. 19(3)(b)
[25] P. 2, 12 & 42
[26] P. 40
[27] P. 38

In the Client Fact Find compiled by her investment advisor, CWM, her 'Risk Profile' was outlined as ***'low to medium'.***[28]

The Complainant's profile of a retail, low to medium risk investor was not disputed by the Service Provider.

Investment Adviser

The Complainant's appointed investment advisor was Continental Wealth Management ('CWM').[29]

Transactions

Following membership of the Retirement Scheme in 2012, a transfer of her Private Teachers Pension from UK was made into the Scheme.

STM Malta, as the trustee of the Complainant's Scheme, applied to acquire the *Executive Investment Bond*, a life assurance policy, issued by Royal Skandia in October 2012 ('the Policy').[30] The Policy was held as an underlying investment of the Retirement Scheme.

The application in respect of the Policy was accepted in 2012, and the Policy issued on 8 November 2012 with a premium of GBP 101,069.03.[31] The said premium was in turn used to acquire an underlying investment portfolio held within the said Policy. The various investment transactions and purchase of investment products underlying the Policy are listed in the *'Historical Cash Account Transactions'* statement produced during the case.[32]

The Service Provider claimed, in its reply, that the Complainant had withdrawn the amount of GBP 10,667 from her Scheme.[33] In their final submissions, STM

[28] P. 42
[29] P. 19, 39-42 & 47
[30] P. 18
[31] P. 21
[32] P. 68-91
[33] P. 100

claim that the total withdrawals were GBP 18,717 but they provided no documentary reference for the figures mentioned.[34]

The Arbiter notes that according to a Valuation Statement issued by *Quilter International* in respect of the Policy as at 6 July 2022, the *'Total Withdrawals'* as at that date amounted to GBP 17,022.52.[35]

The same Valuation Statement indicated that as at 6 July 2022, the *'Total Current Market Value'* of the Policy was of GBP 24,470.17 - thus reflecting a staggering material reduction in value of GBP 59,576.34.[36]

The hearings

At the hearing of 28 November 2022, the Complainant made her case stating:

'The reason I am making this complaint is that I have £24,000 in my account from the initial sum of £101,000. I took out £10,000, so it is a substantial loss. If you analyse what has happened to me - I know nothing about finance – but analysing what has happened to me, my initial fact find has no bearing on what has occurred, and I understand that it is a different case but, at the same time, if I had been an investor and I had carried out all the transactions I was supposed to have carried out with my name on thousands of transfers, surely I would have been kept informed or kept in communication. I feel that my money should have been protected.

I understand it would be difficult to start with; maybe my papers all seemed in order. But as time went on, particularly after 2017, when knowledge came out that there were various different proceedings, there were still losses after this time. I feel that my money as not closely regulated enough by the trustees.

I have been a teacher since 1980. I am a teacher of sport science and English as a second language. I have no financial knowledge whatsoever, and for that reason

[34] P. 116
[35] P. 54
[36] GBP 101,069.03 (Total Premiums) - GBP 17,022.52 (Total Withdrawals as at 06.07.2022) - GBP 24,470.17 (Total Current Market Value as at 06/07/2022) = GBP 59,576.34

I contacted an advisor. And I was also a former national volleyball coach. So that is what I do as a career, and I am still working now'.[37]

Under cross-examination she stated that:

- Her appointed advisor had proposed the transfer of her pension to Malta.
- She disagreed that the bonds and STM were chosen by her and her advisor.
- The investment questionnaire was a tick-box exercise and she had made it clear she wanted a very low risk investment allocating 70% as safe and 30% to allow for some growth.
- Her advisor had misguided her, but she expected more protection from the Trustee.
- She said that her signatures on pages 42 and 43 were hers but she strongly believes she did not sign that form. It was not until very later on that she realised the existence of forms in STM's possession which, in her opinion, she did not sign (even though they show her signature). She noted that:

  'I believe that it was copied in the same way that my signature is on all dealing instructions and is exactly the same signature.'[38]

- She was not involved in any complaint against her advisors (CWM).
- She was already aware in 2017 that her investments were down but she was advised to keep her Trust in Malta as otherwise it could affect any future claims. She started writing to the Trustees and to the 'bondholders'[39] from 2017 onwards but the advice to keep funds in Malta did not come from her advisor but from people in her same situation.

When asked why she was blaming STM for her losses she replied**:**

[37] P. 106
[38] P. 107
[39] Probably refers to investment house holding her bond/policy.

'Being asked, after all that I said today, why am blaming STM for my losses, I say because I have in front of me pages and pages and pages of dealing instructions that had I meant to be the independent investor that you have on your form - and you know that I was purely a teacher - I would have had no knowledge to do this. I think someone should have been regulating it.

It might appear to be very naive, but that is how it is. I am a teacher. How could it be possible that I could invest in these high-risk bonds with no knowledge whatsoever of the stock market; with my signature which is identical on all the paperwork?

It is being said that STM was the recipient of the instructions, it was not the one giving them out. I say that STM should have regulated what was going on beneath them, if you like, the top of the pyramid. That is my impression'.[40]

At the second hearing of 09 January 2023, the Service Provider declared they have no further proofs to present.

Final submissions

In her final submissions, the Complainant reiterated that she was involved both in this Complaint and in the class action against Quilter aided by FORSTERS LLP whose remuneration is on a contingency basis. She said she believed that in her class action *'the claimant to be STM'.*[41]

She further stated that:

'If my Trustees had vetted my initial profile correctly and evaluated the risk they should never have authorised my Retirement plan and I should have been notified immediately. Article 21i TTA, chap 331

As a result I consider my Trustees to be negligent in their failure to assess my risk profile, failure to protect my Pension, failure to act in my best interest and failure to communicate any concerns. If my Trustees had acted according to their professional obligations it would have become apparent by analysing my term

[40] P. 108
[41] P. 110

sheets over the following years, that significant losses had occurred and if measures had been put in place there is a possibility some of these losses could have been avoided. Once again my Trustees had 'turned a blind eye' and failed to act to mitigate further losses to my pension fund. Civil code 1124A, chap 16

It is obvious that STM Malta Pension Services Ltd have totally disregarded my personal and financial interests and have overlooked and permitted serious irregularities from the outset of my Pension Plan. Their failure to regulate the Financial companies responsible for both the initial risk profile and protection of my investment and their failure to communicate and to accept responsibility has led to a very precarious future for both myself and my family in addition to unimaginable stress this has caused me. I have presented the figures in initial submissions but can confirm the amount requested is 107,000 GBP plus interest and costs'.[42]

In their final submissions,[43] the Service Provider stressed the documents that the Complainant had signed including those that seem to confirm that:

- She had refused to give full information on her financial background including her income and expenditure.
- She had accepted to deal on an 'execution only' basis without relying on external advice.
- She had chosen the Bond (Policy) to be invested in.

As a result of these choices that the client had made about her investments, especially that of concealing or failure to provide certain financial information about her, the Trustee argued that it could not make any reliance on her risk tolerance assessment. Therefore, it submitted that the losses suffered were not caused by STM but by the Complainant's choice not to seek investment advice, to choose her own investments and to accept the onus and risk of the trade completely on her shoulders.

[42] P. 113
[43] P. 116

STM finally contended that if the Arbiter does not accept to take the signed documents at their face value, then, the loss was caused by her investment advisor and not by STM as the advisor had great responsibilities towards their client.

Analysis and Considerations

Trustee and fiduciary obligations

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

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

> *'(1)* ***Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias,*** *act in utmost good faith and avoid any conflict of interest'.*
>
> *'(2)(a) Subject to the provisions of this Act,* ***trustees shall carry out and administer the trust according to its terms; and subject as aforesaid, the trustees shall ensure*** *that the trust property is vested in them or is under their control and shall,* ***so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage*** *…'* [44]

In its role as **Trustee, STM was accordingly duty-bound to administer the retirement scheme and its assets to a high standard of diligence and accountability.**[45]

The said crucial aspects should have guided STM in its actions as trustee.

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[44] Emphasis added by the Arbiter

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

Obligations as a Retirement Scheme Administrator

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

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

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

The key obligations and responsibilities, including the oversight and monitoring obligation of STM in its role of Retirement Scheme Administrator and Trustee of the Scheme shall be considered further on in this decision.

Failures of STM

As to a breach committed by some other person, such as the Investment Advisor, as also alleged by STM, the Trustee/RSA has an obligation to protect his client to the best of their ability and not just rely blindly on signed documents which provides a very conflicting view about the customer's true risk profile.[46]

The Arbiter makes particular reference to the Personal Information document (Client Fact Find) completed by the Client Advisor about the Complainant on 18 September 2012.[47]

[46] P. 39 - 45
[47] *Ibid*.

Even to the untrained eye, this document is full of contradictions which merited deeper investigation**.** To a professional trustee, bound by the duty of care toward his customer and to act **with the prudence, diligence and attention of a bonus paterfamilias, acting in utmost good faith and avoiding any conflict of interest,** this document should have been a very large red flag.

One wonders how the Trustee could accept that a person with no professional experience in financial matters and whose attitude to risk is defined as low to medium[48] would condone their client taking decisions like:

a. withholding information about her income and expenditure.

b. selecting solely structured products (purportedly with different levels of risk on guarantee of capital) as the investment products to be invested into.

c. making her own selection of the products to be invested in.

d. investing in Non-regulated Products.

e. choosing to deal on Execution Only basis exempting the Advisor from the obligations that go with Investment Advice – which, in itself, is in contradiction of the appointment of the investment advisor to provide advice in the first place.[49]

The Arbiter will not enter into the argument whether the Complainant's signature on the forms is true or digitally copied. If there is a case of fraud, the Complainant should involve criminal authorities accordingly.

However, the Arbiter questions why the Trustee, receiving a document with such glaring contradictions, accepted it at face value without discussing these contradictions with their client as beneficiary of the Trust to make sure that the client understands the full weight of the decisions she appeared to have signed for and which certainly do not measure to the low to medium risk profile she was assigned.

[48] P. 42
[49] P. 43 & 44

The Arbiter notes that it has not emerged that STM Malta made any reservations or expressed any concerns on these investments, relying completely on the documents which the Complainant had apparently signed taking full responsibility on her shoulders.

If the Trustee does not accept to onboard clients without having an investment advisor, what sense does it make to accept Execution Only orders from their client, which purportedly exempt the Advisor from the responsibility of giving investment advice? And, consequently, what is an Investment Advisor being paid for if they do not accept the responsibility of giving advice?

The application for investing in Royal Skandia Bond ultimately states that

'we only sell our products through independent financial advisers as we believe it is important for you to receive independent financial advice'.[50]

Furthermore, how prudent was the Trustee to accept investment of the whole amount in the same type of product (that is, structured notes) which produce 100% concentration of the risk in a single or similar product without the important attribute of diversification crucial to investment risk management?[51]

It is noted that indeed the Service Provider allowed the Complainant's Scheme to purchase multiple structured notes as emerging from the *'Historical Cash Account Transactions'* statement, such as the following investments:[52]

- EUR 9,000 into *RBC Ecommerce Income AC Note* on 14.11.2014;
- EUR 9,000 into *Leonteq November COSI Blue 1* on 17.11.2014;
- EUR 9,000 into *Leonteq 9% Multi Barrier Rev Conv 4 Equities* on 17.11.2014;
- EUR 4,955 into *BNP Paribas Inv Pt FTSE EPRA Eurozone* on 21.10.2015;

[50] P. 11
[51] P. 21 - 37
[52] P. 68-86

- GBP24,000 into *RBC 1Y GBL Financials Income NT* on 11.04.2013;
- GBP 4,000 into *RBC 4Y Retail Income* on 03.07.2013;
- GBP 26,000 into *Commerzbank 9% Tech Pioneers* on 18.12.2013;
- GBP 26,000 into *RBC Festive Income Note* on 13.01.2014;
- GBP 12,000 into *Nomura 9% US Tech Income Notes* on 29.04.2014;
- GBP 12,000 into *Commerzbank 9% Future Pioneers* on 13.05.2014;
- GBP 1,785 into *Leonteq November COSI Blue 2* on 02.01.2015;
- GBP 1,962 into *EFG EY MB EXP Cert Red March 1* on 01.04.2015;
- GBP 5,999 into *Leonteq 3 Years Multi Barrier Express Cert* on 18.06.2015;
- GBP 6,000 into *Commerzbank 7% PA US Diversified AC Income* on 03.07.2015;
- GBP 6,000 into *Leonteq 9.83% MLT Barr Clovis Lumber Peabody Tidewater* on 13.07.2015;
- GBP 6,000 into *TCM Blue June 1* on 16.07.2015.

It is also evident from the *'Historical Cash Account Transactions'* statement that material losses (some even close to their total capital invested) were realised on multiple of the said products.[53]

The high risk of the disputed investments is indeed even reflected in the high rate of returns featuring in the name of the said products. Such high risk was compounded with the exposure to the same nature of investment products and excessive exposures to the same issuers/into single products.

[53] E.g. The *RBC Festive Income Note* (bought for GBP26,000) was sold for GBP 21,970 (P.74); The *Commerzbank 9% Tech Pioneers* (bought for GBP 26,000) was sold for GBP 2,139.80 (P.76); The *Leonteq 9.83% MLT Barr Clovis Lumber Peabody Tidewater* (bought for GBP 6,000) was redeemed for GBP 762 (P. 79 & 80); The *TCM Blue June 1* (bought for GBP 6,000) matured for GBP 1,731.90 (P.82); The *EFG EY MB EXP Cert Red March 1* (bought for GBP 1,962) matured for GBP 122.50 (p. 83); The *RBC 4Y Retail Income GBP* (bought for GBP 4,000) matured for GBP 1,168.96 (P. 83).

In light of the material realised losses, it indeed does not emerge that there were *'Levels of Guarantee on the Capital'* as indicated in the advisor's report, otherwise such losses would not have materialised.

The Arbiter has already commented in his previous decisions on the nature and riskiness of structured notes using capital buffers and barriers.[54] It is accordingly amply clear that STM should have intervened with respect to the proposed allocations in the said investments given that they were not reflective of the risk attitude of the Complainant, nor the scope of the Retirement Scheme as a pension product and, also, not in line with the applicable regulatory requirements as shall be dealt with further on in this decision.

Other Observations & Conclusion

The Arbiter ultimately places emphasis on certain key important aspects that cannot be ignored or downplayed. One such aspect involves the fact that at the time of her application with the Scheme, the Complainant was employed as a teacher with a salary of just €2,000 per month and never disclosed any evidence of having any solid financial background or understanding of investments.

Moreover, the Investment Advisory Report issued by the adviser *CWM* categorised her risk profile as low to medium.

The Arbiter has already explained above why the personal questionnaire leading to the low to medium risk profile categorisation carried huge inconsistencies with the actions she was choosing for her investments. The Arbiter finds the said report highly questionable and seems perfectly made to fit aggressive investment decisions without the Advisor carrying any risk related to the giving of investment advice.

If it is true that the customer was not divulging all the necessary information about her financial position, then, a professional advisor would have declined to offer advice and terminate the contract rather than hiding behind Execution

[54] E.g. P. 38/39 of the Arbiter's decision in Case ASF No. 082/2019 against STM

- https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20082-2019%20-%20HJ%20vs%20STM%20Malta%20Trust%20%26%20Company%20Mgt%20Ltd.pdf

Only transactions. Besides, this would have been even more of a reason for STM to intervene, which it clearly failed to do, and is now trying to justify its failures by highlighting the alleged failures/actions of the Complainant, as it did in its reply.[55]

Ultimately, with disclosure as her pension fund being her sole financial asset and a monthly income from her salary, what other information was needed about her income and expenditure?

With such red flags written all over the Questionnaire, why did the Trustee not raise issues about such contradictions directly with their customer according to their fiduciary obligations?

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

Final Observations & Conclusion

The Arbiter concludes that the investments were clearly unsuitable for the Complainant's risks profile and the Execution Only façade has no credibility and should have been questioned, together with the portfolio allocation by the Trustee before proceeding with the investments.

Moreover, the investments, as mentioned above, that were allowed by STM as trustee and RSA of the Scheme, are clearly against and not reflective in any way of the requirements to which the Retirement Scheme was subject to with respect to *inter alia* **diversification, prudence and liquidity,** as detailed hereunder:

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

[55] P. 98

Directives applied from the Scheme's inception until its registration under the Retirement Pensions Act ('RPA').[56]

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

SOC 2.7.2 in turn required that the assets of a scheme are '*invested in order to ensure the security, quality, liquidity, and profitability of the portfolio as a whole*'[57] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[58]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[59] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*[60] where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.[61]

- The Arbiter also notes that the Scheme eventually became subject to the '*Pension Rules for Personal Retirement Schemes issued in terms of the*

[56] The *Retirement Pensions Act* (Cap. 514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.
[57] SOC 2.7.2 (a)
[58] SOC 2.7.2 (b)
[59] SOC 2.7.2 (c)
[60] SOC 2.7.2 (e)
[61] SOC 2.7.2 (h)(iii) & (v)

Retirement Pensions Act 2011' (Pension Rules') when it was registered under the Retirement Pensions Act ('RPA').[62]

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

'***The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries*** *and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document*'.[63]

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

It is further noted that SLC 3.2.1 (ii) and (iii) of the Pension Rules provided *inter alia* that the Retirement Scheme Administrator shall ensure that the assets of the scheme are: *'… **properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole**';* and *'… **sufficiently liquid** and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits'.*[64]

The Arbiter accordingly considers that the Trustee did not protect the Complainant's interests – not only from the contradictions contained in the personal questionnaire raised by the Investment Advisor which was clearly designed to protect the adviser rather than the investor – but, also, from the

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

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

[64] SLC 3.2.1 (ii) and (iii) of Part B of the Pension Rules.

inadequate high-risk investments which were not reflective of her risk attitude, the scope of the Scheme and MFSA rules to which it was subject to.

The Arbiter cannot reasonably conclude that the said investments, and high exposure thereto, was in line with, and reflective of, the applicable regulatory requirements.

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

Conclusion

The Arbiter notes that the investments were theoretically undertaken without proper advice of an independent financial advisor which, as of itself, should have served as a strong signal for the Service Provider to investigate further before proceeding with an investment which made it clear that it would only accept clients who have been independently advised.

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

These investments clearly did not comprise, in any way, an allocation reflective of the scope of the Scheme as a retirement product, where the Scheme's assets were required to be *inter alia* invested in a prudent manner, be sufficiently liquid, and properly diversified.[65]

The Arbiter notes that STM Malta did not raise with the Complainant any concerns or issues on her undertaking investments in clearly complex investment

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

products without proper independent advice which evidently did not fit her low to medium investment risk profile.

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

It is further to be pointed out that STM cannot minimise and downplay its key responsibilities, as it tried to do in its reply, by just stating that its role is that of a custodian. STM Malta's role unequivocally goes beyond that of a mere custodian (i.e., a holder of assets), as its roles are actually those of a Trustee and RSA with, *inter alia*, its key monitoring obligations in respect of the Scheme.

The defence of STM as explained in its reply, that it is just a custodian where it only *'note(s) the records of the regulated financial advisor … and proceed with the chosen investment according to the Complainant's instructions'*,[66] indeed shows a lack of appreciation and incorrect interpretation of its obligations and responsibilities in such roles.

The Arbiter cannot thus in any way conclude that STM has properly discharged *'prudence, diligence and attention of a bonus paterfamilias'*[67] in the execution of STM's duties and exercise of its powers and discretions when it itself allowed without question client funds to be invested inappropriately.

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

[66] P. 97

[67] As required under Article 21(1) of the TTA

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

Decision and Compensation

For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case,[68] and is partially accepting it in so far as it is compatible with this decision.

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

The Arbiter considers that, in the particular circumstances of this case, it is fair, equitable, and reasonable for STM Malta Pension Services Limited to be held responsible for seventy per cent of the net losses sustained by the Complainant on her investment portfolio.

Given that the Arbiter has been presented with different figures for withdrawals and has no updated valuation and full statements covering the investments undertaken, the Arbiter shall formulate how compensation is to be calculated by the Service Provider for the purpose of this decision in order for the performance on the whole investment portfolio to be taken into consideration.

The Service Provider is accordingly being directed to pay the Complainant compensation equivalent to 70% of the sum of the Net Loss incurred within the

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

whole portfolio of underlying investments constituted under CWM and allowed by the Service Provider.

The Net Loss calculated on such portfolio shall be determined as at the date of this decision and calculated as follows:

From the original Investment amount of GBP 101,069.03 (total premium paid) deduct:

1. **Drawings paid to the Complainant**
2. **Fees and charges**
3. **Market value of residual portfolio as at the date of this decision.**

The amount of the original investment less the sum of items 1,2,3 above shall be the net loss of the portfolio of which 70% is to be paid by the Service Provider to the Complainant.

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 indicated amount of compensation to the Complainant.

However, the Arbiter is mindful of the other class action taken by the Complainant against other parties and the claims of possible unjustified enrichment through double remedy, if the class action against *Skandia* and successors *et al* proves successful.

The Arbiter notes that the Complainant has stated that she believes that the claimant on the said class action is STM,[69] presumably as the registered owners of the Policy (in its capacity as Trustees).

In the circumstances, the Arbiter is ordering that the payment decided above is to be settled upon either evidence presented to STM that they are the registered beneficiary (as Trustee of the Scheme) of the Class action claim, or

[69] P. 110

an assignment agreement of such rights is signed between the parties transferring them from the Complainant to STM as Trustee of the Scheme.

Once this evidence of STM's registration in the class action claim or the assignment of rights agreement is executed, then, interest at the legal rate will start accruing from such date.

Given the particular status of the *class action* as outlined above, the Arbiter further considers that any future proceeds that may be derived from *such class action*, are to be allocated as 30% to the Complainant with the remaining 70% retained by the Service Provider, but only up to the amount that this decision is ordering the Service Provider to pay the Complainant, excluding legal interest and costs. Any potential excess after full recovery by the Service Provider of such amount, will be fully allocated to the Complainant/Trust.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter is, therefore, ordering STM Malta Pension Services Limited to pay the Complainant 70% of the net loss of the investment to be calculated as above described.

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

Alfred Mifsud
Arbiter for Financial Services