Before the Arbiter for Financial Services

Case No. 185/2018

FO
('the Complainant' or 'the Member')
vs
Momentum Pensions Malta Limited
(C52627) ('MPM' or 'the Service Provider'
or 'the Retirement Scheme Administrator'
or 'the Trustee')

Sitting of the 28 July 2020

The Arbiter,

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

The Complainant noted that her complaint against MPM concerned their ongoing negligence and failures in their fiduciary duties and duties of care as the trustees of her Scheme which have occurred since the initial transfer of her funds in November 2013 till the present day.

The Complainant submitted that a trustee must fulfil its fiduciary duties under section 1124(A) of the civil code Chapter 16 of the Laws of Malta. It was noted that the duty of care required trustees to act with the care, skill and prudence

in investment related matters, including diversification, risk profiles and guidelines; to perform due diligence in matters related to investment of her assets; to incur only costs that are appropriate and reasonable; and to act in accordance with applicable regulations and own guidelines. It was further noted that the trustee has a legal obligation to act in the members best interest, to exercise due diligence and fulfil compliance obligations laid out in the Retirement Pensions Act, 2011 ('RPA').

The Complainant claimed that the losses totalling GBP200,000 that her pension fund has suffered is totally due to the wilful and ongoing negligence of her trustees and that they are accordingly fully responsible for reimbursement in terms of the RPA, Part B.1.5.1 and 4.1.17.

The Complainant quoted that:

'*The Scheme Administrator will be liable to the scheme, members, beneficiary's and contributors of the Scheme for any loss suffered by them resulting from its fraud, wilful default or negligence including the unjustifiable failure to perform in whole or in part of its obligations*'.

The Complainant claimed that in terms of the RPA part D.1, due diligence had to be carried out to ensure that introducers act within the Pension Rules.

With respect to Continental Wealth Management ('CWM') as financial advisers, the Complainant submitted that the appointment of CWM was subject to the Trustee's approval.

The Complainant also stated that the Arbiter has previously ruled that:

'*The Retirement Scheme Administrator shall retain ultimate responsibility to ensure compliance by the Member or any person acting on his behalf with the objective of the retirement scheme and with any applicable license conditions and provisions of the law*'.

With reference to high risk investments, the Complainant submitted that the Trustee needs to ensure that the member's funds are invested in a prudent manner and in the best interests of the member, and quoted that Part B.4, 1.4(b) of the Pension Rules for Service Providers provided that:

'*The Service Provider shall act with due skill, care and diligence. Such action shall include: (b) Where applicable, taking all reasonable steps to obtain, when executing orders, the best possible result for its clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order*'.

With respect to the risk profile, the Complainant noted that in page 4 of the Consultation Document issued by the MFSA on amendments to the Pension Rules issued under the RPA, the MFSA considered:

'*that the [Retirement Scheme Administrator 'RSA'] remains responsible for current retail members and in particular they ensure that the investments made reflect the risk profile of such members*'.

The Complainant further stated that in page 10 of the said Consultation Document, MFSA states that:

'*In case of member directed schemes the RSA is expected to have adequate knowledge of the risk profile of the member so as to ensure that the proposed investments are in line with the investment strategy and investment restrictions of the member-directed scheme and with the risk profile of the member, in order to approve proposed transactions in a members account. In this respect the RSA is expected to vet and approve the investment advice provided by the investment manager or the investment adviser and raise certain queries when necessary'.*

The Complainant claimed that MPM had stated that they do not see the member's fact finds. It was noted that these clearly state that investments should be using '*protected*' and '*guaranteed*' products. The Complainant argued that as part of their due diligence and '*know your customer*', the trustees should review and independently establish member's risk profiles.

With respect to fees and charges, the Complainant submitted that trustees should avoid unfair or unreasonable charges on members whilst also taking into account the charges levied on underlying investments. The Complainant noted that Section B.4 (1.7) of the Pension Rules for Service Providers stated that:

'*The Service Provider shall, before offering any services to the member, provide in writing a description of the nature and amount of any direct or indirect charges or fees a member or beneficiary will or maybe expected to bear in relation to the scheme or fund and investments within the scheme or fund (if applicable)*'.

The Complainant referred to the legal right to cancel and submitted *inter alia* that a member had to be given a period of 30 days to withdraw from the contract entered into with the Scheme as per regulation 7 of the Distance Selling (Retail Financial Services) Regulations, without incurring any penalty and without needing to give any reason.

The Complainant also made reference to MFSA rules, part 2.15.2, with respect to cooling-off and cancellation notice and also stated that the Arbiter has previously ruled that:

'*In accordance with the Pension Rules to which it is subject to, the Service Provider must communicate, in a reasonable and timely way, relevant details about the investment and the applicable cooling-off period regarding the underlying investment*'.

Reference was made to fraudulent dealing instructions where the Complainant noted that the trustee is required to exercise due diligence and exercise care referring to '*Pension Law part B.4.1(b)*'. The Complainant pointed out that the trustee was required to carry out investigations or audits of any potential investment to confirm all facts and review financial records, term sheets and other material aspects like risk profile and the documentation provided.

The Complainant also highlighted that in terms of condition 9.3(b) of Part B.9 of the '*Supplementary Conditions in the case of Member Directed Schemes*' of the Pension Rules for Personal Retirement Schemes issued by the MFSA: '*members have the right to timely and fair execution of their investment decisions and to written confirmation of these transactions*'.

The Complainant argued that the trustee should act honestly, fairly and integrity treating all members and beneficiaries fairly. It was claimed that MPM has taken decisions to agree compensation and contacted some members offering refunds or waiving of fees in return for signing a gagging agreement

and the withdrawal of the complaints. The Complainant submitted that this has, however, not been offered to all affected members and this was not seen as acting fairly and with integrity as per the RPA.

The Complainant noted that it was hard to quantify the distress and financial pressure she has suffered and that if MPM was prepared to return her fund to its original 2013 transfer value of approximately GBP258,400 she would then be able to start to get her life back on track. The Complainant stated that given the current valuation of what remains of her fund a cash injection of some GBP200,000 would be required.

In its reply, MPM essentially submitted the following:

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

2. That MPM is not linked or affiliated in any manner to CWM, Trafalgar or Global Net and that MPM is not licensed to provide investment advice.

3. MPM raised the 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 22 November 2018 and argued that this was therefore beyond the two-year time period allowed by Article 21(1)(b) of the said law. MPM further submitted that for these reasons, the Complaint cannot be entertained.

   MPM also stated that without prejudice to the above and also preliminary, if the Arbiter determines that the conduct complained of is conduct which occurred after the entry into force of Cap. 555, MPM submitted 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.

4. That, at the outset, MPM considers that the manner in which the Complainant put forward her complaint has made it very difficult for it to provide a reasoned reply. MPM submitted that the Complainant refers to rules and legislation (often without providing any references or providing references which are incorrect), without explaining why she is referring to them, without explaining what her complaint against MPM is and what MPM has allegedly done wrong. MPM replied that this has placed it in the position of being unable to reply in a reasoned manner because it has no allegation to reply to but is merely faced with generic references to rules/laws.

5. MPM submitted that, in the first place, it was not the initial Trustee. MPM explained that it took over on or around November/December 2013, by an *in specie* transfer, being a transfer from an existing retirement scheme.

   MPM noted that in the application form completed by the Complainant in 2013, the Complainant appointed CWM as her adviser. MPM further noted that in spite of this, it is not aware of any attempt by the Complainant to initiate proceedings against CWM. MPM also submitted that it is, however, aware that the Complainant received compensation payments from CWM in 2015 in the amount of GBP33,337 and that this has not been disclosed to the Arbiter.

   MPM submitted that any business introduced by CWM to it fell within the MFSA's Pension Rules for Service Providers as they relate to 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 noted 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 noted that it accordingly did not stand to make any gain or benefit as a result of the Complainant investing in any particular underlying investments.

6. It was stated that MPM sent the Complainant annual member statements for the years 2014-2016 inclusive and that it also sent the Complainant emails dated 25/11/2013 and 20/12/2013 which were attached to MPM's reply.

7. MPM noted that in the opening paragraph of the Complaint, the Complainant refers to '… *the additional details of my Complaint* …', but the Complainant must clarify in addition to what she is submitting her complaint in order to allow MPM to reply. MPM further noted that the Complainant also refers to the '*unresolved formal complaint*' against MPM but MPM replied to the Complainant's complaint on the 2 November 2018.

8. With respect to the first paragraph of the complaint on fiduciary duties, MPM noted that the Complainant refers to section 1124A of the Civil Code and to Part B.1.3.1 and Part B.4.1.4 of the RPA. MPM replied that in the first place there is no Part B.1.3.1 and Part B.4.1.4 of the RPA. It was further noted that the Complainant additionally has failed to explain why she is referring to the aforementioned and if MPM has allegedly breached the aforementioned rules and how it has done so. MPM noted that it is also unclear what instrument the Complainant is referring to when she refers to the RPA.

9. With respect to the second paragraph of the Complaint regarding the liability of the trustee and retirement scheme administrators, MPM noted that the Complainant alleges that she has suffered losses '… *totally due to the extreme early, wilful and ongoing negligence of my trustees*' and that MPM is, therefore, responsible to reimburse her as laid out in the RPA. MPM submitted that the Complainant also refers to '*Liability 4.1.17*' but once again it is unclear what instrument the Complainant is referring to when she refers to the RPA besides that there is no Part B.1.5.1 and 4.1.17 of the RPA.

   MPM, furthermore, noted that although the Complainant alleges that MPM was negligent, she fails to say how MPM was allegedly negligent, thereby putting MPM in a position that it cannot provide a reply to her Complaint. MPM rejected the allegations that it was negligent in any respect in the fulfilment of its obligations.

10. With respect to the third paragraph of the Complaint relating to introducers, MPM submitted that once again the Complainant refers to

the RPA and to part D.1. which does not exist. MPM submitted that once again, no clear allegation is formulated in this paragraph to which MPM can reply.

11. With respect to the fourth paragraph of the Complaint relating to CWM as financial advisers, MPM replied that, in the first place, the Complainant is making reference to MPM's application form as it currently stands and not the application form which the Complainant completed and signed in September 2013.

    MPM submitted that the Complainant also quotes from what she refers to as a previous ruling of the Arbiter without providing any references. MPM requested the Complainant to provide appropriate references so that MPM will be in a position to refer to the decision of the Arbiter quoted by the Complainant, its content and context and, consequently, be in a position to comment.

12. With respect to the fifth paragraph of the Complaint relating to high risk investments, MPM replied that once again the Complainant is referring to, and allegedly quoting from, rules without explaining the reason why, what obligations MPM has allegedly breached, and how.

13. With respect to the sixth paragraph of the Complaint relating to fees and charges, MPM replied that, once again, the Complainant refers to rules without providing any explanation as to how MPM allegedly breached the rules referred to. MPM notes that it can only suppose here that the allegation is that literature on charges was not provided to the Complainant. MPM stated that as set out in its reply, MPM was not the initial trustee for the Complainant's investment and, therefore, cannot comment with respect to the fees obtaining at the time when it was not the RSA. MPM submitted that with respect to MPM's fees, the Complainant herself approved MPM's fees.

14. With respect to the eighth paragraph of the Complaint relating to the legal right to cancel, MPM replied that it was not the trustee/RSA when the original investment was made and that MPM took over on, or around, November/December 2013 following an *in specie* transfer. MPM noted that, furthermore, following such transfer, MPM provided the

Complainant with the Policy Endorsement document on 20 December 2013 (which had been received by MPM from SEB on 16 December 2013).

MPM submitted that once again the Complainant allegedly quotes from what she refers to as a previous ruling of the Arbiter without providing any references. MPM requested the Complainant to provide appropriate reference so that it will be in a position to refer to the decision of the Arbiter quoted by the Complainant, its content and context and, consequently, be in a position to comment.

15. With respect to the ninth paragraph of the Complaint relating to fraudulent dealing instructions, MPM submitted that once again the Complainant refers to rules without providing any explanation as to how MPM allegedly breached the quoted rules. MPM further submitted that it is not in a position to provide a reply when no allegation has been directly levelled against it. MPM also noted that the Complainant refers also to '*pension law part B.4.1.4(b)*' but it is entirely unclear what she is referring to.

16. With respect to the tenth paragraph of the Complaint relating to the treatment of all members and beneficiaries fairly, MPM submitted that once again the Complainant refers to rules without providing any explanation as to how MPM allegedly breached the rules referred to. MPM replied that with respect to the allegation that it offered fee refunds to members in return for signing what the Complainant refers to as a '*gagging agreement*', MPM replied that it will not disclose any information pertaining to any other member including whether or not offers for fee refunds were made or otherwise. MPM submitted that even if what the Complainant is alleging is proved, MPM replied that this does not amount to behaviour which is not in line with MPM's obligations.

17. MPM submitted that it has, at all times, fulfilled all its obligations with respect to the Complainant and observed all guidelines, including investment guidelines.

18. MPM submitted that it is not licensed to and does not provide investment advice and that, furthermore, it did not provide investment advice to the Complainant. MPM noted that this is clear from the application form

which specifically requests the details of the Complainant's professional adviser. MPM submitted that the Complainant also declared on the application form that the services provided by MPM did not extend to financial, legal, tax or investment advice as per declaration 8 on page 6 of the said form.

To further reinforce the point that MPM does not provide investment advice, it was submitted that an entire section of the terms and conditions of business as attached to the application form, is dedicated solely to this point, as per page 7 of the application form.

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

20. MPM further 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.

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

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

Considers:

The Complainant, born on 2 May 1957, is of British nationality and was resident in Spain and was '*Retired*' at the time of the *Application Form for Membership into the Retirement Scheme* dated 5 September 2013 ('the Application Form for Membership'). The Complainant was accepted by MPM as a member of the Retirement Scheme on 18 November 2013.

At the time of membership, the Complainant had already an investment into a life assurance policy called the Spanish Portfolio Bond issued by SEB Life International ('the Policy'). The Policy and its underlying investment consisting of a structured note,[1] was transferred *in specie* to the Retirement Scheme following the Complainant becoming a member of the Scheme. The said Spanish Portfolio Bond was assigned to MPM as trustee of the Retirement Scheme through a Notice of Assignment dated 25 November 2013.[2] Following the *in specie* transfer further investments were made into structured notes within the Policy under the control of MPM as trustees of the Scheme.

One particular aspect that has emerged during the proceedings of this case, which is distinct from other complaints made before the Office of the Arbiter for Financial Services ('OAFS') against MPM in relation to the Retirement Scheme, relates to the settlement being negotiated by the Complainant with CWM as early as 2015.

The Arbiter needs to accordingly consider this aspect first in view of the preliminary plea raised by the Service Provider that the Complaint is time-barred under Article 21(1)(b)/Article 21(1)(c) of Chapter 555 of the Laws of Malta.

Preliminary Plea regarding the Competence of the Arbiter

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

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

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

[1] An investment of GBP30,000 into a structured note called the Nomura China Brazil & Oil Autocallable Note – Table shown in the '*Investor Profile'* attached to the Additional Submissions made by the Service Provider.

[2] As per the letter dated 9 December 2013, issued by SEB Life International to MPM as Trustee of the Retirement Scheme with respect to the Endorsement of the Policy following the Notice of Assignment.

Article 21(1)(b) 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 refers to the date when the alleged misconduct took place. The Complaint in question in essence relates to the investments undertaken under CWM at the time when MPM was in control as trustee of the Retirement Scheme.

During the proceedings of this case evidence was produced of communications dated June and July 2015 in relation to loss on investments and settlement between the Complainant and CWM.[3]

The Arbiter notes that in an email dated 26 June 2015, exchanged between the Complainant and CWM, reference was *inter alia* made to a meeting the Complainant had with CWM in 2015 in respect of her investments and that, as a result of loss on investment, CWM was confirming that it will itself make certain payment which payment will be made '*until CWM and Mr and Mrs FO have worked together to recover the position of the policy up to an agreed and acceptable value*'.

In an email communication dated 7 July 2015, further reference was made to the monthly payments that CWM was to make to the Complainant and up till when such payments were to continue.

In another email communication dated 13 July 2015, sent by the Complainant to Trafalgar, reference was *inter alia* made to the problems with their portfolio of investments, the recovery plan being worked with CWM and also the huge actual losses already experienced where it was *inter alia* indicated that:

'*There has been an actual loss of approximately £146K over several of Viv's 'bonds', as these have already either been sold or matured with huge losses*'.

In another email communication sent to CWM dated 6 July 2015, the Complainant *inter alia* confirmed that they had now certain awareness of

[3] Details and attachments submitted by the Service Provider in the '*Additional submissions with respect to complaint 185/2018'.*

'*what has been going on*' and of '*how catastrophic your actions have been so far on our life savings*'.

The Service Provider has also produced an email sent by the Complainant to MPM dated 8 March 2018 where it was *inter alia* mentioned that:

'*The very first time we became aware of the real state of both Pension Funds was at the end of May 2015 during a meeting in our home*'.

Taking into consideration the contents of such communications and the key communications that occurred prior to the coming into force of the Act, including the settlement arrangement made with CWM at the time, the Arbiter considers that in this particular case and on the basis of what has been presented during the proceedings of this case, there is validity to the Service Provider's claim made in terms of Article 21(1)(b) of the Act.

In this regard, there is sufficient basis on which it can be considered that in 2015 the Complainant was aware of the problems and issues relating to her investment portfolio, which are the subject of this Complaint, as well as awareness of the actual substantial losses already occurred on her investments.

The Complainant filed a formal complaint with the Service Provider on 18 July 2018 and a complaint with the OAFS in November 2018. This is later than the two years from the coming into force of Article 21(1)(b) of the Act.

The Arbiter accordingly considers that the plea made by the Service Provider as based on Article 21(1)(b) of Chapter 555 of the Laws of Malta can be upheld in the circumstances of this particular case.

Moreover, given that there is sufficient basis on which it can be deemed that the Complainant first had knowledge of the matters complained of in 2015, the Complaint would also be considered as time-barred even with reference to Article 21(1)(c).

For the above-stated reasons, the plea made by the Service Provider as to the competence of the Arbiter in terms of Article 21(1)(b)/Article 21(1)(c) of Chapter 555 of the Laws of Malta is being accepted and the Arbiter declares that he does not have the competence to deal with this complaint.

Given the particularities of this case, and that the case was decided on a preliminary plea, each party is to bear its own costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services