

Before the Arbiter for Financial Services

Case No. 038/2018

QP

(‘the Complainant’ or ‘the Member’)

vs

Momentum Pensions Malta Limited

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

or ‘the Retirement Scheme Administrator’

or ‘the Trustee’)

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 Complainant explained that his formal complaint was made with MPM on 12 November 2017 and that whilst waiting for answers to his formal complaint he started to discover some alarming information regarding MPM and began asking them various questions regarding his pension, many of which he was still awaiting an answer on. The Complainant noted that he was concerned about the lack of response, so he began copying MFSA and finally received a reply to his formal complaint on 5 February 2018.

The Complainant submitted that the main substance of his complaint is:¹

1. That Old Mutual International ('OMI') was charging him a fee of 1.1% in respect of an insurance bond, into which the Scheme was invested, when the charge rate he signed for was specified as 00.00% and confirmed as zero charge by his adviser. The Complainant referred to section 'M' on page 9 of the OMI application form.²
2. That his dealing instructions were forged/photocopied.³ It was claimed that it can clearly be seen from the picture he has taken of his dealing instructions, that the signatures on the dealing instructions were identical and were in the exact same position of the instruction form despite being signed on different dates. The Complainant further claimed that these investments were completed without his knowledge.

The Complainant submitted that he has also discovered that MPM accepted business from Continental Wealth Management ('CWM'), who were his financial advisers, knowing that they were unlicensed and that they had been involved in scams dating back to 2013, but yet MPM accepted business up to September 2017.

It was also claimed that heavy losses were reported by MPM on their reports from 2013 but yet no action was taken to protect investors funds. The Complainant explained that he joined MPM in 2015 when MPM knowingly allowed his pension to be invested in failed structured note investments.

The Complainant submitted that MPM accepted dealing instructions from CWM without comparing that the investments matched his risk profile as described in the Fact Find which clearly stated that his profile was of Medium Risk. It was alleged that despite this, MPM did not carry out any due diligence checks to ensure that the investments matched his risk profile and allowed high and very high-level investments to go through.

The Complainant further submitted that MPM carried out insufficient checks to ensure that his dealing instructions were signed by him. As an example, it was claimed that two dealing instructions went through on the 30 July 2015

¹ A fol. 6 & 7

² A fol. 28

³ A fol. 6/53

with identical signatures from both himself and his wife, where the two signatures were in the same position on the page, of the same size, same colour pen and thus obviously photocopied. The Complainant further claimed that photocopied signatures were used for a year on ten dealing instructions which instructions were never seen by him until the month of his complaint.

The Complainant explained that when he first became aware his pension fund was dropping substantially in value, he immediately raised his concerns to his adviser but was told not to worry as this was an issue with Leonteq and MPM/OMI were dealing with the said issue.

The Complainant further explained that on 08/09/2017 he was then told that:

'As for Leonteq losses the total amount so far is £81,761. This comprises of matured investments and also sales from capital protected investments where we advised to just sell to stay well away.

Leonteq have said they will settle. We are just awaiting the amount and time frame. This will certainly boost the value of your fund as promised'.⁴

The Complainant submitted that he now understands that Leonteq were part of the issue and that other structured notes were purchased which are not suitable for pension investments.

It was noted that when he discovered, in December 2017, that he was being charged a bond fee of 1.1% by OMI he raised this issue with MPM as he was able to prove to them that the fee had never been discussed with his adviser and had not been signed for on his fact find and any subsequent paperwork. The Complainant attached some communications he had exchanged in 2015 and 2017 with his previous adviser with respect to fees.⁵ Despite this, the Complainant explained that MPM refused to stop taking this fee or refund the £10,601.03 taken without his knowledge and consent.

The Complainant noted that in response to his complaints, MPM stated that it is not their fault and blamed Trafalgar. It was pointed out that yet, MPM continue to trade with Trafalgar despite knowing all the damage done to his pension and others.

⁴ A fol. 6

⁵ A fol. 8, 69 -73

The Complainant noted that he understood that MPM has admitted liability and offered a compensation package to at least two other clients in very similar situations as his. The Complainant noted that by doing so MPM were not treating their customers equally and fairly.

The Complainant asked for:⁶

- a refund of the OMI bond fee of £10,601.03 + 6% interest which amount to £11,237.09 and to stop any future bond fee;
- a refund of £845 per year for MPM fees as he felt they have not provided the service he was paying for;
- all the losses to individual investments reinstated to their original purchase value. The Complainant indicated a total loss of €114,000 plus £17,540 and referred to a list of investments in this regard;⁷
- payment of the 6% per year promised interest to be added to his original investment fund of £426,908.17 that was transferred in August 2015 (calculated up till March 2018 as £67,156.06).

The Complainant noted that the value of his investment should have been £452,522.66 in August 2016, £479,674.01 in August 2017 and £494,064.23 in March 2018.

The Complainant made a total claim in pounds of £98,045.65⁸ plus euros €114,000.⁹

In its reply, MPM essentially submitted the following:

1. That MPM is licensed by the Malta Financial Services Authority to act as the Retirement Scheme Administrator ('RSA') and Trustee of the Scheme. That the Scheme is licensed as a Personal Retirement Scheme.
2. That Continental Wealth Management ('CWM') is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in

⁶ A fol. 7

⁷ A fol. 12 & 32

⁸ £11,237.09+£2,112.50+£17,540+£67,156.06 (A fol. 7)

⁹ A fol. 7

France by Trafalgar International GmbH ('Trafalgar'). Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union.

3. That MPM is not linked or affiliated in any manner to CWM, Trafalgar or Global Net.
4. That MPM is not licensed to provide investment advice.
5. MPM noted that the Complainant has stated in his complaint that he was concerned about a lack of response from MPM, following his complaint of 12/11/2017. MPM replied that until its formal response to the Complainant on the 05/02/2018, MPM communicated with the Complainant at regular intervals and referred to the email communications attached to the complaint itself.
6. MPM submitted that without prejudice to MPM's defence that it is not responsible for the Complainant's claims, more than two years have lapsed since the conduct complained of took place and that therefore pursuant to Article 21(1)(c) of Chapter 555 of the Laws of Malta, the Complaint cannot be entertained.
7. MPM submitted that the Complainant has not suffered a loss. MPM noted that the Complainant had an initial approximate transfer value of GBP385,520¹⁰ and that according to the latest valuation summary (issued by OMI dated 04/05/2018), the total current market value of the Complainant's holdings was GBP422,816.91.¹¹
8. MPM noted that the Complainant himself applied for his portfolio to be in GBP/STG.¹²
9. MPM submitted that it provided the Complainant with annual member statements for the years ended 2015 to 2016 (inclusive).¹³

¹⁰ A fol. 81/90

¹¹ A fol. 82/132

¹² A fol. 37/82

¹³ A fol. 82/125 to 130

10. MPM noted that the Complainant must therefore clarify what he is requesting from MPM. It was submitted that MPM never guaranteed or promised in any manner a return or the 6% return referred to in the complaint.
11. MPM pointed out that the Complainant's application form¹⁴ identified Richard Peasley from CWM as the Complainant's professional adviser.¹⁵ It was noted that the adviser declared, in MPM's application form, that the investment advice given was within the investment guidelines.¹⁶

MPM further submitted that the appointment of CWM as the Complainant's adviser was also confirmed on the application submitted to OMI.¹⁷ It was noted that Richard Peasley and Flora Parker accepted to be appointed as financial advisers and each made the declarations set out on OMI's form.

12. MPM replied that the Complainant's risk profile was chosen by the Complainant and his adviser, and that the chosen risk profile was indicated as '*Medium*'.¹⁸ It was noted that the Complainant was therefore comfortable with a risk profile up to and including Medium.
13. MPM noted that the member, and the adviser appointed by the member, select investments and that the adviser ensures that the investments comply with the member's risk profile. MPM further noted that the RSA then reviews this in line with the risk profile on file to ensure that it broadly reflects the risk profile and offers diversification.
14. With respect to allegations relating to dealing instructions/transaction notes, MPM noted that the Complainant alleges that his dealing instructions were '*forged*' or '*photocopied*'. MPM replied that the Complainant must prove that his signature has been forged, as he is alleging. MPM submitted that the Complainant must also explain what he means when he states that dealing instructions were '*photocopied*' and

¹⁴ A fol. 86 to 99

¹⁵ A fol. 87

¹⁶ A fol. 89

¹⁷ A fol. 112

¹⁸ A fol. 82/88

must also clarify whether he is referring only to his signature, or to the whole document.

15. MPM noted that dealing instructions are not completed by it and that MPM has no awareness or line of sight of what discussions and arrangements take place between the Complainant and his appointed adviser, CWM, regarding dealing instructions. MPM submitted that it has no awareness that signatures were '*forged*' as alleged by the Complainant. MPM stated that it would not have accepted documents of this nature.
16. MPM submitted that it is its duty to ensure that the Complainant's signature and/or that of the fund adviser on the dealing instructions is verified against the proof of identification provided to MPM. It was further submitted that in all cases involving the Complainant's dealing instructions, such verification was made by MPM.
17. MPM replied that the investments made were in line with the Complainant's risk profile and in line with the guidelines applicable at the time of the Complainant's application with MPM.
18. MPM submitted that it had controls in place to ensure that the dealing instructions received by it bore the signatures of the Complainant, ensuring the investment was directed by them and the adviser appointed by the Complainant, in line with the attitude to risk and was then reviewed against the Scheme's investment guidelines. MPM pointed out that the dealing instructions were submitted by the appointed adviser, CWM, and met MPM's Investment Guidelines.
19. MPM noted that it is aware that OMI, the bond provider, has initiated legal action against one of the structured note providers (Leonteq Securities AG), for losses incurred by the ultimate holders of the bonds. MPM further noted that it was OMI, and not MPM, who was pursuing this litigation against Leonteq.

MPM reiterated that the Complainant has not suffered any loss.

20. MPM noted that it charges a fixed fee for the services it provides and that this fee did not change, regardless of the underlying investment, which

the Complainant was advised to invest in by CWM. MPM submitted that accordingly it did not stand to make any gain or benefit as a result of the Complainant investing in any particular underlying investments.

21. MPM noted that Trafalgar was licensed as an Insurance Intermediary and Consultant¹⁹ as well as an Investment Intermediary²⁰ and referred to documentation which had been provided to MFSA. MPM further noted that Trafalgar entered into an agency agreement with CWM.
22. MPM explained that CWM has ceased trading and is no longer operating. MPM submitted that this was the only reason why the Complainant has filed a claim against MPM and not against CWM. MPM further submitted that it is CWM and/or Trafalgar who is the proper respondent to this claim.

MPM noted that it no longer accepted business from CWM as from September 2017 and that it is aware that CWM ceased trading on or around 29 September 2017.

MPM further noted that it is not aware of any attempt by the Complainant to initiate proceedings against CWM or its officials and/or Trafalgar and/or Global Net, which advised the Complainant to invest in the products in question.

23. MPM submitted that any business introduced by CWM to MPM fell within the MFSA's Pension Rules for Service Providers, as they relate to RSAs.
24. MPM replied that it does not work on a commission basis and that it neither receives commissions, nor pays commissions to any third parties.
25. MPM noted that the Complainant refers to an alleged '*scam*' involving CWM which MPM was allegedly aware of, according to the Complainant. MPM replied that it was not aware of any '*scam*' involving CWM.
26. With respect to allegations relating to OMI's fees, it was submitted that MPM is not responsible and cannot answer for fees charged by any entity

¹⁹ A fol. 123

²⁰ A fol. 121

except MPM itself. It was noted that MPM, however, is willing to assist the Complainant in obtaining any information he may require.

27. MPM noted that in Section M (on page 9 of the OMI application form),²¹ the reference to '00.00%' related to fund-based commission. It was further noted that another code (2437651) is also entered in Section M which relates to the OMI charging structure where the code doesn't specify the applicable percentage/figure, but only refers to a code.
28. MPM also noted that, additionally, for clarity, the '*Appointing a Fund Adviser Form*'²² specifies a fund adviser fee of 0.75% per year.²³ MPM pointed out that as already set out in the response provided by MPM to the Complainant, on 13 November 2017, the Spectrum IFA Group was appointed as the Complainant's new fund adviser and that a credit was paid to the Complainant's bond for £139 as a refund for fees from the period 13 November to 28 November 2017.
29. MPM reiterated that it is not licensed to and does not provide investment advice and that furthermore, it did not provide investment advice to the Complainant. MPM noted that it is clear in MPM's application form which specifically requests the details of the Complainant's professional adviser.²⁴ It was also noted that a declaration is also made by the adviser and signed by the adviser on (page 4 of) the application itself. MPM submitted that the Complainant also declared on the application form that he acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice as per declaration 8 on page 8 of the said form.

MPM noted that to further reinforce the point that MPM does not provide investment advice, an entire section of the terms and conditions of business as attached to the application form is dedicated solely to this point, as per page 10 of the said form.

²¹ A fol. 109

²² A fol. 113 to 116

²³ A fol. 115

²⁴ A fol. 86 to 99

30. MPM submitted that it has not committed any fraud, nor has it acted negligently. MPM further submitted that it has not breached any of its obligations in any way and that any losses sustained by the Complainant are attributable to the adviser which the Complainant appointed.
31. It was noted that the Complainant must show that it was MPM's actions or omissions which caused the loss he is alleging. MPM replied that in the absence of the Complainant proving this causal link, MPM cannot be found responsible for the Complainant's claims.

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,

Further Considers:

Preliminary Plea regarding the Competence of the Arbiter

The Service Provider raised the plea that the Arbiter does not have the competence to consider this case because it is time-barred under Article 21(1)(c) of Chapter 555. Article 21(1)(c) stipulates:

'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act, if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'

In this case, the conduct complained of involves the conduct of the Service Provider as trustee and retirement scheme administrator of the Scheme, which role MPM occupied since 28 April 2015, upon the member's acceptance into the Scheme, and continued to occupy after the coming into force of the Act. It is noted that the complaint in question also involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the adviser of the Complainant.

In terms of Article 21(1)(c), the Complainant had two years to complain to the Service Provider *'from the day on which the complainant first had knowledge of the matters complained of'*.

The fact that the Complainant was sent an Annual Member Statement, as stated by the Service Provider in its reply, could not be considered as enabling the Complainant to have knowledge about the matters complained of. This taking into consideration a number of factors including that the said Annual Member Statement was a highly generic report which only listed the underlying life assurance policy. The Annual Member Statement issued to the Complainant by MPM included no details of the specific underlying investments held within the policy, which investments contributed to the losses and are being disputed by the Complainant.

Hence, the Complainant was not in a position to know, from the Annual Member Statement he received, what investment transactions were actually being carried out within his portfolio of investments.

It is also noted that the Annual Member Statement sent to the Complainant by the Service Provider had even a disclaimer highlighting that certain underlying investments may show a value reflecting an early encashment value or potentially a zero value prior to maturity and that such value did not reflect the true performance of the underlying assets.

The disclaimer read as follows:

'Investment values are provided to Momentum Pensions Malta Limited by Investment Platforms who are responsible for the accuracy of this information. Every effort has been made to ensure that this statement is correct but please accept this statement on this understanding.

Certain underlying assets with the Investment may show a value that reflects an early encashment value or potentially a zero value prior to maturity date. This will not reflect the true current performance of such underlying assets.'

Such a disclaimer did not reveal much to the Complainant about the actual state of the investment and the whole scenario could not have reasonably enabled the Complainant to have knowledge about the matters being complained of.

Moreover, the Arbitrator, makes reference to Case Number 137/2018 against MPM,²⁵ whereby it results that the Service Provider itself declared in July 2015, in reply to a member's concern regarding losses, that:

*'... whilst we, as Trustees, will review and assess any losses, **these can only be on the maturity of the note,**²⁶ as any valuations can and will be distorted ahead of the expiry.'*²⁷

The Service Provider did not prove the date of maturity of the structured notes comprising the portfolio of the Complainant. According to the valuation statements presented,²⁸ various structured notes were still within his portfolio after the coming into force of the Act.²⁹

The Arbitrator has also discovered from case number 127/2018 against MPM,³⁰ that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM.³¹ In this regard, in September 2017, members were notified by MPM about the suspension of the terms of business that MPM had with CWM. Later, in October 2017, MPM also notified the members of the Scheme about the full withdrawal of such terms of business with CWM.

The Complainant made a formal complaint with the Service Provider on the 12 November 2017³² and, therefore, within the two-year period established by Art. 21(1)(c) of Chapter 555.

The Service Provider did not prove that the Complainant raised the complaint *'later than two years from the day on which the complainant first had knowledge of the matters complained of'*.

It is also noted that not even two years had passed from the coming into force of Chapter 555 of the Laws of Malta and the date when the formal complaint was made by the Complainant with the Service Provider.

²⁵ Decided today

²⁶ Emphasis of the Arbitrator

²⁷ Case Number 137/2018 (a fol. 7 of the file) decided today

²⁸ OMI Valuation Statement dated 04/05/2018, a fol. 131-134; 'Doc. PA1' attached to MPM's Additional Submissions, a fol. 253

²⁹ *Ibid.*

³⁰ Decided today

³¹ Case Number 127/2018 (a fol. 53 of the file) decided today

³² A fol. 13

For the above-stated reasons this plea is being rejected and the Arbiter declares that he has the competence to deal with this Complaint.

Preliminary plea regarding the request to expunge documents

MPM requested the Arbiter to expunge from the record of the proceedings certain documentation filed in 2019 and not take cognisance of any new allegations raised by the Complainant against Momentum as it was *inter alia* submitted that the Complainant cannot change the basis of his complaint.

The Arbiter accepts the submission that no new allegations could be raised by the Complainant and will only consider the complaint as originally filed.

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.³³

The Arbiter is considering 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 555³⁴ which stipulates that he should deal with the complaints in '*an economical and expeditious manner*'.

The Complainant

The Complainant, born in 1965, is of British nationality and resided in France at the time of application for membership as per the details contained in the *Application Form* for Membership of the Momentum Malta Retirement Trust ('the Application Form for Membership').³⁵

The Complainant's occupation was indicated as '*Owner of Kennels*' in the said Application Form. It was not proven, during the case, that the Complainant was a professional investor. The Complainant can accordingly be treated as a retail client.

³³ Cap. 555, Art. 19(3)(b)

³⁴ Art. 19(3)(d)

³⁵ A fol. 86-99

The Complainant was accepted by MPM as a member of the Retirement Scheme on 28 April 2015.³⁶ His Risk Profile was indicated as ‘*Medium*’ in both the Application Form for Membership³⁷ and the Annual Member Statements issued by the Service Provider to the Complainant for the years ending 31 December 2015 and 31 December 2016.³⁸

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited (‘MPM’). MPM is licensed by the MFSA as a Retirement Scheme Administrator³⁹ and acts as the Retirement Scheme Administrator and Trustee of the Scheme.⁴⁰

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 2015.⁴¹

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.

³⁶ A fol. 126 – Annual Member Statement for the Year ending 31 December 2015

³⁷ A fol. 88 – Application for Membership of the Scheme – Section 07: Risk Profile.

³⁸ A fol. 126 & 129 – Annual Member Statement issued by Momentum)

³⁹ <https://www.mfsa.mt/financial-services-register/result?id=3453>

⁴⁰ Role of the Trustee, pg. 4 of MPM’s Scheme Particulars (attached to Stewart Davies’s affidavit).

⁴¹ *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/>

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.⁴²

Despite not being much mentioned by MPM in its submissions, 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 MPM's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

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

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

Particularities of the Case

The Retirement Scheme 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 MFSA⁴³ as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011⁴⁴ and under the Retirement Pensions Act in January 2016.⁴⁵

⁴² 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.

⁴³ <https://www.mfsa.com.mt/financial-services-register/result/?id=3454>

⁴⁴ Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).

⁴⁵ Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).

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'*⁴⁶ and is *'an approved Personal Retirement Scheme under the Retirement Pensions Act 2011'*.⁴⁷

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'.⁴⁸

The case in question involves a member-directed personal retirement scheme where the Member was allowed to appoint an investment adviser to advise him on the choice of investments.

The assets held in the Complainant's account with the Retirement Scheme were used to acquire a whole of life insurance policy for the Complainant.

The life assurance policy acquired for the Complainant was called the European Executive Investment Bond issued by Old Mutual International ('OMI').⁴⁹

The premium in the said policy was in turn invested in a portfolio of investment instruments under the direction of the Investment Adviser and as accepted by MPM.

The underlying investments in respect of the Complainant comprised substantial investments in structured notes as indicated in the table of investments forming part of the *'Investor Profile'* presented by the Service Provider in respect of the Complainant during the proceedings of the case.⁵⁰

The *'Investor Profile'* presented by the Service Provider for the Complainant also included a table with the *'current valuation'* as at 28/01/2018. The said table indicated a profit (excluding fees) of GBP27,824 as at that date. It is to be

⁴⁶ Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

⁴⁷ Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

⁴⁸ *Ibid.*

⁴⁹ Application Form for OMI bond – A fol. 101 & OMI Acceptance letter to the Trustee - A. fol. 256.

⁵⁰ The *'Investor Profile'* is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant.

noted that the Service Provider does not explain whether the profit indicated in the '*current valuation*' for the Complainant relates to realised or paper gains or both.

Investment Adviser

Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainant.⁵¹ The role of CWM was to advise the Complainant regarding the assets held within his Retirement Scheme.

It is noted that in the notices issued to members of the Scheme in September and October 2017, MPM described CWM as '*an authorised representative/agent of Trafalgar International GMBH*', where CWM's was Trafalgar's '*authorised representative in Spain and France*'.

In its reply, MPM explained *inter alia* that CWM '*is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH*'.⁵²

In its submissions, it was further explained by MPM that '*CWM was appointed agent of Trafalgar International GmbH ('Trafalgar') and was operating under Trafalgar International GmbH licenses*'⁵³ and that Trafalgar '*is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53*'.⁵⁴

On the 13 November 2017, The Spectrum IFA Group was appointed as the new adviser of the Complainant.⁵⁵

Consideration of Key Aspect and Conclusion

Given the divergent views emerging on whether the Complainant has suffered a loss or not on his Retirement Scheme, which is key to this complaint, the Arbiter shall focus on this matter after first considering the allegations relating

⁵¹ As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant.

⁵² Pg. 1 of MPM's reply to the OAFS.

⁵³ Para. 39, Section E titled '*CWM and Trafalgar International GmbH*' of the affidavit of Stewart Davies.

⁵⁴ *Ibid.*

⁵⁵ *A fol.* 16 – Momentum's reply to member's complaint page 4.

to the signature on the dealing instruction and the claims with respect to the charges which aspects formed the main substance of his complaint as indicated in his Complaint Form.⁵⁶

Allegations relating to the signature on the dealing instructions

The Complainant alleged that MPM accepted dealing instructions for investments which were not authorised by him where it was claimed that the dealing investment instruction forms were forged/photocopied.

This is a serious allegation which allegation has to be specifically proven by specific facts and in the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation. However, the Complainant did not provide enough evidence to the Arbiter to accept the allegation.

Allegations in relation to fees

The Complainant made certain allegations relating to fees claiming that he discovered in December 2017 he was being charged a bond fee of 1.1% by OMI which he stated was never discussed with his adviser and for which he had not signed for.

In the case reviewed, the Arbiter has not found sufficient evidence to uphold this claim taking also into consideration in particular the explanations made by the Service Provider and documentation presented with respect to the Scheme and the underlying policy, particularly the OMI policy documentation submitted by MPM in its email dated 29 July 2015 to the Complainant,⁵⁷ which included the policy schedule and the charges schedule in respect of the OMI policy which amongst other listed the 1.150% per year 'Regular Policy Management Charge'.⁵⁸

The extent of loss or otherwise experienced on the Scheme

The Complainant alleged a 'Total loss €114,000 plus £17,540' in his Complaint Form where he referred to a list attached to the said form. With his Complaint

⁵⁶ A fol. 6

⁵⁷ A fol. 255-259

⁵⁸ A fol. 258

Form the Complainant actually attached three separate (undated) lists of investments which he made himself to indicate the alleged losses as follows:

- (i) One of the lists submitted by the Complainant indicated various investments purchased in 2015 with an alleged loss of €118,554.13 in total, made up of an alleged realised loss of €103,249.40 and an unrealised loss (for investments not yet sold) of €15,304.73 according to the said list.⁵⁹
- (ii) Another list presented by the Complainant indicated the same investments purchased in 2015 with an alleged loss of €114,023.50 in total, made up of an alleged realised loss of €103,249.40 and an unrealised loss (for the same investments not yet sold) of a lower figure to that previously indicated, for the amount of €10,774.10. This list of investments also included, in addition, three investments in GBP indicated as purchased in 2016, which were marked as having not yet been sold and which had an unrealised loss in total of £17,540.22.⁶⁰
- (iii) The Complainant further attached another list of investments which indicated the same investments purchased in 2015 and reflected in the previous lists he compiled and attached to the same complaint form which list indicated an alleged loss of €116,113.40 in total, made up of an alleged realised loss of €103,249.40 and an unrealised loss (for the same investments not yet sold) of €12,864. This list also included, in addition, the three investments in GBP indicated in the list referred to in paragraph (ii) above as well as an additional investment also purchased in 2016, with all the four investments marked as having not yet been sold and which had an unrealised loss in total of £13,349.⁶¹

From its part, the Service Provider submitted in its Reply that the Complainant had an initial approximate transfer value of GBP385,520 (as included in his Application Form for Membership),⁶² and further noted that according to the

⁵⁹ A fol. 12

⁶⁰ A fol. 32

⁶¹ A fol. 74

⁶² A fol. 90

latest valuation summary dated 4 May 2018 (attached to its reply), the total current market value of the Complainant's holdings was GBP422,816.91.⁶³ MPM implied that the Complainant had not made a loss with reference to such figures and the Service Provider requested the Complainant to clarify what he was requesting.⁶⁴

The Arbiter notes that the OMI European Executive Investment Bond ('the OMI policy') commenced on 22 July 2015 with a total premium of GBP407,709.15, as clearly indicated in the official schedule of the policy issued by OMI and presented by the Service Provider itself.⁶⁵ A further GBP12,909.94 was added to the premium of the OMI policy shortly after on the 6 August 2015, as per MPM's Annual Member Statement for the year ended 31 December 2015.⁶⁶

Consequently, the total amount invested by the Complainant in the OMI policy thus amounted to a total of GBP420,619.09. The OMI statement dated 4 May 2018 presented by the Service Provider in its reply, indeed clearly indicates that the policy had a '*Total Premium Paid*' of GBP420,619.09.⁶⁷

The reference to GBP385,520 made by MPM in its reply is indeed inadequate and rather misleading for the purposes of this case as this figure was just an '*Approximate Transfer Value*' and is accordingly not the proper figure to use for an assessment of performance where reference should be made to the actual premium transferred.

However, even if one had to compare the actual premium paid into the policy (GBP420,619.09) and the current market value (GBP422,816.91) as at 4 May 2018 as per the said OMI statement dated 4 May 2018, the current market value as at that date was still slightly higher than the premium paid. In addition, the statement of 4 May 2018 indicated '*Total Withdrawals to date*' of GBP8,772.49.⁶⁸

The Arbiter further notes that in his additional submissions of 12 June 2019, the Complainant alleged that his '*pension fund was worth €579,000 when it*

⁶³ A fol. 131-132

⁶⁴ A fol. 82

⁶⁵ A fol. 257

⁶⁶ A fol. 126

⁶⁷ *Ibid.*

⁶⁸ A fol. 132

was transferred to momentum in August 2015', noting that he lived in France and 'so my pension was transferred from GBP to EUR before any investments were made'.⁶⁹ In its additional submissions, the Complainant further pointed out that the 'Current value is £379,035 or €424,480 at current exchange rate' referring to an OMI valuation as at June 2019 which he attached to the said submissions.⁷⁰

The Complainant also pointed out in his submissions that the 'OMI life bond surrender value is £35,101.61' and referred to an OMI statement issued with respect to the surrender value as attached to his submissions.⁷¹

It is noted, however, that the figure of '£35,101.61' quoted by the Complainant as being the surrender value of the OMI bond is actually incorrect as the indicated OMI statement indicates this figure for 'Outstanding charges' and not as the surrender value, where the latter was estimated in the same statement as 'GBP343,920.27'.⁷²

In his additional submissions, the Complainant also presented another list of investments compiled by himself (where the list of indicated investments did not exactly match the previous ones)⁷³ wherein he now alleged a realised loss of €130,836.41 and an unrealised loss of GBP44,049.30 from now five investments denominated in GBP, indicated as purchased in 2016 and having not yet been sold.⁷⁴

It is further noted that in its additional submissions, the Service Provider has further contested the claim of loss made by the Complainant. With reference to the valuation as at 28 January 2018 that the Service Provider attached to its submissions, MPM stated *inter alia* that 'Based on the valuation date above, the Member's investments have returned a positive return after fees of £27,824'.⁷⁵

⁶⁹ A fol. 148

⁷⁰ A fol. 148 & A fol. 158

⁷¹ A fol. 148 & A fol. 159

⁷² A fol. 159

⁷³ Previous lists did not indicate the 'BNP 6Y AC Top 3 Basket of Stocks & FTSE100' neither the 'Algo Performance' investment.

⁷⁴ A fol. 74

⁷⁵ A fol. 253-254

Whilst the table of investments issued by the Service Provider indicates a positive return as at that date, it is considered that the said table cannot either be relied upon given primarily that:

- this is incomplete as it does not reflect the material forex positions taken;
- it includes certain transactions undertaken under a different adviser on 21 November 2017;⁷⁶
- reflects valuations in GBP for investments actually done in EURO, and hence the valuation is just one for reporting purposes (with no details of what currency conversions were made, at which rate, and no distinction between actual positions of the investments/proceeds held and figures quoted in the table just for reporting purposes);
- the valuation in question does not either indicate whether the quoted 'profit' alleged by the Service Provider reflects realised gains on the portfolio as at that date.

Hence, the table provided by the Service Provider is not considered to reflect an accurate actual position.

It is also to be noted that there are various incorrect, inaccurate and misleading statements in the submissions of the Service Provider.

For example, in its additional submissions, MPM stated that:

'What is most impressive, however, is that the two annual member statements sent to complainant (for the years 2015 and 2016) show an increase in value – Momentum therefore cannot fathom what the complainant is referring to'.⁷⁷

It is to be noted however, that the Annual Member Statement for the year ended 31 December 2015 indicated a value for the OMI policy of GBP362,201.05, whilst the one for the year ended 31 December 2016 indicated a value for the OMI policy of GBP418,074.06. These figures are both of them less than the 'Total Premium Paid' into the OMI policy of GBP420,619.09 and,

⁷⁶ The new adviser, 'The Spectrum IFA Group', was appointed on 13 November 2017 – A fol. 16

⁷⁷ A fol. 251

hence, the statements do indicate a loss contrary to what was suggested by MPM in its submissions.⁷⁸

It is also noted that in its additional submissions, MPM noted *inter alia* that:

'Again, in relation to currency exposure, there is no indication that the complainant was seeking to make investments in Euro or conduct a large foreign exchange deal'.

Yet, the Arbiter notes that the very first transaction effected within the portfolio of the Complainant was indeed a material conversion from GBP to EUROS, with the conversion of a substantial amount, GBP402,709, into EUROS. It is also further noted that all the initial transactions (of more than ten investments), were done into investment instruments all denominated in EUROS as clearly reflected in the dealing instruction notes.⁷⁹ Hence, the Service Provider's statements are again in contradiction to factual events.

From the information presented during the proceedings of this case, the Arbiter further observes that whilst the original funds to the OMI policy were transferred in GBP and the '*Bond Currency*' in OMI's Application Form was selected to be GBP, the first dealing instruction dated 23 July 2015 was to convert GBP402,709 into Euro.⁸⁰

The Arbiter further observes that the dealing instructions attached to the Complaint Form also indicate that most of the investments purchased were denominated in Euros.⁸¹ Moreover, various currency transactions has emerged from the dealing instruction forms attached to the Complaint Form as follows:

- another conversion of GBP into Euros was done through a dealing transaction form dated 11 August 2015;⁸²
- proceeds from sales (of 2 assets) received in Euro where to be converted back to GBP as per dealing instruction dated 07 July 2016;⁸³

⁷⁸ A fol. 126 & 129.

⁷⁹ A fol. 54 & A fol. 55-63.

⁸⁰ A fol. 54

⁸¹ A fol. 55-68

⁸² A fol. 58

⁸³ A fol. 64

- proceeds from sales (of 7 investments) received in Euro as well as cash in EUROS were to be converted into GBP as per the dealing instruction dated 13 October 2016;⁸⁴
- that all Euros were to be converted into GBP to cover various purchases of investment instruments denominated in GBP as per the dealing instruction form dated 25 Oct 2016.⁸⁵

Furthermore, it is noted that over the period 23 July 2015 (being the date of the first forex conversion from GBP to EUROS) and July/October 2016, the value of the Euro against GBP appreciated substantially in value by around 25%.⁸⁶ Hence, there were foreign exchange gains to the Complainant's benefit. Any such realised material gains arising from currency transactions, which the Complainant has excluded from his lists of alleged losses altogether, cannot thus be disregarded from the assessment of the actual performance in the overall portfolio created.

Exact details of the extent of the actual realised gains from the currency positions taken have not been produced by either party nor were possible to be determined from the information provided.

Indeed, the lists of investments attached by the Complainant to his Complaint Form and his additional submissions indicating the alleged losses, excluded the impact of material forex transactions in his favour within the policy.

Apart, from this, there are other aspects namely:

- (i) That the OMI statements presented by the Complainant during his additional submissions, which refer to the position of the portfolio as at June 2019 are scant and not sufficiently detailed. Moreover, the said valuation does not reflect the performance of the portfolio constituted under CWM, on which the Complaint is made, but also reflects changes to the portfolio and performance under a different adviser/s – it is indeed noted that the Spectrum IFA Group was appointed as the new fund

⁸⁴ A fol. 66

⁸⁵ A fol. 67

⁸⁶ <https://www.currency-converter.org.uk/currency-rates/historical/table/GBP-EUR.html>
<https://www.currency-converter.org.uk/currency-rates/historical/table/EUR-GBP.html>

adviser as from 13 November 2017.⁸⁷ Hence, such valuations cannot reasonably be relied upon to assess the alleged losses on the portfolio created under CWM.

- (ii) In addition, the alleged losses in the lists presented by the Complainant (which lists included certain discrepancies and lacked sufficient details as explained above), were ultimately not supported and substantiated by the Complainant through any official documentation issued by OMI and/or MPM.

Accordingly, from the evidence produced, the Arbiter considers that neither the various lists produced by the Complainant on the alleged losses nor the valuation produced by the Service Provider can reasonably be relied upon for the purposes of determining whether the Complainant ultimately experienced a loss on the portfolio created at the time of CWM at the date of this decision for the reasons amply explained above.

Since the Complainant alleged the loss, it was up to him to prove such loss - something that the Arbiter cannot determine on the basis of the evidence produced.

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 legal costs of these proceedings.

**Dr Reno Borg
Arbiter for Financial Services**

⁸⁷ A fol. 16