

## **Before the Arbiter for Financial Services**

**Case ASF 024/2021**

**OZ**

**(‘the Complainant’)**

**vs**

**STM Malta Pension Services Limited**

**(C51028) (‘STM Malta’ or ‘the Service  
Provider’)**

### **Sitting of the 28 September 2022**

#### **The Arbiter,**

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

The Complaint, in essence, involves the alleged loss of the Complainant's retirement scheme and the claim that the Trustee and Retirement Scheme Administrator ('RSA') failed in its fiduciary duties to look after his Scheme given the unsuitable underlying investment fund into which his scheme was wholly invested and remained exposed to.

### *The Complaint*

The Complainant claimed that STM Malta allowed all his pension to be invested in an opaque, high risk, unregulated, illiquid investment, the *Blackmore Global Fund* ('BG Fund', 'the fund' or 'the investment') of which STM Malta knew nothing about, and still doesn't.

He stated that by their actions STM Malta, as Retirement Scheme Administrator ('RSA'), abdicated all their powers to the Directors of the BG Fund for 10 consecutive years with reckless indifference to the consequences for the Scheme. STM Malta found itself relegated to being bystanders ever since, watching the destruction of the member's pension.

The Complainant alleged:

- (1) That Harbour/STM Malta failed to observe applicable law and regulations at the material time.

He claimed that they failed to consider exercising the powers they had and, as a result, he has been unable to access his pension or repatriate it back.

- (2) That the RSA failed to conduct adequate checks and enquiries to concerns they should have had with the investment. They failed to engage directly with him in relation to concerns they had with the adviser.
- (3) That had STM Malta observed its fiduciary duties with respect to applicable law and regulations at the material time, then, the misappropriation of his pension could have been wholly avoided.

The Complainant explained that it is highly likely that he and other members have now suffered a complete loss of their pension.

He claimed that he suffered loss and damage because of the RSA's failures and submitted that damage to his pension could have been prevented.

The Complainant made additional detailed submissions and explanations in Doc 3 titled '*Arbiter Complaint*' attached to his Complaint.<sup>1</sup>

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<sup>1</sup> P. 26-40

In essence, he submitted and explained *inter alia* the following in the said document:

- that he is not a professional investor and that, at the time, he knew nothing of investments, investment risks, pension planning or regulations governing advisers and the services they are authorised to provide;
- that Harbour Pensions failed in their duties for not questioning the obvious irregularities with the transfer and the recommended investment and not giving more attention to the true nature of the BG Fund where they should have considered using their powers to reject the BG Fund as a suitable asset for the Scheme in terms of para.5.2, 5.9.9 and 7.9 of the Trust Deed and section 17 of the Scheme Particulars;
- referred to Article 21(1) and (2) of the Trusts and Trustees Act ('TTA'), Cap.331, and submitted that Harbour/STM are in breach of both articles noting that, by their own admission, the trust property is not, and never has been, '*under their control*' and were powerless to '*safeguard the trust property from loss*' because they cannot exercise any powers they possess under applicable law, regulations and Trust Deed (para. 5.2);<sup>2</sup>
- that in December 2016, he requested redemption of his investment and made 27 requests for an update between December 2016 and August 2020;
- that on or around beginning of 2018, STM Malta took over the Scheme and over the course of four years he communicated with several people initially from Harbour and subsequently from STM Malta where he was given numerous excuses for the delay in redemption;
- that excuses ranged from reminding him that the investment was a 10-year locked in investment and the trustee was powerless to force redemption, to there being no liquidity in the fund because it was primarily invested in property and takes time to liquidate;
- that there has been no progress since his request to redeem and repatriate his pension from December 2016 and it was highly likely the funds have been mismanaged by the Directors of the BG Fund with his pension irrevocably lost;

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<sup>2</sup> P. 29

- that he received a letter from STM Malta dated 11 August 2020, expressing serious concerns they now had with the investment. The concerns included *inter alia*, lack of audited accounts and lack of transparency with the underlying investments. The letter suggested that STM Malta were taking advice on available options to obtain transparency on the value of the investments such as: (i) changing the management and control of the fund or (ii) appointing liquidators to take control;
- that the reasons for these concerns now being expressed, existed in 2014 when the BG Fund was accepted as a suitable asset for the Scheme. He submitted that there never was transparency and the financial standing of the BG Fund was never known. Had the RSA acted with '*prudence, diligence and attention of a bonus paterfamilias, in ... utmost good faith*', STM Malta would not find themselves helpless to prevent '*loss or damage*'.<sup>3</sup> He submitted that it is now too late and the money is most likely irretrievably lost;
- that following the said letter, he became very concerned and engaged with STM Malta in several email exchanges submitting a formal complaint on 11 October 2020;
- that from his own subsequent research, using publicly accessible documentation and records he considered that there are various foreign companies and actors cooperating in the scam.

The Complainant mentioned and provided details on various companies in this regard apart from the fund, including the companies *Aspinal Chase, It's Your Pension Ltd, Worldwide Broker* and *St. James International*, as further outlined in Doc. 3 to his Complaint;<sup>4</sup>

- that there was increasing negative commentary on the internet from 2016 onward. Reference was made to an article featured in the BBC News in 2018.<sup>5</sup> He noted that Harbour Pensions should have considered mitigation actions, given: (i) the increasing commentary in the public domain, (ii) action by the regulatory authority in Gibraltar on one of the directors of the BG Fund, (iii)

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<sup>3</sup> P. 30

<sup>4</sup> P. 31-35

<sup>5</sup> <https://www.bbc.com/news/business-42776709>

lack of audited accounts and transparency for the members invested in the BG Fund. However, they did not;

- that it was reasonable to assume that when STM Malta purchased the Scheme it carried out its own due diligence which would have exposed the lack of transparency, the lack of audited financial statements and the growing negative commentary in the media and yet the RSA failed to consider exercising its powers to mitigate the high risk the Scheme was exposed to;
- that the Offer Documents describe the BG Fund as a Close-Ended Investment, with a 10-year lock-in and early redemption at the sole discretion of the Directors. He claimed that, at the time of the transfer, he was not aware of the 10-year lock-in as he never had sight of the Offer Documents;
- that the Group Offer Document stated that *'Close Ended Investment Companies are regarded as private arrangements and are not subject to regulation. A Close Ended Investment Company is not subject to approval in the Isle of Man and investors in such companies are not protected by any statutory compensation arrangements in the event of the Company's failure'*;<sup>6</sup>
- that Harbour/STM had a copy of the Group Offer Document and therefore the said quote was within their knowledge and should have informed their decisions at the time. Yet they inexplicably accepted it as a suitable investment for the Scheme, despite the investment restrictions in the Directives under the Special Funds Act, especially but not limited to, Directive 2.7.2;
- that, by failing to consider the consequences of the disclosure in the Group Offer Document and accepted without question the 10-year lock-in, Harbour/STM Malta abdicated in an instant, all powers and control of the Scheme conferred on them by virtue of applicable law and Trust Deed to the Directors of the BG Fund, an unacceptably high-risk fund they knew nothing about and still don't;
- that by accepting the 10-year lock-in, the Directors of the BG Fund were given unfettered access to the member's pension funds and the trustee relinquished

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<sup>6</sup> P. 32

- all ability to exercise any of its powers for the subsequent 10 years, regardless of what the Directors might choose to do with the fund;
- that with no transparency, the trustee had and still has, absolutely no idea what the Directors of the BG Fund were/are doing with the money and no powers to prevent any misappropriation of the funds. The trustee became a helpless bystander to the Directors' whims leaving themselves no way out;
  - that the trustee had no knowledge of the fund's underlying assets until the publication of the *Underlying Cell Breakdown* in May 2020. The Complainant held the RSA still doesn't really know since the underlying assets are themselves unregulated private ventures, not traded on any open market, and with no documentation or audited financial statements. There were no constraints on what the BG Fund could invest in and the trustee had no knowledge of what the Directors' were actually investing in;
  - that a number of examples from the *Underlying Cell Breakdown* indicate substantial investments in assets which looked increasingly likely will yield little or no value;
  - that even if STM Malta succeed in gaining control of the BG Fund or appoint liquidators as suggested in their August 2020 letter, he posits they are unlikely to discover the value of the underlying assets because of the unregulated nature and the numerous jurisdictions involved;
  - that the investment restrictions in the SFA were designed to prevent a Scheme falling into this very same mess the Scheme now finds itself in, wholly of its own making;
  - that Harbour/STM Malta failed to carry out adequate due diligence in line with the SFA Directives and its duties under the TTA and for reasons known only to them, accepted the BG Fund as a suitable asset for the Scheme, leaving itself powerless to mitigate any risks arising for the next ten years, also without ever knowing the financial status of the BG Fund;
  - that this was in breach of numerous SFA directives. For example, but not limited to: para. 2.7.1 since it is neither '*... prudent nor in the best interest of beneficiaries ...*'; para. 2.7.2(a) since there is no '*... security, quality, liquidity ...*'; para. 2.7.2(b) since it doesn't '*... avoid accumulation of risk ...*', in fact quite the

contrary, it exposes the scheme to an unacceptably high risk and breaches para.2.7.2(c) since the BG Fund, nor any of the underlying sub-funds, are traded on regulated markets;<sup>7</sup>

- that individually and collectively, these breaches amount to gross negligence and/or wilful misconduct and/or reckless indifference to the consequences for members and beneficiaries to whom the trustee owed, at all times, fiduciary duties governed by law, Trust Deed and regulations;
- that as to *Worldwide Broker* ('WWB'), he knew nothing of this entity, nor had he contact with its Chairman. He stated that he did not appoint WWB as his adviser;
- that with respect to the sequence of events he noted *inter alia*:
  - that he was cold called around July 2013 by Marc Rees of *Aspinal Chase* and offered a free pension review, believing he was speaking to an adviser;
  - that, on or around 8 April 2014, he was requested by Marc Rees to write and sign a letter confirming he was suitable for the investment;
  - that he trusted Marc Rees and thought nothing of the letter or its consequences;
  - that Harbour/STM Malta have sought to rely on this letter<sup>8</sup> and a letter from WWB (regarding the suitability of the investment)<sup>9</sup> to absolve themselves of any blame or responsibility for the situation they find themselves in;
  - that, in its response of 15 January 2021 with regard to the WWB letter, STM Malta noted that '*The letter was issued by a regulated firm and Harbour Pensions Limited should have been able to rely on the facts and opinions stated therein*';<sup>10</sup>
  - that the RSA is not able to rely on the WWB letter for a number of reasons, given that there are many irregularities with the contents and timing of the said letter;

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<sup>7</sup> P. 35

<sup>8</sup> P. 139

<sup>9</sup> P. 143

<sup>10</sup> P. 36

- that by their own admission, they never saw nor asked for sight of the '*fact find*' upon which WWB based their opinion. The Complainant further asserted there is no such authorised role as '*regulatory oversight*' and that the said letter raises so many red flags;
- that it was inexplicable why Harbour just accepted it and didn't seek further clarity or appoint their own professional to advise them when para. 15.1 of the Trust Deed gave them the power to do so;
- that, at the time, St James International were not regulated anywhere in the EU. He was unaware of this at the time;
- that in an email from STM Malta dated 25 September 2020, STM acknowledges Harbour were aware of the unregulated status of St James and stated that '*I confirm that Harbour did not rely on Andrew Blackburn to give advice. They insisted that you received an advice from a regulated financial adviser, but did not select the adviser. WWB gave the regulated advice and at the time were regulated to give advice relating to participation rights in collective investment schemes*'.<sup>11</sup>

The Complainant submitted that they certainly did not inform him at any time of their concerns. Nor did they inform him of the WWB letter they received. Consequently, he was not given any opportunity to select another adviser or reconsider the advice given;

- that, as per their response letter of 15 January 2021, STM Malta are claiming that Harbour, by having those concerns, went '*above and beyond*' what was expected of them;
- that STM Malta stress the point Harbour were not permitted to give advice but he submitted that it would not have been giving advice to inform him of their concerns over the regulated status of St James;
- that the letter of 8 April 2014 was dictated to him by Marc Rees. This should have been rejected by Harbour because all EU guidelines at the time, on suitability assessments, state not to get the client to assess their own suitability;

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<sup>11</sup> *Ibid.*



- that on 5 May 2014, WWB, who claims saw and assessed a *'full fact find'*, concluded a retail investor (the Complainant aged 57 at the time) and not a professional investor, has the 'capacity' to lose 100% of his pension (because it was a 100% allocation) by investing in an unregulated fund no one knew anything about and concluded this was consistent with a medium risk profile and therefore suitable for the Complainant, writing a letter to this effect;<sup>12</sup>
- that any prudent man of business would be suspicious and certainly any qualified and fully regulated independent adviser or pension consultant would not have come to the conclusion that WWB did in their letter;
- that on 13 May 2014, eight days later Harbour approved the application and invested 100% of his pension in Blackmore Global, immediately relinquishing all control over his account;
- that the RSA should have realised the 10-year lock-in, along with manifestly unacceptable risks associated with an unregulated fund like this, should have led them to question the opinion of WWB;
- that the 10-year lock-in was, and still continues to be, manifestly disastrous for the Scheme as a whole, since it prevents the RSA from discharging any of its legal duties for the full term of the fund;
- that, with reference to STM Malta's reply of 15 January 2021 to his formal complaint,<sup>13</sup> it was clear that Harbour/STM Malta were seeing themselves as nothing more than an execution only organisation. He claimed that STM Malta was more than just an execution only service but were a trustee, governed by Trust Law. The Complainant submitted that at no time do they acknowledge their fiduciary duties pursuant to the TTA Articles mentioned. At no time have they provided any narrative why they felt, at the material time, the BG Fund was suitable for the Scheme as a whole;

No consideration was given to their fiduciary duties and they were recklessly indifferent to the consequences of the BG conditions on their ability to discharge their duties to the Scheme;

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<sup>12</sup> P. 143

<sup>13</sup> P. 38

- that STM Malta failed to consider exercising their powers (Trust Deed paragraphs 5.2, 5.9.9, 7.9 and 11.3, and section 17 of the Scheme Particulars);
- that that they could not, at any time, provide retirement benefits (Trust Deed para. 2.4) to any member, since they cannot liquidate the asset; nor have they, at any time, been able to provide accurate valuations as per the Trust Deed paragraphs 3.3, 3.4.3, because, by their own admission there has been no transparency of the fund or independently audited accounts. All asset valuations sent to members have been unverified '*fantasies*';<sup>14</sup>
- that in their response of 15 January 2021, STM Malta state:<sup>15</sup>

*'In general terms we have made various contacts with Blackmore Global seeking redemptions which have been met with promises and no action. We have sought clarifications directly from the Auditors and in 2019 we took our own advice from Isle of Man lawyers to try to generate options for our members. In practice there are few options and even liquidation is not easy, but it appears to be the remaining option that we are left with ...'*

Section B.3.3.1(a) of the RPA says that '*if one or more of the Scheme's investment restrictions are at any time contravened ... the RSA shall take such steps as are necessary to ensure a restoration of compliance ...*'.<sup>16</sup>

The Complainant remarked that it is not known exactly when STM Malta realised something was wrong with the BG Fund but from their statement it appears this was sometime in 2019.

- that given he made his request to redeem in December 2016, made frequent requests for updates and Harbour/STM Malta were apparently '*chasing weekly*', it begs the question how long it should have taken the RSA to realise something was very wrong;

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<sup>14</sup> P. 39

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

- that Harbour must have known that the 10-year lock in would be manifestly disastrous for the Scheme since this relinquished all power to mitigate any risks that might arise at any time in the subsequent ten years.

They could not foresee future events and ten years was a long time. They lost all powers to '*... ensure that the trust property is ... under their control and shall...safeguard the trust property from loss or damage*', as per article 21(2) of the TTA;<sup>17</sup>

- that it is unlikely there is any value left in the BG Fund and it is further unlikely that STM Malta will succeed where others have not.

### *The Complainant's Request*

In order to put the matters right, the Complainant requested STM Malta:

- a) To reinstate his pension to the value it was at the commencement of the transfer together with an adjustment for the loss of growth since the transfer.
- b) To refund all their charges since his transfer in 2014.
- c) To repatriate his pension as a Cash Transfer to a UK regulated provider of his choice and pay any costs associated with the repatriation.
- d) To pay an appropriate sum to reflect the materially significant distress and inconvenience suffered as a result of appropriate checks not having been made and their lack of action since he submitted his request to redeem his investment.

The Complainant explained that a total of five pension funds were invested as follows:

- the UKAEA for £28,837.81 on 10/06/2014;
- the LGAS for £68,736.00 on 10/06/2014;
- the LGAS for £82,476.78 on 08/08/2014;
- the Teachers for £44,893.09 on 14/08/2014 and

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<sup>17</sup> *Ibid.*

- the MNOFP for £84,407.83 on 15/01/2015

He accordingly sought a compensation of the total initial investment of £309,351.51 plus lost growth, plus refund of all charges, plus compensation for distress and inconvenience.<sup>18</sup>

**In its reply, STM Malta essentially submitted the following:**<sup>19</sup>

The Service Provider noted that the Complainant alleged he has been '*subject to a scam*' leading him to transfer his pension assets into various investments chosen by him and his investment adviser within the Harbour Pension Scheme in 2014.

The alleged '*scam*' constitutes a plan to place his investments into a number of funds managed by *Blackmore Global Funds Limited* from which he suffered a financial loss as a result of those investments.

STM Malta stated that the Complainant subsequently claims that Harbour Pensions Limited (and not STM Malta), failed to carry out sufficient due diligence in relation to the investment, and had it done so it would not have made the investment and any losses would have been avoided. It noted that the Complainant is asking for four connected remedies which are laid out in his Complaint.

STM Malta respectfully submitted that the Complainant has, for reasons more fully detailed in its reply, no claim to make against it. It requested that the claim should be denied in its entirety.

The Service Provider stated that the Complainant alleges that the underlying cause of his problem is that he is a victim of a pension scam. It submitted that the Complainant makes no connection between STM Malta and the alleged scam, and instead has waited for more than six years after his initial investment with the Harbour Pension Scheme, and more than three years from when he knew or ought to have known that the investments were not performing according to his wishes, to bring a complaint about the alleged failings of a former trustee.

STM Malta made the following preliminary representations:

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<sup>18</sup> P. 5

<sup>19</sup> P. 156-163

**1. The Arbiter is not Competent to consider the matter in line with Article 21(1)(c) of Chapter 555 of the Laws of Malta**

The Service Provider submitted that as a matter of fact, the date of the Complaint to STM Malta was 11 October 2020.

It submitted that, as can be further corroborated by the presentation of documentary evidence, in his Complaint the Complainant states that he first had knowledge of the matters complained of on 13 August 2020. STM Malta vehemently contested this as it is not consistent with the documents presented.

It stated that under the section '*The Sequence of Events*', of the Complainant's document titled '*Arbiter Complaint*', the Complainant admits that he prepared and signed a letter that was dictated to him in 2014.

As explained later in this document, the letter contains a material misstatement that was intended to induce Harbour Pensions Limited to accept the Complainant as a member to the Scheme and to make the investment. Accordingly, the first time that the Complainant was, or should have been, aware that something was amiss was in 2014.

On 29 July 2015, Harbour Pensions Limited, wrote to the Complainant to advise him that his pension had been invested in line with his investments.<sup>20</sup>

Again, at that point, the Complainant did not raise any issues.

STM Malta further stated that it should be noted that the Complainant requested that his fund be transferred from the Harbour Pension Scheme on 7 December 2016 as per the *Transfer Out Discharge Form*.<sup>21</sup> This led to various correspondence leading to an email dated 21 April 2017 from Harbour Pensions.<sup>22</sup> STM Malta enclosed, for completeness, the full chain of emails so that the context of the said email can be understood.<sup>23</sup>

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<sup>20</sup> P. 164

<sup>21</sup> P. 158, 166-172

<sup>22</sup> P. 158, 173

<sup>23</sup> P. 173-176

The Service Provider submitted that it is clear that by 21 April 2017, the Complainant had full knowledge of the nature of the investment he had selected and the impact that was having on his planning.

It argued that, on that basis, the Complainant should have complained by 20 April 2019 and not in 2020.

## **2. STM Malta is not the legitimate defendant in this Complaint**

STM Malta submitted that it was not the trustee or service provider administering the pension of the Complainant at the time when the actions he is complaining of occurred. It noted that as indicated in his Complaint itself (page 3 of the Complaint), the Complainant keeps referring to Harbour Pensions Limited and only refers to STM Malta when it took over as trustees in 2018, way after the Complainant actually transferred his pension into the Harbour Pension Scheme and way after all his investments were placed by the previous trustee.

As a result, it stated that it is not the legitimate defendant in this Complaint. It further submitted that this also emerges clearly from Section 30 of the Trusts and Trustees Act which clearly lays out that '*A trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person*'.<sup>24</sup>

## **3. The power of the ex-trustees to make suggestions, advise upon and supervise the investments**

STM Malta stated that without prejudice to the preceding arguments, it submitted that the fiduciary duties which the Complainant is seeking to attribute to Harbour Pensions (and by association to STM Malta) at the time simply do not exist, as the retirement scheme administrators do not have the power to advise on the investments chosen by the Complainant himself.

The Service Provider attached a copy of the Trust Deed for the Scheme applicable at the time,<sup>25</sup> which it argued will also aid the Arbiter in understanding certain aspects of the Complaint.

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<sup>24</sup> P. 158

<sup>25</sup> P. 159 & 184-244

It noted that the relevant clause in relation to the power of investment is clause 5.3.2 which reads as follows:

*'the Scheme Member may select the Asset Manager or seek investment advice from an Independent Financial Adviser to determine where his assets in his account within the scheme are to be invested. The Independent Financial Adviser or Asset Manager will then notify the Scheme Administrator where the Member's assets are to be invested'.*

It stated that this wording is clear. The power to select the Independent Financial Adviser is with the member and not with the scheme trustee. The power is to be exercised by the member for his own benefit and is therefore to be considered personal and not fiduciary. The power is not expressed so as to be subject to the review of the trustee, and accordingly there is no duty of the trustee to review the selection by the member.

STM Malta stated that furthermore, the Independent Financial Adviser can direct the investment. The Trustee does not have the power to delve into the appropriateness of the investments directed by the Independent Financial Adviser. It simply has a regulatory obligation to ensure that the investments chosen are within the parameters of the rules applicable at the time.

It submitted that except for some restrictions at Clause 5.9.8 of the Deed, which mirror the regulation at the time, there are no significant restrictions on investments permitted by the scheme. Indeed, as units in a collective investment scheme, the Investments are expressly shown as being permitted in the scheme particulars.<sup>26</sup>

STM Malta noted that S21(1) of the Trusts and Trustees Act states that the

*'Trustees shall in the execution of their duties and the exercise of their powers and discretions act ...'* and that S21(2)(a) is expressed to be *'... subject to the terms of the trust ...'*<sup>27</sup>

Since the Complainant has elected to appoint the adviser within the powers granted to him pursuant to the trust deed and his adviser has the power to

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<sup>26</sup> P. 64-70

<sup>27</sup> P. 159

direct the investment, there is no power in respect of appointment of the adviser or selection of investment which is vested in the trustee and to which the standards of S21 of the Trusts and Trustee Act can be applied.

It further noted that the Complainant makes reference to S.2.7.1 of the Standard Operating Conditions in force at the time. Without prejudice to the assertion that Harbour Pensions Limited did not have power of investment, it is noted that the Complainant misrepresented to Harbour Pensions Limited that he had taken advice and had concluded that the investment was suitable for him. It submitted that the RSA must have been able to rely on such a clear statement, and it must have been the Complainant's intention that the RSA would be induced to make the investment when he made the misrepresentation.

It further noted that S.2.7.2(a) and (b) refer to the scheme as a whole and not to the pension assets of the Complainant in isolation. The Complainant does not assert that Harbour did not consider the scheme as a whole, and merely refers to his own fund, where it has already been shown that no fiduciary responsibility rested with Harbour Pensions Limited.

It stated that it is no surprise to the Complainant that Harbour Pensions Limited would not accept responsibility for the advice that he had been given, since in S.11.6 of the application form,<sup>28</sup> the Complainant declared that *'Harbour Pensions did not advise me nor was it party to the advice given and cannot be held responsible for any advice given in respect of the scheme'*.<sup>29</sup>

STM Malta further noted that some of the Complainant's actions in relation to the application for the scheme were completed prior to his joining the scheme. The Complainant cannot claim that Harbour Pensions Limited owed any duty of care in respect of actions that he took prior to his membership of the scheme.

**4. There are players in this arrangement who, by the Complainant's admission have advised him in respect of his pension transfer**

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<sup>28</sup> P. 57

<sup>29</sup> P. 160



STM Malta submitted that these individuals, if at all, should be found to be responsible for the Complainant's decisions.

These include:

- *Aspinal Chase and Marc Rees* - STM Malta stated that it cannot comment on the role that Mr Rees might have played. He is not identified in the Complainant's file acquired from Harbour Pensions Limited. The Complainant claims that he relied on this advice. Any such advice was given without the knowledge of Harbour Pensions Limited, and Harbour Pensions Limited cannot be required to account for actions taken by the Complainant prior to his involvement with Harbour Pensions Limited.

STM Malta submitted that it was not clear why the Complainant would have omitted Aspinal Chase from the application documentation given the apparent high level of involvement in the advice.

On the face of it, the Complainant claims that Mr Rees encouraged him to make false statements in the application process.

- *It's Your Pension Limited* - Again, the Complainant is of the view that It's Your Pension Limited was in some way involved. This is outside the knowledge of STM Malta.
- *Andrew Blackburn of St James International* - STM Malta noted that this was the Investment Adviser nominated by the Complainant prior to his joining the scheme. If the Complainant considers that the advice given to him was not correct, he should take the requisite action against Andrew Blackburn and St James International.
- *World Wide Broker Limited* - The Service Provider stated that this firm was regulated in the Netherlands. Contrary to the Complainant's assertion, Worldwide Broker Limited was regulated to give advice on participants in collective investment schemes (as per the extract from the Dutch Registry).<sup>30</sup> Harbour Pensions Limited was entitled to rely on

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<sup>30</sup> P. 161, 181-183

the veracity of a letter produced by a regulated firm. The letter<sup>31</sup> makes it clear that this firm reviewed the fact find in relation to the Complainant, and that, in line with the Complainant's own statement, found that the investment into the Blackmore Global Funds was suitable.

STM Malta stated that the only reason for producing such a letter would be to induce Harbour Pensions Limited to accept the Complainant's pension transfer and to make the investment into Blackmore Global Limited.

If the Complainant believes that these statements are not correct, and in conversation it seems that he has confirmed that, then the Complainant should take the matter up with World Wide Broker, now Blacktower and/or the relevant regulatory body or compensation scheme to seek redress.

STM Malta therefore respectfully submitted that the Complainant has no grounds to complain to STM Malta in respect of the actions of others and which took place before STM Malta became trustee of the Harbour retirement scheme.

It stated that it is clear from the Complainant's submissions that he believes that this group have made him the subject of a scam. It further submitted that the other parties are wholly responsible for the pension transfer, the selection of investment and the consequences arising therefrom.

## **5. Acting with diligence**

Without prejudice to the assertion that there was no power to invest, STM Malta asserts that in any event Harbour Pensions did take actions that were sufficient to satisfy any obligation of diligence required by S21 of the Trusts and Trustees Act.

Harbour Pensions Limited did not claim to be an investment adviser and would not have given investment advice. It chose not to rely solely on the assertions made by the member. Instead, it relied on a letter from a firm

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<sup>31</sup> P. 143

after satisfying itself that the firm was regulated, in its view sufficiently, for the advice that was being given.

STM Malta stated that there is nothing on the Complainant's file to show how this letter was procured, but it appears that the letter was produced by the Complainant or his adviser who would have been acting as his agent in this matter and did not represent Harbour Pensions Limited in anyway.

It submitted that it is clear that World Wide Broker Limited claims to have assessed the Complainant's circumstances and the suitability of the Blackmore Global Investment, and by extension has reviewed the terms of the Blackmore Global Investment.

It further stated that it is clear therefore that, instead of relying on its own assessment, or that of the member, or that of an unregulated adviser, Harbour Pensions Limited has acted with due care in relying on the advice of a regulated investment adviser.

## **6. No delegation of duties**

STM Malta stated that the purchase of an investment does not imply a delegation of duties. The purchase of an investment is merely the exchange of one asset for another. The property rights associated with different types of assets vary depending on the specific asset purchased. But the power to exercise the property rights in relation to the asset are vested in the trustee.

It submitted that the Complainant represented to Harbour Pensions Limited that he had been fully advised at the time of application for membership to the scheme. He cannot now complain when the investment that he selected in conjunction with his adviser limits his ability to enjoy his pension until the maturity of the investment.

## **7. Conclusions**

The Service Provider stated that for the reasons explained, there can be no order of redress issued against STM Malta as requested by the Complainant.

Moreover, it submitted that if, in any event, the Arbiter acceded to his requests, the fourth request should definitely not be acceded to for it has no legal basis in that Maltese law does not cater for such remedies as compensation for '*distress and inconvenience*'.<sup>32</sup>

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

**Further Considers:**

***Preliminary Pleas***

The Service Provider raised two preliminary pleas in its reply.

It submitted that:

*'The Arbiter is not Competent to consider the matter in line with Article 21(1)(c) of Chapter 555 of the Laws of Malta'*<sup>33</sup> and that *'The Respondent is not the legitimate defendant in this complaint'*.<sup>34</sup>

Other pleas that were raised relate to the merits of the case.

***Plea raised in respect of Article 21(1)(c) of Cap. 555***

The Arbiter shall first consider the plea raised regarding his competence with respect to Article 21(1)(c) of Chapter 555 of the Laws of Malta ('the Act').

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

*'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 Act came into force on 18 April 2016. In terms of the said article, the Complainant had two years to file a complaint in writing with the Service Provider *from the day he first had knowledge of the matters complained of*.

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<sup>32</sup> P. 163

<sup>33</sup> P. 157-158

<sup>34</sup> P. 158

**Firstly, the Arbiter observes that it took three months for the Service Provider to reply to the Complainant's formal complaint of 11 and 12 October 2020.<sup>35</sup> In its reply of 15 January 2021, STM Malta regretted *'the delay in responding' which occurred *'whilst [they] investigated a number of specific points'*.<sup>36</sup>***

**The Arbiter does not see a valid reason why the Service Provider took so long to reply to the Complainant's formal complaint and deems it as very unprofessional for a service provider to procrastinate and delay a complaint in such manner.**

As to the plea in question, the Arbiter notes that STM Malta stated that the Complainant *'... has waited for more than six years after his initial investment ... and more than three years from when he knew or ought to have known that the investments were not performing according to his wishes to bring a complaint ...'*<sup>37</sup>

The Service Provider *'vehemently contested'* the Complainant's claim that he *'first had knowledge of the matter complained of on 13 August 2020'*.<sup>38</sup> The basis for its assertion is that this was *'not consistent with the documents presented'*.<sup>39</sup>

In its reply, the Service Provider referred to three main documents to support its claims: (i) the Complainant's letter of 8 April 2014; (ii) the letter sent by Harbour Pensions of 29 July 2015; and (iii) the email sent by Harbour Pensions of 21 April 2017.

**The Arbiter considers that the date when the investment was undertaken is not relevant nor can be reasonably attributed to *'the day on which the complainant first had knowledge of the matters complained of'*.**

**The conduct of the Service Provider cannot be determined from the date when the transaction took place, and it is for this reason that the legislator departed from that date and laid the emphasis on the date when the conduct took place, as provided for in Article 21 of the Act.**

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<sup>35</sup> P. 10 & 11

<sup>36</sup> P. 15

<sup>37</sup> P. 156

<sup>38</sup> P. 157

<sup>39</sup> *Ibid.*

**The Arbiter shall now consider the documents referred to by the Service Provider.**

*(i) The Complainant's letter of 8 April 2014*

With respect to the Complainant's letter of 8 April 2014,<sup>40</sup> it is noted that, in its reply, STM Malta submitted that *'the first time that the Complainant was, or should have been, aware that something was amiss was in 2014'*,<sup>41</sup> and claimed that the said letter contained *'a material mis-statement that was intended to induce Harbour Pensions Limited to accept Mr OZ as a member to the Scheme and to make the investment'*.<sup>42</sup>

**The Arbiter however dismisses the submission that the Complainant *'was, or should have been aware, that there was something amiss'*<sup>43</sup> in the letter he signed of 8 April 2014, for the reasons explained hereunder.**

The letter of 8 April 2014,<sup>44</sup> (which the Complainant stated was dictated to him by Marc Rees of *Aspinal Chase*),<sup>45</sup> includes a confirmation on various aspects and not just the investment into the BG Fund.

With respect to the BG Fund, the letter just included the following confirmation:<sup>46</sup>

*'I understand that the monies will be invested into Blackmore PCC Ltd which gives me a diverse spread of investments in a variety of high growth asset classes. I have read and understood the "Reasons Why Letter" and confirm that the investment strategy is in line with my risk profile and objectives towards retirement planning'.*

STM Malta did not clearly specify in its reply which *'material mis-statements'* were allegedly made in the letter of 8 April 2014. Nor has the Service Provider provided a clear explanation on what basis it was making such allegation. In its submissions on this plea, it only referred, generally to explanations provided by the Complainant in his document titled *'Arbiter Complaint'*.<sup>47</sup>

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<sup>40</sup> P. 139

<sup>41</sup> P. 157

<sup>42</sup> P. 157

<sup>43</sup> *Ibid.*

<sup>44</sup> P. 139

<sup>45</sup> P. 37

<sup>46</sup> P. 139

<sup>47</sup> P. 157

It is noted that in another section of its reply, the Service Provider stated that the Complainant *'misrepresented to Harbour Pensions Limited that he had taken advice and had concluded that the investment was suitable for him'*.<sup>48</sup>

The Service Provider further stated in its final submissions, that *'by Mr OZ's admission during the complaint process and in both his written submissions to the Arbiter ... the reasons why letter referred to in the 8<sup>th</sup> April 2014 letter did not exist'*.<sup>49</sup> It also submitted that the Complainant *'unconscionably'* signed the letter of 8 April 2014, *'which he knew to contain false statements in order induce the requested behaviour of his trustee'*.<sup>50</sup>

The *'material/false misstatements'* alleged by the Service Provider accordingly seem to relate to the claim of advice taken by the Complainant and his own consideration of the suitability of the BG Fund investment.

**The claim of advice received does not however contradict with the Complainant's understanding at the time** given that, as explained in his Complaint, the Complainant *'was led to believe [Marc Rees of Aspinal Chase] was an adviser'*.<sup>51</sup>

**Furthermore, the Arbiter considers that it cannot either reasonably or sufficiently be concluded that the statements contained in the letter of 8 April 2014 could have made a retail, unprofessional investor aware that something was amiss, as the Service Provider tries to argue.**

It is noted further that the Complainant, an engineer by profession,<sup>52</sup> described himself being *'not a professional investor'*<sup>53</sup> who, *'At the material time ... knew nothing of investments, regulated or unregulated, investment risks, pension planning or regulations governing advisers and the services they are authorised to provide'*.<sup>54</sup>

The profile of a retail investor was again confirmed during the hearing of 12 April 2021, when the Complainant stated *inter alia* that *'... I am not a professional*

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<sup>48</sup> P. 160

<sup>49</sup> P. 271

<sup>50</sup> *Ibid.*

<sup>51</sup> P. 35

<sup>52</sup> P. 167

<sup>53</sup> P. 29 & 37

<sup>54</sup> P. 29

*investor ...*'. Throughout the proceedings of the case, the Service Provider never contested such aspect.

Moreover, if the Service Provider submits that the Complainant, *'was, or should have been, aware that something was amiss'* by way of the said letter, then one might reasonably question how much more such letter should have raised questions to the Trustee and Scheme Administrator – an entity licensed to provide the indicated services, by virtue of which, it should have been in a much better position and knowledgeable than a retail investor to recognise *'something was amiss'*.

**This is also given that it is not customary, nor adequate, for a retail member to himself confirm the suitability of an investment product he intends to invest in.** The assessment and confirmation of suitability rests with the investment adviser or investment manager, as indicated for example, in the rules applicable at the time.<sup>55</sup>

**In any case, it is considered that the nature of the contents of the letter of 8 April 2014 cannot, reasonably and justifiably, be treated as relevant for the purposes of article 21(1)(c) of the Act for the scope of determining *'the day on which the complainant first had knowledge of the matters complained of'*.** Additional comments below also refer.

*(ii) The letter sent by Harbour Pensions of 29 July 2015*

**The notification of 29 July 2015,<sup>56</sup> which was also mentioned by the Service Provider in its submissions, is likewise, considered to have no adequate relevance for the purposes of article 21(1)(c).**

This is given that the letter of 29 July 2015 is just a notification by Harbour Pensions to the Complainant *'that his pension has been invested in line with his investments'*.<sup>57</sup> Accordingly, it cannot be construed either that such letter gave, in any way, rise to knowledge of the matters complained of.

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<sup>55</sup> Such as SLC 2.13, under the section titled *'Assessment of Suitability and Appropriateness'* of Part BI of the *Investment Services Rules for Investment Services Licence Holders which qualify as MiFID Firms* issued 1 November 2007.

<sup>56</sup> P. 164-165

<sup>57</sup> P. 157 & 164



**It is further noted that, ultimately, despite its submissions involving the communications of 8 April 2014 and 29 July 2015, the Service Provider indicated in its reply the date of 21 April 2017 as the date when STM Malta considered *'the complainant first had knowledge of the matters complained of'*.**

*(iii) The email sent by Harbour Pensions of 21 April 2017*

STM Malta submitted that by 21 April 2017, *'the Complainant had full knowledge of the nature of the investment he had selected and the impact that was having on his planning'*.<sup>58</sup>

The Service Provider explained that this was so in view that on 7 December 2016, the Complainant requested a transfer out of the Scheme which led to various exchanges of communications, particularly, an email dated 21 April 2017, sent by Harbour Pensions to the Complainant.<sup>59</sup>

The Service Provider accordingly submitted that the Complaint should have been filed by 20 April 2019.

The Arbiter notes that the email of 21 April 2017 sent by Harbour Pensions followed an email dated 18 April 2017 sent by the Complainant, wherein he queried *inter alia* the lack of progress made to his request of December 2016 to redeem the fund.<sup>60</sup>

The Arbiter further notes that Harbour Pensions' email of 21 April 2017, which was given much emphasis by the Service Provider to justify its plea, contains, in essence, the following:<sup>61</sup>

- it refers to the current and previous financial adviser, the Complainant's risk profile and provisions of the Scheme's Terms and Conditions relating to the appointment of professional advisers;
- refers to a statement made by the Complainant that he was never informed of a ten-year lock;

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<sup>58</sup> P. 158

<sup>59</sup> P. 173 & 175

<sup>60</sup> P. 175-176

<sup>61</sup> P. 173 & 175

- directed the Complainant to take up matters with his previous adviser, St James International;
- refers to the declaration and contents of the letter issued by Worldwide Broker and the Complainant's letter of 8 April 2014;
- refers to the features and structure of the BG Fund as a closed-ended investment with cells as per its Offering Document;
- refers to the risk factors related to the lack of liquidity and restrictions on redemptions and the need for the investment to be viewed for the lifetime of the closed cell as outlined in the Offering Document;
- refers to the lifetime of the respective cells of 10 years;
- refers to the Complainant's wish to liquidate his entire portfolio and that the official of Harbour Pensions will *'personally inquire with Blackmore regarding their immediate intentions and whether they are prepared or even able to meet [the Complainant's] request'*. It further highlighted that *'However, and considering the above circumstances, this is entirely at the discretion of their directors. We are in no position to enforce such redemptions or repurchases'*;
- refers to possible options, such as an *in-specie* transfer, for the transfer out;
- refers to the restrictions of Harbour Pensions' activities in terms of its licence, being only an administrator, noting that Harbour Pensions cannot provide the Complainant with more specific guidance.

**The email of 21 April 2017, accordingly, does not highlight any concerns in respect of the disputed investment but rather explains the reasons for the delay in the redemption of the BG Fund and the limitations of the Scheme Administrator to enforce such redemption, by highlighting the features of the fund, that is, its closed-ended nature and the applicable 10-year lock in period.**

**The said email cannot thus be reasonably considered by the Arbiter as *'the day on which the complainant first had knowledge of the matters complained of'*, also given the nature of the complaint's content.**

**Whilst the said email makes clear the key features of the investment, it does not however indicate any concerns with the investment's suitability/adequacy, nor concerns about any losses/potential losses, nor does it indicate any other issues or anything untoward with the investment.**

Whilst it seems the Complainant was, at the time, starting to having certain doubts about the investment (given that in his email of 18 April 2017 to Harbour Pensions the Complainant noted that '*Also I am beginning to get extremely concerned about the legality of Blackmore Global's operation and would like your opinion on this*'),<sup>62</sup> Harbour Pensions, did not however raise any concerns on the investment and did not even check about the nature of the Complainant's concerns at the time, and neither did it delve nor address such in its reply of 21 April 2017.

In the said letter, Harbour Pensions, in essence, just limited itself to highlighting the features of the investment noting *inter alia* that redemptions were at the discretion of the fund's directors. Instead of making the Complainant knowledgeable '*of the matters complained of*', as argued by STM Malta, the said email seems to accordingly have rather dismissed (by just focusing and highlighting the features of the investment) any possible concerns with this investment. **The consequence of the said email ultimately was rather that of leaving the Complainant waiting for the time when his redemption request could be processed through the routes available in terms of the fund's Offering Document.**

The Arbiter notes that the Complainant indicated the date '*13/08/2020*' as to when he first had knowledge of the matters complained of.<sup>63</sup> To support his claim, the Complainant highlighted the letter dated 11 August 2020 sent by STM Malta.<sup>64</sup> The Complainant, stated that in the said letter, STM Malta expressed '*serious concerns they now had with the Blackmore Global investment ...*'.<sup>65</sup>

During the hearing of 12 April 2021, the Complainant reiterated that the said letter triggered his formal complaint. He referred to '*... the letter of August 2020, where STM said that they had concerns that the pension funds may have gone*',

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<sup>62</sup> P. 175

<sup>63</sup> P. 2

<sup>64</sup> P. 72-74

<sup>65</sup> P. 30

pointing out that after the said letter he *'then ... started the official complaint against STM'*.<sup>66</sup>

The Arbiter notes that the Complainant has indeed been consistent in his answers on this point. The same explanations and background were again re-confirmed when under cross-examination he stated that:<sup>67</sup>

*'Asked if I had raised issues with Harbour before STM entered the scene, I reply that not about the loss of the pension. I did complain to Harbour that it was taking a lot of time to redeem it. And they just kept telling me that it was a 10-year lock-in and that these things would take time; but at no point did they say that the pension fund had gone or that they had concerns about the state of the investment.*

*It is being said that these investments were placed via Harbour in 2014, and that, effectively, these investments continued until I reached a point where in 2019/20, STM told me that these investments seemed to be going south, I say that it was in August 2020'.*

It is further noted that, in his final submissions, the Complainant stated that:<sup>68</sup>

*'At all times, even up until Sep 2020 – one month AFTER STM expressed serious concerns with BG, they issued valuations showing the pension was intact and excuses were given that redemption was delayed because 'property had to be liquidated' and this took time. So until the August 2020 letter I believed redemption would happen – albeit slowly! At no time has STM indicated financial damage to my pension. Impact to my plans is not the same as financial damage!*

*Therefore, the August 2020 letter was the earliest evidence from the trustee they had concerns with BG and could result in serious damage to my pension'.*

With respect to the 11 August 2020 letter, the Arbiter notes that in the said letter STM Malta referred to when it *'acquired the business of Harbour Pensions Limited'* in 2018.

STM Malta further stated in the said letter that:

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<sup>66</sup> P. 245

<sup>67</sup> P. 246

<sup>68</sup> P. 260

*'Since our administration of the Harbour Pension Scheme ... we have been in contact with the directors of the Company with requests for detailed information about the value of the shares in the cells, with regard to the underlying assets, and the attached fact sheet is the information that we have been provided with. As the trustee of the Scheme of the Scheme, we have some concerns over the information that we have received:*

- *The Company has not produced audited accounts ...*
- *We have not received full transparency in relation to the underlying assets owned by the cells, their value and the method of valuation of the assets ...*
- *We note that other companies managed by Blackmore's directors have themselves been placed into administration and there is some adverse commentary in the public domain surrounding the management of those companies.'<sup>69</sup>*

**The above thus confirms that since it took over the administration of the Scheme, STM Malta (i) tried to obtain information on this fund (ii) but only approached the Complainant on 11 August 2020 with its concerns and (iii) there were indeed material concerns on the outlook and prospects of the BG Fund investment so much so that the Trustee was highlighting grave options for consideration which included *'seeking to change the management and control of the Company or appointing liquidators to take control ...'*<sup>70</sup>**

**Hence, taking cognisance of the submissions and explanations provided by the parties as outlined above, the Arbiter gives more credence and weighting to the date indicated by the Complainant as to when he first had knowledge of the matters complained of. This is also in the circumstances, where:**

- (i) the only clear evidence, emerging during this case, about problems with the investment, just appears in the letter of 11 August 2020 as submitted by the Complainant;**
- (ii) the email of 21 April 2017 includes no details of concerns on the BG Fund but only explanations of the features of the fund, as outlined above.**

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<sup>69</sup> P. 72 – Emphasis added by the Arbiter

<sup>70</sup> P. 73

The following are also additional reasons for the Arbiter's decision on this plea:

- (a) The Complaint is not about *'the impact that [the investment] was having on his planning'* as submitted by the Service Provider in its reply.<sup>71</sup>

The delay to redeem the investment during its lifetime, as a consequence of the fund's features, that is its closed-ended nature and lock-in feature, is strictly not the matter complained of, *albeit* this being a relevant aspect indicated in this Complaint.

The matter complained of is much wider and involves various aspects and elements, including, not the least, the alleged *'complete loss'* of the pension<sup>72</sup> emerging following the problems identified on this investment and the alleged lack of actions to safeguard his pension taken by the respective Trustee and Retirement Scheme Administrator with respect to the BG Fund which still features as an underlying investment of the Scheme.

- (b) The aspects considered further on in this decision with respect to the plea that STM Malta is not the legitimate defendant are also of relevance here.

This is particularly so with respect to the part dealing with the actions, or lack thereof, of STM Malta since it took over as Trustee and RSA of the Scheme in 2018, which as mentioned is also a key aspect that needs to be duly considered in this case.

The conduct complained of is also rather continuing in nature. As provided for under article 21(1)(d) of the Act, *'conduct that consists of a series of acts or omissions shall be presumed to have occurred when the last of those acts or omissions occurred'*.

- (c) Moreover, the Service Provider cannot either rest on any misconduct or negligence on its part to raise the plea of lack of competence on the pretext that the action is 'time-barred'.

STM Malta's actions or lack thereof ultimately had an impact on the timing of the Complaint.

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<sup>71</sup> P. 158

<sup>72</sup> P. 3

It is noted that, as indicated above, STM Malta approached the Complainant with its concerns on the BG Fund, only on 11 August 2020, *nearly two years after taking over the role of Trustee/RSA of the Scheme.*

- (d) The acceptance of a plea raised in respect of a period of decadence, as established under Article 21(1)(c), cannot be taken lightly by the Arbiter given its material implications. Such a plea needs to be sufficiently and adequately proven and substantiated by the party raising it. STM Malta has ultimately not adequately and sufficiently proven and substantiated its claim that the Complainant 'should have complained by 20 April 2019 and not in 2020'.<sup>73</sup>

For the reasons amply mentioned, the Arbiter is accordingly not accepting the Service Provider's plea with respect to Article 21(1)(c) and considers that he has the competence to deal with this Complaint.

***Plea raised that STM Malta is not the legitimate defendant in this Complaint***

STM Malta claimed that it is not the legitimate defendant given that it *'was not the trustee or service provider administering the pension of the Complainant at the time when the actions he is complaining of occurred'*.<sup>74</sup>

It further submitted that the Complainant himself kept referring to Harbour Pensions in his Complaint, and only referred to STM Malta when it took over as trustee in 2018, this occurring much after when the Complainant transferred his scheme and made the disputed investments.

STM Malta also referred to the provisions of article 30 of the Trusts and Trustees Act ('TTA') which it claimed exonerated the trustee from liability for a breach of trust committed by another person, prior to its appointment.

**The Arbiter rejects STM Malta's claim that it is not the legitimate defendant when taking into consideration the particular circumstances of this case, nature of the Complaint, and the various reasons outlined hereunder.**

*Context*

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<sup>73</sup> P. 158

<sup>74</sup> *Ibid.*

The Arbiter observes that Harbour Pensions Limited ('Harbour Pensions') was the initial Trustee and RSA in respect of the Complainant's Retirement Scheme as per the Trust Deed dated 19 February 2013.<sup>75</sup>

**Harbour Pensions was licensed by the MFSA as a Retirement Scheme Administrator until it voluntarily surrendered its licence with effect from 5 October 2018.<sup>76</sup> Harbour Pensions is no longer in operation and was subsequently dissolved and struck off from the records held with the Malta Business Registry with effect from 31 January 2020.<sup>77</sup>**

Before Harbour Pensions ceased to exist, STM Malta was the entity which *'acquired the business of Harbour Pensions Limited'*<sup>78</sup> and subsequently took over as the Trustee and RSA of the Scheme. This was accordingly not merely a replacement of the trustee of the Scheme but *an acquisition of business by STM Malta.*

**As outlined in a public notice featuring on the STM Group plc website:<sup>79</sup>**

*'STM Malta Trust and Company Management Ltd signed a Sale and Purchase Agreement ("the Acquisition") with the shareholders of Harbour Pensions Limited ("Harbour") to acquire the entire issued share capital of the company and its related pension trust schemes.'*<sup>80</sup>

**Moreover, this Complaint covers other important aspects than those mentioned by the Service Provider in its plea.**

As explained further on in this decision, these relate to the actions and steps taken by STM Malta with respect to the Complainant's Scheme and its underlying investment when it took over as Trustee/RSA of the Retirement Scheme. Such aspects also form an integral part of the Complaint which accordingly needs to be duly considered in all of its multiple material aspects.

*Transfer of business and new trustee*

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<sup>75</sup> p. 187

<sup>76</sup> <https://www.mfsa.mt/financial-services-register/>

<sup>77</sup> <https://registry.mbr.mt/ROC/index.jsp#/ROC/companiesReport.do?action=companyDetails&fKey=b8f98cfe-2e72-47bc-bb28-d5c36dd6f56c>

<sup>78</sup> p. 72

<sup>79</sup> <https://info.stmgroupplc.com/acquisition-malta-based-harbour-pensions-limited/>

<sup>80</sup> Emphasis added by the Arbiter



The Arbiter cannot accept the argument by STM Malta that it is not the legitimate defendant because the Complaint relates to the time when Harbour Pensions was administering the Scheme for various reasons as outlined hereunder.

a) If the Arbiter had to accept STM's contention, he would be creating a lacuna which can give rise to grave abuse in the financial system, with the resulting negative implications in the trust needed for the proper operation of the financial services sector. If a 'Retiring Trustee/RSA' and a 'New Trustee/RSA' are allowed to agree on a transfer of a pension scheme which absolves them from liability towards the Scheme Members, (simply because there was a transfer of business), there could be situations where the 'Retiring Trustee/RSA', to ward off any liability towards the Members, would dispose of the Scheme, and the New Trustee/RSA would acquire the business at an advantageous price expecting no action to be lodged against it for the shortcomings of its predecessor. Such an abusive transfer would only be to the detriment of the members and cannot be condoned. For this and other reasons outlined hereunder, the plea raised by STM Malta is unsustainable.

b) *No evidence of any waiver of liability catering for the existing scenario*

During the proceedings of the case, STM Malta presented a copy of the '*Deed of Appointment and Retirement of Trustee qua also Retirement Scheme Administrator*', dated 31 August 2018, entered into between Harbour Pensions and STM Malta ('the Deed of New Trustee').<sup>81</sup>

**It is noted that, with respect to liability, Harbour Pensions and STM Malta indemnified each other under certain specific circumstances as per clause 6 of the said Deed.**<sup>82</sup>

Before assuming the business, STM Malta was at liberty to conduct a due diligence exercise to discover any liabilities that Harbour Pensions might have had towards the Scheme Members, and as is the norm, would have factored in such liabilities in the acquisition price.

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<sup>81</sup> P. 251-253

<sup>82</sup> P. 252

Moreover, it is clearly stated in the *Deed of the New Trustee*<sup>83</sup> that:

*'The Parties agree that all the assets of the Pension Scheme **and all the duties, powers and discretions of the Retiring Scheme Administrator arising under the Rules and any deeds supplemental thereto**<sup>84</sup> are to be transferred to and vest in the New Retirement Scheme Administrator ...'.*

This is clear evidence that the Service Provider was acquiring both the assets and liabilities connected with the Scheme and cannot pick and choose the assets and abandon any obligations which the Retiring Administrator might have had towards the Members of the Scheme.

In reality the Service Provider entered into the boots of its predecessor because there was a continuation of business related to the Scheme, and when the Service Provider agreed with Harbour Pensions that *'the New Retirement Scheme Administrator is to be the retirement scheme administrator and Trustee of the Pension Scheme **in place of the Retiring Retirement Scheme Administrator,***<sup>85</sup> it was simply **continuing** the administration of the scheme as 'inherited' from the previous Scheme Administrator, namely, Harbour Pensions.

**STM Malta, as the entity which has 'acquired the business of Harbour Pensions Limited',<sup>86</sup> cannot thus just evade and dismiss any claim involving the previous trustee, also by quoting the provisions of Article 30 of the Trust and Trustees Act which shall also be considered next.**

c) *Article 30 of the Trust and Trustees Act*

STM Malta referred to Article 30 of the TTA in order to support its claim that it is not liable for a breach of trust committed by some other person prior to its appointment. It stated that *'Section 30 of the Trusts and Trustees Act ... clearly lays out that "A trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person"'*.<sup>87</sup>

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<sup>83</sup> P. 251

<sup>84</sup> Emphasis added by the Arbiter

<sup>85</sup> P. 252 Emphasis added by the Arbiter

<sup>86</sup> P. 72

<sup>87</sup> P. 158

Apart from the fact that the Service Provider did not quote **the entire Article 30** of the Trusts and Trustees Act (which will shortly be dealt with), in this particular case, one cannot argue that *de facto*, the Service Provider can exculpate itself on the basis of this Article when in reality **it was continuing the administration** of the same scheme of its predecessor, and it just substituted itself for the previous Trustee.

**Moreover, the Service Provider omitted to include an important part of sub-section 3 of Article 30 of the TTA. The said sub-section is reproduced in full below:**

*'(3) A trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person. It shall, however, be the duty of the trustee on becoming aware of it to take all reasonable steps to have such breach remedied.'*<sup>88</sup>

**The Arbiter considers that, if there was a breach of trust and issues of adequacy with the underlying investment as alleged by the Complainant, STM Malta as the new trustee should have become aware of it, at or around the time, when it took over the role of Trustee and RSA, in 2018.**

**The Arbiter considers it reasonable, justifiable and equitable in the circumstances of this case to expect that the new Trustee/RSA had, or should have undertaken, a review of the Complainant's pension scheme at the time when it acquired the business in order to be able to comply with its obligations applicable in the said roles and:**

- (i) act with *'the prudence, diligence and attention of a bonus paterfamilias'*;**<sup>89</sup>
- (ii) *'act with due skill, care and diligence ...'*;**<sup>90</sup> and

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<sup>88</sup> Emphasis added by the Arbiter

<sup>89</sup> As provided for in Article 21(1) of the TTA which deals with the *'Duties of trustees'*.

<sup>90</sup> As provided for in Rule 2.6.2 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') issued under the Special Funds (Regulation) Act, 2002 ('SFA') and eventually under Rule 4.1.4, Part B.4.1 titled *'Conduct of Business Rules'* of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the Retirement Pensions Act ('RPA').

- (iii) ensure that the Scheme's assets are *'invested in a prudent manner and in the best interest of Members and Beneficiaries'*.<sup>91</sup>

Such review should have *inter alia* been done in order to ensure that the Complainant's Scheme was in order and in compliance with the applicable regulatory provisions, the conditions of the Trust Deed and the scope of the Retirement Scheme; and ensure that it remained so. Otherwise, proper remedial actions had to be taken as appropriate.

Hence, an important aspect that needs to be considered is whether STM Malta took all reasonable steps when it took over as the new Trustee and RSA of the Scheme. Such aspect shall be considered as part of the merits of the case.

*Complaint ultimately captures actions of STM Malta*

The Arbiter notes that in his Complaint, the Complainant is also questioning the actions of STM Malta since it took over as trustee and retirement scheme administrator in 2018.

The Complaint accordingly does not only involve, or is strictly limited to, the actions of the Trustee and RSA at the time when the investment into the BG Fund was undertaken, but also involves the actions occurring thereafter.

The Arbiter notes that in Doc 3, titled 'Arbiter Complaint' attached to his Complaint Form, the Complainant submitted, for example, that:

*'STM Malta purchased the Scheme on or around the beginning of 2018 and it is reasonable to assume they carried out due diligence before committing to that purchase. It is also reasonable to assume that due diligence would have exposed the lack of transparency, the lack of audited financial statements and the growing negative commentary in the media. And yet, it seems, the RSA failed to consider exercising its powers to mitigate the unequivocally high risk the Scheme was exposed to'.*<sup>92</sup>

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<sup>91</sup> As provided for under Rule 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 dated 1 January 2015 issued in terms of the RPA.

<sup>92</sup> p. 32

The Complainant further questioned the timing of STM Malta's action and how long the RSA should have taken to realise something was very wrong.<sup>93</sup>

### *Other*

**In addition to the above, it is furthermore noted that STM Malta has ultimately strongly defended the actions of Harbour Pensions in allowing the disputed investment, even going as far as claiming that Harbour Pensions '*went beyond what was required by regulation or the contractual terms*',<sup>94</sup> a position that it continued to maintain before the Arbiter during the proceedings of this case.**

**STM Malta's strong defence of its predecessor strongly implies that STM itself recognises that once it acquired the business from Harbour Pensions it was also assuming its predecessor's liabilities towards the Scheme.**

**For the reasons amply mentioned, the Arbiter is rejecting the Service Provider's claim that it is not the legitimate defendant in this Complaint. The Arbiter shall accordingly consider next the merits of the case and all relevant aspects to ensure that the case is determined and adjudged by what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case as required in terms of Article 19(3)(b) of the Act.**

### **The Merits of the Case**

The Arbiter is considering the Complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555<sup>95</sup> which stipulates that he should deal with complaints in '*an economical and expeditious manner*'.

### *The underlying investments - Exposure*

The Complainant applied to become a member of the Scheme on 18/04/2014.<sup>96</sup> He was accepted by Harbour Pensions as a member on 13 May 2014.<sup>97</sup>

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<sup>93</sup> P. 39

<sup>94</sup> P. 24

<sup>95</sup> Art. 19(3)(d)

<sup>96</sup> P. 58

<sup>97</sup> P. 16 & 29

As indicated in the '*Subscription Statement and Current Valuation*' attached to the letter dated 29 July 2015 issued by Harbour Pensions, the Scheme was invested into four cells (sub-funds) forming part of the Blackmore Global PCC Limited, the BG Fund, as follows:

- (i) *Blackmore Sustainable Sub-Fund* – a subscription of £42,735.03 (42,735.03 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £16,325.69 (16,271.99 shares @ GBP1.0033) allocated on 22 January 2015, amounting in total to a subscription of £59,060.72;
- (ii) *Blackmore Lifestyle Sub-Fund* - a subscription of £10,683.76 (10,683.76 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £4,081.42 (3,986.15 shares @ GBP1.0239) allocated on 22 January 2015, amounting in total to a subscription of £14,765.18;
- (iii) *Blackmore Property Sub-Fund* - a subscription of £85,470.07 (85,470.07 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £32,651.39 (32,469.56 shares @ GBP1.0056) allocated on 22 January 2015, amounting in total to a subscription value of £118,121.46;
- (iv) *Blackmore Private Equity Sub-Fund* - a subscription of £64,102.55 (64,102.55 shares @ GBP1) allocated on 16 September 2014 as well as a further subscription of £24,488.54 (24,017.79 shares @ GBP1.0196) allocated on 22 January 2015, amounting in total to a subscription value of £88,591.09.

**Hence, the investment into the four cells of the BG Fund in total amounts to GBP280,538.45 according to the said statement. Apart from the amount invested into the BG Fund, the Complainant kept other assets in cash, as per the said statement.<sup>98</sup> The valuation 'based on 30.04.2015 NAV' indicated a total value overall of GBP304,604.55.**

**It is accordingly noted that a staggering 95% of the Scheme's investible amount (of approx. GBP295,000),<sup>99</sup> was solely invested into the BG Fund, with 20% of such investible amount being placed in the *Blackmore Sustainable Sub-Fund*;<sup>100</sup>**

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<sup>98</sup> P. 165

<sup>99</sup> £213,675.17 + £81,628.47 = £295,303.64 as per the '*Subscription Statement and Current Valuation*' - P.165

<sup>100</sup> £59,060.72 of GBP295,303.64 = 20%

**5% into the *Blackmore Lifestyle Sub-Fund*;<sup>101</sup> 40% in the *Blackmore Property Sub-Fund*;<sup>102</sup> and 30% in the *Blackmore Private Equity GBP Sub-Fund*.<sup>103</sup>**

*The underlying investments – Key Features & relevant observations*

As emerging from the copy of the Offering Document presented in respect of the BG Fund, this scheme and its cells had the following distinguishing features:<sup>104</sup>

- (i) Incorporated as a **closed-ended** investment company with limited liability on 2 October 2013,<sup>105</sup> and **'tailored for long term investment'**;<sup>106</sup>
- (ii) The **Cell Shares** were **'non-voting, non-redeemable preference shares'**;<sup>107</sup>
- (iii) Investors were **'not entitled to have their Cell Shares redeemed or repurchased by, or out of funds provided by the Company'** and could not **'trade Cell Shares on an investment exchange'** either;<sup>108</sup>
- (iv) The Exit Strategy was very tight and restrictive. The Offering Document stated *inter alia* that **'Shareholders will not be entitled to redeem their shares at any time'**<sup>109</sup> and that **each cell had 'a fixed investment period'** where *'At the end of each investment period, it is the intention of the Directors that the assets of the relevant Cell are sold and the proceeds distributed to the Cell Shareholders by way of an offer to repurchase the Cell Shares, a cash dividend or combination of the two'*.<sup>110</sup>

The Offering Document further provided that *'In the event the Directors do not believe the market conditions are beneficial for the sale of any*

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<sup>101</sup> £14,765.18 of GBP295,303.64 = 5%

<sup>102</sup> £118,121.46 of GBP295,303.64 = 40%

<sup>103</sup> £88,591.09 of GBP295,303.64 = 30%

<sup>104</sup> Emphasis added by the Arbiter

<sup>105</sup> p. 88

<sup>106</sup> p. 93

<sup>107</sup> p. 89

<sup>108</sup> p. 111

<sup>109</sup> p. 107

<sup>110</sup> p. 96

*particular investment, the Directors may extend the lifetime of any individual Cell or Cells at their discretion*'.<sup>111</sup>

Indeed, the Offering Document warned that *'The investor should be aware the investment is viewed for the lifetime of the closed Cell ... A shareholder will not be permitted to assign or transfer its shares ... without prior consent of the Directors ... Shareholders must therefore be prepared to bear the risks of owning Cell Shares for an extended period of time in excess of the lifetime of a particular Cell*'.<sup>112</sup>

As also emerging from the Fact Sheet produced during the case, the **lock-in period for the cells was of 10 years** as also described throughout the proceedings of the Complaint by both parties.<sup>113</sup>

- (v) That **investments were 'not subject to any restriction and may hold any number of investments in any particular Cell'**,<sup>114</sup>
- (vi) That with respect to borrowing and leverage the Directors of the BG Fund had **'unlimited power to borrow for the account of any Cell'**,<sup>115</sup>
- (vii) That **'Investors may not recover the full value of their investment either during the life of the Company or on completion of the closed-ended period'**,<sup>116</sup>
- (viii) That **'Close Ended Investment Companies are regarded as private arrangements and are not subject to regulation. A Close Ended Investment Company is not subject to approval in the Isle of Man and investors in such companies are not protected by any statutory compensation arrangements in the event of the Company's failure'**.<sup>117</sup>

**Given the features of the BG Fund and the extent of exposure to this single collective investment scheme, there are clearly concerns regarding the**

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<sup>111</sup> *Ibid.*

<sup>112</sup> p. 97

<sup>113</sup> p. 76

<sup>114</sup> p. 97

<sup>115</sup> p. 96

<sup>116</sup> p. 97

<sup>117</sup> p. 111



**adequacy of such investment and how this fitted and satisfied the scope of the Retirement Scheme and the applicable investment principles and restrictions.**

**The fact that:**

- **the BG Fund was closed-ended, with no entitlement to redemptions;**
- **the investment was of long-term having a fixed lock-in period of 10 years and where the lifetime of the cell could possibly be extended even further solely at the discretion of the directors;**
- **the shares were non-voting and hence investors lacked control on the fund;**
- **the fund was relatively new and had no, or very limited, track record of only around a year;**
- **the fund was not subject to any restriction on investment;**
- **the fund was not subject to regulation,**

**make it all amply clear that this was not an adequate investment for a retirement scheme.**

**Moreover, the fact that 95% of the investible premium was solely invested into the cells of the BG Fund makes it even more questionable how such investment could have been allowed and concerns not raised by (i) Harbour Pensions at the time of investment, and (ii) also by STM Malta at the time when it took over as trustee and RSA of the Scheme.**

**It should have clearly and immediately become evident to both Harbour Pensions and STM Malta that there are issues with this investment.**

**Irrespective of any confirmation letters from the Complainant or from any investment adviser (regulated or otherwise) regarding the alleged suitability of such investment, the Trustee had to undertake its own independent proper assessment.**

**A trustee cannot just abdicate from its responsibilities by relying on a third party who may have had his own interest and/or on a member's confirmation, an unprofessional retail investor, when it itself had such a key and important duty**

**to ensure the proper administration of and the Scheme's compliance with its scope, the provisions of the trust deed and applicable regulatory requirements.**

*Scope of the Scheme and oversight function by the Trustee/RSA*

The purpose of the Scheme is defined in the Trust Deed. Clause 2.4 of the Deed provides that:

*'its principal purpose shall be and shall continue to be to provide retirement benefits during retirement and other benefits as set out in this Deed ...'.<sup>118</sup>*

As to the role of the Trustee/RSA with respect to investments, it is noted that as outlined in the Declaration section of the Retirement Scheme's Application Form, ***'... the final decision in respect to the acceptance of any assets or investment into the Harbour Retirement Scheme is with the Administrator of the Harbour Retirement Scheme'.<sup>119</sup>***

This aspect where the RSA had the final decision in respect of a member directed scheme, in order to ensure compliance and adherence with the investment restrictions/principles, is further reiterated in the *'Scheme Key Facts/Particulars Document'* ('the Scheme Particulars'). The latter provided *inter alia* that *'The final decision in respect to the investment and the overall weighting within the Scheme rests with the Administrator'.<sup>120</sup>* The Scheme Particulars also provided that *'The Administrator will retain ultimate control and discretion with regard to the investment decisions ...'.<sup>121</sup>*

It is noted that in its reply, STM Malta ultimately itself acknowledged that the Trustee/RSA had *'... a regulatory obligation to ensure that the investments chosen are within the parameters of the rules applicable at the time'.<sup>122</sup>*

It is furthermore noted that clause 5.3.3 of the Trust deed also provided that *'for the purposes of 5.3.1 and 5.3.2 the directions from the Member to the Scheme Administrator shall be ... subject to the Retirement Scheme Administrator retaining the overall responsibility for the overall operation of the Scheme'.<sup>123</sup>*

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<sup>118</sup> P. 193

<sup>119</sup> P. 57

<sup>120</sup> P. 66

<sup>121</sup> P. 69

<sup>122</sup> P. 159

<sup>123</sup> P. 200

**The Trustee/RSA had accordingly a key monitoring function with respect to investments which function formed part of the important safeguards and controls on the Scheme's underlying investments.**

*Investment principles and regulatory requirements*

Clause 5.6 of the Trust Deed provided that '**All investments of the Scheme ... shall be made in accordance with Maltese Law and with the Retirement Scheme Law**'.<sup>124</sup>

'Retirement Scheme Law' was defined as meaning the Special Funds (Regulation) Act, ('SFA') including '*any regulation, rule, directive, guidance or requirement issued under it from time to time*'.<sup>125</sup>

Clause 5.4 of the Trust Deed further provided *inter alia* that '**... the Retirement Administrator shall arrange for the Scheme assets to be invested in the best interest of Beneficiaries...**'.<sup>126</sup>

With respect to investments, the Scheme Particulars issued at the time by Harbour Pensions,<sup>127</sup> stipulated that:

**'The Administrator must ... always execute investments within the parameters of restricted investments, prudent management and diversification as required by the MFSA'**.<sup>128</sup>

The Scheme Particulars further stated that '*The MFSA imposes strict restrictions on investments ...*'.<sup>129</sup>

The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*', ('the Directives'). The said Directives applied from the Scheme's inception in 2013 until the registration of the Scheme under the RPA.

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<sup>124</sup> P. 201 – Emphasis added by the Arbitrator

<sup>125</sup> P. 192

<sup>126</sup> P. 200 – Emphasis added by the Arbitrator

<sup>127</sup> P. 65

<sup>128</sup> P. 66 – Emphasis added by the Arbitrator

<sup>129</sup> *Ibid.*

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'*<sup>130</sup> and that such assets are *'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'*.<sup>131</sup>

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be *'predominantly invested in regulated markets'*;<sup>132</sup> to be *'properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*<sup>133</sup> 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.<sup>134</sup>

**Despite the standards of SOC 2.7.1 and SOC 2.7.2, Harbour Pensions allowed the Complainant's investment portfolio to comprise solely the investment into the BG Fund and its cells. STM Malta did not question either, when it took over as Trustee/RSA, the portfolio's compliance with the mentioned investment principles and regulatory requirements.**

The Arbiter also notes that following registration of the Scheme under the Retirement Pensions Act ('RPA')<sup>135</sup> the Scheme became subject to the *'Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act 2011'* (Pension Rules'). The investment restrictions for member directed

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<sup>130</sup> SOC 2.7.2 (a)

<sup>131</sup> SOC 2.7.2 (b)

<sup>132</sup> SOC 2.7.2 (c)

<sup>133</sup> SOC 2.7.2 (e)

<sup>134</sup> SOC 2.7.2 (h)(iii) & (v)

<sup>135</sup> 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.

schemes 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 noted that SLC 3.2.1 of the Pension Rules provided *inter alia* that '*the Retirement Scheme Administrator shall ensure that the assets of the scheme are 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*'.<sup>136</sup>

Whilst it is noted that SLC 9.5(d) of the Pension Rules, which also dealt with the conditions in relation to investments, included a footnote stating that '*The said investment restrictions shall apply to the current investments of members in a member directed scheme once any movements occur within the member's pension account or in the case of new investments entered into, as from 1st January 2019*', **STM Malta should nevertheless still have promptly raised the matters involving the adequacy of the underlying portfolio – that is the lack of diversification, lack of liquidity and lack of compliance with the principles and requirements outlined, for necessary action to be taken.**

**The high exposure to the BG Fund and the peculiar features of such fund for a pension investment as outlined above, not only did not reflect and clearly went against the investment standards and principles outlined above but neither can they be construed to reflect the prudence, diligence and attention of a *bonus paterfamilias* required out of the Trustee of the Scheme.**

Indeed, 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*, where '*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**

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<sup>136</sup> SLC 3.2.1 (iii) of Part B of the Pension Rules.

***far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage ...'***

**In their role as Trustee, Harbour Pensions and STM Malta respectively were accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.**

*Compliance with investment conditions – Other*

It is noted that STM Malta argues in its reply that '*S.2.7.2(a) and (b) refer to the scheme as a whole and not to the pension assets of Mr OZ in isolation*'.<sup>137</sup>

This argument however cannot be accepted by the Arbiter.

S.2.7.2 refers to the '*portfolio as a whole*' and can only reasonably be considered, in the case of a member directed scheme, to refer to the whole portfolio within the respective individual's member's account, given that such account would have its own specific and distinct investment portfolio.

Hence, it is only reasonable and correct for the principles, including the investment restrictions specified for the Retirement Scheme to have been applied and adhered to at the level of the individual account. Failure to do so would have meant that the safeguards emanating from the investment conditions and diversification requirements would have not been adopted and ensured in practice in respect of the individual member's portfolio, defeating the aim of such requirements in the first place.

The application of investment restrictions at a general level, that is at scheme level without application on an individual account basis, would only make sense and be reasonable in the context of, and where, the members of such a scheme are participating in the same portfolio of assets held within the scheme and **not in the circumstance where the members have their own individual separate investment portfolios, as was the case in question.**

An analogy can be made in this regard to the market practice long adopted in the context of collective investment schemes, namely in respect of *stand-alone*

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<sup>137</sup> P. 160

*schemes*<sup>138</sup> and *umbrella schemes*.<sup>139</sup> Whilst investment restrictions would be applied at scheme level in the case of a stand-alone scheme (given that the investors into such scheme would be participating, according to their respective share in the scheme, in the performance of the same underlying investment portfolio), in the case of an umbrella fund, the investment restrictions are not applied at scheme level but at the sub-fund level and would indeed be tailored for each individual sub-fund given that each sub-fund would have its own distinct and separate investment portfolio and investment policy.

### *Further Considerations*

**For the reasons amply stated above, the BG Fund was not appropriate and suitable for the scope of the Retirement Scheme and the applicable requirements, let alone in the case where the Complainant's risk profile was actually one of 'Medium Risk', where his 'Investment Objective' was described as 'willing to accept a small amount of risk to provide for potential growth over the medium to long term'.<sup>140</sup>**

**Hence, one cannot really justify how the investment in the BG Fund was allowed in the first place and how no Trustee and RSA had ever raised any issues about the incompatibility and inadequacy of such investment within the Retirement Scheme, not only with reference to the Complainant's risk profile, but also with the scope of the Retirement Scheme and provisions of the Trust Deed as outlined above.**

**There was ultimately no prudence, no diversification and no adherence with the relevant investment provisions.**

**In the case in question, the Arbiter cannot thus conclude that STM Malta has truly acted in the best interests of the Complainant when it took over as Trustee and RSA.**

**Not only has STM Malta not promptly raised itself concerns and alerted the Complainant on the various issues with the BG Fund investment as indicated in this decision, but STM Malta has rather itself untenably took the stance of**

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<sup>138</sup> i.e., a collective investment scheme without sub-funds.

<sup>139</sup> i.e., a collective investment scheme with sub-funds, where each sub-fund would typically have its own distinct investment policies and separate and distinct investment portfolios.

<sup>140</sup> P. 56

defending the position taken by Harbour Pensions in allowing such investment within the Retirement Scheme.

It is indeed somewhat incredulous how, in the face of the glaring and manifest breaches of trust, STM Malta kept defending the actions of Harbour Pensions stating *inter alia* in its reply that '*... the Respondent asserts that in any event Harbour Pensions did take actions that were sufficient to satisfy any obligation of diligence required by S21 of the Trusts and Trustee Act*', and that '*... Harbour Pensions Limited has acted with due care in relying on the advice of a regulated investment adviser*'.<sup>141</sup>

Even during the hearing of 1 June 2021, the official of STM Malta stated before the Arbiter that '*Being asked what steps are STM taking to remedy the breach of trust that has been carried out by the Trustees of the Harbour Pension Scheme as per TTA 30, Sub-Section 3, I say that I have got no evidence of a breach of trust*'.<sup>142</sup>

The Arbiter considers that it would have only been reasonable, adequate and appropriate for STM Malta to promptly raise and bring to the Complainant's attention the various issues related to this investment as considered and mentioned in this decision, with the aim to remedy the breaches.

As outlined above, in its letter of 11 August 2020,<sup>143</sup> STM Malta raised, (*nearly two years after taking over as trustee*) only certain issues involving just the value of the investment, by which time the previous trustee and retirement scheme administrator, Harbour Pensions, had already been dissolved and struck off from the Malta Business Registry.

### Conclusion & 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<sup>144</sup> and is partially accepting it in so far as it is compatible with this decision.

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<sup>141</sup> P. 162

<sup>142</sup> P. 257

<sup>143</sup> P. 72

<sup>144</sup> Cap. 555, Article 19(3)(b)



**Being mindful of the key role of STM Malta Pension Services Limited as Trustee and Retirement Scheme Administrator of the STM Harbour Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by STM Malta for the damages suffered by the Complainant as a result of the breaches allowed and committed in relation to his scheme and the lack of protection afforded to him to safeguard his pension as amply outlined in this decision.**

**The Arbiter considers that apart from the Service Provider, other parties, like the investment adviser, were involved and also carried responsibility. Therefore, the Arbiter considers that in the particular circumstances of this case, it is fair, equitable and reasonable for STM Malta Pension Services Limited to:**

- (i) compensate the Complainant for the amount of 70% of the value invested in the Blackmore Global PCC Limited, which is calculated to amount to GBP196,376.92;<sup>145</sup> and**
- (ii) as part of the compensation being awarded, waive or reimburse its own exit fees that may be applicable in case of a transfer out of the Retirement Scheme.**

**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 Complainant the sum of GBP196,376.92 (one hundred and ninety-six thousand, three hundred and seventy-six pounds sterling and ninety-two pence), as well as waive or reimburse its own exit fees in case of a transfer out of the Retirement Scheme.**

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

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

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<sup>145</sup> 70% of GBP280,538.45 which is the total amount invested in the four cells of the BG Fund as indicated in the statement titled '*Subscription Statement and Current Valuation*' attached to Harbour Pensions letter of 29 July 2015 - P. 165

ASF 024/2021

**Dr Reno Borg**  
**Arbiter for Financial Services**