Before the Arbiter for Financial Services

Case ASF 021/2022

AM & KM

('the Complainants')

vs

Momentum Pensions Malta Limited

(C 52627) ('MPM' or 'the Service Provider')

Sitting of 13 October 2023

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 Complaint, in essence, relates to the Complainants' claim of substantial losses suffered on their respective Retirement Scheme due to the Service Provider's alleged: negligence and failure in its duties of a trustee, lack of compliance with applicable rules and requirements and alleged failure to take reasonable care, act in their best interests and protect their Schemes.

The Complainants namely alleged in this regard:

- That MPM did not undertake adequate due diligence checks on their investment adviser and introducer, CWM, as it did not verify that CWM had adequate credentials and license to carry out the services provided in

respect of their Retirement Schemes. They claimed that this resulted in them being exposed to the rogue trading undertaken by their adviser;

- That MPM did not make them aware of any concerns with respect to their Retirement Schemes and underlying investments;

- That MPM provided them with inadequate annual statements which showed very little detail and no concern about their investments and instead gave them the impression that their pensions were still safe;

- That MPM did not ensure that their funds were invested in a prudent manner and in their best interests as per their own Investment Guidelines.

  They claimed that MPM allowed their funds to be solely and excessively invested into unsuitable high-risk, illiquid, professional-investor-only structured notes which were not reflective of their profile as retail investors having a low to medium-risk attitude and no previous investment experience. They further claimed that the portfolio was not properly diversified and there was excessive exposure to single investments.

- That MPM did not act with due skill, care and diligence in allowing the disputed investments to be made, allowing also further re-purchases into structured notes despite losses experienced on previous sales of such products;

- That they were not made aware of the applicable cooling-off period and were never shown any dealing instructions;

- That MPM did not act fairly and with integrity as it did not offer the same redress to the members of the Scheme.

The Complaint as explained by the Complainants

The Complainants explained that their respective pension funds were originally worth GBP 132,315 and GBP 46,334 when they were transferred to MPM in January 2013 and August 2014 respectively. One was invested into the *Generali Bond* in February 2013 with a premium of GBP 126,855.05 and the other was

invested into an *Old Mutual Bond* in September 2014 with a premium of GBP 44,448.84.[1]

They submitted that the amount they were left with when they transferred out of the *Generali Bond* and the *Old Mutual Bond* in July 2019 was GBP 36,535.44 and GBP 3,194.48 respectively.

After investing their money through their advisory firm *Continental Wealth Management* '(CWM'), they discovered, to their horror in February 2017, that their pension funds were rapidly decreasing in value. They accordingly wrote a complaint letter to CWM.

The Complainants also sought help from *Pension Life*, whom they became aware of through the internet. *Pension Life* advertised its services in helping pension scam victims. This led to *Pension Life* discussing the situation with their trustees, MPM, following which Stewart Davies of MPM offered to meet *Pension Life* to try and resolve the situation.

The Complainants noted that at this time they had absolutely no knowledge of the complex web and links between all of the companies involved with their pension, but they were becoming aware of some of the licensing rules and the due diligence responsibilities that the trustees should take before accepting business from advisory companies.

They were shocked when MPM were unable to confirm to Pension Life that CWM were correctly licensed to provide pensions advice. The Complainants noted that many emails went back and forth between them, MPM, *Pension Life* and CWM, and there was an unacceptable offer of a small amount of compensation from CWM although, very soon after this, CWM stopped trading.

The Complainants submitted that by the end of May 2017, *Pension Life* had an agreement with MPM, wherein an email dated 28 May 2017, Stewart Davies confirmed that:

*'… **I just wanted to reaffirm my commitment to resolving this matter** …*

… I have details of the group of members and with your agreement I will liaise with Dean on this, as we compile our schedules, and I aim to have a formal

[1] Page (P.) 7

communication to you by the end of this week, and if there's any delay to this I will let you know. As a minimum, ***we will focus on Mr and Mrs M given that this was the initial case presented to us and prompted the meeting****.*

In order to start off alleviating the issue, I will look at rebating the Trustee Fees since January 2016 for both Members and suspend such going forward until the Members are happy with the resolution*. I will look at the other members on a case-by-case basis depending on the circumstances'*.[2]

The Complainants explained that, sadly, by November 2017, it seemed that there was never going to be any resolution, nor any fees reimbursed to them. After many emails and negotiations, they felt they had spent months getting nowhere, and this started to affect the health and well-being of one of the Complainants who, for a time, no longer felt able to deal with the situation.

During 2018, the Complainants moved from France back to the UK to help look after the elderly mother of one of the Complainants. At that point, they knew they would later have to return to deal with the matter in order to protect their remaining funds and would need to transfer out of their MPM Schemes or lose everything.

The Complainants explained that they were afraid to complain formally during the transfer process in case it delayed their transfer out which, they claimed, would have caused even more losses. Their final transfer values were a stark reminder of how catastrophic their losses were.

The Complainants made a formal complaint to MPM in August 2019. Whilst they noted they were aware that this was more than two years since they first found out about the problem, they asked the Arbiter to take into account that for the first nine months, they were optimistic for a resolution from MPM, as can be seen from the transcripts attached to their Complaint. The Complainants submitted that they did however complain within two years of discovering that MPM were rescinding on all of their previous agreements and offers which was a huge disappointment, only adding to their dissatisfaction in the services MPM provided as trustees.

[2] P. 7 - 8

MPM replied to their complaint five months later, on 28 January 2020, defending their own position, claiming no responsibility, giving no clear answer to their query over CWM's license to provide pension advice nor explaining why their fees were never reimbursed. The Complainants questioned why the offer to return their fees was made if it was not to apologise for the poor and faulty trusteeship on their part.

The Complainants explained that MPM instead pointed out that it was the Complainants' responsibility when they signed all the initial set-up documents and blamed them for not sending a formal complaint earlier.

The Complainants claimed that this however occurred because their advisers had lied to them as to the nature of the documents, as well as to how to interpret the annual statements which led them to believe that all was well and that in the long term, the investments would do well.

They highlighted that they were never shown any dealing instructions, neither did they sign such instructions, nor were they made aware of the *'cooling off'* period which applied to them.

The Complainants explained that they felt they had no choice but to accept MPM's explanations as apart from the health issue and anxiety at the time they needed to make future plans. They submitted that although they went through a nine-month period between February 2017 and November 2017 when they thought that MPM was willing to help, the end result, in hindsight, seemed that MPM had strung them along, only to conclude, at the end, that MPM was not in any way liable for any of their losses. The Complainants stated that at the time they did not have sufficient knowledge or information to challenge MPM's response and had to accept that they had been the unfortunate and unlucky victims of rogue traders, which they claimed CWM turned out to be.

The Complainants explained that it was only more recently that they came to learn to what extent MPM failed them as trustees, and that MPM has not been following the rules and laws in Malta, resulting in some complaints to the Arbiter being upheld.

The Complainants read some of such cases on the OAFS's website and claimed that these complaints are the same as their own where it seems MPM tried to

say that it was none of their fault but had, in fact, some accountability for what happened. Therefore, the Complainants decided to come to the Arbiter in the hope that their complaint would be investigated.

The Complainants submitted that it is their firm belief that had MPM carried out due diligence in checking CWM's credentials and licences, they would not have been allowed access to MPM's trustee services and they would have not been exposed in such way.

They submitted that a layperson would not know how to carry out such checks, but they expected a high-profile trustee company such as MPM, to have known how to and to have done so.

They argued that by the time MPM cancelled its terms of business with CWM, it was too late for the Complainants as the damage had already been done.

The Complainants claimed that they had been exposed to rogue traders under MPM's trusteeship.

It was claimed that MPM failed to act in their best interests and to fulfil their legal duties as their trustees.

They claimed that MPM have a duty under the Retirement Pensions Act 2011, to carry out due diligence in order to ensure that their introducers act within the rules. It was noted that MPM had Terms of Business with CWM up to September 2017 when MPM withdrew from such terms of business and instead entered into Terms of Business with *Trafalgar International* ('Trafalgar').

The Complainants submitted that they are of the understanding that CWM was not licensed for insurance, investment or pension advice in any jurisdiction and that *Trafalgar* only had an Insurance Mediation license, which was not transferable to CWM or any of its advisers.

They claimed that no licence agreement indeed existed between Trafalgar and CWM. However, when CWM closed, they were automatically transferred to Trafalgar as their *'default adviser'* as accepted and authorised by MPM.

The Complainants further submitted that MPM does not seem to have carried out due diligence on Trafalgar - a Cyprus-based firm regulated in Germany for

insurance mediation but whose licence however did not extend to any other entity or jurisdiction.

They claimed that it was also clear that the Retirement Scheme Administrator is to retain ultimate responsibility to ensure compliance by the member or any person acting on his behalf (i.e., CWM/Trafalgar) with the objective of the compliance of the retirement scheme and with any applicable licensed conditions and provisions of law.

The Complainants referred to Chapter 450, Special Funds (Regulation) Act, and argued that in terms of article 24 of the said Act, relating to the registration of asset managers, MPM had a duty to ensure that CWM and/or *Trafalgar International GmbH* was subject to an adequate level of regulatory supervision. It was further argued that MPM had a duty of care under the pension law to ensure the suitability and legality of any introducers with whom they had Terms of Business.

They submitted that in the declaration section (point 6 viii) of the *Generali Bond* Application, MPM had signed to take *'full responsibility for the selection of investment instruments',* whilst in the *Old Mutual* Application Form, the trustee was clearly signing to appoint/accept CWM as advisers.[3]

The Complainants claim that until recently, the many failings of MPM as their trustees were unknown to them. Various parties were blamed by MPM including the Complainants themselves, CWM, Trafalgar, Leonteq, Generali and Old Mutual.

They noted that MPM had not made the Complainants aware of any concerns or shared any paperwork or communicated with them other than very basic one-page annual statements, showing very little detail and zero concern.

The Complainants submitted that in MPM's own Investment Guidelines, it is stated that the trustee needs to ensure that the applicant's funds are invested in a prudent manner and in the best interests of the member. They claimed that MPM failed to do this as their funds were invested solely in structured notes which they have learned were of high risk and only for professional investors.

[3] P. 10

The Complainants submitted that MPM allowed these transactions to take place and MPM must have given their written authority for the investments to be purchased and sold.

In their response to the Complainants' complaint, MPM mentioned that they *'have controls in place'* to ensure that Dealing Instructions received by MPM were duly signed and met their investment strategy, attitude to risk and in line with the Scheme's Investment Guidelines.

The Complainants noted that the Investment Guidelines for MPM of mid-2014 state that the portfolio must be constructed in such a way as to avoid excessive exposure to any single credit risk.

They submitted that this was clearly not the case for their investments. For one of the Complainants, three structured notes were bought at the outset, representing 97% of the initial premium, whilst for the other Complainant the very first notes bought on 22 February 2013 were of *Commerzbank* which represented 49.6% of the fund and of *RBC Capital Markets* which represented 47.2% of the fund. This happened when the guidelines for January 2013 state that exposure to single issuers should be limited to no more than 20% and be properly diversified to avoid excessive exposure.

The Complainants claimed that MPM should have used their power and discretion to question and stop the unsuitable professional-only investments and act to protect their pension funds but failed to do so.

The Complainants had requested their risk profiles to be set at Low to Medium, which was subsequently changed to Higher Medium. They understand that, as part of the Retirement Scheme Administrator ('RSAs') 'Know Your Customer' due diligence, MPM should have had procedures in place to establish a member's risk profile independently to the IFA. They alleged that MPM failed to do this and did not even refer to their fact-find.

The Complainants further claimed that all of the investments were made into high-risk, professional-investor-only structured notes which did not fall into their risk profile as they were most definitely Retail Investors with no previous investment experience. Their pensions were in company Defined Benefit and private personal pensions with large insurance companies.

The Complainants submitted that the losses vaguely shown by MPM's annual statements were dismissed by CWM as 'paper losses' and they were told the investments would recover at maturity and that these were just values if the customer wanted to cash them in early. They noted that such explanation appeared plausible at the time and in fact, MPM reinforced that explanation as at the bottom of the Annual Statement it was stated that:

'Certain underlying assets within the investment may show a value that reflects an early encashment value, or potentially a zero value, prior to maturity date. This will not reflect the true current performance of such underlying assets'.[4]

This disclaimer from MPM and the fact that they had not communicated any concerns or details of any loss of funds led them to believe that their pensions were safe. They noted that whilst MPM questioned why they did not raise the issue of losses with them directly, MPM however had endorsed the statement from CWM that prior to the maturity date, the values may appear low.

The Complainants claimed that they are not experienced in this field but have learned that each investment has a Term Sheet detailing the investment risk and so on.

They claimed that their investments ('*Commerzbank Global Pharma'*, '*Leonteq 1.5yr Multi Barrier*', '*EFG Red April 6'*), are clearly all marked *'For Professional Investors Only: Not Suitable for Retail Distribution'*.[5] The Complainants further claimed that the investments were all high risk, illiquid and with no diversification/mix of guaranteed or capital-protected products. They also submitted that these term sheets were fully available to MPM.

Reference was made to the Pensions Rules for Services Providers [Part B.4, 1.4(b) relating to the execution of orders], and to the Trusts and Trustees Act. In this regard, the Complainants highlighted that in investing or otherwise applying trust property, a trustee should act as a prudent investor by considering the purposes, terms, distribution requirements and other circumstances of the trust and exercising reasonable care, skill and caution.

[4] P. 11
[5] *Ibid.*

The Complainants submitted that as part of MPM's due diligence, and given that MPM had complete discretion over the investments made, MPM should have obtained and understood the Term Sheets relating to these investments. They claimed that MPM's Compliance Department, however, proceeded with the purchases without raising any queries or concerns.

It was alleged that all of the investments that MPM passed as compliant and suitable for them as retail investors, and suitable for their pension, were high risk and only suitable for Professional Investors with a significant chance of extreme losses. They claimed that MPM failed in their fiduciary duties by allowing any of these high-risk, illiquid investments to be made.

Reference was made to the Transaction Reports attached to the Complaint. The Complainants submitted that such reports clearly showed that when assets were sold or matured, this mostly happened at a greatly reduced price than that of the purchase price, with the proceeds from the maturing note in turn used to buy further structured notes.

The Complainants further submitted that MPM should never have allowed these investments to be made given that, in terms of the Pensions Rules for Service Providers they were required to '*act with due skill, care and diligence and in best interests'*.[6]

Reference was made to the MFSA Consultation Document on amendments to the Pension Rules issued under the Retirement Pensions Act (MFSA Ref: 09-2017). The Complainants claimed that MPM allowed 100% of their pensions to be invested in professional investor funds without raising any concerns or communication with them as retail investors. They claimed that MPM failed to act in their best interest, to use their discretion or to act in a prudent manner or with the diligence and attention of a *bonus paterfamilias* and did not meet their reasonable and legitimate expectations.

The Complainants also claimed that a fact-find in their regard would have shown that they had no other investments at that time and that they were not sophisticated investors.

[6] P. 12

They submitted that MPM's own Guidelines state that the role of the administrator is to *'ensure the scheme assets are invested in the best interests of the member and are properly diversified, in line with prevailing rules'*.[7]

The Complainants further noted that according to MPM's own Investment Guidelines, *'The Trustee and Administrator needs to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification relevant to the investment portfolio'*.[8]

Reference was also made to Section B.4.1.3(f) and B.4.1.17 of the Pensions Rules for Service Providers relating to the duties to *'act honestly, fairly and with integrity'* and the liability of the Scheme Administrator *'for any loss resulting from its fraud, wilful default or negligence, including the unjustifiable failure to perform in whole or part its obligations'*.[9]

The Complainants submitted that a pension fund should, by its nature, be accessible as life plans change and that MPM failed to fulfil its fiduciary duties also under the Civil Code Chapter 16 of the Laws of Malta.

The Complainants accordingly claimed that they have suffered losses to their pensions due to the wilful negligence of MPM as trustee for which they consider them fully responsible for their losses as they have: precluded trust

- Failed to act in their best interests
- Failed to act within their investment guidelines
- Failed to ensure the investments were within their risk profile and investment status
- Failed to ensure that the companies that they issued terms of business with were qualified, and had the correct and necessary legal licences to operate
- Failed to communicate any concerns over the huge losses or inappropriate investments made within their pensions
- Failed to act to mitigate losses to their pension fund
- Failed to obtain or act upon related investment Term Sheets and investigate the associated risks

[7] *Ibid.*
[8] *Ibid.*
[9] P. 13

- Failed to fulfil its fiduciary duties under section 1124(A) of the Civil Code, Chapter 16 of the Laws of Malta and the Trusts and Trustees Act.

In conclusion, the Complainants believe that MPM was negligent with regard to managing their pension funds and failed as their trustees to take reasonable care to avoid causing loss to their funds. They submitted that MPM's behaviour and failings did not meet the standard of care which a reasonable person would meet in the circumstances, failing also to be in compliance with the Retirement Pensions Act, 2011.

The Complainants stated that a reasonable person in the circumstances could have expected to foresee and prevent the extreme financial loss that they suffered.

They claimed that to add to the unfairness, they are aware that MPM have taken the decision to agree to compensation and had contacted some members offering them a refund of fees or waiver of MPM/OMI's fees in return for the signing of a gagging agreement and the withdrawal of complaints. The Complainants alleged that this was not offered to all affected members in accordance to acting fairly and with integrity as per the Retirement Pensions Act, 2011.

The Complainants also attached a timeline of events to their Complaint.[10]

Remedy requested

The Complainants expect to receive compensation to put them back into the financial position they would have been had they not used MPM as trustees.

They submitted that if both of their plans had grown at a rate of even 4% per annum and MPM reimburses their annual fees to both of them whilst also providing some small recompense for the degree of stress they have had to endure, they would be looking for compensation in the region of GBP 200,000.[11]

In its reply, MPM essentially submitted the following:[12]

[10] P. 15
[11] P. 4
[12] P. 166 - 169

1. That it is licensed by the Malta Financial Services Authority ('MFSA') to act as the Retirement Scheme Administrator ('RSA') and Trustee of the Momentum Malta Retirement Trust, which is licensed as a Personal Retirement Scheme.

2. MPM is not licensed to provide investment advice.

Competence and prescription

3. That the Complaint is prescribed pursuant to article 21(1)(c) of Chapter 555 of the Laws of Malta [a period of decadence as stated in pg. 14 of the decision of the Arbiter ref. 070/2019].

4. That the Act came into force on 18 April 2016, and the alleged conduct complained of stopped when the Complainants themselves requested to transfer out of the Scheme on 16 May 2019.

   That by their own admission, the Complainants first had knowledge of the matters complained of in February 2017 (as per page 3 of the Complaint). The complaint to MPM was made on 7 August 2019 (which is the date indicated in the timeline provided by the Complainants and also pg. 2 of the document attached to the Complaint Form which refers to August 2019).

   That the Complainants themselves admit and confirm that their complaint to MPM was made beyond the two-year period envisaged in article 21(1)(c). In their Complaint, the Complainants stated that:

   'Whilst I am aware that this is more than 2 years since we first found out about the problem, we would ask you to take into account that for the first 9 months, we were optimistic for a resolution from Momentum, as you will see from the attached email transcripts. We did however complain within 2 years of discovering that Momentum were rescinding on all their previous agreements and offers …'.[13]

   That, as shall be proved in the course of the proceedings, MPM was not offering any compensation to the Complainants. MPM was only assisting

[13] P. 167 & P. 8

the Complainants in order to reach a settlement with CWM, with respect to the same matters which the Complainants are now complaining about before the Arbiter. What MPM did offer was a rebate of fees, but at no point did MPM offer to make good for any alleged loss suffered by the Complainants.

MPM submitted that the Complainants' statement that they were *'optimistic for a resolution from Momentum'*,[14] must be read in this light – MPM was never offering compensation for their losses because MPM's position has always been that it did not bear responsibility for such. MPM only offered a rebate on its fees, and this was to try and assist the Complainants with their overall position as a gesture of goodwill.

The Complainants' comments that they *'thought Momentum were will willing to help'*, and that *'in hindsight, seemed that they strung us along'* must be read in light of the above.[15] MPM further submitted that the Complainants knew well that MPM only offered to rebate its fees (in fact, reference to this is made in the Complaint itself as per pg. 2 of the document attached to the Complaint Form), and never offered compensation for alleged losses. The latter was offered by CWM and MPM was assisting the Complainants in the hopes of a resolution being reached.

MPM submitted that by the Complainants' own admission, their complaint with MPM was filed beyond the two-year period stipulated in article 21(1)(c) and should therefore be rejected by the Arbiter.

Reply to the Complainants' complaints

5. MPM submitted that, in the first place, the Complainants appointed *Continental Wealth Management* ('CWM') as their adviser. Before CWM ceased trading, it acted as adviser and provided financial advice to the investors. CWM advised the Complainants to invest in the products which led to the Complainants' alleged losses. The Complainants themselves saw

[14] P. 167
[15] *Ibid.*

CWM as their first port of call, having complained to them first in 2017 and having initiated settlement discussions with CWM (as per pg.1 of the document attached to the Complaint Form). MPM submitted that accordingly, CWM is the proper respondent to this claim.

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

7. MPM submitted that, at the time that the Complainants became members of the Scheme, there was no obligation incumbent on MPM to carry out due diligence with respect to CWM. MPM reiterated that it has fulfilled all obligations incumbent upon it from time to time. It submitted, in particular, that there was no obligation for it to verify whether CWM was a regulated entity or whether it was authorised to provide advice.

8. MPM noted that the Complainants allege that they were never shown any dealing instructions and that they did not sign them (as per pg. 2 of the document attached to the Complaint Form). MPM replied that it was provided with dealing instructions signed by the Complainants. It submitted that the Complainants must clarify what they are alleging in relation to the dealing instructions and whether such allegations are being directed towards MPM or otherwise. MPM further replied that any allegation relating to forged signatures cannot be raised before the Arbiter but must be raised before the competent forum.

9. MPM noted that the Complainants further allege that they were not made aware of the 'cooling off' period. It replied, in this respect, that the Complainants were indeed informed of their cooling off period, but in any event any complaint with respect to the cooling off period is time-barred.

10. MPM replied that it has at all times fulfilled its obligations with respect to the Complainants.

11. MPM submitted that article 24 of Chapter 450 of the Laws of Malta, which is referred to on page 4 of the document attached to the Complaint, does not apply to MPM.

12. It submitted that the investments were made in line with both MPM's investment guidelines and MFSA rules.

13. With respect to the Complainants' allegation that their request was to have a 'low to medium' risk profile, MPM replied that the risk profile MPM takes into account is that chosen on the Application Form – low risk for Mrs KM and medium to high risk for Mr AM.

14. It further submitted that, with respect to the quantum of the alleged loss, this must be proved by the Complainants.

MPM does not provide investment advice

15. MPM replied that it has, at all times, fulfilled all its obligations with respect to the Complainants and observed all laws, rules and guidelines, including investment guidelines.

16. It reiterated that it is not licensed to, and does not, provide investment advice and, furthermore, did not provide investment advice to the Complainants.

    This was clear from the application forms which specifically request the details of the Complainants' professional adviser. The Complainants also declared that they acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice.

17. In order to further reinforce the point that MPM does not provide investment advice, MPM noted that an entire section of the terms and conditions of business (attached to the Application Form) is dedicated solely to this point.

MPM's concluding remarks

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

19. That it has not acted negligently, nor has it breached any of its obligations in any way.

20. That the Complainants must show that it was MPM's actions or omissions which caused the loss they are alleging. MPM replied that, in the absence of the Complainants proving this causal link, MPM cannot be found responsible for the Complainants' claims.

For the reasons mentioned, MPM respectfully requested the Arbiter to reject the Complainants' claims with expenses.

Having heard the parties and seen all the documents and submissions made,

Considers:

Preliminary Plea regarding the competence of the Arbiter

Article 21(1)(c) of Chapter 555 of the Laws of Malta stipulates:

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

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

In their Complaint Form filed with the Office of the Arbiter for Financial Services ('OAFS'), the Complainants indicated *'February 2017'* in reply to the question

asking *'When did you first have knowledge of the matters you are complaining about?'*.[16]

In their Complaint, they explained however that this was the time when they *'discovered … that [their] pension funds were decreasing in value rapidly'*.[17] Subsequently, they engaged with *Pension Life* (in the UK) to assist them in looking into their situation.

The Complainants further explained that there were numerous communications which occurred at the time between themselves, *Pension Life*, CWM and MPM.[18] At the time, they were also of the impression that a resolution would be reached between the indicated parties but *'Sadly, by November 17… it seemed that there never was going to be any resolution'*.[19] The Complainants submitted that they, accordingly:

'did however complain within 2 years of discovering that Momentum were rescinding on all their previous agreements and offers …'.[20]

On its part, the Service Provider emphasised the point that the Complainants themselves indicated in their Complaint Form the date of *'February 2017'* as to when they *'first had knowledge of the matters complained of'*.[21]

MPM submitted that this was accordingly proof that the Complainants' formal complaint with the Service Provider went beyond the two-year period envisaged in Article 21(1)(c) of the Act, given that the Complaint with MPM was only made in August 2019.

MPM also claimed in its submissions that, during the discussions held with *Pension Life* and CWM in 2017, MPM was only assisting the Complainants *'in order to reach a settlement with CWM, with respect to the same matters which Complainants are now complaining about'*, and that MPM never offered *'to make good for any alleged loss suffered by the Complainants'*.[22]

[16] P. 3
[17] P. 7
[18] *Ibid.*
[19] P. 8
[20] *Ibid.*
[21] P. 166
[22] P. 167

The Arbiter outrightly states that careful consideration needs to be first made about the pertinent matters relevant to the plea raised by the Service Provider given also the material implications arising with respect to the said plea.

The dates indicated by the respective parties cannot be taken at face value, and the Arbiter shall analyse and consider the validity and relevance or otherwise of the dates and reasons mentioned by the respective parties in reaching a decision on the said plea.

The Arbiter shall determine first what constitutes, in this case, the matters complained of and then consider whether the Complainants are deemed to have had first knowledge of such matters as alleged by the parties.

The matters complained of

As indicated above, the matters complained of by the Complainants involve the substantial losses that the Complainants claimed they suffered on their respective Retirement Scheme (which they attributed to MPM's alleged failures as summarised at the start of this decision).

The claimed losses

The Complainants indeed started their Complaint to the OAFS by first highlighting their claimed substantial losses (amounting in total to GBP 138, 919) as follows:

(a) for KM indicated as being -GBP 95,779.56 (the original amount transferred into the Scheme of GBP 132,315 less the amount transferred out of GBP 36,535.44);

(b) for AM as amounting to -GBP 43,139.52 (the original amount transferred into the Scheme of GBP 46,334 less the amount transferred out of GBP 3,194.48). [23]

The Complainants filed their formal complaint with the Service Provider by way of their complaint dated 20 August 2019.[24] This date was also acknowledged by

[23] P. 7

[24] P. 25-27. Not the 7 August 2019 as was incorrectly indicated in the submissions to the Arbiter.

the Service Provider in its reply of 28 January 2020, to the Complainants' formal complaint.[25]

In their formal complaint to MPM, the Complainants complained, in essence, about the same indicated amount of losses of around GBP 139,000 (listed as *'£95,779.56'* and *'£43,469.27'* respectively in their letter of 20 August 2019).[26]

During the hearing of 25 April 2022, the Complainants further testified that *'As everyone is aware, there were substantial losses on our pension funds to the value of at least £130,000'*.[27]

It is accordingly clear that *'the matters complained of'* for the purposes of Article 21(1)(c) of the Act are the alleged substantial losses of over GBP 130,000 - approx. a loss of GBP 95,000 in the case of KM and a loss of approx. GBP 43,000 in the case of AM (respectively equivalent to around 72% and 93% of the original amount invested into their respective Schemes).

Knowledge of the matters complained of

The Arbiter notes that the reference to *'February 2017'* indicated by the Complainants, is only the period when the Complainants became aware of their *'pension funds ... decreasing in value rapidly'*.[28]

The fact that the Complainants became, in February 2017, aware of their funds decreasing in value, however, cannot be, in the particular circumstances of this case, construed as the same or equivalent to having knowledge of the matters complained of.

Indeed, the Arbiter does not have adequate comfort to reasonably determine and conclude that the date of February 2017 is the one that should be taken as being *'the day on which the complainant first had knowledge of the matters complained of'* in terms of Article 21(1)(c) of the Act. This is due to various reasons including the following:

[25] P. 28

[26] A slight discrepancy emerges due to a slightly different figure quoted in the *'Original transfer value'*. In the Complaint to the OAFS this was indicated for AM as £46,334 whereas in their formal complaint letter to the Service Provider of 20/08/2019, the said value was indicated as £46,663.75 (P. 7 & 25).

[27] P. 170

[28] P. 7 – Emphasis added by the Arbiter

a) Being aware of a drop in the value of the investments is quite different and distinct from being aware of a material or complete loss of the investment which has either been crystallised (that is, actually realised), or on which there is a categoric and/or clear information that such loss will, or is highly likely to, materialise in practice (for example upon the commencement of liquidation proceedings).

b) The Complainants presented a copy of communications they exchanged with CWM, in particular an email from CWM dated 13 February 2017 and 4 April 2017.[29]

The email communication of 13 February 2017 seems to have been used by the Complainants as the basis for them indicating the date of *'February 2017'* in their Complaint Form. From a review of such email, it however clearly transpires that the state and extent of the losses, if any, were not exactly clear nor did it emerge from such email at the time.

Not only did the email of 13 February 2017 not quantify or clearly indicate the total losses or expected total losses on their respective pension plan, but it rather:

(i) Indicated that there were investments in the respective portfolios of the Complainants which were yet to mature at the time.

[Indeed, as shall be seen (in Tables A and B below) further on in this decision there were various material open positions still featuring in the respective investment portfolios of the Complainants even up to April 2017].

In respect of the investment portfolio of AM, CWM had noted that *'The maturity dates for the holding are end of April and early May ...'*,[30] whilst for KM, CWM noted that *'There are currently eight GBP holdings, three funds that are showing a total growth of £1,010, one plan that has been extended and four Leonteq holdings. There are also two Leonteq holdings in Euro funds'*.[31]

[29] P. 16-18 & 19-21
[30] P. 16
[31] P. 18

(ii) Provided mixed messages to the Complainants. Whilst, with respect to the remaining investments of AM, it hinted that there will be a default resulting in a loss, it did not however indicate the extent of such loss. Furthermore, in the said email, CWM informed the Complainants that:

'Until the securities reach their maturity dates they will always be valued at a price lower than what was paid for them. The investments are liquid in that they can be sold before the maturity date but the market will not pay the full value'.[32]

As to the remaining portfolio of investments for KM, CWM did not even indicate which, if any, of the remaining investments will be, or are expected to be in default, nor indicate the expected losses.

(iii) The extent of loss suffered, and the materiality thereof, was even put into question and made even more unclear when in the same communication CWM highlighted, and gave importance to, an investigation into the Leonteq investments. In the said email, it even raised hopes of an expedient positive outcome for investors in receiving compensation on such investments.

CWM indeed noted, in the email of 13 February 2017, that:

'... However, we have recently had some concerns about the investments placed with Leonteq. An investigation was carried out and it seems that certain individuals, or possibly just one person ... acted outside of his authorised duties and without the knowledge of the company's head office in Switzerland.

Representations have been made to Leonteq and Old Mutual International (OMI) has become involved. OMI had a meeting with Leonteq last week and presented certain information ... which Leonteq promised to look into. Since then, ***Leonteq have contacted OMI to say that they would like the situation to be resolved as soon as possible****, but we still don't have a date for resolution yet.* ***We are making demands that all of our clients who have been financially disadvantaged are put into the position they were when the***

[32] P. 16

***investments were made. We are confident of a positive outcome**, but cannot say when that agreement will be reached or what the agreement will actually be.*

*... Although there is no legal obligation on our part to try to rectify matters we are **making every effort to ensure that [our] clients** are treated fairly and **receive proper compensation** ...*

... all the levels of security were voided by the actions of a very small element within the London office of Leonteq ...

...

***As stated above all of the Leonteq funds that have either in the past defaulted or are performing badly will form part of the investigation** ...'.*[33]

c) It is further noted that, in the email of 4 April 2017 sent by CWM to the Complainants, CWM again raised expectations and provided an unclear and obscure picture about the state of their respective pension plans, noting in the said email that:

*'... As a result of the poor performance of the investments supplied by Leonteq an investigation was started over a year ago ... **progress has gained pace and we feel that <u>we are very close to some form of resolution</u>. We are asking Leonteq <u>to make full restitution of all damages</u>** ...'.*[34]

To further strengthen this point, in the email of 4 April 2017, CWM further stated, in respect of AM's portfolio, that:

'For the Leonteq 1.5 Yrs US investment, £14000 was invested, £1890 was received in dividends and it matured at £6399 for an overall loss of £5711. We are asking Leonteq to return (£14000-£6399) £7601 for this investment to Philippe's policy to put him back to where he should have been. It may be that Leonteq only offer the £5711 net loss, but we will have to wait a bit longer to find out the final solution'.[35]

[33] P. 17 & 18 - Emphasis added by the Arbiter
[34] P. 19
[35] *Ibid*.

An account of the performance of the investments within the portfolio of KM was also similarly provided in the same email, where it was *inter alia* noted that *'any Leonteq resolution may relate only to OMI bondholders in the first instance with others - like Generali being covered by subsequent negotiations'*.[36]

It is considered that the Complainants were indeed being led to believe that there was a good likelihood of material compensation ensuing in the not-too-distant future.

d) The Arbiter further notes that, in a later email dated 3 October 2017 sent by the Complainants to MPM, *Pension Life* and Trafalgar, the Complainants stated *inter alia* that:

***'At the end of last week there seemed to be great optimism that an agreement in terms of compensation was coming together**. I am further devastated to hear that there may have been a setback and am urging (no begging), the parties to bring this to a conclusion ...'*.[37]

This further provides evidence that by end September 2017, at the very least, the Complainants still lacked awareness of the state of their losses.

As also testified by the Complainants during the hearing of 25 April 2022:

'…it seemed to us that Momentum were working positively with the representative, Angie Brooks from Pension Life, to resolve our situation …

…

The reason that we felt that Momentum were working towards a resolution, was that Stewart Davies had lots of meetings with Angie Brooks …

We had a report back from Angie Brooks after a very important meeting which states:

'My meeting with Stewart went well. He is undertaking to ensure that all those who have suffered losses from their pensions would be put back to

[36] P. 20. The Retirement Scheme of AM acquired a policy issued by OMI (underneath which a portfolio of investments was held) whilst the Retirement Scheme of KM acquired a Generali policy.
[37] P. 23 - Emphasis added by the Arbiter

where they should have been had the unnecessary losses not have occurred …'.[38]

g) Further considerations are also outlined below.

Other matters taken into consideration

- The Arbiter is mindful of the context of the Complaint made by the Complainants, who described themselves as being retail inexperienced investors, and who chose to file their Complaint with the OAFS themselves, without assistance, as allowed within the parameters of the law, and thus with their Complaint not being completed in a legalistic manner or with the knowledge and expertise of a professional in the field.

  The reference to *'February 2017'* made by the Complainants in the Complaint Form cannot be taken literally in the circumstances of this case for the purposes of Article 21(1)(c). It needs to be seen in the right context and keeping into consideration the explanations provided. Ultimately, reference needs to be made to the facts of the case as emerging throughout the proceedings and the proof, or lack thereof, submitted to consider the date on which the Complainants first had knowledge of the matters complained of.

- In their Complaint, the Complainants also mentioned an email dated 28 May 2017 sent by MPM to them, Angie Brooks and CWM, wherein MPM *inter alia* stated that:

  *'… **In order to start off alleviating the issue**, I will look at rebating the Trustee Fees since January 2016 for both Members and suspend such going forward **until the Members are happy with the resolution** …'*.[39, 40]

  This email was not disputed by the Service Provider. Whilst the said email cannot indeed be considered as an irrevocable offer of compensation for their losses, such email, however, clearly served to build legitimate expectations of Complainants that the offer to rebate past Trustee fees was

[38] P. 171

[39] P. 8 - Emphasis added by the Arbiter

[40] The Annual Trust Fee ranged between *'£525'* to *'£945'* in the case of the Complainants as per the *'Fee Schedule'* annexed to the *'Momentum Malta Retirement Trust Scheme Particulars'* – P. 227.

just the beginning of a process leading to substantial remediation. During such process, when the Complainant was induced to build expectations of substantial recoveries, it cannot be said that the Complainant had first knowledge on the quantum of the losses that they would incur.

Such an email cannot be considered on its own, but has to importantly be seen in light of the ongoing communications the Complainants had with CWM which indicated possible material compensation with respect to the Leonteq investments as indicated above, and even compensation offered by CWM itself as outlined below.

It is indeed noted that draft compensation agreements between CWM and the Complainants were even considered at the time (which agreements ended up being ultimately refused by the Complainants). As confirmed during the hearing of 25 April 2022, the Complainants testified *inter alia* that:

'It is being said that back in 2017, settlement agreements were passed on to us from CWM, where CWM agreed to make compensation payments to us'.[41]

In its additional submissions presented during the case, MPM itself noted that *'In fact, in June 2017, draft compensation agreement were sent to the Ms'*.[42]

Whilst MPM was indeed not a party to the said draft settlement agreement, this further suggests and corroborates that the situation was fluid and unclear at the time and there was no clear knowledge on the part of the Complainants on the losses that they were essentially going to suffer.

- Moreover, the Arbiter notes that even in the submissions made by MPM before him, MPM itself highlighted the proceedings before the High Court of Justice of the Isle of Man involving allegations of fraud that were eventually filed (later *'during 2018'*) by *Old Mutual International* against

[41] P. 172
[42] P. 252

Leonteq Securities AG.[43] In the affidavit made by the Managing Director of MPM, it was *inter alia* stated that:

'… By Momentum's calculations, ***if the litigation against Leonteq is successful, approximately 90% of the losses incurred by all claimants will be reimbursed by Leonteq through this litigation****.*

This is significant on two fronts. First, if those proceedings are successful it becomes manifestly evident that any losses incurred on the Leonteq investments were due to the fault of Leonteq … Secondly, any recovery made will be paid out to members who will be compensated for their loss. ***In the circumstances, it would be premature to order the payment of any compensation to members by Momentum****'*.[44]

Hence, whilst on the one hand, the Service Provider is raising the plea of prescription in respect of a complaint filed against it, on the other hand, MPM is claiming, even in its submissions before the Arbiter, that any order for the payment of compensation on its part is premature as nearly all of the losses (*'approximately 90%'*) could be reimbursed.[45] This, in itself, is contradictory to their claim that Complainants had first knowledge of the subject matter of the complaint in February 2017.

- It is ultimately noted that the only reason why the Service Provider justified the plea of prescription, is simply for the fact that the Complainants had indicated the date of *'February 2017'* in page 2 of their Complaint Form to the OAFS.

  The mere indication of such a date, however, cannot be deemed on its own as a sufficient and/or satisfactory basis to justify the plea raised in terms of Article 21(1)(c) of the Act.

  The Service Provider had the onus and all the opportunity to adequately substantiate the plea it raised, but, in essence, it merely based its plea on the date indicated by the Complainants in the Complaint Form and just

[43] P. 192 - 194
[44] P. 193 – Emphasis added by the Arbiter
[45] P. 193

mentioned that it only offered to assist and not compensate the Complainants when it considered to rebate its own fees.

As noted above, the Complainants had however themselves clarified that the indicated date of February 2017 is the time when they discovered that their funds *'were decreasing in value rapidly'*.[46] The communication of February 2017 mentioned above cannot reasonably be deemed to have put the Complainants in a state of being knowledgeable of the matters complained of, for the reasons already amply explained.

The Arbiter cannot indeed satisfactorily and reasonably conclude that this was the time when the Complainants had knowledge of the losses they ultimately complained about. At the time, in February 2017 (and even after August 2017), the Complainants were still in the process of gathering the material facts and information about their exact situation, with the losses not being clear, certain and neither principally determinable.

According to the evidence and documentation emerging during the case, it is more plausible and reasonable to conclude that the Complainants first had knowledge about the matters complained of in November 2017,[47] this being the date when the Complainants themselves admitted that they realised *'that there never was going to be any resolution, nor any fees reimbursed'*,[48] as declared by them in their Complaint Form.

By then, the compensations that they were led and given hope to believe that would (quickly) occur and which would have had a material bearing in the determination of their Scheme's performance, were not forthcoming.

Furthermore, given the particular circumstances of this case, the question arises whether the Service Provider acted in absolute good faith in abetting and/or inducing the Complainants to build expectations during the period leading up to November 2017 of substantial recoveries of the losses. This occurred through negotiations with the parties involved and lack of

[46] P. 7
[47] P. 8
[48] *Ibid.*

intervention in the misleading impressions about material positive resolutions that were being provided to the Complainants at the time.

The Arbiter in fact also cannot find any justification for MPM replying to their complaint (of 20 August 2019) five months later, on 28 January 2020, defending their own position, claiming no responsibility, giving no clear answer to their query over CWM's licence to provide pension advice nor explaining why their fees were never reimbursed. Evidently, MPM were struggling to justify their change of attitude.

Whilst the Complainants could have realised (prior to 20 August 2017), that they might incur certain losses on some of their investments, however, it has not been satisfactorily proven nor emerged that prior to such date, they had knowledge of the matters complained of (and accordingly had the information, facts or understanding of the losses on their pension plans).

Decision on the plea raised with respect to Article 21(1)(c)

In summary, the Arbiter cannot ignore the particular circumstances of this case and also not give weighting to the credible discussions and indications of positive resolution on compensation and measures to alleviate the Complainants' concerns that occurred at the time, as emerging during this case.

It has indeed clearly and satisfactorily emerged that during the period of February 2017 and October 2017, the Complainants were led to believe that they could receive and/or negotiate a substantial recovery of their pension schemes. The positive resolutions indicated by the parties, as considered above, however, later transpired (in November 2017) not only as not being possible to achieve in the near future but elements of the indicated compensations actually turned out to have been unreliable, not meaningful nor effective at that time. Consequently, this is, in itself, a valid reason to accept that the Complainants were not aware of the matters complained of before November 2017.

In the particular circumstances of this Complaint and for the reasons amply mentioned, the Arbiter cannot fairly, reasonably and justifiably conclude that the Complainants registered their complaint in writing with the financial services provider later than two years from the day on which the Complainants

first had knowledge of the matters complained of, as claimed by the Service Provider.

The Arbiter is accordingly dismissing the Service Provider's plea made in terms of Article 21(1)(c) of the Act and determines that he has the competence to hear this Complaint. The Arbiter shall accordingly consider the merits of the case next.

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.[49]

The Complainants

The Complainants, born in 1960 and 1957 respectively, are of British and French nationality and resided in France at the time of their application for membership as per the details contained in the respective MPM's Application Form dated 7 November 2012 and 22 July 2014.[50]

Their occupation was indicated as *'XXXXX'* and *'XXXXX'* respectively in the said forms.[51]

The Complainants were accepted by MPM as members of the Retirement Scheme in December 2012 and August 2014 respectively.[52]

Their risk profile in their individual MPM Application form was indicated as follows:[53]

- *'No risk'* in respect of KM with her attitude being *'Uncomfortable with risk but prepared to take some risk to provide opportunity for growth over the longer term'*;[54]

[49] Cap. 555, Art .19(3)(b)
[50] P. 60, 65, 138 & 145
[51] P. 60 & 138
[52] P. 69 & 151
[53] P. 23 & 39
[54] P. 63

- *'Medium to High'* in respect of AM with the risk profile defined as *'There is a chance of more growth over the longer term but with an increased possibility of the capital value declining too'*.[55]

Their *'Attitude to Risk'* was stipulated as *'Low'* and *'Higher Medium'* respectively in the Annual Member Statements issued by MPM.[56]

In the Fact Find Form issued by CWM their risk profile and attitude to risk was indicated as follows:

- An attitude to risk of Low to Medium in respect of KM;[57]
- In respect of AM, a *'Medium'* attitude to risk with an *'Appetite for loss'* of 50% and an *'Attitude to risk'* of 4 out of a scale of 1 to 6.[58]

In the respective CWM Fact Find, it was indicated that apart from their pension plans that they held at the time, the Complainants had no other investment instruments.[59]

During the course of the proceedings it was not indicated, nor has it emerged, that the Complainants were professional investors. The Complainants can accordingly be regarded as retail clients.

Particularities of the Case

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

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta and authorised by the MFSA.[60] The Complainants were members of the Retirement Scheme and had their own respective individual and separate Retirement Scheme account.

Continental Wealth Management ('CWM') was indicated as the Complainants' appointed professional adviser in respect of their distinct Scheme account.[61] CWM provided investment advice to the Complainants with respect to the

[55] P. 139
[56] P. 70-73 & 152-154
[57] P. 36
[58] P. 131
[59] P. 35 & 129
[60] https://www.mfsa.mt/financial-services-register/
[61] P. 61 & 138

selection and composition of the investments underlying their respective Scheme.

The investments within their respective Schemes were accordingly directed by the members who received investment advice from CWM as their investment adviser, with the investments subject to the oversight and acceptance of MPM as the trustee and RSA of the Scheme.

The Retirement Scheme's Underlying Investments

The Retirement Scheme in respect of KM, acquired a life policy issued by *Generali International* in Ireland within which the underlying investment portfolio was held.[62] MPM confirmed in February 2013, that it had received the sum of GBP 132,315 into her Retirement Scheme.[63] The initial total premium transferred into the policy for investment in February 2013, amounted to GBP 126,855.05.[64]

The Retirement Scheme in respect of AM, acquired a life policy, the *European Executive Investment Bond* issued by *Old Mutual International* ('OMI') in Ireland within which the underlying investment portfolio was held.[65] According to a statement issued by MPM that was presented during the case, MPM received the sum of GBP 46,663.75 into his Retirement Scheme in September 2014.[66] The initial total premium transferred into the OMI policy for investment in September 2014, amounted to GBP 44,448.84 according to the same statement.[67]

The investment transactions (excluding FX positions) that were allowed to be undertaken within the respective policies - as emerging from the *'Cash Account Transaction Report'* covering the period February 2013 to April 2017 in respect of KM and the '*Historical Cash Account Transactions'* statement for the period ending April 2017 in respect of AM - are summarised in Table A and B below.[68]

[62] P. 56
[63] P. 57
[64] P. 56
[65] P. 155
[66] P. 134
[67] *Ibid.*
[68] P. 91 - 118 & 155 - 160

Table A – Data for KM's Scheme according to the *'Cash Account Transaction Report'* issued by Generali till 28.04.2017

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold/Matured	Maturity/ Sale price	Realised Capital Loss/ Profit (exclusive dividends/ interest)
SN	Commerzbank AG 1yr (630 units)	22.02.13	GBP	63,000	24.02.14 (630 units)	63,000	0
SN	RBC Capital Markets (600 units)	18.03.13	GBP	60,000	04.12.13 (300 units) 18.03.14 (300 units)	29,700 30,000	-300
SN	RBC Capital Markets 2 yr (70 units)	18.10.13	GBP	7,000	05.03.14 (70 units)	7,074.90	+74.90
SN	Commerzbank AG (150 units)	18.12.13	GBP	15,000	18.06.15 (150 units)	1,234.50	-13,765.50
SN	RBC Capital Markets (150 units)	13.01.14	GBP	15,000	05.11.14 (150 units)	12,675	-2,325
SN	Commerzbank AG (320 units) Commerzbank AG (70 units)	21.03.14 21.03.14	GBP	32,000 7,000	23.03.15 (390 units)	39,000	0
SN	RBC Capital Markets (320 units)	25.03.14	GBP	32,000	Open position as at 28.04.17		
SN	RBC Capital Markets (150 units)	17.04.14	GBP	15,000	18.04.16 (150 units)	37.67	-14,962.33
SN	Nomura International (150 units)	29.04.14	GBP	15,000	29.04.15 (150 units)	15,000	0
SN	EFG Financial Products 1.5yr (40 units)	23.10.14	GBP	4,000	29.01.15 (40 units)	4,000	0
SN	Commerzbank AG (40 units)	27.03.15	GBP	4,000	Open position as at 28.04.17		
SN	Commerzbank AG (70 units)	07.05.15	GBP	7,000	Open position as at 28.04.17		
SN	EFG Financial Products (80 units)	08.05.15	GBP	7,388.80	Open position as at 28.04.17		
SN	Notenstein Private Bank 1.5y (70 units)	08.09.15	GBP	7,000	Open position as at 28.04.17		
Fund	Vam Fund (Lux) (56.922 units)	18.04.16	GBP	5,999.92	Open position as at 28.04.17		

Fund	IFSL Brooks MacDonald (5536.6913 units)	29.04.16	GBP	6,000	Open position as at 28.04.17		
Fund	Gemini Investment Funds (53.7715 units)	07.09.16	GBP	5,000	Open position as at 28.04.17		
SN	RBC Capital Markets (50 units)	14.11.14	EUR	5,000	26.08.16 (50 units)	4,673.50	
SNs	EFG Financial Products (50 units)	17.11.14	EUR	5,000	18.06.2015 (300 units)	30,000	
	EFG Financial Products (50 units)	24.11.14		4,955	06.04.16 (100 units)	8,160	
	EFG Financial Products (300 units)	15.04.15		30,000	14.02.17 (300 units)	3,874.23	
	EFG Financial Products (220 units)	24.04.15		22,000	Open position of 220 units as at 28.04.17		
	EFG Financial Products 1.5Yr (300 units)	14.08.15		30,000			

Table B – Data for AM's Scheme according to the *'Historical Cash Account Transactions'* issued by OMI till 27.04.2017

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold/Matured	Maturity/ Sale price	Realised Capital Loss/ Profit (exclusive dividends/ interest)
SN	Leonteq 1.5Y Multi Barrier Leonteq 1.5Y MultiBarrier	22.09.14 22.09.14	GBP	14,970 14,000	23.04.15 17.03.16	14,700 6,398.67	-7,871.33
SN	Commerzbnk 1.5Y AC Phnx NT ARO	25.09.14	GBP	14,000	06.04.16	830.62	-13,169.38
SN	EFG Red April 5	08.05.15	EUR	11,000	Open position as at 27.04.17		
SN	EFG Red April 6	08.05.15	EUR	11,000	Open position as at 27.04.17		

It clearly emerges that the investment portfolios held within the Complainants' respective Retirement Scheme account indeed comprised, predominantly (or exclusively in case of AM), of structured note ('SN') investments with such portfolios containing material investment positions

into single investment instruments, apart from material exposures to the same issuers.

Observations and Conclusions

Background and application of aspects raised in similar cases

The Arbiter has previously exhaustively considered multiple complaints against the Service Provider similar to that raised by the Complainants. The Arbiter would like to, in particular, refer to the single decision issued to over thirty complainants on 28 July 2020,[69] as well as other multiple cases such as case 073/2019, 076/2019, 070/2019 and 074/2020.[70] The said decisions were also all confirmed by the Court of Appeal (Inferior Jurisdiction) with numbers 39/2020 LM, 37/2021 LM, 38/2021 LM, 39/2021 LM and 124/2021 LM respectively.

For the sake of streamlining the decision, avoiding repetition, and deciding the case in an expeditious manner as he is obliged to do in terms of Chapter 555, the Arbiter shall not reproduce here details of the same or similarly applicable background and analysis, namely, with respect to the following aspects already extensively covered in the said decisions:

- the legal framework as explained in the section titled *'The Legal Framework'* of the said decisions;
- responsibilities of MPM as explained in the section titled the *'Responsibilities of the Service Provider'*;
- the observations on structured notes as outlined in the *'Preliminary observations'* for *'Investment into Structured Notes'* as applicable.

[69] https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf
[70] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20073-2019%20-%20PG%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20076-2019%20-%20MN%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20070-2019%20-%20GA%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20074-2020%20-%20EP%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

For all intents and purposes, these same sections are, in essence, considered relevant and applicable also to the case in question with the exception of pertinent details specifically applicable to each case (such as the extent of loss, the particular underlying life assurance policy and the exact investments forming part of the investment portfolio of each complainant).

Other observations and comments below however also refer in respect of the disputed investments in the case under consideration.

The nature of the disputed investments

As part of their submissions, the Complainants produced various dealing instruction forms and fact sheets in respect of the structured notes investments featuring within their respective portfolios. The ISIN of a number of structured notes emerged from the dealing instructions provided as follows:[71]

a) In respect of KM's Scheme: [72]
   - for *RBC E-Commerce Income* (ISIN No. XS1116370088);
   - for *(Leonteq) EFG Red Nov* (ISIN No. CH0259239439);
   - for *Notenstein July 1* (ISIN No. CH0283714068);
   - for *EFG June 6* (ISIN No. CH0283710215);
   - for *EFG March 3* (ISIN No. CH0273392818);
   - for *Commerzbank April 1* (ISIN No. DE000CB0FGC6);
   - for *EFG April 4* (ISIN No. CH0273397288);
   - for *Comm April 2 (*ISIN No. XS1218203823);
   - for *Comm Yellow March 1* (ISIN No. DE000C244849);
   - for *Comm Yellow February 1* (ISIN No. XS1180132042);
   - for *Leonteq COSI Nov Blue 1* (ISIN No. CH0255091668);
   - for *RBC Festive* (ISIN No. XS1000868247);
   - for *Leonteq EFG Red Income* (ISIN No. CH0254450338);
   - for *RBC Travel Income Note* (ISIN No. XS0973067530);
   - for *RBC Large Tech Income* (ISIN No. XS1015512533);
   - for *Commerzbank 10% Pharmaceutical* (ISIN No. XS1035007969);

[71] The names of the structured notes are indicated as produced in the *Dealing Instruction Forms*. The names of the structured notes as listed in the *Dealing Instruction Notes* may not exactly reflect the corresponding name for the same structured note as indicated in the Account Statements – this is however considered to be cosmetic and arising due to the manner in which the investments were reported in separate forms/statements.
[72] P. 37 - 55

- for *Nomura 9% US Energy* (ISIN No. XS1048446188);
- for *RBC 10% Energy Inc.* (ISIN No. XS1015499921);
- for *RBC Festive Income Note* (ISIN No. XS1000868247).

b) In respect of AM's Scheme:[73]
- for *Comm 1 yr 6m Auto* (ISIN No. XS1112506180);
- for *Leonteq Multi Barrier US Opp* (ISIN No. CH0245655888);
- for *Leonteq Multi Barrier Pharm* (ISIN No. CH0245655904).

The Complainants produced a number of Fact Sheets themselves as part of their submissions, which Fact Sheets match the ISIN numbers as featured in the Dealing Instruction Forms.

The valid Fact Sheets produced in respect of KM are namely in respect of the following:

- for *RBC 10% Energy Inc.* (ISIN No. XS1015499921);[74]
- for *Commerzbank 10% Pharmaceutical* (ISIN No. XS1035007969);[75]
- for *Nomura 9% US Energy* (ISIN No. XS1048446188);[76]
- for *RBC Festive* (ISIN No. XS1000868247);[77]
- for *RBC Large Tech Income* (ISIN No. XS1015512533);[78]

Whilst for AM no fact sheets were produced in respect of the structured notes featured in his portfolio, it is noted that the above-mentioned ISIN numbers all featured in another similar case (case ASF 074/2020) as mentioned above.

From the above, it clearly emerges that the nature of the structured notes allowed within the Complainants' portfolios had the same or similar features of the notes (which led to the same material losses) as described in the *'Preliminary observations'* for *'Investment into Structured Notes'* as referred to above, which were extensively considered in other cases.

[73] P. 133
[74] P. 74 - 77
[75] P. 78 - 79
[76] P. 80 - 82
[77] P. 83 - 86
[78] P. 87 - 90

It is also evident that MPM had permitted structured products that were actually targeted for 'professional investors' and hence in conflict with the Complainants' profile as retail investors.

No evidence has indeed emerged or been produced by the Service Provider that the structured notes that were allowed to be invested into within their respective Retirement Schemes were retail products.

Excessive exposures resulting in the disputed investment portfolio and lack of compliance with applicable investment guidelines/rules

As clearly emerging from Tables A and B above, the respective portfolios **contained predominant if not exclusive exposure to structured notes investments as well as material investment positions into single structured notes investments, apart from material exposures to the same issuers**.

The Arbiter considers that it cannot reasonably be concluded that such high and unjustifiable exposures that were allowed to occur by MPM within the Complainants Retirement Scheme, reflected in any way the requirement for their pension fund to be *'invested in a prudent manner and in the best interests of the member'* as MPM, in its capacity as Trustee and RSA of the Scheme, was bound to ensure as also specified in the *'Momentum Malta Retirement Trust Scheme Particulars'*.[79]

The permitted allocation is, furthermore, also considered as not being either reflective of and in conformity with, MPM own's Investment Guidelines[80] and the MFSA's rules applicable at the time - as similarly analysed and concluded in the section titled *'The permitted portfolio composition'* in the Arbiter's afore-mentioned previous decisions.[81]

Other matters

Whilst the Arbiter has taken into consideration the other aspects raised by the Complainants in their Complaint, particular focus has been placed on the key

[79] P. 322
[80] P. 322 & 323
[81] That is, for example, in the single case decided by the Arbiter on 28 July 2020 and the other OAFS cases with numbers ASF 073/2019, 076/2019, 070/2019 and 074/2020.

determining aspect of the investment portfolio as amply considered in this decision.

Additional observations

It is noted that as part of its submissions, the Service Provider has, in this case, also filed copies of two legal opinions drafted for MPM dated 30 March 2022 and 19 December 2019 in respect of the application and interpretation of the investment restrictions under the regulatory framework.[82]

The Arbiter notes that such legal opinions make, *inter alia*, much emphasis on the point that, at the time of the disputed investments, the investment restrictions were not applicable and were not to be interpreted as applicable at the member's account but had to be applied generally on the Scheme.

The Arbiter has already considered such an aspect in previous decisions – as outlined, for example, under the section titled *'Context of entire portfolio and substance of MPM's Investment Guidelines'* in case OAFS ASF 076/2019.[83]

This is apart from the fact that even in the covering letter dated 28 April 2011 to the Scheme's Certificate of Registration (which letter was part of the registration conditions as per para. 2.3 of such certificate),[84] the MFSA itself had stipulated that:

'We understand that the assets of the Scheme will not be pooled and will not be unitised but the trust will consist of separate individual funds, whereby assets and liabilities relating to each member of the Scheme will be accounted for separately for internal accounting and administrative purposes … The Standard Operating Conditions forming part of the Directives for Occupational Retirement Schemes, Retirement Funds and related parties issued under the SFA will apply separately to each member's individual fund other than: [i] the conditions relating to audit; and [ii] the annual report and reports as required in terms of the SFA.' [85]

[82] P. 359 - 362 & 363 - 375
[83] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20076-2019%20-%20MN%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf
[84] P. 303
[85] P. 300 – Emphasis added by the Arbiter

Indeed, any other interpretation would have defeated the safeguards that the regulatory requirements were intended to achieve for the protection of the members in respect of investments and applicable diversification requirements.

The said legal opinions do not change the Arbiter's position and the Arbiter accordingly stands by the position taken as outlined in this decision and relevant previous decisions as referred to above.

Final Remarks

As highlighted in other decisions, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainants, the Retirement Scheme Administrator had clear duties to check and ensure that the portfolio composition recommended by the investment adviser provided a suitable level of diversification and was *inter alia* in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme. The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

It is considered that had there been a careful consideration of the contested structured products and extent of exposure to such products and their issuers, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainants' best interests amongst others.

It has also satisfactorily resulted that the permitted investment portfolios were not reflective of, and in conformity with, the Complainants' respective profile, attitude to risk and investment objectives, nor in conformity with the applicable

principles and parameters and the requirements and conditions specified in the rules and MPM's own documentation.

The Complainants ultimately relied on MPM as the Trustee and Retirement Scheme Administrator of the Scheme as well as other parties within the Scheme's structure, to achieve the scope for which the pension arrangement was undertaken, that is, to provide for retirement benefits and also reasonably expect a return to safeguard their pension.

Whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainants and in carrying out its duties as Trustee, particularly when it came to the oversight functions with respect to the Scheme and the investment portfolio structure.

It is considered that the Service Provider ultimately failed to act with the prudence, diligence and attention of a *bonus paterfamilias.*[86]

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[87] **of the Complainants who had placed their trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.**

Conclusion

For the reasons stated earlier on in this decision, the Arbiter considers the Complaint to be fair, equitable, and reasonable in the particular circumstances and substantive merits of the case and is accepting it in so far as it is compatible with this decision.

[86] Cap. 331 of the Laws of Malta, Art. 21(1)
[87] Cap. 555, Article 19(3)(c)

Cognizance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment adviser to the Members of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the losses incurred.

Compensation

Being mindful of the key role of Momentum Pensions Malta Limited as Trustee and Retirement Scheme Administrator of the Momentum Malta Retirement Trust and, in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Complainants respective Retirement Scheme, the Arbiter concludes that the Complainants should be compensated by Momentum Pensions Malta Limited for part of the realised losses experienced on their respective pension portfolio.

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited, to be held responsible for seventy per cent of the sum of the Net Loss incurred by Complainant KM and sixty per cent of the sum of the Net Loss incurred by Complainant AM within their respective whole portfolio of underlying investments.

The different percentage compensation awarded reflects the difference in the risk profiles of the Complainants as earlier explained. The Arbiter accordingly awards a higher rate of compensation to the Complainant with a substantially lower risk profile who accordingly merited higher protection from the Service Provider.

Given that the Arbiter does not have the figures in order to calculate the exact sum of compensation, details of how such Net Loss is to be calculated are stipulated below.

The Net Loss calculated on the Complainants' respective portfolio shall be calculated individually for each Complainant as follows:

From their original investment amount (of GBP 132,315 and GBP 46,663.75) into their respective Scheme deduct:

1. **Withdrawals and payments made to the Complainants respectively out of their Retirement Scheme (inclusive of the final payment paid to the Complainants upon surrender of their Scheme)**

2. **Fees and charges paid on their Scheme and respective underlying policy.**

The amount of the original investment amount stipulated above less the sum of items 1 and 2 above shall be the net loss of their respective portfolio of which 70%/60% (as above explained) is to be paid by the Service Provider respectively to the Complainants.

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

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

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

The costs of these proceedings are to be borne by the Service Provider.

Alfred Mifsud
Arbiter for Financial Services