Before the Arbiter for Financial Services

Case No. 035/2018

TF

('the Complainant' or 'the Member')

vs

Momentum Pensions Malta Limited

(C52627) ('MPM' or 'the Service Provider'

or 'the Retirement Scheme Administrator'

or 'the Trustee')

Sitting of the 28 July 2020

The Arbiter,

PRELIMINARY

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

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

The Case in question

The Complainant submitted that her initial complaints to MPM were done over a period of time. It was noted that her formal complaint was eventually dated 2 November 2017 and MPM did not send her a final response until 26 January 2018 continually delaying and stating that they needed another 30 days. The Complainant also noted that she sent her complaint to MFSA in November 2017 as MPM was not answering important questions.

The Complainant raised the following aspects in her Complaint Form:

(i) That MPM accepted business from unlicensed advisers and did not adequately control their actions.

The Complainant explained that she was aware that some offshore pension trustees who provide QROPS do legitimately take business from unlicensed advisers, but only if they have carried our detailed 'fit and proper' checks. It was submitted that Continental Wealth Management ('CWM') however were on record acting as cold callers, lead generators and introducers to Stephen Ward's Premier Pension Solutions SL as early as 2011. The Complainant noted that CWM's role in a series of Ward's scams ranging from the Evergreen QROPS liberation scam to a variety of later scams was clearly documented from at least 2013. It was pointed out that MPM yet continued to accept business from the firm seamlessly until September 2017. The Complainant noted that heavy losses were reported by MPM themselves in their annual reports from at least 2013, and yet no action was taken to stem the haemorrhaging of investors' funds. The Complainant claimed that by the time she became a member in 2015, the carnage of failed structured notes was well known to MPM, and yet her pension was invested in the same assets and her funds suffered the same terrible fate.

(ii) That MPM accepted instructions from CWM without checking her original Fact Find document.

The Complainant noted that her original Fact Find document stated that her risk profile will be maintained through diversification and the use of 100% capital protected products. The Complainant further alleged that it was confirmed to her verbally at a meeting of 16 November 2017 by the Chairman of Momentum, Mark Gaywood that MPM never ask for a copy

of the Fact Find so they never checked her attitude to risk or what she said she wanted as investments. She referred in this regard to the extract of the minutes of the said meeting.

The Complainant questioned how a pension trustee can possibly carry out their fiduciary duties to members without having due regard to the personal circumstances and risk profiles of the members. The Complainant explained that her associates and herself had spoken to a number of pension trustees in different QROPS jurisdictions and had established with the trustees and their regulators that it is an absolute requirement that members' risk profiles should be part of their core records and that those profiles should act as a safety valve to ensure unsuitable investments are not made.

(iii) That MPM accepted an Application that had been altered to reflect a different attitude to risk which would not have been possible if MPM had seen the original Fact Find.

(iv) That MPM accepted dealing instructions which were not signed by her and had photocopied signatures.

The Complainant explained that she had been asked to sign one blank document so that when the funds were received from her pension in the UK, they could discuss over the phone with her what to invest in, but this never happened. It was further explained that she chased and chased up where her funds were from early March 2015 to 18 May 2015 and finally received an email from MPM on 20 May 2015. The Complainant pointed out that the funds had already been with them since the 11 March and no-one had told her. It was also submitted that the dealing instructions were sent off without discussion and structured notes were purchased throughout April 2015 and before she knew anything about this the fund had lost over £25k as per the evidence she attached to her Complaint Form.

(v) That the dealing instructions were made to purchase high risk structured notes from RBC, Commerzbank, Nomura and Leonteq which were against her risk profile as stated on her fact find.

The Complainant further submitted that all of these structured notes were accompanied by information sheets which clearly warned that they were for PROFESSIONAL INVESTORS ONLY although these were never provided to her. The Complainant noted that she has only learned this since.

(vi) That the dealing instructions have been photocopied as all the signatures cross through the same place in each one, except the last one which they did ask her to sign. The Complainant claimed that MPM as trustees did not pick up on any of the forged dealing instructions in her case or in hundreds of other cases.

It was explained that MPM's response to this was that the 'signatures match[ed] their records', which the Complainant noted that this would of course be the case if they are photocopied. The Complainant noted that she accepted that if a trustee were to look at one single dealing instruction in isolation they would not necessarily pick on the fact that the investor's signature had been forged. She further stated that as crippling losses had started to be reported in 2013 and 2014, it should however surely have been the duty of the trustee to have a '*root and branch'* inspection of the '*book'* of the members and their rapidly failing investments. The Complainant alleged that in fact this never happened and MPM merely kept charging their fees but carrying out no due diligence or vigilance.

The Complainant noted that MPM also state that the dealing instructions were executed by her, but she claimed that these were not. It was stated that MPM are aware of this as Stewart Davies uses the very same phrase in the email she enclosed about compensation.

The Complainant enclosed copies of the dealing instructions and noted that these are stamped to indicate that the investment instructions had been checked, the signature checked and '*in line with investment guidelines*'.

The Complainant submitted that this was however clearly not the case. The Complainant attached a copy of the investment guidelines to her Complaint.

(vii) That MPM invested 100% of her pension fund into structured notes which is against even their own guidelines. It was submitted that there are several points in their Guidelines that have not been adhered to.

(viii) That MPM's role as a trustee is to act in the best interests of the Member and invest their funds '*prudently*', which the Complainant claimed they have not done. The Complainant submitted that this is the over-riding factor of why they had failed her.

It was explained that MPM has attempted to lay the blame at her own feet saying that it was her decision to appoint CWM as her adviser, and then authorising the firm as a discretionary investment manager by signing a blank dealing instruction. The Complainant however refuted this and stated that MPM were perfectly well aware that nobody had authorised CWM as a discretionary investment management and nor they could have done since CWM did not have an investment license. It was also noted that she also gave instruction in her application that she did not allow discretionary investment management.

(ix) That MPM did not send her any notification or explanation when the structured notes started to fail.

The Complainant noted that she raised it several times with the initial adviser and was told MPM were dealing with Leonteq and OMI regarding legal action but claimed that no-one has as yet seen an evidence of this. It was also submitted that other structured notes have however failed so the issue was not just Leonteq and the issue was that these notes should have never been allowed for a retail investor and definitely not in a pension.

(x) That despite knowing that all the dealing instructions for hundreds of people have been forged/ photocopied they have never notified the legal authorities on behalf of their members.

(xi) That MPM advised one Member in October 2017 that they were going to pursue legal action against CWM but had never done so.

The Complainant explained that in fact, MPM had already acknowledged that it was their duty to take criminal action against CWM for the fraud they had committed against her and hundreds of other victims. It was stated that MPM had subsequently denied this despite there being hard evidence of their commitment to do this.

(xii) That the trustee has failed so badly in looking after her pension and she had asked several times for the fees to be suspended.

The Complainant explained that MPM agreed and then reneged and have reinstated fees even though her fund is down over 50% from the original investment. It was noted that after further pressure they had agreed to suspend for one year only although they were doing no work for her at all.

(xiii) That the bond that MPM have funds invested into is prohibitively expensive and that she was never made aware of the fees for this.

The Complainant explained that only in late 2017 after being made aware of such a large-scale scam she asked for something that she had signed to say she accepted the fees. It was noted that she obtained a blank copy of the form, but her signature is not on it.

The Complainant claimed that she is now tied into this investment bond for 10 years at a cost of over 4500 euros a year. It was further claimed that this makes it almost impossible for the pension to grow and to provide an income in retirement. The Complainant claimed that MPM was however aware of this at the time and yet made no attempt to alert her to the damaging drag this would cause to her fund. It was alleged that even without the catastrophic investment losses, her fund was bound to lose over 35% of its initial value purely due to the fees of the insurance bond and the structured notes.

(xiv) That throughout the underlying policy had been in force MPM has allowed forged/ photocopied signatures for foreign exchange transactions to be made and that these transactions had not been in her favour causing the value of the fund to drop with currency fluctuations.

The Complainant explained that she specifically had requested for her funds to be invested into euros as she had no intention of moving back to the UK and she lived in France. It was further explained that the exchange rate for her UK pension at the time meant she had over 379,000 euros invested.

The Complainant alleged that the currency fluctuations has further escalated the rate at which her fund has dropped, but MPM did nothing to alert her to this damage.

(xv) That MPM have not cancelled their terms of business with Trafalgar International despite they end their response by saying that all of the problems are nothing to do with them and blame Trafalgar International.

The Complainant questioned why MPM still allowed Trafalgar to send investment instructions when they are not licensed for investment advice.

(xvi) That since at least 2015, MPM has been aware of this scam and however continued to allow terms of business with the companies that were sending in these dealing instructions and continued to allow people to lose money. The Complainant noted that this is the most serious complaint that she had against them and how they failed her.

The Complainant explained that MPM has been aware that dealing instructions have been forged since 2015 (as per the email from Stewart Davies that she enclosed with her Complaint Form, saying that compensation payments may be required and the Compensation Agreement made with Liz Barrington), but continued to accept dealing instructions in the same manner as done previously.

The Complainant noted that MPM did not change their checking procedures even though they knew forgeries were being sent to them from CWM.

The Complainant submitted that MPM should have been more aware and the hundreds of victims scammed after 2015 would have not been in this position now.

It was further explained that a compensation package was offered to at least two other members, most notably Liz Barrington. The Complainant noted that they tried to keep it quiet and out of the public domain, by making her sign a confidentiality agreement. The Complainant submitted that her case was exactly the same as hers and hundreds of others. It was alleged that MPM paid the compensation and in this regard the Complainant provided details of the agreement and correspondence she obtained regarding the agreement.

The Complainant reiterated that MPM continued to allow terms of business until as late as September 2017 despite this happening and tried to avoid a social media campaign and made a payment, admitting liability.

The Complainant attached an email from Stewart Davies of MPM claiming that such email involved cases that were discussed and on which compensation was agreed. The Complainant noted that MPM also state that they are aware of other cases of faked dealing instructions and had also stated in the said email that it would give them sufficient grounds to suspend terms of business. It was pointed out that MPM however still continued for a further three months before suspending terms of business with CWM. It was also noted that MPM still has terms of business with Trafalgar.

The Complainant alleged that her case is exactly the same and that MPM has failed her for exactly the same reasons. It was submitted that MPM cannot discriminate against one investor and pay compensation to another.

It was also noted that recently in late 2017, MPM had also tried to ‘gag’ another investor by offering a deal on exit fees as long as an agreement, which stated that they can never litigate or go public, is signed. The Complainant attached to her Complaint Form a draft copy of the said agreement and email from Stewart Davies.

The Complainant submitted that given that MPM have already admitted liability by their actions by signing an agreement and paying compensation to at least one other investor who was exactly the same as her, she wanted her pension fund to be reinstated to its original value. The Complainant noted that all losses should be reimbursed and all fees and charges repaid to her fund and also claimed loss of growth on her fund for the three years it had been invested, where at the time, she was *'promised'* a 6% growth. The Complainant also indicated her wish to exit from the OMI bond with no penalties or MPM to pay the penalties for her to leave. It was noted that she was looking to have back a fund of 379,317.98, that she started with, available to re-invest elsewhere with a modest 4% per annum growth added to her fund. The Complainant calculated these to amount to 407,958 euros up to March 2018. It was noted that her fund was currently valued at 175,000 and the total she was claiming therefore was 232,000 euros with no further fees taken to exit any part of the investment or MPM to reimburse the fees.

In its reply, MPM essentially submitted the following:

1. That MPM is licensed by the Malta Financial Services Authority to act as the Retirement Scheme Administrator ('RSA') and Trustee of the Scheme. That the Scheme is licensed as a Personal Retirement Scheme.

2. That Continental Wealth Management ('CWM') is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH ('Trafalgar'). Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union.

3. That MPM is not linked or affiliated in any manner to CWM, Trafalgar or Global Net.

4. That MPM is not licensed to provide investment advice.

5. That without prejudice to MPM's defence that it is not responsible for the Complainant's claims, more than two years have lapsed since the conduct complained of took place and that therefore pursuant to Article 21(1)(c) of Chapter 555 of the Laws of Malta, the Complaint cannot be entertained.

6. MPM noted that the Complainant's application form lists John Owens and Richard Peasley from CWM as the Complainant's professional adviser as indicated in the Application Form. MPM noted that a declaration by Richard Peasley as to the suitability of the Complainant's underlying investment is also in the application form (page 4, section 9).

7. MPM submitted that the Complainant's risk profile was chosen by the Complainant and her adviser. It was noted that the document received by the RSA and reflecting the Complainant's chosen risk profile in the application form was not attached to the Complainant's complaint. It was further noted that the application form attached to the reply, clearly shows the chosen risk profile as Medium to High risk.

   MPM explained that the member and the adviser appointed by the member select investments, and the adviser ensures that the investments comply with the member's risk profile. It was also explained that the RSA then reviews this in line with the risk profile on file to ensure that it broadly reflects the risk profile and offers diversification.

8. MPM noted that the Complainant refers to a Fact Find completed by her and her adviser but that it was not industry practice for the advice provided by the adviser to be provided to the RSA.

9. MPM noted that the application form attached to its reply includes a detailed checklist of the information required by MPM (page 1 of the form) and that this information does not include a Fact Find. MPM explained that the Fact Find is a result of the Complainant's meetings and consultations with her chosen adviser, CWM. It was submitted that allegations that the Complainant's risk profile was not correctly stated to MPM must be directed towards the Complainant's advisers.

10. MPM noted that together with its reply of the 26 January 2018 attached to the complaint, MPM provided the Complainant with documents which the Complainant has omitted to provide to the Arbiter. MPM pointed out that Annual Benefit Statements were sent to the Complainant since inception specifically highlighting the value of the Scheme since her entry into the Scheme. MPM noted that the statements specifically show the depreciation in the value of the assets. Copies of the said statements were attached to MPM's reply.

11. MPM noted that, furthermore, the Complainant has also omitted to provide the Arbiter with her email dated 2 October 2017, wherein the Complainant states: '… *One from was signed by myself, and Richard Peasley – **stupidly I was asked and agreed to sign it blank, as I was told "that's the way we do it***". *I was told that the investments would be chosen and I would have final say before it went ahead. That didn't happen'.*[1]

    MPM provided a copy of this email as Appendix 3 to its reply.

    MPM noted that it is amply clear that it was the CWM adviser who gave the Complainant the instruction to complete the document in blank and the Complainant accepted. It was submitted that at that point in time, MPM was not involved and furthermore, MPM had no awareness or line of sight of these discussions and arrangements made by the Complainant and her appointed adviser.

    MPM replied that the Complainant was negligent when she executed documents in blank, as she herself asserts. MPM noted that it does not support documentation being signed blank and would not accept any documents of this nature, had it been aware. MPM submitted that it cannot now be requested to make good for the Complainant's own negligence, which she acknowledges.

[1] Pg. 2 of MPM's Reply. Emphasis added by MPM.

MPM pointed out that the blank dealing instructions enabled CWM to decide on the investments to be purchased and enable them to place instructions with MPM.

12. MPM noted that the Complainant has stated in her complaint that, as early as 2015, two months after the investment was made, that the Complainant was aware of losses of £25,000 based on the original portfolio selected – MPM questioned why the Complainant did not take any action against CWM, and indeed any action at all, at that point in time. MPM submitted that the Complainant had clearly challenged CWM at that time and however, despite this, she retained CWM as her appointed adviser, failed to raise a complaint to MPM regarding the issues, and retained the investments. MPM submitted that the complainant failed in her duty to mitigate potential losses.

13. With respect to the allegation that MPM accepted business from unlicensed advisers and other allegations concerning CWM, MPM submitted that Trafalgar was licensed as an insurance intermediary and consultant, as well as an investment intermediary and referred to documentation which it attached to the reply and which it noted had been provided to MFSA. MPM pointed out that Trafalgar entered into an agency agreement with CWM.

    MPM noted that CWM has ceased trading and is no longer operating and that this was the only reason why the Complainant has filed a claim against MPM and not against CWM. MPM submitted that it is CWM who is the proper respondent to this claim.

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

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

14. MPM noted that the Complainant herself leads and administers a Facebook Group named '*Disadvantaged CWM Complainants*'. MPM submitted that this was further acknowledgement that the Complainant considers CWM as being responsible for the losses she has allegedly suffered. It was noted that the present claim has been however directed towards MPM who is not the proper respondent to this claim.

15. MPM noted that the Complainant alleges that MPM was aware of CWM's activities as '*cold callers*'. MPM replied that it was not aware of any such practices employed by CWM and in any event, if the Complainant was subject to such practices by CWM these should be reported to the appropriate regulatory authority and not directed towards MPM. MPM further requested the Complainant to clarify what is referred to by the term '*lead generators*'. In relation to MPM allegedly being aware that CWM acted as '*introducers*', MPM submitted that there is nothing inherently wrong with introducers, which are regulated by the MFSA's Pension Rules for Service Providers.

16. MPM submitted that any business introduced by CWM to MPM fell within the MFSA's Pension Rules for Service Providers as they relate to RSAs.

17. With respect to fees charged by MPM, MPM submitted that it is entitled to levy appropriate fees in line with its fee tariff and terms and conditions, details of which the Complainant has been fully aware of since inception and acknowledged.

    MPM explained that as a gesture of goodwill, and as reflected in the complaint, MPM agreed to suspend the Complainant's fees for 2018 whilst both this matter was reviewed and pending the outcome of the Old Mutual International Irelenad (Ireland) Limited ('OMI')/ Leonteq Securities AG ('Leonteq') matter which is referred to below. MPM submitted that this gesture of goodwill has now been interpreted by the Complainant as some form of admission of liability. MPM submitted that this is not the case and that it had set out its position to the Complainant both in its reply of the 26 January 2018 and in various exchanges of correspondence (which the Complainant has attached to her claim).

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

18. With respect to the settlement referred to in the Complaint, MPM noted that the Complainant refers to '*compensation packages*' having been offered to at least two other members. MPM replied that any information in the complaint which discloses information relating to persons who are not involved in this claim should be deleted from the record. MPM submitted that the disclosures breach the rights, both in terms of confidentiality and data protection of the persons with respect to whom they have been made.

    MPM noted that it will not disclose any information pertaining to any other member, but states that MPM never paid any sums or made any financial contribution towards any legal settlement involving ex-CWM clients and CWM/Trafalgar.

19. MPM referred to document marked '9' which the Complainant attached to her Complainant and noted that the Complainant must explain to the Arbiter the said document. MPM noted that if this is an email, the Complainant has omitted from printing the email showing who the sender and the receiver is/are, and that if the Complainant was not copied with this email, she must explain to the Arbiter how she obtained a copy of it.

20. MPM referred to the privileged correspondence with another complainant (the document attached to the complaint and marked as '18'). MPM pointed out that it has been working hard to help those members who have suffered as a result of CWM actions and in certain circumstances, in a very limited way, has offered assistance. MPM submitted that this is in no way an admission of liability.

21. MPM noted that other claims are being pursued and explained that it is aware that OMI, the bond provider, is considering legal action against one of the structured notes providers, Leonteq, for losses incurred by the ultimate holders of the bonds, such as the Complainant. MPM replied that

it is pertinent to note that it is OMI, and not MPM, who is considering this litigation against Leonteq.

22. MPM noted that in addition, it was aware that the Complainant has joined litigation against various life companies in Spain.

23. MPM submitted that as already stated in its Reply, it is not licensed to and does not provide investment advice and furthermore it did not provide investment advice to the Complainant.

24. MPM noted that this is clear from the application form which specifically requests the details of the Complainant's professional adviser CWM (page 2 thereof). MPM further noted that a declaration is also made by the adviser and signed by the adviser on the application itself (page 4). MPM 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 (and referred to paragraph 8 on page 8).

25. MPM noted that 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 10 of the application form.

26. With respect to compliance with Investment Guidelines, MPM noted that the Momentum investment guidelines in place at the time at which the Complainant invested are those attached to the application form. MPM pointed out that the guidelines attached to the Complaint are the most recent guidelines, and not the applicable guidelines at the time of Complainant's investment.[2] MPM submitted that the investment guidelines were not breached by MPM.

27. With respect to the losses allegedly suffered, MPM noted that the Complainant alleges heavy losses suffered by MPM. It was submitted that this was false, as will be proved by MPM in the course of the proceedings.

[2] Emphasis added by MPM.

28. With respect to the charges/costs raised in relation to the OMI bond, MPM noted that the OMI Bond Application and Appointment of a Fund Adviser form were completed by the Complainant's Adviser. MPM noted that the Complainant's signature on the Appointment of Fund Adviser form was verified against the proof of identification provided to MPM. It was submitted that MPM also confirmed that the Adviser fee section on the application was completed ensuring that the fee for the advice provided was fully disclosed.

29. MPM noted that correspondence received from the investment company, OMI, confirming the Investment Bond application was accepted and a copy of the Policy Documentation was sent to the Complainant on 20 May 2015. MPM noted that this correspondence included the Investment Bond '*Charges Schedule'* which very clearly outlined and fully disclosed all fees payable on the Investment Bond.

30. MPM submitted that the Complainant is and was fully aware of the Bond charges and Fund Adviser Fees.

31. MPM submitted that it has not committed any fraud, nor has it acted negligently. MPM stated that it has not breached any of its obligations in any way and submitted that the losses sustained by the Complainant are attributable to the adviser appointed by the Complainant.

32. MPM pointed out that the Complainant must show that it was MPM's actions or omissions which caused the loss being alleged. MPM replied that in the absence of the Complainant proving this causal link, MPM cannot be found responsible for the Complainant's claims.

Having heard the parties and seen all the documents and submissions made including the affidavits, the notes of submissions, the additional submissions made and respective attachments,

Further Considers:

Preliminary Pleas

In its Reply, MPM submitted that it was '*aware that the Complainant has joined litigation against various life companies in Spain*'.[3] MPM, however, produced no evidence on this matter in the said Reply nor did it specify that the alleged litigation related to the same subject matter of this Complaint.

In point 2 of its additional submissions, MPM stated that:

'*Attached is also correspondence sent by complainant in February 2019, clearly stating that proceedings have been initiated in various jurisdictions against entities responsible for losses*'.[4]

MPM further stated in its additional submissions that:

'*It is clear that complainant and others like her are taking a shot gun approach and filing proceedings wherever possible, in the hope that something will stick. It is submitted with respect that this should clearly show that complainant herself, through her actions, has shown that it is not Momentum who should be held responsible for her losses.'*[5]

First of all, the Arbiter must underline that the final note of submissions should not serve the purpose of including additional defences that were not raised in the Reply. However, for the sake of completeness the Arbiter will consider the above-quoted objection.

With respect to the document titled '*Doc. SB1*' referred to by MPM in the said additional submissions, it is to be firstly noted that such document, which is actually dated 24 May 2019, is an email sent from Angie Brooks and not by the Complainant. Secondly, the said document does not mention nor makes specific reference to the Complainant. Such document cannot accordingly be considered as '*correspondence sent by complainant in February 2019*' as alleged by MPM.

[3] Pg. 5, para. 24 of MPM's Reply before the Arbiter for Financial Services.
[4] Point 2 of MPM's Additional Submissions (*A fol.* 359) and document titled '*Doc. SB1*' attached to the said submissions *(A fol.* 363-364).
[5] *Ibid.*

The said document attached by MPM to its additional submissions cannot be reasonably construed either as providing any sufficient and reliable evidence of the other claims made by MPM in regard to the Complainant, in point 2 of its additional submissions.

In addition, it is particularly noted that MPM has ultimately not demonstrated either that the proceedings claimed to have been '*initiated in various jurisdictions*' are on the same subject matter of this Complaint, which deals with the alleged shortcomings of MPM as the Trustee and Retirement Scheme Administrator of the Scheme.

Similarly, the statements made by Stewart Davies, Director of MPM, in his affidavit[6] regarding criminal proceedings filed in Spain against *inter alia* CWM and the press release he attached in this regard, do not mention the Complainant nor do they demonstrate either that they are on the same subject matter of the Complaint. By their very nature criminal proceedings are totally different and independent from civil or commercial procedures.

Moreover, when MPM made reference to these *'proceedings'* it did not specifically refer to any section of the law on which it is implying a doubt about the competence of the Arbiter, as it did in another plea referring to the competence of the Arbiter. However, even when the Arbiter tried ***ex officio*** to examine these allegations to establish whether he has competence to deal with the complaint, he did not find enough evidence to satisfy the requisites of the law especially Article 21(2)(a) of Chapter 555 of the Laws of Malta which stipulates that :

'*An Arbiter shall decline to exercise his powers under this Act where:*

(a) the ***conduct complained*** *of is or has been the subject of a lawsuit before a court or tribunal initiated by the* ***same complainant*** *on* ***the same subject matter****:'*[7]

Moreover, MPM did not prove that 'these proceedings' related to the 'conduct complained of' in this complaint; failed to substantiate by clear and specific

[6] Para. 58, Pg. 15 of the affidavit of Stewart Davies attached to MPM's Additional Submissions.
[7] Emphasis added by the Arbiter

evidence that '*the same complainant'* initiated proceedings before a Court *'on the same subject matter'*.

For the above-stated reasons, the Arbiter declares that he has the competence to consider this Complaint and cannot refrain from considering the case.

However, the Arbiter has to consider the other plea raised by the Service Provider based on Article 21(1)(c) which specifically relates to his competence.

Preliminary Plea regarding the Competence of the Arbiter with reference to Article 21(1)(c)

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

'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act, ***if a complaint is registered in writing with the financial services provider***[8] *not later than two years from the day on which* ***the complainant first had knowledge of the matters complained of****.'*[9]

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

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

In this case, the conduct complained of involves the conduct of the Service Provider as trustee and retirement scheme administrator of the Scheme, which role MPM occupied since 3 March 2015, upon the member's acceptance into the Scheme, and continued to occupy after the coming into force of the Act. It is noted that the Complaint in question also involves the conduct of the Service

[8] Emphasis added by the Arbiter
[9] Emphasis added by the Arbiter

Provider during the period in which CWM was permitted by MPM to act as the adviser of the Complainant.

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

The Service Provider has not clearly explained in this specific plea on what basis the Complaint cannot be entertained pursuant to this article other than stating that '*more than two years have lapsed since the conduct complained of took place.'*

However, further on in its formal reply to the Complaint, MPM noted that:

'*… Complainant has stated in her complaint that, as early as 2015, two months after the investment was made, that the Complainant was aware of losses of £25,000 based on the original portfolio selected - why did Complainant not take any action against CWM, and indeed any action at all, at that point in time. Complainant had clearly challenged CWM at that time. However, despite this, she retained CWM as her appointed Adviser, failed to raise a complaint to MPM regarding the issue, and retained the Investments. Complainant failed in her duty to mitigate potential losses*'.

Whilst, in this particular case, the Complainant seemingly became aware in 2015 of the structured note investments undertaken in April 2015, it is to be noted that there are various material aspects raised by the Complainant in relation to the contested structured note investments which have not been demonstrated that the Complainant was aware of at the time.

The said aspects include, in particular, the allegation relating to the nature of the structured note investments being for '*Professional Investors Only*', of high risk and not reflective of her risk profile and the allegation that her funds were not invested prudently. It has not been proven that the Complainant was aware of such aspects in 2015 or before the coming into force of the Act.

It is also noted that the loss of £25,000, (which was indicated with reference to the OMI Investment Report dated 18 May 2015 presented by the Complainant with her Complaint Form), was an unrealised loss which was based on the market value of the investments applicable at the time.

Certain structured notes comprising part of her portfolio have in the meantime matured or been sold as reflected in the table presented by the Service Provider post the coming into force of the Act.[10] Indeed, the claim of losses made by the Complainant in her Complainant Form dated February 2018 is actually much different than the loss of £25,000 reported in May 2015. The alleged losses claimed by the Complainant are now indicated as being over Eur200,000. The Service Provider itself also indicated that the loss on 01/01/2018 was of Eur167,595 as at that date.[11] The Complainant could not file a complaint on these issues back in 2015.

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

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

The disclaimer read as follows:

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

Certain underlying assets with the Investment, may show a value that reflects an early encashment value or potentially a zero value, prior to the maturity

[10] '*Doc. SB2'* attached to MPM's Additional Submissions.
[11] *Ibid.*

date. This will not reflect the true current performance of such underlying assets.'

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

Moreover, the Arbiter makes reference[12] to Case Number 137/2018[13] against MPM, whereby it results that the Service Provider itself declared in July 2015, in reply to a member's concern regarding losses, that:

'… *whilst we, as Trustees, will review and assess any losses,* ***these can only be on the maturity of the note,***[14] *as any valuations can and will be distorted ahead of the expiry'.*[15]

The Service Provider did not prove the date of maturity of the structured notes comprising the portfolio of the Complainant.

According to a statement presented by the Complainant dated 2 November 2016[16] ***and the table of investments presented by the Service Provider,***[17] ***various structured notes were still within her portfolio after the coming into force of the Act.***

In addition, it is also noted that besides the issue of the structured notes, the Complainant raised other material aspects in her Complaint including *inter alia* in respect of the alleged unlicensed nature of the investment adviser accepted by MPM, lack of actions taken by MPM in respect of the Scheme including in continuing to allow terms of business with CWM until September 2017.

[12] The Arbiter notes that Chapter 555 of the Laws of Malta gave investigative powers to the Arbiter and the nature of the complaints in this sector necessarily involves research by the Arbiter and also reference to other cases.
[13] Decided today
[14] Emphasis of the Arbiter
[15] Case Number 137/2018 (*a fol.* 7 of the file)
[16] Attachment 17 to her Additional Submissions.
[17] '*Doc. SB2'* attached to MPM's Additional Submissions.

The Arbiter has discovered from Case Number 127/2018[18] against MPM that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM.[19] In this regard, in September 2017, members were notified by MPM about the suspension of the terms of business that MPM had with CWM. Later, in October 2017, MPM also notified the members of the Scheme about the full withdrawal of such terms of business with CWM.

The Service Provider ultimately itself acknowledged, by invoking Article 21(1)(c), that the complaint is '*in relation to the conduct of a financial service provider occurring after the coming into force of this Act',* that is, in relation to MPM's conduct occurring after 18 April 2016. MPM did not prove that the Complainant raised the complaint '*later than two years from the day on which the complainant first had knowledge of the matters complained of*'.

It is true that MPM has made various allegations about the attitude of the Complainant in making representations on early losses with CWM, but a plea to exclude the competence of an adjudicator is a very serious one because if successful it prematurely brings the case to an end. It is an accepted legal principle by our Courts that any plea raised by way of defence has to be substantiated by specific and clear evidence and not by generic statements to a selected few facts. In this particular case the Service Provider had to establish '***the day*** *on which the complainant first had knowledge of matters complained of'.* In cases relating to the exclusion of competence the law has to be applied rigorously and there is no room for interpretation.

The Complainant made a formal complaint with the Service Provider on the 2 November 2017, and it has not been proven by MPM that two years had passed from '***the day on which the complainant first had knowledge of the matters complained of'***. It is further noted that not even two years had passed from the coming into force of Chapter 555 of the Laws of Malta and the date, 2 November 2017, when the formal complaint was made by the Complainant with the Service Provider.

[18] Decided today

[19] Case Number 127/2018 (*a fol.* 53 of the file)

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.[20]

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 555[21] which stipulates that he should deal with the complaints in '*an economical and expeditious manner'.*

The Complainant

The Complainant, born in 1962, is of British nationality and resided in France at the time of application for membership as per the details contained in the *Application Form* for Membership of the Momentum Malta Retirement Trust ('the Application Form for Membership').

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

The Complainant was accepted by MPM as member of the Retirement Scheme on 3 March 2015.

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator[22] and acts as the Retirement Scheme Administrator and Trustee of the Scheme.[23]

[20] Cap. 555, Art. 19(3)(b)
[21] Art. 19(3)(d)
[22] *https://www.mfsa.mt/financial-services-register/result/?id=3453*
[23] Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

The Legal Framework

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

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015.[24]

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by MFSA under the RPA.

As confirmed by the Service Provider, registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and hence the framework under the RPA became applicable as from such date.[25]

Despite not being much mentioned by MPM in its submissions, the Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA, in light of MPM's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

Indeed, Article 1(2) of the TTA provides that '*The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such*

[24] *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/*

[25] As per pg. 1 of the affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 January 2016 attached to his affidavit.

trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A', with Article 43(6)(c) in turn providing that '*A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes …'.*

Particularities of the Case

The Retirement Scheme in respect of which the Complaint is being made

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA[26] as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011[27] and under the Retirement Pensions Act in January 2016.[28]

As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme '*was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap.331) on the 23 March 2011*'[29] and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011*'.[30]

The Scheme Particulars specify that:

'*The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death*'.[31]

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

[26] https://www.mfsa.com.mt/financial-services-register/result/?id=3454
[27] Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's Affidavit).
[28] Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's Affidavit).
[29] Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit).
[30] Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit).
[31] *Ibid.*

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

The life assurance policy acquired for the Complainant was called the European Executive Investment Bond issued by Old Mutual International ('OMI').[32]

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

The underlying investments in respect of the Complainant comprised substantial investments in structured notes as indicated in the table of investments forming part of the '*Investor Profile*' presented by the Service Provider in respect of the Complainant during the proceedings of the case.[33]

The '*Investor Profile*' presented by the Service Provider for the Complainant also included a table with the '*current valuation'* as at 01/01/2018. The said table indicated a loss (excluding fees) of Eur167,595 as at that date. The loss experienced by the Complainant is thus higher when taking into account the fees incurred and paid within the Scheme's structure. It is to be noted that the Service Provider does not explain whether the loss indicated in the '*current valuation*' for the Complainant relates to realised or paper losses or both.

Investment Adviser

Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainant.[34] The role of CWM was to advise the Complainant regarding the assets held within her respective Retirement Scheme.

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

[32] Application Form for OMI bond – *A fol.* 215.
[33] The '*Investor Profile'* is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant.
[34] As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant.

In its reply, MPM explained *inter alia* that CWM '*is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH*'.[35]

In its submissions, it was further explained by MPM that '*CWM was appointed agent of Trafalgar International GmbH ('Trafalgar') and was operating under Trafalgar International GmbH licenses*'[36] and that Trafalgar '*is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'*.[37]

Underlying Investments

As indicated above, the investments undertaken within the life assurance policy of the Complainant were summarised in the table of investment transactions included as part of the '*Investor Profile*' information sheet provided by the Service Provider.[38]

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

The said table indicates that the portfolio of investments for the Complainant involved substantial investments in structured notes with the portfolio comprising predominantly of structured notes during the tenure of CWM as investment adviser.

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.

[35] Pg. 1 of MPM's reply to the OAFS.
[36] Para. 39, Section E titled *'CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies.
[37] *Ibid.*
[38] Attachment to the '*Additional submissions*' made by MPM in respect of the Complainant.

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

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

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

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

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

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

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

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

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

From the various general conduct of business rules/standard licence conditions applicable to MPM in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively, it is pertinent to note the following general principles:[39]

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*';

[39] Emphasis added by the Arbiter.

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*'.[40]

As has been authoritatively stated:

'*Trustees have many duties relating to the property vested in them. These can be summarized as follows:* ***to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'***.[41]

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

[40] Ganado Max (Editor), '*An Introduction to Maltese Financial Services Law*') Allied Publications 2009) p.174.
[41] *Op. cit*, p. 178

'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****'.*[42]

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**. As acknowledged by the Service Provider whilst MPM's duties did not involve the provision of investment advice, however, MPM did '*… **retain the power to ultimately decide whether to proceed with an investment or otherwise***'.[43]

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

'The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed) …'.[44]

[42] Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 December 2017) p. 9.
[43] Para. 17, page 5 of the affidavit of Stewart Davies
[44] Para. 31, Page 8 of the affidavit of Stewart Davies

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***'.[45]

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

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

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

'… is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'.[46]

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*

[45] Para. 33, Page 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers.
[46] 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/.

account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments'. [47]

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

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

'***The Trustee need to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification*** *…*'[48]

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

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

Other Observations and Conclusions

Allegations relating to the signature on the dealing instructions

The Complainant alleged that MPM accepted dealing instructions for investments which were not authorised by her where it was, in essence, claimed that the signatures on the dealing investment instruction forms were photocopied.

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

[47] 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).*

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

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

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

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

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

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

This highlights the apparent lack of adequate controls and administrative procedures implemented by MPM which reasonably put into question MPM's adherence with the requirements to have adequate operational, administrative and controls in place in respect of its business and that of the

scheme as it was required to do in terms of Rule 2.6.4 of Part B.2.6 of the Directives under the SFA and Standard Condition 4.1.7, Part B.4.1 of the Pension Rules for Service Providers issued under the RPA as well as Standard Condition 1.2.2, Part B.1.2 of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA during the respective periods when such rules applied as outlined above.

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

Allegations in relation to fees

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

In the case reviewed, the Arbiter has not found sufficient evidence to uphold this claim taking also into consideration in particular the explanations made by the Service Provider and documentation presented with respect to the Scheme and the underlying policy's charging structure.

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

On the point of fees, the Arbiter would however like to make a general observation. The Arbiter considers that the trustee and scheme administrator of a retirement scheme, in acting in the best interests of the member as duty bound by law and rules to which it is subject to, is required to be sensitive to, and mindful of, the implications and level of fees applicable within the whole structure of the retirement scheme and not just limit consideration to its own fees.

In its role of a *bonus paterfamilias,* the trustee of a retirement scheme is reasonably expected to ensure that the extent of fees applicable within the whole structure of a retirement scheme is reasonable, justified and adequate overall when considering the purpose of the scheme. Where there are issues or concerns these should be reasonably raised with the prospective member or member as appropriate. Consideration would in this regard need to be given to a number of aspects including: the extent of fees vis-à-vis the size of the respective pension pot of the member; that the extent of fees are not such as to inhibit or make the attainment of the objective of the Scheme difficult to be actually reached without taking excessive risks; neither that the level of fees motivate investment in risky instruments and/or the construction of risky portfolios.

Key considerations relating to the principal alleged failures

The Arbiter will now focus on key principal alleged failures raised in this Complaint namely that:

(i) MPM allegedly accepted business and allowed the appointment of CWM as an unlicensed investment adviser;

(ii) MPM allegedly allowed an unsuitable portfolio of underlying investments to be created within the Retirement Scheme which portfolio comprised high risk structured products of a non-retail nature which was not in line with her risk profile.

General observations

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

This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case as will be later seen 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 appointment of the Investment Adviser

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

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

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

Inappropriate and inadequate material issues involving the Investment Adviser

i. *Inaccurate, incorrect and unclear information relating to the adviser in MPM's Application Form for Membership*

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

If inaccurate, unclear and incorrect material information was made in the Application Form for Membership on such a key party it was only appropriate and in the best interests of the Complainant, and reflective

of the role as Trustee as a *bonus paterfamilias*, for MPM to raise and flag such matters to the Complainant and not accept such inadequacies in its form. **MPM had ultimately the prerogative whether to accept the application, the selected investment adviser and also decide with whom to enter into terms of business**.

The section titled '*Professional Adviser's Details*' in the Application Form for Membership in respect of the Complainant indicated '*Continental Wealth Trust'* (rather than Continental Wealth Management) as the company's name of the professional adviser.

In the same section of the Application Form, the adviser was indicated as having a registered address in Spain and that it had '*Global Net*' as regulator. The field for '*Licence Number'* in the same section was left unanswered.

The Arbiter considers the reference to *Global Net* as regulator to be inadequate and misleading.

With respect to the reference to '*Globalnet*' as the regulator of the adviser, it is to be noted that MPM itself had explained that '*Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union*'.[49] Global Net could have thus not been the regulator of a professional adviser.

Global Net is clearly not a regulatory authority and, being an unregulated and connected company itself, could not possibly have provided any comfort that there was some form of regulation nor that there were any adequate controls and/or supervision as one would expect in the field of regulated financial services providers.

The reference to Global Net could also not have reasonably provided any comfort to MPM that this was a regulator of CWM and neither that there was some form of regulation and adequate controls and/or

[49] Pg. 1 – Reply by MPM to the OAFS

supervision on CWM equivalent to that applicable for regulated investment services providers.

ii. *Lack of clarity/convoluted information relating to the adviser in the Application Form of the Underlying Policy*

It is noted that the lack of clarity and convolution relating to the investment adviser has also prevailed in the Application Form submitted in respect of the acquisition of the underlying policy, that is, the one issued by Old Mutual International.

MPM, as Trustee of the Scheme had clear sight of the said application and had indeed signed the application for the acquisition of the policy for the Complainant in its role as trustee.

It is noted that the Application Form of the policy provider refers to, and includes, the stamp of another party as financial adviser. The first page of the said application form includes a section titled '*Financial adviser details*' and a field for '*Name of financial adviser*', with such section including a stamp bearing the name of '*Trafalgar International GmbH*' ('Trafalgar') apart from the reference to '*Continental Wealth Trust*'. The two entities, both Continental Wealth Trust and Trafalgar are then featured in the section titled '*Financial adviser declaration*' of the said form with the same stamp of Trafalgar with a PO Box in Cyprus and another one with a Head Office in Germany, again featuring here in the part titled '*Financial adviser stamp*' in the same section.

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

iii. *No proper distinctions between CWM, GlobalNet and/or Trafalgar*

It is unclear why the Annual Member Statement sent by MPM to the Complainant for the years ending December 2015 and 2016 indicated in

the same statement '*Continental Wealth Management*' as '*Professional Adviser*' whilst at the same time indicated another party, '*Trafalgar International GmbH*' as the '*Investment Adviser'*.

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

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

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

Indeed, during the proceedings of this case MPM has not provided evidence of any agency agreement between CWM and GlobalNet nor between CWM and Trafalgar.

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

'*Momentum in its capacity as Trustee and RSA, in exercising its duty to you ensured: The full details of the Scheme, including all parties' roles and responsibilities were clearly outlined to you in the literature provided ensuring no ambiguity,*[50] *including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules*'.[51]

[50] Emphasis added by the Arbiter.

[51] Section 3, titled '*Overview of Momentum Controls in place in exercising a duty to all members*' in MPM's reply to the complainant in relation to the complaint made in respect of the Momentum Malta Retirement Trust.

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

iv. *No regulatory approval in respect of CWM*

During the proceedings of this case no evidence has emerged about the regulatory status of CWM. As indicated earlier, MPM only referred to the alleged links between CWM and Trafalgar and only provided a copy of the authorisations issued to Trafalgar International GmbH in Germany which just indicated that Trafalgar (and not CWM) held an authorisation as at 05.02.2016 as '*Investment intermediary*' and '*Insurance intermediary and insurance consultant*' from IHK Frankfurt am Main, the Chamber of Commerce and Industry in Frankfurt with the '*Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53*'.[52]

With respect to authorisations issued by IHK, the Arbiter makes reference to Case Number 068/2018[53] and Case Number 172/2018[54] against MPM in which replies issued by IHK in 2018 to queries made in respect of CWM was produced. In this regard, it is noted that in an email from IHK dated 19 April 2018, IHK indicated *inter alia* that it was not aware of an official affiliation between CWM and Trafalgar and that Trafalgar held the financial investment intermediation licence (34f para. 1 GewO) from June 2013 until March 2016 where the licence was '*not extendable'* and *'even back then it did not cover the activities of another legal personality*'.[55]

Similarly, in a letter dated 20 April 2018 issued by IHK it was *inter alia* noted by IHK that '*Trafalgar International GmbH is a German limited company headquartered in Frankfurt am Main. The company currently holds a licence under 34d para.1 German Trade Law (German:*

[52] Copy of authorisations issued to Trafalgar were attached to the Reply of MPM submitted before the Arbiter for Financial Services and/or specifically referred to in para. 39 Section E, titled '*CWM and Trafalgar International GmbH*' in the affidavit of Stewart Davies.
[53] Decided today
[54] Decided today
[55] Email from IHK dated 19 April 2018 – *A fol.* 166/167 of Case Number 068/2018, decided today

Gewerbeordnung, GewO) (insurance intermediation). The German licence as an insurance intermediary cannot be extended to another legal personality and it does not authorize the licence holder to regulate other insurance or financial investment intermediaries.'[56]

MPM's statement that CWM '*was operating under Trafalgar International GmbH licenses*'[57] has not been backed up by any evidence during the proceedings of this case and has actually been contradicted by communications issued by IHK as indicated above. It is accordingly clear that no comfort can either be taken from the authorisation/s held by Trafalgar.

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

In the absence of such, **the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM '*was authorised to trade in Spain and in France by Trafalgar International GmbH*',[58] are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant**.

This also taking into consideration that:

(i) Trafalgar is itself no regulatory authority but a licensed entity itself. Similarly, GlobalNet was not a regulatory authority and as explained by the Service Provider itself this was just '*an unregulated company*', being '*an associate company of Trafalgar*' offering '*administrative services to entities outside the European Union*'.[59]

[56] Letter from IHK dated 20 April 2018 – *A fol.* 12/13 of Case Number 172/2018, decided today
[57] Para. 39, Section E titled *'CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies.
[58] Pg. 1, Section A titled *'Introduction'*, of the Reply of MPM submitted before the Arbiter for Financial Services.
[59] Page 1, Section A of the Reply filed by MPM to the OAFS.

(ii) the lack of clarity as to the regulatory status of the investment adviser included in the Application Form for Membership in respect of the Complainant;

(iii) legislation covering the provision of investment advisory services in relation to investment instruments, namely the Markets in Financial Instruments Directive (2004/39/EC) already applied across the European Union since November 2007.

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

Article 23(3) of the MiFID I Directive, which applied at the time, indeed provided specific requirements on the registration of tied agents.[60]

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

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

The Service Provider noted *inter alia* that '*CWM was appointed agent of Trafalgar International GmbH*'.[61]

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

[60] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN
[61] Para. 39, Section E, titled '*CWM and Trafalgar International GmbH*' of the affidavit of Stewart Davies.

Other observations & synopsis

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

The responsibility of MPM in accepting and allowing CWM to act in the role of investment adviser takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM. As indicated above, MPM accepted CWM when, as verified in the Complainant's Application Form for Membership, it was being stated in MPM's own application form that CWM was a regulated entity. However, no evidence has transpired that this was so, as amply explained above.

MPM allowed and left uncontested incorrect, misleading and unclear key information to feature in its own Application Form for Membership of the Retirement Scheme with respect to the regulatory status of the investment adviser. In so doing, it abetted a fundamentally wrong impression and perception that the investment adviser being selected was regulated when, in reality, no evidence has emerged that CWM was indeed a regulated entity.

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

However, the Arbiter believes that MPM as Trustee had in any case the obligation to act with the required diligence of a *bonus paterfamilias* throughout, and was duty bound to raise with the respective member, and not itself accept, material aspects relating to the investment adviser, which it should have reasonably been in a position to know that where incorrect, misleading and inappropriate.

Instead it chose to allow and accept such material incorrect, misleading and inappropriate information relating to the adviser to even prevail in its own application form.

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

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

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

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

Even in case where under the previous applicable regulatory framework, an unregulated adviser was allowed by the trustee and scheme administrator to provide investment advice to the member of a member-directed scheme

one would, at the very least, reasonably expect the retirement scheme administrator and trustee of such a scheme to exercise even more caution and prudence in its dealings with such a party in such circumstances.

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

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

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

B. <u>The permitted portfolio composition</u>

Investment into Structured Notes

Preliminary observations

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

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

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

A typical definition of a structured note provides that:

'*A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index*'.[62]

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'*.[63]

The Arbiter notes that various relevant fact sheets of structured notes that featured in the portfolio of the Complainant, as produced by the Complainant in her additional submissions and as also sourced by the Office of the Arbiter for Financial Services ('OAFS'), highlighted a number of risks in respect of the capital invested into these products.

Apart from *inter alia* the credit risk of the issuer and the liquidity risk, the fact sheets 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 frequent feature emerging of the type of structured notes invested into, involved the application of capital buffers and barriers. In this regard, the fact sheets 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

[62] https://www.investopedia.com/terms/s/structurednote.asp
[63] https://www.investopedia.com/articles/bonds/10/structured-notes.asp

observed on maturity/final valuation of the note. The specified percentage in the fall in value in the fact sheets sourced in the case of the Complainant was typically 50% of the initial value. The underlying asset to which the structured notes were linked typically comprised stocks or in some cases indices.

The said 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*'.[64]

Such features and warnings featured, in essence, in the fact sheets of similar structured notes.

It is accordingly clear that there were certain specific risks in various structured products invested into and there were material consequences if just one asset, out of a basket of assets to which the 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 fully quoted shares.**

The Arbiter would also like to make reference to a particular communication presented in another separate case made against MPM which is relevant to the case in question. In this regard, it is particularly revealing to note the statements made by Trafalgar itself, in its email communication dated 17 September 2017 to CWM, **wherein MPM was in copy**, and which communication was presented in *Case Number 185/2018* against MPM.[65]

In the said case, MPM did not contest that such communication was untrue or did not exist, but only challenged the way in which the said email was obtained by the complainant. The email sent by Trafalgar's official *inter alia* stated the following:

[64] Example – Fact Sheet of the RBC US Large Cap Income Autocallable Notes – Issue 2 (*A fol.* 305).
[65] Decided today

'***Structured Notes – It is my opinion we need to get as far away from these vehicles as possible. They have no place in an uneducated investor's portfolio and when they breech their barriers untold amounts of damage is done***'.[66]

Such a statement indeed summarily highlighted the pertinent issues with respect to investments in structured notes which are relevant to the case in question.

Excessive exposure to structured products and to single issuers in respect of the Complainant's portfolio

As indicated above, the portfolio of investments in respect of the Complainant comprised predominantly of structured products. Such excessive exposure to structured products occurred over a long period of time. This clearly emerges from the Table of Investments forming part of the '*Investor Profile*' provided by the Service Provider for the Complainant.

In addition, the said table indicates investments resulting in high exposures to the same single issuer/s, through cumulative purchases in products issued by the same issuer.

Even in case where the issuer of the structured product was a large institution, the Arbiter does not consider this to justify or make the high exposure to single issuers acceptable even more in the Scheme's context. The maximum limits relating to exposures to single issuers outlined in the MFSA rules and MPM's own Investment Guidelines did not make any distinctions according to the standing of the issuer.

Hence, the maximum exposure limits to single counterparties should have been applied and ensured that they are adhered to across the board. The credit risk of the respective issuer was indeed still one of the risks highlighted in various fact sheets of structured products invested into.

Portfolio not reflective of the MFSA rules

The high exposure to structured products (as well as high exposure to single issuer in respect of the Complainant), which was allowed to occur by the

[66] Emphasis added by the Arbiter.

Service Provider in the Complainant's portfolio, jars with the regulatory requirements that applied to the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'*, ('the Directives'), which applied from the Scheme's inception in 2011 until the registration of the Scheme under the RPA on 1 January 2016. The applicability and relevance of these conditions to the case in question was highlighted by MPM itself.[67]

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

SOC 2.7.2 in turn required the Scheme to ensure *inter alia* that, the assets of a scheme are '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole*'[68] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[69]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[70] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings',*[71] where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.[72]

[67] Para. 21 & 23 of the Note of Submissions filed by MPM in 2019.
[68] SOC 2.7.2 (a)
[69] SOC 2.7.2 (b)
[70] SOC 2.7.2 (c)
[71] SOC 2.7.2 (e)
[72] SOC 2.7.2 (h)(iii) & (v)

Despite the standards of SOC 2.7.2, MPM allowed the portfolio of the Complainant to, at times, comprise solely and/or predominantly of structured products.

In the case of the Complainant it has also emerged that individual exposures to single issuers were at times even higher than 20%, this being the maximum limit applied in the Rules to diversified investment instruments, such as collective investment schemes whose performance was not materially impacted or determined by a single underlying asset. The structured products invested into were also not indicated, during the proceedings of this case, as themselves being traded in or dealt on a regulated market. The portfolio also included various positions into high risk investments with the high risk being reflected in, for example, the high rate of return of over 7%, 8% p.a., and also 9% p.a. which featured in the name of a number of structured products invested into as indicated in the Complainant's portfolio.[73]

*Portfolio not reflective of MPM's **own** Investment Guidelines*

In its submissions MPM produced a copy of the Investment Guidelines marked '*January 2013*' and *'Mid-2014'*, which guidelines featured in the Application Form for Membership, and also Investment Guidelines marked '*2015'*, '*2016*', '*Mid-2017',* '*Dec-2017*' and '*2018*' where, it is understood the latter respectively also formed part of the Scheme's documentation such as the Scheme Particulars issued by MPM.

Despite that the Service Provider claimed that the investments made in respect of the Complainant were in line with the Investment Guidelines, **MPM has, however, not adequately proven such a claim**.

The investment portfolio in the case reviewed was at times solely/ predominantly invested in structured notes for a long period of time. It is unclear how a portfolio composition solely/ predominantly invested in structured notes truly satisfied certain conditions specified in MPM's own Investment Guidelines such as:

[73] '*Doc. SB2'* attached to MPM's Additional Submissions refers.

(i) **The requirement that the member's assets had to be '*predominantly invested in regulated markets*'**.

This was a condition which prevailed in all of the presented MPM's Investment Guidelines since January 2013 till that of 2018.[74]

The said requirement of being '*predominantly invested in regulated markets*' meant, and should have been construed to mean, that investments had to be predominantly invested in listed instruments, that is financial instruments that were admitted to trading. With reference to industry practice, the terminology of '*regulated markets*' is referring to a regulated exchange venue (such as a stock exchange or other regulated exchange). The term '*regulated markets*' is in fact commonly referred to, defined and applied in various EU Directives relating to financial services, including diversification rules applicable on other regulated financial products.[75] Hence, the interpretation of '*regulated markets*' has to be seen in such context.

The reference to '*predominantly invested in regulated markets*' cannot be interpreted as referring to the status of the issuers of the products and it is typically the product itself which has to be traded on the regulated market and not the issuer of the product.

Moreover, a look through approach, could not either be sensibly applied to the structured notes for the purposes of such condition taking into consideration the nature and particular features of the structured notes invested into.

No evidence was submitted that predominantly the portfolio, which comprised solely/predominantly of structured notes, constituted listed structured notes in respect of the Complainant. The fact sheets in respect of the structured notes forming part of the Complainant's portfolio, actually indicated that the products in question were not listed on an exchange.

[74] Investment Guidelines attached to the affidavit of Stewart Davies.

[75] Such as UCITS schemes - the Undertakings for Collective Investments in Transferable Securities (UCITS) Directive (Directive 2009/65/EC as updated). The Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EC as repealed by Directive 2014/65/EU) also includes a definition as to what constitutes a '*regulated market'*.

On its part the Service Provider did not prove either that the portfolio of the Complainant was '*predominantly invested in regulated markets*' on an ongoing basis.

Furthermore, when investment in unlisted securities was itself limited to 10% of the Scheme assets, as stipulated throughout MPM's own Investment Guidelines for 2013 to 2018, it is unclear how the Trustee and Scheme Administrator chose to allow much higher exposures (as will be indicated further below) to structured notes, a debt security, which were themselves unlisted.

(ii) **The requirement relating to the liquidity of the portfolio.**

The Investment Guidelines of MPM marked January 2013 required no more than a '*maximum of 40% of the fund*[76] *in assets with liquidity of greater than 6 months*'. This requirement remained, in essence, also reflected in the Investment Guidelines marked '*Mid-2014'* which read '*Has a maximum of 40% of the fund in assets with expected liquidity of greater than 6 months*' as well as in the subsequent Investment Guidelines marked 2015 till 2018 which were updated by MPM and tightened further to read a '*maximum of 40% of the fund in assets with expected liquidity of greater than 3 months but not greater than 6 months*'.

It is evident that the scope of such requirement was to ensure the liquidity of the portfolio as a whole by having the portfolio predominantly (that is, at least 60%) exposed to liquid assets which could be easily redeemed within a short period of time, that is 3-6 months (as reflected in the respective conditions) whilst limiting exposure to those assets which take longer to liquidate to no more than 40% of the portfolio.

With reference to the Complainant's portfolio, it is noted that the structured notes invested into typically had a maturity or investment term of 1-2 years as evidenced in the product fact sheets. It is unclear how the 40% maximum limit referred to above could have been satisfied in such

[76] The reference to '*fund'* is construed to refer to the member's portfolio.

circumstances where the portfolio was predominantly invested into structured notes which themselves had long investment terms.

It is further noted that the fact sheets of the said unlisted structured products included reference to the possibility of a secondary market existing for such structured notes. In this regard, a buyer had to be found in the secondary market in case one wanted to redeem a holding into such structured note prior to its maturity.

The secondary market could, however, not have provided an adequate level of comfort with respect to liquidity.

There were indeed various risks highlighted in relation to the secondary market as amply reflected in the risk warnings emerging in the said fact sheets.

The said risk warnings highlighted the risks related to the availability of such market (as the secondary market had to be in the first place offered by the issuer), as well as the limitations of the said market. They also highlighted the lower price that could be sought on this market.

In this regard, there was the risk that the price of the structured note on the secondary market could be well below the initial capital invested.

For example, the notes issued by RBC typically included the risk disclaimer that:

'***Any secondary market provided by Royal Bank of Canada is subject to change and may be stopped without notice and investors may therefore be unable to sell or redeem the Notes until their maturity. If the Notes are redeemed early, they may be redeemed at a level less than the amount originally invested***'.

Similar warnings feature in the fact sheets of structured notes issued by other issuers.

MPM should have been well aware about the risks associated with the secondary market. It has indeed itself seen the material lower value that could be sought on such market in respect of the structured notes invested into.

The lower values of the structured notes on the secondary market was indeed affecting the value of the Scheme as can be deduced from the respective Annual Member Statements that MPM itself produced.

Hence, no sufficient comfort about liquidity could have possibly been derived with respect to the secondary market in case of unlisted structured notes.

The Arbiter is not accordingly convinced that the conditions relating to liquidity were being adequately adhered to, nor that the required prudence was being exercised with respect to the liquidity of the portfolio, when considering the above mentioned aspects and when keeping into context that the portfolio of investments that was allowed to develop within the Retirement Scheme was solely/predominantly invested in the said structured notes.

It is also to be noted that even if one had to look at the composition of the Complainant's portfolio purely from other aspects, there is still undisputable evidence of non-compliance with other requirements detailed in MPM's own Investment Guidelines. This is particularly so with respect to the requirements applicable regarding the proper diversification, avoidance of excessive exposure and permitted maximum exposure to structured notes.

The '*Table of Investments*' forming part of the '*Investor Profile*' produced by MPM as part of its submissions indicates that over 90% of the policy value was invested in 10 structured notes in April 2015. Instances of high exposures (of over 20%) of the policy value at the time of purchase were made to single issuers such as Leonteq, EGM and Commerzbank respectively at the time of purchase of the said structured notes.

The Arbiter notes that the Service Provider has along the years revised various times the investment restrictions specified in its own '*Investment Guidelines*' with respect to structured products, both in regard to maximum exposures to structured products and maximum exposure to single issuers of such products. The exposure to structured notes and their issuers was indeed progressively and substantially reduced over the years in the said Investment Guidelines.

The specified maximum limit of 66% of the portfolio value in structured notes having underlying guarantees which featured in the '*Investment Guidelines*' marked 2015[77] was reduced to 40% of the portfolio's value in the '*Investment Guidelines*' marked December 2017[78] and subsequently reduced further to 25% in the '*Investment Guidelines*' for 2018.[79]

Similarly, the maximum exposure to single issuers for '*products with underlying guarantees*', that is structured products as referred to by MPM itself, in the '*Investment Guidelines*' marked Mid-2014 and 2015 specifically limited maximum exposure to the same issuer default risk to no more than (33.33%), one third of the portfolio.

The maximum limit to such products was subsequently reduced to 25%, one quarter of the portfolio, in the '*Investment Guidelines'* marked 2016[80] and mid-2017,[81] reduced further to 20% in the '*Investment Guidelines*' marked December 2017 and subsequently to 12.5% in the '*Investment Guidelines*' for 2018. Even before the Investment Guidelines of Mid-2014, MPM's Investment Guidelines of January 2013 still limited exposure to individual investments (aside from collective investment schemes) to 20%.

Indeed, the Arbiter considers that the high exposure to structured products and single issuers in the Complainant's portfolio jarred and did not reflect to varying degrees with one or more of MPM's own investment guidelines applicable at the time when the investments were made, most particularly with respect to the following guidelines:[82]

[77] MPM's Investment Guidelines '2015' as attached to the affidavit of Stewart Davies
[78] MPM's Investment Guidelines 'Dec-2017' as attached to the affidavit of Stewart Davies
[79] MPM's Investment Guidelines '2018' as attached to the affidavit of Stewart Davies
[80] MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies
[81] MPM's Investment Guidelines 'Mid-2017' as attached to the affidavit of Stewart Davies
[82] Emphasis in the mentioned guidelines added by the Arbiter.

Investment Guidelines marked '2015':
• *Where products with underlying guarantees are chosen, i.e.* ***Structured Notes****, these will be* ***permitted up to a maximum of 66% of the portfolio's values****,*
with no more than one third of the portfolio to be subject to the same issuer default risk.
In addition, ***further consideration needs to be given to*** *the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to* ***avoid exposure****:* • *...* • ***To any single credit risk****.*

It is particularly noted in this case that investments into structured notes were allowed to occur within the Complainant's portfolio in excess of the limits allowed on the maximum exposure to such products. MPM's Investment Guidelines of 2015 specifically mentioned a maximum limit of 66% of the portfolio value to '*products with underlying guarantee … i.e. structured notes*'.

In the case reviewed, the Service Provider allowed investments into structured products above the said percentage. Even if, for the sake of the argument, one had to consider all the structured products invested into as having underlying guarantees, (which had not been proven that it was the case for all of said products),[83] the percentage of over 90% of the policy value invested into

[83] The RBC US Large Cap Income Autocallable Note for example, had no capital protection – *A fol*. 305

structured notes starkly goes against the 66% maximum limit stipulated in the requirement that:

'*Where products with underlying guarantees are chosen, i.e. Structured Notes, these will be permitted up to a maximum of 66% of the portfolio's values …'.*

The fact that such high exposure to structured products and single counterparty was allowed in the first place indicates, in itself, the lack of prudence and excessive exposure and risks that were allowed to be taken on a general level.

In the reply the Service Provider sent in relation to the Complainant's formal complainant, MPM stated that:

'*In relation to investments, Momentum's role as a RSA and Trustee is to ensure the Scheme's investments are managed in accordance with relevant legislation and regulatory requirements, as well as in accordance with the Trust Deed and Rules and T&C*'.[84]

For the reasons amply explained, the Arbiter has no comfort that the above has been truly achieved generally, and at all times, by MPM in respect of the Complainant's investment portfolio.

Portfolio invested into Structured Products ***Targeted for Professional Investors***

Besides the issues mentioned above, there is also the aspect relating to the nature of the structured products and whether the products allowed within the portfolio comprised structured notes aimed solely for professional investors.

The Service Provider has not claimed that the Complainant, whose occupation was indicated as '*Auto Entrepreneur*',[85] was a professional investor. No details have either emerged indicating the Complainant, not being a retail investor.

[84] Section 1, '*Background'/'Overview of the Scheme'* of MPM's formal reply to the complainant in relation to the complaint

[85] Application Form for Membership.

With respect to the Complainant's portfolio, the Complainant presented four relevant Fact Sheets and the OAFS also traced a Fact Sheet in respect of another structured product which featured in her portfolio.[86]

The fact sheets in question specify that the products were targeted for professional investors only or in the case of the Leonteq structured note indicated for '*qualified investors*' were no evidence was produced or emerged that this comprised the typical retail investor.

With respect to the structured product issued by RBC for example, the fact sheet clearly indicates that the investment was '*For Professional Investors Only'* and *'not suitable for Retail distribution*' with the '*Target Audience*' for such product being specified as '*Professional Investors Only*' as outlined in the '*Key Features*' section of the fact sheet.

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 as explained above and it is clear that such fact sheets were 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. Indeed, the Service Provider presented no fact sheet of structured notes invested into which were targeted for retail investors.

It is therefore considered that in the Case of the Complainant's portfolio there is sufficient evidence resulting from multiple instances which show that her portfolio generally included investments not appropriate and suitable for a retail client. It is clear that there was a lack of consideration by the Service Provider with respect to the suitability and target investor of the structured notes.

Such lack of consideration is not 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.

[86] Structured Notes with ISIN No: CH0266684593; CH0283709340; XS1211647281 and XS1193042451 (presented by the Complainant as attachments in her additional submissions) and XS1218203823 (where the fact sheet in respect of the latter was sourced from Case 130/2018 against MPM decided today).

Other observations & synopsis

The Service Provider did not help its case by not providing detailed information on the underlying investments as already stated in this decision. Although the Service Provider filed a Table of Investments it did not provide adequate information to explain the portfolio composition and justify its claim that the portfolio was diversified. It did not provide fact sheets in respect of the investments comprising the portfolio of the Complainant and it did not demonstrate the features and the risks attached to the investments.

The Service Provider's mere indication that it made in its submissions, that the respective portfolio was diversified through '*10 structured notes very widely diversified across Sector, Industry and Region*',[87] cannot reasonably provide, in itself, sufficient and adequate comfort on the level of diversification/adequacy of such investments.

Various other aspects cannot be ignored by the Service Provider. Such aspects include, but are not limited to:

- the nature of the structured products being invested into 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 already detailed above;

- the potential rate of returns as indicative of the level of risk being taken;

- the level of risks ultimately exposed to in the respective product and in the overall portfolio composition; and

- not the least, the issuer/counterparty risk being taken.

The extent of losses experienced on the capital of the Complainant's portfolio is in itself indicative of the failure in adherence with the applicable conditions on diversification and avoidance of excessive exposures. Otherwise, material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have not occurred.

[87] Doc. SB2 attached to the Additional Submissions.

Apart from the fact that no sensible rationale has emerged for limiting the composition of the pension portfolio solely/predominantly to structured products, no adequate and sufficient comfort has either emerged that such composition reflected the prudence expected in the structuring and composition of a pension portfolio. Neither that the allocations were in the best interests of the Complainant despite her risk profile.

In the circumstance where the portfolio of the Complainant was at times solely/predominantly invested in structured products with a high level of exposure to single issuer/s, and, for the reasons amply explained above, the Arbiter does not consider that there was proper diversification nor that the portfolio was at all times '*invested in order to ensure the security quality, liquidity and profitability of the portfolio as a whole*',[88] and '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[89]

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

The excessive exposure to structured products and their issuers, nevertheless, clearly departed from such principles and cannot ultimately be reasonably considered to satisfy and reflect in any way a suitable level of diversification nor a prudent approach.

This is even more so when considering the crucial aim of a retirement scheme being that to provide for retirement benefits – an aspect which forms the whole basis for the pension legislation and regulatory framework to which

[88] SOC2.7.2(a) of Part B.2.7 of the Directives.
[89] SOC2.7.2(b) of Part B.2.7 of the Directives.

the Retirement Scheme and MPM were subject to. The provision of retirement benefits was indeed the Scheme's sole purpose as reflected in the Scheme Particulars.

Causal Link and Synopsis of Main Aspects

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

There is sufficient and convincing evidence of deficiencies on the part of MPM in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above which, at the very least, impinge on the diligence it was required and reasonably expected to be exercised in such roles.

It is also evidently clear 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 in terms of its own Retirement Scheme documentation as explained above, such losses would have been avoided or mitigated accordingly.

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

In the particular circumstances of the cases reviewed, the losses experienced on the Retirement Scheme are ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which

MPM was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainant.

Final Remarks

As indicated earlier, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance 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 provided a suitable level of diversification and was *inter alia* in line with the applicable requirements 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 and extent of exposure to such products and their issuers, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in 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 properly diversified and balanced and prudent approach, as expected in a pension

portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly when it came to the dealings and aspects involving the appointed investment adviser and the oversight functions with respect to the Scheme and portfolio structure. It is also considered that there are various instances which indicate non-compliance by the Service Provider with applicable requirements and obligations as amply explained above in this decision. The Service Provider failed to act with the prudence, diligence and attention of a *bonus paterfamilias.*[90]

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[91] of the Complainant who had placed her trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

For the above-stated reasons, the Arbiter considers the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case[92] 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.

[90] Cap. 331 of the Laws of Malta, Art. 21(1)
[91] Cap. 555, Article 19(3)(c)
[92] Cap. 555, Article 19(3)(b)

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 net realised losses on her pension portfolio.

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

The Arbiter notes that the latest valuation and list of transactions provided by the Service Provider in respect of the Complainant is not current. Besides, no detailed breakdown was provided regarding the status and performance of the respective investments within the disputed portfolio.

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

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

The Service Provider is accordingly being directed to pay the Complainant compensation equivalent to 70% of the sum of the Net Realised Loss incurred within the whole portfolio of underlying investments existing and

constituted under Continental Wealth Management and allowed within the Retirement Scheme by the Service Provider.

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

(i) For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Member's current investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised) inclusive of any realised currency gains or losses. Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

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

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

In case where any currency conversion/s is/are required for the purpose of (a) finally netting any realised profits/losses within the portfolio which remain denominated in different currencies, and/or (b) crystallising any remaining currency positions initiated at the time of Continental Wealth Management, such conversion shall, if and where applicable, be made at the spot exchange rate sourced from the European Central Bank and prevailing on the date of this decision.

Such a direction on the currency conversion is only being given in the very particular circumstances of such cases for the purposes of providing clarity and enabling the calculation of the compensation formulated in this decision and avoid future unnecessary controversy.

(iii) Investments which were constituted under Continental Wealth Management in relation to the Scheme and are still held within the current portfolio of underlying investments as at, or after, the date of this decision are not the subject of the compensation stipulated above. This is without prejudice to any legal remedies the Complainant might have in future with respect to such investments.

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

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

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

Because of the novelty of this case each party is to bear its own legal costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services