

Before the Arbiter for Financial Services

Case No. 110/2018

EC

(‘the Complainant’ or ‘the Member’)

vs

Momentum Pensions Malta Limited

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

or ‘the Retirement Scheme Administrator’)

Sitting of the 28 July 2020

The Arbiter,

Having seen **the Complaint** 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’), established in the form of a trust and administered by Momentum Pensions Malta Limited (‘MPM’ or ‘the Service Provider’), as its Trustee and Retirement Scheme Administrator.

The Complainant submitted that she experienced a loss in her Retirement Scheme as MPM failed to properly protect her interests as trustee. The Complainant claimed that:¹

- a) MPM accepted business from Continental Wealth Management (‘CWM’) which was unqualified and unlicensed;
- b) The Complainant claimed that she had a low to medium approach to risk as shown in an initial report issued by ‘G6T’.²

¹ A fol. 4

² A fol. 115

The Complainant submitted that MPM did not seek to confirm her attitude to risk and that CWM was able to define her as having a medium attitude to risk rather than low to medium as the application form for membership into the Scheme did not require each page to be signed or initialised;

- c) Despite that MPM was aware that there were issues with investments in structured products in late 2016 onwards, MPM still allowed CWM to invest in such unsuitable investments;
- d) MPM owed her a duty of care which it failed to deliver as it should have had procedures to verify her attitude to risk and ensure that her money was invested in appropriate instruments by adequately licensed individuals employed by a properly licensed company;
- e) MPM did not, at any time, since 2016 question her holdings of structured products.

The Complainant claimed that a significant portion of her portfolio was invested in high-risk professional investor only structured notes when she was a low to medium risk retail investor,³ with such investments being undertaken without her knowledge or consent. The Complainant also claimed that her risk profile was altered from '*low to medium*' to '*medium*' without her knowledge and consent.

The Complainant requested that all the losses are restored to her. She also requested a small premium for all the stress and distress that this matter has caused her, and in her complaint form dated April 2018 indicated that she expected MPM to waive their fees for the subsequent two years as a gesture of apology and goodwill. The Complainant further indicated that a sum of GBP40,000 would be satisfactory.⁴

In its reply, MPM essentially submitted the following:⁵

³ A fol. 14

⁴ A fol. 4

⁵ A fol. 122 to 124

1. 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.
2. That MPM is not linked or affiliated in any manner to CWM, Trafalgar or Global Net and that MPM is not licensed to provide investment advice.
3. The complaint relates to conduct which occurred before the entry into force of Chapter 555 of the Laws of Malta on 18 April 2016. It was noted that the complaint was filed on 3 May 2018, and that this was beyond the two-year time period allowed by Article 21(1)(b) of the said law.

The Service Provider further submitted that if the Arbiter determines that the conduct complained of is conduct which occurred after the entry into force of Cap. 555, the complaint still cannot be entertained pursuant to Article 21(1)(c) as more than two years have lapsed since the conduct complained of took place.

4. MPM submitted that it was the Complainant who in the first place appointed CWM as her adviser and that, in the application form her chosen risk profile was '*medium*'. MPM noted that as stated by the Complainant, '*either Momentum changed my risk profile – or, admittedly, more likely, Continental Wealth Management changed it*'.⁶ 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 International GmbH ('Trafalgar') and/or Global Net, which advised the Complainant to invest in products which have led to the Complainant's losses. MPM firmly rejected that it changed the Complainant's risk profile and submitted that the reference by the Complainant to the report of G6T and its findings were irrelevant as the Complainant confirmed herself her risk profile in MPM's application form. MPM also submitted that the attitude to risk was also set out in the welcome letter (which attached a Certificate of Membership) that was sent

⁶ A fol. 123

to the Complainant as well as in the annual member statement for 2016, with the Complainant not raising any issues in this respect.

It was noted that CWM has ceased trading and is no longer operating and that this was the only reason why the Complainant filed a claim against MPM and not against CWM. The Service Provider submitted that the proper respondent to this claim is CWM and/or Trafalgar.

The Service Provider noted that the Complainant alleges that CWM was '*unqualified and unlicensed*'.⁷ MPM submitted that Trafalgar was licensed as an insurance intermediary and consultant, as well as an investment intermediary. MPM attached documentation of Trafalgar's licences which were provided to MFSA. It was noted that Trafalgar entered into an agency agreement with CWM and that MPM no longer accepted business from CWM as from September 2017. MPM was aware that CWM ceased trading on or around 29 September 2017.

MPM pointed out that any business introduced by CWM fell within the MFSA's Pension Rules for Service Providers, as they relate to RSAs. MPM further submitted that it does not work on a commission basis and that it neither receives commissions nor pays commissions to any third parties.

5. MPM noted that the Complainant stated in her complaint that '*The application form of Momentum Pensions does not require each page to be signed or initialized and therefore Continental Wealth Management were able to define me as having a Medium attitude to risk*'.⁸ MPM submitted that with such statement, the Complainant is trying to shift the blame for her own negligence. MPM further submitted that the Complainant must confirm with her oath how she completed the application form and argued that initialising/signing each page was of no consequence if the application form was signed in blank by the Complainant. MPM also submitted that, additionally, the confirmation of the attitude to risk required by MPM was on the application form itself and represented by the Complainant's signature.

⁷ *Ibid.*

⁸ *Ibid.*

6. MPM noted that the Complainant alleged that there were issues with private investors being sold structured notes at the time her pension was invested during '*late 2016 to date*'.⁹ MPM submitted that the Complainant must in the first place clarify what issues she is referring to. Additionally, MPM replied that it was not aware of any such issues at the time and, when issues with CWM came to light, the relationship with them was suspended and then terminated.

MPM further noted that the Complainant alleged that her funds were invested in '*totally unsuitable stocks*' and that Momentum should have ensured that her money '*was invested in appropriate stocks*'.¹⁰ MPM replied that the investments made were in line with the Complainant's risk profile and in line with the investment guidelines applicable at the time of the Complainant's application with Momentum.

MPM pointed out that it is aware that Old Mutual International Ireland Limited ('OMI'), the bond provider,¹¹ has initiated legal action against one of the structured note providers (Leonteq Securities AG) for losses incurred by the ultimate holders of the bonds, such as the Complainant. It was noted that it is OMI, and not MPM, who was pursuing litigation against Leonteq.

The Service Provider further noted that it charges a fixed fee for the services that it provides and that this fee does not change regardless of the underlying investment which the Complainant was advised to invest into by CWM. It was claimed that MPM did not accordingly stand to make any gain or benefit from any particular underlying investment.

7. MPM noted that the Complainant alleged that MPM has failed to protect her interests and that MPM owes her a duty of care which it failed to deliver. MPM replied that it has, at all times, fulfilled its obligations with respect to the Complainant as will be shown throughout the course of the proceedings.

⁹ *Ibid.*

¹⁰ *A fol.* 124

¹¹ The investments within the Retirement Scheme were undertaken via a life assurance bond provided by an insurance company – *A fol.* 208

8. MPM submitted that it is not licensed to and does not provide investment advice and that it did not provide investment advice to the Complainant. MPM further submitted that this is clear from the application form which specifically requests the details of the Complainant's professional adviser. It was noted 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 as per the declaration on page 13 of the said form.

To further reinforce the point that MPM does not provide investment advice, it was submitted that an entire section of the terms and conditions of business as attached to the application form, is dedicated solely to this point, as per page 8 of the application form.

9. MPM submitted that it is not responsible for payment of any amounts claimed by the Complainant and that it has, at all times, fulfilled all its obligations with respect to the Complainant.

MPM further submitted that it has not committed any fraud, nor has it acted negligently. MPM re-iterated 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.

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,

Considers:

Preliminary Plea regarding the Competence of the Arbiter

The Service Provider raised the plea that the Arbiter does not have the competence to hear this case because it is time-barred under Article 21(1)(b) of Chapter 555 of the Laws of Malta which states:

'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.'

This paragraph came into force on the 18 April 2016. The Complainant did not even have a relationship with MPM before the coming into force of this article given that the Complainant became member of the Scheme on 26 August 2016 and, thus, after the coming into force of the Act. The preliminary plea made in terms of Article 21(1)(b) is being thus being rejected.

With respect to Article 21(1)(c), the law states that:

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

The Complainant made a formal complaint to MPM on 11 November 2017,¹² this being not even one and a half years since she joined the Scheme in August 2016, let alone *'from the day on which the complainant first had knowledge of the matters complained of'*. The preliminary plea made in terms of Article 21(1)(c) is also being rejected.

The Merits of the Case

¹² A fol. 15

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.¹³

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 555¹⁴ which stipulates that he should deal with the complaint in *'an economical and expeditious manner'*.

The Complainant

The Complainant was born on 10 January 1959.¹⁵ She is of British nationality and resident in France. Her occupation was indicated as *'Retired Head of Social Services'*¹⁶ in the *Application Form for Membership into the Retirement Scheme* dated 15 August 2016 ('the Application Form for Membership') which application bore her signature.¹⁷

The Complainant was accepted by MPM as a member of the Retirement Scheme on 26 August 2016.¹⁸ Her Risk Profile was indicated as *'Medium'* in the Application Form for Membership,¹⁹ as well as in the Scheme's Certificate of Membership,²⁰ and also in the Annual Member Statement issued by the Service Provider to the Complainant for the year ending 31 December 2016.²¹

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator²² and acts as the Retirement Scheme Administrator and Trustee of the Scheme.²³

The Legal Framework

¹³ Cap. 555, Art. 19(3)(b)

¹⁴ Art. 19(3)(d)

¹⁵ A fol. 127 & 143

¹⁶ A fol. 127

¹⁷ A fol. 126-139

¹⁸ A fol. 24

¹⁹ A fol. 128

²⁰ A fol. 24

²¹ A fol. 177

²² <https://www.mfsa.mt/financial-services-register/result/?id=3453>

²³ A fol. 236

The Retirement Scheme and MPM are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). 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.²⁴ The framework under the RPA accordingly applied given that the Complainant became a member of the Scheme in August 2016.

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

Particularities of the Case

The Product in respect of which the Complaint is being made

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA as a Retirement Scheme²⁵ under the Special Funds (Regulation) Act²⁶ in April 2011 and under the Retirement Pensions Act²⁷ in January 2016.

As detailed in the recent Scheme Particulars dated May 2018, the Scheme '*was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap.331) on the 23rd March 2011*'²⁸ and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011*'.²⁹

The Scheme Particulars specify that:

²⁴ A fol. 202/229/231

²⁵ <https://www.mfsa.com.mt/financial-services-registry/result/?id=3454> /a fol. 236

²⁶ A fol. 218

²⁷ A fol. 230

²⁸ A fol. 234

²⁹ A fol. 236

'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'.³⁰

The assets held in the Complainant's account with the Retirement Scheme was used to acquire the European Executive Investment Bond on 21 September 2016, this being a life assurance policy issued by Old Mutual International.³¹

The policyholder of the European Executive Investment Bond was indicated as *'Momentum Pensions (Malta) Limited as trustee of Momentum Malta Retirement Trust Re: Mrs EC'* with the Complainant being the life assured under the said policy.³²

The total premium paid into the Executive Investment Bond, which amounted to GBP427,994.93,³³ was in turn invested in investment instruments such as those indicated in the table of investments provided by the Service Provider.³⁴

Investment Adviser

Continental Wealth Management ('CWM') was the original investment adviser appointed by the Complainant.³⁵ The role of CWM was to advise the respective Member regarding the assets held within the Retirement Scheme.

Underlying Investments

The underlying policy, the European Executive Investment Bond issued by Skandia International and held within the Retirement Scheme commenced on 21 September 2016 with a total premium of GBP427,994.93.³⁶ The investments undertaken within the said policy were summarised in the table of investment transactions provided by the Service Provider.³⁷

³⁰ *Ibid.*

³¹ *A fol. 87*

³² *Ibid.*

³³ *Ibid.*

³⁴ *A fol. 282*

³⁵ *A fol. 123*

³⁶ *A fol. 87*

³⁷ *A fol. 282*

The said table indicates that the portfolio of investments comprised 6 collective investment schemes and 4 structured products with the initial investments being in the 6 funds all undertaken in September 2016 and the subsequent investments in 4 structured products undertaken over the period September to December 2016.³⁸

The Service Provider indicated the valuation of the Retirement Scheme amounting to GBP399,872 as at 22 January 2018.³⁹

In the notes to the table of investments, MPM noted that in May 2018 the Complainant elected to sell the remaining structured notes invested into and *'crystallised a loss of £22,793 on these notes which ultimately led to an overall loss of £18,746. If they were held to Maturity the 100%/90% Capital Guarantee would have applied and no such loss would have been suffered'*.⁴⁰

In her communication of 5 June 2019,⁴¹ the Complainant explained *inter alia* that since appointment of her new adviser her *'pension has steadied but it took the sale of all the previous investments, including these structured notes, deemed acceptable by Momentum, to achieve some stability'*.⁴²

The Complainant further noted that as at 11 May 2019, her pension was valued at GBP322,963.57 with an indicative surrender value of GBP280,616.58, and that she made withdrawals of GBP50,000. The Complainant also indicated that her losses were *'now running at over GBP50,000'*.⁴³

A dealing instruction note dated 5 April 2018 was presented during the proceedings.⁴⁴ The said dealing instruction note shows the request by the Complainant, through her new adviser, for the sale of all the units in the six collective investment schemes and the three remaining structured notes⁴⁵ given

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ A fol. 283

⁴¹ A fol. 193

⁴² A fol. 195

⁴³ *Ibid.*

⁴⁴ A fol. 200

⁴⁵ Commerzbank 6 Year 90% Capital Protected; Stonehedge Invested Even 30 Dual Credit Note; Invested 6Y Even 30 Dual Credit Note (A fol. 200)

that one other structured note (the Boltmarket Natixx AAA Index Autocall)⁴⁶ was sold in September 2017.

Final Observations and Conclusions

The particular circumstances of this complaint are quite unique and differ in certain key aspects from other complaints filed with the Office of the Arbiter for Financial Services ('OAFS') with regards to, *inter alia*, claims of unsuitable investments allowed within a pension scheme.

In her Complaint Form dated 20 April 2018, the Complainant indicated the losses on the investments within the Retirement Scheme as amounting to GBP36,000.⁴⁷ In her communication of 5 June 2019 to the OAFS, the Complainant explained that the losses were '*now running at over GBP50,000*'.⁴⁸ The Service Provider, on the other hand, indicated a loss of GBP18,746 in the valuation of the pension portfolio for 2018 where it was *inter alia* explained that in May 2018, the Complainant sold three structured notes incurring a loss of GBP22,793 on these notes which ultimately led to an overall loss of GBP18,746 on the whole portfolio.⁴⁹

There are accordingly material discrepancies in the losses claimed by the Complainant on the disputed investments made under the investment advice of CWM and those indicated by the Service Provider.

It is also noted that apart from the fact that no evidence was provided regarding the valuation of 11 May 2019, which was referred to by the Complainant with respect to the claimed losses of over GBP50,000, such valuation as at May 2019 denotes the value of a portfolio constituted under a new adviser. This is so in view that instructions were given in April 2018, under a new adviser indicated as Beacon/Blacktower, for the redemption of all the units held in the original portfolio.⁵⁰

Notwithstanding the differences in the claimed amount of losses and lack of information on the actual losses realised from each respective investment

⁴⁶ A fol. 282

⁴⁷ A fol. 4

⁴⁸ A fol. 195

⁴⁹ A fol. 282-283

⁵⁰ A fol. 200

constituting the portfolio advised upon by CWM, an important consideration which is regarded to prevail in the particular circumstances of this case is the manner in which the losses ultimately arose.

An important aspect arising in this Complaint is that instructions were given, through a dealing instruction form dated 05/04/2018 signed by the Complainant through her new adviser,⁵¹ for the full redemption of all the investments advised upon by CWM and held by the Complainant. The said portfolio comprised the original investments of six collective investment schemes and the three structured notes remaining in the portfolio.

The decision to redeem the whole portfolio, which occurred even before the submission of the Complaint Form to the OAFS dated 20 April 2018, has, in practice, led to the realised losses.

During the proceedings of this case no evidence has emerged and/or sufficient basis and explanations provided justifying the early redemption of the original investments. The reason that it *'took the sale of all the previous investments, including these structured notes, deemed acceptable by Momentum, to achieve some stability'*,⁵² is not considered to provide, on its own, sufficient and solid reasonable grounds on which one can justify compensation on losses directly incurred as a result of actions taken for the early redemption of the portfolio.

The basis on which the original portfolio was unsuitable has not sufficiently emerged in this case and neither has it been demonstrated that the early redemption of the whole portfolio was necessitated to prevent higher losses on the respective investments.

Consideration also needs to be given to the claim made by the Trustee that if investments in structured notes were held to maturity the *'100%/90% capital guarantee would have applied and the loss would likely not have occurred'*.⁵³

Moreover, a search on the contested structured products indeed indicate that the said notes had an element of capital protection in that two notes issued by

⁵¹ *Ibid.*

⁵² *A fol. 194/195*

⁵³ *A fol. 279. A fol. 281 also refers.*

Investec Bank plc were '*without Capital at Risk*'⁵⁴ and another one issued by Commerzbank AG had '*90% Capital Protected regardless of performance of underlying*'.⁵⁵

Hence, in the particular circumstances of this case, it appears that the returns on such investments were more likely at stake rather than the original capital invested unless there were concerns on the counterparty risk, which have not either emerged in this case. The other structured note, the Boltmarket Natixx AAA Index Autocall, which had formed part of the portfolio was sold in September 2017 at a profit of GBP1,653 as shown in the table of investments provided by MPM.⁵⁶

Hence, it is considered that, in the circumstances and on the basis of the information and evidence presented during this case, the Arbiter does not have sufficient grounds and basis on which to allocate responsibility, either in full or part thereof, to the Service Provider for the losses resulting from the redemption of the investments in the original portfolio.

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

Since the Arbiter has rejected the preliminary plea raised by the service provider and in light of the particularities of this case, each party is to bear its own legal costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services

⁵⁴ Final Terms of the Invested Notes – Stonehedge Investec Even30 Dual Credit Note <https://www.investec.com/content/dam/structured-products/files/other-issues/6-Yr-Capital-Protected-Upside-Note-linked-to-Barclays-Bank-General-Recovery-GBP.pdf> and Investec 6Y Even30 Dual Credit Note <https://www.investec.com/content/dam/structured-products/files/other-issues/6yr-capital-proected-upside-note-link-to-credit-suisse-group-ag-general-recovery-XS1513734704.pdf>

⁵⁵ <https://www.portman-associates.com/wp-content/uploads/2016/10/Commerzbank90CapitalProtected-FactSheet.pdf>

⁵⁶ Sale amount of GBP31,653 less Purchase Amount of GBP30,000 in respect of the Boltmarket Natixx AAA Index Autocall (A fol. 282).