Before the Arbiter for Financial Services

Case ASF 130/2021

GQ

('the Complainant')

vs

Integrated-Capabilities (Malta) Limited

(C 50348) ('ICML' or 'the Service Provider')

Sitting of the 13 February 2023

The Arbiter,

Having seen **the Complaint** relating to *The Optimus Retirement Benefit Scheme No 1* ('the Scheme'), this being a personal retirement scheme licensed by the Malta Financial Services Authority ('MFSA'), established in the form of a trust and formerly administered by Integrated-Capabilities (Malta) Limited ('ICML' or 'the Service Provider'), as its previous Trustee and Retirement Scheme Administrator.

Where, in summary, and in essence, the Complaint involves the claim that ICML acted negligently given that it allegedly failed to:

(i) disclose a major conflict of interests between the entity that approached the Complainant to transfer his pension and the issuer of the investments into which his pension scheme was invested;

(ii) ensure that the Complainant received advice from an adequately regulated entity in respect of his pension transfer and underlying investments; and

(iii) ensure that his monies were invested appropriately given that a considerable percentage of his portfolio was invested into high-risk, esoteric assets which had no viable secondary market and left the Complainant unable to draw down from his Scheme.

The Complaint

The Complainant explained that he was cold called by a company called *First Review Pension Services* to transfer his pension. His representative, *Bushido Support Services CIC*, brought to his attention that *First Review Pension Services* ('FRPS') was wholly owned by *The Resort Group* ('TRG').

It was noted that the said entities had liaised with ICML and some of his pension fund was invested in TRG's products.

He alleged that at no time was the relationship disclosed and he now felt this was a major conflict of interest. The Complainant further claimed that had such conflict been disclosed to him, he would have never transferred his pension.

The Complainant also claimed that he received no regulated advice with regard to opening his policy. He alleged that this came out clearly from a letter written by *Strategic Wealth Limited* ('SWL'). The said letter stated that the service provided by SWL was in respect of the provision of information on the already selected pension and investments, as well as in determining his risk profile on behalf of the trustees.

The Complainant further submitted that ICML allowed him to open his QROPS despite his application form stating that he had no intention of leaving the UK.

It was pointed out that the Complainant turned sixty-five in February 2021 and that almost 64% of his portfolio was invested in high-risk, esoteric assets with no viable secondary market. The Complainant claimed that he was thus unable to draw down from the full value of his pension.

He claimed that ICML accordingly invested his monies inappropriately and it failed to disclose material conflicts of interest. He further claimed that ICML's administration and communication had been shocking.

The Complainant submitted that the entity the Service Provider portrays as being his Financial Adviser could not have simply been involved in the transfer of his pension under UK legislation as it had to be a UK Financial Adviser who should have advised him.

He alleged that something was accordingly being covered up by the trustees.

In his Complaint Form to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant noted that his complaint was multi-faceted and that the full details of his complaint can also be found in his complaint letter made with the Service Provider (a copy of which was attached to the form).[1]

The Complainant's formal letter of complaint dated 6 May 2021 that was sent to ICML by his representative included various references to, and quotes from laws,[2] as well as posed multiple questions to the Service Provider in respect of the Complainant's Scheme.

The said letter listed the following claims, requests, and questions amongst others:

(i) Allegations that ICML has presented post-sales barriers to the Complainant which prevented him from receiving all of his personal data held by ICML.

(ii) Questioned whether ICML made the client aware that the majority of his investments were in fact unregulated and not *'regulated'* as alluded to in SWL's letter.

(iii) Claimed that SWL did not have the necessary permission to give advice on pension transfers. Its permissions held with the Gibraltar Financial Services Commission were restricted to advising life assurance. It was further questioned how ICML appointed a firm, SWL, without this having the necessary permissions as an investment advisor.

[1] Page (P.) 6-11

[2] Namely, the GDPR Act and Trusts & Trustees Act Cap.331 ('TTA'), as well as MFSA rules, namely the MFSA's Code of Conduct under the TTA and Conduct of Business Rules and Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act 2011 – as per the letter dated 6 May 2021 sent by *Bushido Support Services CIC* to ICML (P. 6-11)

(iv) Claimed that TRG owned FRPS and that the latter acted as an introducer for TRG. It was further claimed that the Complainant was introduced to ICML by FRPS.

(v) Requested details of the systems and procedures the Service Provider had in place when carrying out due diligence on investments as to their suitability and appropriateness for retail clients as was the Complainant.

The due diligence carried out in respect of the Complainant's underlying investment portfolio was further questioned together with the reasons as to why almost 64% of his portfolio was held into high-risk, illiquid products when his attitude to risk was one of balanced risk.

(vi) Questioned how the Complainant was going to be able to draw down from the full value of his pension, as he turned sixty-five in February 2021 and almost 64% of his pension was invested in high-risk, esoteric assets which had no viable secondary market.

It was further questioned how, as trustees of the Scheme, ICML could have invested in a prudent manner and in the Complainant's best interests when almost 64% of his funds were illiquid.

(vii) Claimed that the investments that were to be made on the Complainant's behalf as listed in a letter sent to him dated 3 June 2016, did not reflect the summary of assets dated 31 December 2017 and 15 July 2020. A table was provided listing the investments for each of the respective periods indicated.[3] An explanation was requested as to when the portfolio changed and who had the authority to switch the investments.

(viii) Requested the reason as to why the Complainant was not provided with annual statements during his membership of the Scheme.

(ix) Claimed that ICML's actions were in clear breach of the rules by which ICML was governed.

[3] P. 9 & 10

It was thus claimed that ICML did not act in the client's best interests; it had appointed an investment advisor without such entity having the necessary permissions; that ICML had placed almost three-quarters of the Complainant's portfolio in high-risk, esoteric assets; and that ICML had placed post-sale barriers on the Complainant with the result that the Complainant was not able to access all of his personal data.

Remedy requested

The Complainant requested the Arbiter to

"Have the company put back all investments held in the Resort Group and other loan notes with immediate effect, and ensure [his] funds are all liquid assets".[4]

In its reply, ICML essentially submitted the following:[5]

1. That the Complaint is unfounded and ought to be rejected because of the following reasons:

   (i) *Optimus Fiduciaries (Malta) Ltd* (C 90147) is the new trustee and retirement scheme administrator of the Scheme in question.

   (ii) That preliminary, the Complaint is time-barred by virtue of Article 21(1)(b) of Chapter 555 of the Laws of Malta since the investment transaction complained of took place on 18 April 2016.

   (iii) That the remedy being sought, for the Arbiter to order to *"put back all investments held in the Resort Group and other loan notes with immediate effect, and ensure my funds are all liquid assets"*, is contrary to the applicable Pension Rules.

   ICML submitted that this has already been the subject of a decision by the Arbiter in case number OAFS 107/2019, wherein it was amply proved that the service provider cannot buy back investments and render them liquid as (a) the investments are locked in long term contracts and cannot be moved and (b) any purchase of the investment

[4] P. 4
[5] P. 44

by the Service Provider would be deemed to be a transaction with the Member which is a regulatory restriction imposed on RSA's.

The Service Provider further submitted that according to Standard Licence Condition B.3.2.1 of the Pension Rules for Personal Retirement Schemes, a retirement scheme administrator shall not engage directly or indirectly in transactions with any of its members. The remedy is tantamount to a direct engagement with the members and is a regulatory restriction. It further submitted that, as the Complainant's representative is aware, an official from MFSA confirmed this matter.

ICML noted that Standard Licence Condition 3.2.1 of Part B.3.2. titled *'Investment Restrictions of a Personal Retirement Scheme'* of the Pension Rules for Personal Retirement Schemes, states the following:

> *"3.2.1 Personal Retirement Schemes shall comply with the following investment restrictions:*
>
> *…*
>
> *iv. subject to paragraph (vi), a Scheme shall not engage, directly or indirectly, in transactions with, or grant loans to, any of its Members or connected persons thereto."*

The Service Provider submitted that therefore it is precluded from purchasing from the members any assets or engaging with them directly or indirectly as the above-mentioned rules apply.

Hence, ICML considers that the Complainant's plea should not, and cannot be upheld by the Arbiter, particularly in terms of Article 26 (3)(c) of Chapter 555 of the Laws of Malta.

(iv) On the merits and without prejudice to its above-mentioned submissions, the Service Provider further stated the following:

(a) With regards to the <u>provision of data</u> detailed by the *Bushido Support Services CIC* ('the Representative'), in its letter dated 6 May 2021:

ICML submitted that the Complainant must forward all requests to the new trustee, *Optimus Fiduciaries (Malta) Ltd*, as the new trustee is the holder and keeper of all member data and all data is retained by it.

(b) With regards to Strategic Wealth Limited ('SWL') being the appointed advisor:

ICML submitted that *Strategic Wealth* was appointed as an investment advisor by the member prior to joining the Scheme. It noted that it must be made clear that SWL acted as an independent advisor and held (and still does not hold), absolutely no ties with the Service Provider, nor with The Resort Group.

ICML further noted that, as shall be amply proved, contrary to the Representative's allegations, ICML did conduct the necessary due diligence on SWL.

As an investment advisor, SWL was licensed to provide advice by the Gibraltar Financial Services Commission (the Gibraltar regulatory authority), which the MFSA considered to be of *'an equivalent standard'*. Therefore, SWL held an equivalent licence as though it was licensed in Malta.

It noted that, as far as it is aware, SWL had recommended the Resort Group as part of the Complainant's portfolio as a long-term income-producing asset that would support the income-for-life concept. At the time when they provided recommendations, they worked on the basis that there was a liquidity option after 5 years of investment with the Resort Group, and a large portion of each member's portfolio was kept liquid.

ICML noted that it shall be proven that the Complainant received suitability letters from Strategic Wealth regarding the Resort Group investment, and the Complainant had confirmed in writing that he was in agreement with the recommendations.

(c) With regards to the conflict-of-interest issue reflected in the last paragraph of page 2 of the letter, it submitted that there is absolutely no conflict of interest of which the Complainant was to be made aware.

ICML stated, in no uncertain terms, that there is no and has never been any conflict of interest with The Resort Group, ICML, or Strategic Wealth.

ICML further submitted that it has always acted in line with its regulatory obligations ensuring that investments were permitted and were in accordance with the Scheme's investment policy, the Scheme rules, and the statutory rules issued by the MFSA that were applicable at the time of the investment.

(d) ICML submitted that all allegations are unfounded in fact and at law and, as shall be amply evidenced, it has acted in the best interest of the Complainant, with prudence, diligence, and utmost good faith and has adhered to its statutory obligations according to law.

2. It submitted that for the above-stated reasons all of the Complainant's demands are to be rejected with costs to be borne by the Complainant.

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

Further Considers:

Preliminary Pleas

Since the Service Provider raised the question of competence on the basis that it claimed that the Complaint was time-barred and also raised other preliminary pleas relating to the defendant and the nature of compensation requested, the Arbiter will deal with these pleas first.

Preliminary Plea regarding the defendant

Plea number 1 raised in ICML's reply relates to the defendant.[6] The Service Provider submitted that the Complaint was unfounded and ought to be rejected *inter alia* because *'Optimus Fiduciaries (Malta) Ltd … is the new trustee and retirement scheme administrator of the retirement scheme in question'*.[7]

The Arbiter however outrightly refutes this plea. Not only did ICML not provide sufficient basis as to why it considered there being a new trustee and RSA of the Scheme as a justifiable reason for the rejection of the Complaint, but **it is amply clear that ICML is responsible and answerable for its conduct at the time it occupied the role of trustee and administrator of the Scheme.**

The main material aspects complained about by the Complainant, as summarised above at the start of this decision, all relate to and involve the time when ICML was acting as the Scheme's trustee and RSA.

For the stated reasons, the Arbiter is rejecting this plea.

Preliminary Plea regarding the Competence of the Arbiter

Plea number 2 raised in ICML's reply relates to the competence of the Arbiter under article 21(1)(b) of Chapter 555 of the Laws of Malta.[8]

Article 21(1)(b) of Chapter 555 of the Laws of Malta stipulates that:

'An Arbiter shall have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider which occurred on or after the first of May 2004:

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

The said article stipulates that a complaint related to the '*conduct*' of the financial service provider which occurred before the entry into force of this Act shall be

[6] P. 44
[7] *Ibid*.
[8] *Ibid*.

made not later than two years from the date when this paragraph comes into force. This paragraph came into force on 18 April 2016.

The law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

Consequently, the Arbiter has to determine whether the conduct complained of took place before 18 April 2016 or after, in accordance with the facts and circumstances of the case.

In its reply, the Service Provider justified its plea *'since the investment transaction complained of took place on the 18th of April 2016'*.[9]

This was however not substantiated.

If, for argument's sake only, one had to just refer to the date of the actual purchase of the disputed investments (which is not the correct approach for the purposes of Article 21(1)(b) as outlined further below), it actually transpires that the disputed TRG investments and Loan Note investments (in respect of which the Complainant requested remedy in his Complaint), were rather acquired at a date which is after the coming into force of the Act.

As emerging from the *'RBSI Scheme Account Statement'* produced by the Service Provider, the said statement indicates a *'Purchase of TRG'* on dates which are after 18 April 2016.[10]

Whilst the exact date of the purchase of the loan note investments, that is, of the *'Energy Circle 8% Loan Note'* and the *'Via Capital 5 YR Loan Note'*, has not emerged during the proceedings of this case, it is noted that such loan note investments did not appear to have been undertaken before the 18 April 2016. They were indeed not listed in the letter dated 3 June 2016 sent by ICML to the Complainant in respect of the money that was sent for investments after the transfer of his pension from Scottish Widows.[11]

[9] P. 44
[10] P. 310
[11] P. 21

Hence, it has not even been proven or emerged in the first place that the disputed TRG and Loan Note investments occurred before the entry of the force of the Act.

In any case, and as already stipulated in various other prior decisions issued by the Arbiter, in the case of a financial investment, the conduct of the service provider cannot be determined from the date when the transaction took place and, it is for this reason that the legislator departed from that date and laid the emphasis on the date when the conduct took place.

In this case, the conduct complained of involves the conduct of the Service Provider **as trustee and retirement scheme administrator of the Scheme**, which roles ICML occupied since the Complainant became member of the Scheme on 22 December 2015[12] and **continued to occupy until Optimus Fiduciaries (Malta) Ltd took over such roles.**

As emerging during the proceedings of the case, **ICML occupied the post of trustee and RSA of the Scheme at a time which goes beyond the date of the coming into force of Chapter 555 of the Laws of Malta.**[13]

It is also to be noted that the Service Provider did not prove either that the disputed investments no longer formed part of the portfolio **after** the coming into force of Chapter 555 of the Laws of Malta. The onus of proof for such evidence rests with the Service Provider.

Furthermore, the Arbiter notes that there is actually clear evidence, from the *'Annual Member Statement for the year ending 31 December 2017'* issued by ICML, as well as the Policy Statement issued by Optimus as at 15 July 2020, that the Complainant's portfolio still included the disputed TRG and Loan Note investments as at the date of the said statements.[14]

It is accordingly clear that the said investments still formed part of the Scheme's portfolio of underlying investments after the coming into force of the Act.

[12] P. 19

[13] Integrated-Capabilities (Malta) Ltd was, for example, still the trustee and RSA of the Scheme in December 2017 as evidenced in *'The Annual Statement for the year ending 31 December 2017'* issued by Integrated-Capabilities in respect of the Scheme (P. 19).

[14] P. 19 & 308

The Arbiter considers that the conduct related to the Retirement Scheme complained of cannot thus be considered to have occurred before 18 April 2016. The plea as based on Article 21(1)(b) is therefore being rejected and the Arbiter declares that he has the competence to deal with this Complaint.

Preliminary Plea regarding the nature of the Complaint

Plea number 3 raised in ICML's reply relates to the nature of the remedy sought by the Complainant.[15]

It is noted that ICML submitted that the remedy sought went contrary to the applicable Pension Rules as the Service Provider cannot engage in transactions with its members and the remedy sought was *'tantamount to a direct engagement with the members and is a regulatory restriction'*.[16]

The Service Provider referred to the Arbiter's decision in case OAFS 107/2019, to justify and substantiate its arguments on this point. It noted that it had been *'amply proved by ICAP that it cannot buy back investments and render them liquid'*.[17] This was so given that the investments were *'locked in long term contracts'* and thus illiquid, and also given that any purchase of the investment by ICML *'would be deemed to be a transaction with the Member'* which was not allowed in terms of the regulatory restrictions imposed on the RSA.

The Arbiter would like to first highlight however that, as specified by Article 19(3)(b) of Chapter 555 of the Laws of Malta, he must treat each case in its particular circumstances.

Having considered the nature of the remedy sought under this case and the quoted case of OAFS 107/2019, the Arbiter considers that there is a key distinction between the two.

The Arbiter notes that **the remedy requested in case OAFS 107/2019 was categorically, solely and indisputably for *'the trustee of the Scheme to purchase any illiquid assets from their Scheme'***.[18]

[15] P. 44
[16] *Ibid.*
[17] *Ibid.*
[18] P. 6 of Case OAFS 107-2019 - https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20107-2019%20-%20Various%20vs%20Integrated-Capabilites%20%28Malta%29%20Ltd.pdf

Whilst the wording with respect to the remedy requested in the case under review[19] could have been better articulated, the Arbiter considers that the remedy requested by the Complainant is not the same as the remedy requested in the case of OAFS 107/2019 quoted by the Service Provider.

The Complainant requested the Arbiter to *'Have the company put back all investments held in the Resort Group and other loan notes with immediate effect, and ensure my funds are all liquid assets'*.[20]

The Arbiter considers that this is not the same as asking *'the trustee of the Scheme to purchase any illiquid assets from their Scheme*' (requested in case OAFS 107/2019), as is somehow being subjectively interpreted by the Service Provider.

Nowhere in his Complaint made to the OAFS has the Complainant requested that *"the trustees purchase any illiquid asset"* as was categorically done in Case OAFS 107/2019. Such use of words has in fact clearly not featured in the Complaint Form filed with the OAFS by the Complainant.

The Arbiter considers that the remedy requested in the case under review,[21] is rather tantamount and akin to a request to put the Complainant back into the original position, that is, the position he was into prior to the disputed investments were made. This is a typical request made by consumers when submitting a complaint against a financial services provider and is ordinarily taken to mean as a request to award a compensation equivalent to the sum originally invested into the disputed investments.

The Arbiter considers that it would not be fair, equitable and reasonable in the particular circumstances of this case to take the subjective position and interpretation given by the Service Provider on this matter. This is also in terms of the provisions of Article 19(3)(a) and 19(3)(b) of the Act.

For the reasons mentioned, the Arbiter is accordingly not accepting the plea raised by the Service Provider that:

[19] i.e. ASF 130/2021
[20] P. 4
[21] i.e. ASF 130/2021

'the Complainant's plea should not and cannot be upheld by the Arbiter particularly in terms of Article 26(3)(c) of Chapter 555 of the Laws of Malta,'

given also that, in the particular circumstances, it is considered that there are no issues with the nature of the remedy requested under Article 26(3)(c) of the Act. [22]

Having considered and rejected all the preliminary pleas raised by the Service Provider, the Arbiter shall proceed next to consider the merits of the case.

The Merits of the Case

The Arbiter is considering the complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555[23] which stipulates that he should deal with complaints in '*an economical and expeditious manner'.*

The Trustee and Administrator of the Scheme

Integrated-Capabilities (Malta) Limited ('Integrated-Capabilities'), was the original trustee and Retirement Scheme Administrator ('RSA'), of the Scheme. It was authorized to act in such capacity in respect of the Scheme by the Malta Financial Services Authority ('MFSA').

The Complainant

The Complainant was accepted as a member of the Scheme on 22 December 2015 as emerging from the *'Annual Statement for the year ending 31 December 2017'* issued by Integrated Capabilities in respect of the *'Optimus Directus – Optimus Retirement Benefit Scheme No. 1'*.[24]

As indicated in the Scheme's Application Form signed by the Complainant on 7 December 2015, the Complainant is of British nationality and was resident in the

[22] P. 45
[23] Art. 19(3)(d)
[24] *Ibid.*

United Kingdom at the time.[25] In the same form, he was indicated as being born in February 1956, with his occupation listed as *'Driver'*.[26]

No indication was made or has emerged, during the proceedings of this case which indicates that the Complainant was not a retail investor.

The Complainant's risk profile was stated as being of *'Balanced Risk'* (out of the other options of *'Conservative Risk'* and *'Aggressive Risk'*) in the Scheme's Application Form. In the *'Annual Statement for the year ending 31 December 2017'*, issued by ICML his attitude to risk was indeed reflected as *'Balanced Risk – Some risk to capital – potential for growth over the longer term'*.[27]

It is further noted that in the *'Risk Profiler Report'* dated 1 December 2015 compiled in respect of the Complainant by the advisor, (which report was presented by ICML during the proceedings of the case), the Complainant was classified as being *'A moderate risk taker'*.[28]

Investment Advisor

In the letter dated 1 December 2015, sent by Strategic Wealth Limited ('SWL') to the Complainant, it was stated that further to the Complainant's decision to transfer his UK paid-up pension benefits to the Malta-based QROPS Scheme, SWL was engaged *'to provide [him] with information regarding [his] options'*.[29]

In the said letter it was further stated the following by SWL:

'Our service will be focused on providing you with information regarding your selected pension and investments, determining your risk profile on behalf of your pension Trustees, and providing details of the regulated investments that the Trustees will make on your behalf'.[30]

In the said letter, SWL was indicated as being based in Gibraltar and *'licensed by the Gibraltar Financial Services Commission Ref: FSC1175B'*.[31]

[25] P. 291 - 307
[26] P. 291 & 292
[27] P. 19
[28] P. 187
[29] P. 196
[30] *Ibid.*
[31] *Ibid.*

'Strategic Wealth Limited' was indicated as the *'Appointed Adviser'* in the *'Annual statement for the year ending 31 December 2017'* issued by ICML.[32]

The Scheme's underlying assets

The Complainant transferred policies from Scottish Widows into the Retirement Scheme in April 2016 as indicated in the *'RBSI Scheme Account Statement'*.[33]

The transfers from Scottish Widows into the Scheme amounted, in total, to GBP71,671.16 according to the calculations made from the details included in the said statement.[34, 35, 36]

The Arbiter notes that on 13 May 2016, shortly after becoming member of the Scheme, the Complainant effected a withdrawal from his pension scheme of GBP17,917.79 indicated as *'Payment of 100% PCLS'* in the *'RBSI Scheme Account Statement'*.[36] Such withdrawal was also confirmed in an email dated 13 April 2022 sent by Optimus Fiduciaries (Malta) Ltd to ICML.[37]

The Scheme's underlying assets are summarised in Table A and B below.

Table A lists the Scheme's assets as emerging from the letter dated 3 June 2016 issued by ICML which described how the sum received from Scottish Widows was sent for investment.[38]

Table B lists the Scheme's assets as emerging from the valuation statement presented for the year ending 31 December 2017. [39]

[32] P. 19
[33] P. 4
[34] Three transfers for the amount of: GBP38,720.40; GBP14,992.32 and GBP17,958.44 which in total amount to GBP71,671.16 - P. 310
[35] The *'RBSI Scheme Account Statement'* refers to another transfer from Scottish Widows which was however reversed back as well as a number of other *'original trades'* which were also reversed – P. 310
[36] P. 310
[37] P. 343
[38] P. 21
[39] P. 19

Table A

Asset	Investments in GBP Letter dated 3 June 2016
Scheme Account	241.57
Platform Cash Account	1,940.17
Prudential Dynamic 20-55 Class R	14,150
Resort Group – Property (direct)	10,000
Westbury Discretionary Managed Portfolio	14,150
TRG 7% 2026	9,085
Total investments	GBP49,566.74

Table B

Asset	Market Value (GBP) as at 31 Dec 2017
Scheme Cash Account	1,123.50
Reyker Direct Cash Account	2,951.01
Athena Global Opportunities Fund	15,461.18
Energy Circle 8% Loan Note	11,000
Resort Group 7% 2026	9,085
Resort Group – Property (direct)	10,000
Via Capital 5 YR Loan Note	2,000
Total Market Value	GBP51,620.69

The disputed investments

In the Complaint Form filed with the OAFS, the Complainant requested remedy specifically in respect of the *'investments held in the Resort Group and other loan notes'*.[40]

The Arbiter shall accordingly focus on the said investments.

The TRG investments

The TRG investments comprise the following two separate, but related investments:

(i) a direct property investment in *The Resort Group plc*;

(ii) an investment into corporate bonds issued by *The Resort Group plc*.

According to the letter dated 3 June 2016, the real estate investment amounted to GBP10,000 (this being around 20% of the Scheme's investible funds at the time), whilst the investment in the TRG corporate bonds comprised GBP9,085 (around 18% of the Scheme's investible funds at the time).

The said percentages nearly reflect the percentage allocations of 40% in total of the Scheme's investment holdings into the TRG investments as indicated in the report of SWL dated 1 December 2015 under the section titled '*Your Proposed Selected Investments'* which stipulated that the *'proposed pension investment holdings are as follows:'* [41]

> *'20% The Resort Group (TRG) PLC – Commercial Property*
>
> *20% TRG Corporate Bonds, 7% pa*
>
> *…'*

Some general background information as emerging on the disputed investments is detailed below:

(a) <u>The TRG Bond 7% 2026</u>

[40] P. 4
[41] P. 206

With respect to the bonds, the report by SWL dated 1 December 2015 specified *inter alia* that *'The Resort Group Corporate Bonds will receive a yield of 7% per annum'*, with these being *'issued for a term of 10 years with the option for Bondholders to redeem early at any time following the end of the fifth year'*.[42]

It was also noted that the *'Investments in The Resort Group Corporate Bonds are secured over real estate assets in Cape Verde'*.[43]

(b) <u>The TRG Property (Direct) Investment</u>

SWL's report of December 2015, explained *inter alia* that *'TRG's proposition is that of an asset backed, hotel managed commercial property investment, generating touristic revenues and the potential for capital appreciation for the benefit of the unit holders and The Resort Group'.*[44]

With respect to liquidity, the said report by SWL stated that:

'Real-Estate may be sold at any time. ***Generally illiquid****, although an active secondary market exists for completed operational Resort property via UK and Overseas agents and distributor, who will market the sale of the property…'* .[45]

As to the corporate structure of The Resort Group, it was *inter alia* noted in the same report that:

'Incorporated in 2007, TRG is a Gibraltar based company…TRG is the ultimate holding company for each of the individual Resort/ operational company' [46] where its investment strategy was *'focused on developing Resort property in the Cape Verde Islands …'*.[47]

The Resort Group was also described as *'a leading developer of luxury resort properties …'*.[48]

[42] P. 209
[43] *Ibid.*
[44] P. 206
[45] P. 207 – Emphasis added by the Arbiter
[46] P. 207
[47] *Ibid.*
[48] P. 206

> The Arbiter notes that the Service Provider also provided a Corporate Rating Review in respect of The Resort Group plc by ARC Ratings, which review of November 2017 stipulated a rating of *'BBB- issuer medium and long-term rating, with a Stable outlook'*.[49]
>
> It is also further noted that the said rating of BBB- was apparently only issued first in November 2016, which was after the time, when the Complainant's investments were initially made. The Arbiter also notes that the said rating was eventually withdrawn within approximately two years in 2018.[50]

As to the status of the TRG investments, the Arbiter notes the submissions of the Service Provider that such investments are not a *'lost investment and no real losses can be said to have been materialized'*.[51]

The Arbiter is however aware about material difficulties arising in relation to The Resort Group investments. This is not only from a previous case where such investments were extensively considered, (and reference is made to them here),[52] but also through general searches over the internet which bring up various articles regarding the difficulties faced in respect of the mentioned TRG investments.[53]

The Loan Note investments

The Loan Note investments featured in the Complainant's portfolio are the *'Energy Circle 8% Loan Note'* and the *'Via Capital 5 YR Loan Note'* as per the *Annual Statement for the year ending 31 December 2017* issued by ICML.[54]

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[49] P. 275 - 288

[50] https://arcratings.com/?s=The+Resort+Group

[51] P. 150

[52] Case ASF 107/2021 vs Optimus Fiduciaries (Malta) Ltd details for example the difficulties arising in relation to such investments and the devaluation undertaken by the new trustee in respect of the investments given the financial difficulties of The Resort Group; the problems with fair valuation and illiquidity of the investments; and unclear prospects about the realisation of the investments.

[53] https://www.ftadviser.com/pensions/2019/11/19/troubled-overseas-property-firm-calls-in-restructure-specialists/
https://www.standard.co.uk/business/hotel-developer-the-resort-group-cape-verde-fscs-ombudsman-b241773.html
Other articles by various UK claims management companies and decisions by the UK Financial Ombudsman in respect of the TRG investments also refer.

[54] P. 19

Whilst during the proceedings of the case various explanations and documentation emerged in respect of the TRG investments, no such details were provided by either party in respect of the indicated Loan Note investments despite the extensive submissions made by both parties.

General searches over the internet undertaken by the OAFS over the internet also yielded no information of relevance in respect of the indicated loan note investments.

Final Observations & Conclusion

With reference to the extensive submissions and documentation produced by the parties, the Arbiter would like to generally point out that he cannot rely on and take as adequate evidence, documents, or references to rules and conditions that are only applicable at a date different than that at the time the conduct complained of took place.

One needs to refer to the position, status, terms, rules, and requirements applicable at the time of the questioned conduct.

Having considered the relevant submissions, documents, and testimony during the various sittings held, the Arbiter has the following final observations and conclusions to make:

Claim of lack of disclosure of major conflicts of interests

The Arbiter considers that there is no sufficient basis on which he can conclude that the Service Provider failed to disclose material conflicts of interests to the Complainant also given that the investment was recommended by a separate unrelated party, this being SWL.

Neither does the Arbiter has any comfort that the Complainant would have taken a different position and not invest in the TRG investments had he been aware of the relationship between *First Review Pension Services* (which had approached him to transfer his pension), and *The Resort Group* if such relationship had been disclosed to him at the time of the investment.

The Arbiter is not convinced either about the nexus between such alleged failure and the losses from the TRG Investments.

In the circumstances, the Arbiter is rejecting the Complainant's claim about ICML's alleged failure with respect to the lack of disclosure of material conflicts of interest regarding the TRG investments.

Claim relating to the regulatory status of the advisor

The Arbiter considers that no adequate and sufficient evidence emerged in this case to justify the Complainant's claim that the Service Provider did not ensure that advice was received from an adequately regulated entity.

It has not been satisfactorily proven that SWL was inadequately regulated, given also that as outlined in the letter dated 1 December 2015 issued by SWL, such entity was indicated as being *'licensed by the Gibraltar Financial Services Commission'*,[55] and thus regulated.

The Arbiter further takes cognizance of the regulatory requirements specifically applicable with respect to the appointment of advisors at the time when the disputed advice was provided. No apparent breaches of the rules applicable at the time with respect to the appointment of such party have been noted in the circumstances of this case.[56]

It has also not emerged that there was incorrect information regarding the regulatory status of the advisor and neither what other authorizations the Complainant expected such an advisor to have in place.

The Arbiter is accordingly rejecting the Complainant's claim with respect to the regulatory status of the advisor.

Claim of the inappropriateness of the disputed investments

Given that the claims in respect of the Loan Note investments were not substantiated and no evidence has emerged regarding the nature, features and status of such investments, the Arbiter considers that, in this particular case, there is no sufficient basis on which he can consider the claims in relation to the Loan Note investments made by the Complainant any further.

[55] P. 196

[56] This is with reference to the requirements relating to the appointment of advisors as stipulated in the regulatory framework applicable under the Special Funds (Regulation) Act, 2022 regime and the eventual implementation of Part B.9 titled *'Supplementary Conditions in the case of entirely Member Directed Schemes'* of the Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act.

From the information presented and emerging in respect of the TRG investments, the **Arbiter however considers that there is a sufficient basis on which he can reasonably conclude that the TRG Investments and material exposure thereto were unsuitable and should have not been allowed by ICML to be undertaken within the Complainant's Scheme.**

The Arbiter has no comfort that the TRG investments can in some way be considered suitable and appropriate for the Complainant considering the scope of the Retirement Scheme, his profile and risk attitude, and the applicable regulatory requirements. This also takes into consideration the following:

(i) **The particular features and nature of the TRG investments.** The said investments did not emerge to be listed and/or regulated investments but were rather non-traditional, illiquid investments with a long and fixed investment term as outlined in the section titled *'The TRG investments above'*.

(ii) **The lack of liquidity of the TRG investments was clear and apparent**.

The bonds had *'an original 10-year maturity'* with *an 'early redemption option'* only after 5 years, which option, did not even materialize in practice. The product was thus, by its very nature, illiquid and not easily and readily realizable.

Although the direct property investments could in principle *'be sold at any time'*, as described by SWL, these were however *'Generally illiquid'*.[57] Indeed no comfort has been provided nor has evidence emerged that such investments were easily realizable either.

The Arbiter further notes that in the report titled *'The Resort Group – Due diligence Report'* issued by The Resort Group plc that was presented by ICML during the proceedings of the case, it was specified *inter alia* that:

'Specifically for Pension related investments, The Resort Group undertake to liquidate investments in the event the member either passes away, becomes

[57] P. 207

terminally ill or permanently incapacitated should such an event occur prior to the pension scheme going into draw-down. This undertaking allows liquidation to take place within a 6 month period for fractional investments or a 12 month period for the liquidation of a whole property'. [58]

It is clear that the investments were thus not readily realizable even to TRG. The undertaking by TRG to itself liquidate investment could also not have reasonably provided adequate and sufficient comfort either as to the liquidity of such products.

(iii) **The riskiness of the TRG investments,** as also reflected in the nature of such investments through the concentration risks to the same issuer, activities, and location which specifically and solely involved Cape Verde.

The Arbiter further notes that despite the extensive documents presented by the Service Provider on the due diligence it undertook in respect of The Resort Group, no evidence was, however, in the first place, provided that The Resort Group had a credit rating at the time of the Complainant's investments in early 2016.

The Service Provider only presented a document indicating a rating of BBB-, as reflected in the Corporate Rating Report issued by ARC Ratings, but only for November 2017.

Even if for argument's sake only, The Resort Group also had a rating of BBB- at the time of the investments, this could not have provided sufficient comfort as to a low or balanced risk either. A comparative rating of BBB- by rating agencies, such as Standard & Poor's and Fitch, indicate that such rating is the lowest possible rating of investment grade bonds and involves certain vulnerabilities, possible speculative elements, and higher risks compared to bonds of higher ratings.[59]

There was no reasonable justification for the Scheme to be in turn highly exposed (of nearly 40%) to the same issuer. Such high exposure further

[58] P. 246 – Emphasis added by the Arbiter
[59] https://www.investopedia.com/terms/i/investmentgrade.asp

amplified the risks being taken which can be considered as neither balanced nor prudent in the circumstances.

The Arbiter also notes that ICML did not even present any historical audited financial statements of TRG to provide comfort regarding the checks done with respect to the financial standing of the Group, as part of its due diligence exercise.

It is also noted that in the Application Form for membership, the TRG investments were given a rating of 5 on a risk scale of 10, with 1 denoting low risk and 10 high risk.[60] Given the features of the products including their lack of liquidity, unregulated status, and concentration risk amongst other, the TRG investments were furthermore clearly of a higher risk than that indicated in the said form.

(iv) **The lack of diversification and concentration risks inherent in such products**. No adequate comfort has emerged during the proceedings of this case that the TRG investments, which were **solely concentrated in one specialized sector involving the real estate /touristic sector in Cape Verde,** were diversified.

In addition, and as outlined above, there was **no adequate diversification either within the Scheme's overall portfolio of investments given the material position of nearly 40% of the Scheme's investible amount being allowed to be exposed to the same issuer, The Resort Group.**

The TRG investments resulted in the Scheme being thus heavily exposed to the performance of The Resort Group and the immovable property located in Cape Verde and thus to material losses of the Retirement Scheme in case of failure of or difficulties experienced by the Group and/or projects in Cape Verde.

(v) **The lack of conformity of the TRG investments with the Complainant's risk profile.** As detailed in the Annual Statements in respect of the Scheme issued by ICML, the Complainant's profile was of *'Balanced Risk'*.

[60] P. 298

There is no comfort that such investments were indeed reflective of the risk capacity of the Complainant, as also outlined in his Risk Profiler Report - where his investment timeframe was indicated as being *'Short term (0-5 years)'*, his capacity for loss as *'Small/ medium losses could be tolerated*', and his investment liquidity indicated as *'[he] would almost certainly need access to this investment*'.[61]

The Arbiter considers that **the above aspects all corroborate the claim that the TRG investments undertaken were inappropriate for the Complainant's Retirement Scheme and should have accordingly not been permitted by ICML in its capacity as trustee and RSA of the Scheme**.

Moreover, the above aspects clearly go against, and are not reflective of, the requirements to which the Retirement Scheme was subject with respect to *inter alia* diversification, prudence, and liquidity, which applied at the time ICML was acting as Trustee and RSA of the Scheme, as detailed hereunder:

- The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'*, ('the Directives'). The said Directives applied from the Scheme's inception until its registration under the Retirement Pensions Act ('RPA').[62]

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

  SOC 2.7.2 in turn required that the assets of a scheme are '*invested in order to ensure the security, quality, liquidity, and profitability of the portfolio as a*

[61] *Ibid.*

[62] The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided 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.

whole'[63] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[64]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[65] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*[66] where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.[67]

- The Arbiter also notes that the Scheme eventually became subject to the '*Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act 2011'* (Pension Rules') when it was registered under the Retirement Pensions Act ('RPA').

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

  '***The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries*** *and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document*'.[68]

  The investment restrictions for member-directed schemes under the RPA were outlined in Part B.2 titled *'Investment Restrictions of a Personal*

[63] SOC 2.7.2 (a)
[64] SOC 2.7.2 (b)
[65] SOC 2.7.2 (c)
[66] SOC 2.7.2 (e)
[67] SOC 2.7.2 (h)(iii) & (v)
[68] The same principle was reflected in Rule 2.7.1 of Part B.2.7 titled *'Conduct of Business Rules related to the Scheme's Assets'* of the *'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'* which applied to STM Malta as Scheme Administrator at the time it was subject to the Special Funds (Regulation) Act.

Retirement Scheme' and Part B.9, *'Supplementary Conditions in the case of entirely Member Directed Schemes'* of the Pension Rules.

It is further noted that SLC 3.2.1 (ii) and (iii) of the Pension Rules provided *inter alia* that the Retirement Scheme Administrator shall ensure that the assets of the scheme are: *'… **properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole**';* and *'… **sufficiently liquid** and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits'.*[69]

In the particular circumstances of this case, the Arbiter cannot reasonably conclude that the TRG investments, and high exposure thereto, were in line with, and reflective of the applicable regulatory requirements.

Neither can the Arbiter reasonably conclude that the TRG investments reflected the Complainant's risk profile, nor that they comprised, in any way, an allocation reflective of the scope of the Scheme as a retirement product, where the Scheme's assets were required to be *inter alia* invested in a prudent manner, be sufficiently liquid, and properly diversified as outlined above.[70]

Responsibility

The Arbiter notes that the Service Provider submitted *inter alia* that: (i) it was the Complainant himself who chose the investment advisor and (ii) that ICML did not provide investment advice and was not licensed to do so, thus, inferring that it could not have been involved in the suitability of the investments but was rather *'simply required to ensure that the investments were permitted'* as explained in the sworn declaration provided by the ICML's Director.[71]

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

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

[71] P. 150

The Arbiter would like to point out however that whilst it is true that ICML was not responsible to provide investment advice to the Complainant - as such function was clearly the responsibility of the third-party appointed investment advisor - ICML however, had an onerous duty with respect to the monitoring and final acceptance of the proposed TRG investments. As acknowledged by the Service Provider itself, **ICML was indeed required to ensure that the investments were ultimately permitted.**

If an investment proposed by a member's advisor is clearly not adequate when taking into consideration the relevant aspects, including *inter alia* the scope of the Retirement Scheme, the Complainant's profile and attitude to risk, the particular features and risks of the investments and proposed exposure thereto, and the applicable requirements and principles stipulated in the regulatory requirements, the trustee and RSA clearly had a responsibility to duly intervene accordingly and not permit the investments.

The trustee and RSA ultimately had the final say on whether to permit the investments to be undertaken within the Scheme.

The trustee and RSA cannot thus hide behind the claim that it was not the advisor and try to diminish the importance of its monitoring functions and its ultimate power to permit or refuse an investment within the Retirement Scheme in the case where an investment went contrary to the various relevant aspects as highlighted above.

In the circumstances of this case, the Arbiter cannot reasonably conclude that there was *'prudence, diligence, and attention of a bonus paterfamilias'*[72] in the execution of ICML's duties and the exercise of its powers and discretions as a trustee with respect to the TRG investments.

The Arbiter concludes that there is a clear lack of diligence by ICML in the general administration of the Scheme in its roles as trustee and RSA when it permitted and allowed the TRG investments and the material exposure thereto as underlying investments within the Scheme.

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

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[73] of the Complainant who had placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Decision and Compensation

For the reasons stated throughout this decision, the Arbiter considers the Complaint to be fair, equitable, and reasonable in the particular circumstances and substantive merits of the case,[74] and is partially accepting it in so far as it is compatible with this decision.

Being mindful of the key roles of Integrated-Capabilities (Malta) Limited as Trustee and Retirement Scheme Administrator, and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, the Arbiter concludes that the Complainant should be given partial compensation by Integrated-Capabilities for the damages suffered by the Complainant in relation to his Scheme.

Whilst the Arbiter does not accept the extent of compensation requested by the Complainant given that:

(i) only the claims in respect of the TRG investments have been substantiated; and

(ii) other external parties, like the investment adviser and the previous trustee and RSA of the Scheme were involved and also carried responsibility, with respect to the disputed investments,

the Arbiter considers that in the particular circumstances of this case, it is fair, equitable, and reasonable for Integrated-Capabilities (Malta) Limited to compensate the Complainant for the amount of 70% (seventy percent) of the 'total net contributions' made by the Complainant into the TRG investments.

Given that the Arbiter does not have the exact figures, the Arbiter shall stipulate how the 'total net contributions' is to be calculated. In this regard, the 'total net

[73] Cap. 555, Article 19(3)(c)
[74] Cap. 555, Article 19(3)(b)

contributions' resulting from the TRG investments are to be calculated as the sum of the following:

(i) The amount initially invested into the TRG direct property plus any fractional payments paid directly to TRG from the Scheme's account in respect of such holding,[75] less any income paid into the Scheme from the investment throughout the term of the investment up to the date of this decision; and

(ii) The amount initially invested into the TRG bond less any income received from the investment throughout the term of the investment up to the date of this decision.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter is, therefore, ordering Integrated-Capabilities (Malta) Limited to pay the Complainant 70% of the 'total net contributions' resulting from the TRG investments as calculated above.

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

Since the Arbiter rejected some of the Complainant's pretences and the Complaint was only partially upheld, each party is to pay its own expenses for these proceedings.

Dr Reno Borg
Arbiter for Financial Services

[75] Such as those emerging from the *RBSI Scheme Account Statement* – P. 309