

Before the Arbiter for Financial Services

Case No. 008/2019

YM & MM ('the Complainants')

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 22 February 2021

The Arbiter,

PRELIMINARY

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

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 in name certificate on 13 July 2020. For all intents and purposes the records of this case have been accordingly updated to reflect the change in name of the Service Provider.

¹ 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=

The Case in question

The Complaint relates to The STM Malta (US) 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 now renamed as STM Malta Pension Services Limited ('STM Malta' or 'the Service Provider'), as its Trustee and Retirement Scheme Administrator.

The Complainants submitted that STM Malta facilitated the loss of their investment as it allowed an unregulated adviser, Justin Harris of Chase Belgrave, to conduct financial business against the risk profile stipulated in its own application form.

It was claimed that STM Malta accepted transactions from an unregulated adviser when it knew that the adviser was not regulated and despite it was stated to the Complainants that the adviser was regulated.

The Complainants submitted that the investments made within the Scheme were, without their knowledge, outside of the risk profile specified in STM Malta's Application Form.² They stated that on the basis of their risk profile they should have not lost so much money and such loss should have never been allowed to occur.³

Background to their complaint, risk profile and other

The Complainants noted that they sought to transfer their UK company pension schemes to a QROPS regulated scheme in 2014. During their communications with their adviser, they received a spreadsheet on investments which indicated growth figures of between 7-9%.

Their adviser also informed them that:

'All the investments have risk of default on capital and income like any investment including stocks and bonds. We consider the risk of the investments chosen to be medium/low'.⁴

² A fol. 6 & 9

³ A fol. 4

⁴ A fol. 6

The Complainants highlighted that their attitude to financial risk as included in the application form, was '*Cautious*' and that they had accepted lower growth and income to protect capital. It was submitted that the chosen risk classification by the Complainants was the lowest risk out of the three available risk options.

The Complainants also explained that in July 2014, the adviser provided them with his pension recommendations which were attributed a risk classification of 4 out of 10. It was noted that the adviser had informed them that a mutual fund of 50 blue chip equities had a risk classification of 5 out of 10 in comparison, whilst debentures of the same 50 blue chip companies had a classification of 3 out of 10, with 10 being the highest risk as per the communication dated 13 March 2014 sent by Chase Belgrave to them.⁵

The Complainants submitted that on this basis they felt that the adviser fully understood their aversion to risk and their cautious approach. It was noted that the adviser's predicted target for growth was again quoted to them at 9%.⁶

The Complainants pointed out that on 3 July 2014 they raised queries regarding the investment approach and stressed how important it was for them not to lose their money as this was the only money they had. The Complainants noted that they were again assured by the adviser that he was on top of the situation.

The Complainants explained that after the investments went live, the investments immediately reduced in value and despite that the Complainants queried this several times with the adviser, they always received the same exact reply from the adviser that no action was recommended to be taken on their portfolios. The Complainants further noted that in June 2017, they were informed that one of the investments recommended by the adviser had lost 90% of its value.

It was noted that after the Complainants questioned such investment, the adviser informed them that this was:

'clearly very disappointing however it's one investment within the portfolio, the portfolio is down 30% having recovered about +8% since the start of the year.

⁵ A fol. 7 & 37

⁶ A fol. 7

We expect the remainder of the 30% gap to be fully closed by the end of the year'.⁷

The Complainants further claimed that after contacting the adviser again they were sent an email from the adviser on 16 June 2017 stating that:

'If, under my advice, your portfolio doesn't increase by that 7% between now and the end of the year (around 6 months), I will resign as your IFA and pay you £15000. That is my confidence'.⁸

The Complainants explained that by end 2017 the pension fund had actually decreased below the figure of June 2017 and continued to drop, and it became subsequently very difficult to contact the adviser, who did not officially resign until 2 February 2018, by which time the pension fund dropped further in value.

The Complainants further noted that the adviser's resignation was conditional on signing a non-disclosure clause, a copy of which was attached as Appendix 3A to the Complaint Form. The Complainants explained that they had no choice but to sign it and that Justin Harris made no mention of this condition of resigning in June 2017 but held them to ransom.⁹

The Complainants also explained that despite his promise of June 2017, Justin Harris *'did not honor his agreement until over a month later'.¹⁰*

The Complainants submitted that the pension fund continued to fall and given that the adviser had not structured the pension plan correctly, STM Malta were forced to sell parts of the pension fund to pay for fees.

Delays in the appointment of the new adviser

It was also pointed out by the Complainants that upon their request to STM Malta for the appointment of a new adviser in April 2018, the Service Provider refused to appoint such new adviser citing regulations.¹¹

⁷ A fol. 7

⁸ A fol. 7 & 41

⁹ A fol. 7

¹⁰ *Ibid.*

The Complainants submitted that STM Malta did not allow them to reinvest the money until the appointment of the new adviser and, whilst they were informed that they were only allowed to cash in any part of the underlying investments during such time, STM Malta could however not tell them the risk or costs of withdrawing the funds. It was also claimed that if they decided to cash in funds, they would end up paying negative interest of 3.75% on the funds. The Complainants further claimed that on this basis they had no choice other than to wait for advice from the new adviser.¹²

The Complainants submitted that the delays caused by STM Malta in the appointment of the new adviser allowed their pension fund to fall even further.¹³

It was noted that despite numerous exchanges, the new adviser was not appointed until November 2018, by which time their pension fund had fallen to over 38% below its initial value. The Complainants claimed that all the investments, except for one, that were done by the previous investment adviser, were cashed in at a loss.¹⁴

Regulatory status of the adviser

With respect to the regulatory status of the adviser, the Complainants explained that in the formal response to their complaint, STM Malta wrote that Justin Harris was regulated by PolyReg in Switzerland. It was noted that the Complainants however contacted PolyReg in Switzerland and PolyReg confirmed to them that from January 2013 to December 2017, Chase Belgrave and Justin Harris were not regulated by Polyreg. It was further noted that this covered the whole period of time the Complainants were with Chase Belgrave.

The Complainants explained that Chase Belgrave had started the process of regulation through Tourbillion in order to ensure that they were regulated through the EEU. It was noted that although Tourbillion was set up and registered with the Financial Services Authority, the Complainants claimed that

¹¹ A fol. 8

¹² *Ibid.*

¹³ A fol. 9

¹⁴ A fol. 8

this was however purely a smoke screen and that no business was set up with Tourbillion.

The Complainants referred to an email in this regard, from the Gibraltar Financial Services Commission which they claimed confirmed this.¹⁵

The Complainants also explained that in October 2017, Chase Belgrave was taken to court by a client and the company was liquidated and closed down. It was claimed that Chase Belgrave now operates in Mauritius with the same website and staff.¹⁶

The Complainants submitted that they were of the understanding that the use of STM Malta in their pension scheme provided a degree of oversight or confidence that the pension funds would be administered in an appropriate way. It was claimed that this however was not the case.¹⁷

The Complainants noted that STM Malta believed that Chase Belgrave was regulated and that they only listened to the Complainants when they told them and submitted proof to the contrary. The Complainants submitted that they contacted the regulatory authorities in Malta, Switzerland, Mauritius, UK and Isle of Man to submit proof on this matter.

It was claimed that through their own investigation, the Complainants found that STM Malta allowed Chase Belgrave to operate and conduct regulated activity through STM Malta when this was an unregulated company which also had fake references on their website,¹⁸ when Justin Harris was an unregulated adviser, and when it was claimed Chase Belgrave had no financial security as it was unable to meet its obligations and was liquidated.¹⁹

Requests made by the Complainants

In their covering letter to the Complaint Form submitted to the OAFS, the Complainants stated that on the basis of the advice received from Justin Harris

¹⁵ A fol. 8 & 44

¹⁶ A fol. 8

¹⁷ Ibid.

¹⁸ A fol. 9 & 53

¹⁹ A fol. 8 & 9

of Chase Belgrave to transfer their UK pension schemes to a regulated QROPS scheme and the adviser's subsequent advice, they wished to raise a complaint and requested sanctions to be placed against Justin Harris and Chase Belgrave.²⁰

The Complainants further submitted in their covering letter to the complaint that they have asked STM Malta to make good on the investment and its value as they felt that STM Malta has demonstrated incompetence, but the Service Provider is refusing and is claiming that it complied with all rules governing investments.²¹

The Complainants noted that they also asked STM Malta to leave the Scheme at no charge but it was claimed that STM Malta refuses to cancel the respective policy underlying their schemes without incurring fees.²²

As further outlined by the Complainants in their covering letter to the Complaint Form, the Complainants have requested STM Malta to stop managing their pension funds and remove their role over the underlying policies, (referred to as RL360), held within their pension schemes. The Complainants explained that this would involve the cancellation of such accounts, which can only be done by STM Malta as the Service Provider is the client of the RL360 policies.²³

In the Complaint Form, the Complainants indeed requested '*the investment to be unwound and reset back to 2014*', with the proceeds to be released to them in order to be invested as it was claimed STM Malta had demonstrated a complete lack of competence and therefore the Complainants felt they could no longer continue with the Service Provider.²⁴

Following the hearing of 24 June 2019, the Complainants made further submissions where they explained that they are requesting both the return of the lost capital of GBP111,605.11 (this being described as the difference between the November 2018 valuation and the initial valuation), and the capital of GBP156,629.89, where reference was made to the valuation as at November 2018, in order to bring them back to where they started in 2014.²⁵

²⁰ A fol. 6

²¹ A fol. 8

²² *Ibid.*

²³ A fol. 9

²⁴ A fol. 4

²⁵ A fol. 113

The Complainants referred to article 14(1) of Chapter 514, Retirement Pensions Act in this regard. The Complainants also requested any difference in value between the valuation of 27 November 2018 and the date of the decision of this case.

In the said submissions, the Complainants further requested compensation on the return/growth lost on their investments, where they stated that this was to be *'calculated at a conservative 3% based upon a low risk profile as per Chapter 514 Retirement Pensions Act Part IV Governance 45'*.²⁶ The said 3% return was requested to be calculated on the figure of GBP111,605.11 between 23 July 2014 up to the date of the decision, and on GBP156,629.89 between 23 July 2014 and 27 November 2018.²⁷

In their submissions of July 2019, the Complainants also requested the cancellation of all agreements with STM Malta and the underlying policies, the RL360, with the funds requested to be returned *'with no future or continued fees applied as per Case No 22/2017 CL vs Sovereign Pension Services Ltd'*.²⁸

The Complainants also requested, in the said submissions, the following actions to be taken by the Arbiter:

- (i) the appointment of an officer to investigate any business conducted with other clients between STM Malta and Chase Belgrave from January 2013 to-date along with a resolution similar to that of article 40(1) of Chapter 514, Retirement Pensions Act;
- (ii) to contact HMRC in the UK and recommend the removal of STM Malta's ability to conduct QROPS pension transfers given the Complainants claim that STM Malta has operated in an unapproved manner. The Complainants referred to article 43(1) of Chapter 514, Retirement Pensions Act in this regard;

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

(iii) to award appropriate costs to the Complainants, in respect of, but not limited to, time spent researching and preparing for the case, lost vacation time and expenses.²⁹

In its reply, STM Malta essentially submitted the following:³⁰

That before considering the detail of the Complaint, the Service Provider wanted to emphasise that whilst it has every sympathy for the Complainants given the apparent reduction in the worth of their pension fund, STM Malta has no liability for this.

STM Malta explained that the Complainants transferred their pension fund to the scheme administered by it on advice from their chosen pension and investment advisers and continued to take advice from such advisers; the Complainants invested in the underlying investments that were a permitted pension investment; the Complainants signed the various forms confirming the investments were their choice and acknowledging the Service Provider's (limited) role that did not include advising on investments.

STM Malta submitted that the Complainants were fully aware that under the provisions governing the appointment of the Service Provider, given the Service Provider's limited role, STM Malta had the benefit of various indemnities and warranties and STM Malta would not have provided a service to the Complainants absent such indemnities and warranties.

The Service Provider further submitted that any loss suffered by the Complainants is due entirely to the actions and investment recommendations of their investment advisers and it is the action of the investment advisers alone that has caused their loss. The Service Provider submitted that it cannot be held responsible for the actions of a third-party adviser selected by the Complainants themselves.

²⁹ *Ibid.*

³⁰ *A fol. 78-81*

Order sought from the Arbiter

STM Malta noted that in the Complaint, the Complainants are requesting the Arbiter for Financial Services to have their investment unwound and reset back to 2014, claiming that they should have not lost so much money based on their risk profile. It was noted that the Complainants claimed that STM Malta demonstrated a complete lack of competence and want their funds released to them.

STM Malta submitted that at the same time, however, the Complainants, in their covering letter annexed to the Complaint, *'raise a complaint and request sanctions placed against Mr Justin Harris and Chase Belgrave'*.³¹

The Service Provider noted that the Complainants raise a number of allegations against Justin Harris and/or Chase Belgrave, including the fact that he offered to resign as their IFA and pay them GBP15,000 quoting him as stating that *'if, under my advice, your portfolio doesn't increase by 7% between now and the end of the year (around 6 months), I will resign as your IFA and pay you £15,000'*.³²

STM Malta noted that the Complainants, who are members of the STM Malta (US) Retirement Plan ('the Plan') since the 11 April 2014, allege that the Service Provider should be held responsible for the losses they suffered as a result of the decline in the value of the investments represented by their member's sub-fund.

STM Malta submitted that the Complainants do not however claim that STM Malta has breached any specific provision or provisions of the applicable regulatory framework and it was therefore difficult for the Service Provider to be able to defend itself accordingly.

The Service Provider submitted that this notwithstanding, STM Malta refers to Paragraph B.1.5.1 of the Malta Financial Services Authority's ('MFSA') Pension Rules for Service Providers, Part B.1 - Pension Rules for Retirement Scheme Administrators which states:

³¹ A fol. 79

³² Ibid.

'1.5.1 The Scheme Administrator shall be liable to the Scheme, its Contributor(s), Members and Beneficiaries for any loss suffered by them resulting from its fraud, wilful default or negligence, including the unjustifiable failure to perform in whole or in part its obligations'.³³

The Service Provider cross-referred to its responses dated 27 July 2018, 13 August 2018 and 20 August 2018 to the Complainants complaint, (a copy of which were annexed and marked as Appendix STM 1 to its reply),³⁴ and noted that these were being included and repeated in full to avoid repetition.

STM Malta further submitted that it does not accept any responsibility for any losses that may have been suffered by the Complainants since:

- (i) the Service Provider is not responsible for the selection of investment adviser and the relationship the Claimants had with their chosen adviser is governed by any agreement that they may have had with such adviser;
- (ii) the chosen adviser is not affiliated with or subject to the supervision of STM Malta and the Service Provider is not in a position to comment on the discussions which took place between the Complainants and the said investment adviser;
- (iii) the Service Provider does not advise on investments, and relies on the Complainants' selected adviser to recommend suitable investments;
- (iv) on the basis of objective assessment, it is not apparent that the investments chosen by the adviser at the time would not have been suitable for inclusion in a portfolio with the Complainant's risk profile.

STM Malta further noted that losses suffered by the Complainants are or may have been the result of market movements in the value of investments selected by the Complainants' adviser and not as a result of any fraud, wilful default, negligence or unjustifiable failure of and on the part of the Service Provider to perform in whole or in part any of its obligations.

The Service Provider submitted that without prejudice to its other arguments and defences, no responsibility can ever be imputable on the Service Provider in

³³ *Ibid.*

³⁴ *A fol. 82 - 87*

view of the failures of the advisers chosen by the Complainants and against whom the Complainants also ask the Arbitrator to issue sanctions.

Brief background

The Service Provider notes that the Complainants were introduced to STM Malta by Chase Belgrave on or around March 2014 when seeking membership of the Plan.

It was noted that each of the Complainants signed an Instrument of Adherence dated 11 April 2014 following advice received from their independent advisers. The Service Provider further explained that, always on the Complainants instructions, the funds received by STM Malta as part of the Plan were transferred to the RL360 Personal Investment Management Services Policy in the name of STM Malta on behalf of the Plan (for the benefit of the Complainants as members of their respective Plan), under Policy Number PM 10003346 and PM 10003324 respectively ('the Policies').

STM Malta explained that the Policies were capital redemption '*PIMS Flexible*' holding underlying financial instruments, in each case selected by the Complainants and/or their appointed investment adviser/s, and, as warned on numerous instances in the application documentation signed by the Complainants before joining the Plan, were at the Complainants' own risk. It was noted that STM Malta has no agency or other connection with the Policy provider or the advisers.

Application Documents signed by the Complainants to join the Plan

STM Malta submitted that whilst it may be somewhat convenient for the Complainants to make absolutely no reference whatsoever to the Application Documents they signed on the 11 April 2014 seeking membership of the Plan ('the Application Documents'), it however makes reference in full to the said Application Documents in its reply which clearly set out the information provided and include declarations made and warranties and indemnities given by the Complainants on the basis of which the Complainants were eventually allowed to join the Plan as Members.

The Service Provider in particular pointed out that the Application Documents signed by the Complainants confirm that:

- a. the Complainants have either received independent pension transfer, financial, legal and tax advice with regard to the suitability of the Plans for their individual circumstances and the implications to them of entering into the Plan, or that they have chosen not to take such advice because they are sufficiently knowledgeable and experienced to make the pension transfer decision on their own;
- b. the Complainants acknowledge that STM Malta has not provided and cannot provide such advice and cannot be held responsible for the advice obtained or not sought by the Complainants or any related persons/party to the affairs of the Plans;
- c. the STM Master Trust Instrument and Rules ('the Trust Rules'), to which the Complainants eventually adhered on their becoming Members of the Plan, will be made available to them on request and agreed to be bound by the said Trust Rules;
- d. the Complainants were provided with written information of all fees, expenses and running costs of their membership in the Plan and that the Service Provider was authorised to automatically collect fees from their account; and
- e. the Complainants agreed that the Service Provider would not incur any liability in connection with the Plans investments except where this arises as a result of the Service Provider's fraud, wilful misconduct or gross negligence.

STM Malta further submitted that, without prejudice to the foregoing, the Complainants presented no proof of any fraud, wilful misconduct or negligence that can be equitably attributed to the Service Provider.

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

Further Considers:

Preliminary

The Arbiter notes that in their additional submissions the Complainants mentioned money laundering, in addition to compliance and risk management, as one of the key areas of their concerns within STM Malta.

However, apart from the fact that that the Complainants provided no explanations nor basis for their concern on this area, such an aspect was not raised in the original complaint filed with the Office of the Arbiter for Financial Services.³⁵ The Complainants cannot change the basis of their complaint and the Arbiter will only consider the basis of the complaint as originally filed.

Moreover, if the Complainants have proofs that the Service Provider is acting contrary to law, they should report the case to the appropriate authorities; however, no such proofs were provided in this case.

Request for sanctions against Justin Harris and Chase Belgrave

The Arbiter notes that in their covering letter to the Complaint Form dated 15 January 2019, the Complainants requested sanctions to be taken against Justin Harris and Chase Belgrave.³⁶

It is noted that Chase Belgrave was indicated, in STM's Malta Application Form for Membership, as being based in Switzerland. It is also further noted that as advised by the Complainants themselves in their additional submissions, Chase Belgrave in Switzerland, (referred to as Chase Belgrave GmbH), was liquidated.³⁷

The definition of a '*financial services provider*', against whom a complaint can be made and considered by the Arbiter under Cap. 555. Arbiter for Financial Services Act ('the Act'), is stipulated under Article 2 of the Act.

The said article provides that:

³⁵ A fol. 112

³⁶ A fol. 6 & 79

³⁷ A fol. 120

"financial services provider" means a provider of financial services which is or has been licensed or otherwise authorized by the Malta Financial Services Authority in terms of the Malta Financial Services Authority Act or any other financial services law, including but not restricted to investment services, banking, financial institutions, credit cards, pensions and insurance, which is or has been resident in Malta or is or has been resident in another EU/EEA Member State and which offers or has offered its financial services in and, or from Malta.

A provider of financial services which has had its licence suspended or withdrawn by the competent authority, but which was licensed during the period in relation to which a complaint by an eligible customer is made to the Arbiter, shall be considered as falling within the definition of a financial services provider ...'

In this respect, the Arbiter considers that neither Justin Harris nor Chase Belgrave (Switzerland) fall under the definition of a '*financial services provider*' under the Act and, accordingly, the Arbiter has no jurisdiction in their regard.

Joinder request by the Service Provider

The Arbiter notes that in the submissions and response of the 18 July 2019, STM Malta requested the joinder, as party to the complaint, of Justin Harris. The Service Provider made such request on the basis of the definition of '*parties*' in Article 2 of the Arbiter for Financial Services Act, Chapter 555, where it noted that the definition of '*parties*' in the said Article also makes reference to '*and any other person who in the opinion of the Arbiter should be treated as a party to the complaint*'.³⁸

The Service Provider further stated in its submissions that:

*'Noting the age-old maxim **fraus omnia corrumpit**, it is submitted that in the interest of justice Mr Harris should answer for himself in these proceedings in respect of the fraud which the Complainants are attributing to him. It would not be fair and equitable on the Respondent to have any responsibility imputable to it if this results from the fraud of a third party'.³⁹*

³⁸ A fol. 170

³⁹ A fol. 170-171

It is firstly noted that this issue was raised by the Service Provider in the submissions and response which it sent following the hearing of the 24 June 2019, during which hearing the Arbiter granted the Service Provider a period of time to present its submissions and response to any new submissions and proofs made by the Complainants.⁴⁰

The request for a joinder should have accordingly been raised in the Service Provider's original reply and not in the said written submissions. In the same way that the Arbiter did not admit additions to the Complaint, he does not consider it appropriate to admit additions to the reply especially when the Complainants had already closed their proofs.

It is further noted that in Section C of the Complaint Form, the Complainants identified STM Malta as the financial services provider against whom their Complaint is being made in relation to the Scheme.⁴¹

The complaint that is being considered by the Arbiter under the Act is indeed one relating solely to the alleged shortcomings of the Service Provider as Administrator and Trustee of the Retirement Scheme.

In addition, not only are claims relating to fraud outside the jurisdiction of the Arbiter, as any such claims are to be referred to and handled by the police, but also no action can be taken by the Arbiter on Justin Harris under the provisions of the Act for the reasons already outlined above given that the Arbiter has no jurisdiction in his regard.

Having considered the particularities of this complaint and the various aspects raised above, it is in the Arbiter's opinion that Justin Harris should not be treated as a party to the Complaint presented before him and the Service Provider's request in this regard is accordingly being rejected.

Request for certain actions to be taken in terms of the Retirement Pensions Act

In their submissions of July 2019, the Complainants requested *inter alia* certain actions to be taken by the Arbiter in terms of Chapter 514, Retirement Pensions Act ('RPA'). The Complainants *inter alia* requested the Arbiter to:

⁴⁰ A fol. 111

⁴¹ A fol. 3

- (i) appoint an officer to investigate any business conducted between STM Malta and Chase Belgrave from January 2013 to-date with reference to article 40(1) of the RPA;
- (ii) contact HMRC in the UK and recommend the removal of STM Malta's ability to conduct QROPS pension transfers as per article 43(1) of the RPA.⁴²

The provisions referred to by the Complainants, Articles 40(1) and 43(1) of the RPA, respectively deal with the '*Appointment of Inspectors*' and the '*Co-operation with overseas regulatory authorities and EIOPA*' by the competent authority under the RPA.⁴³

In its submissions, the Service Provider *inter alia* noted that:

'the Complainants cannot seek from the Arbiter any order or remedy which would be ultra vires the powers of the Arbiter as set out in Article 26(3) of the Arbiter for Financial Services Act, Chapter 555 of the Laws of Malta' and that *'the Arbiter has no competence to take any action which is reserved to the competent authority under the Retirement Pensions Act, Chapter 514 of the Laws of Malta'*.

The Arbiter remarks that, apart that the indicated requests made by the Complainants were not raised in their original complaint, the respective articles of the RPA referred to by the Complainants relate to the powers of the '*competent authority*' designated under the RPA, where such designated authority is actually the Malta Financial Services Authority as stipulated under Article 2 of the RPA.

⁴² A fol. 113

⁴³ Article 40(1) of the RPA provides that, '*The competent authority may, whenever it deems it necessary or expedient, appoint an inspector or inspectors to investigate and report on the affairs of any retirement scheme, retirement fund, service provider, overseas retirement scheme or person, referred to in article 39(1)(a) to (c) and to report thereon to it.*'

Article 43(1) of the RPA provides that, '*The competent authority may exercise the following powers at the request of or for the purposes of assisting an overseas regulatory authority:*

(a) the power to impose, revoke or vary conditions on the license or recognition granted pursuant to the provisions of article 9(3);

(b) the power to cancel or suspend a license or recognition under article 10(1);

(c) the power to require information and documentation under article 39;

(d) the power to appoint inspectors under article 40;

(e) the powers of intervention under article 41;

(f) the powers of entry under article 42;

(g) the power to communicate to the overseas regulatory authority information which is in the possession of the competent authority, whether or not as a result of the exercise of any of the above powers.'

The requests made by the Complainants as indicated in this section cannot accordingly be upheld and the Arbiter is accepting the Service Provider's submissions on this matter.

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.⁴⁴

The Complainants

The Complainants, born on March 1969 and October 1972 respectively, were indicated as both residing in the USA in the Service Provider's form titled '*Application for Retirement Benefits*'.⁴⁵

An extract from an Application Form of the Service Provider with respect to the Retirement Scheme, presented by the Complainants during the case, indicates that the attitude to financial risk of the Complainants was one indicated as '*Cautious*' with such category described as '*(accepting lower growth and income to protect capital)*'.⁴⁶ This was the lowest category of risk from the other available options of '*Balanced (accepting moderate risk within a balanced and diversified portfolio)*' and '*Aggressive (aiming to achieve high returns and accepting risk of high losses)*'.⁴⁷

The level of understanding of financial risk was indicated, in the same form, as '*Reasonably well. I consider myself well informed*' from the other options of '*Not well. I have little or no knowledge*' or '*Very well. I fully understand the pros and cons, risk and rewards*'.⁴⁸

The '*Application for Retirement Benefits*' submitted by the Service Provider for each of the Complainants were respectively signed by the Complainants - one dated 25 March 2014 and the other one undated.⁴⁹

⁴⁴ Cap. 555, Article 19(3)(b)

⁴⁵ A fol. 97 & 102

⁴⁶ A fol. 32, 34 & 124

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ A fol. 98 & 103

The Service Provider

STM Malta is licensed as a Retirement Scheme Administrator⁵⁰ by the Malta Financial Services Authority and acts as the Retirement Scheme Administrator and Trustee of the Scheme.⁵¹ The Service Provider established the trust instrument and rules in respect of the Scheme on 2 December 2011.⁵²

Investment Adviser

The extracts from the Application Form for membership into the Scheme and from STM Malta's Investment Advisory Agreement that were presented by the Complainants specify that the Investment Adviser was Chase Belgrave, an entity based in Switzerland with Justin Harris indicated as contact person.⁵³

An extract from the application form in respect of the underlying policy held by the respective Scheme, the RL360, indicates Chase Belgrave GmbH ('Chase Belgrave' or 'the Investment Adviser') as financial adviser. The extract in question, titled '*Section 9 Adviser's declaration*', is dated 4 July 2014 and signed by the adviser. In the said section the adviser declares that '*Polyreg*' is the '*regulatory or authorising body*' in respect of Chase Belgrave.⁵⁴

Particularities of the Case

The Product in respect of which the Complaint is being made and other background information

The STM Malta (US) Retirement Plan ('the Retirement Scheme' or 'Scheme') is a trust domiciled in Malta and authorised by the Malta Financial Services Authority ('MFSA') as a Personal Retirement Scheme.⁵⁵ The Scheme was initially registered with MFSA under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta).⁵⁶ The scope of the Scheme is to provide for retirement benefits.⁵⁷

⁵⁰ <https://www.mfsa.mt/financial-services-register/result/?id=204>

⁵¹ A fol. 91

⁵² A fol. 88

⁵³ A fol. 34 & 131

⁵⁴ A fol. 132

⁵⁵ <https://www.mfsa.mt/financial-services-register/result/?id=4139>

⁵⁶ A fol. 182

⁵⁷ A fol. 92

The Complainants respectively signed the Scheme's Instrument of Adherence to be admitted as members of the Retirement Scheme on 11 April 2014.⁵⁸

The assets held into their individual Retirement Scheme account were used to respectively purchase a contract of insurance ('the RL360') issued by RL360 Insurance Company Limited in the Isle of Man. The policy number of the respective RL360 policies are 'PM10003346' for YM and 'PM10003324'⁵⁹ for MM as also confirmed by the Service Provider in its reply.⁶⁰

The RL360 Plans in respect of the Complainants commenced on the 22 July 2014 and 23 July 2014 respectively.⁶¹ An amount of GBP206,628 and GBP61,607 was respectively invested in the RL360 Plan. The said amounts reflect the respective premiums paid into each individual plan as emerging from the valuations as at 27 November 2018 and 14 January 2019 presented by the Complainants in respect of their respective RL360 plan.⁶²

The value of each of the Complainants account with the Retirement Scheme is linked to the value of the respective underlying RL360 Plan which is, in turn, linked to the performance of the respective portfolio of underlying investments held within the said policy.

Underlying Investments and Value of Policy - PM10003346

In their Complaint, the Complainants explained that a new financial adviser was appointed in November 2018.⁶³ As part of the attachments to their Complaint, the Complainants presented a valuation statement as at 27 November 2018.

The value of Policy PM10003346 was of GBP122,389.06 as at the date of the said valuation statement with the policy just comprising one investment as at that date - the '*Fundsmith Equity R Acc GBP*' for the current value of GBP50,702.73 (the latter comprising an unrealised gain of GBP1,702.73). The remaining value in the policy was made up of cash of GBP71,623.55, and income

⁵⁸ A fol. 88

⁵⁹ A fol. 54, 57 & 58

⁶⁰ A fol. 80

⁶¹ A fol. 63 & 67

⁶² A fol. 55, 59, 64 & 68

⁶³ A fol. 8

due (from a previous investment called '*Kempen & Co 6 Year Range Accrual Note on 3 Indices GBP*' which was sold on 1 November 2018), of GBP62.78.⁶⁴

The difference in the amount of the premium invested of GBP206,628 in this policy and the policy value of GBP122,389.06 as at 27 November 2018, equates to a loss of GBP77,778.94 (37.64% of the premium paid), after accounting for withdrawals of GBP6,460, as also indicated in the same statement.⁶⁵

The statement dated 27 November 2018 (which only covered the transaction history that took place between 27 August 2018 and 27 November 2018),⁶⁶ only indicates four investment transactions as follows:

- a purchase of GBP40,000 undertaken on 7 November 2018 into the '*Fundsmith Equity R Acc GBP*' and,
- the sale of three investments in early November 2018:- the '*Kempen & Co 6 Year Range Accrual Note on 3 Indices GBP*' which was sold on 1 November 2018 for GBP46,328.40; the '*Gemini Principal Asset Allocation Fund C GBP*' which was sold on 5 November 2018 for GBP58,356.65; and the '*Rudolf Wolff Systematic Fund Ltd A GBP*' which was sold on 8 November 2018 for GBP8,218.38.⁶⁷

The above four transactions seem to have been undertaken following the appointment of the new adviser in November 2018.

The other statement provided by the Complainants of 14 January 2019 does not include any additional details as to the underlying investments and transactions that were undertaken at the time of Chase Belgrave in respect of this policy.⁶⁸

Underlying Investments and Value of Policy - PM10003324

The valuation statement as at 27 November 2018, in respect of Policy PM10003324 indicates that the policy value was of GBP34,240.83, with the policy just comprising one investment as at that date - the '*Fundsmith Equity R*

⁶⁴ A fol. 64 & 65

⁶⁵ A fol. 64

⁶⁶ A fol. 65

⁶⁷ *Ibid.*

⁶⁸ A fol. 55-57

Acc GBP' for the current value of GBP31,436.91 (the latter comprising an unrealised gain of GBP436.91).

The remaining value of the policy comprised of cash for the amount of GBP2,786.69, and income due (from a previous investment called '*Kempen & Co 6 Year Range Accrual Note on 3 Indices GBP'* which was sold on 1 November 2018), of GBP17.23.⁶⁹

The difference in the amount of the premium invested of GBP61,607 in this policy and the policy value of GBP34,240.83 as at 27 November 2018, equates to a loss of GBP20,906.17 (33.93% of the premium paid), after accounting for withdrawals of GBP6,460, as also indicated in the same statement.⁷⁰

The statement dated 27 November 2018 (which only covered the transaction history that took place between 27 August 2018 and 27 November 2018),⁷¹ in respect of this policy only indicates four investment transactions as follows:

- a purchase of GBP30,000 undertaken on 7 November 2018 into the '*Fundsmith Equity R Acc GBP'* and,
- the sale of three investments in early November 2018:- the '*Kempen & Co 6 Year Range Accrual Note on 3 Indices GBP'* which was sold on 1 November 2018 for GBP12,717.60; the '*Gemini Principal Asset Allocation Fund C GBP'* which was sold on 5 November 2018 for GBP16,125.45; and the '*Rudolf Wolff Systematic Fund Ltd A GBP'* which was sold on 8 November 2018 for GBP2,371.30.⁷²

The above four transactions seem to have been undertaken following the appointment of the new adviser in November 2018.

The other statement provided by the Complainants of 14 January 2019 does not include any additional details as to the underlying investments and transactions that were undertaken at the time of Chase Belgrave in respect of this policy.⁷³

⁶⁹ A fol. 68 & 69

⁷⁰ A fol. 68

⁷¹ A fol. 69

⁷² *Ibid.*

⁷³ A fol. 58-61

Investment Report issued by Chase Belgrave

As part of the documents attached to their Complaint, the Complainants presented the investment recommendations report that was issued to them by Chase Belgrave dated 13 March 2014.⁷⁴

The said report indicates *inter alia* that the portfolio recommended by Chase Belgrave had the following allocation:

- 2% in cash,
- 38% in mutual funds - (28% of the portfolio in the '*Rudolf Wolff Income Fund*' and 10% of the portfolio in '*Darwin Leisure Property Fund*') and;
- 60% in structured products, (25% of the portfolio into the '*Global Indices Income Plan*', 20% of the portfolio into the '*Technology stocks plan*'; and 15% of the portfolio into the '*Gold Miners plan*').⁷⁵

The recommended allocation of 60% of the portfolio into structured products is further confirmed in an email dated 13 March 2014 sent by Justin Harris of Chase Belgrave.⁷⁶

The Legal Framework

As part of the consideration of this Complaint, it is pertinent to refer to the legal framework applicable to STM Malta and the Retirement Scheme and the responsibilities, duties and obligations emerging under such framework.

The Retirement Scheme and STM Malta are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules 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 repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws

⁷⁴ A fol. 35

⁷⁵ A fol. 37

⁷⁶ A fol. 12

of Malta). The Retirement Pensions Act ('RPA') was published in August 2011 and came into force on the 1 January 2015.⁷⁷

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 the MFSA under the RPA.

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

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',

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 ...'.

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.

⁷⁷ 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/>

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 the SFA/RPA regime respectively, it is pertinent to note the following general principles:⁷⁸

- 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 STM Malta as a Scheme Administrator under the RPA, provided that:

⁷⁸ Emphasis added by the Arbitrator.

'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'.

Duties as a Trustee

As highlighted 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 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'*.⁷⁹

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'.⁸⁰

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 paterfamilias in the performance of his obligations'.⁸¹

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.

⁷⁹ Editor Max Ganado, *'An Introduction to Maltese Financial Services Law'*, Allied Publications 2009, p. 174.

⁸⁰ *Op. cit.* p. 178

⁸¹ Pg. 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.

Observations and Conclusions

Key considerations relating to the principal alleged failures

The Complaint, in essence, revolves around the claim that the Complainants experienced a loss on their Retirement Scheme due to STM Malta not having adequately carried out its duties as administrator and trustee of the Scheme with the Complainants claiming *inter alia* that STM Malta had '*demonstrated a complete lack of competence*'⁸² and '*its conduct constituted negligence*'.⁸³

Two principal alleged failures made by the Complainants against STM Malta are that:

- (i) STM Malta allowed the appointment of, and accepted instructions from, an unregulated investment adviser in respect of the underlying investments of the Retirement Schemes, and this when it was wrongly stated to them that the adviser was regulated;
- (ii) STM Malta allowed the creation of a portfolio of underlying investments within their Schemes which was outside their cautious risk profile, further claiming that the Retirement Schemes should have not been allowed to experience such extent of loss considering their profile.

General observations

On a general note, it is clear that STM Malta did not provide itself investment advice in relation to the underlying investments of the Retirement Scheme. The role of the investment adviser was the duty of other parties, such as, Chase Belgrave.

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.

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested investment portfolio, **STM Malta had nevertheless certain obligations to undertake in its role of Trustee and Scheme Administrator.**

⁸² A fol. 4

⁸³ A fol. 112

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 directly, or indirectly, its performance.

Consideration thus needs to be made as to whether STM Malta 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 Schemes and the resulting loss for the Complainants.

It is also pertinent to consider any particular arrangements that STM Malta had with the investment adviser as shall be considered in the next section.

Role of STM Malta in relation to the Investment Advice provided by the Adviser

In its reply, the Service Provider argued and emphasised *inter alia* that the investment adviser was an adviser to the Complainants and that STM Malta:

'cannot be held responsible for the actions of a third-party adviser selected by the Complainants themselves'.⁸⁴

Even in its submissions, the Service Provider tried to attribute responsibility onto the Complainants, claiming *inter alia* that:

'... it would not be equitable to find the Respondent responsible for losses suffered by the Complainants as a result of underlying investments selected by the Complainants themselves ...'.⁸⁵

The Arbiter cannot however ignore the role of STM Malta as a Retirement Scheme Administrator and Trustee and even more the particular arrangement that has emerged in this case which, in practice, reflects a higher degree of involvement on the part of STM Malta both in the appointment of the investment adviser and the investment decision process.

It is in this regard noted that in one of the Service Provider's documents in respect of the Scheme, marked as '*Documents to Establish a Plan*' (bearing date '*10/2013*'), there is a particular relevant disclosure under the section titled

⁸⁴ A fol. 79

⁸⁵ A fol. 170

'*Investment advice*' which explains the particular arrangement that was put in place and existed in relation to the Retirement Scheme in respect of which the Complainants were members of and which targeted US based members.

The said section provided as follows:

'Please note that US regulatory requirements prevent the Client from being involved in the choice of investments to be held by the Plan, which must be entirely under the control of the pension trustee. In the case of the STM Plan, the trustees make investment decisions in accordance with advice given directly to them by qualified independent financial advisers. Such decisions are made with consideration to factors including the risk profile provided by the Client in the Application Form (Section 4).

It is possible for the trustees to have the same Adviser as the Client, however there must be a contractually separate relationship and the Adviser's investment recommendations must be made directly to the trustees in writing referring to the client risk profile and an investment profile suited to the assets and the Plan. Please note that Advisers to STM Malta need to be pre-approved by us and authorised in their jurisdiction to give investment advice'.⁸⁶

Indeed, it has transpired that an '*Investment Advisory Agreement*' dated 10 April 2014 was specifically entered into between the Service Provider and the Investment Adviser as confirmed by the Service Provider itself in its submissions.⁸⁷

The said agreement, extracts of which were both provided by the Complainants and the Service Provider, specifies *inter alia* that:

'STM wishes to appoint an independent, qualified and suitably regulated investment adviser to advise it on the nature and composition of the underlying assets of one or a number of Member's funds ...'

The parties to the said agreement, that is, STM Malta and the Investment Adviser further agreed *inter alia* in terms of the said investment advisory agreement that:

⁸⁶ A fol. 105 - Emphasis added by the Arbitrator.

⁸⁷ A fol. 168

*'STM hereby appoints the Investment Adviser to advise it in writing on the initial and on-going nature and composition of the underlying assets of the Advised Fund, including making recommendations to purchase, sell, transfer or otherwise deal with such assets ...'*⁸⁸

It is accordingly clear that in this case, the Service Provider's role and involvement in the appointment of the investment adviser cannot be minimised and downplayed nor can one try to displace responsibility onto the Complainants by arguing that the Complainants had themselves selected the adviser and the underlying investments.

This is particularly so in the context and particular circumstances outlined above where it has actually transpired that STM Malta itself had such an active part in the appointment of the investment adviser and the investment advice was being provided directly to the trustee with the choice of investments being ultimately *'entirely under the control of the trustee'* as outlined in STM Malta's own documentation.

(i) **Regulatory status of the investment adviser**

The extract of the Application Form in respect of the acquisition of the underlying policies, the RL360 (referred to as the *'PIMS Application'*), clearly demonstrates that the investment adviser, Chase Belgrave GmbH, had declared that *PolyReg* was its regulatory body.⁸⁹

Although such declaration dated 4 July 2014 was made by the investment adviser, the declaration formed an integral part of the application form for the acquisition of the underlying policies. The said form has been sighted and processed/consented to by STM Malta, as the Retirement Scheme Administrator and Trustee of the Scheme.

The Complainants demonstrated that further to their enquiry to Polyreg of the 15 August 2018, Polyreg confirmed to them that:

⁸⁸ A fol. 182

⁸⁹ A fol. 132

'Chase Belgrave GmbH is not regulated anymore by the SRO PolyReg since January 2013'.⁹⁰

The Service Provider has ultimately itself acknowledged in its submissions of 18 July 2019, that the declaration that the investment adviser was regulated by PolyReg was false, when it stated *inter alia* that:

'Mr Justin Harris/the Investment Adviser lied to the Respondent and to the Complainants when Mr Harris claimed that the Investment Adviser was authorised and/or regulated by a competent authority at the time when the Complainants became members of the Plan administered by the Respondent'.⁹¹

In its defence, the Service Provider *inter alia* referred to the warranties and declarations, with respect to the authorisation and the maintenance of such authorisation to provide investment advice, provided by the investment adviser in the Investment Advisory Agreement entered into between the Service Provider and Chase Belgrave.

STM Malta further submitted that:

'Because of these statements, warranties and declaration by Mr Harris, the Respondent had no reason to suspect that the Investment Adviser was no longer regulated by Polyreg at the time'.⁹²

The Arbiter considers, however, that in the circumstances of this case, there is no justification whatsoever on the part of the Service Provider for overlooking such a material factor regarding the actual regulatory status of the investment adviser that applied during the time when the Complainants were members of the Scheme and Chase Belgrave was involved in their respective investment portfolio. This is particularly so for various reasons.

Firstly, the Service Provider was duty bound to undertake due diligence on the investment adviser to verify *inter alia* that the claim made by the adviser, that it was regulated by PolyReg, was indeed truthful. Such due diligence had to be undertaken, not only as it was in the best interests of the Complainants to verify

⁹⁰ A fol. 136

⁹¹ A fol. 168

⁹² *Ibid.*

that what was being claimed to them by the investment adviser regarding its regulatory status in the application forms related to the Scheme was indeed correct, but also as a basic due diligence check before the Service Provider itself entered into a contractual agreement with the investment adviser.

Indeed, as indicated above, STM Malta entered into the *Investment Advisory Agreement* with Chase Belgrave. It was accordingly not only natural and logical to undertake such basic checks, but also part of its obligations as a regulated entity for STM Malta to undertake relevant due diligence enquiries on the other party with whom it entered into a contractual agreement.

As considered above, such agreement was ultimately entered into in respect of the appointment by the trustee of the investment adviser and for the provision of such a key service, that of investment advice, which can materially affect the performance of a Retirement Scheme and thus the scope of the Scheme itself.

Part of the basic due diligence requirements reasonably expected from STM Malta would have involved undertaking an enquiry (similar to that done by the Complainants themselves), with PolyReg to confirm *inter alia* that the investment adviser's claimed status with PolyReg was indeed valid.

No evidence has emerged or been submitted during this case that STM Malta has indeed undertaken such an enquiry with PolyReg, not only at the time of the Complainants application, but neither at any other point in time. It is noted that even in the case where an enquiry was done at a time before the Complainants became members (which has not been mentioned and/or demonstrated by the Service Provider to be the case), it is clear that no regular updates and follow up due diligence enquiries were ever made by the Service Provider on Chase Belgrave.

It is noted in this regard that PolyReg confirmed that Chase Belgrave GmbH had had not been regulated by them since January 2013, this being more than a year prior to the application for membership done by the Complainants in March/April 2014.

Not only has no proof emerged that the Service Provider undertook any recent due diligence checks/updates on the investment adviser at the time of the

Complainants membership, as it was duty bound and reasonably expected to do, but even subsequent to the Complainants membership in April 2014, no due diligence checks/updates were it seems ever done by the Service Provider thereafter. Indeed, the process for the replacement of Chase Belgrave as investment adviser was only triggered in 2018 and at the request of the Complainants in February 2018,⁹³ this being nearly four years after its appointment in respect of the Complainants Retirement Scheme.

Should there have been regular due diligence updates, as expected from a regulated professional party, such as the scheme administrator and trustee of a Retirement Scheme, the 'false' declarations of the Investment Adviser would have been determined by STM Malta itself, and the Service Provider would have itself intervened into the matter rather than taking action at the prompt of the Complainants in 2018. This after that Chase Belgrave GmbH was already months before in the process of liquidation since August 2017, as demonstrated by the Complainants and also confirmed by the Service Provider.⁹⁴

There is accordingly a clear lack of adequate due diligence undertaken by the Service Provider in respect of the investment adviser, Chase Belgrave GmbH. This clearly impinges on the Service Provider's duties and responsibilities as outlined in the sections titled '*Responsibilities of the Service Provider*' and the '*Duties as a Trustee*' above, particularly the duty to '*act with due skill, care and diligence – in the best interests of the Beneficiaries*' and to '*act with the prudence, diligence and attention of a bonus paterfamilias*'.

(ii) The alleged loss and permitted portfolio composition

Alleged Loss

In their Complaint, the Complainants claimed that all the investments, except for one, that were done by Chase Belgrave, were cashed in at a loss.⁹⁵

Whilst this could not be determined in the case in question as no specific and complete details have been presented of the underlying investments undertaken at the time of Chase Belgrave and the respective gains/losses arising

⁹³ A fol. 177-178

⁹⁴ A fol. 138 & 170

⁹⁵ A fol. 8

from each such investment including any income received therefrom, it is however sufficiently clear that the Complainants realised substantial losses on their respective overall investment portfolio constituted under Chase Belgrave as emerging from the valuation statements as at 27 November 2018 and as considered in detail under the sections titled '*Underlying Investments*' in respect of '*Policy PM10003346*' and '*Policy PM10003324*' above.

The Arbiter would however like to comment on the alleged amount of loss claimed by the Complainants in their Complaint.

It is noted that in their additional submissions, the Complainants claimed that the lost capital amounted to GBP111,605.11. With reference to the valuations of November 2018, the loss in capital is however actually calculated to amount to a total of GBP98,685.11 on both Schemes, that is (GBP77,778.94 on policy PM10003346 and GBP20,906.17 on policy PM10003324), as described in the section titled '*Underlying Investments and Value of Policy*' above given that total withdrawals on both policies of GBP12,920 (GBP6,460 on each of the RL360 policy) are not considered as a capital loss, as also pointed out in the same statements of November 2018.

Furthermore, the indicated total loss of GBP98,685.11 comprises not just the loss on investments, on which the Complainant is specifically complaining about, but also would include various fees that were incurred and charged to the policies along the years. Hence, if one had to consider the extent of losses actually on the investments selected by the investment adviser, the figure of actual total loss on the underlying investment portfolio would be lower in practice than that quoted by the Complainants.

The Arbiter is however not in a position to arrive at the specific figure of the realised cumulative loss on the respective investment portfolio for the reasons already indicated and, also, in the absence of figures relating to the fees charged.

It has nevertheless clearly emerged that the Complainants have suffered a substantial loss on their investment portfolio constructed by Chase Belgrave as otherwise, the indicated losses in their valuation statements of November

2018 as further considered in the sections above titled '*Underlying Investments and Value of Policy*' would not have emerged.

The Arbiter will provide for losses later on in this decision.

The Arbiter shall now proceed to consider the other key aspect relating to this case involving the permitted portfolio of underlying investments.

Permitted portfolio composition

The Arbiter notes that other than the information described in the sections titled '*Underlying Investments and Value of Policy ...*' and the section titled '*Investment Report issued by Chase Belgrave*' above, no other specific details have emerged of the exact investment instruments constituting the investment portfolio at the time of Chase Belgrave acting as investment advisers.

The Arbiter does not have specific details on the underlying investments and any factsheets on the respective products, however, it has clearly emerged and been demonstrated that there were material realised losses that the Complainants experienced on their respective Retirement Schemes. The extent of losses are in themselves indicative of high risks and lack of adequate diversification within the investment portfolio which does not reflect the cautious attitude to risk clearly selected in the Application Form nor possibly reflective of any prudent investment approach.

It is also noted that the 60% exposure to structured products mentioned in the Investment Report issued by Chase Belgrave to the Complainants, and referred to also in the email dated 13 March 2014 sent by Justin Harris, as outlined in the section titled '*Investment Report issued by Chase Belgrave*' above, exceeds and does not comply with the '*Diversification Parameters*' in the '*Investment Principles*' stipulated by the Service Provider in respect of the Retirement Scheme that were provided by the Complainants in Appendix 14 of their submissions,⁹⁶ and which were not contested or alleged not to have been applicable by the Service Provider.

The section marked as '*Diversification Parameter*' in the document issued by STM Malta titled '*Investment Principles*' stipulated *inter alia* that as a general

⁹⁶ A fol. 128

principle, the parameters that STM Malta has developed and expects all IFAs to abide by with respect to structured products, involved a maximum of 50% exposure to such products.⁹⁷

Hence, the 60% recommended exposure to structured notes as emerging from the Investment Report and communication by the investment adviser, is in breach and not reflective of the said parameter. No evidence has emerged, nor has it been contested or intimated by the Service Provider that the allocation of investments was a different one in practice to that recommended by Chase Belgrave.

Indeed, the Service Provider itself chose not to demonstrate and submit any proof whatsoever that the investments allowed within the Retirement Scheme were done in a prudent manner as was required in terms of the rules to which it was subject as mentioned in the section titled *'Responsibilities of the Service Provider'* above.

The Service Provider chose to omit and not delve into, in its reply and any of its submissions, any details and breakdowns of the actual investment portfolio and neither did it submit any justifications and explanations of how the respective investment portfolio of the Complainants was in line with the applicable requirements. This despite the material nature of the claim made by the Complainants that the investments were outside their risk profile and also, notwithstanding, that ultimately the choice of investments was *'entirely under the control of the pension trustee'* and the adviser's investment recommendations being made directly to the trustees as already considered in the section titled *'Role of STM Malta in relation to the Investment Advice provided by the Adviser'* in this decision.

In the circumstances and for the reasons mentioned, the Arbiter is accordingly more amenable to accept the Complainants version of events and the claim that the investments made within the Scheme were outside of their risk profile rather than the version and claim put forward by the Service Provider that the:

'losses suffered by Complainants are or may have been the result of market movements in the value of investments selected by the Complainants' adviser

⁹⁷ *Ibid.*

and not as a result of any fraud, wilful default, negligence or unjustifiable failure of and on the part of the Respondent to perform in whole or in part any of its obligations'.⁹⁸

The Service Provider did not prove in any manner that the losses were the result of such market movements.

Other observations

STM Malta did not help its case by not providing information on the underlying investments and not presenting other relevant and complete documentation in relation to the Scheme.

It is also to be noted that despite the fact that one of the Complainants was a former bank manager for Lloyds TSB, this does not in itself automatically make him a competent person with respect to investment portfolios, and neither is it considered, in the particular circumstances of this case, as being a sufficient valid reason to shift the onus of responsibility for the losses on the Complainants as the Service Provider led to in its submissions.⁹⁹

Apart that it has not been determined when and the extent of time the Complainant in question acted as a bank manager, no details have either emerged of the nature and particular areas of responsibilities of his prior activities as a bank manager and relevance of such thereto.

Moreover, the Complainant had himself indicated that he '*never dealt with this type of investment*' when referring to his previous experience as bank manager and the nature of his enquiries at the time with the investment adviser mainly related to him understanding the fee structure and implications of such, which fees are being excluded by the Arbiter from the scope of this Complaint.¹⁰⁰

Causal link

The actual cause of the losses experienced by the Complainants on their Retirement Schemes cannot just be attributed to the alleged 'fraud' by the investment adviser as argued by the Service Provider in its submissions and/or

⁹⁸ A fol. 79, 80

⁹⁹ A fol. 169

¹⁰⁰ A fol. 13

losses of market movements in the value of the investments selected by the adviser.

There is sufficient and convincing evidence of deficiencies on the part of STM Malta in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above. At the very least, such deficiencies impinge on the diligence STM Malta was required and reasonably expected to exercise in such roles.

It is also sufficiently clear that such deficiencies prevented the losses from being minimised and, in a way, contributed in part to the losses experienced. The actions and inactions that occurred, as explained in this decision, enabled such losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.

Had STM Malta undertaken its role adequately and as duly expected from it in terms of the obligations resulting from the law, regulations and rules stipulated thereunder, as explained above, such losses would have been avoided or mitigated accordingly.

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with STM Malta being one of such parties.

The losses experienced on the Retirement Scheme is, in the case in question, ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which STM Malta was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainants.

Final remarks

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainants, the Retirement Scheme Administrator had a duty to check and ensure that the portfolio composition recommended by the investment adviser was *inter alia* in line with the applicable requirements and reflected the profile and objective of the Complainants in order to ensure that the interests of the Complainants were duly safeguarded.

It should have also 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 and, in practice, promote the scope for which the Scheme was established.

The principal purpose of a personal retirement scheme is ultimately that to provide retirement benefits. Such purpose is reflected under the primary legislation, the Special Funds (Regulation) Act ('SFA')¹⁰¹ and the Retirement Pensions Act ('RPA').¹⁰²

It is considered that, had there been adequate due diligence on the investment adviser, the Service Provider would have intervened and raised concerns and not proceed with the appointment of Chase Belgrave as investment advisers in respect of the Complainants' Scheme and in the process not allow it to undertake any investment decisions and structure the investment portfolio composition which led to the losses experienced by the Complainants. The Service Provider had to act as a *bonus paterfamilias* and in the best interests of its clients.

The Complainants ultimately relied on STM Malta as the Trustee and Retirement Scheme Administrator of the Scheme, as well as other parties within the Scheme's structure, to achieve the scope for which the pension arrangement was undertaken, that is, to provide for retirement benefits and also reasonably expect a return to safeguard their pension.

Moreover, with respect to the portfolio composition, the Arbiter considers that whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a

¹⁰¹ 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...*'.

¹⁰² 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*'.

pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainants and in carrying out its duties as Trustee.

The Arbiter also considers that the Service Provider did not meet the *'reasonable and legitimate expectations'*¹⁰³ of the Complainants who had placed their trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case 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 members 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 Limited as Trustee and Retirement Scheme Administrator of The STM Malta (US) Retirement Plan and, in view of the deficiencies identified in the obligations emanating 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 respective Retirement Scheme, the Arbiter

¹⁰³ Cap. 555, Article 19(3)(c)

concludes that the Complainants should be compensated by STM Malta for part of the realised losses on their 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 the extent of deficiencies determined, the Arbiter considers it fair, equitable and reasonable for STM Malta to be held responsible for seventy per cent of the realised losses sustained by the Complainants on their overall investment portfolio as calculated below, subject to also deduction of GBP15,000 of the settlement agreement reached with the investment adviser.

Given that the Arbiter has no sufficient detail with respect to the respective underlying investments comprising the portfolios including the respective amount of gains/losses on each investment as well as any income such as dividends, derived therefrom, the Arbiter shall explain how the amount of compensation shall be calculated.

Given that the Complaint made by the Complainants principally relates to the losses suffered on the Scheme at the time of Chase Belgrave acting as adviser, compensation shall be provided solely on the investment portfolio constituted under Chase Belgrave and allowed by the Service Provider.

In this regard, the amount of compensation shall be calculated on the total cumulative realised losses (after deducting any realised gains) arising on the underlying investment portfolio constituted by Chase Belgrave GmbH, taking also into consideration any dividends or other income received from such investments.

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

- (i) For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Complainants investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised).

Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

- (ii) In case where an investment in (i) above is calculated to have rendered a profit after taking into consideration the amount realised (inclusive of any total interest or other total income received from the respective investment), such realised profit shall be accumulated from all such investments and netted off against the total of all the realised losses from the respective investments calculated as per (i) above to reach the figure of the Net Realised Loss within the indicated portfolio.

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

- (iii) In case of any remaining investment which was constituted at the time of Chase Belgrave and is still held within the Schemes' respective portfolio of underlying investments as at, or after, the date of this decision, such investment shall not be subject of the compensation stipulated above.

Given the settlement agreement that the Complainants themselves reached with the investment adviser, which agreement it is noted, was honoured, in light of the Complainants statement that '*Mr Justin Harris did not honour his agreement until over a month later*',¹⁰⁴ the amount of GBP15,000 referred to in the said settlement agreement shall be deducted from the total amount of compensation that the Service Provider is required to calculate as per the above under 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 to the Complainants.

¹⁰⁴ A fol. 7

A full and transparent breakdown of the calculations made by the Service Provider in respect of the compensation, as decided in this decision, shall be provided to the Complainants.

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

Given that the Arbiter has refuted certain pleas raised by both parties to this Complaint, each party is to bear its own costs of these proceedings.

**Dr Reno Borg
Arbiter for Financial Services**