

Before the Arbiter for Financial Services

Case No. 107/2018

BW

(‘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 she experienced a substantial amount of loss on her pension fund due to mismanagement and investment into high-risk products unsuitable for a pension fund.

It was claimed that her pension fund has been invested into products '*with long tie-in dates*' where, if she had to request for her money to be transferred, she would incur severe penalties incurring further losses. The Complainant noted that this was done despite the fact that MPM knew that she wanted a lump sum payment on her 55th birthday in 2020.

The Complainant noted that her original investment on 30 November 2015 was EUR189,633.13 and according to the last valuation dated 8 June 2018 her investment amounted to EUR146,233.43, a loss of EUR43,399.70.

The Complainant explained that a formal complaint to MPM was made on 2 April 2018 and she received their response on 11 June 2018. She also noted that MPM deny all knowledge of any fraud committed and lay the blame on her and her financial advisers, currently Trafalgar International GmbH, who they appointed.

The Complainant submitted that MPM never acted in her best interests allowing her pension fund to be invested into products that were not suitable for this type of investment, that is, a personal retirement pension fund.

The Complainant explained that her partner died very suddenly in May 2015 whilst her application was being processed by MPM and they were aware that she would need to take a significant part of her pension as a lump sum on her 55th birthday. It was noted that she can no longer do this due to the lack of care and understanding of her circumstances by MPM.

The Complainant pointed out that when she originally invested her money, she was told that her pension fund would be carefully monitored to avoid any losses whatsoever and that if a particular scheme started to lose any money her pension fund would be transferred away immediately.

The Complainant claimed that this has clearly not happened and, moreover, her pension had been invested into schemes with long tie-in/early release

penalties, with this being another example of the lack of care of her circumstances by MPM.

In the letter dated 11 June 2018 MPM sent in reply to her complaint, MPM laid the blame for her losses on herself and her advisers Trafalgar International GmbH. The Complainant submitted that, as far as she was aware, MPM as trustees of her pension fund appointed Trafalgar International to act as her advisers. The Complainant submitted that she understood *'that Trafalgar are actually NOT LICENCED to give financial advice at all'*.

The Complainant requested the total reimbursement of all losses including all fees paid to MPM and any costs incurred in taking this matter to arbitration, as well as all commissions paid to third parties for investing her funds in high-risk investments. The Complainant noted that she was of the understanding that commissions could be up to 30% of the value of the investment and that this could go some way to explain her losses of EUR43,399.70 as at 8 June 2018.

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 raised the preliminary plea that the complaint relates to conduct which occurred before the entry into force of Chapter 555 of the Laws of Malta on 18 April 2016. In this regard, MPM submitted that the Complaint was filed on the 8 August 2018 and argued that this was, therefore, beyond the two-year time period allowed by Article 21(1)(b) of the said law. MPM further submitted that for these reasons, the Complaint cannot be entertained.

MPM also stated that without prejudice to the above and also preliminary, if the Arbiter determines that the conduct complained of is conduct which occurred after the entry into force of Cap. 555, MPM respectfully submits that more than two years have lapsed since the conduct complained of took place, and 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 appointed CWM as her adviser. MPM referred in this regard to the application form of MPM and that of Old Mutual International. MPM submitted that in spite of this, MPM 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 noted that additionally, it cannot reply with respect to any advice the Complainant received from CWM.

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.

7. MPM noted that the Complainant states that she suffered a loss due to *'mis-management and investment into 'High Risk' products unsuitable for a pension fund'*. MPM submitted that, in the first place, on the application form, the Complainant has indicated her risk profile as *'High'*.

It was noted that, additionally, MPM does not provide investment advice. MPM pointed out that the Complainant indicated (page 3 of her Momentum application form) that her attitude to risk was *'High'*. MPM

also noted that, furthermore, CWM was the Complainant's appointed adviser not MPM. MPM submitted that it was therefore CWM and the Complainant who set and agreed the Complainant's investment strategy. MPM submitted that MPM does not provide investment advice and that the investments made were in line with the Complainant's risk profiles and in line with the guidelines applicable at the time of the Complainant's application.

MPM explained that it charges a fixed fee for the services it provides and that this fee does not change regardless of the underlying investment (which the Complainant was advised to invest in by CWM). It was noted that accordingly, MPM did not stand to make any gain or benefit as a result of the Complainant investing in any particular underlying investments.

MPM further replied that it is aware that Old Mutual International Ireland Limited ('OMI'), the bond provider, has initiated legal action against one of the structured note providers (Leonteq Securities AG ('Leonteq')) for losses incurred by the ultimate holders of the bonds, such as the Complainant. It is pertinent to note that it is OMI, and not MPM who is pursuing this litigation against Leonteq.

8. MPM noted that the Complainant also states that the fund has been invested into products with '*long tie-in dates*'. MPM pointed out that the Complainant's investment strategy was agreed between her and her appointed adviser CWM, and furthermore CWM advised the Complainant on product selection. MPM noted that the Complainant also alleges that MPM was aware that the Complainant wanted to take a lump sum payment in 2020. MPM replied that it is possible for the Complainant to take a lump sum payment and that the benefits of a QROPS allow the Complainant to take retirement benefits at any time between the age of 55 and 75. MPM also noted that the Complainant can also withdraw a Pension Commencement Lump Sum (PCLS) payment, subject to retirement benefits having commenced.

MPM submitted that the Complainant may have disclosed her proposed retirement date on MPM's application form, but this is irrelevant to the actual date when a PCLS may be taken.

9. MPM noted that the Complainant alleges that her original investment was EUR189,633.13 on 30 November 2015. MPM replied that this is not correct and that the funds received amounted to GBP137,672.31 and the amount of the initial investment was GBP132,913.86 as per the Client Account Statement marked Appendix 3 to its reply. MPM also pointed out that the fee structure was agreed to by the Complainant on the 23/07/2015.
10. MPM confirmed that it received the Complainant's complaint and responded on 11 June 2018. MPM submitted that the Complainant's complaint only raised the point that her losses resulted from *'mismanagement and investment in products unsuitable for a pension'*, and there were no other issue raised. MPM noted that the Complainant's complaint to MPM did not raise any allegations of fraud and therefore such allegations were not addressed in the response. MPM noted that the Complainant also alleges that Trafalgar was appointed by MPM. MPM replied that this is false and incorrect.
11. MPM noted that the Complainant alleges that MPM never acted in her best interests but fails to explain why this is allegedly the case or to substantiate her allegation. MPM replies that it has, at all time, fulfilled all its obligations with respect to the Complainant.
12. MPM also noted that the Complainant further alleges that MPM allowed her pension fund to be invested into products that were not suitable for her personal retirement fund. MPM reiterated that the investments made were in line with the Complainant's risk profiles and in line with the guidelines applicable at the time of the Complainant's application.
13. MPM noted that the Complainant claimed that her funds would be transferred immediately they started to lose money and that the losses would be carefully monitored. MPM submitted that the Complainant however fails to say who gave her this information/advice. MPM replied that it did not do so.

14. MPM submitted that it has also sent the following documents to the Complainant: annual member statements for 2015 and 2016 (inclusive); the welcome letter as well as the correspondence attaching the policy documents.
15. MPM replied that it has, at all times, fulfilled all its obligations with respect to the Complainant and observed all guidelines, including investment guidelines.
16. 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.

MPM noted that this is clear from the application form which specifically requests the details of the Complainant's professional adviser. MPM pointed out that the Complainant also declared on the application form that she acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice and referred to declaration 8 on page 8 of the said form.

17. 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 (attached to the application form), is dedicated solely to this point, as per page 9 of the application form.
18. MPM replied that it is not responsible for the payment of any amount claimed by the Complainant and that it has, at all times, fulfilled all its obligations with respect to the Complainant.
19. 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.
20. 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 preliminary plea that the Arbiter has no competence to consider this case based on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta.

Plea relating to Article 21(1)(b) of Chapter 555 of the Laws of Malta

Article 21(1)(b) stipulates that:

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

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

Firstly, the Arbiter notes that it took over two months for the Service Provider to send the Complainant a reply to her formal complaint.¹ The Arbiter does not see a valid reason why the Service Provider took so long to send a reply and related documents, even if it had to deal with various other complaints around the same time.

The Arbiter deems it as very unprofessional for a service provider to make all in its powers to hinder a complaint against it, procrastinate and then raise the plea of lack of competence on the pretext that the action is *‘time-barred’*.

It is a long accepted legal principle that no one can rest on his own bad faith.

As to Article 21(1)(b), the said article stipulates that a complaint related to the *‘conduct’* of the financial service provider which occurred before the entry into force of this Act shall be made not later than two years from the date when

¹ The Complainant’s formal complaint dated 2 April 2018 was answered by the Service Provider on 11 June 2018.

this paragraph comes into force. This paragraph came into force on the 18 April 2016.

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

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

In the case of a financial investment, the conduct of the service provider cannot be determined from the date when the transaction took place and, it is for this reason that the legislator departed from that date and laid the emphasis on the date when the conduct took place.

In this case, the conduct complained of involves the conduct of the Service Provider **as trustee and retirement scheme administrator of the Scheme**, which role MPM occupied since the Complainant became member of the Scheme and **continued to occupy beyond the coming into force of Chapter 555 of the Laws of Malta**.

Even if for argument's sake only, the Arbiter had to limit himself to the question of the investment portfolio, (which is not the case because the Complainant raised another issue and the Service Provider had other obligations apart from the oversight of the portfolio as explained later in this decision), the Service Provider did not prove in this particular case that the products invested into no longer formed part of the portfolio **after** the coming into force of Chapter 555 of the Laws of Malta. The onus of proof for such evidence rests with the Service Provider.²

The Arbiter also makes reference to the comments made further below **relating to the maturity of such products**.

It is also noted that the complaint in question involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to

² Furthermore, the Arbiter notes that there is actually clear evidence from the Investor Profile presented in respect of the Complainant that structured notes, being the main type of products predominantly invested into as will be considered later in this decision, still formed part of the Complainant's portfolio after 18 April 2016.

act as the adviser of the Complainant in relation to the Scheme. The Service Provider itself declares that it no longer accepted business from CWM **as from September 2017**.³

CWM was, therefore, still accepted by the Service Provider and acting as the investment adviser to the Complainant after the coming into force of Chapter 555 of the Laws of Malta. It has emerged that CWM was only replaced in September 2017 when MPM no longer accepted business from CWM. The responsibility of MPM in this regard is explained later on in this decision.

The Arbiter considers that the actions related to the Retirement Scheme complained about cannot accordingly be considered to have occurred before 18 April 2016 and, therefore, the plea as based on Article 21(1)(b) cannot be upheld.

Article 21(1)(c)

The Service Provider alternatively also raises the plea that Article 21(1)(c) of Chapter 555 should apply. 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 that case, 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 notes of submissions, 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

³ Para. 44, Section E, of the affidavit of Stewart Davies, Director of MPM – A fol. 231

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 said 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 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 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.

Moreover, the Arbiter, makes reference to Case Number 137/2018⁴ against MPM, whereby it results that the Service Provider itself declared in July 2015, in reply to a member's concern regarding losses, that:

⁴ Decided today

*'... 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 Service Provider did not prove the date of maturity of the structured notes, being a main type of instrument included in the Complainant's portfolio. The Arbiter also refers to the comments already made above with respect to the products forming part of the portfolio after the coming into force of Chapter 555.

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 in this case made a formal complaint with the Service Provider on 2 April 2018 and thus within the two-year period established by Art. 21(1)(c) of Chapter 555.

Therefore, the Service Provider did not prove that the Complainant in the said cases 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 in this case 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 also being rejected and the Arbiter declares that he has the competence to deal with the Complaint.

⁵ Emphasis of the Arbiter

⁶ Case Number 137/2018 (a fol. 7 of the file)

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 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, of British nationality and born in 1965, resided in Turkey at the time of application for membership as per the details contained in the Application Form for membership of the Scheme ('the Application Form for Membership').

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

The Complainant was accepted by MPM as member of the Retirement Scheme on 25 September 2015.

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 Cap. 555, 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 Old Mutual International ('OMI').

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 processed and accepted by MPM.

The underlying investments in respect of the Complainant comprised extensive investments in structured notes 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').²¹

The '*Investor Profile*' presented by the Service Provider in respect of the Complainant included a table with the '*current valuation*' as at 23/05/2018 indicated in both GBP and EUR as '*127794GBP/145829.32 EURO*'. The said table indicated that the '*Total Amount Invested*' was '*132,913 GBP/189479 Euro*'. It is noted that the current valuation (in both GBP and EUR) is of a lower value than the total amount invested, with the net loss calculated in Euros amounting to EUR43,649.68 and the net loss calculated in GBP amounting to GBP5,119 according to the same figures provided by the Service Provider.²²

The Service Provider, from its part, excluded the fees of GBP7,822 and GBP1,740 from its calculations to arrive at a gross profit on investments that it indicated in its table of GBP4,443. The said alleged profit would result into a loss on the Scheme when taking into consideration the overall fees. Besides not indicating any currency conversions and exchange rates used, the Service Provider does not either indicate whether the claimed (gross) profit figure comprises **realised** or **paper gains**.

²¹ The '*Investor Profile*' is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant.

²² (EUR189,479-EUR145829.32 = EUR43,649.68); (GBP132,913- GBP127,794= GBP5,119).

Investment Adviser

Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainant.²³ The role of CWM was to advise the Complainant regarding the assets held within her 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*'.²⁴

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*'.²⁵

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*'²⁶ 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*'.²⁷

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.²⁸

The said table indicates the investments made which reveal extensive investments into structured notes, indicated as '*SN*' in the column titled '*Asset Type*' during the tenure of CWM as investment adviser.

²³ As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant.

²⁴ For example, in Case Number 127/2018 against MPM decided today

²⁵ Pg. 1 of MPM's reply before the Arbiter for Financial Services.

²⁶ Para. 39, Section E, titled '*CWM and Trafalgar International GmbH*' of the affidavit of Stewart Davies.

²⁷ *Ibid.*

²⁸ Attachment to the '*Additional submissions*' made by MPM in respect of the Complainant.

It is noted that the table of investments attached to the additional submissions made by the Service Provider indicates the following investments into structured notes all undertaken at the same time in November 2015 which together constituted 65.75% of the policy value, at the time of purchase:

- (i) an investment of EUR21,249 into *Morgan Capital: 3 YR GBP Index Phoenix Autocall (60% EKIP)* indicated as being issued by Morgan Stanley and constituting 11.19% of the policy value at the time of purchase;
- (ii) an investment of EUR17,929 into *Leonteq 6Y MB Express Cert 10% Oct 1* indicated as being issued by Leonteq and constituting 9.44% of the policy value at the time of purchase;
- (iii) an investment of EUR17,929 into *Leonteq 3Y Express Cert 50% Multi Barr 4 Underlying* indicated as being issued by Leonteq TCM and constituting 9.44% of the policy value at the time of purchase;
- (iv) an investment of EUR25,879 into *Leonteq Credit LKD NT Indices 5% P.A. Coupon* indicated as being issued by Leonteq and constituting 13.63% of the policy value at the time of purchase;
- (v) an investment of EUR25,879 into *Leonteq Contingent Cap Protected Cert* indicated as being issued by Notenstein and constituting 13.63% of the policy value at the time of purchase;
- (vi) an investment of EUR16,000 into *Leonteq 6Y Autocall European Stocks and Indices* indicated as being issued by EFG and constituting 8.42% of the policy value at the time of purchase.

The same table indicates the sale of the following structured notes in 2016 and 2017, (all quoted in EUR) in the said table:

- (i) the sale, in March 2016, of the *Leonteq Contingent Cap Protected Cert* for the amount of EUR18,616;
- (ii) the sale, in November 2017, of the *Morgan Capital: 3YR GBP Index Phoenix Autocall (60% EKIP)* for the amount of EUR14,265;

- (iii) the sale, in November 2017, of the *Leonteq 6Y MB Express Cert 10% Oct 1* for the amount of EUR12,912;
- (iv) the sale, in November 2017, of the *Leonteq 3Y Express Cert 50% Multi BARR 4 Underlying* for the amount of EUR13,650;
- (v) the sale, in November 2017, of the *Leonteq Credit LKD NT Indices 5% PA Coupon* for the amount of EUR17,499.

It is to be noted, however, that certain information provided by the Service Provider in the '*Investor Profile*' does not match the information included in the statement issued by OMI. Whilst MPM quoted the sale figure of the structured notes in EURO, the exact same figure is indicated in the statement issued by OMI in a different currency, being GBP. There are accordingly inconsistencies/ inaccuracies in the information provided to the Arbitrator.

The '*Historical Cash Account Transactions*' issued by OMI dated 25/05/2018, indicates the following with respect to the structured note investments:²⁹

- (i) An investment of GBP15,000 into *Morgan Capital: 3 YR GBP Index Phoenix Autocall (60% EKIP)*, which was then sold for GBP14,265.
- (ii) An investment of GBP13,000 into *Leonteq 6Y MB Express Cert 10% Oct 1*, which was then sold for GBP12,911.60.
- (iii) An investment of GBP13,000 into *Leonteq 3Y Express Cert 50% Multi Barr 4 Underlying*, which was then sold for GBP13,650.
- (iv) An investment of GBP19,000 into *Leonteq Credit LKD NT Indices 5% P.A. Coupon*, which was then sold for GBP17,499.
- (v) An investment of GBP19,000 into *Leonteq Contingent Cap Protected Cert*, which was then sold for GBP18,616.20.
- (vi) An investment of EUR16,000 into *Leonteq 6Y Autocall European Stocks and Indices*, which had not yet been sold/matured at the date of the statement.

²⁹ Attached to the Complaint Form.

The OMI valuation dated 15 April 2019, presented by the Complainant in her additional submissions indicated an unrealised loss on the *Leonteq 6Y Autocall European Stocks and Indices* of 1,803.20 in EUR as at that date.³⁰

Further Considerations

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.

³⁰ A fol. 212

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:³¹

- 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 ...'*

- 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:

³¹ Emphasis added by the Arbitrator.

'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'*.³²

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'**.*³³

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'**.*³⁴

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

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

³² Editor Dr Max Ganado, *An Introduction to Maltese Financial Services Law*, Allied Publications 2009 p. 174.

³³ *Op. Cit*, p 178

³⁴ Page 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.

Other relevant aspects

One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments**. As acknowledged by the Service Provider whilst MPM's duties did not involve the provision of investment advice, however, MPM did '*... retain the power to ultimately decide whether to proceed with an investment or otherwise*'.³⁵

Once an investment decision is taken by the member and his investment adviser and such decision is communicated to the retirement scheme administrator, MPM explained that as part of its duties

*'The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed) ...'*³⁶

MPM had accordingly the final say prior to the placement of a dealing instruction, in that, if MPM was satisfied that the level of diversification is suitable and in order, and the member's portfolio as a whole is in line with his attitude to risk and investment guidelines '*the dealing instruction will be placed with the insurance company and the trade will be executed. If the RSA is not so satisfied, then the trade will not be proceeded with*'.³⁷

This, in essence, reflected the rationale behind the statement reading:

*'I accept that I or my designated professional adviser may suggest investment preferences to be considered, however, **the Retirement Scheme administrator will retain full power and discretion for all decisions relating to the purchase, retention and sale of the investments within my Momentum Pensions Retirement Fund**'* which featured in the '*Declarations*' section of the Application Form for Membership signed by the Complainant.

³⁵ Para. 17, page 5 of the affidavit of Stewart Davies

³⁶ Para. 31, Page 8 of the affidavit of Stewart Davies

³⁷ Para. 33, Page 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers.

The MFSA regarded the oversight function of the Retirement Scheme Administrator as an important obligation where it emphasised, in recent years, the said role. The MFSA explained that it:

'... is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'.³⁸

The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment adviser stating that:

'the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments'.³⁹

Despite that the above-quoted MFSA statements were made in 2018, an oversight function applied during the period relating to the case in question as explained earlier on.

As far back as 2013, MPM's Investment Guidelines indeed also provided that:

³⁸ Pg. 7 of the MFSA's Consultation Document dated 16 November 2018 titled '*Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' (MFSA Ref. 15/2018) - <https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/>.

³⁹ Pg. 9 of MFSA's Consultation Document dated 16th November 2018 titled '*Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' (MFSA Ref. 15/2018).

'The Trustee need to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification ...'⁴⁰

Whilst para. 3.1 of the section titled '*Terms and Conditions*' of the Application Form for Membership into the Scheme also provided *inter alia* that:

'... in its role as Retirement Scheme Administrator [MPM] will exercise judgement as to the merits or suitability of any transaction ...'

Other Observations and Conclusions

Key considerations

The Arbiter will now consider the principal alleged failures made by the Complainant who claimed that there was a lack of care by MPM and that MPM never acted in her best interests. The Complainant alleged that MPM allowed an unsuitable portfolio of underlying investments to be created within the Retirement Scheme comprising of high-risk structured products unsuitable for a pension fund where her portfolio was tied into products of long term and early release penalties.

The Complainant also raised the aspect that she was now of the understanding that her advisers were actually not licensed to give financial advice.⁴¹

General observations

On a general note, it is clear that MPM did not provide investment advice in relation to the underlying investments of the member-directed scheme. The role of the investment adviser was the duty of other parties, such as CWM. This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case.

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested

⁴⁰ Investment Guidelines titled '*January 2013*', attached to the affidavit of Stewart Davies. The same statement is also included in page 9 of the Scheme Particulars of May 2018 (also attached to the same affidavit).

⁴¹ Section D of the Complaint Form and other additional related aspects and clarifications made by the Complainant in her additional submissions on the points raised in the Complaint Form.

financial instruments, **MPM had, nevertheless, certain obligations to undertake in its role of Trustee and Scheme Administrator. The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial bearing on the operations and activities of the scheme and affect directly, or indirectly, its performance.**

Consideration thus needs to be made as to whether MPM failed in any other relevant obligations and duties, and if so, to what extent any such failures are considered to have had a bearing or otherwise on the financial performance of the Scheme and the resulting losses for the Complainant.

A. The appointment of the Investment Adviser

It is noted that the Complainant chose the appointment of CWM to provide her with investment advice in relation to the selection of the underlying investments and composition of the portfolio within the member-directed Scheme.

However, from its part, MPM allowed and/or accepted CWM to provide investment advice to the Complainant within the Scheme's structure. MPM even had itself an introducer agreement with CWM.

There are a number of aspects which give rise to concerns on the diligence exercised by MPM when it came to the acceptance of, and dealings with, the investment adviser as further detailed below.

Inappropriate and inadequate material issues involving the Investment Adviser

i. Incomplete and inaccurate material information relating to the adviser in MPM's Application Form for Membership

It is considered that **MPM accepted and allowed inaccurate and incomplete material information relating to the Adviser to prevail in its own Application Form for Membership.** MPM should have been in a position to identify, raise and not accept the material deficiencies included in the Application Form.

If inaccurate and incomplete material information was made in the Application Form for Membership on such a key party it was only appropriate and in the best interests of the Complainant, and reflective of the role as Trustee as a *bonus paterfamilias*, for MPM to raise and flag such matters to the Complainant and not accept such inadequacies in its form. MPM had ultimately the prerogative whether to accept the application, the selected investment adviser and, also, decide with whom to enter into terms of business.

The section titled '*Professional Adviser's Details*' in the Application Form for Membership for the Complainant indicated a different name for the adviser with this being indicated as '*Continental Wealth Trust*' rather than '*Continental Wealth Management*'. More importantly, in the same section of the Application Form, the section of the '*Regulator*' and '*Licence Number*' for the adviser were left empty and accordingly the section dealing with the '*Professional Adviser*' was incomplete in respect of the regulatory status and license of such party.

ii. *Lack of clarity convoluted information*

It is also noted that the Application Form submitted in respect of the purchase of the underlying policy includes lack of clarity and convoluted information relating to the investment adviser. MPM, as Trustee of the Scheme had clear sight of the said application and had indeed signed the application for the acquisition of the respective policy in its role as trustee.

The application form in respect of the policy issued by Old Mutual International, includes the stamp of another party, that of '*Trafalgar International GmbH*' ('Trafalgar') (with one stamp indicating the Head Office of Trafalgar in Germany and another stamp indicating a correspondence address for Trafalgar in Cyprus), next to the section titled '*Financial adviser details*' which also made reference to '*Continental Wealth*' in Spain. Trafalgar is then also featured in the section titled '*Financial adviser declaration*' in the same form with the field for '*Financial adviser stamp*' in the same section just including the stamps of Trafalgar (in Germany and Cyprus).

There was accordingly lack of clarity on the exact entity ultimately taking responsibility for the investment advice being provided to the Complainant. For the reasons explained, the information on the financial adviser is also somewhat inconsistent between that included in MPM's application form and the application form of the issuer of the underlying policy.

iii. *No proper distinctions between CWM and Trafalgar*

It is also unclear why the Annual Member Statements sent by MPM to the Complainant for the years ending December 2015 and 2016, indicated in the same statement '*Continental Wealth Management*' as 'Professional Adviser' whilst at the same time indicated another party, '*Trafalgar International GmbH*' as the 'Investment Adviser'.⁴²

No indication or explanation of the distinction and differences between the two terms of '*Professional Adviser*' and '*Investment Adviser*' were either provided or emerged nor can reasonably be deduced.

Besides the lack of clarity on the entity taking responsibility for the investment advice and the lack of clear distinction/links between the indicated parties in the application forms and statements, it has also not emerged that the Complainant was provided with clear and adequate information regarding the respective roles and responsibilities between the different mentioned entities throughout.

If CWM was acting as an appointed agent of another party, such capacity, as an agent of another firm, should have been clearly reflected in the application forms and other documentation relating to the Scheme. Relevant explanations and implications of such agency relationship and respective responsibilities should have also been duly indicated without any ambiguity.

It is also noted that during the proceedings of this case MPM has not provided evidence of any agency agreement between CWM and Trafalgar.

⁴² Attachments to the Reply submitted by MPM before the Arbiter for Financial Services.

In the reply that MPM sent directly to the Complainant in respect of her formal complaint, MPM itself explained that:

'Momentum in its capacity as Trustee and RSA, in exercising its duty to you ensured: The full details of the Scheme, including all parties' roles and responsibilities were clearly outlined to you in the literature provided ensuring no ambiguity⁴³, including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules'.⁴⁴

The Arbiter does not have comfort that such a duty has been truly achieved in respect of the adviser for the reasons amply explained above.

iv. *No regulatory approval in respect of CWM*

During the proceedings of this case no evidence has either emerged about the regulatory status of CWM. As indicated earlier, in its submissions MPM only referred to the alleged links between CWM and Trafalgar and only provided a copy of the authorisations issued to Trafalgar International GmbH in Germany which just indicated that Trafalgar (and not CWM) held an authorisation as at 05.02.2016 as *'Investment intermediary'* and *'Insurance intermediary and insurance consultant'* from IHK Frankfurt am Main, the Chamber of Commerce and Industry in Frankfurt with the *'Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'*.⁴⁵

With respect to authorisations issued by IHK, the Arbiter makes reference to Case 068/2018 and Case 172/2018 against MPM.⁴⁶ The said correspondence involved replies issued by IHK in 2018 to queries made in respect of CWM. In this regard, it is noted that in an email from IHK

⁴³ Emphasis added by the Arbiter.

⁴⁴ Section 3, titled *'Overview of Momentum Controls in place in exercising a duty to all members'* in MPM's reply to the Complainant in relation to the complaint made in respect of the Scheme.

⁴⁵ Copy of authorisations issued to Trafalgar were attached to the Reply of MPM submitted before the Arbiter for Financial Services and/or specifically referred to in para.39 Section E, titled *'CWM and Trafalgar International GmbH'* in the affidavit of Stewart Davies.

⁴⁶ Decided today

dated 19 April 2018, IHK indicated *inter alia* that it was not aware of an official affiliation between CWM and Trafalgar and that Trafalgar held the financial investment intermediation licence (34f para. 1 GewO) from June 2013 until March 2016 where the licence was ‘*not extendable*’ and ‘*even back then it did not cover the activities of another legal personality*’.⁴⁷

Similarly, in a letter dated 20 April 2018 issued by IHK it was *inter alia* noted by IHK that:

*‘Trafalgar International GmbH is a German limited company headquartered in Frankfurt am Main. The company currently holds a licence under 34d para.1 German Trade Law (German: Gewerbeordnung, GewO) (insurance intermediation). The German licence as an insurance intermediary cannot be extended to another legal personality and it does not authorize the licence holder to regulate other insurance or financial investment intermediaries.’*⁴⁸

MPM’s statement that CWM ‘*was operating under Trafalgar International GmbH licenses*’⁴⁹ has not been backed up by any evidence during the proceedings of this case and has actually been contradicted by communications issued by IHK as indicated above. It is accordingly clear that no comfort can be taken from the authorisation/s held by Trafalgar.

Indeed, no evidence of any authorisation held by CWM in its own name or as an agent of a licensed institution, authorising it to provide advice on investment instruments and/or advice on investments underlying an insurance policy has, ultimately been produced or emerged during the proceedings of this case.

In the absence of such, the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM ‘*was authorised to trade in Spain and in France by Trafalgar International*’

⁴⁷ Email from IHK dated 19 April 2018 – A fol. 166/167 of Case Number 068/2018 against MPM decided today

⁴⁸ Letter from IHK dated 20 April 2018 – A fol. 12/13 of Case Number 172/2018 against MPM decided today

⁴⁹ Para. 39, Section E, titled ‘*CWM and Trafalgar International GmbH*’ of the affidavit of Stewart Davies

GmbH⁵⁰, are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant.

This also taking into consideration that:

- (i) Trafalgar is itself no regulatory authority but a licensed entity itself;
- (ii) the lack of clarity/ incomplete information as to the regulatory status of the investment adviser in the Application Form for Membership as well as the confusing and unclear references in the sections relating to the investment adviser in other documentation as indicated above;
- (iii) legislation covering the provision of investment advisory services in relation to investment instruments, namely the Markets in Financial Instruments Directive (2004/39/EC) already applied across the European Union since November 2007.

No evidence was provided that CWM, an entity indicated as being based in Spain, held any authorisation to provide investment advisory services, in its own name or in the capacity of an agent of an investment service provider under MiFID.

Article 23(3) of the MiFID I Directive, which applied at the time, indeed provided specific requirements on the registration of tied agents.⁵¹

No evidence of CWM featuring in the tied agents register in any EU jurisdiction was either produced or emerged.

Neither was any evidence produced of any exemption from licence under MiFID or that CWM held an authorisation or exemption under any other applicable European legislation for the provision of the contested investment advice.

⁵⁰ Pg. 1, Section A titled 'Introduction', of the Reply of MPM submitted before the Arbitrator for Financial Services

⁵¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN>

The Service Provider noted *inter alia* that 'CWM was appointed agent of Trafalgar International GmbH'.⁵²

The nature of the agency agreement that CWM was claimed to have was not explained nor defined, and it was not indicated either in terms of which European financial services legislation such agency agreement was in force and permitted the provision of the disputed investment advice. Nor evidence of any agency agreement existing between CWM and any other party was produced during the proceedings of this case as indicated above.

Other observations & synopsis

As explained above, albeit being selected by the Complainant, the investment adviser was however accepted, at MPM's sole discretion, to act as the Complainant's investment adviser **within the Scheme's structure**.

The responsibility of MPM in accepting and allowing CWM to act in the role of investment adviser takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM where no details were included in its own form in respect of the regulatory status of such entity with the respective fields in the form being left empty.

MPM allowed and left uncontested, incomplete key information in its own Application Form for Membership of the Retirement Scheme with respect to the regulatory status of the investment adviser.

The Service Provider argued *inter alia* in its submissions that it was not required, in terms of the rules, to require the appointment of an adviser which was regulated during the years 2013-2015 under the SFA regime and until the implementation of Part B.9 titled '*Supplementary Conditions in the case of entirely Member Directed Schemes*' of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA updated in December 2018, where the latter clearly introduced the requirement for the investment adviser to be regulated.

⁵² Para. 39, Section E, titled '*CWM and Trafalgar International GmbH*' of the affidavit of Stewart Davies.

However, the Arbiter believes that MPM as Trustee had in any case the obligation to act with the required diligence of a *bonus paterfamilias* throughout, and was duty bound to raise with the Complainant, and not itself accept, material aspects missing relating to the investment adviser.

The appointment of an entity such as CWM as investment adviser meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where an adequately regulated adviser is appointed. An adequately regulated financial adviser is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory authority. MPM, being a regulated entity itself, should have been duly and fully cognisant of this. It is only in the best interests of the Complainant for MPM to ensure that the Complainant had correct and adequate key information about the investment adviser.

Besides the issue of the regulatory status of the adviser, MPM also allowed and left uncontested important information, which was convoluted, misleading, unclear and lacking as explained above, with respect to the investment adviser, namely in relation to:

- CWM's alleged role as agent of another party, and the respective responsibilities of CWM and its alleged principal;
- the entity actually taking responsibility for the investment advice given to the Complainant as more than one entity was at times mentioned with respect to investment advice;
- the distinctions between CWM and Trafalgar.

It is also to be noted that apart from the above, MPM had itself a business relationship with CWM, having accepted it to act as its introducer of business. Such relationship gave rise to potential conflicts of interest, where an entity whose actions were subject to certain oversight by MPM on one hand was on the other hand channelling business to MPM.

Even in case where, under the previous applicable regulatory framework, an unregulated adviser was allowed by the trustee and scheme administrator to provide investment advice to the member of a member-directed scheme (on the basis of clear understanding by the member of such unregulated status and implications of such, and the member's subsequent consent for such type of adviser), **one would, at the very least, reasonably expect the retirement scheme administrator and trustee of such a scheme to exercise even more caution and prudence in its dealings with such a party in such circumstances.**

This is even more so when the activity in question, that is, one involving the recommendations on the choice and allocation of underlying investments, has such a material bearing on the financial performance of the Scheme and the objective to provide for retirement benefits.

It would have accordingly been only reasonable, to expect the trustee and retirement scheme administrator, as part of its essential and basic obligations and duties in such roles, to have an even higher level of disposition in the probing and querying of the actions of an unregulated investment adviser in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances.

The Arbiter does not have comfort that such level of diligence and prudence has been actually exercised by MPM for the reasons already stated in this section of the decision.

B. The permitted portfolio composition

Investment into Structured Notes

Preliminary observations

The sale of, and investment into, structured notes is an area which has attracted various debates internationally including reviews by regulatory authorities over the years. Such debates and reviews have been occurring even way back since the time when the Retirement Scheme was granted registration in 2011.

The Arbiter considers that caution was reasonably expected to be exercised with respect to investments in, and extent of exposure to, such products since the time of the Scheme's registration. Even more so when taking into consideration the nature of the Retirement Scheme and its specific objective.

Nevertheless, the exposure to structured notes allowed within the Complainant's portfolio was extensive, with the insurance policy underlying the Scheme being at times predominantly invested into such products.

A typical definition of a structured note provides that:

'A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index'.⁵³

A structured note is further described as:

'A debt obligation – basically like an IOU from the issuing investment bank – with an embedded derivative component; in other words, it invests in assets via derivative instruments'.⁵⁴

As indicated above, the portfolio was extensively invested into structured products with these constituting 65.75% of the policy value at the time of purchase of these products.

No relevant fact sheets of structured products forming part of the Complainant's portfolio have been produced in the case in question. Neither has the Office of the Arbiter for Financial Services managed to source any fact sheet in respect of any of the structured products featuring in the Complainant's portfolio.

The Arbiter nevertheless observes that the exposure to structured products in the portfolio was extensive as already indicated and also notes high exposure to the same single issuer, through cumulative purchases in products issued by the same issuer, this being Leonteq.

⁵³ <https://www.investopedia.com/terms/s/structurednote.asp>

⁵⁴ <https://www.investopedia.com/articles/bonds/10/structured-notes.asp>

The Arbiter shall accordingly consider only this aspect in the circumstances.

Portfolio not reflective of the MFSA rules

The high exposure to structured products as well as high exposure to single issuers, which was allowed to occur by the Service Provider in the Complainant's portfolio, jars with the regulatory requirements that applied to the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*', ('the Directives') which applied from the Scheme's inception in 2011 until the registration of the Scheme under the RPA on 1 January 2016. The applicability and relevance of these conditions to the case in question was highlighted by MPM itself.⁵⁵

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

SOC 2.7.2 in turn required the Scheme to ensure *inter alia* that, the assets of a scheme are '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole*'⁵⁶ and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.⁵⁷

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';⁵⁸ to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings*',⁵⁹ where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to

⁵⁵ Para. 21 & 23 of the Note of Submissions filed by MPM in 2019.

⁵⁶ SOC 2.7.2 (a)

⁵⁷ SOC 2.7.2 (b)

⁵⁸ SOC 2.7.2 (c)

⁵⁹ SOC 2.7.2 (e)

be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.⁶⁰

Despite the standards of SOC 2.7.2, MPM allowed the portfolio of the Complainant to, at times, comprise predominantly of structured products. An individual exposure to Leonteq as single issuer of higher than the 20% threshold in diversified products such as collective investment schemes and even higher than the 30% maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above, also emerges from the information provided.⁶¹ The structured products invested into were also not indicated, during the proceedings of this case, as themselves being traded in or dealt on a regulated market.

Other observations & synopsis

The Service Provider did not help its case by not providing detailed information on the underlying investments as already stated in this decision. Although the Service Provider filed a Table of Investments it did not provide adequate information to explain the portfolio composition and justify its claim that the portfolio was diversified. It did not provide fact sheets in respect of the investments comprising the portfolio of the Complainant and it did not demonstrate the features and the risks attached to the investments. Notwithstanding that the portfolio had a high exposure of 32.51% to the same issuer, through three structured notes issued by Leonteq which respectively comprised 9.44%, 9.44% and 13.63% of the policy value at the time of purchase in 2015, it has not been demonstrated either that such products had underlying guarantees.

Apart from the fact that no sensible rationale has emerged for exposing the composition of the pension portfolio extensively to structured products, no adequate and sufficient comfort has either emerged that such composition reflected the prudence expected in the structuring and composition of a pension portfolio despite the Complainant's selected risk profile.

⁶⁰ SOC 2.7.2 (h)(iii) & (v)

⁶¹ Doc. EG1 attached to MPM's additional submissions;

In the circumstance where the portfolio of the Complainant was at times extensively invested in structured products with a high level of exposure to single issuer, and for the reasons explained above, the Arbiter does not consider that the portfolio was at all times *'invested in order to ensure the security quality, liquidity and profitability of the portfolio as a whole'*⁶² and *'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'*.⁶³

Apart from the fact that the Arbiter does not have comfort that the portfolio was reflective of the conditions and investment limits outlined in the MFSA's Rules, it is also being pointed out that over and above the duty to observe specific maximum limits relating to diversification as may have been specified by rules, directives or guidelines applicable at the time, the behaviour and judgement of the Retirement Scheme Administrator and Trustee of the Scheme is expected to, and should have gone beyond compliance with maximum percentages and was to, in practice, reflect the spirit and principles behind the regulatory framework and in practice promote the scope for which the Scheme was established.

The extensive exposure to structured products and single issuer nevertheless departed from such principles and cannot ultimately be reasonably considered to satisfy and reflect in any way a suitable level of diversification nor a prudent approach.

This is even more so when considering the crucial aim of a retirement scheme being that to provide for retirement benefits – an aspect which forms the whole basis for the pension legislation and regulatory framework to which the Retirement Scheme and MPM were subject to. The provision of retirement benefits was indeed the Scheme's sole purpose as reflected in the Scheme Particulars.

C. The extent of loss or otherwise experienced on the Scheme

As indicated above whilst the Complainant alleged in her Complaint Form a loss of EUR43,399.70 as at 8 June 2018, the Service Provider did not contest

⁶² SOC2.7.2(a) of Part B.2.7 of the Directives.

⁶³ SOC2.7.2(b) of Part B.2.7 of the Directives.

that the Complainant made a loss in its reply before the Arbiter for Financial Services. It only contested this in its additional submissions as will be considered further hereunder.

Firstly it is noted that, in its reply, MPM stated that the Complainant's allegation that her original investment on 30 November 2015 stood at EUR189,633.13, was incorrect and in this regard referred to its own Client Account Statement dated 3 December 2015.⁶⁴ The Client Account Statement *inter alia* indicated that on 18 November 2015, the Complainant's account with the Scheme had '*Funds received from Royal London*' of GBP137,672.31. The same Client Account Statement indicated that on 19 November 2015 there was an '*Investment – Old Mutual*' of GBP132,913.86.

It is to be noted, however, that the attachments that MPM submitted to its Reply, included a confirmation letter dated 23 November 2015 issued by OMI in relation to the investment into the European Executive Investment Bond.⁶⁵ The said letter and attached schedules to the policy clearly indicate that the OMI policy in respect of the Complainant, bearing a '*Contract Date*' of 23 November 2015, had indeed a '*Premium*' of '*EUR189,633.13*'.

Furthermore, notwithstanding that the OMI policy confirmation letter and schedules indicated the premium being in EURO, in the OMI '*Historical Cash Account Transactions*' statement dated 25 May 2018, the OMI statement indicates a '*Transfer of Initial Premium*' on 23/11/2015 of GBP132,913.86.

No explanations were provided as to the differences emerging in this regard and what currency conversions, if any, had been made and reasons therefor had been made.

It is further noted that in its additional submissions, MPM claimed that according to a '*current valuation at 23/05/2018*' the Complainant made a profit of (GBP) '*4,443*'.⁶⁶ As indicated above, in the section titled '*The Retirement Scheme in respect of which the Complaint is being made*', the alleged (gross) profit is one which excludes fees.

⁶⁴ Attached as Appendix 3 to MPM's Reply.

⁶⁵ Appendix 8 to its Reply.

⁶⁶ Doc. EG1 to MPM's additional submissions.

The Service Provider did not state whether the said figure was a realised/unrealised gain, besides not providing a more recent valuation.

It is also noted that MPM alleged in its additional submissions that '*Reflecting notional foreign exchange rates, which are entirely relevant, **the complainant has suffered NO LOSS***'.⁶⁷ MPM made reference in this regard to a communication dated 6 August 2019 issued by OMI to the Complainant. It is noted, however, that the said communication sent by OMI just provides an example of the effects in the movement in the exchange rate and this only with reference to the original premium - where it just calculated the conversion of the original premium of GBP132,913.86 into EUROS at the GBP/EUR rate applicable as at 23/11/2015 and comparing the same figure of premium, that is, GBP132,913.86 (with no investments) with the GBP/EUR rate applicable on the valuation as at 23/05/2018 to explain paper losses.

The said communication by OMI cannot reasonably be construed as confirming that the complaint has suffered no loss, and it is misleading for one to try to argue that the Complainant has not suffered any loss just by referring to such communication. Neither has the Service Provider provided clear and sufficient evidence to back its allegation that '*the Complainant has suffered NO LOSS*' for the reasons already indicated.

In addition, the Service Provider just refers to notional foreign exchange rates and does not clearly indicate realised losses and gains. Besides, the Service Provider chose to provide in its additional submissions sent in August 2019, a dated valuation showing only the value as at 23/05/2018.

The Arbiter cannot accordingly reasonably and safely rely on the indicated calculations presented by the Service Provider to determine the actual position of the Complainant and whether the Complainant suffered a loss (excluding fees) or otherwise on the Scheme.

The actual position of the Complainant will be considered accordingly in the calculations that the Arbiter will direct the Service Provider to undertake as stipulated further on in this decision.

⁶⁷ Emphasis made by the Service Provider.

As indicated above, the letter from OMI dated 23 November 2015, confirming the acceptance of the investment into the European Executive Investment Bond, refers to an initial premium in Euros of EUR189,633.13.

It is further noted that in her additional submissions the Complainant presented a communication dated 10 June 2019 issued by MPM, where MPM confirmed that the *'Current Value Held at Momentum'* estimated as at 10 June 2019 was of EUR118,705.58 thus indicating a reduction in value of EUR70,927.55. The *'Current Estimated Transfer Value'* communicated by MPM after deducting its fees was indeed indicated as EUR116,755.58 in the same communication. This is in contradiction to the Service Provider's claim that the Complainant did not make a loss. Given that the OMI statements however indicate the investments in GBP and a surrender value in GBP, the transfer value would be different if the transfer value had to be made in GBP instead of EUROS.

Hence, MPM's claim in its additional submissions that the Complainant has suffered no loss, has not been adequately substantiated.

The Arbiter would also like to make some observations regarding other inconsistencies and confusing references emerging in certain documents submitted. Such inconsistencies and confusing references emerged both in the OMI statements (were the exact same figures were at times shown as being in EUR and at other times in GBP) and the table of investments presented by MPM (*were certain figures did not reconcile with those shown in the OMI statements*). This is in addition to the lack of clarity of having the confirmation letter of the OMI policy showing a premium in EURO whilst certain statements showing a premium in GBP as indicated above.

It is noted that the *'Valuation Summary'* issued by OMI dated 23/05/2018 and another one dated 06/06/2018 were issued in EUR and both showed *'Total Premiums Paid'* of ***'132,913.86 EUR'***.⁶⁸ However, another *'Valuation Summary'* issued by OMI and dated 15/04/2019 was issued in GBP indicating the same figure of *'Total Premiums Paid'* of ***'132,913.86 GBP'***.⁶⁹

⁶⁸ OMI Statements attached to the Complaint Form refer; Emphasis added by Arbiter.

⁶⁹ A fol. 211; Emphasis added by Arbiter.

With respect to the table of investments presented by MPM in its additional submissions, it is noted that whilst MPM indicated the sale figures of the structured notes in EURO the exact same figures are however shown in GBP in the '*Historical Cash Account Transactions*' statement issued by OMI dated 25/05/2018.⁷⁰

Moreover, it is somewhat odd that MPM has reported the value of the policy in EUR in its Annual Member Statements and itself indicated in the '*Investor Profile*' attached to its Additional Submissions that the '*Investment Policy Currency*' is in '*EUR*', when the bulk of the transactions were apparently in GBP and the latest statement issued by OMI for the policy is also in GBP throughout.⁷¹

The Arbiter would like to highlight the importance for the Trustee to ensure that clear, full, correct and consistent information is provided. Relevant and clear explanations should have also been made in the respective statements in respect of any currency conversions, distinguishing between actual conversions and conversions made for reporting purposes.

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainant on her account within the Retirement Scheme **cannot** just be attributed to the under-performance of the investments as a result of general market and investment risks and/or the issues alleged against one of the structured note providers, as MPM has *inter alia* suggested in these proceedings.

Deficiencies on the part of MPM in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme has emerged as amply highlighted above which, at the very least, impinge on the diligence it was required and reasonably expected to be exercised in such roles. Such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced.

⁷⁰ Statement attached to the Complaint Form.

⁷¹ Doc. EG1 to MPM's Additional Submissions.

The actions and inactions that occurred, as explained in this decision, enabled such losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.

Had MPM undertaken its role adequately and as duly expected from it, in terms of the obligations resulting from the law, regulations and rules stipulated thereunder and the conditions to which it was subject to in terms of its own Retirement Scheme documentation as explained above, such losses would have been avoided or mitigated accordingly.

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

In the particular circumstances of the cases reviewed, the losses experienced on the Retirement Scheme are ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which MPM was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainant.

Final Remarks

As indicated earlier, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance with the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

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

Whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than reduce the original capital invested.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly when it came to the dealings and aspects involving the appointed investment adviser and the oversight functions with respect to the Scheme and portfolio structure. The Service Provider failed to act with the prudence, diligence and attention of a *bonus paterfamilias*.⁷²

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

Conclusion

For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case⁷⁴ and is accepting it in so far as it is compatible with this decision.

Cognisance needs to be taken however of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment adviser to the respective member of the Scheme.

Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be only partially held responsible for the losses incurred.

Compensation

Being mindful of the key role of Momentum Pensions Malta Limited as Trustee and Retirement Scheme Administrator of the Momentum Malta Retirement Trust and, in view of the deficiencies identified in the obligations

⁷² Cap. 331 of the Laws of Malta, Art. 21(1)

⁷³ Cap. 555, Article 19(3)(c)

⁷⁴ Cap. 555, Article 19(3)(b)

emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by Momentum Pensions Malta Limited for part of the net realised losses on her pension portfolio.

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited, to be held responsible for seventy per cent of the net realised losses sustained by the Complainant on her investment portfolio as stipulated hereunder.

The Arbiter notes that the latest valuation and list of transactions provided by the Service Provider in respect of the Complainant is not current and adequate for the reasons explained above.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for the Complainant for the purpose of this decision.

Given that the Complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of Continental Wealth Management acting as adviser, compensation shall be provided solely on the investment portfolio existing and constituted under Continental Wealth Management in relation to the Scheme.

The Service Provider is accordingly being directed to pay the Complainant compensation equivalent to 70% of the sum of the Net Realised Loss incurred within the whole portfolio of underlying investments existing and constituted under Continental Wealth Management and allowed within the Retirement Scheme by the Service Provider.

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

- (i) For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Member's current investment

portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised) inclusive of any realised currency gains or losses. Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

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

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

In case where any currency conversion/s is/are required for the purpose of (a) finally netting any realised profits/losses within the portfolio which remain denominated in different currencies and/or (b) crystallising any remaining currency positions initiated at the time of Continental Wealth Management, such conversion shall, if and where applicable, be made at the spot exchange rate sourced from the European Central Bank and prevailing on the date of this decision. Such a direction on the currency conversion is only being given in the very particular circumstances of such cases for the purposes of providing clarity and enabling the calculation of the compensation formulated in this decision and avoid future unnecessary controversy.

- (iii) Investments which were constituted under Continental Wealth Management in relation to the Scheme and are still held within the current portfolio of underlying investments as at, or after, the date of**

this decision are not the subject of the compensation stipulated above. This is without prejudice to any legal remedies the Complainant might have in future with respect to such investments.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Momentum Pensions Malta Limited to pay the indicated amount of compensation to the Complainant.

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

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

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**