

Before the Arbiter for Financial Services

Case No. 049/2019

FU

(‘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 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 relating to the nature of the alleged failures as will be considered further in this decision.

The Case in question

The Complainant first explained that she complained with MPM by email on 5 December 2018, and that MPM had notified her that this matter was being taken seriously and being dealt with by its Compliance Department. The Complainant noted that on 16 January 2019, she received a reply by email which stated that MPM had not concluded their investigations and would do so by 15 February 2019. The Complainant further noted that she later received another email stating that MPM had still not concluded their investigations and she was given assurance that a reply will be provided by 1 March 2019.

The Complainant pointed out that MPM's reply was finally received on the 25 March 2019, and it only contained information as to how MPM is protected by their terms of business. The Complainant submitted that at no point in their reply had MPM actually dealt with her complaint or explained or provided any details as to the compliance process they had signed up to.

The Complainant submitted that her complaint is basically in three parts:¹

(i) Allegation on her financial adviser and the dealing instructions

The Complainant submitted that her financial adviser, Continental Wealth Management ('CWM') had no discretionary right to make investments on her behalf. She further submitted that this was confirmed in an email dated 16 February 2017 sent by MPM.

The Complainant explained that she had subsequently asked MPM why they accepted and processed instructions from CWM and was in turn advised that all the instructions held by MPM had been signed by her.

The Complainant further explained that she requested copies of these instructions and had then pointed out to MPM that these were clearly forgeries. The Complainant noted that at the time she was supposed to have signed these instructions, she was, in fact, undergoing treatment for breast cancer and had no knowledge the instructions existed.

(ii) Alleged failure in MPM's duty

The Complainant submitted that she informed MPM that the actions of CWM in sending instructions amounted to fraud. The Complainant

¹ Attachment 'AP22' to the Complaint Form.

considered that MPM failed in its duty towards her as it had the rights under its terms of business to enforce CWM to recompense for their actions, but it declined to do so. The Complainant further submitted that CWM subsequently ceased trading and one of her options for compensation was removed.

(iii) Allegation in relation to MPM's processes

The Complainant submitted that the process approved and accepted by MPM for third parties to send investment instructions via email and not request that the investor actually signs a form allows MPM's systems to be subject to fraud. The Complainant explained that, in its defence, MPM stated that they checked the signatures on the forms received which matched hers, but she pointed out that she was not surprised about this as she claimed that the signatures were photocopies of a forged blank form.

The Complainant stated that she asked MPM for details of their systems in respect of the receipt and approval of investment instructions, which details she still awaits.

The Complainant submitted that she believes that MPM have agreed with third parties to accept emailed instructions, but this is however not declared in their Terms of Business with investors. The Complainant further submitted that for this to apply this had to be clearly identified in such documentation.

The Complainant noted that, from what she understood, MPM had in effect agreed with third parties to accept instructions based on receipt of email. It was submitted that whilst this has become more acceptable in recent years with e-signatures, however, this required certain criteria, one of which was being able to show the email trail as originating from the third party.

It was noted that MPM are unable to provide this information, that is, the trail of CWM going to the investor, the trades being sanctioned by the investor and then sent back to CWM for forwarding to MPM for processing.

The Complainant noted that MPM will turn to their standard terms of business which will protect them from the actions of third parties but argued that this does not protect them against negligence and malpractice.

The Complainant submitted that MPM had a legal venue to enforce CWM to face up to their responsibility of compensating customers for their fraudulent transactions, which they chose to ignore as she alleged it took MPM a number of weeks to take any action against CWM after she had raised the existence of the forged instructions. The Complainant argued that, accordingly, the resulting responsibility then falls on MPM to compensate investors for the losses instead.

The Complainant claimed that by turning a blind eye to the actions of CWM, MPM has been negligent and guilty of malpractice and suggested that there is a problem with the agreed procedure for the processing of investor instructions that MPM has in place with OMI.

The Complainant further stated that in the agreements between OMI, MPM and third parties, there is a serious flaw that allows instructions to be sent by third parties via email without the requirement to provide proof that the investor has actually seen the instruction. It was submitted that investors are not privy to these agreements and it was the responsibility of OMI and MPM to ensure they are ethical, legal and in the best interests of the investors on whose behalf they act.

The Complainant submitted that MPM have failed in their duties to investors by having unsecure procedures that allow and encourage fraud and as such are responsible for losses sustained by investors.

The Complainant requested MPM to reinstate the value of her investment to its original status and also requested compensation for the lost earnings since the start of the policy at the rate of 5% per annum.

The Complainant indicated a figure for compensation of GBP71,288.93, which was calculated as the amount of loss on investment amounting to GBP53,495.09 (calculated as the initial investment of GBP88,969.18 less the investment value as at 31.12.2018 of GBP35,474.09), together with interest

based on a rate of 5% calculated on GBP88,969.18 amounting to GBP4,448.46 for each year from 2015 to 2018 inclusive.

In its reply, MPM essentially submitted the following:

1. That MPM is licensed by the Malta Financial Services Authority to act as the Retirement Scheme Administrator ('RSA') and Trustee of the Scheme. That the Scheme is licensed as a Personal Retirement Scheme.
2. That Continental Wealth Management ('CWM') is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH ('Trafalgar'). Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union.
3. That MPM is not linked or affiliated in any manner to CWM, Trafalgar or Global Net.
4. That MPM is not licensed to provide investment advice.
5. MPM raised the preliminary plea that the complaint relates to conduct which occurred before the entry into force of Chapter 555 of the Laws of Malta on 18 April 2016. In this regard, MPM submitted that the Complaint was filed on the 16 June 2019 and argued that this was therefore beyond the two-year time period allowed by Article 21(1)(b) of the said law. MPM further submitted that for these reasons, the Complaint cannot be entertained.

MPM also stated that without prejudice to the above and also preliminary, if the Arbiter determines that the conduct complained of is conduct which occurred after the entry into force of Cap. 555, MPM respectfully submits that more than two years have lapsed since the conduct complained of took place, and therefore, pursuant to Article 21(1)(c) of Chapter 555 of the Laws of Malta, the complaint cannot be entertained.

6. MPM noted that, in the first place, the Complainant appointed CWM as her adviser, referring to MPM's application form and the application form of Skandia Life International, as attached to its Reply.

MPM submitted that in spite of this, MPM is not aware of any attempt by the Complainant to initiate proceedings against CWM or its officials, which advised the Complainant to invest in products which have led to the Complainant's alleged losses. MPM noted that additionally, it cannot reply with respect to any advice the Complainant received from CWM or with respect to any discussions which the Complainant may have had with CWM. MPM claimed that it is not answerable for any information/advice or assurance provided by CWM.

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

MPM replied that any business introduced by CWM to MPM fell within the MFSA's Pension Rules for Service Providers, as they relate to Retirement Scheme Administrators ('RSAs'). MPM further replied that it does not work on a commission basis and that it neither receives commissions, nor pays commissions to any third parties. MPM submitted that it charges a fixed fee for the services it provides and that this fee does not change, regardless of the underlying investment (which the Complainant was advised to invest in by CWM). MPM further submitted that it accordingly did not stand to make any gain or benefit as a result of the Complainant investing in any particular underlying investments.

7. With respect to the Complainant's complaint that MPM's response arrived on the 25 March 2019, MPM submitted that it required time to investigate the Complainant's complaints and that the Complainant was kept up to date. MPM submitted that in any event, there was nothing stopping the Complainant from proceedings with filing her complaint before the Arbiter. MPM noted that furthermore, with respect to the Complainant's allegation that MPM's reply to her initial complaint did not deal with her complaint or explain or provide details, MPM replied that

this is not the case and that the fact that the Complainant did not receive the reply she may have been expecting, does not mean that MPM did not deal with her complaint.

8. With respect to the Complainant stating that CWM had no discretionary right to make investments on her behalf, MPM referred to the reply it had sent to the Complainant on the 15 February 2017, as per doc AP04 attached to the Complaint where it was confirmed that all dealings made for the Complainant must be agreed to by herself.
9. MPM noted that the Complainant then states that she asked MPM for copies of the dealing instructions, and pointed out to MPM that *'these were clearly forgeries'* and that at the time that she was supposed to have signed them, she was undergoing treatment for breast cancer and didn't know the instructions existed. MPM noted that the Complainant does not specify who allegedly forged her signature and who she is directing this allegation against (although she later referred to *'the actions of CWM in sending the instructions amount to fraud'*). MPM submitted that it so appears that the Complainant is alleging that the forgery was committed by CWM and not by MPM. MPM also referred to the document to the complaint and marked *'AP09'* where the Complainant states that Dean Stogsdill and Anthony Downs facilitated the fraudulent actions of their fellow staff.

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

MPM pointed out that it is its duty to ensure that the Complainant's signature on the dealing instructions is verified against the proof of identification provided to MPM and that in all cases involving the Complainant's dealing instructions, such verification was made by MPM.

10. MPM noted that the Complainant then goes on to state that CWM ceased trading and one of her *'options for compensation [was] removed'*. MPM

pointed out that in the first place, it is not clear what the Complainant means when she states that MPM could *'enforce CWM to recompensate'* it for their actions. MPM submitted that additionally, seeking compensation is not a matter of *'options'* and that compensation can only be sought from a person who is responsible at law to pay such compensation. MPM submitted that the Complainant's position is clear and noted that she could not seek compensation from CWM, so now she was trying to do so from MPM. It was noted that this is also clear from the paragraph in the second page of her claim, where she says that MPM should have taken action against CWM and since they didn't, *'the resulting responsibility falls on MPM to compensate investors for those losses instead'*. MPM submitted that this is untenable for all the reasons set out in its reply.

MPM noted that the Complainant herself clearly believes that CWM is responsible for her alleged losses and CWM was her first point of reference, as it should have been. It was submitted that:

- i. Doc AP02 attached to the Complaint – letter dated 6 February 2017 – where the Complainant stated that *'over the past twelve months I have been in communication with CWM trying to resolve a number of issues to no avail, hence my reason for writing to you as the starting point of my formal complaint'*;
- ii. Doc AP05 attached to the Complaint – letter dated 27 February 2017 – where the Complainant stated that she has been *'trying to resolve this with CWM for the past fourteen months'*;
- iii. Doc AP06 attached to the Complaint – email dated 6 April 2017 – *'I assume you are aware that I currently have a dispute with CWM ...'*;
- iv. Doc AP08 attached to the Complaint – letter dated 11 April 2017 – after noting that MPM had sent her copies of all dealing instructions: *'This same question was asked to CWM their reply was not supported by the evidence you provided and now by putting two and two together I understand why. They were aware that I had not signed any of the instructions and by furnishing me with this information twelve months ago I would have dealt with the*

complaint differently, in as much as getting regulatory bodies involved at a much earlier date.

I am grateful that you have offered your assistance in resolving this complaint and pleased that you have removed CWM's agency'.

- v. Doc AP09 attached to the Complaint – letter dated 15 August 2017 – *'I am disappointed that they have chosen to ignore my request for assistance in taking **action against CWM who I believe are responsible for the problems that have arisen with my policy**'*;
 - vi. Doc AP11 attached to the Complaint – email dated 23 August 2017 – the Complainant had requested CWM to put her back in the position she was before making the fraudulent transactions.
11. MPM noted that it tried to assist in obtaining compensation from CWM for the Complainant, referring to the document marked 'Appendix 6' to its reply.
 12. With respect to the Complainant's allegation that she was not given details of the system for receipt and approval of investment instructions, MPM submitted that this was not the case. MPM noted that the email sent to the Complainant, attached to the complaint and marked AP07, sets this out in the first paragraph.
 13. MPM submitted that the Complainant's complaint is based on MPM's acceptance of what she alleges are forged dealing instructions – this is the only basis of her complaint. MPM noted that she states in Doc AP19 that she has no complaint as to the advice she has been given. MPM noted that her qualm is with respect to the allegedly forged dealing instructions. MPM noted that it is also clear that she has filed this complaint against MPM because she cannot (she states) file it against CWM. MPM noted that as already stated in this reply, this is untenable and MPM should not be ordered to pay any compensation simply because the Complainant did not proceed against the responsible party.

MPM noted that it is clear that the Complainant initially directed her grievances with respect to allegedly forged dealing instructions against CWM and, not having had success, decided to try her luck against MPM.

14. MPM replied that it has, at all times, fulfilled all its obligations with respect to the Complainant and observed all guidelines, including investment guidelines.
15. MPM submitted that it is not licensed to and does not provide investment advice and, furthermore, it did not provide investment advice to the Complainant.
16. MPM submitted that this is clear from the application forms which specifically request the details of the Complainant's professional adviser. MPM further noted that the Complainant also declared on the application form that she acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice as per declaration 8 on page 6.
17. MPM noted that to further reinforce the point that MPM does not provide investment advice, an entire section of the terms and conditions of business (attached to the Application Form), is dedicated solely to this point (as per page 10 of the Application Form).
18. MPM replied that it is not responsible for the payment of any amount claimed by the Complainant and that it has, at all times, fulfilled all its obligations with respect to the Complainant.
19. MPM submitted that it has not committed any fraud, nor has it acted negligently. MPM stated that it has not breached any of its obligations in any way.
20. MPM pointed out that the Complainant must show that it was MPM's actions or omissions which caused the loss being alleged. MPM replied that in the absence of the Complainant proving this causal link, MPM cannot be found responsible for the Complainant's claims.

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

Further Considers:

Preliminary Plea regarding the Competence of the Arbiter

The Service Provider raised the preliminary plea that the Arbiter has no competence to consider this case based on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta.

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

Article 21 (1)(b) states that:

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

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

The said article stipulates that a complaint related to the 'conduct' of the financial service provider which occurred before the entry into force of this Act shall be made not later than two years from the date when this paragraph comes into force. This paragraph came into force on the 18 April 2016.

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

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

In this case, the conduct complained of involves the conduct of the Service Provider in respect of the Scheme. It is noted that MPM's role with the Scheme is that of a trustee and retirement scheme administrator, with such roles having been occupied by MPM in respect of the Complainant since the time the Complainant became a member of the Scheme and **continued to be occupied beyond the coming into force of Chapter 555 of the Laws of Malta.**

It is further noted that the Complainant raised three main aspects in her Complaint where, in essence, she alleged that MPM has been negligent and guilty of malpractice claiming that: (i) MPM accepted and processed forged

instructions from her adviser CWM, when CWM had no discretionary mandate to make investments; (ii) by the time CWM ceased trading, MPM had failed in its alleged duty to seek compensation from CWM, in respect of the fraudulent transactions, in terms of the rights alleged under the terms of business it had with CWM; and (iii) there was a problem with the processes and procedures adopted by MPM in respect of dealing instructions allowing its systems to be subject to fraud.

As described in the affidavit of Stewart Davies (Director of MPM),² the Service Provider has terminated its terms of business with CWM/Trafalgar as from September 2017. The Arbiter is also aware that, as advised by MPM in other cases, '*CWM ceased trading on or around 29 September 2017*'.³ The complaint submitted by the Complainant is considered to cover alleged shortcomings by MPM during the time CWM acted as advisers including until the time MPM had terms of business with such party and the company ceased trading, as referred to by the Complainant also in view of the claimed inactions in respect of the Service Provider.

Accordingly, it is considered that the alleged shortcomings involving the conduct of MPM complained about in relation to the Retirement Scheme cannot be considered to have all occurred before 18 April 2016 and therefore the plea as based on Article 21(1)(b) cannot be upheld.

Article 21(1)(c)

The Service Provider alternatively also raises the plea that Article 21(1)(c) of Chapter 555 should apply. Article 21(1)(c) stipulates:

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

² Para. 44, Section E – A fol. 211

³ Such as in Case Number 127/2018, decided today.

In that case, the Complainant had two years to complain to the Service Provider *'from the day on which the complainant first had knowledge of the matters complained of'*.

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

In its additional submissions, MPM noted that without prejudice to its plea relating to Article 21(1)(b):

'the complaint is also prescribed on the basis of [article 21(1)(c)] (with respect to the two trades carried out after Chapter 555 of the Laws of Malta came into force, only one of which was a purchase)', submitting that *'The complainant received annual member statements from the start of her investment (Appendix 3 attached to the reply filed by Momentum), and yet she only filed a complaint with Momentum in February 2017 (as emerges from the documentation filed with the original complaint)'*.

Considering the only point raised by the Service Provider (which just covers one, of the number of aspects complained about by the Complainant), it is noted that the fact that the Complainant was sent an Annual Member Statement, as stated by the Service Provider in its notes of submissions, could not be considered as enabling the Complainant to have knowledge about the matters complained of. This taking into consideration a number of factors including that the said Annual Member Statement was a highly generic report which only listed the 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. Hence, the Complainant was not in a position to know, from the Annual Member Statement she received, what investment transactions were actually being carried out within her portfolio of investments.

It is further noted that, with respect to one of the issues raised by the Complainant involving the alleged forged dealing instructions, the Complainant initially approached the Service Provider asking for explanations how her funds

were invested by MPM *'on instructions CWM were not authorised to issue'* on 6 February 2017.⁴

Further subsequent exchange of communications ensued. With respect to such exchange of communications, it is particularly noted that in one of her emails, dated 16 February 2017,⁵ the Complainant requested MPM to provide her with copies of the instructions MPM had received from CWM. In her subsequent email of the 27 February 2017,⁶ the Complainant made reference to the dealing instructions sent by MPM and drew MPM's attention that various instructions were *'photocopies that contain a version of my signature'*.⁷

The Complainant submitted her formal complaint with the Service Provider on the 17 December 2018 and, accordingly, less than two years had passed from the aspects she became aware of in February 2017. The complaint is thus considered to have been undertaken within the two-year period established by Art. 21(1)(c) of Chapter 555.

The Service Provider did not ultimately prove that in this case the Complainant raised the complaint *'later than two years from the day on which the complainant first had knowledge of the matters complained of'*.

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 preliminary plea regarding the request to expunge documents

MPM requested the Arbiter to expunge from the record of the proceedings certain documentation filed in the Complainant's additional submissions which were used during mediation. The Service Provider argued that a mediation hearing was conducted in a private and confidential manner and the Complainant cannot refer to any document/submission used during the mediation. Additionally, MPM further submitted that the Complainant cannot at this stage widen the scope of her complaint against it. MPM further noted that in its Reply it had already been pointed out that the Complainant's complaint is based on MPM's acceptance of what she alleges are **forged**

⁴ Doc. AP02 attached to the Complaint Form.

⁵ Doc. AP04 attached to the Complaint Form.

⁶ Doc. AP05 attached to the Complaint Form.

⁷ *Ibid.*

dealing instructions.⁸ MPM submitted that this was the only basis of her complaint against MPM and the Complainant cannot at this stage widen the scope of her complaint. MPM also submitted that **allegations of forgery**⁹ fall outside the competence of the Arbiter and that no cognisance should be taken of any such allegations.

The Arbiter accepts the submission that the Complainant cannot refer to any document or submission used during the mediation and that no new allegations could be raised by the Complainant and will only consider the complaint as originally filed.

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.¹⁰

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

The Complainant

The Complainant, born in 1964, and of British nationality, resided in France at the time of application for membership as per the details contained in the *Application for Membership of the Momentum Malta Retirement Trust* ('the Application Form for Membership').

The Complainant's occupation was indicated as *'Retired'* in the said Application Form. The Complainant was accepted by MPM as member of the Retirement Scheme on 24 March 2014.

The Service Provider

⁸ Emphasis made by MPM.

⁹ *Ibid.*

¹⁰ Cap. 555, Art. 19(3)(b)

¹¹ Art. 19(3)(d)

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator¹² and acts as the Retirement Scheme Administrator and Trustee of the Scheme.¹³

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 2015.¹⁴

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.¹⁵

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

¹² <https://www.mfsa.mt/financial-services-register/result/?id=3453>

¹³ Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

¹⁴ 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/>

¹⁵ 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.

Article 43(6)(c) of the TTA, in light of MPM's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

Indeed, Article 1(2) of the TTA provides that:

'The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A',

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 MFSA¹⁶ as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011¹⁷ and under the Retirement Pensions Act in January 2016.¹⁸

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'*¹⁹ and is *'an approved Personal Retirement Scheme under the Retirement Pensions Act 2011'*.²⁰

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

¹⁶ <https://www.mfsa.com.mt/financial-services-register/result/?id=3454>

¹⁷ Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).

¹⁸ Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).

¹⁹ Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

²⁰ Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

*both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death’.*²¹

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.

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

The life assurance policy acquired for the Complainant was called the European Executive Investment Bond issued by Skandia International²²/Old Mutual International (‘OMI’).²³

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 investments as indicated in the table forming part of the ‘*Investor Profile*’ presented by the Service Provider during the proceedings of the case (‘*the Table of Investments*’).²⁴

The ‘*Investor Profile*’ presented by the Service Provider in respect of the Complainant also included a table with the ‘*current valuation*’ as at 01/01/2020. The said table indicated a loss (excluding fees) of GBP41,859 as at that date. It is to be noted that the Service Provider does not explain whether the loss indicated for the Complainant relates to realised or paper losses or both.

Investment Adviser

²¹ *Ibid.*

²² Skandia International eventually rebranded to Old Mutual International - <https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-2014/skandia-international-rebrands-to-old-mutual-international/>

²³ Welcome Letter dated 10 June 2014 issued by Skandia International in respect of her policy no. 50046897refers.

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

Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainant.²⁵ The role of CWM was to advise the Complainant regarding the assets held within her respective Retirement Scheme.

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*'.²⁶

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*'²⁷ 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*'.²⁸

Further Considerations

Responsibilities of the Service Provider

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

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

As indicated in the MFSA's Registration Certificate dated 28 April 2011 issued to MPM under the SFA, MPM was required, in the capacity of Retirement Scheme Administrator, '*to perform all duties as stipulated by articles 17 and 19 of the Special Funds (Regulation) Act, 2002 ... in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the [SFA]*'.

The obligations of MPM as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the various conditions stipulated in the original Registration Certificate which *inter alia* also referred to various Standard Operational Conditions (such as those set out in Sections B.2, B.5, B.7

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

²⁶ Pg. 1 of MPM's reply to the OAFS.

²⁷ Para. 39, Section E, titled '*CWM and Trafalgar International GmbH*' of the affidavit of Stewart Davies.

²⁸ *Ibid.*

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 which are considered most relevant to the case in question:²⁹

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

²⁹ Emphasis added by the Arbitrator.

'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 2.6.4 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.

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

The said article provides that:

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

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

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

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

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property ‘*as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality*’.³⁰

As has been authoritatively stated:

‘Trustees have many duties relating to the property vested in them. These can be summarized as follows: to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries

³⁰ Pg. 174, ‘*An Introduction to Maltese Financial Services Law*’, Editor Dr Max Ganado, Allied Publications 2009.

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’.³¹

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

‘In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus pater familias in the performance of his obligations’.³²

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

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

Final Observations and Conclusions

Allegations relating to the signature on the dealing instructions

The Complainant alleged that MPM accepted and processed investments which were not authorised by her claiming that the dealing investment instruction forms were forged with the signatures being photocopies of a forged blank form.

³¹ Pg. 178, *‘An Introduction to Maltese Financial Services Law’*, Editor Dr Max Ganado, Allied Publications 2009.

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

However, the Complainant making this allegation did not provide enough evidence to the Arbiter to accept such allegation.

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

Communications relating to dealing instructions seem to have only occurred between MPM and the investment adviser without the Complainant being in copy or made promptly and adequately aware of the investment instructions given by the investment adviser and executed by MPM.

It has indeed not emerged during the proceedings of the case that the Complainant was being adequately and promptly notified by MPM about material developments relating to her portfolio of investments within the Scheme as would reasonably be expected in respect of a consumer of financial services.

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

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

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

In the context of member-directed schemes such measures could have involved, for example, accepting communications either from the Complainant or with the Complainant being in copy in certain communications involving

dealing instructions/confirmation of execution; and/or the Member being adequately and promptly informed by MPM of the purchases and redemptions being made within the portfolio of investments.

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

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

The Provision of information

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

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

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

*'a record of all transactions (purchases and sales) occurring in the member's account during the relevant reporting period should be provided by the Retirement Scheme Administrator to the Member at least once a year and upon request ...'.*³³

It is noted that the Pension Rules for Personal Retirement Schemes under the RPA became applicable to MPM on 1 January 2016 and that, as per the MFSA's communications presented by MPM,³⁴ Part B.9 of the said rules did not become effective until the revised rules issued in 2018.

Nevertheless, it is considered that even where such condition could have not strictly applied to the Service Provider from a regulatory point of view, the Service Provider as a Trustee, obliged by the TTA to act as a *bonus paterfamilias* and in the best interests of the members of the Scheme, should have felt it its duty to provide members with detailed statements and information on the underlying investments.

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

- Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002³⁵ respectively already provided that:

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

³³ The said condition was further revised and updated as per condition 9.5(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes indicated as *'Issued: 7 January 2015/Last updated: 28 December 2018'*

³⁴ MFSA's letter dated 11 December 2017, attached to the Note of Submissions filed by MPM in 2019.

³⁵ Condition 2.2 of the Certificate of Registration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives.

...

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

'2.6.3 The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and not misleading. This shall include:

...

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

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

The general principles of acting in the best interests of the member and those relating to the duties of trustee as already outlined in this decision³⁶ and to which MPM was subject to, should have prevailed and should have guided the Service Provider in its actions to ensure that the Member was provided with an adequate account of the underlying investments within her portfolio.

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

Other Considerations

In addition to the allegation that MPM accepted and processed forged dealing instructions from her adviser and the allegation relating to the problems with the processes and procedures adopted by MPM in respect of such instructions, the Complainant also raised the aspect that MPM had failed in its alleged duty

³⁶ The section titled '*Responsibilities of the Service Provider*'.

to seek compensation from CWM, under the terms of business it had with CWM in respect of the fraudulent transactions by the time CWM ceased trading.

As to the latter, the Complainant attached an incomplete '*Terms of Business*' agreement referring to '*Momentum Pensions*' and an '*Intermediary*'. Besides being undated and unsigned there are also no details of the entity acting as '*Intermediary*' and, thus, acting as party to such agreement, nor any references to CWM in such agreement presented by the Complainant.

Having considered the submissions made and nature of documentation presented, the Arbiter does not consider that sufficient evidence has been produced, and the claims made by the Complainant on this point are considered unsubstantiated.

Conclusion

The Arbiter considers that, in the particular circumstances of this case, given that the Complaint made by the Complainant and the specific alleged shortcomings and claims made against the Service Provider were solely based and linked to the alleged forged dealing instructions, an aspect on which the Arbiter is not in a position to consider for the reasons already explained in this decision, the Arbiter is not in a position to reasonably uphold the Complainant's claims for compensation of loss with respect to the alleged unauthorised investments.

Considering, however, the particular circumstances of this case, including the indicated administrative shortfalls on MPM's procedures in respect of dealing instructions and lack of adequate reporting to the Complainant, as amply explained above, the Arbiter considers that on the basis of what is fair, equitable and reasonable,³⁷ if the Complainant elects to leave the Scheme, the Service Provider should not charge the Complainant its own fees applicable in case of a transfer out of the Scheme.

³⁷ Cap. 555 of the Laws of Malta, Art. 19(3)(b)

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**