

Before the Arbiter for Financial Services

Case No. 164/2018

MS

(‘the Complainant’ or ‘the Member’)

vs

Momentum Pensions Malta Limited

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

or ‘the Retirement Scheme Administrator’

or ‘the Trustee’)

Sitting of the 28 July 2020

The Arbiter,

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

The Complainant submitted that as pension fund trustees, MPM had a duty of care to safeguard her pension fund against any measures that threatened its security. It was claimed that MPM did not visibly or effectively exercise judgement in this regard with reference to the bad investment decisions made by Montpelier.

The Complainant explained that Montpelier had permission to make investment decisions for her but had clearly made some very poor investment decisions. It was submitted that MPM did not query these decisions with her or

with Montpelier. The Complainant noted that she assumed a trustee's role was to offer the additional level of screening.

The Complainant claimed that two structured note investments, issued by BNP and RBC respectively, were for professional investors and not retail investors with medium risk.¹ The Complainant also questioned purchases of Inspirato collective investment schemes within her portfolio claiming that Montpelier had a vested interest in Inspirato due to a financial partnership of sorts with Inspirato.²

The Complainant requested full refund on all capital that was inappropriately invested indicating a total of GBP58,000 made up of GBP30,000 in respect of Inspirato funds, GBP19,000 in respect of the BNP investment and GBP9,000 in respect of the RBC investment.

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 Montpelier Malaysia Limited and Montpelier (Labuan) Ltd ('Montpelier') act as adviser and provide financial advice to investors. It was noted that amongst its specialist areas is providing wealth management advice to teachers.
3. That MPM is not licensed to provide investment advice.
4. 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 28 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.

¹ Emails sent by the Complainant to MPM on 16 February 2018 and 13 June 2018.

² Pg. 10 of the attachment to the Complaint Form.

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.

5. MPM further submitted that without prejudice to the above, and also preliminary, the Complainant transferred out of the Scheme over two years ago in May 2016 to a scheme provided by Momentum Pensions (Gibraltar) Limited, in doing so and in considering the period of time that has passed since the transfer out, the complaint cannot be entertained and should be dealt with by the relevant body in Gibraltar.³
6. MPM noted that in the first place, the Complainant appointed Montpelier as her adviser. It was noted that she appointed Montpelier on a discretionary basis, delegating all investment decision making to Montpelier without the need to consult her and also authorised Royal Skandia to act upon investment instructions directly from Montpelier as per the form of Skandia International appointing the fund adviser to her Royal Skandia portfolio bond. MPM further noted that, in turn, Montpelier confirmed they hold the appropriate authorisation to offer this service. It was also noted that the Complainant herself admits in her complaint that *'Montpelier has permission to make investment decisions for me'* and she further admits that Montpelier *'clearly made a number of very poor ones'*.

It was further noted that in spite of this, MPM is not aware of any attempt by the Complainant to initiate proceedings against Montpelier which advised the Complainant to invest in products which have led to the Complainant's losses.

7. MPM pointed out that its role as a Retirement Scheme Administrator and Trustee is to ensure that investments into the Scheme are managed in

³ Emphasis made by the Service Provider.

accordance with relevant legislation and regulatory requirements, Scheme terms and conditions and the Trust Deed and Rules.

8. MPM submitted that it does not provide investment advice and the Complainant is aware of this. It was noted that the Complainant admits this in her email to MPM dated 16 February 2018, where she stated, '*I accept that Momentum are not responsible for the dreadful investment advice given by Montpelier*'. MPM also noted that investment advice is provided by the Complainant's appointed adviser, Montpelier and the Complainant's investment strategy is agreed between Montpelier and the Complainant and in doing so with Montpelier taking into consideration the Complainant's investment objectives and attitude to risk in order to advise the Complainant of suitable investments. MPM submitted that responsibility for ensuring investments are in line with the risk profile and the Complainant's objectives, sits with her adviser. MPM also replied that investment instructions received from Montpelier for the Complainant were reviewed by MPM against the Scheme investment guidelines and were in accordance with these investment guidelines.
9. MPM noted that the Complainant alleges that MPM '*had a duty of care to safeguard my pension fund against any measures that threatened its security*' and that MPM never '*visibly or effectively exercise judgement in this regard*', but fails to explain why this is the case or to substantiate her allegation. MPM replied that it has, at all time, fulfilled all its obligations with respect to the Complainant.
10. MPM noted that as the Complainant alleges in her complaint, bad investment decisions, made by Montpelier, are the issue. MPM submitted that these investment decisions were based on her investment strategy which was put in place by the Complainant and her adviser, Montpelier. MPM further submitted that it is not involved with the investment strategy and it further reiterates that the investments made for the Complainant were in line with the Scheme guidelines applicable at the time of the Complainant's application.

MPM replied that furthermore it is important to consider the full range of investments in a portfolio and argued that the breadth and diversification

of all the Complainant's investments should be taken into account when assessing the risk of her portfolio.

11. MPM submitted that the Complainant would have been aware of the performance of her investments on an annual basis as MPM communicated fund performance by sending the Complainant annual member statements for 2013 and 2016 inclusive.
12. MPM 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 Montpelier. It was claimed that MPM did not accordingly stand to make any gain or benefit as a result of the Complainant investing in any particular underlying investment.
13. MPM replied that it has, at all times, fulfilled all its obligations with respect to the Complainant and observed all guidelines, including investment guidelines.
14. MPM submitted that, as already stated in its reply, it is not licensed to and does not provide investment advice and that furthermore, it did not provide investment advice to the Complainant. MPM noted that this is clear from the application form which specifically requests the details of the Complainant's professional adviser. MPM submitted 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 declaration 9 on page 6 of the said form.
15. MPM submitted 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.
16. MPM further submitted that it has not 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.

17. 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 notes of submissions, the additional submissions made and respective attachments,

Further Considers

Preliminary

The Service Provider raises the plea that since

'the Complainant transferred out of the Scheme over two years ago in May 2016 to a scheme provided by Momentum Pensions (Gibraltar) Limited, in doing so and in considering the period of time that has passed since the transfer out, the complaint cannot be entertained and should be dealt with by the relevant body in Gibraltar'.⁴

The Arbiter notes that the Service Provider did not specify on what legal grounds it is basing this plea. Chapter 555 of the Laws of Malta confers jurisdiction on the Arbiter when the complainant is an *'eligible customer'* and the complaint is against a financial services provider licensed or authorised by the Malta Financial Services Authority (MFSA). At the time of the Complaint, MPM was a licensed financial services provider and, consequently, a provider against whom a complaint could be raised.

The definition of financial service provider stipulates that:

"financial services provider" means a provider of financial services which is or has been licensed or otherwise authorized by the Malta Financial Services Authority in terms of the Malta Financial Services Authority Act or any other financial services law, including but not restricted to investment services, banking, financial institutions, credit cards, pensions and insurance, which is or has been resident in Malta or is or has been resident in another EU/EEA

⁴ Page1/2 of MPM's Reply before the Arbiter for Financial Services.

*Member State and which offers or **has offered**⁵ its financial services in and, or from Malta. A provider of financial services which has had its licence suspended or withdrawn by the competent authority, but which was licensed during the period in relation to which a complaint by an eligible customer is made to the Arbiter, shall be considered as falling within the definition of a financial services provider’.*

The legislator contemplates the situation where a complainant can also raise a complaint for ‘past’ services given by the service provider and does not impose a limit as to the time when the service was offered save the provisions of Article 21(1)(b)(c)(d) and the relevant Articles relating to prescription.

In arguing that the Complaint should be heard in Gibraltar, the Service Provider is hinting that the Complainant should lodge a complaint in Gibraltar against a different company, namely, Momentum Pensions (Gibraltar) Limited.

Since the Complaint relates to the conduct of the Service Provider at the time when the Complainant was receiving a service from a licensed service provider, the Arbiter cannot refrain from considering the case. However, in this connection, the Arbiter has to consider the other pleas raised by the Service Provider based on Article 21(1)(b) and (c).

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) states 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:

⁵ Emphasis made by the Arbiter

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 three and a half months for the Service Provider to send the Complainant a reply to her formal complaint.⁶ 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 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 wrong.

As to Article 21(1)(b), it is noted that 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 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**, during the period in which Montpellier was the adviser, which role MPM

⁶ The Complainant's formal complaint dated 16 February 2018 was answered by the Service Provider on 4 June 2018.

occupied since the Complainant became member of the Scheme and continued till May 2016 when the Complainant left the scheme in Malta and seemingly changed her adviser at the time of transfer.

It is also noted that with respect to the contested investments, which were done at the time Montpelier was adviser and when MPM was acting as trustee and retirement scheme administrator of the scheme, such investments still formed part of the Complainant's portfolio not only upon the transfer from the Malta Scheme to the Gibraltar Scheme but also after May 2016.⁷ Hence, the Service Provider did not prove either in this particular case that the contested investments no longer formed part of the portfolio after the coming into force of Chapter 555 of the Laws of Malta.

Since Chapter 555 of the Laws of Malta came into effect on the 18 April 2016, it is amply clear that the conduct complained of continued even after Chapter 555 of the Laws of Malta came into force, and, therefore, Article 21(1)(b) of the law does not apply.

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) provides 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.'

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'*.

⁷ As per the Valuation Statements dated June 2018 presented by the Complainant in her additional submissions.

In its Reply before the Arbiter for Financial Services, the Service Provider only submitted that more than two years have lapsed since the conduct complained of took place and did not elaborate any further as to why the Complaint cannot be entertained in terms of the said article.

In its additional submissions, MPM *'pleaded prescription in terms of art 21(1)(c) of Cap. 555'* and submitted that *'the complaint is prescribed on the basis that the Member has exited the Momentum scheme over 3 years ago'*.

The Complainant exited the Retirement Scheme in May 2016, and the formal complaint with the Service Provider was made by the Complainant on 16 February 2018 and, accordingly, less than two years had passed from the time of exit of the Momentum scheme till the formal complaint to the Service Provider as is established by law.

With respect to the exit from the Momentum scheme, even if one had to take the date when the Complainant completed the *'Pension Transfer Document'*, which was presented by MPM in its additional submissions and which document was signed by the Complainant on 10 March 2016 and by the receiving scheme (that is the Gibraltar scheme) on 25 April 2016, the two years' timeframe referred to in Article 21(1)(c) did not expire even with reference to such dates given that the formal complaint with the Service Provider was filed on 16 February 2018 as indicated.

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

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

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.⁸

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

The Complainant

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

Her occupation was indicated as *'Teacher'* in the Application Form for Membership. It was not proven during the case that the Complainant was a professional investor and, consequently, the Complainant can be treated as a retail client.

The Complainant was accepted by MPM as member of the Retirement Scheme on 31 October 2012. The risk profile of the Complainant was indicated of *'Medium Risk'* in her Application Form for Membership.

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator¹⁰ and acts as the Retirement Scheme Administrator and Trustee of the Scheme.

The Legal Framework

⁸ Cap. 555, Art. 19(3)(b)

⁹ Art. 19(3)(d)

¹⁰ <https://www.mfsa.mt/financial-services-register/result/?id=3453>

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

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015.¹¹

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. 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.

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',

¹¹ 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/>

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 and the contested Underlying Investments

The Momentum Malta Retirement Trust (‘the Retirement Scheme’ or ‘the Scheme’) is a trust domiciled in Malta. It was granted a registration by the MFSA¹² as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 and under the Retirement Pensions Act in January 2016.¹³

The Arbiter notes that the case in question does not involve a member-directed personal retirement scheme with an investment adviser advising the Member on the choice of investments, but a member-directed personal retirement scheme with a third party managing the member’s investments on a discretionary basis.¹⁴

This is reflected by MPM in its Reply before the Arbiter for Financial Services¹⁵ and evidenced in the form issued by Royal Skandia, Appendix 3 to the same Reply.¹⁶

The assets held in the Complainant’s account with the Retirement Scheme was used to acquire a whole of life insurance policy, this being the Executive Redemption Bond issued by Skandia International¹⁷/ Old Mutual International.

¹² <https://www.mfsa.com.mt/financial-services-register/result/?id=3454>

¹³ As per the Registration Certificates issued by MFSA to the Scheme attached to an affidavit by Stewart Davies of MPM, presented in Case Number 127/2018 decided today.

¹⁴ As per condition 9.2(b), Part B.9 of the ‘*Supplementary Conditions in the case of entirely Member Directed Schemes*’ of the Pension Rules for Personal Retirement Schemes.

¹⁵ Para. 6, Page 2 of MPM’s Reply.

¹⁶ Whereby ‘*Option 2 – Discretionary investment manager authority*’ was selected in the Skandia International’s form titled ‘*appointing a fund adviser to your Royal Skandia portfolio bond*’.

¹⁷ Skandia International eventually rebranded to Old Mutual International -

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

The premium in the said policy was in turn invested in investment instruments under the discretionary mandate of the adviser, whose investment instructions were accepted and executed by MPM.

The investments contested by the Complainant involved the following:

- an investment of GBP28,000 invested into two structured notes – GBP19,000 into a structured note issued by BNP and GBP9,000 into a structured note issued by RBC;
- an investment of GBP30,500 invested into collective investment scheme offered by Inspirato.¹⁸

The said transactions occurred whilst the Complainant was a member of the Malta Retirement Scheme. The two structured note investments were identified by Momentum as the RBC US Large Cap Phoenix ('the RBC investment') and the BNP European Recovery Phoenix ('the BNP investment').¹⁹

In her additional submissions, the Complainant provided documentation which indicated the following:

- the final maturity of the BNP investment in 2019, which investment provided a final cash payout of GBP8,112.83;²⁰
- according to a valuation issued by OMI dated 6 June 2018, the RBC US Large Cap Phoenix note experienced an unrealised loss of GBP6,850.80 at the time;
- an investment in three Inspirato collective investment schemes for a total of GBP30,500, which according to a valuation statement issued by OMI as at 25 February 2019 had an unrealised loss of GBP266.76, GBP371.21 and GBP500.43 respectively and, thus, in total an unrealised loss of GBP1,138.40 at the time.

¹⁸ Section D of the Complaint Form and email dated 13 June by the Complainant to MPM, pg. 9/10 of the attachment to the Complainant Form.

¹⁹ Letter dated 4 June 2018, sent to the Complainant by the Group Chairman of Momentum, which reply was sent for Momentum Pensions Malta Limited and Momentum Pensions (Gibraltar) Limited.

²⁰ A fol. 125 – 'Payment Confirmation – Final Maturity' sheet issued by OMI in respect of this product; A fol. 134 & 135 also refer.

In its additional submissions, the Service Provider in turn submitted the following:

- that whilst the Complainant claimed a loss of GBP19,000 on the BNP investment, this *'product returned capital of £9,442 together with coupons of £1,330 resulting in a Net Loss of £8,112'*.²¹

The Arbiter notes that the figure of 'Net Loss' of £8,112 indicated by MPM does not tally with the statement provided by the Complainant which actually indicated a cash payment of £8,112 as indicated above. It seems the Service Provider wanted to indicate that the product returned capital of £9,442 made up of coupons of £1,330 and the cash payment upon maturity of £8,112. The resulting realised Net loss would in turn amount to £9,558 and not *'a Net Loss of £8,112'*.²²

- with respect to the RBC investment, MPM submitted that whilst the Complainant claimed a loss of £9,000 on this investment, this *'product returned capital of £3573.5 together with coupons of £720 resulting in a Net Loss of £2,853.50'*.²³

Again, the figures here provided by the Service Provider do not tally

- with respect to the Inspirato funds, MPM noted that whilst the Complainant is seeking MPM to reimburse the value of these funds, MPM noted that *'at this stage, the evidence presented suggest little or no loss (total LOSS £1,138.40 – NOT THE £30,000 SHE IS CLAIMING)'*.²⁴

Investment Adviser

The Application Form for Membership indicates Montpelier (Labuan) Ltd ('Montpelier'), of Suite A-13-1, 13th Floor, Manara UOA Bangsar, 5 Jalan Bangsar Utama 1, 59000 Kuala Lumpur, as the investment adviser appointed

²¹ A fol. 140

²² £19,000 less £9,442

²³ *Ibid.*

²⁴ A fol. 141

by the Complainant, with Diana Ducherty indicated as the individual adviser of Montpellier.²⁵

The Application Form for Membership dated 17 October 2012, further indicated Montpellier being a regulated entity, with the regulator identified as the '*Labuan FSA*'.

The Skandia International Application Form in respect of the Executive Redemption Bond, and Skandia's '*appointment of fund adviser*' form signed in October/November 2012,²⁶ both indicate an entity with a slightly different name this being Montpellier Malaysia Limited, as the adviser. In the said forms, Montpellier Malaysia Limited bears the same contact details of Montpellier (Labuan) Ltd indicated in MPM's Application Form. The name of the individual adviser of Montpellier Malaysia Limited is indicated as Stuart Williamson in Skandia's form.

Monteplier Malaysia Limited was indicated, in Skandia's '*appointment of fund adviser*' form, as having a discretionary mandate, meaning that '*the fund adviser has complete discretionary authority, without consulting me/us, to make all investment decisions, to buy or sell assets, hold cash or other investments*'.²⁷

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

In terms of 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*

²⁵ As per pg. 1/2 of MPM's reply to the OAFS.

²⁶ Attached as Appendix 2 and 3 to MPM's Reply.

²⁷ '*Option 2 – Discretionary investment manager authority*', selected in Skandia International form titled '*appointing a fund adviser to your Royal Skandia portfolio bond*'.

Special Funds (Regulation) Act, 2002 ... in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the [SFA]'.²⁸

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

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

Following the repeal of the SFA and issue of the Registration Certificate dated 1 January 2016 under the RPA, MPM was subject to the provisions relating to the services of a retirement scheme administrator in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the RPA. As a Retirement Scheme Administrator, MPM was subject to the conditions outlined in the '*Pension Rules for Service Providers issued under the Retirement Pensions Act*' ('the Pension Rules for Service Providers') and the '*Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' ('the Pension Rules for Personal Retirement Schemes').

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

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

²⁸ As per the Registration Certificate issued by MFSA attached to an affidavit by Stewart Davies of MPM, presented in Case Number 127/2018 decided today.

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:²⁹

- 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:

'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';

²⁹ Emphasis added by the Arbitrator.

- 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'*.³⁰

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

³⁰ Editor Dr Max Ganado, *'An Introduction to Maltese Financial Services Law'*, Allied Publications 2009, p. 174

trust property and to apply the trust property in accordance with the terms of the trust'.³¹

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'.³²

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.

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**. The Arbiter is aware, that as acknowledged by the Service Provider in other cases involving the Scheme,³³ 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'**.³⁴

³¹ *Op Cit.*, p. 178

³² Page 9 – Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], dated 6 December 2017.

³³ Affidavit presented by Stewart Davies Director of MPM, submitted in a number of other cases made against MPM in relation to the Scheme, such as in Case Number 127/2018, decided today.

³⁴ Para. 17, page 5, of the said affidavit of Stewart Davies.

Once an investment decision is communicated to the retirement scheme administrator, it is noted that:

*'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) ...'*³⁵

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'*.³⁶

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

*'I accept that I or my chosen 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 Retirement Fund***,

which featured in the *'Declarations'* section of the Application Form for Membership signed by the Complainant.

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

³⁵ Para. 31, Page 8, of the said affidavit of Stewart Davies.

³⁶ Para. 33, Page 9, of the affidavit of Stewart Davies. Para. 17 of Page 5, of the said affidavit also refers.

*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’.*³⁷

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’.*³⁸

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. Indeed, in the Application for Membership signed by the Complainant dated October 2012, the section titled *‘Investment Policy Statement’* included a provision that:

*‘Momentum Pensions Malta Ltd are professional Retirement Scheme Administrators. **We will consider your Investment preferences and ensure your retirement fund is managed in line with the relevant regulatory requirements of HMRC and the Malta Financial Services Authority. The Retirement Scheme Administrator will retain ultimate power and discretion with regards to the investment decisions.**The Retirement Scheme Administrator binds himself to review the performance of the Scheme using generally accepted local and international benchmarks prevalent at the time and fully in line with the requirements of SOC B 1.3.2 iii of the Directive issued*

³⁷ 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/>.

³⁸ Pg. 9 of 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).

under the Act. The Retirement Scheme Administrator, furthermore, shall ensure that any investments made are within the diversification parameters established under the prevailing legislation whilst at the same time, having due regard to any Member's 'letter of wishes'. However, it is clear that the Retirement Scheme Administrator will use his absolute discretion at all times and will place any investments in the best interests of the Members and the Beneficiaries as explained in Clause 13.1 of the Trust Deed'.

Other Observations and Conclusions

Key considerations relating to the principal alleged failures

The Arbiter will now consider the principal alleged failure which, in essence, involved the claim that the Service Provider, as trustee of the scheme, did not adequately exercise its duty of care by allowing unsuitable investments made by the Complainant's adviser, Montpellier, within the Retirement Scheme.

As to the claimed unsuitability of the investments, the Complainant, in essence alleged that the structured note investments were for professional investors and '*not geared or suitable for retail investors*' and did not reflect her 'medium risk profile', whilst the investments into the Inspirato funds were questionable as it was claimed Montpellier had a vested interest in Inspirato.

General observations

On a general note, it is clear that MPM did not provide investment advice in relation to the underlying investments of the Scheme. The role of the investment adviser was the duty of other parties, such as Montpellier.

This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case as will be later decided in this decision.

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

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'.³⁹

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'.⁴⁰*

³⁹ <https://www.investopedia.com/terms/s/structurednote.asp>

⁴⁰ <https://www.investopedia.com/articles/bonds/10/structured-notes.asp>

In its additional submissions, the Service Provider attached product sheets in respect of the two structured note investments allowed within the Complainant's portfolio of investments. In addition to the product sheet presented, the Office of the Arbiter for Financial Services ('OAFS') also traced the fact sheet in respect of the RBC structured note investment that featured in the Complainant's portfolio.⁴¹

It is to be noted that the product sheets/fact sheet sourced highlighted a number of risks in respect of the capital invested into these products.

Apart from the credit risk of the issuer and the liquidity risk, the product/fact sheet of the said structured products also highlighted risk warnings about the notes not being capital protected, warning that the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment.

A particular feature emerging of the type of structured notes invested into, involved the application of capital buffers and barriers. In this regard, the product/fact sheet of such products described and included warnings that the invested capital was at risk in case of a particular event occurring. Such event typically comprised a fall, observed on a specific date of more than a percentage specified in the respective fact sheet, in the value of any underlying asset to which the structured note was linked. The fall in value would typically be observed on maturity/final valuation of the note. The specified percentage in the fall in value mentioned in the relevant product/fact sheet was of 50% of the initial value. The underlying asset to which the structured notes were linked comprised equities.

⁴¹ Fact Sheet for the RBC structured note bearing ISIN No. XS0994307295: <https://www.portman-associates.com/wp-content/uploads/2015/08/RBC-US-Large-Cap-Phoenix-Autocallable-Notes-Fact-Sheet.pdf>

The said product/fact sheets further included a warning, on the lines of:

'If any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity'.⁴²

It is accordingly clear that there were certain specific risks in the structured products invested into and there were material consequences if just one asset, out of a basket of assets to which the respective note was linked, fell foul of the indicated barrier. The implication of such a feature should have not been overlooked nor discounted. Given the particular features of the structured notes invested into, neither should have comfort been derived regarding the adequacy of such products just from the fact that the structured notes were linked to a basket of quoted shares.

Whilst the Arbiter notes that, as highlighted by the Service Provider in its submissions, the respective issuer of these structured product was a large institution, the Arbiter does not however consider this aspect to justify either, on its own, the investment into such products as other issues need to be taken into consideration, not the least the nature of these products and the effects any events or barriers that may form part of the key features of such products would have on the investment if and when such events occur as detailed above. Another important aspect that had to be considered is to whom these products were actually targeted, which will be considered in the subsequent section.

Investments into Structured Products Targeted for Professional Investors

The key aspect relating to this Complaint indeed revolves around the nature of the structured products and whether the said products, allowed within the Complainant's portfolio, were aimed solely for professional investors.

The Service Provider has not claimed that the Complainant was a professional investor. No details have either emerged indicating the Complainant, as not being a retail investor as explained above.

⁴² Example – Fact Sheet of the structured note issued by RBC with ISIN no. XS1000868247-
<https://www.portman-associates.com/wp-content/uploads/2013/11/RBC-Festive-Fixed-Income-FACTSHEET.pdf>

The fact sheet traced by the OAFS in relation to the RBC investment, which bears the ISIN number indicated in the product sheet produced by the Service Provider,⁴³ **specifies that this structured note was indeed targeted for professional investors only.** The said fact sheet in respect of the RBC investment clearly indicates that this note was *'For Professional Investors Only'* and *'not suitable for Retail distribution'* with the *'Target Audience'* for this product being clearly specified as *'Professional Investors Only'* as outlined in the *'Key Features'* section of the fact sheet.

With respect to the BNP structured note investment, it is noted that the *'Important Information'* section of the fact sheet presented by the Service Provider in respect of this product provided *inter alia* that the fact sheet *'has been prepared by a Sales and Marketing function within BNP Paribas ('BNPP') for, and is directed at, (a) Professional Customers and Eligible Counterparties as defined by the Markets in Financial Investments Directive, and (b) where relevant, persons who have professional experience in matters relating to investments falling within Article 19(1) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, and at other persons to whom it may lawfully be communicated'*.

The same section also highlighted that:

*'The Securities have no capital protection at any time and investing does put your capital at risk. Investors should be aware that there is risk of partial or total loss of any capital invested. **Investment in the Securities is highly speculative and should only be considered by investors who can afford to lose the entire capital invested'**.*^{44 45}

In its submissions, the Service Provider claimed that the references to *'Professional Investors only'* in the fact sheets referred to the marketed documentation. This is, however, not really the case. Besides that, no fact sheets were produced indicating the contested structured notes as targeted for retail investors, it is clear that the fact sheets presented and sourced were

⁴³ *Ibid.*

⁴⁴ Page 5 of the fact sheet in respect of the BNP European Recovery Phoenix Autocall – Attachment to MPM's Additional Submissions.

⁴⁵ Emphasis added by the Arbitrator.

issued purposely for those investors who were eligible to invest in the product. It is also clear that such products were not aimed for retail investors but only for professional investors.

Therefore, it is considered that there is sufficient evidence resulting from the product/fact sheet produced and sourced which show that the two structured products allowed by MPM within the Complainant's portfolio were not appropriate and suitable for a retail client. In this regard, it is considered that there was a lack of consideration by the Service Provider with respect to the suitability and target investor of the said structured notes with such lack of consideration not being reflective of the principle of acting with '*due skill, care and diligence*' and '*in the best interests of*' the member as the relevant laws and rules mentioned above obliged the Service Provider to do.

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 – needs to be kept into context in this regard. The provision of retirement benefits was indeed the Scheme's sole purpose and investments which were '*highly speculative*' as indicated in the fact sheet of the BNP structured note itself, went counter to such purpose.

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainant on her investments in structured notes **cannot** just be attributed to the under-performance of the investments as a result of general market and investment risks as MPM has *inter alia* suggested in these proceedings.

The deficiencies on the part of MPM in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as highlighted above impinge on the diligence it was required and reasonably expected to exercise in such roles.

It is considered that such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced. 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 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 this case, 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 Considerations

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 of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, **the Retirement Scheme Administrator had clear duties to check and ensure that the portfolio composition recommended by the investment adviser involved instruments which were all suitable for the Complainant in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme.**

The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

It is considered that, had there been a careful consideration of the contested structured products, the Service Provider would and should have intervened, queried, challenged and raised concerns relating to the suitability of such products and not allow the investments made in the said structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others.

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 pension portfolio needs to reflect a properly diversified, balanced and prudent approach and only consist of suitable investments for the member concerned. The investments undertaken need to ultimately reflect and promote the scope for which the pension product has been created.

For the reasons explained it is considered that there was, at the very least, a lack of diligence by the Service Provider in the carrying out of its duties as Trustee in regard to the oversight function with respect to the structured note investments allowed within the Complainant's portfolio. It is also considered that with respect to such function there are instances which indicate the Service Provider's approach and actions not being reflective of the requirements and obligations to which it was subject to, as explained above in this decision. The Service Provider failed to act with the prudence, diligence and attention of a *bonus paterfamilias*.⁴⁶

The Arbiter also considers that the Service Provider did not meet the 'reasonable and legitimate expectations'⁴⁷ of the Complainant who had

⁴⁶ Cap. 331 of the Laws of Malta, Art. 21(1)

⁴⁷ Cap. 555, Article 19(3)(c)

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 case⁴⁸ 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 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 in relation to the structured note investments.

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 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 realised losses as further stipulated below.

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 losses sustained by the Complainant

⁴⁸ Cap. 555, Article 19(3)(b)

on the structured note investments after offsetting any realised profits from other investments constituted by Montpelier at the time the Complainant was a member of the Retirement Scheme, as further stipulated in detail hereunder.

The Arbiter does not consider that he can accept the Complainant's claims in respect of the Inspirato funds given that the alleged inappropriateness of such investments have, on the basis of the information and documentation provided, not been substantiated nor emerged during the proceedings of the case in question.

Moreover, no sufficient evidence has either emerged, of there being sufficient material deficiencies on the part of MPM in relation to the appointment of the investment adviser, (which in this case, was Montpelier), to reasonably justify compensation on any realised losses on such investments as well. Accordingly, the Complainant's request for a refund on the total investment into the Inspirato funds is being rejected.

The Arbiter notes that the details of the status and performance of the portfolio created by Montpelier until the transfer to the Gibraltar Scheme, are not sufficient and current. The Arbiter shall accordingly formulate how compensation for the Complainant is to be calculated by the Service Provider for the purpose of this decision.

The Service Provider is, in this regard, being directed to pay the Complainant compensation equivalent to 70% of the sum of the Realised Loss resulting on the structured note investments after offsetting any realised profits made on the remaining portfolio of investments constituted under Montpelier within the Retirement Scheme. The Realised Loss on which compensation is to be paid shall, in the particular circumstances of this case, be determined as follows:

- (i) In respect of the indicated two structured note investments which, it is noted have already matured or been redeemed at a loss, it shall be calculated the realised loss resulting from the difference in the purchase value and the sale/maturity value (amount realised) from such investments. The realised loss on the respective structured note

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 on the said two investments.

- (ii) The realised loss on the two structured note investments as calculated in paragraph (i) above shall be reduced by the Net Realised Profit, if any, resulting from other investments in order to reach the figure of the Realised Loss on which the stipulated compensation is to be calculated for the purposes of this decision.**

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.

Each party is to bear its own legal costs of these proceedings.

**Dr Reno Borg
Arbiter for Financial Services**