

Before the Arbiter for Financial Services

Case ASF 040/2022

GP

(‘the Complainant’)

vs

Momentum Pensions Malta Limited

(C52627) (‘MPM’ or ‘the Service Provider’)

Sitting of the 14 March 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.

The Complaint, in essence, relates to the Complainant’s claims of substantial losses suffered on her Retirement Scheme due to the Service Provider’s alleged failure to act in her best interests and to adequately undertake its duty of care and monitor her pension appropriately, as it was primarily claimed that MPM permitted unlicensed and unqualified advisers, as well as high-risk, inappropriate investments within her pension structure, and did not ensure that she received all statements relating to the performance of her pension.

The Complainant explained that she was approached by *Continental Wealth Management* (‘CWM’) in 2012/2013 and was advised to transfer her UK pensions into a QROPS.

Some years later she was, for the first time, asked by CWM to sign a form to move some investments. Shortly thereafter, MPM notified her by email that it was withdrawing its terms of service with CWM and that a company called *Trafalgar* would be taking over.

The Complainant claimed that she then received a statement for the first time and was alarmed to see that the value of her pension had plummeted to around half of the invested value.

She noted that she was assured by Stewart Davies of MPM that Trafalgar was qualified to take over but at that stage, she was very cynical. The Complainant further noted that Stewart Davies was most helpful in providing explanations and paperwork, all of which was very confusing as it contradicted her memories that the investments were high risk.

She further claimed that when she pointed out to Stewart Davies that the first statement received from MPM stated '*low risk*', he told her that this was an error in the statement as the original paperwork stated otherwise.

The Complainant noted that she noticed that all the risk boxes were ticked and not just the one of '*low risk*' that she would have selected. She explained that she remembered the original salesman agreeing with her that, as she was still young, she could afford to play it safe as she had years left to build up her pension.

The Complainant further explained that with around half of her pension lost, she decided to place the rest as soon as possible and without paying penalties, into a cash account held with MPM.

She noted that she cannot trust the system anymore and noted that her cash will only devalue by inflation and not through a constant deduction of fees paid to largely invisible corporations and processes that were never explained to her.

The Complainant submitted that until February 2022 she was not aware that MPM had tried to hide its failure in its duties.

The Complainant expected the trustee of her Scheme:

1. To verify that all investments were appropriate for the pension scheme;

2. To ensure that the pension holder, and not just the adviser, receives all statements regarding performance which she submitted only happened after the demise of CWM;
3. To be able to provide supporting documentation rather than constantly ask her to provide copies;
4. To verify signatures on purchase and sales documents as originals and not copies;
5. To monitor and react to massive losses at the very least by drawing it to the pension holder's attention instead of conveniently sending a statement just to the financial adviser;
6. To actively ensure that all financial advisers are actually qualified before doing business with them. The Complainant further submitted that she has now found out that *Trafalgar*, which took over from CWM, is also not qualified to provide pension advice.

The Complainant also remarked that MPM only replied to her Complaint to state that it needed more time to investigate and to also ask her to provide it with documentation. The Complainant submitted that MPM should have such information itself if it had done its job properly.

In her formal complaint to MPM dated 10 February 2022, the Complainant highlighted that she had suffered severe losses on her pension fund due to MPM accepting business from an unlicensed advisory firm, CWM, using unqualified advisors and *Trafalgar International* which, she claimed, was only licensed for Insurance Mediation.

The Complainant further noted that she had only recently become aware of MPM's failings in its duty of care and to act in her best interests as her trustee.¹

In the letter of February 2022 to MPM, the Complainant further claimed that all of the investments made within her retail pension portfolio were passed by MPM and made into inappropriate high-risk structured notes. She alleged that this placed her pension fund at a very high and unacceptable risk of being

¹ Page (P.) 8

destroyed. The Complainant submitted that, as trustee, MPM should have acted in her best interests and disallowed the inappropriate and non-diverse investments which MPM was allegedly aware of since early 2015. It was also claimed that MPM failed to follow its own guidelines.

Remedy requested

The Complainant noted that MPM received the sum of £130,533.96, out of which £114,098.19 were sent to OMI (Old Mutual International) for investment. The said amount had plummeted in value and the remaining balance of £73,902.33 has been sitting in a client cash account held with MPM since November 2020.

The Complainant further noted that she is aware that other people in exactly the same situation had been awarded 70% of the losses. She asked to receive the same award, with a minimum of £16,435.77, these being the fees she paid for not having her pension monitored appropriately.

Having considered, in its entirety, the Service Provider's reply, including attachments,²

Where the Service Provider explained and submitted the following:

Introduction

1. That MPM 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.
2. That MPM is not licensed to provide investment advice.

Submission of Competence and Prescription

² P. 23-121

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 page 14 of the decision of the Arbiter in case number 070/2019).
4. It noted that the Act came into force on 18 April 2016.

MPM submitted that although in her complaint, the Complainant declares that she first had knowledge of the matters complained of on 01/02/2022, MPM considers that the Complainant was aware of the matters complained of far earlier.

It noted that as early as 22 December 2017, and throughout 2018, the Complainant was corresponding with MPM with respect to her portfolio. The Complainant exchanged a significant number of emails with MPM. In December 2017, she was provided with a number of documents, including a valuation, showing that the then current market value stood at GBP75,382.94 – MPM referred to ‘Doc. MS1’ attached to its reply³ and furthermore noted that statements were provided to the member annually as per the copies attached in ‘Doc. MS2’-‘Doc. MS7’ attached to its reply.⁴

MPM submitted that this is almost the same figure provided by the complainant in her Complaint (where she alleged that her investment plummeted from GBP114,098.19 to GBP73,902.33) – therefore, as far back as 2017, she was aware that the value of her investment stood at the same amount at which it approximately stood at the time of her Complaint.

The Complainant first complained to MPM on 10 February 2022. This is more than two years from the day on which the Complainant first had knowledge of the matters complained of.

5. It further submitted that the Complaint is also prescribed pursuant to Article 21(1)(b) of Chapter 55 of the Laws of Malta.

Even with respect to conduct occurring before the entry into force of the Act (on 18 April 2016), the Complaint is time-barred. Article 21(1)(b) came into force on 18 April 2016 – however, the Complaint was filed on 4 April

³ P. 28

⁴ P. 97-121

2022 and therefore beyond the two-year period mentioned in the said article.

It submitted that the Complaint should therefore be rejected by the Arbiter.

Reply to the complaints made

6. That, in the first place, the Complainant appointed CWM as her adviser. Before CWM ceased trading, it acted as an adviser and provided financial advice to the investors. CWM advised the Complainant to invest in the products which have led to the Complainant's losses. Accordingly, MPM considers that CWM is the proper respondent to this claim.
7. MPM submitted that any business introduced by CWM to MPM fell within the MFSA's Pension Rules for Service Providers, as they relate to RSAs. It further noted that it does not work on a commission basis. It neither receives commissions nor pays commissions to any third parties but only charges a fixed fee for the services it provides – this fee does not change, regardless of the underlying investment (which the Complainant was advised to invest in by CWM). Accordingly, MPM did not stand to make any gain or benefit as a result of the Complainant investing in any particular underlying investments.
8. MPM further replied that at the time the Complainant became a member of the Scheme, there was no obligation incumbent on it to carry out due diligence with respect to CWM. MPM reiterated that it has fulfilled all obligations incumbent upon it from time to time. There was no obligation for it to verify whether CWM was a regulated entity or whether it was authorized to provide advice.

It noted that under the Special Funds Act ('SFA'), only Occupational Pension Schemes were provided for and covered the Rules providing for schemes established by an Employer, and where the Scheme would appoint/ self-appoint an Investment Manager to manage the investments.

MPM noted that Member Directed Schemes were not introduced until the introduction of the Retirement Pensions Act ('RPA') and there was no legal or regulatory requirement regarding licensed Investment Advisers.

On 1 April 2013, the MFSA issued a consultation document on the Regulations and draft Pension Rules issued under the RPA. Those rules subsequently came into force on 1 January 2016. Section 3.2.2(d) of the consultation stated that:

'In view of the fact that in a number of instances, members of personal retirement schemes appoint their own investment managers, a new section has been included in the proposed Pension Rules establishing certain requirements for these types of schemes'.⁵

MPM further noted that in the proposed Rules, B12 was the new section introduced entitled '*Supplementary Conditions in the case of entirely Member Directed Schemes*' which provided the following:

'B12.1 'A Scheme may permit a member to direct the investments of their individual accounts. The Scheme may offer a selection of investment options for the Member to choose from and/or allow the Member unrestricted choice of investment decisions – which the Member may affect himself or may choose to appoint an Investment Manager to manage the assets on his behalf. The following conditions shall apply:

...

(h) The Scheme Document should include a statement advising members that in opting to direct the investments in their individual account, in selecting or directing the investments themselves, they are assuming additional responsibilities and risks on them, and they should seek professional advice for the management of such investments. Alternatively, if they opt to appoint their own investment manager to manage the investments in their own individual account on their behalf, they should ensure that the appointed party is properly qualified and regulated as may

⁵ P. 25

be applicable. The Scheme Document should also clearly outline the investment options it offers to Members.’⁶

MPM submitted that the Authority hence itself communicated a clear position from 2013 that it was the member’s responsibility to direct the investments and to ensure that whoever is appointed to advise on investments is duly regulated. MPM submitted that one could thus not come to the conclusion that there was any responsibility on the scheme administrator to verify the regulated status of the investment adviser appointed by the member.

MPM further noted that the RPA Rules were then published in 2015, effective from January 2016. Part B.9 of the Pension Rules for Personal Retirement Schemes only came into effect on 1 January 2019, and it was only at this point that a regulatory requirement for RSA’s to carry out due diligence on the licensing of an Investment Adviser came into force.

Accordingly, it argued there was no regulatory obligation on the part of any RSA prior to 1 January 2019 to conduct any due diligence on any investment adviser that was member appointed or to verify the regulatory status of such adviser. MPM submitted that pursuant to the 2015 regulations that remained in force in the meantime, such responsibility was indeed placed squarely on the member.

MPM noted that the implementation of part B.9 was delayed on four subsequent occasions, and throughout 2017 and 2018 there was further in-depth consultation with the Authority (by MARSP), which included a major focus on the licensing and due diligence requirements of Investment Advisers. This requirement is still a matter of current consultation with further draft changes being proposed.

9. It submitted that, furthermore, from 2015, *Trafalgar International GmbH* (‘Trafalgar’) was ultimately responsible for the provision of advice by Dawn Kirby.

⁶ P. 25 – Emphasis made by the Service Provider

In 2015, Trafalgar confirmed that CWM advisers were employees of Trafalgar (referred to as agents but not Tied Agents). Hence, the Complainant's appointed adviser, Dawn Kirby, was in an employee relationship with Trafalgar and therefore she was regulated and licensed to provide advice under Trafalgar's licensing. All advice from this time, including reviewing the Complainant's existing portfolio and subsequent dealing instructions submitted, was regulated advice provided by Trafalgar.

MPM further noted that in 2015, Trafalgar confirmed they provided regulation and a compliance role for transactions carried out by their employees and that they had ultimate responsibility as the principal.

As part of the compliance process, all business was strictly controlled via the Head Office Business Unit in Germany. It noted that Trafalgar confirmed they also separately risk rated all funds/structured notes and reviewed such in line with their respective fact finds, as part of its own duty of care.

When Terms of business with CWM were terminated by MPM, Trafalgar as their principal/employer took over all Members, as they were Trafalgar's Members/Clients, and this could only occur as this was factually the case.

10. MPM replied that it has at all times fulfilled its obligations with respect to the Complainant.
11. It submitted that the investments were made in line with both MPM's investment guidelines and MFSA rules.
12. With respect to the Complainant's allegations that '*... there were ticks in all the risk boxes and not just the low-risk one I would have selected*', MPM replied that the risk profile it takes into account is the chosen on the application form.⁷
13. With respect to the quantum of the alleged loss, MPM submitted that this must be proved by the Complainant.

⁷ P. 26

MPM does not provide investment advice

14. MPM submitted that it has, at all times, fulfilled all its obligations with respect to the Complainant and observed all laws, rules and guidelines, including investment guidelines.
15. MPM is not licensed to and does not provide investment advice and, furthermore, did not provide investment advice to the Complainant.
16. That this is clear from the application form which specifically requests the details of the Complainant's professional adviser. The Complainant also declared that she acknowledged that the services provided by MPM did not extend to financial, legal, tax, or investment advice.
17. To further reinforce the point that MPM does not provide investment advice, an entire section of the terms and conditions of business (attached to the application form) is dedicated solely to this point.

MPM's concluding comments

18. MPM reiterated that it is not responsible for the payment of any amount claimed by the Complainant and that it has, at all times, fulfilled its obligations with respect to the Complainant.
19. It submitted that it has not acted negligently, nor has it breached any of its obligations in any way.
20. MPM further submitted that the Complainant must show that it was MPM's actions or omissions which caused the loss she is alleging. It replied that in the absence of the Complainant proving this causal link, MPM cannot be found responsible for the Complainant's claims.
21. The Arbiter was accordingly requested to reject the Complainant's claims.

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 Complainant had two years to complain to the Service Provider *‘from the day on which the complainant first had knowledge of the matters complained of’*.

In her Complaint Form filed with the Office of the Arbiter for Financial Services, the Complainant indicated that the first time she had knowledge of the matters complained of was on *‘01/02/2022’*.⁸

The Service Provider contested the date indicated by the Complainant and submitted that the Complainant was aware of the matters complained of, *‘far earlier’*, noting also that *‘as early as 22 December 2017, and throughout 2018 the Complainant was corresponding with Momentum with respect to her portfolio ...’*.⁹

MPM further submitted that the Complainant *‘first complained to Momentum on the 10th February 2022’*, this being more than two years from when she first had knowledge of the matter complained of, and the Complaint was accordingly *‘prescribed pursuant to Article 21(1)(c) of Chapter 555 ...’*.¹⁰

The Arbiter shall accordingly consider the pertinent matters relevant to this plea first.

⁸ P. 2

⁹ P. 23

¹⁰ P. 24

The matters complained of

As indicated above, the matters complained of by the Complainant involve the substantial losses that the Complainant claimed she suffered on her Retirement Scheme due to MPM's alleged failures to act in her best interests, to adequately undertake its duty of care and to monitor her pension appropriately, namely given that MPM, allegedly:

- i) permitted unlicensed and unqualified advisers;
- ii) allowed high-risk, inappropriate investments within her pension structure;
- iii) did not ensure that the Complainant received all statements relating to the performance of her pension.

The claimed losses and timing related to the disputed transactions

The Complainant was accepted as a member of the Scheme on 18 December 2013.¹¹ In January 2014, the *European Executive Investment Bond* issued by *Skandia International* ('the Policy') was acquired as an underlying policy of the Scheme.^{12, 13} A total premium of GBP114,098.19 was allocated to the said Policy on 28/01/2014 with an additional top-up of GBP8,389.07 on 01/08/2014.¹⁴ The said premium was used to purchase the disputed underlying investments.

In her formal complaint letter dated 10 February 2022, the Complainant indicated, that the '*Total known loss to date: £ 48,954.93*'.¹⁵

It is also noted that the Complainant further indicated in her Complaint Form to the OAFS dated '04.04.2022', that she now had '*remaining £73,902.33*' sitting in her '*cash account*'.¹⁶

The loss complained about thus involves the sum of over GBP48,500.¹⁷

¹¹ P. 17

¹² P. 30-43 & P. 59-72

¹³ Skandia International eventually rebranded to Old Mutual International – general search over the internet

¹⁴ P. 8 & 83

¹⁵ P. 8

¹⁶ P. 1 & 4

¹⁷ GBP114,098.19 plus GBP8,389.07 less GBP73,902.33 = GBP45,584.93

The investment transactions undertaken within the policy as emerging from the *Historical Transactions Statement* presented during the case for the period January 2014 till '20/12/2017' are summarised in Table A below:¹⁸

Table A – Investment transactions between Jan 2014 till Dec 2017

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold/Matured	Maturity/Sale price	Realised Capital Loss/ Profit (exclusive dividends/ interest)
SN	Nomura Global Phoenix AC Note 2	03/02/2014	GBP	20,000	Not yet matured/sold by 20/12/2017		
SN	RBC Homebuilder Income Note	21/02/2014	GBP	38,000	23/02/2016	3,676.71	(34,323.29)
SN	Commerzbank Fixed 7% IDX NT	25/02/2014	GBP	38,000	Not yet matured/sold by 20/12/2017		
SN	BNP Paribas 5Y Anthena	04/03/2014	GBP	17,000	01/09/2014	17,850	+850
SN	Nomura 10% PA US Retail Inc	26/08/2014	GBP	8,000	26/08/2015	3,298.87	(4,701.13)
SN	Leonteq 1.5Y Multi Barrier	19/09/2014	GBP	18,000	23/04/2015	17,640	(360)
SN	Leonteq November COSI Blue 2	17/12/2014	GBP	2,503.50	16/11/2015	2,825.70	+322.20
SN	Commerzbank 1Y 5M AC Phoenix Penn DK	26/01/2015	GBP	2,000	10/08/2016	1,033.64	(966.36)
SN	Marlborough Intern Multi Income	11/09/2015	GBP	2,000	Not yet matured/sold by 20/12/2017		
SN	Exane Recovery Cert	21/10/2015	GBP	860	Not yet matured/sold by 20/12/2017		
Fund	VAM Managed Funds Lux Close Brothers Balanced	20/11/2015	GBP	3,0000	Not yet matured/sold by 20/12/2017		
SN	Investec 5Y 90% CAP Protected Growth Note	08/12/2015	GBP	3,000	Not yet matured/sold by 20/12/2017		
Fund	OMI IE GBP Invesco UK Equity	24/06/2016	GBP	3,999.98	18/09/2017	4,668.64	+668.66
Fund	Ishares GBP Corporate Bond UCITS ETF	06/09/2016	GBP	2,930.23	Not yet matured/sold by 20/12/2017		
Fund	SL Brooks Macdonald Balanced Class D ACC	22/09/2017	GBP	6,000	Not yet matured/sold by 20/12/2017		
SN	EFG Red April 5	08/05/2015	EUR	13,000	08/05/2017	1,723.52	(11,276.48)
SN	EFG Red April 6	26/11/2015	EUR	14,000	08/05/2017	519.48	(13,480.52)

¹⁸ P. 81 - 92

Other relevant matters for consideration as to when the Complainant first had knowledge of the matters complained of

- a) It is noted that in an email dated 22 December 2017 sent by the Complainant to MPM for a *'Request for Pension Update'*, the Complainant *inter alia* stated that:

*'I have been **waiting patiently for advice on where my pension stands following the collapse of CWM and subsequent accusations made by other investors.** I have received nothing since your email of 3 October 2017, and nothing ever from Trafalgar International GmbH.*

I have of course seen many emails, social media postings and previews of news articles regarding CWM, Momentum and OMI handling of funds, and these greatly alarm me. It seems that unless I join these 'disadvantaged investors', I am to hear nothing more regarding my pension funds from those entrusted with handling them'.¹⁹

In the said email of 22 December 2017, the Complainant further requested MPM to provide her with certain information, including a *'Statement of all transactions made on my behalf since receiving the initial funds in early 2014 ... Annual Member Statements ...'* as she had *'only ever received one, for the year ending 31 December 2015'*, so that she could then *'make a judgement on [her] next steps'*.²⁰

- b) MPM replied through their email dated 22 December 2017, which email provided the Complainant with a copy of the *'Annual Statements issued to you over the last two years confirming the various valuations'* as well as another *'Valuation'* and *'Transaction history'* following her request for information.²¹
- c) It is further noted that, in a subsequent email dated **'02/18/2018'**, sent by the Complainant to Stewart Davies of MPM, she *inter alia* stated that:

¹⁹ P. 29

²⁰ *Ibid.*

²¹ P. 28

'It is very concerning that low-risk investments have cost me 22,157€ and £30,164.92, excluding my current active portfolio, where only two (the smallest investments) of the eight are currently in profit anyway ...'.²²

The said email of February 2018 was described by the Complainant as being an email where she *inter alia* asked ***'Stewart why I suffered such ENORMOUS LOSSES despite ...'*** her low-risk attitude.²³

- d) The Arbiter further notes that during the hearing of 24 May 2022, the Complainant testified *inter alia* the following:

'... I suddenly received an email from Momentum saying that their terms of business with CWM were suspended,²⁴ which shocked me, obviously. And, then, they were withdrawn, and I started conversations with Momentum on what was going on. I merely thought that that was it, that my pension had gone, but I finally received a statement from Momentum.

And, then, because of these conversations, I found out that I was entitled to have access to OMI to know exactly what was going on with the investments and to find that half of my money had gone basically. Momentum sent many emails and provided me with copies of paperwork: some which I had never seen before, apart from some which I had signed originally. But a lot which I had never seen before.

But, then, more recently, at the end of last year, I found out that many other people who have lost money through CWM had recognised that Momentum were a fault. So that is really the point of which I was aware that Momentum were at fault ...'.²⁵

- e) In her final submissions, the Complainant also stated that *'my main losses occurred between 2014 and 2015'.*²⁶

The above-mentioned aspects are considered to clearly corroborate that:

²² P. 14 – Emphasis added by the Arbiter

²³ P. 13 – Emphasis added by the Arbiter

²⁴ The terms of business between MPM and CWM was withdrawn in September 2017 – P. 133

²⁵ P. 122 & 123 – Emphasis added by the Arbiter

²⁶ P. 224

(1) substantial losses had indeed materialized over the period 2015 to 2017;
(2) the Complainant had access to/received any alleged missing statements by end of December 2017 and was aware of the losses she is complaining about as emerging from her emails of 22 December 2017 and 18 February 2018. The Complainant was also aware of adverse information relating to the adviser which had '*greatly alarm[ed]*' her as also indicated at the time.

In the circumstances, the Arbiter cannot reasonably and justifiably consider the indicated date by the Complainant of '*01/02/2022*'²⁷ or the end of 2021, the latter being the time she '*found out that many other people who have lost money through CWM had recognized that Momentum was at fault*', as the date or period when she first had knowledge of the matters complained of.

The Complainant only filed a formal complaint with the Service Provider through its letter dated 10 February 2022.²⁸ This is after more than two years she is considered to have had knowledge of the matters complained of as outlined above.

For the reasons mentioned, the Arbiter considers that the plea made by the Service Provider as based on Article 21(1)(c) of Chapter 555 of the Laws of Malta should be upheld in the circumstances of this particular case.

The Arbiter accordingly declares that he does not have the competence to deal further with this complaint in terms of the said article.

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

Dr Reno Borg
Arbiter for Financial Services

²⁷ P. 2

²⁸ P. 8