

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

**Case No. 033/2018**

**GF and FF**

**(‘the Complainants’ or ‘the Members’)**

**vs**

**Momentum Pensions Malta Limited**

**(C52627) (‘MPM’ or ‘the Service Provider’**

**or ‘the Retirement Scheme Administrator’)**

### **Sitting of the 28 July 2020**

#### **The Arbiter,**

Having seen the **Complaint** made against Momentum Pensions Malta Limited (‘MPM’ or ‘the Service Provider’) relating to the Momentum Malta Retirement Trust (‘the Retirement Scheme’ or ‘Scheme’), this being a personal retirement scheme licensed by the Malta Financial Services Authority (‘MFSA’). The Retirement Scheme is established in the form of a trust and administered by MPM as its Trustee and Retirement Scheme Administrator. The Complainants both had their own separate account with the Scheme.

The Complainants noted that a pension was set up with MPM by a company called Continental Wealth Management (‘CWM’) which had Trafalgar International GmbH as regulator. The Complainants explained that they were sold a life insurance bond as the investment vehicle for the pension.

It was submitted that the products the Complainants were subsequently placed into were for professional investors only and that the dealing instructions used to place investments were signed in blank and repeatedly used to place investment without their knowledge.

The Complainants claimed that as trustees of the pension scheme, MPM should have considered more the type of investments that they were being placed into and the suitability of such investments to them.

It was further claimed that one of the Complainant had her risk profile changed into 'High' without consent.

The Complainants submitted that at no point did MPM, as trustees, contacted them to raise concerns about their investments or their poor performance.

It was also claimed that high commissions were being settled between the three companies, with CWM taking up to 16% initially and other amounts paid to Trafalgar International GmbH and MPM.

The Complainants claimed that MPM took high trustee and set up fees and have not acted in their best interests or taken their responsibility as trustees seriously.

It was submitted that had MPM taken the time to check the proposed investments, MPM would at least have queried the investments prior to the purchase and advised them of their unsuitability. The Complainants also claimed that their pension should have been held under a lower risk than they were exposed to.

The Complainants felt that MPM has not addressed any of the issues raised in their response to their complaint choosing to instead cite forms they had completed and signed, terms they had agreed to and exonerating themselves of all responsibility despite that as trustees the Complainant considered them to hold a responsibility to ensure that investments placed were appropriate.

The Complainants also felt that they were pushed and misdirected by an official of CWM to go for a medium/high risk profile and that this was accepted by the trustees without query.

The Complainants claimed that they are not investment experts so most of the issues went over their head in terms of what they were invested into. It was further claimed that the massive losses on just a few investments, however, show that they must have been high risk.

The Complainants alleged that the amounts did not tie up with the valuations, allowing for losses, interest and fees, and requested full disclosure on the commissions taken by each party involved.

The Complainants requested redress by putting the balance of their respective pension scheme back to the original amount invested. The Complainants claimed that there has been negligence by the trustees and in case of a lower amount of compensation they requested fees to be refunded. It was submitted that the Complainants were aware that MPM has settled at least two cases of compensation under the same circumstances with ex-CWM clients and they requested MPM to do the same for them.

**In its reply, MPM essentially submitted the following:**

1. That Continental Wealth Management ('CWM') is a company registered in Spain. Before its insolvency, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH ('Trafalgar') a company registered in Germany and regulated in Germany. Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union.
2. That MPM is not linked or affiliated in any manner to CWM, Trafalgar or Global Net and that MPM is not licensed to provide investment advice.
3. That each of the Complainants individual application forms to MPM for membership of the Scheme lists Dawn Kirby of CWM as their professional adviser.

MPM noted that a declaration as to the suitability of the underlying investment is also in the application form for Mrs FF and that Dawn Kirby also confirmed with her signature that the advice given to Mr GF was within the investment guidelines.

Further confirmation that Dawn Kirby from CWM was appointed as the Complainants adviser is evidenced by the applications submitted to Skandia Life Ireland Limited.

In the complaint submitted to the Arbiter for Financial Services the Complainants specifically acknowledge and state that:

- (i) CWM was the company which set up the pension with Momentum; and
  - (ii) they were misdirected by Dawn Kirby on their risk profile when she pushed them *'to go to medium/high'*.
4. MPM submitted that CWM is insolvent and is no longer operating and that this was the only reason why the Complainants have filed a claim against MPM and not against CWM. The Service Provider submitted that the proper respondent to this claim was CWM.

The Service Provider noted that MPM ceased to accept business from CWM in September 2017. MPM was aware that CWM ceased trading on or around 29 September 2017.

MPM pointed out that it is not aware of any attempt by the Member to initiate proceedings against CWM and/or Trafalgar and/or Global Net, who advised the Member to invest in these products. MPM noted that in the Complaint, the Complainants state that MPM has not *'acted in our best interests or taken their responsibility as trustees seriously'*. MPM submitted that they however fail to indicate what obligations MPM has failed to fulfil and how MPM has not acted in the Complainants' best interest.

MPM further submitted that the grievances of the Complainants:

- that the life insurance bond sold to them was for professional investors only;
- that dealing instructions were signed blank and used to place investments without their knowledge;
- that Mrs FF's risk profile was changed without her consent; and
- that the investments were allegedly not suitable

must be directed towards CWM and Dawn Kirby.

5. MPM noted that the Complainants investment risk profiles were chosen by their adviser, Dawn Kirkby from CWM and not by MPM. The Service Provider submitted that it is not privy to the risk profile advice provided by Dawn Kirby to the Complainants.

MPM stated that its obligation is to ensure that the investments selected met the risk profiles of the Complainants. MPM replied that the risk profile was chosen by the Complainants together with CWM/ Dawn Kirkby and not by MPM.

6. MPM submitted that it updated the Complainants annually on the performance of their investment. It further submitted that at no point prior to the collapse of CWM did the Complainants raise any concerns with MPM either regarding the performance of their investment, or the service MPM was providing.
7. The Service Provider noted that the Complainants each raised a complaint with MPM on 1 November 2017 and that MPM replied to both complaints on 26 January 2018.
8. MPM pointed out that in the Complaint, Mr GF states that he is not an investment expert so *'most of this goes over my head in terms of what we were invested into'*. MPM noted that, however, in his application form Mr GF states that his occupation is a financial adviser. MPM further noted that indeed it has information to the effect that Mr GF was in fact a financial adviser working for CWM and MPM will produce evidence in due course to confirm this.
9. MPM pointed out that it is aware that Old Mutual International Ireland Limited ('OMI'), the bond provider,<sup>1</sup> is considering legal action against one of the structured note providers (Leonteq Securities AG) for losses incurred by the ultimate holders of the bonds, such as the Complainants. It was noted that it is OMI, and not MPM, who was pursuing litigation against Leonteq.

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<sup>1</sup> The investments within the Retirement Scheme were undertaken via a life assurance bond provided by an insurance company – A fol. 391

10. MPM submitted it does not provide investment advice and, furthermore, did not provide investment advice to the Complainants.

The Service Provider noted that this is clear from the application form which specifically requests the details of the Members professional adviser. MPM further noted that a declaration is also made by the adviser, and signed by the adviser, on the application itself. MPM pointed out that the Member also declared on the application form that they acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice.

MPM submitted that to further reinforce the point that MPM does not provide investment advice, an entire section of the terms and conditions of business attached to the application form is dedicated solely to this point.

11. MPM noted that in Section of the Complaint, the Complainants state that dealing instructions were signed in blank and used repeatedly without the Complainants knowledge. MPM noted that, in the first place, it was the CWM representative who gave the Complainants this instruction. MPM submitted that at that point in time it was not involved. MPM also submitted that, furthermore, it had no awareness or line of sight of these discussions and arrangements made by the Members and their appointed Adviser. MPM replied that the Members were negligent when they executed documents in blank. MPM pointed out that it does not support documentation being signed blank and would not accept any documents of this nature, had it been aware. MPM submitted that it cannot now be requested to make good for each of the Complainants' own negligence.

MPM noted that the dealing instruction as a document is not issued by MPM. It was further explained that when MPM receives a dealing instruction, MPM verifies the signature of the policy holder against the member's identification document – if the signature is not a match, MPM's procedure is to request a signature confirmation letter.

12. On commissions and fees, MPM replied that it is entitled to charge a fee for its work in accordance with its fee tariff and terms and conditions,

details of which were communicated to the Complainants in each of their welcome packs and which they were fully aware of since inception.

13. MPM submitted that it does not work on a commission basis and that it charges a fixed fee for the services it provides where this fee does not change regardless of the underlying investment which the Complainants were advised to invest in by CWM. It was noted that, accordingly, MPM did not stand to make any gain or benefit as a result of the Complainants investing in any particular underlying investments.
14. MPM replied that it has carried out the services as required to do so under the Scheme and there is no reason why the fees charged by MPM should be refunded.
15. MPM noted that, furthermore, in reference to the comment about MPM settling other cases, MPM replied that it will not disclose any information pertaining to any other member, but states that MPM never paid any sums or made any financial contributions towards any settlement involving ex-CWM clients.
16. MPM referred to Regulation 4.1.17, Part B.4 of the Pension Rules for Services Providers which provides that *'As applicable: (a) The Scheme Administrator will be liable to the Scheme, Member(s), Beneficiary(ies) and Contributor(s) of the Scheme, (b) The Investment Manager will be liable to the Scheme or the Retirement Fund or Investors thereof, (c) The Custodian will be liable to the Scheme or the Retirement Fund or Investors thereof, 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'*.

MPM submitted that it has not committed any fraud, nor has it acted negligently. MPM submitted that it has not breached any of its obligations in any way and submitted that the losses sustained by the Complainants are wholly attributable to the adviser which the Complainants themselves appointed.

**Having heard the parties and seen all the documents and submissions made, including the affidavits, the notes of submissions, the additional submissions made and respective attachments,**

**Considers:**

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

**The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.<sup>2</sup>**

### **The Complainants**

The Complainants respectively born on 4 January 1966 and 29 October 1968 are both of British nationality and were resident in Portugal at the time of the Application Form for Membership.

Mr GF's occupation was indicated as '*Financial Adviser*' in the *Application Form for Membership into the Retirement Scheme* dated May 2014 ('the Application Form for Membership') which application bore his signature.

Mrs GF's occupation was indicated as '*Housewife*' in the *Application Form for Membership into the Retirement Scheme* dated September 2014 ('the Application Form for Membership') which application bore her signature.

The Complainants were accepted by MPM as members of the Retirement Scheme on 17 June 2014 and 21 October 2014 respectively.

### **The Service Provider**

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator<sup>3</sup> and acts as the Retirement Scheme Administrator and Trustee of the Scheme.<sup>4</sup>

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<sup>2</sup> Cap. 555, Art. 19(3)(b)

<sup>3</sup> <https://www.mfsa.mt/financial-services-register/result/?id=3453>

<sup>4</sup> Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

## The Legal Framework

The Retirement Scheme and MPM 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 of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015.<sup>5</sup>

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

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

As confirmed by the Service Provider, registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and hence the framework under the RPA became applicable as from such date.<sup>6</sup>

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

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<sup>5</sup>Retirement Pensions Act, Cap.514/Circular letter issued by the MFSA - <https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/>

<sup>6</sup> As per pg. 1 of the affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 January 2016 attached to his affidavit.

## Particularities of the Case

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

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA<sup>7</sup> as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011<sup>8</sup> and under the Retirement Pensions Act in January 2016.<sup>9</sup>

As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme '*was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap.331) on the 23 March 2011*'<sup>10</sup> and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011*'.<sup>11</sup>

The Scheme Particulars specify that:

*'The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death*'.<sup>12</sup>

The case in question involves a member-directed personal retirement scheme where the Members were respectively allowed to appoint an investment adviser to respectively advise them on the choice of investments.

The assets held in the Complainants respective account with the Retirement Scheme were used to respectively acquire the European Executive Investment Bond, this being a life assurance policy issued by Skandia International.<sup>13</sup>

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<sup>7</sup> <https://www.mfsa.com.mt/financial-services-register/result/?id=3454>

<sup>8</sup> Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).

<sup>9</sup> Registration Certificate dated 1 Jan 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).

<sup>10</sup> Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

<sup>11</sup> Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

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

<sup>13</sup> Skandia International eventually rebranded to Old Mutual International -

<https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-2014/skandia-international-rebrands-to-old-mutual-international/>

The total premium paid into the respective Executive Investment Bond, was in turn invested in investment instruments such as those indicated in the table of investments forming part of the '*Investor Profile*' presented for each Complainant by the Service Provider during the proceedings of the case.<sup>14</sup>

### ***Investment Adviser***

Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainants. The role of CWM was to advise the respective Member regarding the assets held within the Retirement Scheme.

### ***Underlying Investments***

The Service Provider indicated that the underlying policy, the European Executive Investment Bond issued by Skandia International, and held within the Retirement Scheme commenced in July 2014 in respect of Mr GF and in March 2015 in respect of Mrs FF. The respective policies had a total premium for investment (after fees/charges) of GBP172,777 in respect of Mr GF and GBP26,636 in respect of Mrs FF.<sup>15</sup>

The investments undertaken within the said policy were summarised in the table of investment transactions as provided by the Service Provider.<sup>16</sup>

The said table indicates that the respective portfolio of investments in respect of the Complainants comprised substantial investments into structured notes.<sup>17</sup>

The Service Provider indicated a loss (excluding fees) of GBP101,123 on the Retirement Scheme of Mr GF and a loss (excluding fees) of GBP9,940 on the Scheme of Mrs FF as at 26 January 2018.<sup>18</sup>

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<sup>14</sup> The '*Investor Profile*' in respect of the Complainants is attached to the Additional Submissions document presented by the Service Provider.

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

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

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

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

## Final Observations and Conclusions

There is a particular key aspect which distinguishes this Complaint from the other complaints filed with the Office of the Arbiter for Financial Services ('OAFS') with regards to the Scheme. This particular aspect, which the Arbiter considers has a material bearing on this Complaint, relates to one of the Complainants, Mr GF, having worked for CWM, the indicated investment adviser.

Further to MPM's claim, in its reply to the OAFS, that Mr GF's occupation was as a financial adviser and that he '*was in fact a financial adviser, working for CWM*', the Complainant made certain clarifications on this point in his additional submissions filed in June 2019.

The Complainant noted *inter alia* that he wanted to '*make it clear that I worked for CWM in the capacity of selling QROPS to people following training provided by Head Office*'.

The Complainant also stated *inter alia* that he had '*worked in pensions for Guardian Royal Exchange and Aegon and had good background knowledge of UK pensions for Final Salary and Money Purchase but had not previously heard of QROPS*'.

The Complainant further claimed that he had '*no investment experience other than holding investments in blue chip shares from a trust fund*' and that he '*was not involved in the investments in CWM*', where he also alleged that '*although I asked about being given training on this as I felt it would assist in the selling of the product, this never occurred*'.

As to his duties with CWM, the Complainant explained that '*Generally, I provided phone numbers of expats to head office, who in turn would cold call and give general details of the product. I would then visit to explain in more detail but mostly, the closing of the business was carried out by Dawn Kirby or Anthony Bishop from head office*'.

On its part, in its additional submissions, the Service Provider submitted that Mr GF was attempting to downplay his involvement in CWM as it was claimed that Mr GF was a '*Senior Partner at CWM at least until 2017*'.

As evidence, the Service Provider provided an email communication sent by Mr GF dated 19 June 2017 in such capacity. Furthermore, the Service Provider also attached an Application For Membership in respect of the Retirement Scheme which was signed in June 2017 where, in the section titled '*Financial Adviser Details*' of the said form, Mr GF was mentioned as the Adviser of CWM and where the '*Financial Adviser Declaration*' section in the same form was completed and signed by Mr GF himself.

Having considered the particular circumstances in hand and the explanations provided by both parties with respect to the role and involvement of Mr GF with CWM, the Arbiter attributes more weight to what has been stated by the Service Provider on this specific point.

On the basis that, ultimately, Mr GF:

- was a '*Financial Adviser*' as indicated in his own Application Form for Membership of the Scheme dated May 2014;
- occupied a role with CWM where such role transpired to be a senior position;
- was involved in the selling of pension products with CWM as confirmed by Mr GF himself;
- was signing in the capacity of Financial Adviser of CWM as transpired in the form dated June 2017 submitted by MPM.

Through his background and actual involvement with CWM itself, Mr GF was, or should have been, in a position to be aware of and understand the implications of the investments made within his and his wife's portfolio.

Considering Mr GF's occupation as '*Financial Adviser*' and his employment with CWM, it is unclear how the Complainants can claim in their Complaint that investments were placed without their knowledge or that the risk profile of one of the Complainant was changed without consent, or now challenge the suitability of the investments made claiming in the process that:

*'I am not an investment expert so most of this goes over my head in terms of what we were invested into, but the massive losses on just a few of these investments shows they must have been high risk', as claimed in the Complaint Form.*

It is considered that there are no sufficient and justifiable grounds on which the Arbiter can uphold Mr GF's and his wife's Complaint.

**For the above-stated reasons, the Arbiter cannot uphold the complaint.**

**Because of the novelty of this case each party is to bear its own costs.**

**Dr Reno Borg  
Arbiter for Financial Services**