

Before the Arbiter for Financial Services

Case ASF 045/2021

MT

(the Complainant)

vs

Momentum Pensions Malta Ltd.

(C 52627)

(The Service Provider/MPM)

Sitting of 22 February 2022

The Arbiter,

Having seen the complaint where in summary and in essence it states that:

The Complainant's pension/s were transferred to Momentum from the HSBC pension fund and London Borough of Camden pension. The Complainant's funds were subsequently invested into various investments ('the investments'), which have now failed, and the Complainant has lost the money invested. He holds Momentum responsible for his losses. He stated that they failed to operate to the standards expected of a regulated SIPP provider and professional trustees. These failures directly led to the Complainant's losses, and Momentum failed to meet their regulatory obligations.

He further stated that they failed to conduct their business with due skill and care. Momentum failed to assess the Complainant's investment knowledge and attitude to risk. The Complainant had a modest income and no real assets other than the family home. Had they complied with their duties and made any attempts to assess his personal circumstances, they would have realised that the Complainant was not in a position to make this investment.

Moreover, no adequate due diligence was undertaken, otherwise they would not have allowed the transfer of funds into the investments. If due diligence was undertaken, they failed to act on it with due skill and care and continued to allow the investments to take place despite its total unsuitability.

The Complainant insists that Momentum failed to pay regard his best interests and treat him fairly. The Complainant is neither an experienced investor nor a high-net-worth investor. They should have realised the investments were high risk and refused to allow them, or at least obtain appropriate clarification before proceeding. There is no evidence this was carried out and, has resulted in the loss of his pension.

The Complainant further states that Momentum knew that there was a significant risk that the investment would be illiquid and should also have taken into consideration what was fair, reasonable and good industry practice. Throughout the transaction, they failed to carry out adequate due diligence about the Complainant and the failed investments. Alternatively, if Momentum allege that they did carry out such due diligence, they failed to act with due skill and care and, despite knowing that the investments were unsuitable, continued to allow the investments to be made. The investments were high risk, and this did not match with his true risk tolerance. They failed to assess his personal circumstances and best interests.

The Complainant states that he relied on their professional status when taking advice when making the investments. He put his trust into them that his pension funds would be reasonably protected.

The Complainant seeks:

1. Compensation in full of the amount transferred to Momentum from his previous pension/s;
2. Interest at 8% since the date of transfer **OR** the amount that the funds would have been worth had it not been transferred to them, whichever is greater;
3. Compensation for the stress and aggravation in the sum of £1000 and;
4. Professional fees incurred in bringing this complaint.

Regarding time limitations, the Complainant refers to article 21(1)(c) of Chapter 555 of the Laws of Malta.

This article says that:

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

The Complainant stated that he did not have knowledge of the matters complained of until September 2019 and, at that point, he instructed Mendelsons Solicitors to look into a potential complaint. It was only around that time that he realised that his pension had suffered a loss. Therefore, the Complainant had until September 2021 to make the complaint and the complaint was therefore made in time.

The Complainant therefore asks the Arbiter to consider his complaint.

Having seen the reply of the Service Provider which in summary and in essence states that:

1. Momentum is licensed by the Malta Financial Services Authority to act as the Retirement Scheme Administrator ('RSA') and Trustee of the Momentum Malta Retirement Trust (the 'Scheme'). The Scheme is licensed as a Personal Retirement Scheme. The Complainant initially invested in the Scheme on 12 December 2012 and transferred out of the Scheme in August 2013 (transferring out of jurisdiction to a pension scheme of Momentum Pensions in the Isle of Man).

Momentum therefore is making this response in respect of the period during which the Complainant was a member of the Scheme.

2. Momentum is not authorised to provide financial and/or investment advice, a point which is clearly stated in the Momentum Application for Membership¹ of the Scheme form ('Application Form') at paragraph

¹ Momentum Application Form – on complaint pack

number 9 of the Declarations section. The Application Form was signed by the Complainant on the 11 October 2012.

3. MountRock Capital Ghana Limited ('MRC') is a company registered in Ghana. MRC were appointed by the Complainant and acted as his appointed adviser. The Complainant was residing in Ghana whilst a Member of the Scheme.

Competence and prescription

4. The Complainant transferred out of the Scheme in August 2013 while the valuation of the fund was showing a profit.² At the point of transfer from The Scheme, the Complainant was taking quarterly income payments, which we continued post transfer to the IOM. Quarterly income payments would have ceased when the Lancelot Global PCC in which the Complainant was invested became suspended, which based on the date the Fund went into Administration according to the Mauritius Financial Commission authority occurred on the 23 March 2015. Post transferring to the new Scheme, annual pension statements including a valuation of the Funds would have been provided by his new provider, Momentum Pensions Limited in the Isle of Man. Momentum therefore find it inconceivable that the Complainant first knew of this issue as stated in the complaint only with effect from 2019.
5. Preliminary, in terms of Article 21(1)(b) of Chapter 555 of the Laws of Malta:

'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.'

This complaint relates to conduct which occurred between 10 December 2012 (the date the application was signed) and December 2013 (the date

² Valuation of fund at the time of transfer – complaint pack

of the transfer out of the Scheme). This is conduct which occurred before the entry into force of Chapter 555 Article 21(1)(b), which came into force on the 18 April 2016. The complaint was filed on the 19 April 2021, therefore, beyond the two-year time period allowed by article 21(1)(b). Momentum submits that for these reasons, the complaint cannot be entertained.

6. Preliminary, in terms of article 21(1)(c) of Chapter 555 of the Laws of Malta:

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

Reply to the Complainant's complaints

7. The Complainant had a professional adviser in place during his membership of the Scheme to provide him with any professional advice required; as previously stated, the Complainant appointed MRC as his professional adviser.³ This appointment of MRC by the Complainant is clear from page 2 of the Momentum Application Form, signed by the Complainant on 11 October 2012 (page 2) and also evident on the Royal Skandia Bond Application Form on the front page, page 8 and page 9 of this form where MRC are named as the financial adviser and the fund adviser. Furthermore, the financial adviser declarations were signed and stamped by MRC. Shortly before the transfer out of the Scheme a top-up payment was made from the Complainant's HSBC pension on the advice of Stuart Harris of MRC who was stated on the top up form as the adviser of the Complainant.
8. The complaint contains the following allegations made by the Complainant:

³ Skandia Application form – Appendix A (better copy of one in complaint pack)

a) Funds were subsequently invested into various investments

Momentum responds that there was only one investment during the Complainant's membership of the Scheme. This investment was into a well-diversified and collective scheme fund known as Lancelot Global PCC. There was a top up to this investment shortly before the transfer out of the Scheme.

b) Momentum 'failed to operate to the standards of a regulated SIPP provider and professional trustee. These failures led directly to our Client's losses'.

Momentum responds that it is not required to operate to the standards of a regulated SIPP provider. Momentum is not a SIPP provider. This was clearly explained in Momentum's response letter dated 22 January 2021 to the Complainant's complaint letter, which is attached in the Complaint Pack submitted to the Arbiter at pages 12-15.

Momentum is licensed by the MFSA to act as the RSA and Trustee of the Scheme. The Scheme is licensed as a Personal Retirement Scheme. Momentum replies that it operates to the standards required by this licence in the operation of the Scheme.

The Complainant needs to specify what exact standards he is referring to and provide further details of how Momentum have failed to satisfy these standards. Furthermore, the Complainant has not substantiated how these alleged failures of Momentum directly led to the Complainant's losses.

Momentum also states that the Complainant's fund was in fact in profit around the time of the transfer out of the Scheme and therefore no loss had been suffered by the Complainant, nor was there any reason at the time of the transfer for Momentum to believe that a loss would be made at any later date.

c) 'Momentum failed to comply with their regulatory obligations' as:

- i. They 'failed to conduct their business with due skill and care. Momentum failed to assess the (Complainant's) investment knowledge and attitude to risk.'

The Complainant signed the Momentum Application Form and confirmed that his risk profile was as set out in the Momentum Application form, medium risk (defined on the Application Form as 'there is some risk that the capital may go down as well as up, whilst there is potential for growth over the longer term'). To note he also ticked the box stating that liquidity was not required.

Momentum refutes that it did not act with due skill and care in following the members and their adviser's decision to buy the investment. Momentum assert that it is for the Complainant to prove that Momentum acted without due skill and care, and the Complainant has failed in his complaint to specify why or how he thinks Momentum acted without due skill and care. Momentum further asserts that the professional adviser, as appointed by the Complainant, was paid to provide the Complainant with advice and to advise the Complainant in respect of his circumstances and that Momentum is not authorised to give any form of advice. It is the Complainant and his appointed professional adviser who between them choose the Complainant's appropriate investment strategy. It is therefore the professional adviser and not Momentum who is responsible for giving advice in respect of the Complainant's personal circumstances. Momentum only has what details are provided on the Application Form.

Momentum asserts that during the whole period when the Complainant was in the Scheme, it carried out its duties and had no knowledge of any reason to be concerned about the Complainant's investment, which was in profit when the Complainant left the Scheme.

- ii. The investment was 'high risk'. 'The investments were high risk and did not match with his true risk tolerance.'

Momentum disputes this and this allegation does not correlate with the information published in the Fund Prospectus by Lancelot Global PCC ('Lancelot') (the 'Prospectus').

The Complainant and his professional adviser instructed the investment into a well-diversified fund held under Lancelot, which was an open-ended investment company, constituted as a protected cell company in Mauritius, regulated by the Mauritius FSC since 2009.

Lancelot is linked to Belvedere Management Group, a significant company at time of placing the investment, who had operations in other jurisdictions including Guernsey, South Africa and Mauritius.

The fund prospectus stated clearly the Fund is a global macro, multi asset fund investing across the major asset classes as well as providing specialist exposure to investment trusts, direct equities, cash, money market instruments, direct equities, Exchange Traded Funds (ETFs) and structured products.

The Prospectus does not at any point reference the investment as High-Risk nor does it reference anywhere the Fund was only suitable for Professional or High-Risk Investors.

Momentum asserts for the above reasons and given it was a global macro, multi asset fund that it was a product which was within the risk appetite of the Complainant, as detailed in his Application Form. It was a well-diversified regulated fund and acceptable with Momentum's requirements for the Scheme at that point in time.

- iii. 'Either no or inadequate due diligence was conducted on the investment or the due diligence was not acted upon. Failed to regard the best interests of the client and treat the client fairly by allowing investment in high-risk investments which they should have refused or asked for further clarification'.

Momentum disputes that the due diligence conducted was insufficient or not acted upon. The proper due diligence was carried out to ensure that the investment was within the guidelines and requirements of the

Scheme, as set out in the Scheme Particulars, with adequate diversification as required.

Referring again to the Prospectus for this investment, it states that the Fund is *'a global macro, multi asset fund investing across the major asset classes'* as well as providing specialist exposure to investment trusts, direct equities, cash, money, market instruments, direct equities, ETFs and structured products. The Fund utilised fund managers or ETFs.

The specifics of Investment Strategy of the fund were clearly set out and provided in for the following types of Asset Classes and Limits on the allocation, which included:

- Up to 65% could be held as 'Managed Funds' which also provided conditions on the maximum permitted amounts which could be held with specific fund managers. For example, up to 50% could be held with Fund Managers responsible for investments in excess of over \$1 billion under Management.
- Alternatively, or as part of the composition, the Fund was permitted to invest up to 80% in ETFs provided that the ETF exposure is restricted to equity index, trackers which may include developed an emerging equity ETFs. ETFs by their nature are very well diversified listed Funds.
- Up to 50% in Managed Cash or Absolute Return Products.
- No less than 5% in cash.

Momentum disputes that no due diligence was carried out in the best interests of the Complainant nor that it did not treat the Complainant fairly.

Momentum replies that the Complainant's claims in this regard are unsubstantiated. Momentum further replies that it is the role of the Complainant's professional adviser, not the RSA, to advise the Complainant on the investments and their financial circumstance.

There were no classification rules or restrictions to professional only members on the Fund website.

Momentum replies that it has, at all times, fulfilled all its obligations with respect to the Complainant.

- iv. They failed to assess the personal circumstances of the Complainant and act in his best interests

Momentum is not regulated to give investment advice and for this reason requires a member of the Scheme to have an appointed professional adviser to provide this advice and assess the Complainant's particular circumstances.

- v. The Complainant relied on the professional status of Momentum when taking advice on investments

Momentum's role as a RSA and Trustee is to ensure the Scheme's investments are managed in accordance with relevant legislation and regulatory requirements, as well as in accordance with the Trust Deed and Rules and Terms and Conditions. However, as outlined, no investment advice can be provided by Momentum in relation to investments, and the complainant has a responsibility to choose an appropriate professional adviser and an appropriate investment strategy, with the assistance and advice of that appointed adviser. The appointed adviser's role, in conjunction with his client, the complainant, is to determine the investment objectives and attitude to risk and on this basis, advise the complainant on an investment strategy, including, suitable investments in which the pension fund should be invested. If the Complainant misunderstood this, then it is the fault of the adviser who is responsible for advising the Complainant.

- vi. Momentum knew there was a significant risk that the investment would be illiquid and should have taken into account what was fair, reasonable and good industry practice.

The Complainant specifically ticked the box on the Momentum Application Form that stated that he did not require any investments

to be liquid. But, in any event, in the Prospectus the liquidity section clearly confirmed that 5% of the fund value will at all times be retained in cash for liquidity purposes and the investment strategy of the fund was that it must allow for the following:

Liquidity:

- *Up to at least 60% of the portfolio must have weekly liquidity*
- *The entire portfolio (i.e., FUND) must have liquidity of no more than two calendar months*

This shows that the Complainant could have divested of the fund relatively quickly during the period of his membership of the Scheme.

- d) The Complainant wishes to be re-imbursed the full amount of transfer funds, 8% interest thereon (or such amount of interest which would have been received had he not transferred), £1,000 compensation for stress and professional fees

During the time of being a member of the Scheme, the Complainant took a Pension Commencement Lump Sum (PCLS) and regular quarterly withdrawals, there were fees and charges which he agreed to in respect of the Scheme and investment company. Momentum claims that the Complainant has no right to be re-imbursed for money he has already had or fees he has paid. Without prejudice to Momentum assertion that it is not responsible for any of the loss or the interest thereon Momentum would like to clarify that the Complainant needs to prove that 8% is a reasonable level of interest as this is very much higher than usual, what amount is his actual loss and whether he could have mitigated the loss. As shown previously, there was no loss apparent when the Complainant left the Scheme.

- e) Momentum would like to point out that the letter of complaint to Momentum dated 1 December 2020 (a copy is already within the Complaint Pack) makes claims in respect to the Financial Conduct Authority (UK) client care requirements, COBS, etc. In Momentum's response to the complaint, we tried to respond fairly but the complaint letter referred to UK regulations and laws which are not relevant to this

matter. No amended complaint letter was resent to us in respect of the laws of Malta and relevant regulations which are applicable to the Scheme.

Momentum does not provide investment advice

9. Momentum replies that it has, at all times, fulfilled all its obligations with respect to the Complainant and observed all guidelines and requirements.
10. Momentum is not licensed to and does not provide investment advice and, furthermore, did not provide investment advice to the Complainant.
11. This is clear from the application forms which specifically request the details of the Complainant's professional adviser. The Complainant also declared on the application form that he acknowledged that the services provided by Momentum did not extend to financial, legal, tax or investment advice (see declaration 9 on page 6).
12. To further reinforce the point that Momentum does not provide investment advice, an entire section of the terms and conditions of business (attached to the application form), is dedicated solely to this point (page 8, s3 of the application form).

Conclusion

13. Momentum replies 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.
14. Momentum has not acted negligently. Momentum has not breached any of its obligations in any way.
15. Momentum replies that many of the Complainant's allegations are unsubstantiated, and that the Complainant needs to specify what standards, duties or regulatory obligations he is referring to and provide further details of how Momentum have failed to satisfy these.

16. The Complainant must show that it was Momentum's actions or omissions which caused the loss he is alleging. Momentum replies that in the absence of Complainant proving this causal link, Momentum cannot be found responsible for Complainant's claims.

Momentum respectfully requests the Arbiter to reject the Complainant's claims.

Having heard the parties

Having seen all the documents of the case

Considers

The Service Provider raised the plea of '*competence and prescription*' and the Arbiter will deal with this plea first.

The Arbiter notes that while the Service Provider refers to '*prescription*', in reality the plea is one relating to the competence of the Arbiter as stipulated in Article 21 of the Act. This Article does not refer to prescription but to decadence, that is, timeframes established by law within which the consumer may raise the case before the Arbiter.

Article 21(1)(b) of Chapter 555 of the Laws of Malta (the Act) states that:

'An Arbiter shall have the competence to hear complaints in terms of his function 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 the conduct which occurred before the entry into force of the Act shall be made by not later than two years from the date when this paragraph came into force.'

The Act came into force on the 18 April 2016 and, therefore, any complaint regarding the conduct of a Service Provider **before the entry of this Act** had to be filed before the Arbiter by the 18 April 2018.

Therefore, the Arbiter has to establish whether the conduct complained of happened before the entry into force of the Act.

From the facts of the case, it results that the Complainant initially invested in the Scheme on the 12 December 2012 and transferred out of the Malta Scheme in August 2013 to the Scheme of Momentum in the Isle of Man.

When the Complainant's Malta Scheme was transferred to the Momentum Isle of Man Scheme in August 2013, the valuation of the fund was showing a profit. The Complainant was taking quarterly income payments which were transferred to the Isle of Man Scheme (IOM).

The Service Provider submitted that *'Quarterly Income Payments would have ceased when the Lancelot Global PCC in which the Complainant was invested became suspended, which based on the date the Fund went into Administration, according to the Mauritius Financial Commission authority occurred on the 23 March 2015.'*⁴

During the hearing of the 2 November 2021 before the Arbiter, the Complainant confirmed that:

*'... it was when I stopped getting drawings because the Fund was suspended in 2015 that I spoke to somebody about it because I was not getting my monthly payments anymore, I say that, yes, that would have been the case.'*⁵

The Arbiter has also seen the decision given by the Isle of Man Ombudsman. From that decision, it transpires that:

'Momentum also contacted the Applicant directly to tell him that the fund had been suspended on 1 June 2015 and the quarterly pension payments would be suspended. The email said that at that stage Momentum did not know when the suspension would be lifted. The email asked the Applicant to contact advisers Mount Rock Group ...

In September 2015 a Mr Quayle of Momentum provided the Applicant with an up to date valuation. The email also commented on PWC's appointment as administrators and shared information taken from Apex Global Website advising that "Apex Global fund is an individual cell of Lancelot Global PCC ... that is currently under the administration of PWC Mauritius"...

⁴ A fol. 94

⁵ A fol. 143

The Applicant contacted Momentum in October 2015 asking when the fund may be unsuspending ...

It was also not apparent from the regular valuations that the fund was valueless until the July 2020 valuation. However, the stated value of the fund up to 2019 was still significantly less than the value at the date of transfer. It remained less than half the original value at date of transfer from 2014 to 2020 ...

The Applicant would ... have been aware how volatile his fund was once he received the 2014 annual valuation given the fact that the fund fell in value from £37,736 to £18,516. The Applicant would therefore have been aware that the fund was potentially a very volatile investment in 2014 (it had halved in value) and arguably was not compatible with his stated attitude to risk and was also notified by Momentum of the suspension of the Lancelot Fund in 2015 ...

*The Applicant would also have been aware of the suspension of the Lancelot Fund following the appointment of PWC administrators in 2015 ...*⁶

From these facts, and from the admission of the Complainant during the hearing of the 2 November 2021,⁷ that he became aware that his pension scheme was not paying him the quarterly payments because the Fund was suspended in 2015, the Arbiter is convinced that the Complainant was in a position to understand that his investment had halved in value at least in 2015. This means that the conduct of the Service Provider being complained of occurred before the entry into force of the Act, and the Complainant had to file his complaint by not later than two years from the date when the Act came into force.

The Complainant filed his complaint with the Arbiter on the 19 April 2021. According to Article 21(1)(b) of Chapter 555 of the Laws of Malta, since the conduct of the Service Provider occurred before the entry of the Act, the Complainant had up to the 18 April 2018 to file his complaint.

Therefore, the Act precludes the Arbiter to take further cognisance of this case.

For the above-stated reasons, the Arbiter does not have the competence to decide the merits of the case.

⁶ A fol. 153-154

⁷ A fol. 143

Due to the particular nature of this case, each party is to pay its own costs of these proceedings.

**Dr Reno Borg
Arbiter for Financial Services**