

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

**Case No. 002/2017**

**KL ('the Complainant')**

**vs**

**STM Malta Trust and Company  
Management Limited as substituted by  
STM Malta Pension Services Limited  
(C51028) ('STM Malta' or 'the Service  
Provider')**

### **Sitting of the 15 September 2020**

**The Arbiter,**

#### **PRELIMINARY**

The Office of the Arbiter for Financial Services ('OAFS') has discovered, through its own research, that STM Malta Trust and Company Management Ltd changed its name to STM Malta Pension Services Limited ('STM Malta' or 'the Service Provider') in June 2020. This results from the records filed with the Malta Business Registry relating to the change in name which was effective from 22 June 2020.<sup>1</sup>

No notification was made by the Service Provider to the OAFS regarding such material development, but after a communication from the OAFS of the 10 September 2020, the Service Provider confirmed such a change in name and confirmed that the MBR issued the change of name certificate on 13 July 2020.

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<sup>1</sup> As per the documents filed on 22 June 2020 with the Malta Business Registry - [https://registry.mbr.mt/ROC/index.jsp#/ROC/downloadDocument.do?companyId=C+51028&filename=C+51028%2FC\\_51028\\_D50\\_0.pdf&archiveid=3738958&anonEmailAddress=&anonConfirmEmailAddress=](https://registry.mbr.mt/ROC/index.jsp#/ROC/downloadDocument.do?companyId=C+51028&filename=C+51028%2FC_51028_D50_0.pdf&archiveid=3738958&anonEmailAddress=&anonConfirmEmailAddress=)

For all intents and purposes the records of this case have been accordingly updated to reflect the change in the name of the Service Provider.

### **The Case in question**

**The Complaint** relates to the STM Malta (US Qualified) Retirement Plan ('the Retirement Scheme' or '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 Trust and Company Management Ltd ('STM Malta' or 'the Service Provider'), as its Trustee and Retirement Scheme Administrator.

The Complainant submitted that he suffered losses on his Retirement Scheme and claimed that STM Malta did not perform adequately its role as Administrator and Trustee of the Scheme under the applicable legislation.<sup>2</sup>

The Complainant explained that he became a Member of the Retirement Scheme in 2012 commencing his account with the Scheme with an initial value of over GBP220,000.<sup>3</sup> It was submitted that his Scheme sustained a negative performance given that the underlying investments of the Scheme involved '*a combination of funds which are either suspended, in the hands of the administrators or have been liquidated at a significant loss*'.<sup>4</sup>

The Complainant projected a loss of over GBP50,000<sup>5</sup> from his account with the Scheme.

The Complainant questioned whether his financial adviser, who had suggested the underlying investments of the Scheme and who was accepted by STM Malta, was qualified and registered to deal with a Malta QROPS.<sup>6</sup>

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<sup>2</sup> A fol. 8

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> The Retirement Scheme had the status of a Maltese QROPS (i.e. as a Qualifying Recognised Overseas Pension Scheme, this being '*an overseas pension scheme that the UK HM Revenue & Customs (HMRC) recognises as being eligible to receive an authorised payment in the form of a recognised transfer from registered UK pension schemes*' – A fol. 68

The Complainant also questioned whether his financial adviser met the MFSA's guidance for investment advisers and why STM Malta, as the Trustee and Administrator of the Scheme, had not raised such matters with him.<sup>7</sup>

The Complainant further submitted that he believes that *'Maltese QROPS trustees may only delegate fund management to a regulated adviser'*.<sup>8</sup> The Complainant explained that his financial adviser, John M Pye of Waterstone Investment Associates, was not regulated. It was also submitted that *'The Pension Transfer Report or TVAS was carried out by John M Pye of Waterstone Investment Associates'*,<sup>9</sup> and that upon *'further research it transpires John M Pye or Waterstone is presently not UK FCA regulated and was not in 2012'*.<sup>10</sup>

The Complainant further submitted that his advisers *'are now located in Germany and not regulated by the German BaFin either'*,<sup>11</sup> and pointed out that *'advisers need to be regulated in another jurisdiction in order to be passported'*.<sup>12</sup>

The Complainant explained that his financial adviser provided the investment recommendation through a phone call, following which the Complainant did not remember ever receiving a formal document regarding all the investments, how they fitted with his moderate risk balanced portfolio, and the associated risks.<sup>13</sup>

The Complainant also claimed that his adviser received commissions in relation to the investments placed into his portfolio and that STM Malta *'have details of commission received which could potentially provide additional insight on whether the investment allocation was focused on high risk, high commission funds'*.<sup>14</sup>

The Complainant claimed that he was informed by Waterstone Investment Associates that his Retirement Scheme *'could invest in a wide array of investments upon the approval of the trustees'*.<sup>15</sup> The Complainant explained that he was also informed that he could replace his adviser if he wanted to. The

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<sup>7</sup> A fol. 8 & 11

<sup>8</sup> *Ibid.*

<sup>9</sup> A fol. 9

<sup>10</sup> *Ibid.*

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

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> A fol. 10

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

Complainant claimed that his hands were, however, tied given that upon a change in adviser he *'would have incurred an additional fee of 1% on top of charges levied by STM and Friends Provident'*.<sup>16</sup>

The Complainant questioned whether STM Malta had any evidence to support that the portfolio of investments underlying the Retirement Scheme was *'balanced, of moderate risk and had been signed off by the investor'*.<sup>17</sup> The Complainant also questioned why STM Malta approved *'investments that should not have been sold for the interests of retail investors who are based in US'*.<sup>18</sup>

The Complainant submitted that, consistent with the Malta pension guidance, the Scheme was not supposed to invest in high risk funds and that it should have adopted a moderate risk balanced approach.<sup>19</sup> The Complainant questioned whether STM Malta took all the necessary steps to safeguard his investments in its role as Administrator and Trustee of the Scheme.

The Complainant further questioned whether STM Malta performed *'the necessary administrative checks to ensure that the asset choices and allocation satisfied Malta's regulations/restrictions for Pension Schemes'*.<sup>20</sup>

The Complainant questioned whether the investments of the Scheme were properly diversified to avoid excessive exposure to any particular asset, issuer or group of undertakings and also questioned why investments were approved in high risk funds not deemed suitable for personal pensions.

The Complainant submitted that the Scheme should have not invested more than 10% of its assets in securities issued by the same body and the Scheme should have not held more than 10% of any class of security issued by any single issuer.

The Complainant claimed that the asset allocation of his Retirement Scheme was not compliant with the regulations and not reflective of a moderate risk balanced portfolio.

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

<sup>17</sup> *A fol. 8*

<sup>18</sup> *Ibid.*

<sup>19</sup> *A fol. 9*

<sup>20</sup> *A fol. 10*

It was also questioned why STM Malta had authorised the Axiom Legal Financial Fund as one of the underlying investments when, according to its fund fact sheet, this fund was not to be sold to anyone representing the interests of US residents. The Complainant also questioned why STM Malta had authorised another underlying investment, being the New Earth Fund, when this *'was considered to be high risk and only targeted at qualified investors (not retail)'*.<sup>21</sup>

The Complainant submitted that the Scheme will not *'provide an income on retirement of GBP30K/year as projected in the TVAS'*.<sup>22</sup>

The Complainant listed a number of underlying investments in respect of which there were issues and stated that:

*'New Earth (\$25k) and Axiom Legal Fund (\$15k) may result in 100% loss of the initial investment (shown in parentheses).*

*LM Australian Income Fund (\$15k) is also at significant risk and is suspended.*

*Global Forestry Fund (\$20k) is suspended and no information is available on this fund.*

*Mansion (\$15k) was just sold but was suspended for over 2 years.*

*Platinum Cap Mgt Gold Adv Fund (\$25k) was eventually liquidated after it lost nearly 50% of value.*

*Due to the risk of further suspensions, I have decided to liquidate Prestige, Lucent (may also be suspended) and Coral even though I may incur some early redemption penalties'*.<sup>23</sup>

The Complainant emphasised that his Retirement Scheme had an overexposure to illiquidity and an overallocation to high risk funds, with the investment choices not reflective of a moderate risk balanced approach and not in line with MFSA's rules.<sup>24</sup>

The Complainant projected his loss to be at GBP91,000. This was calculated as being the difference between the original investment into the Retirement

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<sup>21</sup> A fol. 11

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> A fol. 12

Scheme of GBP222,500 together with a 6% growth rate sought on such investment calculated in total as GBP281,000, and the claimed worth of the Complainant's policy of GBP190,000.<sup>25</sup>

**In its reply, STM Malta essentially submitted the following:**<sup>26</sup>

1. That, the Complaint is unfounded in fact and at law and accordingly should be dismissed with costs and this for the reasons set out in this response.
2. That, as a preliminary plea and without prejudice to the remainder of this response, the Respondent would like to state that although the claims of the Complainant are not clear from the Complaint itself, any claims for the payment of damages are prescribed in terms of Article 2153 of the Civil Code (Chapter 16 of the Laws of Malta).
3. That, the Respondent would like to point out that the relationship between the Complainant and the Respondent Company initiated and is based on a client profile questionnaire and an application form dated the 4 February 2012, which was duly signed by the Complainant.
4. That, in the afore-mentioned profile questionnaire and application, the Complainant declared, *inter alia*, the following:
  - The Complainant confirmed that he was recommended, by STM Malta, to obtain financial, legal and tax advice concerning the financial affairs and that STM Malta cannot provide any such advice and cannot be held responsible for any advice obtained or advice not sought by the Complainant or any related person/party to the affairs of the plan;
  - The Complainant confirmed that he had received advice on the preferred investments with regard to their suitability and appropriateness for the plan;
  - The Complainant further agreed that STM Malta will not incur any liability in connection with the plan's investments except where this arises as a result of the Administrator's fraud, wilful misconduct or negligence.

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<sup>25</sup> A fol. 13

<sup>26</sup> A fol. 201 to 203

The Service Provider also pointed out that, moreover, in the profile questionnaire and application, the Complainant had clearly indicated:

- The details of the pension adviser and investment adviser as Waterstone Investment and Associates;
- The preferred investment selection/criteria, whereby the Complainant stated that: *'the balance of my transfer value to be invested via Friends Provident Reserve. Details of the Investments to be held will be forwarded by my Investment Adviser'*,<sup>27</sup>
- That the Complainant considered himself an informed investor and understood the risks of investing in financial markets reasonably well;
- The Complainant confirmed that the approach to be taken when investing the plan assets is one of balanced, moderate risk investment within a balanced and diversified portfolio.

5. That, in addition to the above, as indicated in the client profile questionnaire and an application form dated the 4 February 2012, the Complainant had selected Waterstone Investment and Associates as his financial and investment advisers and STM Malta invested the Complainant's assets in line with the instructions given by Waterstone Investment and Associates. Moreover, STM Malta would like to point out that (i) the investment recommendations which they had received were to invest in nine funds consisting of different asset classes which ought to have resulted in the required diversification and (ii) at the time the investment took place, none of the funds had any particular known issues in terms of liquidity or otherwise.
6. That, in 2012, the Complainant was given online access to the Friends Provident International portfolio, which means that the Complainant could have got acquainted with the portfolio.
7. That, in addition to the above, in terms of Maltese Law and in particular the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta) which was,

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<sup>27</sup> A fol. 211

at the time applicable to the grievances in question the Act does not outline the detail in terms of how the investment needs to be made but only obliges STM Malta to observe a list of general investment restrictions which were found in the licence conditions applicable to STM Malta prior to the entry into force of part B.3 of the Pension Rules for Personal Retirement Schemes issued by the Malta Financial Services Authority. This obligation is placed on the investment and financial adviser whose role is to carry out research and create the most suitable portfolio for his client. It was noted that STM Malta is prohibited from giving members financial and investment advice and for this reason it relies on the advice given by the financial and investment adviser selected by each member.

8. That, STM Malta would like to highlight that, on the 30 June 2016, the Complainant had specifically requested a pension administrator working with STM Malta to ensure that Waterstone Investment and Associates are retained as the Complainant's adviser.
9. That, in view of the above, it was submitted that there could be no remedy to the Complaint as it is unfounded in fact and at law.

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

**Considers:**

***Preliminary Plea***

The Service Provider submitted that:

*'although the claims of the Complainant are not clear from the Complaint itself, any claims for the payment of damages are prescribed in terms of article 2153 of the Civil Code (Chapter 16 of the Laws of Malta)' .<sup>28</sup>*

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<sup>28</sup> A fol. 201

The Arbiter notes that the Complaint is clear enough, so much so, that the Service Provider filed both a detailed reply to it and also submitted a detailed final note of submissions.

As to the plea of prescription, in terms of Article 2153 of Chapter 16 of the Laws of Malta, the Arbiter has noted that apart from mentioning this plea in its reply, the Service Provider did not prove it as it is obliged to do. The party that raises the plea must prove that plea.

Moreover, as has been repeatedly decided by the Arbiter in previous decisions, the plea of prescription in terms of Article 2153 of Chapter 16 of the Laws of Malta, is not relevant to these cases which are basically of a contractual nature. As has been held by our Courts, the plea of prescription based on Article 2153 of the Civil Code, is of a tortuous nature<sup>29</sup> as it is independent of any contractual relationship entered into by the parties.

This was also repeated by the Courts,<sup>30</sup> where the Court stated that:

*‘The prescriptive period of two years mentioned in Article 2153 of the Civil Code, apart from the fact that it does not apply to the damage caused by a criminal offence, it does not apply where the alleged damage arises from a contractual relationship or another similar obligation’.*

The relationship established between the parties was of a contractual nature and, therefore, the Arbiter is rejecting this plea.

The other pleas raised by the Service Provider will be dealt with under the merits of the case.

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<sup>29</sup> For example, *GO p.l.c. vs Charles Dimech*, PA, 28/07/2011; *Roland Darmanin Kissaun vs GlobalCapital Financial Management Ltd*, PA, 1/06/2017

<sup>30</sup> *Improved Design Ltd vs Dr Michael Gialanze*, PA, 19/05/2005: *‘Illi, ghalhekk, il-preskrizzjoni ta’ sentejn imsemmija fl-artikolu 2153 tal-Kodici Civili, minbarra li ma tapplikax għall-hsara mahluqa minn ghemil li jikkostitwixxi reat, lanqas ma tapplika fejn l-allegata hsara titnissel minn ksur ta’ patt kuntrattwali jew obbligazzjoni li tixbahha.’ Cf also *Salvu Fenech vs GlobalCapital Financial Management*, QA (inf), 21/10/2019*

## **The Merits of the Case**

**The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.<sup>31</sup>**

### ***The Product in respect of which the Complaint is being made***

The STM Malta (US Qualified) Retirement Plan ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta registered with the Malta Financial Services Authority ('MFSA'). It was initially registered as a Personal Retirement Plan, under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta).<sup>32</sup>

The Retirement Scheme was established by STM Malta, which is in turn licensed by the MFSA and registered as a Retirement Scheme Administrator.<sup>33</sup> STM Malta acts as the Retirement Scheme Administrator and Trustee of the Scheme.<sup>34</sup>

As described by STM Malta, the Scheme:

*'is a member directed plan in that the member (in this case the complainant) directs which investments he wishes to make after advice has been duly taken and the duty of the administrator of that plan (the Company) is solely to ensure that the choice of investments made satisfies the pension rules that are in force at the time of acceptance of the pension transfer (in this case 2012)'.<sup>35</sup>*

The Application form for membership of the Retirement Scheme specifies *inter alia* that:

*'The Plan has been established to provide a life-time income to its members'.<sup>36</sup>*

## **The Legal Framework**

The Retirement Scheme and STM Malta are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules

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<sup>31</sup> Cap. 555, Art. 19(3)(b)

<sup>32</sup> A fol. 68

<sup>33</sup> <https://www.mfsa.com.mt/financial-services-register/result/?id=204>

<sup>34</sup> A fol. 68

<sup>35</sup> A fol. 332

<sup>36</sup> A fol. 28

issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was eventually repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015.<sup>37</sup>

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. 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.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by MFSA under the RPA.

The Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA, given STM Malta's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.<sup>38</sup>

Indeed, Article 1(2) of the TTA provides that:

*'The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A',*

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<sup>37</sup> Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - <https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/>

<sup>38</sup> The TTA also applies to a party which is acting in the capacity of a Trustee and as a Retirement Scheme Administrator under the RPA, even where such party may not have a specific trustee authorisation under the TTA.

Article 1 (2) of the TTA provides that:

*'The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A'. Article 43 (6)(c) of the TTA in turn provides inter alia that: '(c) A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes'*

with Article 43(6)(c) in turn providing that:

*'A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes ...'.*

### **Profile of the Complainant**

The Complainant, who was born in December 1965, is of British Nationality and was resident in the USA at the time of membership of the Scheme.<sup>39</sup>

As indicated in the Application Form for Membership into the Scheme dated 04/02/2012, the Complainant worked as an Associate VP Marketing in the BioPharma sector in the USA.<sup>40</sup>

In reply to question (A), Section 10 of the Application Form for Membership, which asked *'How well do you understand the risks of investing in financial markets?'*, the box *'Reasonably well – I consider myself an informed investor'*, was selected by the Complainant from the other available options of *'sophisticated investor'* or *'inexperienced investor'*.<sup>41</sup>

In the same section 10 of the said Application Form, which dealt with the *'Attitude to Risk/Investment Objectives/Financial Position'*, it was indicated that the Complainant had \$800,000 in investments and a total net worth of \$1,025,000 with liabilities of \$600,000.<sup>42</sup>

In reply to question (E), Section 10 of the same Application Form, which asked how would the applicant *'best describe the approach that should be taken when investing'*<sup>43</sup> the Plan's assets, the Complainant indicated *'Balanced – moderate risk investments within a balanced and diversified portfolio'*.<sup>44</sup>

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<sup>39</sup> A fol. 31

<sup>40</sup> A fol. 32

<sup>41</sup> A fol. 35

<sup>42</sup> *Ibid.*

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

<sup>44</sup> *Ibid.*

The Complainant did not opt in this regard for the other available options of either '*Aggressive – high risk investments aimed at achieving superior returns*' or '*Cautious – providing an annual income whilst protecting the capital*'.<sup>45</sup>

### ***Investment Adviser***

The Application Form for membership into the Scheme signed by the Complainant and dated 04/02/2012 specifies that the pension adviser of the Complainant was Waterstone Investment Associates, which featured an address in Italy.<sup>46</sup>

Waterstone Investment Associates was unregulated, as confirmed in the email communication of 7 July 2016, that the adviser itself exchanged with the Complainant.<sup>47</sup>

### ***Underlying Investments***

The Complainant became a member of the Scheme in 2012. Following the acceptance of the Complainant's application dated 4/02/2012,<sup>48</sup> by STM Malta as trustee of the Scheme, the Complainant transferred funds from his previous overseas plan/s into the Retirement Scheme.<sup>49</sup>

The money held into the account of the Complainant, as a member of the Retirement Scheme, was used to purchase a Reserve Whole of Life Policy issued by Friends Provident International. The said policy commenced on the 12 July 2012 and had an investible premium of GBP222,541.29.<sup>50</sup>

The investible premium of the said policy was, in turn, invested on the advice of Waterstone Investment Associates into various collective investment schemes.

The value of the Complainant's account with the Retirement Scheme is linked to the value of the policy offered by Friends Provident International which is, in turn, linked to the performance of the underlying assets undertaken within the said policy.

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<sup>45</sup> *Ibid.*

<sup>46</sup> *A fol. 32*

<sup>47</sup> *A fol. 24*

<sup>48</sup> *A fol. 30*

<sup>49</sup> *A fol. 36*

<sup>50</sup> *A fol. 134*

The Application Form for membership into the Scheme signed by the Complainant and dated 04/02/2012 specifies *inter alia* that the main reason for the Complainant applying for membership of the Retirement Scheme was ‘*to obtain a higher level of return from the QROPS than that afforded by my current UK pension provision*’.<sup>51</sup>

In reply to one of the questions in Section 10 of the said Application Form, it was also indicated that the Scheme ‘*will supplement additional retirement funds*’ where this would represent 30% of the Complainant’s total retirement income.<sup>52</sup>

STM Malta submitted email communications exchanged between the Complainant and his financial adviser in August 2012.

The said communications indicated that the initial allocation suggested by the financial adviser and, subsequently agreed to by the Complainant, in respect of the investible premium of GBP222,541, constituted of the following allocation:

<i>‘Platinum Gold Advantage Fund</i>	<i>£25,000.00</i>
<i>Coral Student Accommodation portfolio</i>	<i>£15,000.00</i>
<i>Prestige Alternative Finance Fund</i>	<i>£15,000.00</i>
<i>Mansion Student Accommodation Fund</i>	<i>£20,000.00</i>
<i>Rudolf Wolff Building Society Income Fund</i>	<i>£20,000.00</i>
<i>Lucent Strategic Land Fund</i>	<i>£25,000.00</i>
<i>New Earth Solutions Recycling Fund</i>	<i>£25,000.00</i>
<i>LM Australian Income Fund</i>	<i>£15,000.00</i>
<i>Global Forestry Growth Fund</i>	<i>£20,000.00</i>
<i>Axiom Legal Financing Portfolio</i>	<i>£15,000.00</i>
<i>TCA Global Credit Master Fund</i>	<i>£25,000.00</i>
<i>Cash</i>	<i>£2,541.29’</i> <sup>53</sup>

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<sup>51</sup> A fol. 31

<sup>52</sup> A fol. 35

<sup>53</sup> A fol. 337

The allocation indicated above reflected the one that was also indicated by the Complainant during the proceedings of the case.<sup>54</sup>

It is noted that only 9 investments (out of the 11 indicated in the above list), were, however, mentioned by the Complainant in his Complaint Form. The Complainant did not make any reference to the Rudolf Wolff Building Society Income Fund and the TCA Global Credit Master Fund in his Complaint Form.

During the proceedings of the case, the Complainant explained that the Rudolf Wolff Building Society Income Fund was still an active investment whilst the TCA Global Credit Master Fund was redeemed by him following advice that this will be suspended.<sup>55</sup>

### **Overview of underlying investments**

The following is an overview of the nine underlying investments mentioned by the Complainant in his Complaint Form (which investments constituted 78.63% of his investible premium):<sup>56</sup>

- 1) The New Earth Solutions Recycling Facilities Fund was a sub-fund of the Premier Investment Opportunities Fund Protected Cell Company, a Qualifying-Type Experienced Investor Fund<sup>57</sup> which *'meant that the fund could only be promoted to certain types of sophisticated investors'*.<sup>58</sup>

This fund was a non-retail registered fund not regulated, but registered with the Isle of Man Authority.<sup>59</sup> The New Earth Solutions Recycling Facilities Fund *'invested in industrial facilities that specialised in recycling waste management systems'*.<sup>60</sup> This fund was suspended and put into liquidation.<sup>61</sup> The investment into the New Earth Solutions Fund

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<sup>54</sup> A fol. 286-287

<sup>55</sup> A fol. 121

<sup>56</sup> GBP175,000 out of GBP222,541.29 - (A fol. 134)

<sup>57</sup> A fol. 38 & Information found on <http://www.premiernewearthfund.com/>

<sup>58</sup> <https://www.financial-ombudsman.org.uk/files/176513/DRN7199965.pdf> - Ref: DRN7199965

<sup>59</sup> A fol. 40

<sup>60</sup> <https://www.financial-ombudsman.org.uk/files/176513/DRN7199965.pdf> &

<https://www.morningstar.co.uk/uk/news/63255/fund-documents-why-you-should-read-the-fine-print.aspx>

<sup>61</sup> A fol. 45 and a fol. 286-287

comprised 11.23% of the investible assets within the Retirement Scheme.<sup>62</sup>

- 2) According to information found over the internet, the Axiom Legal Financing Portfolio constituted a *'segregated portfolio'* of *'a segregated portfolio company in the Cayman Islands'*.<sup>63</sup>

As detailed in its Offering Memorandum, this fund invested substantially all of its assets in a Master Segregated Portfolio which provided *'short term fixed interest loans to law firms in the United Kingdom (excluding Scotland) to pursue legal claims on a no-win, no-fee basis for the misselling of financial services products on behalf of claimants'*.<sup>64</sup>

This fund had a targeted rate of return of 11%<sup>65</sup> and was only available to certain types of investors.

Page 15 of the Offering Memorandum of the Axiom Legal Financing Fund, Segregated Portfolio dated August 2010 *inter alia* specified that:

*'Investment in Participating Shares is strictly limited to Eligible Investors as defined in the Offering Memorandum. Prospective applicants must represent and warrant in the subscription application form that they are Eligible Investors and that they have the knowledge, expertise and experience in financial investment and business matters to evaluate the risks of investing in the Segregated Portfolio, are aware that the Participating Shares are an investment involving risk, that they are aware of the risks inherent in investing in assets in which the Segregated Portfolio will invest and the method by which these assets may be held and/or traded, that they are not dependent upon current cash returns with respect to the investment in the Segregated Portfolio and that they can bear the loss of their entire investment in the Segregated Portfolio'*.

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<sup>62</sup> GBP25,000 of GBP222,541.29 (A fol. 11 & 337/286-287)

<sup>63</sup> [http://hintonpi.com/pdfs/axiom\\_brochure.pdf](http://hintonpi.com/pdfs/axiom_brochure.pdf)

<sup>64</sup> Pg.8/9 of the Offering Memorandum of the Axiom Legal Financing Fund, Segregated Portfolio dated August 2010 - [http://hintonpi.com/pdfs/axiom\\_supplement\\_memo.pdf](http://hintonpi.com/pdfs/axiom_supplement_memo.pdf)

<sup>65</sup> *Ibid.*

The Axiom Legal Financing Fund was eventually placed into receivership.<sup>66</sup> As indicated in one of the articles about this fund *'It cannot realistically have been considered to be a low-risk investment'*.<sup>67</sup> The investment into the Axiom Legal Financing Portfolio comprised 6.74% of the Scheme's assets.<sup>68</sup>

- 3) The Platinum Gold Advantage Fund was a fund of hedge funds domiciled in Luxembourg aimed for institutional investors.<sup>69</sup>

The aim of the Platinum Gold Advantage Fund was to achieve *'long term, attractive risk adjusted returns through actively managed investments in a diversified portfolio focused on gold and precious metals'*.<sup>70</sup>

The Complainant stated that the Platinum Gold Advantage Fund *'was eventually liquidated after it lost nearly 50% of value'*.<sup>71</sup> The investment into the Platinum Gold Advantage Fund comprised 11.23% of the assets that the Complainant had into his account with the Scheme.<sup>72</sup>

- 4) The Mansion Student Accommodation Fund was a cell of the International Mutual Fund PCC Ltd which, according to its brochure, was an *'open ended Protected Cell Company (PCC) approved by the Guernsey Financial Services Commission and listed on the Channel Islands Stock Exchange'*.<sup>73</sup>

This fund aimed for a target rate of return of 10-12% p.a. before tax and had the objective *'to achieve capital growth through the careful acquisition and management of suitable properties and will reinvest surplus rental income after allowances for costs'*, with the fund investing in *'existing private halls of residence which are subdivided into cluster flats with communal kitchen, lounge and bathroom facilities'*.<sup>74</sup>

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<sup>66</sup> A fol. 286-287/<http://www.axiomlff.com/>

<sup>67</sup> <https://wards.uk.com/news/uk-investors-lose-out-as-axiom-legal-financing-fund-collapses/>

<sup>68</sup> GBP15,000 of GBP222,541.29 (A fol. 11, 286-287, 337)

<sup>69</sup> Bloomberg Terminal – Security information for Platinum Funds SICAV – Platinum Gold Advantage Fund

<sup>70</sup> *Ibid.*

<sup>71</sup> A fol. 11

<sup>72</sup> GBP25,000 of GBP222,541.29 (A fol. 11, 286-287, 337)

<sup>73</sup> Pg. 4 of the Fund Brochure titled *'Mansion Student Accommodation Funds'*.

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

The fund was suspended and eventually put into liquidation.<sup>75</sup> The investment into the Mansion Student Accommodation Fund comprised 8.99% of the assets that the Complainant had into his account with the Scheme.<sup>76</sup>

- 5) The objective of the LM Australian Income Fund was *'To provide investors with a competitive return by benefiting from the Fund's investment in Australian registered first mortgages (debt instruments) secured against real estate assets in Australia'*.<sup>77</sup>

This fund provided *'senior debt across the Australian property market'*<sup>78</sup> and invested *'in a diversified portfolio of Australian first registered mortgages over commercial, residential, industrial, retail and vacant land, and interest bearing cash investments'*.

Whilst this fund was open to *inter alia* individual investors, the fund had various investment terms of up to 5 years maturity and the redemption policy provided *inter alia* that:

*'Generally, the Manager is required by the constitution to satisfy withdrawal requests within 180 days. In certain circumstances, that period may be extended to 365 days or the Manager may be entitled to suspend withdrawals in order to protect all investments'*.<sup>79</sup>

The fund also had certain particular risks given that it also involved related party transactions.<sup>80</sup> The fund was put into liquidation and made certain

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<sup>75</sup> A fol. 286-287/ <https://www.ft.com/content/5114ff24-966d-11e4-922f-00144feabdc0>  
<https://www.rl360.com/row/news/fund-update-mansion-student-accommodation-feb18.htm>

<sup>76</sup> A fol. 286-287, 337

<sup>77</sup> Pg. 4 of the Product Disclosure Statement dated November 2012 issued in respect of the LM Australian Income Fund - <https://www.yumpu.com/en/document/read/44087064/lm-australian-income-fund-lm-investment-management>

<sup>78</sup> Pg. 9 of the Product Disclosure Statement dated November 2012 issued in respect of the LM Australian Income Fund - <https://www.yumpu.com/en/document/read/44087064/lm-australian-income-fund-lm-investment-management>

<sup>79</sup> Pg. 58 of the Product Disclosure Statement dated November 2012 issued in respect of the LM Australian Income Fund - <https://www.yumpu.com/en/document/read/44087064/lm-australian-income-fund-lm-investment-management>

<sup>80</sup> Pg. 7/61/62 of the Product Disclosure Statement dated November 2012 issued in respect of the LM Australian Income Fund - <https://www.yumpu.com/en/document/read/44087064/lm-australian-income-fund-lm-investment-management>

distributions along the past years during the winding up process.<sup>81</sup> The investment into the LM Australian Income Fund comprised 6.74% of the assets that the Complainant had into his account with the Scheme.<sup>82</sup>

- 6) The Global Forestry Growth Fund is an open-ended fund domiciled in Luxembourg and regulated by the CSSF. The objective of this fund, was:

*'to maximise returns to its investors via direct and indirect investments in the forestry asset class, whilst focusing its investment objective towards stable and consistent returns based on prime acquisitions and participations in promising forestry assets, developments and projects linked to the timber industry'*.<sup>83</sup>

The Complainant indicated that the Global Forestry Fund *'is suspended and no information is available on this fund'*.<sup>84</sup> According to public information available over the internet, the Board of Directors of the Global Forestry Fund had suspended *'all redemption, subscription, conversion requests received and of the computation of the NAV'*<sup>85</sup> in respect of this fund since March 2015,<sup>86</sup> with the financial statements on this fund for the fiscal year of 2013 not being completed due to *'a disagreement between the Board and the current auditors of the Fund'*,<sup>87</sup> which disagreement *'is linked to the valuation of the assets held by the Fund'*.<sup>88</sup>

The Complainant indicated that this fund remains in suspension.<sup>89</sup> The Global Forestry Fund targeted *'above average returns with minimal*

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<sup>81</sup>A fol. 286-287/<https://www.lminvestmentadministration.com/aif/https://0j.b5z.net/i/u/10199052/f/8976r3.pdf>

<sup>82</sup> GBP15,000 of GBP222,541.29 (A fol. 11, 286-287, 337)

<sup>83</sup> <http://www.globalforestry.com/sites/default/files/pdf/Global%20Forestry%20-%20Factsheet.pdf>

<sup>84</sup> A fol. 11

<sup>85</sup>

<http://www.globalforestry.com/sites/default/files/pdf/Letter%20to%20Shareholders%20March%202015.pdf>

<sup>86</sup>

<http://www.globalforestry.com/sites/default/files/pdf/Letter%20to%20Shareholders%20March%202015.pdf>

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> A fol. 286-287

*correlation to traditional asset classes such as bonds and stocks*'.<sup>90</sup> The investment into the Global Forestry Growth Fund comprised 8.99% of the assets that the Complainant had into his account with the Scheme.<sup>91</sup>

7) The Prestige Alternative Finance Fund is:

*'an experienced investor Fund focusing on asset-based direct lending, investing in a diversified portfolio consisting of rural, commercial and industrial loans, leases and finance agreements in the United Kingdom*'.<sup>92</sup>

The fund is based in the Cayman Islands and regulated by the Cayman Islands Monetary Authority.<sup>93</sup> The investment into the Prestige Alternative Finance Fund comprised 6.74% of the assets that the Complainant had into his account with the Scheme.<sup>94</sup> The Complainant indicated that he redeemed the investment into this fund.<sup>95</sup>

8) The Lucent Strategic Land Fund is a fund domiciled in Luxembourg and regulated by the CSSF.<sup>96</sup> This fund *'commenced operations in September 2010 with the investment objective of providing capital gains in excess of 12% p.a. through a targeted program of investment into land sites in high growth areas throughout England*'.

This fund is a dedicated fund of a Luxembourg scheme and *'qualifies as an Alternative Investment Fund ('AIF') of the specialised investment funds type*'.<sup>97</sup> The investment into the Lucent Strategic Land Fund comprised 11.23% of the assets that the Complainant had into his account with the Scheme.<sup>98</sup> The Complainant indicated that he redeemed the investment into this fund.<sup>99</sup>

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<sup>90</sup> <http://www.globalforestry.com/sites/default/files/pdf/Press%20Release%20-%202011-04-11%20-%20Fund%20launch.pdf>

<sup>91</sup> GBP20,000 of GBP222,541.29 (A fol. 11, 286-287, 337)

<sup>92</sup> <https://www.trustnetoffshore.com/Factsheets/Factsheet.aspx?fundCode=EEFC5&univ=DC>

<sup>93</sup> <https://www.prestigefunds.com/wp-content/uploads/PALTF-USD-Factsheet-English-01-2018.pdf>

<sup>94</sup> GBP15,000 of GBP222,541.29 (A fol. 337/A fol. 286-287)

<sup>95</sup> A fol. 11

<sup>96</sup> [http://www.gbstrategiclandfund.com/wp-content/uploads/2016/11/Lucent\\_Factsheet\\_July\\_2016.pdf](http://www.gbstrategiclandfund.com/wp-content/uploads/2016/11/Lucent_Factsheet_July_2016.pdf)

<sup>97</sup> *Ibid.*

<sup>98</sup> GBP25,000 of GBP222,541.29 (A fol. 337 / A fol. 286-287)

<sup>99</sup> A fol. 11

- 9) The Coral Student Accommodation Fund is a specialised investment fund incorporated and regulated in Luxembourg which invests in the student accommodation sector.<sup>100</sup> The investment into the Coral Student Accommodation Fund comprised 6.74% of the assets that the Complainant had into his account with the Scheme.<sup>101</sup> The Complainant indicated that he redeemed the investment into this fund.<sup>102</sup>

### **Responsibilities of the Service Provider**

STM Malta is subject to the duties, functions and responsibilities applicable as a Retirement Scheme Administrator and Trustee of the Scheme.

#### *Obligations under the SFA, RPA and directives/rules issued thereunder*

The obligations of STM Malta as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the applicable conditions that at the time were outlined in the *'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'* ('the Directives').

Following the repeal of the SFA and eventual registration under the RPA, STM Malta became subject to the provisions relating to the services of a retirement scheme administrator under the RPA. As a Retirement Scheme Administrator under the RPA, STM Malta became subject to the conditions outlined in the *'Pension Rules for Service Providers issued under the Retirement Pensions Act'* ('the Pension Rules for Service Providers') and the *'Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act'* ('the Pension Rules for Personal Retirement Schemes').

One key duty of the Retirement Scheme Administrator emerging from the primary legislation itself is the duty to *'act in the best interests of the scheme'* as outlined in Article 19(2) of the SFA and Article 13(1) of the RPA.

From the various general conduct of business rules/standard licence conditions applicable to STM Malta in its role as Retirement Scheme Administrator under

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<sup>100</sup> <http://gsa-coral.com/wp-content/uploads/2016/09/20161013studentGSA-coral-brochure-a4-super-compressed.pdf>

<sup>101</sup> GBP15,000 of GBP222,541.29 (A fol. 337/A fol. 286-287)

<sup>102</sup> A fol. 11

the SFA/RPA regime respectively, it is pertinent to note the following general principles:<sup>103</sup>

- a) Rule 2.6.2 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to STM Malta as a Scheme Administrator under the SFA, provided that '*The Scheme Administrator shall act with due skill, care and diligence – in the best interests of the Beneficiaries ...*'.

The same principle continued to apply under the rules issued under the RPA. 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 RPA, and which applied to MPM as a Scheme Administrator under the RPA, provided that:

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

- b) 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, which applied to STM Malta as a Scheme Administrator under the SFA, provided that:

*'The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries ...'*

The same principle continued to apply under the rules issued under the RPA. 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, provided that:

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

### *Trustee and Fiduciary obligations*

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<sup>103</sup> Emphasis added by the Arbitrator.

As highlighted in the section titled '*The Legal Framework*' above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is also relevant for STM Malta considering its capacity as Trustee of the Scheme.

Article 21 (1) of the TTA which deals with the '*Duties of trustees*', stipulates a crucial aspect, that of the ***bonus paterfamilias***, which applies to STM Malta.

The said article provides that:

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

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

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

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

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property '*as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality*'.<sup>104</sup>

As has been authoritatively stated:

***'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'.***<sup>105</sup>

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<sup>104</sup> Pg. 174, '*An Introduction to Maltese Financial Services Law*', Editor Dr Max Ganado, Allied Publications 2009.

<sup>105</sup> Pg. 178, '*An Introduction to Maltese Financial Services Law*', Editor Dr Max Ganado, Allied Publications 2009.

The fiduciary and trustee obligations were also highlighted by MFSA in a recent publication where it was stated that:

***‘In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus pater familias in the performance of his obligations’.***<sup>106</sup>

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

**The above are considered to be crucial aspects which should have guided STM Malta in its actions and which shall accordingly be considered in this decision.**

#### *Other relevant aspects*

One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments**. As acknowledged by the Service Provider, whilst STM Malta’s duties did not involve the provision of investment advice, however, STM Malta did ***‘... monitor pension rules compliance in relation to such investments’***.<sup>107</sup>

As also explained by the Retirement Scheme Administrator itself:

***‘From our end, when we receive the advice which is given to and agreed by the client of the financial adviser, ..., we only have the duty to ensure that the advice does not run counter to the pension rules (so for example that there is sufficient diversification) ...’***<sup>108</sup>

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<sup>106</sup> Pg. 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.

<sup>107</sup> A fol. 334

<sup>108</sup> A fol. 248

## **Other Observations and Conclusions**

In essence, the complaint revolves around the claim that the Complainant experienced a loss on his Retirement Scheme due to STM Malta not having adequately carried out its duties as administrator and trustee of the Scheme in line with the applicable regulations and requirements.

Two principal alleged failures made against the Retirement Scheme Administrator are that (i) it had allowed the appointment of an unregulated investment adviser to provide recommendations in respect of the underlying investments of the member-directed scheme and (ii) it allowed the creation of a portfolio of underlying investments within the Scheme which, according to the Complainant, was considered to be of high risk and not reflective of a moderate risk within a balanced and diversified portfolio.

The following are considered to be the key considerations relevant to the case in question:

- a) It is clear that the Retirement Scheme Administrator was not responsible for the provision of the investment advice provided to the Complainant in relation to the underlying investments of his member-directed scheme. The role of the investment adviser was the duty of Waterstone Investment Associates Inc which was appointed by the Complainant.

**This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case as will be later seen in this decision.**

- b) Although the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the financial instruments which suffered the losses, **the Retirement Scheme Administrator had nevertheless certain obligations to undertake in its role of Trustee and scheme administrator of the Retirement Scheme.**

**The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a**

**substantial bearing on the operations and activities of the Scheme and affect direct, or indirectly, its performance.**

Consideration thus needs to be made as to whether the Retirement Scheme Administrator failed in any relevant obligations and duties and if so, to what extent any such failures are considered to have had a bearing or otherwise on the financial performance of the Scheme and its resulting losses.

c) *The appointment of an unregulated adviser:*

The Complainant chose himself the appointment of Waterstone Investment Associates Inc to provide him with investment advice in relation to the selection of the underlying investments and composition of the portfolio within his member-directed account held with the Scheme.

The Retirement Scheme Administrator, from his part, allowed and/or accepted the unregulated investment adviser to provide investment advice to the Complainant within the structure of the Retirement Scheme.

No clear evidence has emerged in this case indicating that the regulatory framework, which applied at the time the Complainant became member of the Scheme in 2012, did not permit the appointment of an unregulated investment adviser in relation to the member-directed personal retirement scheme.

The regulatory framework which has been updated over the years seems to have allowed certain scenarios when it came to the appointment of an investment adviser until the coming into force and application of relevant provisions in section B9 of Part B of the Pension Rules for Retirement Schemes issued in terms of the Retirement Pensions Act, 2011, which deals with member-directed schemes.<sup>109</sup>

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<sup>109</sup> A fol. 249 & 254 as well as: Pages 4/5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017 15-2018) issued in relation to the 'Consultation on Amendments to Pension Rules for Personal Retirement Schemes' - <https://www.mfsa.com.mt/publications/policy-and-guidelines/feedback-and-statements/>; Page 9 of the MFSA's Consultation Document dated 16 November 2018 titled 'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' (MFSA Ref. 15/2018) also refers - <https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/>.

The said section of the rules includes *inter alia* the criteria that need to be satisfied in respect of the investment advisers of member directed schemes, which include the requirement for the investment adviser to be subject to *inter alia* authorisation and regulation as is specified in standard licence condition 9.6 (b) of the said rules.<sup>110</sup>

The MFSA allowed a transitional period, until 1 July 2019, for compliance with the said condition 9.6 (b).<sup>111</sup>

**However, the appointment of an unregulated entity to act as investment adviser meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where a regulated adviser is appointed. An adequately regulated financial adviser is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory authority. The Retirement Scheme Administrator and Trustee of the Retirement Scheme, a regulated entity itself, should have been duly cognisant of this.**

In the scenario where an unregulated adviser was allowed to provide investment advice to the member of a member-directed scheme, **one would reasonably expect the Service Provider, in its role of Retirement Scheme Administrator and Trustee of the Retirement Scheme, to exercise even more caution and prudence in its dealings with an unregulated party.**

This is even more so, when the activity in question, that is, one involving the recommendations on the choice and allocation of underlying investments, has a material bearing on the financial performance of the Scheme and the objective of the retirement scheme to provide for retirement benefits. It would have accordingly been only reasonable to expect the retirement scheme administrator and trustee to have an even higher level of disposition in the probing and querying of the actions of such

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<sup>110</sup> Last updated 28 December 2018 - <https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/#Pension%20Rules>

<sup>111</sup> Page 5 of the MFSA's Feedback Statement document dated 4 January 2019 (MFSA Ref. 9-2017 / 15-2018) issued in relation to the 'Consultation on Amendments to Pension Rules for Personal Retirement Schemes'

unregulated party in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances.

d) *The permitted portfolio composition:*

i. Despite that the underlying investments were all collective investment schemes, where such type of investment typically but not necessarily includes a level of diversification, one notes that the nine underlying products chosen were ultimately all exposed to very particular asset classes/industries. The portfolio of underlying investments was predominantly invested or exposed to alternative asset classes ranging from real estate, lending, timber, gold/precious metals and recycling waste facilities as further indicated in the '*Overview of underlying investments*' detailed above.

Besides the peculiarities of the alternative industry sectors to which the portfolio was predominantly exposed to, one also notes that some of the chosen underlying collective investment schemes were also unregulated products and non-retail investments.

- ii. The fact that the underlying investments constituted nine funds cannot be considered, on its own, to justify and provide sufficient comfort that there was an adequate level of diversification and a balanced portfolio with moderate risks. This is even more so when one considers the nature and risk profile of such funds.
- iii. The Complainant ultimately ended up having over 50% of his assets, with 6 out of the 9 funds invested into, all experiencing substantial difficulties and/or losses which is, in itself, indicative of the high exposure to the speculative nature and risks of the selected underlying investments which were allowed to occur within the Retirement Scheme by the Retirement Scheme Administrator.
- iv. It is considered that there was no such '*low risk spread of investments within your portfolio*' as claimed by the investment adviser of the Complainant in his email of 1 August 2012, wherein it was stated, that the proposal for the initial investment '*looks to produce a high rate of*

return but from a low risk spread of investments within your portfolio'.<sup>112</sup>

Besides that, it is somewhat contradictory to achieve a high rate of return from low risk investments, no evidence of a spread of low risks investments has in reality emerged from the portfolio composition that was ultimately allowed by STM Malta to be constituted within the Scheme.

- v. One accordingly is justified in questioning the Retirement Scheme Administrator in permitting such an allocation given that the portfolio of underlying investments allowed for the Complainant cannot reasonably be considered as reflective of moderate risk investments within a balanced and diversified portfolio.

In addition, it is unclear on what basis one can reasonably conclude that the portfolio composition was an adequate one for the purposes of retirement provision, this being the scope for which the Scheme was set up.

- e) One notes that a personal retirement scheme is ultimately *'established with the principal purpose of providing Retirement Benefits to Members and/or Beneficiaries'* as per condition 1.1.3 of the Pension Rules for Personal Retirement Schemes. Such purpose of provision of retirement benefits is indeed reflected under the primary legislation, the Special Funds (Regulation) Act ('SFA')<sup>113</sup> and the Retirement Pensions Act ('RPA').<sup>114</sup>

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<sup>112</sup> A fol. 337

<sup>113</sup> Article 2(1) of the SFA defined a 'scheme' to mean *'a scheme or arrangement which is registered under this Act under which payments are made to beneficiaries for the principal purpose of providing retirement benefits ...'*

<sup>114</sup> Article 2 of the RPA defines a 'personal retirement scheme' as: *'a retirement scheme which is not an occupational retirement scheme and to which contributions are made for the benefit of an individual'*.

A 'retirement scheme' is, in turn, defined under Article 2 of the RPA, as *'a scheme or arrangement as defined in article 3'*, where Article 3 (1) stipulates that *'A retirement scheme means a scheme or arrangement with the principal purpose of providing retirement benefits'*.

Article 2 of the RPA also defines 'retirement benefit' as meaning: *'benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death;'*

The documentation used in respect of the Retirement Scheme, itself specified that:

*'The Plan has been established to provide a life-time income to its members'*.<sup>115</sup>

- f) It is deemed, in the circumstances, that no convincing nor sufficient evidence was provided by STM Malta that the portfolio was reflective of a balanced and diversified portfolio with moderate risks in line with the approach that should have been taken in the investments of a Retirement Scheme. Neither has it emerged that the portfolio constituted within the Retirement Scheme was reflective of the prudence one would reasonably expect in a portfolio whose scope is to provide *'a life-time income to its members'*<sup>116</sup> and having *'the principal purpose of providing Retirement Benefits'*.<sup>117</sup>
- g) **Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant and to select the underlying investments of the Retirement Scheme, the Retirement Scheme Administrator had a duty to check and ensure that the portfolio composition recommended by the investment adviser was in the interests of the Complainant and should have ensured that the portfolio composition was one enabling the aim of the Retirement Plan to be achieved with the necessary prudence as one would reasonably expect from a retirement plan.**

**The Scheme Administrator and Trustee had to, in practice, promote the scope for which the Scheme was established with the choice of investments reflecting such scope.**

It is considered that should there have been a careful consideration of the recommended portfolio composition, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky

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<sup>115</sup> A fol. 28

<sup>116</sup> *Ibid.*

<sup>117</sup> Condition 1.1.3 of the Pension Rules for Personal Retirement Schemes; Article 3(1) of the Retirement Pensions Act; Article 2(1) of the Special Funds (Regulation) Act.

portfolio of underlying investments to develop within the Complainant's member-directed scheme as this ran *inter alia* counter to the objectives of the retirement scheme and was not in the Complainant's best interests, nor reflective of a prudent approach and a suitable level of diversification to achieve the scope of the Scheme.

The portfolio composition was ultimately exposed to very particular and specialised industries and was more skewed and reflective of an aggressive portfolio overall aimed at achieving superior returns and of high risk<sup>118</sup> and this also in a scenario where the Complainant was not a sophisticated investor.<sup>119</sup>

It is thus considered that, at the least, there was a lack of diligence by STM Malta in allowing such composition of portfolio within the Scheme, which composition resulted in the losses experienced on his member-directed account with the Scheme.

## **Conclusion**

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

**However, cognisance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment adviser to the member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be only partially held responsible for the losses incurred.**

## **Compensation**

**Being mindful of the key role of STM Malta Pension Services Ltd as Trustee and Retirement Scheme Administrator of the STM Malta (US Qualified) Retirement Plan and in view of the deficiencies identified in the obligations emanating**

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<sup>118</sup> Contrary to what was selected in the Application Form for membership of the Scheme – A fol. 35

<sup>119</sup> A fol. 35

from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by STM Malta for part of the realised losses on his pension portfolio.

In the particular circumstances of this case, considering the role of STM Malta as Trustee and Retirement Scheme Administrator of the Scheme and extent of deficiencies of the Service Provider, the Arbiter considers it fair, equitable and reasonable for STM Malta, to be held responsible for seventy per cent of the losses sustained by the Complainant on his overall investment portfolio indicated above in this decision.

The Service Provider is accordingly being directed to pay the Complainant compensation equivalent to 70% of the sum of the Net Realised Loss incurred within the whole portfolio of underlying investments.

The Net Realised Loss on such portfolio shall be calculated by netting the total of the realised losses and realised profits arising from the portfolio based on the actual realisable values from the said investments, inclusive of any income received from the respective investments.

The computation of the Net Realised Loss shall accordingly take into consideration any realised gains or realised losses arising within the portfolio as at the date of this decision.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders STM Malta Pension Services Limited to pay the indicated amount of compensation as mentioned in this decision.

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

Because of the novelty of these cases, each party is to bear its own legal costs of these proceedings.

**Dr Reno Borg**  
Arbiter for Financial Services

