

Before the Arbiter for Financial Services

Case ASF 027/2024

AY ('the Complainant')

vs

Momentum Pensions Malta Limited
(C52627) ('MPM' or 'the Service Provider')

Sitting of 14 June 2024

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'), established in the form of a trust and administered by MPM as its Trustee and Retirement Scheme Administrator ('RSA').

The essence of the Complaint involves the Complainant's allegations of a significant financial loss of approximately GBP 70,000, which he claims he experienced on his Retirement Scheme between the years 2022 and 2023. He claimed that this loss occurred as a result of his previous investment advisor, *Taylor Brunswick Group* ('TBG'), being removed by MPM and not replaced by another investment advisor or investment manager. The Complainant asserts that MPM mismanaged his Retirement Scheme by removing TBG, under whose advice the investment portfolio was performing well, and then failed to appoint another party to manage his investments despite indicating that it would. He further claims that during the period when his Retirement Scheme had no investment advisor/manager, and was thus in an unmanaged state, the investment portfolio substantially deteriorated in value, leading to the claimed loss.

*The Complaint*¹

The Complainant explained that his investments decreased in value by GBP 70,000 from April 2022 to April 2023, due to the mismanagement of the Service Provider.

He noted that at the start of the year 2022, MPM advised him that his advisor (Nick Smith, Partner at *Taylor Brunswick*), did not have the correct approvals/certification to manage his pension investments. The Complainant further noted that during the previous five years, *Taylor Brunswick* had performed very well – with his pension having increased by GBP 80,000 to a value of approximately GBP 330,000. He accordingly wanted to remain with TBG.

The Complainant further explained that in February 2022, MPM and TBG communicated to consider his options to remain with TBG.

He claimed that on 2 March 2022, he received an email stating that he did not have an investment advisor and that if he did not appoint one by 3 April 2022, MPM would, however, do so via *TAM Asset Management* ('TAM').

The Complainant noted that further correspondence was exchanged between MPM and TBG on 11 and 14 March 2022. He claimed that the correspondence indicated they were working on the options. He also submitted that, at this point, he believed that his investments were still under management.

According to the updated statement that the Complainant received in April 2022, his investments were still performing well at the time. However, his member statement of April 2023 showed a significant drop in performance by approximately GBP 70,000.

The Complainant explained that upon investigation, he found that his investments had been transferred away from TBG, but that TAM had not been appointed instead of TBG. He considered this to have had a significant impact on the performance of his investments and claimed that the lack of communication, the poor follow-up and MPM's failure to do what it said it would do (by appointing another investment adviser/manager) seriously impacted his investment performance.

¹ Complaint Form on Page (P.) 1 - 6 with supporting documentation on P. 7 - 137

Remedy requested

The Complainant noted that MPM offered him compensation, but he felt that the sum offered was significantly lower than what it should have been.

He explained that he was looking for a fair resolution and financial offer. The Complainant felt that, as a minimum, at least 50% of the poor performance (that is, an amount of GBP 35,000) lies with MPM.²

Having considered, in its entirety, the Service Provider's reply, including attachments,³

Where, in essence, the Service Provider explained and submitted the following:

Introduction and background

1. That MPM is licensed by the MFSA to act as the RSA and Trustee of the Scheme. The Scheme is licensed as a Personal Retirement Scheme and operates as a member-directed scheme. The Complainant became a member of the Scheme on 21 February 2017.

Reply to the complaint

2. MPM submitted that the Complainant has not substantiated explicitly what duties he alleges MPM has failed to uphold, how he believes MPM failed to uphold these duties, as well as how MPM contributed to the decrease in the value of his investments.
3. The Service Provider stated that it was pertinent to note firstly that, under the Rules for a member-directed scheme, the member is the only individual who can legally appoint an Investment Adviser and Investment Manager. MPM submitted that there is no provision for the RSA to appoint, and MPM cannot legally appoint, an Adviser or Investment Manager for a member.

It highlighted that it is also important to note that even if MPM could appoint a party in the individual's best interest, a regulated and licensed adviser would not be willing or able to accept the appointment. This is due to the fact that a regulated adviser cannot advise a member without having

² P. 4

³ Reply (P. 143 – 148) with attachments (P.149 – 170)

gone through an onboarding financial fact-finding and due diligence process, which requires holding a meeting directly with the member. It submitted that similar issues arise when seeking to appoint an Investment Manager who would also not be willing to manage a member's investments where they have not met the member or where no adviser is assisting or involved in the process.

4. MPM explained that in February 2017, when the Complainant was accepted as a member of the Scheme, Nick Smith from TBG was appointed as his financial and investment adviser. It noted that TBG is an entity incorporated in Hong Kong and is fully regulated by the *Hong Kong Insurance Authority*. TBG were appointed by the Complainant as his financial and investment adviser.
5. The Service Provider further explained that following the introduction of the Malta Pension Rules ('the Rules') in 2019 by the MFSA, the Complainant was required to have appointed an Investment Adviser, who is authorised, regulated, and licensed to provide investment advice in relation to his investments, including advice on any insurance policy (if applicable) held within the Scheme.

It noted that following the introduction of the Rules, MPM notified all Members and also all advisory firms requesting that each advisory firm reviews their position with their clients and ensure that they are authorised, regulated and licenced in accordance with the Rules.

6. MPM noted that it subsequently undertook a very detailed and extensive exercise across its business, reviewing each individual Adviser Firm and reviewing their permissions on an individual member-by-member basis taking into account the jurisdiction in which the member resided. Following this exercise, MPM had discussions with TBG as it wanted to clarify how TBG was complying, given that frequently, Adviser Firms are appointed representatives or part of networks in other jurisdictions and hence are licensed and regulated in that jurisdiction. MPM pointed out that it is also relevant to note that whilst the discussion related to whether they could be retained as the Complainant's Investment Adviser, there was [an] issue

in terms of the Rules with them being retained as the Complainant's Financial Adviser.⁴

7. It was noted that on 15 September 2021, following various discussions with TBG, the Service Provider emailed TBG specifically regarding the Complainant, as no way forward had been provided by TBG as agreed with them for the Complainant. It noted that, in this email, MPM stressed that *'we need to draw a line under this one asap'*.⁵

MPM further noted that in the response received on 29 September 2021 from TBG, it was specifically confirmed as follows:

'Can I please ask that if you have any need to correspond on this client (my client) can you please come directly to myself. Thank you.

*In regard to this client **I have now been able to engage with him** and it is his intention to transfer into a DFM under Brooks Macdonald ... We have already reached out to Brooks MacDonald to request the latest requirements and as soon as received by them and completed by the Member we will send these onto yourself (emphasis added by Momentum).*

If you have the relevant application/your requirements to hand please by all means send these through to us and we can move faster'.⁶

8. MPM noted that at all times during discussions with TBG and as articulated above, it was confirmed to and understood by MPM that TBG was discussing the matter with the Complainant and that the Complainant was looking into the option of appointing an Investment Manager in compliance with the Rules. MPM submitted that it is also clear from the communications that TBG had discussed the requirements with the Complainant, at least from September 2021.
9. MPM explained that it appreciated that the discussions held were during COVID and that the sourcing of a revised solution with a client requires a

⁴ During a hearing of 30 April 2024, the official of the Service Provider clarified that there was an issue in terms of the Malta rules for TBG to be retained in the Malta Scheme – P. 180 & 181

⁵ P. 144 & 149

⁶ *Ibid.*

period of time to firstly find and present a suitable solution and, secondly, to explain and assist the client. MPM noted that it continued to follow up with TBG into early 2022 for an update, again stressing the urgency and explaining the need to complete this exercise.

A further communication was received from TBG on 24 January 2022, stating the following and making it clear that the Complainant was not in favour of replacing his adviser:

*'My understanding is that if the client is moved away to a DFM say under Brooks Macdonald, we are effectively having to give up "our" client up **which neither the existing member** (emphasis added by Momentum) no [sic] ourselves wish to happen, is that correct?'*⁷

10. MPM submitted that it could no longer allow further time and, as such, needed to press on removing TBG, notifying the Complainant, and providing a default option to the Complainant of appointing TAM. It further submitted that it notified TBG that this would be communicated to the Complainant and asked that TBG discuss this with the Complainant.
11. TBG responded on 3 February 2022, confirming they made the client aware of the communication that would be coming from MPM, as follows:

*'Thank you for your email and I appreciate that you are in a difficult position. In preparation for what I believe this client's reaction will be (**I do not believe he likes to get dictated to nor has seen any evidence that a DFM would be any better for him**), can you please send to me the list of requirements and any appropriate documentation that you require if this client wishes to transfer away from you?*

*I have today already made this client aware that he might receive communication from you.'*⁸

MPM noted that furthermore, on 4 February 2022, TBG responded:

⁷ P. 144 & 150

⁸ P. 145 & 151

'Entirely understood about the Legislation, we know that it wasn't down to you.

Yes likely a transfer to a SIPP (will give the client different SIPP choices) so please send to me what you require if he moved across to iPensions or another company.⁹

MPM explained that, following this, it provided this transfer-out information to TBG on 4 February 2022.

12. MPM submitted that the said communications confirmed to MPM that firstly, the Complainant had been made aware of the position of removing TBG as his investment adviser, and that secondly, he was not in favour of appointing another Adviser or Brooks MacDonald or another Investment Manager. It submitted that this further clearly articulated that the Complainant was considering **going to the extent of transferring out of the Scheme to retain TBG and to avoid having to appoint another adviser or Investment Manager (DFM)**.
13. The Service Provider explained that on 2 March 2022, it issued the correspondence to the Complainant via email to again inform him of his options going forward.¹⁰ It noted that to assist the Complainant further, it also reviewed its Adviser firms based in Australia that are licensed and regulated adviser firms which the Complainant could consider appointing and provided him with the name of a suitably licensed Advisory Firm. MPM also provided details of an Investment Manager, TAM, who would be willing to manage assets for the Complainant and to seek to ensure compliance with the Rules, notwithstanding the fact that ultimately, MPM cannot appoint someone on the Complainant's behalf. This was presented as a default option.
14. MPM explained that no response was received from the Complainant. It noted that in an email to MPM of 11 March 2022, TBG stated that:

⁹ P. 145 & 152

¹⁰ P. 153

*'I have spoken at length with AY today and his decision/ preference is to move into a SIPP. Is the Application/requirements that you have sent the links to us on 04th February still the correct ones?'*¹¹

MPM submitted that it was pertinent to note that the Complainant was copied into TBG's email to MPM of 11 March 2022 and was accordingly fully aware of the communication exchanged which confirmed that he intended to transfer from the Scheme and move to a SIPP in specie, as was confirmed to MPM.

15. The Service Provider pointed out that the basis of the email to the Complainant of 2 March 2022 was that the default option of TAM was only to be utilised, as the Complainant's chosen option, if MPM were not informed of an alternative, and clearly, as it is a Complainant's appointment, where no alternative was communicated.

It submitted that, however, as stated above, on 11 March 2022, a response was received from TBG, with the Complainant in copy, now confirming the Complainant's wish to transfer out to a SIPP.

MPM explained that a transfer out means a sale of assets and/or a transfer of ownership of the assets from MPM to the other SIPP provider, and that hence, it was inconceivable for MPM to proceed on the basis that:

- (i) the Complainant's chosen option was not to appoint TAM. This was clearly not what the Complainant wanted as he elected to actually leave the Scheme in place of having to do so; and
- (ii) the Complainant was in the knowledge that by appointing TAM, they would sell and buy assets on a discretionary basis, when this transfer out/in specie decision was confirmed to MPM for the Complainant.

MPM submitted that if the Complainant had any intention or desire to appoint TAM, he could have confirmed this, but instead, the confirmation received by MPM was that he was electing to transfer out, and it was

¹¹ P. 145 & 158

unconscionable to now revert to MPM claiming he believed TAM were appointed.

It further submitted that, in the event that MPM had proceeded with the appointment, then the Complainant could understandably have complained that MPM was aware there were discussions held with the Complainant on transferring out.

MPM thus reiterated that it was informed that the Complainant was not in favour of a DFM and that his Financial Adviser confirmed that he intended to transfer out to a SIPP pension scheme to avoid the necessity to appoint an Investment Manager. It submitted that, to be clear, the confirmation of the Complainant wanting to transfer out was the reason why TAM was not appointed to manage the Complainant's investments on a discretionary basis.

16. MPM noted that it responded to the 11 March 2022 email on 14 March 2022, setting out more information about the transfer and the process involved. It highlighted that it is pertinent to note that the Complainant was again also copied into this email by MPM and even addressed by MPM in the email. It submitted that this showed that he was kept informed and aware of what was being communicated.
17. It noted that, unfortunately, as time passed, the transfer out of the Scheme by the Complainant never materialised, and no further progress was made by the Complainant on actioning the transfer out.
18. MPM further submitted that, by March 2022, the Complainant was aware that TBG had been removed as his appointed investment adviser. This is despite numerous emails from his previous adviser regarding discussions held with the Complainant and the consideration of the appointment of *Brooks MacDonald*. MPM claimed that, this notwithstanding, this aspect also clear emerges from the email communication it sent to the Complainant on 2 March 2022, wherein MPM stated: '*you do not currently have an Investment Adviser or Investment Manager appointed*' and also outlined the requirement to appoint an Adviser or Investment Manager.

It further noted that, if this was not understood by the Complainant at this point, MPM does not understand why the Complainant then did not question or respond to MPM at that point in time. It noted that, yet, the Complainant states in his complaint that he was '*confused*' in May 2023 that TBG had been removed.¹²

19. MPM submitted that the Complainant never contacted MPM directly, and that if he was confused over the matter, he never once queried with it about appointing an Adviser, following receipt of its email on 2 March 2022. It further submitted that, in fact, the Complainant **only** started to allege that he had no knowledge when he noted his investment value had fallen.
20. The Service Provider explained that on 29 April 2022 and 29 March 2023, MPM provided the Complainant with his annual benefit statement ('the Statements').¹³ It submitted that both Statements clearly confirmed '*No adviser appointed*'.¹⁴ MPM further pointed out that the Complainant did not contact it at any stage either to query this information. It submitted that one assumes he would have done so if, like he said, the Complainant believed TAM had been appointed, or in the alternative, if he believed TBG were still [not] appointed.
21. MPM stated that it is also important to note that from 5 September 2019, the Complainant was provided login details and access to his Investment Provider's online portal. It submitted that he could have accessed this at any time if he was unsure of who his adviser was.
22. It further noted that, as a member of the Scheme with an appointed adviser for 5 years from February 2017 to February 2022, the Complainant would have had regular discussions or, as a minimum, an annual discussion with his appointed adviser on his investment strategy.

MPM noted that, in his complaint, the Complainant however outlines how it was only confirmed to him in May 2023 by TBG that they were no longer his appointed adviser. The Service Provider thus questioned how this could

¹² P. 8

¹³ P. 159 - 166

¹⁴ P. 147

conceivably be the case if the Complainant was arranging the transfer out of his benefits as indicated in the email he was in copy.

MPM further submitted that, consequently, it is clear the Complainant became inactive, ceased discussions with his Adviser on transferring out, and did not notify MPM of this. Thus, this was the Complainant's own decision regarding inaction.

Losses

23. MPM submitted that, as with any investment, the value can go down as well as up, and until assets are sold, no loss or gain is actually realised or suffered. Accordingly, it did not agree with the losses alleged by the Complainant as detailed in his Complaint.
24. MPM explained that it is important to note that the Complainant states in his complaint that in April 2022, his *'funds were performing well'*.¹⁵ Hence, it was clear that the Complainant was aware of this valuation from his annual Statements. The Statements, however, clearly note that no Adviser nor Investment Manager (TAM) was appointed.
25. Reference was made to the Complainant's alleged loss of GBP 70,000 following a comparison of the Portfolio Value in his valuation statement as at 31 December 2021 to the value of his Portfolio as at 31 December 2022. MPM submitted in this regard that, however:
 - (i) These are merely valuations, and the Member **did not in fact suffer any loss** as these are not realised losses.
 - (ii) All investment markets fell over this period, in particular the second half of 2022, (indeed it was only at the end of 2023 and start of 2024 that the markets were recovering), and in 2022 all investment returns including TAM investments fell/were negative during this period.

As an example, MPM attached Factsheets from TAM¹⁶ and claimed that it can be seen that whilst for a 1-year period to end quarter one

¹⁵ P. 147

¹⁶ P. 168 - 170

2022 was positive, a 12-month period to the end of quarter two and quarter three were negative showing -8.23% to end Q3 and this despite positive returns in quarter four 2021 and quarter one 2022.

- (iii) MPM submitted that the Complainant is also not taking into account the fact that had his wish to transfer out not been communicated, and therefore in case MPM proceeded with TAM, then even allowing time for both TAM and Utmost (the Complainant's investment provider) to process the request, which is typically 12 to 16 week period, his investment in TAM would have not been finalised until June 2022 at the earliest.
26. MPM submitted that after conducting a thorough assessment of the Complainant's portfolio, it established that overall, the performance of the Complainant's portfolio as at 4 March 2024 is in profit by approximately GBP 8,773, after fees and charges are taken into account.¹⁷ As such, it claimed that **the Complainant has suffered no actual loss.**
27. It pointed out that it is also worth noting that despite MPM providing the Complainant with a further two adviser options from which he could choose to appoint as his investment adviser, the Complainant still had not appointed an Investment Manager nor an Investment Adviser to his Scheme as at the date of its reply. MPM noted that the Complainant was, at the time of its reply, still in discussions with one of three Advisory Firms, and the Service Provider continues to chase him to appoint an investment adviser.

MPM's concluding remarks in its reply

28. MPM concludes that it is not responsible for the payment of any amount claimed by the Complainant.
29. It submitted that the Complainant must show that it was MPM's actions or omissions which caused the loss he was alleging. MPM explained that, otherwise, it cannot be found responsible for the Complainant's claims.

¹⁷ P. 167

30. The Service Provider, consequently, requested the Arbiter to reject the Complainant's claims with expenses.

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.¹⁸

The Complainant

The Complainant, born in 196X and of Australian nationality, became a member of the Retirement Scheme in February 2017.¹⁹

The Complainant's risk rating was marked as '*Low Risk*' in a document produced by the Service Provider.²⁰ His current occupation is as a 'XXX' - a group involved in wholesale XXX.²¹

No details emerged during the case that indicate that the Complainant was a professional investor. Thus, the Complainant is considered a retail member for the purposes of the Scheme.

Particularities of the Case

The Retirement Scheme

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta and authorised by the MFSA as a personal retirement scheme.²²

As explained by the Service Provider, the Scheme was operated as a member-directed scheme.²³

¹⁸ Cap. 555, Art .19(3)(b)

¹⁹ P. 143 & 177

²⁰ P. 177

²¹ P. 188

²² <https://www.mfsa.mt/financial-services-register/>

²³ P. 143

Nick Smith of *Taylor Brunswick Group* ('TBG'), '*an entity incorporated in Hong Kong and regulated by Hong Kong Insurance Authority*',²⁴ was the appointed investment adviser. TBG provided investment advice to the Complainant regarding the selection and composition of the investments underlying his Scheme.

The investments within the Complainant's Retirement Scheme were accordingly directed by the member on the investment advice received from TBG.

Removal of the investment adviser

MPM removed TBG as the Complainant's investment adviser in 2022. This followed a change in 2019 in the regulatory requirements applicable to personal retirement schemes in Malta regarding the regulatory status of permitted investment advisers.

As explained by MPM in its reply dated 27 June 2023 to the Complainant's complaint:

'Following the introduction of the Malta Pension Rules ... by the Malta Financial Services Authority ('MFSA') on 1 January 2019, ... you must have an appointed Investment Adviser, who is authorized, regulated and licensed to provide investment advice in relation to your investments, including advice on your insurance policy (if applicable) held within the Momentum Malta Retirement Trust Scheme. The Investment Advisory firm must hold a license to provide investment and insurance advice in the country you are residing in and currently hold Terms of Business with us'.²⁵

The official communications which were presented during the proceedings of the case that refer to either the Complainant's Scheme not having an adviser or make reference to the actual removal of TBG as adviser are the following:

- (i) An email from MPM to the Complainant dated 2 March 2022, wherein MPM *inter alia* outlined that:

²⁴ P. 28

²⁵ *Ibid.*

'We are writing to you as we note that you do not currently have an Investment Adviser or Investment Manager appointed'.²⁶

- (ii) An email from MPM to the Complainant dated 29 April 2022, attaching the Annual Member Statement for the year ending 31 December 2021, which statement *inter alia* stated *'Financial Adviser: No adviser appointed'*;²⁷
- (iii) An email from MPM to the Complainant dated 29 March 2023, attaching the Annual Member Statement for the year ending 31 December 2022, which statement *inter alia* stated *'Financial Adviser: No adviser appointed'*;²⁸
- (iv) A letter sent by MPM to the Complainant dated 27 June 2023 in reply to his complaint wherein MPM stated that:

*'... Nick Smith from Taylor Brunswick Group **was officially removed as your investment advisor on 22 February 2022**. Subsequently, we sent you an email on 2 March 2022, explaining that we do not currently have an appointed Investment Adviser or Investment Manager. We provided you with the option to select an advisor who is fully licensed and regulated to provide investment advice in Australia. Additionally, we presented a default option, TAM Asset Management, to manage your investments on a discretionary basis'.²⁹*

- (v) A letter sent by MPM to the Complainant dated 3 August 2023, wherein MPM stated *inter alia* that:

'As explained in our complaint response letter dated 27th June 2023, Nick Smith from Taylor Brunswick Group' was removed as your Adviser on 22nd February 2022'.³⁰

The Arbiter notes that despite TBG's removal in February 2022, a new investment adviser or manager had not yet been appointed two years later.

²⁶ P. 32

²⁷ P. 163 & 165

²⁸ P. 159 & 161

²⁹ P. 29 – Emphasis added by the Arbiter

³⁰ P. 20

During the hearing of 8 April 2024, the Complainant indeed testified that ‘... *he has been working with a company called Hoxton Capital since October 2023 to fully take on his portfolio and being his advisor*’.³¹ He further testified that ‘... *it’s been a very detailed process*’.³² In its final submissions, MPM included a timeline of the exchange of communications relating to the appointment of Hoxton Capital and the reasons why this was still not appointed by March 2024, but only ‘*in April Hoxton were appointed*’.³³

Timeline

The following is a summary of key relevant events and communications which were substantiated and produced during the proceedings of the case (unless otherwise specified):³⁴

- a) 2019 Updates to the regulatory framework in January 2019 which introduced new requirements applicable for investment advisors of personal pension schemes. In its final submissions, MPM referred to various communications ‘*sent to advisors*’ in 2019 (namely, January, February and April 2019) on this matter (with no copy, however, presented during the proceedings).³⁵ As to communications sent directly to the Complainant in 2019, MPM specifically referred to a copy of a ‘*Chairman’s Note*’ dated 30 May 2019, which included a detailed ‘*Summary of the revised Malta Pension Rules for Personal Pension Schemes*’.³⁶
- b) 15 Sep 2021 Email from MPM to TBG asking for an update on the Complainant’s Scheme, highlighting the need to close this matter as soon as possible.³⁷
- c) 29 Sep 2021 TBG sent an email regarding the Complainant’s Scheme where it asked MPM ‘... *that if you have any need to*

³¹ P. 171

³² P. 173

³³ P. 192-193

³⁴ Those communications where the Complainant is in copy are indicated accordingly.

³⁵ P. 191

³⁶ P. 191 & 200-203

³⁷ P. 149

correspond on this client (my client) can you please come directly to myself'.³⁸ TBG further notified MPM that *'In regards to this client I have now been able to engage with him and it is his intention to transfer into a DFM under Brooks Macdonald ... We have already reached out to Brooks MacDonald to request the latest requirements and as soon as received by them and completed by the Member we will send these onto yourself*'.³⁹

- d) 18 Jan 2022 MPM sent a reminder to TBG asking for updates and pointing out the need *'to get this case to comply with the rules'* and for TBG to give it due attention accordingly.⁴⁰
- e) 24 Jan 2022 TBG replied to MPM asking it to confirm their understanding *'that if the client is moved away to a DFM say under Brooks Macdonald, we are effectively having to give up 'our' client up which neither the existing member no[r] ourselves wish to happen*'.⁴¹
- f) 3 Feb 2022 MPM sent email to TBG explaining that MPM had *'no choice but to remove all firms who do not comply with the MFSA rules*'.⁴² It further explained that MPM needed *'an investment adviser on the bond and an investment adviser on the underlying assets*'.⁴³ MPM noted that a DFM would have covered the investment advice on the assets but MPM did not receive anything on this matter. TBG was further asked to *'advise your client that they will receive a letter from Momentum Malta soon explaining the rules and that a firm who is not regulated in the eyes of the MFSA and their legislation surrounding pensions, cannot remain as the appointed adviser...'* in order for the client not to be alarmed

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ P. 150

⁴¹ *Ibid.* [DFM is short for discretionary fund management]

⁴² P. 151

⁴³ *Ibid.*

by MPM's communication.⁴⁴ MPM further highlighted that it simply had no choice.

- g) 3 Feb 2022 TBG sent email to MPM appreciating its position but noting that it believes their client does not like *'to get dictated to nor has seen any evidence that a DFM would be any better for him'*, asking also to be provided with a list of requirements and any appropriate documentation required by MPM if the client wishes to transfer out.⁴⁵ TBG also indicated that they had *'today already made this client aware that he might receive communication from you'*.⁴⁶
- h) 4 Feb 2022 MPM explained that the changes were *'really ... down to legislation'* and asked whether they will be considering a transfer out to another Malta QROPS given that *'they are all under the same legislation'* and that in case of a transfer to a SIPP (Self Invested Pension Plan), then MPM could assist accordingly.⁴⁷
- i) 4 Feb 2022 TBG confirmed its understanding of the legislation and indicated that it is *'likely a transfer to a SIPP (will give the client different SIPP choices)'* and asked MPM to send relevant details of the applicable requirements.⁴⁸
- j) 4 Feb 2022 - MPM replied to TBG providing it with the relevant forms for a transfer out, outlining also certain fees that MPM would waive – namely, the exit fee from the Scheme and the set up fee for the SIPP.⁴⁹
- k) 4 Feb 2022 TBG sent an email to MPM asking for further details of the exit fee and requirements for a transfer out.⁵⁰

⁴⁴ *Ibid.*

⁴⁵ P. 151

⁴⁶ *Ibid.*

⁴⁷ P. 152

⁴⁸ *Ibid.*

⁴⁹ P. 19

⁵⁰ P. 18 - 19

- l) 7 Feb 2022 MPM sent TBG details of the applicable exit fee and other details regarding a transfer out.⁵¹
- m) 8 Feb 2022 TBG sent email to MPM to verify the options before discussing further with the Complainant.⁵² Reference was made to the scenario of a transfer to a UK SIPP or alternative QROPS provider.
- n) 2 Mar 2022 MPM sent an email to the Complainant noting *inter alia* the following:

'We are writing to you as we note that you do not currently have an Investment Adviser or Investment Manager appointed.

The Maltese Pension Rules ('Rules') issued by the Malta Financial Services Authority, require that you must have an appointed Investment Adviser, who is authorized, regulated and licensed to provide investment advice in relation to your investments, including advice on your insurance policy (if applicable) held within the Momentum Malta Retirement Trust Scheme.

Under Malta Rules, an Investment Adviser must be duly authorised and licensed to provide investment advice both in the country where the Adviser is established, as well as in the country in which you are resident. Where no suitable framework for regulated investment advice exists in your country of residence, a fully authorised and regulated European Adviser can be considered. This is to ensure you receive investment advice from an Adviser who is highly regulated and who will ensure your investments are working for you. Additionally, the Advisory firm must hold Terms of Business with us.

⁵¹ P. 18

⁵² P. 17

Alternatively, an Investment Manager has to be appointed to manage your investments for you on a discretionary basis.

Therefore, you must appoint an Investment Adviser or Manager, with whom we hold Terms of Business and who satisfies the Rules.

In compliance with these Rules, we require receipt of our Appointment Form no later than the 3rd April 2022.’⁵³

In the said email, MPM further outlined some options, including ‘*an Investment Manager default option, to apply in the event you decide not to appoint an Investment Adviser or Manager*’.⁵⁴

MPM also stated in the said email that:

‘As a default option, we have made arrangements with TAM Asset Management [“TAM”], who are discretionary investment managers, fully authorized and regulated

Should we not receive an appointment of Investment Adviser or Manager by the 3rd of April 2022, we will take this as your confirmation that you opted for the Investment Manager default option and will proceed to appoint TAM, on your behalf in due course, as your appointed Investment Manager, in compliance with the Rules. Under the arrangements, TAM will manage your portfolio of investments on a discretionary basis.’

MPM also explained in the said email the fees charged by TAM, and the actions that TAM would take in determining a model portfolio following a review of the Complainant’s existing investments and taking into consideration his risk profile. The Service Provider further indicated that ‘*Based*

⁵³ P. 32

⁵⁴ *Ibid.*

on your current attitude to risk of Low to Medium, TAM will put you in their Balanced model portfolio'.⁵⁵ An Investment Proposal regarding TAM's 'Mainstream Model Investment Portfolios' was furthermore attached.⁵⁶

- o) 11 Mar 2022 Email from TBG to MPM, with the Complainant in copy, where TBG confirmed that he spoke at length to the Complainant and the Complainant's '*decision/preference is to move into a SIPP*' with MPM's assistance.⁵⁷ TBG asked MPM to confirm the validity of previous forms provided and, also, whether they would still be accepted as adviser to the Complainant.
- p) 14 Mar 2022 Email sent by MPM to TBG, with the Complainant in copy, where TBG was notified that all assets of the Complainant's Retirement Scheme were acceptable for an *in specie* transfer into a SIPP where TBG could be retained as adviser.⁵⁸ The email included a copy of the relevant forms that needed to be completed relevant to such transfer out.
- q) 29 Apr 2022 MPM sent the Complainant a copy of the Annual Member Statement for the year ended 31 December 2021.⁵⁹ In the said statement it was *inter alia* stipulated the following: '*Financial Adviser: No adviser appointed*'.⁶⁰
- r) 29 Mar 2023 MPM sent the Complainant a copy of the Annual Member Statement for the year ended 31 December 2022.⁶¹ In the said statement it was *inter alia* stipulated the following: '*Financial Adviser: No adviser appointed*'.⁶²

⁵⁵ P. 33

⁵⁶ P. 35 - 54

⁵⁷ P. 16

⁵⁸ P. 15

⁵⁹ P. 163 - 166

⁶⁰ P. 165

⁶¹ P. 159 - 162

⁶² P. 161

- s) 23 May 2023 Email from MPM to the Complainant (following the Complainant's expression of dissatisfaction with the investment performance and lack of communication from his ex-advisor or MPM, following the removal of the advisor). In the said email, MPM pointed out that it sent an email on 2 March 2022 notifying the Complainant that he did not have an investment adviser/manager and the options available to him.⁶³ MPM further noted that it appeared that the Complainant did not respond to this email and that MPM did not follow up with him. It was noted that his Scheme was, accordingly, in an unmanaged state. In the email, the Complainant was provided with details of some options available to him relating to the appointment of an investment adviser/manager.
- t) 24 May 2023 The Complainant sent an email to MPM stating that he would like to hear the outcome of his complaint prior to moving forward with a new financial adviser.⁶⁴ He also stated *inter alia* that he was extremely unhappy with the confusion over who is his financial advisor. He explained that following receipt of the annual statement as at end of March he noticed the poor performance and contacted TBG at which point he was informed by TBG that they were no longer his advisor. He noted that he had received no official correspondence informing him of this and was under the impression that nothing had been changed.
- u) 26 May 2023 MPM acknowledged the Complainant's communication and registered this as an official complaint.⁶⁵
- v) Jun-Jul 2023 Various communications were exchanged between the Complainant and MPM regarding the formal complaint

⁶³ P. 12

⁶⁴ P. 11

⁶⁵ P. 75

raised by the Complainant with MPM involving the issue regarding the investment advisor and alleged losses.⁶⁶

- w) 3 Aug 2023 Detailed reply by MPM to the Complainant's complaint covering the aspect of the investment adviser, fees and claimed losses.⁶⁷ MPM indicated that it was prepared to extend a resolution involving a reimbursement of trustee fees for one year amounting to GBP 945 and an additional compensation of GBP 200 as a goodwill gesture as an *ex-gratia* payment.
- x) Aug 2023 Multiple communications were subsequently exchanged between the Complainant and the Service Provider in August 2023.⁶⁸

The Retirement Scheme's Underlying Investments

The Complainant's Retirement Scheme was invested into an insurance policy, the '*Executive Redemption Bond*' issued by *Utmost International* based in the Isle of Man.⁶⁹ The said policy commenced on 17 May 2017.⁷⁰ The initial premium invested in 2017 was of GBP 293,247.88.⁷¹ A total of GBP 6,580 was indicated as having been withdrawn from the policy at the time of the Service Provider's reply in March 2024.⁷²

The Complainant's investment portfolio, held within the said policy, comprised the following investments as at 31 December 2021:⁷³

- (i) 33,715.4417 units for a book value of GBP 50,000 into '*IFSL Brooks McDonald (CAU Gth A Acc GBP)*';
- (ii) 3,303.146 units for a book value of GBP 12,000 into '*Lindsell Train Global Equity A GBP*';

⁶⁶ P. 20 & 27

⁶⁷ P. 20 - 22

⁶⁸ P. 59 - 65

⁶⁹ P. 83

⁷⁰ *Ibid.*

⁷¹ P. 167

⁷² *Ibid.*

⁷³ P. 49, 81 & 115 - 116

- (iii) 5,573.36 units for a book value of GBP 12,000 in '*M&G Inv Man Optimal Income Class A Acc Shares GBP*';
- (iv) 18,367.34 units for a book value of GBP 28,779.28 into '*QIN IM USD Deposit (PPB)*';
- (v) 457.665 units for a book value of GBP 50,000 into '*VAM Managed Funds (Lux) Cautious Fund A (GBP) Acc*';
- (vi) 277.1399 units for a book value of GBP 52,000 into '*Vanguard UK Inflation Linked Gilt Index*';
- (vii) 1,290 units for a book value of GBP 12,026.13 into '*Finsbury G&I Trust Ord GBP 0.25*';
- (viii) 3,758 units for a book value of GBP 20,094.63 into '*Scottish Mortgage Inv TST Ord GBP0.05*';
- (ix) 2,249 units for a book value of GBP 29,938.32 into '*Ishares II Plc Core UK Gilts UCITS ETF*'.

It is noted that the same investment portfolio composition was maintained in 2023, as per the tables presented during the case proceedings. This is with the exception of a slight reduction in the following:

- a) the book cost of the *IFSL Brooks McDonald* investment, which reduced by GBP 2,855.35 (from GBP 50,000 to GBP 47,144.65) by the end of December 2022.⁷⁴ The Valuation Statements issued by Utmost International indeed indicated that the units held into this fund (of 33,715.4417) reduced by 1925.3911 units (to 31,790.0506) between June 2022 and end December 2022;⁷⁵
- b) the book cost of the *Vanguard UK Inflation Linked Gilt Index* investment where the book cost of this investment was reduced by GBP 2,538.40 from GBP 52,000 to GBP 49,461.60 by 31 June 2022. The Valuation Statements issued by Utmost International indeed indicated that the units held into

⁷⁴ P. 81

⁷⁵ Number of units held in *IFSL Brooks McDonald* amounted to 33,715.4417 in June 2022 (P. 105). This reduced to 31,790.0506 units held by end December 2022 (P. 95).

this fund (of 277.1399) reduced by 13.5287 units (to 263.6112) between 2021 and end June 2022.⁷⁶

It is noted that, in its final submissions, the Service Provider explained that the redemptions were sale transactions *'to pay Momentum's fees'*.⁷⁷

During the hearing of 8 April 2024, the Complainant confirmed that the investment portfolio *'is still intact'* and was still *'in the process of being changed'*.⁷⁸

This was also confirmed by the Service Provider who, during the hearing of 30 April 2024, testified *'that in 2024, those assets are all mainly still held, that nothing has changed in terms of the Member's portfolio'*.⁷⁹

It is further noted that the total Market Value of the said investment portfolio stood at GBP 328,964.59 as at 31 December 2021 and reduced as follows:⁸⁰

- to GBP 271,668.58 as at 30 June 2022 (equivalent to -17.4% from its value as at Dec 2021);
- to GBP 259,479.56 as at 31 December 2022 (equivalent to -21.1% from its value as at Dec 2021);
- to GBP 255,551.50 as at 1 June 2023; and
- to GBP 270,429 as at 31 December 2023.⁸¹

The total market value of the investment portfolio as at 1 June 2023 equates to an unrealised loss of -2.25% when compared to the book value investment

⁷⁶ Number of units held in *Vanguard UK Inflation Linked Gilt Index* amounted to 277.1399 in Dec 2021 (P. 115). This reduced to 253.6112 units held by end June 2022 (P. 105).

⁷⁷ P. 193

⁷⁸ P. 171

⁷⁹ P. 184

⁸⁰ P. 81 & 205

⁸¹ P. 205 & 206 – GBP 12,075.97 + 12,995.40 + 55,823.33 + 30,951.17 + 53,391.20 + 40,043.41 + 11,055.30 + 30,281.96 + 23,811.29

applicable at the time⁸² and a drop in value of approx -22.32% compared to the market value as at 31 December 2021.⁸³

Observations

Context

In the case of a member-directed scheme involving a retail (unprofessional) member, the appointment of an investment adviser or investment manager is a key aspect which has material implications on the Scheme and its performance.

As outlined in the *Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011* by the MFSA ('the MFSA Rules'),⁸⁴ in the case of a member-directed scheme, the member directs the investments of their individual account on the basis of the investment advice received by their appointed investment adviser who would advise the member on the choice of investments. The member may alternatively appoint an investment manager to manage the member's investments on a discretionary basis. Only those members who qualify as a '*professional member*', are allowed, in terms of the MFSA Rules⁸⁵ to manage or direct the investments in their account without such investment advisor/manager so appointed.

As outlined above, the Complainant is a retail investor and, therefore, the option for a professional member to direct the investments on his own did not apply for him. The appointment of an investment adviser/manager to direct the investment portfolio was thus an important aspect to his Scheme.

Identified shortcomings

It is amply clear that the required change in the investment adviser was triggered by changes in the MFSA's Rules applicable for personal retirement

⁸² Market Value of GBP 255,551.59 as at 01/06/2023 less Book Value of investments of GBP 261,444.61 as at 01/06/2023 equals -GBP 5,893.02. The unrealised loss of -GBP5,893.02 equates to a percentage unrealised drop in value of - 2.25% when compared to the said Book Value of GBP 261,444.61 (P.81).

⁸³ Market Value of GBP 255,551.59 as at 01/06/2023 less Market Value of investments of GBP 328,964.59 as at 31/12/2021 reflects a drop in market value of -GBP 73,413. The drop in market value of -GBP 73,413 equates to a percentage (unrealised) drop in market value of approx. - 22.32% when compared to the Market Value of GBP 328,964.59 (P.81).

⁸⁴ Rule 8.2 of Part B.8, titled '*Supplementary Conditions in the case of entirely Member Directed Schemes*' of the said MFSA Rules (Version 5 – May 2022). [Reflected as Rule 9.2 of Part B.9 in older versions refer].

⁸⁵ Rule 8.2(c)

schemes. Accordingly, there are valid and justifiable reasons which necessitated required changes to be made in order for the Complainant's Scheme to become compliant with the applicable updated requirements.

The Arbiter, however, determines that various shortcomings were made by both parties to this Complaint in the ensuing process to get the Scheme in line with the new requirements. The identified shortcomings are explained in more detail below:

i) *Shortcomings on the part of the Service Provider*

- a) Inadequate actions - It is noted that, as explained by the Service Provider itself, the new MFSA Rules, which required the member to have an appointed investment adviser who is regulated and licensed to give investment advice, were introduced in 2019.⁸⁶ The updated MFSA Rules were introduced on 1 January 2019, with a transitional period for existing members until 1 July 2019.

The Arbiter further notes in this regard that in the *'Feedback Statement issued further to Industry Responses to MFSA Consultation Documents'* [MFSA Ref: 9-2017/15-2018], issued by the MFSA on 4 January 2019, the MFSA outlined its position as follows:⁸⁷

'MFSA's Position: In the Consultation Document dated 16th November 2018, the MFSA agreed to a transitional period of six months after the implementation date of the proposed amendments to the Pension Rules for Personal Retirement Schemes is granted, (until 1st July 2019) so that the Retirement Scheme Administrator ensures that the investment advisors of current members take any necessary actions to comply with the requirements of SLC 9.6(b)(i) of the Pension Rules for Personal Retirement Schemes.

The MFSA would like to clarify that notwithstanding this six-month transitional period, measures are to be taken without

⁸⁶ P. 143

⁸⁷ https://www.mfsa.mt/wp-content/uploads/2019/02/Feedback_Statement_04012019.pdf - Emphasis added by the Arbiter

delay, so that the requirements of SLC 9.6(b) are met by the investment advisors concerned.

*Furthermore, the MFSA would like to clarify that the Retirement Scheme Administrator is required to inform the members of the new requirements to appoint an investment advisor who complies with the requirements of SLC 9.6(b) Pension Rules for Personal Retirement Schemes. The Retirement Scheme Administrator shall inform the member that **where such member does not co-operate with the Retirement Scheme Administrator to appoint an investment advisor satisfying the criteria in SLC 9.6(b) of the Pension Rules for Personal Retirement Schemes, within the established time frame of six months, the Retirement Scheme Administrator shall take appropriate action, and if necessary, consider the termination of membership of such member with the retirement scheme.***

It is noted that the Complainant stated in his complaint that *'at the start of 2022, Momentum advised me that my current advisor (Nick Smith, Partner, Taylor Brunswick) did not have the correct approvals/certification to manage my Pension Investments'*.⁸⁸

In its reply, MPM referred to and focused on the discussions it had in 2021 with TBG regarding the matter.⁸⁹ It particularly referred to the communication sent by MPM to TBG on 15 September 2021, *'following various discussions with TBG'*.⁹⁰

In its final submissions, the Service Provider clarified that the Complainant was notified of the regulatory changes much beforehand. MPM stated that *'... the 2019 update and revision of the Malta Pension Rules ... that were sent to member's advisor and to members, in 2019, including the Complainant ...'*,⁹¹ also pointing out that *'In 2019 all advisors were informed by Momentum regarding the updates to the*

⁸⁸ P. 4 - Emphasis added by Arbitrator

⁸⁹ P. 144

⁹⁰ *Ibid.*

⁹¹ P. 191

Rules'. As outlined earlier, it indicated three communications that '*were sent to advisors*', namely on 13 January 2019, 14 February 2019 and 25 April 2019.⁹²

Whilst it is unclear whether all of the said communications were received by the Complainant, it is noted that MPM further explained that a Chairman's Note dated May 2019 was '*sent out in 2019, including to the Complainant ...*'.⁹³ The Chairman's Note included details of the revised pension rules.⁹⁴

No evidence of any direct further active engagement between the parties to this Complaint has emerged regarding this matter in the years 2019, 2020 and 2021 as also indicated in the section titled '*Timeline*' above.

In any case, the Arbiter cannot understand how such a key aspect relating to the appointment of an adequately regulated investment adviser, which should have been settled by July 2019, was still being debated and discussed directly with the Complainant's investment adviser, more than two years after the end of the applicable transitional period for the implementation of the MFSA's new rules.

Furthermore, it is disturbing that five years after the introduction of the new pension rules of 1 January 2019, the Retirement Scheme was still not compliant with the said rules as no adequately regulated investment advisor had yet been appointed by early 2024, (as emerging from the hearings of April 2024 noted above).

The changeover process was evidently not handled appropriately as such excessive delays (parts of which were contributed to by the Complainant himself and his investment adviser) are, nevertheless, inexcusable. In its role as trustee and RSA of the Scheme, MPM was duty-bound to ensure that such a situation did not occur in the first

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ P. 191, 200 - 203

place and, even more, for the matter not to be prolonged to such an unreasonable and unjustifiable extent.

It is clear there was a breakdown and gap in the communications. No timely and appropriate follow-ups occurred (particularly regarding the initial introduction of the new rules; proposed initial transfer to a DFM and the eventual proposed transfer out of the Scheme to another retirement plan). There was also no adequate direct communication with the Complainant, and it also deemed that there was a lack of active and effective intervention and action to promptly solve the ensuing matters.

It is observed that most (if not all), of the communications were initially handled with the investment adviser – a party which was itself conflicted in this matter as the new rules affected its own appointment and replacement.

The need to actively communicate and pursue communications in the first place with the Complainant (apart from his adviser), should have been evident to MPM (when such an investment adviser reasonably would have lacked interest in actively pursuing its own replacement).

- b) Inadequate notifications regarding the removal of adviser - **It has not emerged either that MPM provided prompt and clear notification to the Complainant in respect of the removal of his investment adviser.** Firstly, no prior notification has emerged to have been provided to the Complainant as to when his investment adviser was intended to be removed. Furthermore, neither did notification of such an important event occur on the date of the removal of the adviser. Nor was such date indicated in any communications exchanged shortly thereafter.

As explained in the section titled '*Removal of the investment adviser*' above, the date when the investment adviser was officially removed by MPM, that is '*on 22 February 2022*', only transpired from the

explanation provided on 27 June 2023 to the Complainant's complaint.⁹⁵

The first notification that the Complainant was without adviser (which notification had no reference to the actual removal of TBG) was in an email dated 2 March 2022, which just stated that '*we note that you do not currently have an investment adviser or investment manager appointed*' and did not specify the action of TBG's actual removal.⁹⁶

- c) Annual Member Statement – The Service Provider highlighted the importance of the disclosure made in the respective Annual Member Statements which pointed out that there was no investment adviser appointed.

The Arbiter, however, notes certain inconsistencies in the Annual Member Statement for the year ending '*31st December 2021*'.⁹⁷ Despite that TBG was '*officially removed ... on 22 February 2022*',⁹⁸ the said Annual Member Statement for 2021 supposedly should have referred to TBG as an investment adviser, given that TBG still held such a role at the time. Confusingly, the statement covering the year 2021 indicated no adviser.

- d) Removal of investment adviser in an uncertain situation - Whilst there were multiple discussions between MPM and TBG regarding the requirements and intentions of the Complainant, including the likely intention of a transfer into a SIPP, however, it is noted that by February 2022, no specific and clear confirmation was provided about the transfer out.

Nor were any indications of any planned timelines for the said transfer out agreed to and confirmed at the time before the removal. It is noted that, as per the timeline above, the communications were still rather general and fluid in nature. Yet, MPM proceeded to remove TBG in the

⁹⁵ P. 29

⁹⁶ P. 153

⁹⁷ P. 165

⁹⁸ P. 29

same month without any clear confirmation of the transfer out and solid sight of the end-solution.

- e) Removal of adviser did not ensure compliance with the Rules - It is furthermore observed that the forced removal of TBG did not bring the Scheme in compliance with the Rules, when the Scheme was, at the same time, left without an investment adviser/manager.

Whilst MPM removed TBG to bring the Scheme in compliance (with rule 9.6 of) Part B.9, '*Supplementary Conditions in the case of entirely Member Directed Schemes of the Pensions Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011*', however, the member-directed Scheme still ended up in breach of another rule (rule 9.2) when it had no investment adviser or investment manager appointed. The said rules provided the following:⁹⁹

'9.2 In the case of a Scheme which is entirely member-directed, such Scheme may permit a Member to direct the investments of their individual accounts (member directed schemes), based on one or more of the following grounds, and such direction shall be provided for in the Scheme Document. The Scheme shall:

- (a) allow the Member to appoint an investment advisor to be approved by the Retirement Scheme Administrator to advise the Member on the choice of investments; and/or*
- (b) allow the Member to appoint an investment manager to be approved by the Retirement Scheme Administrator to manage the Member's investments on a discretionary basis; or*

⁹⁹ Part B.9, Supplementary Conditions in the case of entirely Member Directed Schemes of the Pensions Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011 (Version December 2018, 2020). The said rules were, in essence, and in a similar manner reflected in later versions of the Rules (e.g., version dated May 2022), but with different numbering as 'Part B.8' / SLC 8.2 / SLC 8.6 and a slightly different wording for insurance-based investment products.

(c) allow the Member who qualifies as a “professional member” to manage/direct his/her investments in their account.

...

9.6 Where the Scheme allows the Member to opt for the scenario in SLC 9.2(a), the Retirement Scheme Administrator shall:

(a) carry out due diligence on the investment advisor and approve such advisor. This due diligence should be documented; and

(b) ensure that, as part of the due diligence referred to in paragraph (a):

(i) the investment advisor may either be:

(aa) a person licensed to provide investment advice under the Investment Services Act, 1994;

(bb) a person established in a Member State or EEA State and duly authorised for this activity in that Member State or EEA State and where the services related to this activity are being provided in another Member State or EEA State, the person is duly authorised to provide such services in accordance with Directive 2014/65/EU and/or Directive 2016/97 (in the case of insurance-based investment products), as amended from time to time, and is carrying out its activities in relation to the Member pursuant to the respective Directives, as applicable; or

(cc) in the case of a person established in a non-Member State or non-EEA State, a person who is considered by the Retirement Scheme Administrator to be subject to an equivalent level of regulatory supervision in the jurisdiction where

its operations take place, for it to undertake investment advice;

(ii) the investment advisor is authorised and regulated to provide such investment advice;⁴ and

(iii) the requirements listed in paragraphs (a) and (b)(i) and (ii) above are satisfied by the investment advisor, on an ongoing basis;...

....

⁴ *It is not sufficient for such person to be licensed, but such licence permits the person to provide the investment advice being given to the Member’.*

ii) *Shortcomings on the part of the Complainant/his initial adviser –*

It has also clearly and amply emerged in this case that the Complainant and his initial investment adviser also tangibly contributed to the delay and unnecessary prolongation of the process. This is due to various reasons, including by:

- ignoring and/or not reverting clearly and promptly to MPM’s requests and communications as can be seen in the section titled ‘*Timeline*’ above;
- not taking decisive action and shifting positions notwithstanding the awareness of the need to comply with the new rules and the multiple communications exchanged on the matter;
- not following up on the deadline of April 2022 relating to TAM and by not providing any updates and progress whatsoever about the intended transfer out to another retirement plan.

Other relevant aspects

During the hearing of 30 April 2024, the parties were asked by the Arbiter to provide their submissions as to the causality of the claimed losses – given that on the one hand the Complainant argued that the loss was caused given that there was no investment adviser whilst on the other the Service Provider

submitted that the loss, which was unrealised, was due to market movements that would have occurred irrespective of the investment adviser.¹⁰⁰

In his final submissions, the Complainant, in essence, just reiterated the previous submissions made that the claimed losses are the result of the failures of MPM in the administration of his Retirement Scheme (for the reasons essentially already highlighted in his Complaint Form).

On its part the Service Provider submitted that the *'two investments which to-date have returned the biggest losses are the UK Gilt Funds, namely the iShares II Plc Core UK Gilts UCITS ETF and Vanguard UK Inflation Linked Gilt Index'*.¹⁰¹

MPM explained that the drop in value on these investments:

'... is market related and owing to the significant increase in UK deposit rates and inflation rates which is widely and publicly known. Bond values and interest rates move inversely, and once UK interest rates start to decrease again, these funds will be expected to increase in price'.¹⁰²

It further submitted that *'... the market movements influencing these two investments ... would have happened regardless of whether an advisor was appointed or not'*.¹⁰³

The Arbiter also notes MPM's additional explanation that.¹⁰⁴

'It is relevant to note that for pension fund investors this assets class is a primary asset class and is typically held for medium to longer term and not bought and sold based on market volatility or decrease in prices. This is particularly true during periods of high increase in interest rates. It is also relevant to note that Momentum is not seeing investment advisors advising members to sell these investments during this period and are not receiving a significant number of dealing instructions selling fixed interest investments. Instead, they are waiting until Deposit Rates fall and these funds market values increase again'.

¹⁰⁰ P. 186

¹⁰¹ P. 194

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

It is further noted that the Complainant did not explain or indicate what would have been done differently with respect to his investment portfolio if he had still had TBG appointed as his adviser in 2022 and 2023 or another investment adviser/manager appointed in its stead.

Whilst it cannot be discounted that changes to the investment portfolio could have been made on the advice of TBG (if this has been retained until replaced) or by a newly appointed investment adviser or investment manager - where any of the loss-producing investments could have been sold or exposure thereto reduced with other purchases made in light of the financial market developments – the outcome of such scenarios and effects and results thereof on the value of the Complainant's investment portfolio cannot be truly determined due to the multitude of hypothetical situations and possibilities arising.¹⁰⁵

Furthermore, the Arbiter is not convinced and does not have sufficient comfort that the Complainant intended to do any changes to his investment portfolio. On the contrary, the Arbiter is aware that the special situation created in the first quarter of 2022, where geo-political events forced sharp and unanticipated increases in interest rates, impacted negatively all asset classes but, particularly fixed income instruments which generally form a large component of investment portfolios of long-term cautious investors.

Apart from the aspects already raised, it has not satisfactorily emerged that the Complainant tangibly intended to do any changes to his investment portfolio.

This position is further reinforced when taking into consideration that five years down the line from the regulatory changes of 1 January 2019, the Complainant still retained the same investment portfolio. Throughout this time, no rush and urgency has emerged, nor been indicated, by the Complainant regarding any changes he wished or intended to make to his investment portfolio and which he was prevented from doing so in light of not having officially an investment adviser/manager appointed in respect of his Scheme.

¹⁰⁵ The effect on the claimed loss and investment performance is subject to so many possible permutations and factors in the circumstances (where such performance is also dependent on the extent of changes, if any, to the investment portfolio and the time of such changes given fluctuating values.

In the particular circumstances of this case, it is furthermore not deemed appropriate for the Arbitrator to award compensation in respect of a claimed unrealised loss, by reference to high and low values taken at specific points in time. This is also when the loss in value is based on the same positions that still remain in place in 2024 and whose value continues to be subject to fluctuations and market performance.

Concluding remarks

It is clear that the process involving the updated regulatory requirements and compliance thereof has been badly handled, with both parties being responsible (to different degrees) for the unjustifiable situation which has ensued.

The unilateral forced removal of the investment adviser by MPM in 2022, solely due to such party not satisfying the new requirements [of Rule 9.6(b)(i)/(ii)], did not solve in the first place the issue of getting the Scheme into compliance with the new rules. It merely swapped one problem for another.

As explained above, in the absence of the appointment of a replacement investment adviser or investment manager, the Complainant's Scheme still ended up being in breach of other MFSA Rules, which necessitated the appointment of such party. In the particular circumstances of this case, the rationale for removing the investment adviser without a clear way forward for a proper replacement is confusing, especially when the member had already signified his intention to transfer out of the scheme.

The rationale of the forced removal of the investment adviser with the resulting consequences is thus not considered reasonable, proportionate and justifiable in the circumstances.

It is considered that there are legitimate questions as to whether such forced removal was appropriate and in the Complainant's best interests in the circumstances – this is particularly so when taking into consideration that (i) TBG had been allowed in breach of the MFSA rules previously for more than two and a half years (ii) there was no tangible and clear alternative already put

in place and finalised prior to TBG's removal (iii) the Complainant was happy with TBG and there were no apparent concerns with the investment portfolio or the advice provided by TBG and (v) the removal of TBG ultimately did not solve the compliance issues faced by the Scheme with respect to the applicable requirements but rather exposed the Scheme to risks by disabling its ability to make changes to its investment portfolio as required or needed.

Whilst the investment portfolio has indeed reduced in value, the same investments, however, still remain active and positions are still unrealised. Furthermore, the quantification of any losses or damages with respect to the identified shortcomings is difficult to conclude and determine in the circumstances in the absence of details of any intended revisions to the investment portfolio and the timings thereof. This is apart from no sufficient comfort emerging either that the Complainant wished to make changes to his investment portfolio in the first place and conviction that losses reflected market movements which affected most portfolios irrespectively.

It is noted that, in his final submissions, the Complainant acknowledged that *'Yes, I do accept that I have a part to play in this issue'*.¹⁰⁶ MPM also acknowledged the situation as it had already offered the Complainant compensation at the time of his formal complaint with the Service Provider,¹⁰⁷ (which compensation was not deemed sufficient by the Complainant).

The Arbiter notes that the compensation offered by MPM at the time was GBP 945 in reimbursement of fees together with a compensation of GBP 200 compensation, which MPM then increased by adding a waiver of a GBP 1,500 termination fee and reimbursement of an additional GBP 355 in trust fee.¹⁰⁸

As quoted by the Complainant in his formal complaint to MPM, this *'... resolution package amounts to a total compensation of £3,000. If you decide to stay ... we are prepared to match this total compensation, which includes £200 as compensation and a £2,800 waiver in trust fees'*.¹⁰⁹

The extent of compensation offered is taken into consideration in this decision.

¹⁰⁶ P. 189

¹⁰⁷ P. 4

¹⁰⁸ P. 10

¹⁰⁹ *Ibid.*

Compensation

For the reasons amply explained above, the Arbiter is rejecting the Complainant's claim for compensation of '*a minimum at least 50% of the poor performance*' equivalent to GBP 35,000 as it is deemed that there is no sufficient basis to justify such claim in the particular circumstances of this case.

Given the identified shortcomings, the Arbiter, however, concludes that it is fair, equitable and reasonable in the particular circumstances and substantive merits of the case to award the Complainant a compensation of GBP 5,000 for damages suffered as a result of the conduct complained of.¹¹⁰

This amount is established by the Arbiter in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta which gives a latitude of discretion to the Arbiter to fix compensation. Such compensation has been established *arbitrio et boni viri*.

Therefore, 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 amount of five thousand pounds sterling as compensation to the Complainant for the reasons amply stated in this decision.

With interest at the rate of 5.25% p.a.¹¹¹ from the date of this decision till the date of payment.¹¹²

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

Alfred Mifsud
Arbiter for Financial Services

¹¹⁰ This figure is close to a refund of a trustee fee of GBP 945 over 3 out of the 5 years (from 2019 to 2024 by when the new requirements of 2019 were ultimately satisfied considering that the Complainant was also partly responsible for the delay) in addition to other amounts previously agreed to by MPM to be refunded or waived (and which in this case are being determined as upfront compensation instead of being waived).

¹¹¹ Equivalent to the current Bank of England Bank Rate.

¹¹² It is to be noted that in case this decision is appealed, should this decision be confirmed on appeal, the interest is to be calculated from the date of this decision.

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.