

Before the Arbiter for Financial Services

Case No. 074/2018

SJ

(‘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,

PRELIMINARY

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.

Having considered the particular circumstances of this case, the Arbiter decided to deal with this case separately from those cases made against the Service Provider in relation to the Scheme that were treated together in terms of Article 30 of Chapter 555 of the Laws of Malta.

This decision was taken given certain particularities of the case in question as will be considered further in this decision.

The Case in question

The Complainant submitted that MPM failed in its duty of care, to exercise due diligence, to communicate in a timely manner and to professionally fulfil its duties as trustee.

The Complainant further alleged possible financial discrimination as well as possible misconduct by MPM in allowing her pension to be invested in a product, a life bond, which the Supreme Court deemed illegal.

The Complainant explained the following with respect to the alleged failures of MPM in respect of the Scheme:

- (i) Alleged failure to communicate in a timely manner

The Complainant referred to the fee structure in relation to the Old Mutual International ('OMI') bond underlying the Scheme and stated that she received this *via* email from MPM on 15 September 2015, but claimed that there was a nine-day delay in the information relayed to her from when this was received by MPM from OMI.

The Complainant explained that she was accepted by MPM on 14 November 2014 and her funds were transferred in December 2014, and that she therefore believed that her funds had been invested.

The Complainant alleged that despite that MPM made reference to Skandia's¹ terms and conditions, there was no clear outline of fee structure but just a code reference which MPM has still to date failed to explain.

The Complainant noted that given that she became aware of the fee structure on 15 September 2015 and in view of her understanding that her money had already been invested, she alleged that there was no opportunity for her to utilise the cooling-off period. The Complainant further noted that part of her funds had already been sold for euros, to purchase unauthorised products. The

¹ Skandia International rebranded to Old Mutual International - <https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandia-international-rebrands-to-old-mutual-international/>

Complainant explained that she felt at a loss as a new investor especially in relation to QROPS. The Complainant submitted that she was already tied into something she no longer felt was right for her but was advised that it was too late to withdraw as funds had already been utilised.

The Complainant furthermore submitted that to date she still has not been advised where, or who, benefited from her funds from December 2014 until September 2015.

The Complainant explained that till October 2017 there was no email communication between herself and MPM. It was submitted this was questionable in relation to MPM's responsibilities as trustee, since she claimed there was evidently untoward goings on with her investments. The Complainant further submitted that in respect of written communication, MPM had an incorrect address and despite that they updated their database in 2017 their final response to her complaint was still incorrectly addressed.

The Complainant questioned why MPM did not advise that it was possible to have online access to OMI's Wealth Management system until November 2017 and claimed that it would appear that MPM had minimal desire for her as beneficiary to see or understand what was happening within her pension pot. The Complainant submitted that annual statements had not been previously received due to the incorrect postal address and non communication via email.

The Complainant also submitted that her official complaint was submitted by email on the 19 October 2017, and then on 1 November 2017, but the final response was received on 29 January 2018 which was outside the time parameters set by MPM for dealing with complaints.

The Complainant claimed that till April 2018 some of her questions still remain unanswered and MPM still continues to use the incorrect address despite advising her that they had updated their database.

- (i) Alleged failure of duty of care, due diligence and role of trustee

Dealing instructions

The Complainant claimed that the backbone of her complaint was the unauthorised dealing instructions which were either unsigned or have been photoshopped with her signature being lifted from an alternative document. The Complainant stated that at no time did she sign a blank dealing instruction and she stated that she will not accept MPM attempting to suggest this. It was submitted that this illegal activity has led to unauthorised product purchase and FX transactions and, in her opinion, this constituted theft.

The Complainant explained that she did not authorise these investments and, therefore, she did not believe she should suffer the financial losses that they incurred. It was further explained that the information on the dealing instructions was indeed wrong and misleading and that EFG was indeed Leonteq. It was also noted that the transaction was not a sterling purchase of 10,000 but a euro purchase of 13,000 as advised by MPM itself.

The Complainant submitted that there was no authorisation issued from her to sell sterling to buy euros and that the OMI bond was specified as a GBP product as she had an alternative investment in SEB denominated in euros. The Complainant attached documents to her Complaint Form of what she considered as evidence of a photoshopped signature and an unsigned dealing instruction.

The Complainant further referred to a document attached to her Complaint Form which reflected a dealing instruction authorised and signed by herself but, however, not fully executed. The Complainant noted that she had raised questions about this and that it appeared that MPM made the decision themselves not to sell. The Complainant argued that MPM always say that as trustee they make no investment decisions and questioned why in this case they were permitted to prevent the sale of the investment. The Complainant noted that an internal email which MPM accidentally sent to her makes reference to kickbacks and parameters. It was further alleged that MPM made the decision to sell some, or all, of the individual investor holdings and stated that as a trustee MPM surely need to look after all the investors and not a select few.

The Complainant further questioned how MPM can decide who wins and who loses and also questioned whether this constituted financial discrimination.

Compliance issues

It was submitted that she repeatedly informed MPM that her address and tax reference were incorrect and, despite them saying that the address has been updated, their response to the complaint still retained the old address in January 2018. It was further alleged that the tax reference is still not resolved.

Risk Profile

The Complainant noted that her risk profile was low to medium. It was submitted that MPM failed in their duty of care and diligence to ensure her investments matched her risk profile.

The Complainant questioned why MPM, as her trustee, allowed her funds to be invested in toxic, high-risk products specified for the professional high-risk investor with a minimum financial pot of 250,000.

The Complainant alleged that MPM were aware of these high-risk investments and they were aware of churning. The Complainant questioned why MPM allowed this to happen in the first instance and for the situation to then continue.

The Complainant claimed that the fee structure of the OMI bond was unsustainable on an investment pot of less than 100,000. The Complainant questioned how many investors did not receive the fee structure until it was too late to get out of a financial vehicle which was totally unworkable. The Complainant questioned again why MPM did not react in their role as trustee. It was submitted that there is a definite clear problem of using wrapper bonds with high fees and commissions for the small investor.

The Complainant questioned why MPM allowed dealing instructions with no signatures to be processed. It was submitted that the fund adviser agreement forms clearly state that she must give written authority for changes within her investment.

With reference to the matters raised, the Complainant questioned why MPM did not fulfil their role as trustee and whistle blow and why they did not exercise their duty of care to her as investor and beneficiary.

(ii) Alleged financial discrimination

The Complainant noted that MPM made investment decisions not to execute dealing instructions when properly authorised whilst not making her aware of such decisions or the reasons behind them or potential impact of such decisions. It was questioned that this contradicted the role of trustee.

The Complainant also noted that compensation payments, gagging orders and waiving of fees were offered to select individuals. The Complainant questioned whether this was an example of financial discrimination and use of bullying tactics. She further questioned whether this type of behaviour was acceptable with the finance industry in 2018.

The Complainant attached various documentation to her Complaint Form which she considered as evidence to the respective claims and allegations made.

The Complainant requested the reimbursement of losses incurred on unauthorised product purchases and subsequent sales which was estimated at approximately £8,000, the reimbursement of fees charged from inception amounting to £7,000, and to exit the OMI investment bond without incurring the OMI and MPM exit fees which was currently indicated at £10,000. The Complainant stated that if such compensation was granted, she would waive any potential claims on current holdings due to unauthorised purchases and any claim for interest lost on balance of portfolio since inception.

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 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 submitted that without prejudice to its 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.
6. MPM noted that, in the first place, the Complainant's application form identified Neil Hathaway from CWM as the Complainant's professional adviser. MPM further noted that a declaration by Neil Hathaway confirming that the investment advice is within the investment guidelines is also in the application form (page 4).
7. MPM pointed out that the appointment of CWM as the Complainant's adviser is also confirmed on the application submitted to Skandia Life Ireland Limited. It was noted that on page 9 of this form, the Complainant appoints a fund adviser and that in this respect, reference was also made to the *Appointing a Fund Adviser Form*.

MPM noted that CWM has ceased trading and is no longer operating and that this is the only reason why the Complainant has filed a claim against MPM and not against CWM. MPM submitted that it is CWM and/or Trafalgar who is the proper respondent to this claim. MPM pointed out that it no longer accepted business from CWM as from September 2017 and that MPM is aware that CWM ceased trading on or around 29 September 2017.

MPM 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 products which have led to the Complainant's losses. MPM submitted that any business introduced by CWM to MPM fell within the MFSA's Pension Rules for Service Providers, as they relate to Retirement Scheme Administrators ('RSAs').

MPM further replied that it does not work on a commission basis and it neither receives commissions, nor pays commissions to any third parties.

8. MPM noted that the Complainant states that the fee structure in relation to the Old Mutual International ('OMI') bond was received by her via email from MPM on the 15 September 2015, and that there was a nine day delay where she attached in her Complaint Form a document marked '*Evidence nbr 1*'.

MPM noted that this document was received by it on the 7 September 2015 (as per the stamp on the document), and that the document was emailed to the Complainant (to the same email address provided to the Arbiter) on the 10 September 2015² as per the email marked as '*Appendix 2*' to its Reply. MPM submitted that there was therefore no nine day delay as alleged. MPM further submitted that additionally, this point could have been raised with MPM upon receipt of the email at the time.

9. MPM noted that the Complainant states that her '*acceptance to MPM*' was on the 14 November 2014 and that funds were transferred in December 2014. It was also noted that the Complainant stated that she therefore believed that funds had been invested ('*Evidence nbr2*' attached to the Complaint).

MPM replied that the application form is dated 14 November 2014, however, because two sets of pension funds were required to be transferred, investments took place on the 28 August 2015. MPM explained that the first set of funds from Phoenix Life was sent to MPM on the 21 January 2015; the second set of funds from LGPS was sent to MPM on the 28 August 2015 (as per the Client Account Statement attached to Appendix 2). MPM submitted that once again, the Complainant could have raised this point upon receipt of the relevant email in 2015.

² Emphasis added by MPM.

10. MPM noted that the Complainant states that MPM refer to Skandia terms and conditions, however there is no clear outline of fee structure which MPM has failed to explain, as alleged by the Complainant (in her document titled '*Evidence nbr 12 page 9*').

MPM noted that the document referred to by the Complainant as '*Evidence nbr 12 page 9*', was signed by the Complainant on the 12 November 2014 and the Complainant did not make queries with MPM about the fees. MPM submitted that additionally, the fees referred to are charged by Skandia/OMI and not MPM.

11. MPM noted that the Complainant then states that upon becoming aware of the fee structure on 15 September 2015 and understanding that her money had already been invested then there was no opportunity to utilise the cooling-off period.

MPM pointed out that the fee structure was emailed to the Complainant on the 10 September 2015 and that it was made amply clear to the Complainant that she had the right to cancel within 30 days. MPM submitted that the Complainant, therefore, had until 7 October 2015 to cancel. MPM reiterated that once again, the Complainant could have raised this matter back in 2015. MPM noted that, furthermore, the Complainant is requested to clarify how her document marked as '*Evidence nbr3*' to the Complaint Form, is related to this point.

12. MPM noted that the Complainant further states:

- That she has not been advised where or who benefitted from her funds from December 2014 – September 2015. MPM replied that this is incorrect referring to the Annual Member Statements that were sent to the Complainant (Appendix 3 attached to the Reply) as well as the email dated 10 September 2015;
- That until October 2017, there was no email communicated between the Complainant and MPM. MPM replied that this is also incorrect for the same reasons outlined above;

- That MPM had the incorrect postal address. MPM replied that all correspondence was also sent to the Complainant via email to the email address provided by the Complainant herself on the Complaint;
- That despite updating the database in 2017, MPM's reply was sent to the incorrect address. In this respect, MPM referred to the reply made in the preceding point;
- That MPM did not advise that it was possible to have online access to OMI Wealth Management system until November 2017. MPM replied that this information is not for MPM to provide, but should have been provided to the Complainant by her advisers.

MPM noted that in support of her claims the Complainant refers to '*Evidence nbr16*'. MPM noted that it appears that this document contains a description of the word 'trustee' and it is therefore unclear how it is intended to substantiate the Complainant's claims.

13. MPM noted that the Complainant states that her complaint was submitted to MPM on 19 October 2017 and on 1 November 2017 and that she received her response on the 29 January 2018. MPM also noted that the Complainant further states that, to date, some of her questions have not been replied to (referring to the documents she marked as '*Evidence nbr 4 and 5*').

MPM replied that acknowledgement and update emails were sent to the Complainant on the 2 and 22 November, 20 December 2017 and 19 January 2018, before the response was sent on 29 January. MPM also noted that, furthermore, additional correspondence was also exchanged with the Complainant, and that the Complainant herself even thanked MPM for their continued assistance with her Complaint (as per '*Appendix 4*' and '*Appendix 5*' attached to MPM's Reply).

14. MPM noted that with respect to the dealing instructions, the Complainant alleges as follows:
 - That the backbone of her complaint are the '*unauthorised dealing instructions which are either unsigned or have been photo shopped, lifting my signature from an alternative document*' ('*Evidence nbr 6*').

MPM replied that the Complainant must prove her allegations with respect to the dealing instructions;

MPM submitted that dealing instructions are not completed by MPM and that MPM has no awareness or line of sight of what discussions and arrangements take place between the Complainant and her appointed adviser, CWM, regarding dealing instructions.

MPM noted that it is MPM's 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. MPM submitted that in all cases involving the Complainant's dealing instructions, such verification was made by MPM.

MPM further submitted that it had controls in place to ensure that the dealing instructions received by MPM bore the signature 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 investment guidelines. MPM also submitted that the dealing instructions were submitted by the appointed adviser, CWM, and met MPM's Investment Guidelines.

- That the Complainant did not authorise the investments and therefore shouldn't suffer the associated losses. MPM noted that the Complainant further states that with respect to '*Evidence nbr6 – para A*', that the information is wrong and misleading and that the purchase was a Euro purchase of 13,000 not a sterling purchase of 10,000. MPM noted that the Complainant states that there was no authorisation to sell Sterling to buy Euros. MPM replied that the trades referred to in this document did not result in a loss to the Complainant, as will be shown throughout the proceedings.
- That '*Evidence nbr 7*' is a photo shopped signature. MPM replied that the Complainant must prove this, as this does not result from the document;

- That '*Evidence nbr 8*' is unsigned. MPM replied that this dealing instruction was signed by the Complainant's adviser;
 - That '*Evidence nbr 9*' is authorised and signed but wasn't fully executed.
 - That the Complainant claims that '*Evidence nbr 10*' contradicts the role of trustee. MPM replied that it has already explained the reference to '*kickback*' in the document '*Evidence nbr 10*'. MPM replied that in the email dated 14 February 2018 (forming part of Appendix 4 to the Reply), it was explained that '*kickback*' reflects a rejection (kicked-back) of the first sale of what was largely capital guaranteed notes that had been purchased – and that therefore it was only a partial sale/purchase that was carried out while the rest was rejected, or kicked-back.
15. MPM noted that the Complainant also alleges that MPM failed in their duty of care and due diligence to ensure the investments matched her risk profile.

MPM replied that the Complainant's risk profile was chosen by the Complainant and her adviser. It was noted that the chosen risk profile was '*Low to Medium*'. MPM explained that the member and the adviser appointed by the member select investments, and the adviser ensures that the investments comply with the member's risk profile. MPM further explained 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.

MPM submitted 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, as will be shown throughout the course of these proceedings.

MPM noted that the Complainant also states that MPM was allegedly aware of '*churning*' but fails to specify with respect to whom the allegation is being levelled. MPM requested the Complainant to clarify this so that MPM will be in a position to reply.

16. MPM noted that the Complainant further alleges:

- That the fee structure of the OMI bond is unsustainable. MPM replied that it cannot reply with respect to the fee structure of OMI and that, furthermore, the fee structure was disclosed to the Complainant;
- That MPM allowed dealing instruction with no signature. MPM noted that the Complainant then refers to a document without specifying the number. MPM noted that it believes the reference should be to '*Evidence nbr 13 page 2 of 4*'. MPM submitted that this confirms that the Complainant allowed the fund adviser to sign/submit written instructions on her behalf.
- That MPM should have fulfilled their role as trustee and '*whistle blow*'. MPM submitted that once again the Complainant refers to '*Evidence nbr 16*' but it is unclear how this is intended to substantiate the claim. MPM submitted that, furthermore, MPM will not be in a position to reply to the Complainant's claims unless the Complainant clarifies what MPM should have disclosed.

17. MPM noted that the Complainant further alleges that select individuals were given compensation payments, gagging orders and waiving of fees and alleges that this is financial discrimination ('*Evidence nbr 15*'). MPM replied that any information in the Complaint, or documents attached thereto, which disclose information relating to persons who are not involved in this claim should be deleted from the record and documents expunged. MPM submitted that the disclosures breach the rights, both in terms of confidentiality and data protection of the persons with respect to whom they have been made.

MPM submitted that it will not disclose any information pertaining to any other member but stated that it never paid any sums or made any financial contribution towards any legal settlement involving ex-CWM clients and CWM/Trafalgar. MPM further submitted that it had been working hard to help those members who have suffered as a result of CWM actions and, in certain circumstances, in a very limited way, has offered assistance. MPM submitted that this was in no way an admission of liability.

18. MPM submitted that as already stated in its Reply, it is not licensed to and does not provide investment advice and, furthermore, it did not provide investment advice to the Complainant. Reference was made to the application form in Appendix 1 to the Reply, wherein it was noted that an entire section of the terms and conditions of business (attached to the Application Form), is dedicated solely to this point (as per page 10 of the Application Form).
19. MPM requested the Complainant to clarify the quantification of the losses she is alleging.
20. MPM submitted that it has not committed any fraud, nor has it acted negligently. MPM stated that it has not breached any of its obligations in any way and submitted that the losses sustained by the Complainant are attributable to the adviser appointed by the Complainant.
21. MPM pointed out that the Complainant must show that it was MPM's actions or omissions which caused the loss being alleged. 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.'

The Act came into force on 18 April 2016. As to the '*conduct of a financial service provider*' the law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

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 Service Provider has not explained on what basis the Complaint cannot be entertained pursuant to article 21(c) other than indicating that '*more than two years have lapsed since the conduct complained of*'.³

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 14 November 2014, 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 essence, also involves the conduct of the Service Provider during the period in which CWM acted 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*'.

It is noted that the Complainant submitted that annual statements had not been previously received due to incorrect postal address. No relevant evidence was provided by the Complainant on this specific point. MPM, on its part, provided copies of the annual member statements for 2015 and 2016 sent to the Complainant's email, which email is the one reflected in the Complaint Form.

³ Page 1 of the Reply filed by MPM before the Arbiter for Financial Services.

However, notwithstanding the fact that the Complainant was sent an Annual Member Statement, such a statement could, however, 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 are being disputed by the Complainant. Hence, the Complainant was not in a position to know from the Annual Member Statement what investment transactions were actually being carried out within her 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 the 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 the 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 investments and the whole scenario could not have reasonably enabled the Complainant to have knowledge about the matters being complained of.

It is also noted that contested investments, which included structured notes, were still within her portfolio after the coming into force of the Act. The Arbiter, makes reference to case number 137/2018,⁴ 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,**⁵ as any valuations can and will be distorted ahead of the expiry'.⁶*

The Arbiter has also discovered from case number 127/2018⁷ that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM.⁸ 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 1 November 2017 and this within the two-year period established by Art. 21(1)(c) of Chapter 555.

Therefore, 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.

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

⁴ Decided today

⁵ Emphasis of the Arbiter

⁶ Case Number 137/2018 (*a fol. 7* of the file), decided today

⁷ Decided today

⁸ Case Number 127/2018 (*a fol. 53* of the file)

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.⁹

The Arbiter is considering all the 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 555¹⁰ which stipulates that he should deal with the complaints in '*an economical and expeditious manner*'.

The Complainant

The Complainant, born in 1958, resided in Spain at the time of application for membership as per the details contained in the *Application for Membership of the Momentum Malta Retirement Trust* ('the Application Form for Membership').

The Complainant's occupation was indicated as '*Baker*' in the said Application Form. It was not proven during the case that the Complainant was a professional investor and it is clear that the Complainant was a retail client.

The Complainant was accepted by MPM as member of the Retirement Scheme on 14 November 2014.

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator¹¹ and acts as the Retirement Scheme Administrator and Trustee of the Scheme.¹²

The Legal Framework

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

⁹ Cap. 555, Art. 19(3)(b)

¹⁰ Art. 19(3)(d)

¹¹ <https://www.mfsa.mt/financial-services-register/result/?id=3453>

¹² Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

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 2015.¹³

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.¹⁴

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',

¹³ 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/>

¹⁴ 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.

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 MFSA¹⁵ as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011¹⁶ and under the Retirement Pensions Act in January 2016.¹⁷

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’*,¹⁸ and is *‘an approved Personal Retirement Scheme under the Retirement Pensions Act 2011’*¹⁹.

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’.*²⁰

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

¹⁵ <https://www.mfsa.com.mt/financial-services-register/result/?id=3454>

¹⁶ Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies’s affidavit).

¹⁷ Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies’s affidavit).

¹⁸ Important Information section, Pg. 2 of MPM’s Scheme Particulars (attached to Stewart Davies’s affidavit).

¹⁹ Regulatory Status, Pg. 4 of MPM’s Scheme Particulars (attached to Stewart Davies’s affidavit).

²⁰ *Ibid.*

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 Skandia International²¹/Old Mutual International ('OMI').²²

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 various investments in structured notes, apart from funds, with the investments in structured notes in total comprising £43,000²³ (out of a '*Total Amount Invested*' of £86,218) as indicated in the table of investments forming part of the '*Investor Profile*' presented by the Service Provider during the proceedings of the case ('the Table of Investments').²⁴

The '*Investor Profile*' presented by the Service Provider in respect of the Complainant also included a table with the '*current valuation*' as at 29/01/2018. The said table indicated a slight profit (excluding fees) of GBP563 as at that date. The Complainant does not agree that she registered a profit. This issue will be dealt with later on in this decision.

Underlying Investments

As indicated above, the investments undertaken within the life assurance policy of the Complainant were summarised in the table of investment transactions included as part of the '*Investor Profile*' information sheet provided by the Service Provider.²⁵

²¹ 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/>

²² Welcome Letter dated 9 June 2014 issued by Skandia International in respect of her policy no. 50047085 refers.

²³ GBP5,000+GBP5,000+GBP5,000+GBP15,000+GBP13,000 = GBP43,000 in respect of 5 structured notes purchased at the same time in September 2015.

²⁴ The '*Investor Profile*' is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant.

²⁵ Attachment to the '*Additional submissions*' made by MPM in respect of the Complainant.

The extent of investments in structured notes, indicated as 'SN' in the column titled 'Asset Type' in the said table of investment transactions can be seen from the said table.

The said table indicates that the equivalent of half of the '*Total Amount Invested*' was done into structured notes with the sale of some of these products occurring in May and November 2016.

Responsibilities of the Service Provider

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

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

As indicated in the MFSA's Registration Certificate dated 28 April 2011, issued to MPM under the SFA, MPM was required, in the capacity of Retirement Scheme Administrator:

'to perform all duties as stipulated by articles 17 and 19 of the Special Funds (Regulation) Act, 2002 ... in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the [SFA]'.

The obligations of MPM as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the various conditions stipulated in the original Registration Certificate which *inter alia* also referred to various Standard Operational Conditions (such as those set out in Sections B.2, B.5, B.7 of Part B and Part C) of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*' ('the Directives').

In terms of the said Registration Certificate issued under the SFA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the SFA, the regulations and the Directives issued thereunder.

Following the repeal of the SFA and issue of the Registration Certificate dated 1 January 2016 under the RPA, MPM was subject to the provisions relating to the services of a retirement scheme administrator in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the RPA.

As a Retirement Scheme Administrator, MPM was subject to the conditions outlined in the '*Pension Rules for Service Providers issued under the Retirement Pensions Act*' ('the Pension Rules for Service Providers') and the '*Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' ('the Pension Rules for Personal Retirement Schemes').

In terms of the said Registration Certificate issued under the RPA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the RPA, the regulations and the Pension Rules issued thereunder.

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

From the various general conduct of business rules/standard licence conditions applicable to MPM in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively, it is pertinent to note the following general principles:²⁶

- a) Rule 2.6.2 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that:

'The Scheme Administrator shall act with due skill, care and diligence – in the best interests of the Beneficiaries ...'

The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, and which applied to MPM as a Scheme Administrator under the RPA, provided that:

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

²⁶ Emphasis added by the Arbitrator.

- b) Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that:

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

The same principle continued to apply under the rules issued under the RPA. Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provided that:

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

- c) Rule 2.6.4 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA provided that:

'The Scheme Administrator shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative and financial procedures and controls in respect of its own business and the Scheme to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed ...'.

The same principle continued to apply under the rules issued under the RPA. Standard Condition 4.1.7, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, provided that:

'The Service Provider shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative and financial procedures and controls in respect of its own business and the

Scheme or Retirement Fund, as applicable, to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed.'

Standard Condition 1.2.2, Part B.1.2 titled 'Operation of the Scheme, of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, also required that:

'The Scheme shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative and financial procedures and controls to ensure compliance with all regulatory requirements'.

Trustee and Fiduciary obligations

As highlighted in the section titled 'The Legal Framework' above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is also relevant for MPM considering its capacity as Trustee of the Scheme. This is an important aspect on which not much emphasis on, and reference to, has been made by the Service Provider in its submissions.

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

The said article provides that:

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

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

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

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

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property *'as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality'*.²⁷

As has been authoritatively stated:

'Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'.²⁸

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

'In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries.

It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts.

In particular, the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus pater familias in the performance of his obligations'.²⁹

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

²⁷ *'An Introduction to Maltese Financial Services Law'*, Editor Dr Max Ganado, Allied Publications 2009, pg. 174.

²⁸ *Op cit.* Pg. 178

²⁹ Page 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.

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

Final Observations and Conclusions

Allegation relating to the Cooling-Off period

The Arbiter notes that the underlying policy was undertaken on the 3 September 2015, with the respective documentation in relation to the policy being then received by MPM from OMI on 7 September 2015 and, subsequently, emailed by MPM to the Complainant on the 10 September 2015.³⁰

The Complainant claimed, without providing adequate evidence, that the said email was only received by her on the 15 September 2015. However, it is clear that this is not the case and there is sufficient evidence that the documentation relating to the underlying policy was sent on the 10 September 2015.

In any case, the Arbiter does not consider, in the particular circumstances of this case, that there are sufficient grounds on which he can accept the Complainant's request for redress on the argument that the Complainant was not able or was prevented from exercising the cooling-off period in relation to the underlying policy which was applicable way back in 2015.

Apart from the extent of time that has now passed since the applicability of the cooling-off period and the claim being made by the Complainant on this specific point, it is also considered that the Complainant still had the option, at the time, to exercise her right to cancel in case she wanted to pursue such venue at the time.

The Arbiter does not feel he can accept the Complainant's request for redress on this specific point in view of the reasons mentioned.

Allegations in relation to fees

The Complainant also made allegations related to fees not being disclosed, fully explained and/or being high.

³⁰ Appendix 2 to MPM's Reply before the Arbiter for Financial Services.

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's charging structure.

With respect to the fees being high, the Arbiter considers that there is also insufficient evidence for him to determine whether, in the particular circumstances of the case, the contested fees were reflective of, or not, in line with market practice.

Allegations relating to the signature on the dealing instructions

The Complainant also alleged that MPM accepted investments which were not authorised by her claiming that the dealing investment instruction forms were either unsigned or had been photoshopped where her signature had been lifted from an alternative document.

In this regard, the Complainant did not provide enough evidence to the Arbiter to accept such allegation.

Nonetheless, the Arbiter would like to comment on the practice adopted by the Service Provider.

Communications relating to dealing instructions seem to have only occurred between MPM and the investment adviser without the Complainant being in copy or made promptly and adequately aware of the investment instructions given by the investment adviser and executed by MPM. It has indeed not emerged during the proceedings of the case that the Complainant was being adequately and promptly notified by MPM about material developments relating to her portfolio of investments within the Scheme as would reasonably be expected in respect of a consumer of financial services.

Not even the statements issued annually by MPM to the Member of the Scheme provided details of the underlying investments. The Annual Member Statements were indeed generic in nature and only mentioned the underlying policy. Such statements did not include details of the investment transactions undertaken over the respective period nor details about the composition of the portfolio of investments as at the year end.

In its capacity as Trustee and Scheme Administrator, MPM had full details of the investment transactions undertaken and the composition of the portfolio but yet did not report about such and neither did it ensure that the Complainant had received such information.

The procedures used and methods of communications adopted by MPM, indeed enabled a possible situation such as that claimed by the Complainant. The serious allegations about the dealing instructions could have been easily avoided and/or at least addressed in a timely manner with simple measures and safeguards adopted by the trustee and scheme administrator.

In the context of member-directed schemes such measures could have involved, for example, accepting communications either from the Complainant or with the Complainant being in copy in certain communications involving dealing instructions/confirmation of execution; and/or the Member being adequately and promptly informed by MPM of the purchases and redemptions being made within the portfolio of investments.

This highlights the apparent lack of adequate controls and administrative procedures implemented by MPM which reasonably put into question MPM's adherence with the requirements to have adequate operational, administrative and controls in place in respect of its business and that of the Scheme as it was required to do in terms of Rule 2.6.4 of Part B.2.6 of the Directives under the SFA and Standard Condition 4.1.7, Part B.4.1 of the Pension Rules for Service Providers issued under the RPA as well as Standard Condition 1.2.2, Part B.1.2 of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA during the respective periods when such rules applied as outlined above.

The lack of adequate controls and administrative procedures is not just an aspect that features with respect to the handling of dealing instructions and verification of consent by the Member of such instructions, but also on another aspect involving the ongoing activities of the Scheme Administrator. This is particularly so with respect to the reporting to the Member as shall be considered below in this decision.

Key considerations

The Arbiter will now consider other key alleged failures. The Complainant stated that the backbone of her complaint were the unauthorised dealing instructions. Part of her claims in this regard related to the allegation that MPM failed in its duty of care and diligence in ensuring that her investments matched her risk profile as well as the allegation that MPM allowed her pension to be invested in toxic high risk products aimed for professional investors.

The permitted portfolio composition

Investment into Structured Notes

It is noted that as emerging from the 'Table of Investments' presented by the Service Provider as part of the 'Investor Profile', half of the 'Total Amount Invested' in the pension portfolio was invested into the following 5 structured notes:³¹

- Morgan Capital: 3 Yr GBP Index Phoenix, whose issuer was indicated as Morgan Stanley;
- Leonteq DBS 1.5Y Multi Barrier Express Cert 7.37%, whose issuer was indicated as DBS;
- BTG Pactual World Index Phoenix GBP, whose issuer was indicated as BTG;
- Leonteq 5Y Cap Prot 70% Swiss Market Index, whose issuer was indicated as Leonteq;
- Leonteq 6Y Airbag Outperformance Certificate, whose issuer was indicated as EFG.

From the dealing instruction forms presented by the Complainant, only 3 ISIN numbers of the said 5 structured notes could be determined, these being:

- ISIN XS1249309797 in respect of the structured note issued by DBS;

³¹ Doc. DK1 to MPM's Additional Submissions.

- ISIN CH0283714217 in respect of the structured note named Leonteq 5Y Cap Prot 70% Swiss Market Index;
- ISIN CH0287819244 in respect of the structured note named Leonteq 6Y Airbag Outperformance Certificate.

As part of her additional submissions, the Complainant attached two term sheets, which were themselves incomplete, as they only included the first page. Moreover, the term sheets presented by the Complainant were in respect of the following two structured notes:

- one offered by EFG International, named the Express Certificate on BP, Cobalt International Energy, Royal Dutch Shell, Seadrill Ltd, bearing ISIN CH0273397429;
- one offered by Leonteq, named the 7.00% p.a. Multi Barrier Reverse Convertible on Achillion Pharmaceuticals, Barclays, Kinross Gold Corp, Sears Holdings, bearing ISIN CH0266684593.

Neither of the above-mentioned two term sheets reflected either the available ISIN numbers or names of structured notes featuring in the Complainant's portfolio as indicated above. The term sheets produced by the Complainant cannot accordingly be taken into account in the case in question.

The Arbiter did not manage either to source any term or fact sheet in respect of any of the structured products featuring in the Complainant's portfolio.

In the absence of fact sheets in respect of any of the structured products specifically constituting part of the Complainant's portfolio, the Arbiter considers that, in the particular circumstances of this case, he is not in a position to consider further this aspect.

On the basis of the information available at hand and emerging during the proceedings of this case, the lack of relevant sufficient evidence in relation to the nature of structured notes invested into, and also taking into consideration the specific allocation and composition of the portfolio of investments as summarised in the '*Table of Investments*', the Arbiter considers that, in the particular circumstances of this case, he does not have sufficient basis on which he can uphold the Complainant's claim that '*my trustee allowed my*

funds to be invested in toxic high risk products which are specific for the professional high risk', and neither the claim that MPM failed in their duty of care and diligence to ensure her investments matched her risk profile.

The Arbiter will, in the particular circumstances, not delve any further on the subject of the portfolio composition.

The Provision of information

With respect to reporting to the member of the Scheme, MPM mentioned and referred only to the Annual Member Statement in its submissions. The said annual statements issued by the Service Provider to the Complainant are, however, highly generic reports which only listed the underlying life assurance policy and included no details of the underlying investments, that is, the structured notes comprising the portfolio of investments.

Hence, the extent and type of information sent to the Complainant by MPM as a member of the Scheme in respect of her underlying investments is considered to have been lacking and insufficient.

SOC 9.3(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes of 1 January 2015 already provided that, in respect of member directed schemes:

'a record of all transactions (purchases and sales) occurring in the member's account during the relevant reporting period should be provided by the Retirement Scheme Administrator to the Member at least once a year and upon request ...'.³²

It is noted that the Pension Rules for Personal Retirement Schemes under the RPA became applicable to MPM on 1 January 2016 and that, as per the MFSA's communications presented by MPM,³³ Part B.9 of the said rules did not become effective until the revised rules issued in 2018.

Nevertheless, it is considered that even where such condition could have not strictly applied to the Service Provider from a regulatory point of view, the Service Provider as a Trustee, obliged by the TTA to act as a *bonus*

³² The said condition was further revised and updated as per condition 9.5(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes indicated as '*Issued: 7 January 2015/Last updated: 28 December 2018*'

³³ MFSA's letter dated 11 December 2017, attached to the Note of Submissions filed by MPM in 2019.

paterfamilias and in the best interests of the members of the Scheme, should have felt it its duty to provide members with detailed statements and information on the underlying investments.

Moreover, prior to being subject to the regulatory regime under the RPA, the Service Provider was indeed already subject to regulatory requirements relating to the provision of adequate information to members such as the following provisions under the SFA framework:

- Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002³⁴ respectively already provided that:

'2.6.2 The Scheme Administrator shall act with due skill, care and diligence in the best interests of the Beneficiaries. Such action shall include:

...

b) ensuring that contributors and prospective contributors are provided with adequate information on the Scheme to enable them to take an informed decision ...';

'2.6.3 The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and nor misleading.

This shall include:

...

b) reporting fully, accurately and promptly to contributors the details of transactions entered into by the Scheme ...'.

³⁴ Condition 2.2 of the Certificate of Registration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives.

There is no apparent and justified reason why the Service Provider did not report itself on key information such as the composition of the underlying investment portfolio which it had in its hands as the trustee of the underlying life assurance policy held in respect of the Complainant.

The general principles of acting in the best interests of the member and those relating to the duties of trustee as already outlined in this decision³⁵ and to which MPM was subject to, should have prevailed and should have guided the Service Provider in its actions to ensure that the Member was provided with an adequate account of the underlying investments within her portfolio.

The provision of details on the underlying investments could have ultimately enabled the member of the Scheme to highlight any transactions on which there were any issues.

The extent of loss or otherwise experienced on the Scheme

In its reply, MPM claimed that the trades referred to in the document titled '*Evidence nbr6*' attached to the Complainant's Complaint Form, which included transactions in structured notes, did not result in a loss to the Complainant. In its Reply, MPM also requested the Complainant to clarify the quantification of the losses she was alleging.

In her additional submissions, the Complainant indicated that her pension fund transfer was originally GBP86,217.78. (This figure is corroborated by the Service Provider).³⁶

The Complainant further indicated in her additional submissions, that she made a cash withdrawal of GBP16,000.³⁷ (The Service Provider from its part indicated a lower figure of GBP15,000 as '*Retirement Benefits taken*').³⁸

In her additional submissions, the Complainant also indicated that the value of her pension fund was GBP58,902.98, providing a screen shot of OMI's

³⁵ The section titled '*Responsibilities of the Service Provider*'.

³⁶ '*Total Amount Invested*' in Doc. DK1 attached to MPM's Additional Submissions is indicated as GBP86,218 by MPM, as well as Appendix 2 to the Reply filed by MPM before the Arbiter for Financial Services.

³⁷ A fol. 112

³⁸ Doc. DK1 attached to MPM's Additional Submissions.

valuation of her policy as at 17 June 2019.³⁹ The Complainant, thus, intimated a reduction of GBP11,314.80 from the original pension fund transfer.⁴⁰

On its part, in its Additional Submissions, the Service Provider indicated that on the basis of a '*current valuation at 29/01/2018*' the Complainant was indicated to have actually experienced a slight profit of GBP563 on investments (which figure, however, excluded fees of GBP5,989 in respect of '*Adviser and Investment Company Fees*' and GBP1,000 in respect of '*Momentum Fees*').⁴¹ The claimed slight profit of GBP563 on investments was also not indicated as being realised or whether it was a paper gain or both, as explained earlier above.

Whilst the valuation provided by the Service Provider is relatively dated and does not include sufficient details for the reasons already explained, the valuation on which the Complainant has based her claims of loss is not sufficiently detailed either as it *inter alia* does not list the investments on which such valuation is based.

From the evidence produced, the Arbiter considers that neither the valuation produced by the Complainant nor that by the Service Provider can reasonably be relied upon for purposes of determining whether the Complainant ultimately experienced a **realised loss** or a **realised profit** on the portfolio created at the time of CWM. Since the Complainant alleged the loss, it was up to her to prove such loss. Something that the Arbiter cannot determine on the basis of the evidence produced.

Other aspects

The Arbiter notes that the Complainant raised other aspects in her Complaint Form, such as the claim relating to a dealing instruction not being fully executed by MPM, the use of incorrect address and tax reference numbers by MPM, the claim of financial discrimination or MPM not acting as a whistleblower, which are, however, either in themselves not considered to have sufficient material bearing on the claim for the compensation requested by the Complainant and/or otherwise in respect of which insufficient evidence was

³⁹ Evidence 2 to the Additional Submissions presented to the OAFS by the Complainant.

⁴⁰ GBP86,217.78 less the cash withdrawal of GBP16,000 and less the '*current value*' of GBP58,902.98.

⁴¹ Doc. DK1 attached to MPM's Additional Submissions received in August 2019.

produced or emerged during this particular case and which accordingly were in this case unsubstantiated.

Conclusion

The Arbiter considers that, in the particular circumstances of this case, no sufficient evidence has been produced and/or emerged for the Arbiter to reasonably uphold the Complainant's claims for compensation of losses on the alleged unauthorised investments.

Considering, however, the particular circumstances of this case, including the indicated administrative shortfalls on MPM's procedures in respect of dealing instructions and lack of adequate reporting to the Complainant, as amply explained above, the Arbiter considers that on the basis of what is fair, equitable and reasonable,⁴² if the Complainant elects to leave the Scheme, the Service Provider should not charge the Complainant its own fees applicable in case of a transfer out of the Scheme.

Because of the novelty of this case, and because the Arbiter has rejected the preliminary pleas raised by the Service Provider, each party is to bear its own legal costs of these proceedings.

**Dr Reno Borg
Arbiter for Financial Services**

⁴² Cap. 555 of the Laws of Malta, Art. 19(3)(b)