

Before the Arbiter for Financial Services

Case ASF 054/2022

AM ('the Complainant')

vs

Momentum Pensions Malta Limited

(C52627) ('MPM' or 'the Service Provider')

Sitting of 21 December 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 Complainant's claims of significant financial losses of around GBP 90,000 (from his initial investment of about GBP 105,000), incurred within his Retirement Scheme due to the alleged failures of the Service Provider. The Complainant claimed that MPM acted negligently, failed to act in his best interests and fulfil its duty of care as trustee and RSA of his Scheme when:

- it allowed and had terms of business with his investment adviser, *Continental Wealth Management* ('CWM'), which was not licensed or regulated to provide investment advice;
- it allowed the extensive purchase of structured notes within his Retirement Scheme, which investments were claimed to be unsuitable as they were of a very high-risk nature and aimed at professional investors only.

He claimed that the investments were accordingly not suitable for a retail member of a pension scheme and went against MPM's investment guidelines as well as the requirement for MPM to ensure that his funds were invested in a prudent manner and in his best interests;

- MPM did not raise any concerns and did not take any actions to mitigate his escalating losses and protect his pension scheme from the significant losses.

The Complainant further alleged that he had not signed all the trading deals in respect of the disputed structured note investments and that his risk profile was also changed to a higher level of risk after he had filled out the original paperwork.

*The Complaint*¹

The Complainant explained that in October 2017, he became aware that there were significant issues with pensions handled by CWM and MPM.

He explained that he tried to find out from CWM about these problems but could not get a reply from them. He contacted MPM a few times, most significantly in September 2017 and October 2018, when he received official notification by MPM of its cessation of business with CWM.

The Complainant noted that, in just two years, his initial investment of GBP 105,162.39 dropped to GBP 46,856.11. He claimed that as of 31 March 2022, this stood at just GBP 11,096.08. He pointed out that costs, dealing fees, commissions and other fees alone amounted to GBP 45,406.70.

The Complainant claimed that if he had to refer to his initial investment and calculate his loss based on the value remaining at the time of his Complaint, his loss would amount to a staggering sum of GBP 87,568.74.

He submitted that such losses arose due to MPM's inability and negligence to properly operate its functions as trustee of his pension scheme.

¹ Complaint Form on Page (P.) 1 - 6 with supporting documentation on P. 7 - 95

The Complainant explained that he only discovered the real scale of the negligence after other similarly affected clients successfully claimed against MPM at the Arbiter's office, following their action at rooting out the truth and scale of MPM's negligent failure.

He explained that he had wrongly assumed that the failures were just down to CWM. It was noted that his knowledge of pensions was minimal and that he only realised what the actual role of MPM should have been when he had spoken to others.

The Complainant further noted that he now understood that CWM was completely unlicensed to trade, yet MPM had terms of business with CWM to trade and deal in pensions. He pointed out that, in its final response, MPM stated that CWM was regulated under the license of *Trafalgar International GmbH* ('Trafalgar') but he claimed that this was not true. It was submitted that Trafalgar was only licensed for insurance advice and that according to the licensing bodies of Trafalgar, CWM was neither licensed nor regulated.

The Complainant quoted (an undated communication from *IHK Frankfurt am Main*) which he claimed stated that Trafalgar held a license under 34f para. 1 GewO (financial intermediation) from June 2013 till March 2016. He noted that given that the licence was not extendable, it did not cover the activities of another legal personality. He claimed that the said communication also stated that '*in general, any company doing business with another company in a regulated field, should make sure that each complies with statutory provisions*' and that *IHK Frankfurt* was '*not aware of an official affiliation between Cwm and Trafalgar International GmbH*'.²

The Complainant pointed out that he had wrongly assumed that since MPM informed him of the termination of business with CWM back in 2017, MPM was going to actually help him. This, however, turned out not to be the case.

He explained that following his formal complaint to MPM of 24 January 2022, and its eventual response, MPM never accepted that it was its fault, but yet stated in its reply that it was the Complainant's duty to find an appropriate adviser. He noted that MPM however made no mention of allowing an

² P. 7

unlicensed company to trade for it. He noted that MPM tried to say that he had himself signed all the trading deals, but he rebutted this and claimed that this was just not true. He submitted that, to his knowledge, he had only signed one document at the start of the policy in 2015.

The Complainant remarked that MPM stated that his attitude to risk was high/very high, but he claimed that this was again not true and that his profile must have been changed or altered after filling out the original paperwork.

He submitted that irrespective of this, the fact remained that his Scheme was a pension and that MPM had allowed the purchase of very high-risk structured notes by the unlicensed CWM, which investments carried an extremely high risk of substantial losses.

The Complainant submitted that his pension fund was being unknowingly, and systematically destroyed given that, at times, between 80 to 100% of his pension was being invested into unsuitable high-risk investments which were not aimed at a retail pension member. He claimed that MPM accordingly failed to act in his best interests and fulfil its legal duties as his trustee.

The Complainant further explained that he did not realise the level of stalling, mismanagement and sheer negligence on MPM's part in allowing all this to continue. He submitted that MPM had every chance to inform him of any concerns, as he claimed that MPM was aware of the problems and could have taken action to mitigate his losses but failed to do so.

He noted that his pension should have allowed him to retire with a modest income but, instead, he was left with virtually nothing and faced the very real prospect of hardship into his retirement years.

The Complainant claimed that MPM was hypocritical when it came to pensions and noted that the Investment Guidelines in MPM's pension form 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. He claimed that MPM, however, failed to do this and thus failed in its duty of care and to act in his best interests at all times.

He also pointed out that MPM's Application Form stated that:

'I accept that I or my designated professional adviser may suggest investment preferences to be considered. However, the retirement scheme administrator will retain full power and discretion for all decisions relating to the purchase, retention and sale of the investments within my Momentum Pensions Retirement Fund'.³

He therefore felt that MPM should have used its knowledge, power and discretion to question and stop the unsuitable, professional-only investments and protect his pension fund but failed to do so.

The Complainant claimed that MPM was guilty of not carrying out due diligence on the investments made in his pension and reiterated that it failed to operate according to its own guidelines.

He noted that he was aware that there was a time limit for making his Complaint, but, because he only became aware of MPM's failures in December 2021, given that MPM had denied all the blame throughout the various dealings he had with them, the Complainant asked for the Arbiter to consider his Complaint.

Remedy requested

The Complainant indicated that his initial investment was of GBP 105,162.39 and that the costs, dealing fees, commission and other fees paid out were of GBP 45,406.70. The value as at 31 March 2022 stood at GBP 11,096.08. He calculated his actual loss to amount to GBP 94,066.31.⁴

The Complainant requested the restoration of all the funds which were mishandled and poorly invested and asked for all fees, costs and disbursements associated with his losses to also be refunded.⁵

Having considered, in its entirety, the Service Provider's reply, including attachments,⁶

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

Introduction and background

³ P. 8

⁴ P. 4

⁵ *Ibid.*

⁶ P. 101 - 145

1. That MPM is licensed by the MFSA to act as the RSA and Trustee of the Scheme which is licensed as a Personal Retirement Scheme. It noted that MPM is not licensed to provide investment advice.

Competence and prescription

2. MPM submitted that the Complaint is prescribed pursuant to article 21(1)(b) of Chapter 555 of the Laws of Malta.

It noted that the Complaint is time-barred with respect to conduct occurring before the entry into force of the Act. article 21(1)(b) came into force on 18 April 2016, however, the Complaint was filed on 9 May 2022, and, therefore, beyond the two-year period mentioned in article 21(1)(b).

3. Without prejudice, MPM further replied that the Complaint was prescribed also pursuant to article 21(1)(c) of Chapter 555 of the Laws of Malta (a period of decadence).⁷
4. MPM noted that in the Complaint, the Complainant states that he was *'aware in October of 2017 that there were significant issues with pensions handled by Continental Wealth Management and Momentum Pensions Malta'*.⁸ It noted that the Complainant also states that he contacted MPM *'a few times, most significantly in September 2017 and October 2018'*.⁹

In the Complaint, the Complainant further states that he only found out the scale of the negligence after other similarly affected clients claimed against MPM before the Arbiter. The Complainant adds that he *'had wrongly assumed it was just down to CWM'*.¹⁰

MPM replied as follows in this respect:

- i. That, in the first place, it was clear from the correspondence exchanged between the Complainant and MPM during 2018, that the Complainant was, even at that point in time, attributing fault to MPM. It was therefore entirely inaccurate of the Complainant to state that he *'had*

⁷ Reference was made to pg. 14 of the Arbiter's decision with reference number 070/2019

⁸ P. 102

⁹ *Ibid.*

¹⁰ *Ibid.*

wrongly assumed it was just down to CWM'.¹¹ Reference was made to the email (marked 'Doc. RF1' to MPM's reply),¹² sent by the Complainant to MPM on the 2 January 2018, wherein the Complainant stated that:

*'As a result of the disastrous situation I am left in, following on from utter ruination of my funds by CWM, Trafalgar **and Momentum**, I am looking to you and your company to sort this out'*.¹³

The various correspondence exchanged between the Complainant and MPM was attached to its reply, marked as 'Doc. RF1' to 'Doc. RF7'.¹⁴

- ii. That, additionally, if, as the Complainant alleges, he only found out the scale of the negligence (as he alleges) when other members filed claims against MPM, the question arises as to why he did not also file his claim at the same time that other members did (as far back as 2018). MPM noted that it appeared that the Complainant decided to bide his time, even though he was fully aware of the allegations being made against MPM as far back as 2018, and even though he himself was exchanging correspondence with MPM over the course of 2017 and 2018.

It noted that, furthermore, in January 2018, the Complainant was also provided with a valuation which showed at the time a current market value of GBP 45,210.90.¹⁵

It submitted that the Complainant was fully cognisant of the claims being made against MPM (and argued that the eventual success or otherwise of such claims was irrelevant). The Complainant was also cognisant of the allegations surrounding CWM and their alleged lack of licensing. MPM noted that yet, he did not complain to MPM, nor file a claim before the Arbiter until 2022.

¹¹ *Ibid.*

¹² P. 107

¹³ P. 102 - Emphasis added by the Service Provider

¹⁴ P. 107 - 118

¹⁵ Reference was made to an email dated 12 January 2018 attached to the reply and marked 'Doc. RF10' - P.

MPM further added that the correspondence exchanged shows that MPM engaged with the Complainant and was trying to assist him in his exchanges with Trafalgar.

5. That in Annex 1, the Complainant goes on to state that he is *'aware there is a time limit for making such a complaint, but, because I only became aware of the failure by Momentum in December 2021, after they denied all blame throughout my various dealings with them, I would ask you to consider my complaint'*.¹⁶ MPM noted that, without prejudice to its submissions that the Complainant was, in fact, aware of the matters complained of as far back as 2017, MPM submitted that the Complainant is furthermore contradicting himself – on the one hand alleging that he only found out about the scale of negligence when other members filed claims against MPM, while on the other hand stating that he only became aware of MPM's failure in December 2021.
6. MPM accordingly submitted that the Complaint should therefore be rejected by the Arbitrator.
7. It noted that the Complainant also states in his Complaint that *'They [Momentum] try to say that I had signed all trading deals. This is just not true. To my knowledge, I have only ever signed one document, and that was at the start of the policy in 2015'*.¹⁷ MPM stated that the Complainant must however clarify what he is alleging. It claimed that the dealing instructions received by it were all duly signed. If the allegation is that his signature on the dealing instructions was forged, then this would fall outside the competence of the Arbitrator.

MPM further replied that it does not complete, nor has it completed dealing instructions. It submitted that it had no awareness or line of sight of what discussions and arrangements took place between the Complainant and the appointed adviser, Trafalgar, regarding dealing instructions. MPM's explained that its duty was to ensure that the dealing instructions were submitted by the appointed adviser and that the Complainant's signature on the dealing instructions was verified against

¹⁶ P. 102 & 103

¹⁷ P. 103

the proof of identification provided to it. MPM confirmed that this verification was indeed made and submitted that it had adequate controls and procedures in place to carry out such verifications.

Reply to the Complainant's Complaint

8. MPM noted that the Complainant alleges a loss of GBP 87,568.74 (and then later in the Complaint, GBP 94,066.31). MPM replied that the Complainant has not taken into account fees and charges paid to the investment provider and the adviser (both authorised by the Complainant), as well as interest payments received on his investments. It replied that the alleged loss is therefore not as claimed by him.
9. MPM noted that the Complainant alleges that CWM '*were completely unlicensed to trade*' and, furthermore, that '*Trafalgar International GmbH were only licensed for insurance advice, and in fact, according to the licensing bodies of Trafalgar GmbH, CWM were neither licensed nor regulated*'.¹⁸

It submitted that the Complainant himself however appointed CWM/ Trafalgar as his adviser. Before CWM ceased trading, CWM acted as adviser and provided him with the financial advice to invest in the products which led to his losses. MPM accordingly submitted that CWM is the proper respondent to his claim.

MPM noted that from 2015, CWM's advisers were individual employees of Trafalgar (referred to as 'members' by Trafalgar, but Trafalgar had confirmed to MPM they were employees).

As employees of Trafalgar, they were operating under Trafalgar's licences. Trafalgar's licence confirmed that '*Trafalgar International GmbH is authorised and regulated in Germany by the Deutsche Industrie Handelskammer Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53*'.¹⁹

¹⁸ *Ibid.*

¹⁹ P. 104

MPM submitted that this will be amply proved throughout the proceedings, including through the communications sent by Trafalgar itself.

The Service Provider claimed that any investment trades placed for, and on behalf of, the Complainant by his adviser (Dawn Kirby) from 2015 onwards, who was employed and regulated by Trafalgar, were reviewed and strictly controlled via Trafalgar's Head Office in Germany. MPM claimed this was confirmed by Trafalgar itself as it shall prove.

It submitted that, from 2015, CWM was not an '*unlicensed investment advisor*'.²⁰ The Complainant's adviser was an employee of Trafalgar (as confirmed by Trafalgar), and was regulated under Trafalgar's authorisation within the regulatory environment in Germany and hence licensed to provide insurance mediation activities.

MPM further explained that when Terms of Business with CWM were terminated by it, Trafalgar immediately, and in coordination with MPM, assumed responsibility for its clients as the regulated entity and principal.²¹ It submitted that this was reflected in all exchanges with the affected members noting that Trafalgar had indeed contacted members by phone and by follow-up exchanges and appointed new advisers, internally, to work with the members. At no stage were the members thus left without an adviser. It submitted that there was complete continuity on the matter and the change was solely the individual adviser.²²

10. MPM also submitted that, without prejudice, and as shall be proven, at the time that the Complainant became a member of the Scheme, there was no law or rule which required MPM to carry out any due diligence or to ensure that CWM/ Trafalgar was licensed. MPM reiterated that it has thus fulfilled all obligations incumbent upon it from time to time. It emphasised, 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.
11. MPM replied that it has accordingly, at all times, fulfilled its obligations with respect to the Complainant.

²⁰ *Ibid.*

²¹ Emphasis added by MPM

²² MPM referred to the email it sent to the Complainant, marked as 'Doc. RF8', to its reply – P. 104 & 119

12. It was noted that the Complainant alleged that MPM allowed the purchase of 'very high risk structured notes'.²³ It submitted that, as it shall prove throughout the course of the proceedings, the investments were made in line with both MPM's investment guidelines and the MFSA's rules.
13. With respect to the attitude to risk and the allegation that this was changed or altered after the Complainant filled out the original paperwork, MPM submitted that the Complainant must clarify what his allegation is and whether it is directed towards it. The attitude to risk was selected by the Complainant (and he had clearly chosen the risk category 4 as 'medium to high'), on MPM's application form that was signed by him – as per 'Doc. RF9' attached to its reply.²⁴

MPM does not provide investment advice

14. MPM reiterated 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. It submitted that it is not licensed to, and does not provide investment advice, and that furthermore it did not provide investment advice to the Complainant.

This was clear from the application form which specifically requests the details of the Complainant's professional adviser. MPM pointed out that the Complainant himself declared that he acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice.

16. To further reinforce the said point, that MPM does not provide investment advice, it highlighted that an entire section of the terms and conditions of business (as attached to its Application Form) is dedicated solely to this aspect.

²³ P. 104

²⁴ P. 105 & 122

Conclusion

17. MPM concluded 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. It submitted that it has not acted negligently, nor has it breached any of its obligations in any way.
18. It submitted that the Complainant must show that it was MPM's actions or omissions which caused the loss he was alleging. MPM explained that it cannot be found responsible for the Complainant's claims in the absence of him proving this causal link.
19. MPM, consequently, requested the Arbiter to reject the Complainant's claims with expenses.

Preliminary

Competence of the Arbiter

In Section B of its reply, the Service Provider raised the preliminary plea that the Arbiter has no competence to hear this Complaint based **on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta** (the 'Act').

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

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

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

Article 21(1)(b) provides that a complaint related to the '*conduct*' of the financial service provider which occurred before the entry into force of this Act, **shall be made not later than two years** from the date when this paragraph comes into force. **This paragraph came into force on the 18 April 2016.**

The law refers to the date when the alleged misconduct took place.

The Complainant applied to become a member of the Retirement Scheme following submission of his signed Application Form. This was received by MPM on 2 March 2015.²⁵ Once set up, the Scheme's structure was retained till 2022. As indicated by MPM in its submissions, *'In March 2022, the Complainant submitted a request to surrender his policy and take his remaining benefits...'*.²⁶

The Arbiter further notes that certain transactions within his Retirement Scheme in relation to the disputed investments also occurred after the date of the coming into force of the Act.²⁷

The Retirement Scheme indeed remained in operation after the coming into force of the Act and the Scheme still featured the disputed structured note investments beyond such date as shall be seen further on in this decision.²⁸ Furthermore, the conduct complained of involves the actions of CWM at the time it was acting as the Complainant's appointed investment advisor. MPM terminated its terms of business with CWM only in 2017.

Given that the Complaint involves the conduct of the Service Provider during its tenure as trustee and administrator of the Scheme, which conduct goes beyond the period when the Act came into force, the Arbiter considers that Article 21(1)(b) is therefore not applicable to the case in question. The conduct complained of is rather considered to have been continuing in nature as per article 21(1)(d) of the Act.

The Arbiter is accordingly dismissing the submissions made by MPM with reference to Article 21(1)(b) and shall consider the plea raised with respect to article 21(1)(c) of the Act next.

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

'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

²⁵ P. 120 - 133

²⁶ P. 153

²⁷ As per the Historical Cash Account Transactions Statement covering till 23 Feb 2022 – P. 70 - 87

²⁸ P. 4; p. 72 - 87

later than two years from the day on which the complainant first had knowledge of the matters complained of.'

Therefore, 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'*.

The matters complained of involve the substantial losses experienced by the Complainant on his Retirement Scheme. In his Complaint Form filed with the Office of the Arbiter for Financial Services ('OAFS'), the Complainant stated *inter alia* that:

*'If I just go on my initial investment and base my loss on what remains to date, it amounts to a staggering £87,568.74.'*²⁹

In the section of the Complaint Form dealing with the remedy requested, he further indicated an *'Actual loss (Initial funds – today's value) £94066.31'* and requested the:

'Restoration of all funds mishandled & poorly invested. All fees, costs and disbursements associated with my losses refunded'.³⁰

The Complainant indicated in his Complaint Form that the first time he had knowledge of the matters complained of was on *'19/01/2022'*.³¹ In his Complaint filed with the OAFS, he also stated that *'... I only became aware of the failure by Momentum in December 2021'*.³²

The time indicated by the Complainant as to when he first had knowledge of the matters complained of was however contested by the Service Provider, which held that the Complainant was aware of such matters far earlier, *'as far back as in 2018'*.³³

Having considered the particular circumstances of this case, including the transactions as emerging in respect of the disputed investments, these being the

²⁹ P. 4

³⁰ *Ibid.*

³¹ P. 3

³² P. 8

³³ P. 102

structured notes as specifically highlighted by the Complainant in his Complaint to the OAFS, **the Arbitrator accepts MPM's submissions that the Complainant had awareness of the matters complained of as far back as 2018**. This is particularly so after taking into account the following:

- i) It is noted that the Complainant indicated that he became aware of the matters complained of in December 2021/January 2022. In his Complaint, he explained *inter alia* that:

*'I only discovered the real scale of the negligence after other similarly affected clients successfully claimed against Momentum at your Arbitrator office following their action at rooting out the truth and scale of the negligence failure of Momentum to act accordingly.'*³⁴

The Arbitrator's decision involving MPM, which was referred to by the Complainant, was first issued in July 2020³⁵ and confirmed by the Court of Appeal (Inferior Jurisdiction) in December 2021.³⁶ The said decisions however did not add fresh knowledge to the matters complained of, this being the extensive losses suffered, but reflected that the conduct of the Service Provider was indeed a contributing factor to the losses incurred by the complainants. Hence, such aspect is not considered relevant for determining *'the day on which the complainant first had knowledge of the matters complained of'* for the purposes of Article 21(1)(c).

- ii) As emerging from the *'Historical Cash Account Transactions'* statement issued by *Quilter International* in respect of the policy held by the Retirement Scheme (underneath which the disputed portfolio of structured note investments was held), the disputed investments had, in the main, been sold or matured by 2017, with the last remaining major structured note investment maturing on 30 May 2018.³⁷

³⁴ p. 7

³⁵ <https://financialarbitrator.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf>

³⁶ E.g., civil court cases 37/2021 LM and 38/2021 LM - <https://ecourts.gov.mt/onlineservices/Judgements>

³⁷ Table A which features later on in this decision further refers. Another structured note investment, the *Leonteq EX Cert HZNP* appears to have been sold/matured later than 2018, as its sale or maturity was not indicated in the *Historical Cash Account Transactions* statement which covered till the period 23.02.2022. The investment into the *Leonteq EX Cert HZNP* was, however, a relatively minor investment of just GBP 4,650 compared to the other various multiple investments of GBP 17,000 done in other structured notes as summarised in Table A later in this decision.

- iii) Furthermore, as also emerging from the correspondence produced during the proceedings of the case, it clearly emerges that by early 2018 the Complainant was indeed aware of the substantial losses experienced on his Retirement Scheme.³⁸

Having first determined the day on which the Complainant had knowledge of the matters complained of, the Arbiter shall now consider the other key element of Article 21(1)(c) of the Act relating to when *'a complaint is registered in writing with the financial services provider'*.

It is noted that in its reply to the OAFS, the Service Provider based its plea of prescription regarding Article 21(1)(c) of the Act on the basis that the Complainant had filed a letter of complaint in 2022. It submitted that the Complainant *'did not complain to Momentum (nor file a claim before the Hon Arbiter) until 2022'*.³⁹

The Arbiter notes that the Complainant had indeed filed a letter of complaint *'dated 24 January 2022'* as per MPM's formal reply of 5 April 2022 - copies of both letters were produced by the Complainant himself and attached to his Complaint Form.⁴⁰ If the Arbiter had however to limit himself to this partial analysis as the Service Provider is suggesting, one could simplistically conclude that more than two years had lapsed from the day on which the Complainant first had knowledge of the matters complained of (that is, in 2018 ,as determined above), and the date of the indicated letter of complaint of 24 January 2022.

Such analysis would however be incomplete and inadequate, and the Arbiter considers that this aspect needs to be deliberated and studied more closely and in depth, taking also cognisance of all the important relevant aspects that have emerged in this case.

The plea of prescription has such a material implication to the parties that such an aspect cannot be considered lightly or superficially. A proper and full

³⁸ The Complainant's emails to MPM dated 2 and 13 January 2018 particularly refer – P. 117 & 119

³⁹ P. 102

⁴⁰ P. 9 & 10 - 13

analysis where all relevant matters are taken into consideration is indeed merited.

The Arbiter needs to ensure that the provisions of the law, including relating to his competence under article 21 of the Act, are truly addressed and applicable to the particular case under consideration.

In this particular case, the key question that the Arbiter has to consider is whether the letter of complaint of 24 January 2022 is indeed the appropriate one to take into consideration for the purpose of Article 21(1)(c) or whether the Complainant had, in essence, communicated his complaint formally to MPM earlier. This is particularly in view that, as acknowledged and referred to by the Service Provider itself, there were certain other material formal communications sent by the Complainant to MPM in early 2018. In its reply to the OAFS, the Service Provider itself noted that:

'...it is clear from the correspondence exchanged between Complainant and Momentum during 2018, that Complainant was, even at that point in time, attributing fault to Momentum'.⁴¹

Having carefully considered the particular circumstances of this case and the nature of the correspondence and communications sent by the Complainant in 2018, the Arbiter considers that the communications sent by the Complainant in 2018, can *de facto* be deemed as a complaint registered in writing with the financial services provider for the purposes of the Act prior to that of January 2022.

This decision is based taking into consideration various factors including the following:

- a) In early 2018, the Complainant – who during the hearing of 22 November 2022, described himself as knowing '*... very little about the pension world and how it works*⁴² - himself sent an email dated 2 January 2018 directly to MPM (a copy of which was produced by the Service Provider itself), where he was clearly complaining to MPM about the significant losses on his pension and that he was attributing responsibility to MPM as trustee. It is

⁴¹ P. 102

⁴² P. 147

particularly noted that in the said email of 2 January 2018 addressed to MPM, the Complainant stated that:

'As a result of the disastrous situation I am left in, following on from the utter ruination of my funds by CWM, Trafalgar and Momentum, I am looking to you and your company to sort this out.

...

I hold you and your company responsible as my trustees.

...

This situation should NEVER have been allowed to happen, and regardless of who did what and who hid their actions, your duty of care responsibility as my trustee is where my future actions will be directed'.⁴³

- b) The Complainant was, subsequently, in communication with Stewart Davies, MPM's Group Chief Executive Officer. The latter held a phone call with the Complainant as per the emails of 3rd, 5th, 8th and 10th January 2018.⁴⁴

The Arbiter particularly notes that in the ensuing email of 13 January 2018 to Stewart Davies, the Complainant still attributed blame to MPM and contested the investments within his Scheme, referring in particular to the structured note investments. In the said email of 13 January 2018, the Complainant stated *inter alia* that:

'To initially listen to you and to try to understand exactly what happened with my policy/plan was a little daunting ... I feel I have a slightly better understanding of what these investments and CWM, Trafalgar and Momentum let me in for.

There had to have been an ulterior motive for investing in some of these ...

...

The note that included Sears, Invensense, Ariad Pharma and Oasis [was] a disaster waiting to happen ...

⁴³ P. 119 – Emphasis added by the Arbiter

⁴⁴ P. 110, 111, 112, 115 & 116

...

This is only one of the investments over a VERY short period of time that has effectively destroyed what chance I had of receiving a moderate monthly income.

...

This all suggests to me that negligence and complicit behaviour had to have taken place...

...

I would be interested to hear your thoughts on why, over a period of two years, nobody stepped in to curb these losses. After our conversation, I had thought that it may have been just CWM who had a part in this, BUT, following on from your call, and trying to come to terms with what is supposed to take place and what has actually taken place, judging by what little information I have been able to research, these were deliberate acts of negligence. Just how far spread remains unclear'.⁴⁵

The above, together with the email of 2 January 2018 are, in the Arbiter's opinion, reasonably construed, in essence, as a complaint made in writing against MPM where the Complainant is *inter alia* alleging failure and negligence on the part of MPM, in its role of trustee of the Scheme, in respect of the structured note investments featuring within the Scheme on which he suffered the material losses.

- c) It is further noted that as indicated by MPM in its submissions, the Complainant had a few months later, in April 2018 also '*lodged a formal complaint with OMI International in relation to his losses*'.⁴⁶

OMI International ('OMI'), which was the issuer of the policy acquired by the Scheme and underneath of which the disputed structured note investments were made and held, had sent to MPM a copy of the said complaint as evidenced by the emails exchanged of 31 May 2018.⁴⁷

⁴⁵ P. 117

⁴⁶ P. 152

⁴⁷ Marked as Doc. 'RF13' (P. 205 – 206) attached to the Solemn declaration of Susan Brooks (managing director of MPM), as presented during the proceedings of the case – P. 149

The Arbiter particularly notes that, in the email of 31 May 2018, that OMI sent in reply to the complaint sent by the Complainant to OMI on 7 April 2018, OMI stated that:

'... I understand that you are unhappy with the performance of the investments made for this policy, which do not match your[r] attitude to risk. You also state that instructions we received in respect of those investments were forged, and state your concern about the actions of Continental Wealth Management (CWM), who you believe were unlicensed to provide financial advice.

...

... In this case, your pension trustee, Momentum, applied for the policy with OMI and they are our policyholder ...

...

... It is the responsibility of the policyholder and the fund adviser to ensure that the chosen investments are in line with the financial goals of the policyholder, and their attitude to risk ...'⁴⁸

It is further noted that the reply was sent by OMI to the Complainant with MPM in copy.⁴⁹

- d) The Arbiter further notes that in the complaint sent by email on 7 April 2018, by the Complainant to OMI (which was also addressed to the 'The Isle of Man Financial Services Authority, The Central Bank of Ireland, Financial Services and Pensions Ombudsman and The Association of International Life Offices'),⁵⁰ the said complaint highlighted various aspects, including: 'That investments were made into high-risk professional-investor-only funds. Many of these failed and caused huge losses to victims' funds...';⁵¹ '...that OMI has allowed unlicensed advisers to place clearly unsuitable investments inside their wrappers';⁵²
- e) It is clear that the communication of 7 April 2018 and, most importantly, the reply sent by OMI of 31 May 2018, which MPM was without doubt in

⁴⁸ P. 208 & 209 – Emphasis added by the Arbiter

⁴⁹ P. 208 - 210

⁵⁰ P. 212

⁵¹ P. 213

⁵² P. 214

receipt of, raised the material grievances that the Complainant had, as highlighted above, which grievances, clearly and categorically directly impacted, involved and implicated MPM as the trustee of the Scheme.

- f) It is unclear why despite the Complainant's communications to MPM of 2 and 13 January 2018 as well as his complaint to OMI of 7 April 2018 and OMI's reply (to the Complainant and copied to MPM) of 31 May 2018, MPM seemed to have remained silent and did not treat such material communications as a complaint against its conduct, when it most appropriately and reasonably had an obligation to deem it so.

The Arbiter notes that MPM is now attempting to halt the complaint made by the Complainant with the OAFS against it, by raising the plea of prescription and pretending that there was no complaint against it in 2018 but just referring to the complainant's communication of 24 January 2022 as the formal complaint.

- g) The Arbiter further notes that the aspects raised in 2018, are in their essence, the same main aspects that were again raised by the Complainant in its communication of 24 January 2022.⁵³ Indeed, the said letter of 24 January 2022 raised again the point of the substantial losses suffered on his pension Scheme; the point about the unlicensed status of his investment adviser CWM; and the point about the inappropriate high-risk structured notes that were made and allowed within his pension plan.

It is noted that the Complainant's communication of 24 January 2022 to MPM, went further in that it also referred to the decisions of the Arbiter and Court of Appeal.

The Arbiter accordingly deems the communication of 24 January 2022 as just a supplement or additional communication to the Complainant's original complaint which, in substance and effect, is deemed as having already taken place in 2018.

⁵³ p. 9

The serious issues that were raised and communicated formally in 2018, as highlighted above, cannot be downplayed, delayed or avoided, as MPM seemingly did.

MPM did not at the time issue a formal rebuttal of the allegations and the serious issues raised which directly involved the trustee - it eventually issued its formal feedback and position only in April 2022 (through its letter of 5 April 2022).⁵⁴

MPM's own faults and/or non-action in treating the communications of 2018 as a complaint against it, cannot be now used by MPM as a pretext to justify the plea of prescription raised in its reply.

As highlighted in other previous decisions, it is deemed *'very unprofessional for a service provider to make all in its powers to hinder a complaint against it, procrastinate and then raise the plea of lack of competence on the pretext that the action is 'time-barred'. It is a long accepted legal principle that no one can rest on his own bad faith'*.⁵⁵

- h) **The Arbiter considers that the Complainant's communications of 2018 ultimately also reflect the spirit of the law, particularly for the purposes of articles 21(1)(c) and 21(2)(b) of the Act, in that the Service Provider was aware in a formal manner of the Complainant's grievances and had a reasonable opportunity to consider the matters raised.**⁵⁶

The fact that it failed its duty to address and reply properly to the complaint at the time it was originally raised should not be taken as being equivalent to the complaint not having been made and/or that the Service Provider was not aware of it and did not have a reasonable opportunity to deal with it.

⁵⁴ P. 10

⁵⁵ P. 15 of the case decided by the Arbiter against MPM of 28 July 2020 -

<https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf>

⁵⁶ in satisfaction of Article 21(2)(b) of the Act which provides that *'An Arbiter shall decline to exercise his powers under this Act where ... (b) it results that the customer failed to communicate the substance of the complaint to the financial service provider concerned and has not given that financial service provider a reasonable opportunity to deal with the complaint prior to filing a complaint with the Arbiter'*.

For the reasons amply mentioned, the Arbiter is dismissing the plea of prescription made by MPM with respect to article 21(1)(c) and is proceeding to 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.⁵⁷

The Complainant

The Complainant, born in 1963, is of British nationality and resided in Turkey at the time of his application for membership as per the details contained in MPM's Application Form dated 13 February 2015.⁵⁸

His occupation was not indicated in the said form.⁵⁹

The Complainant was accepted by MPM as a member of the Retirement Scheme on 3 March 2015.⁶⁰

His risk profile in the MPM Application form was indicated as *'Medium to High'* 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'*.⁶¹

His *'Attitude to Risk'* was stipulated as *'Higher Medium'* in the Annual Member Statements issued by MPM.⁶²

In the Fact Find Form issued by CWM, his attitude to risk was also indicated as *'Medium to High'*.⁶³ The said CWM Fact Find, also indicated that the Complainant's investment experience was *'Basic (deposit accounts)'*.⁶⁴

⁵⁷ Cap. 555, Art .19(3)(b)

⁵⁸ P. 120 - 133

⁵⁹ P. 121

⁶⁰ P. 252

⁶¹ P. 122

⁶² P. 252, 255 & 258

⁶³ P. 31

⁶⁴ P. 30

During the course of the proceedings, it was not indicated, nor has it emerged, that the Complainant was a professional investor. The Complainant can accordingly be regarded as a retail customer.

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.⁶⁵

Continental Wealth Management ('CWM') was indicated as the Complainant's appointed professional adviser in respect of his Scheme account.⁶⁶ CWM provided investment advice to the Complainant with respect to the selection and composition of the investments underlying his Scheme.

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

The Retirement Scheme's Underlying Investments

The Complainant's Retirement Scheme, acquired a life policy, the *Executive Investment Bond* ('the Policy') issued by *Old Mutual International* ('OMI') in the Isle of Man within which the underlying investment portfolio was held.⁶⁷

According to OMI's Welcome Letter of 22 May 2015 sent to MPM as trustee of the Scheme and Policyholder of the said Policy,⁶⁸ a premium of GBP 105,162.39 was paid into the OMI Policy for investment in May 2015.⁶⁹

The investment transactions (excluding FX positions) that were allowed to be undertaken within the Policy - as emerging from the '*Historical Cash Account*

⁶⁵ <https://www.mfsa.mt/financial-services-register/>

⁶⁶ P. 24 & 121

⁶⁷ P. 14 & 217

⁶⁸ MPM was the Policyholder in respect of the OMI Policy – P. 299

⁶⁹ *Ibid.*

Transactions' statement issued by *Quilter International*⁷⁰ covering the period '01/01/2015' to '23/02/2022' - are as follows:⁷¹

- a) Purchase of *Leonteq 3 Years Multi Barrier Express Cert* of GBP 17,000 on 12 June 2015 which matured on 30 May 2018 for GBP 1,503.88. The total interest received on this investment was of GBP 3,842.82 (twelve payments of GBP 288.60 and eleven payments of GBP 34.51). A realised loss of -GBP 11,653.30 (incl. of div./int.) thus resulted on this investment;
- b) Purchase of *Commerzbank 2Y AC Phoenix* of GBP 17,000 on 19 June 2015 which matured on 19 June 2017 for GBP 7,022.02. The total interest received on this investment was of GBP 2,720 (eight payments of GBP 340). A realised loss of -GBP 7,257.98 (incl. of div./int.) thus resulted on this investment;
- c) Purchase of *Leonteq Express Achillion Pharma Arena* of GBP 1,948 on 02 July 2015 which matured on 30 June 2017 for GBP 664.28 thus resulting into a realised loss of -GBP 1,283.72;
- d) Purchase of *Leonteq 9.83% MLT Barr Clovis Lumber Peabody Tidewater* of GBP 17,000 on 13 July 2015 which had a full call/early redemption on 29 April 2016 for GBP 2,159. The total interest received on this investment was of GBP 1,188.30 (three payments of GBP 396.10). A realised loss of -GBP 13,652.70 (incl. of div./int.) thus resulted on this investment;
- e) Purchase of *TCM Blue June 1* of GBP 17,000 on 16 July 2015 which matured on 16 January 2017 for GBP 4,907.06. The total interest received on this investment was of GBP 2,172.60 (six payments of GBP 362.1). A realised loss of -GBP 9,920.34 (incl. of div./int.) thus resulted on this investment;
- f) Purchase of *EFGI 1.5Y MB Cert 8% June 1* of GBP 17,000 on 20 July 2015 which matured on 23 January 2017 for GBP 4,053.44. The total interest received on this investment was of GBP 2,040 (six payments of GBP 340).

⁷⁰ A general search over the internet indicates that *Old Mutual International* changed its name to *Quilter International* - <https://www.forthcapital.com/eu/articles/old-mutual-international-has-rebranded-as-quilter-international#:~:text=Part%20of%20the%20Quilter%20family,their%20parent%20company%2C%20Quilter%20plc.>

⁷¹ P. 70 - 87

A realised loss of -GBP 10,906.56 (incl. of div./int.) thus resulted on this investment;

- g) Purchase of *Leonteq DBS 1.5Y Multi Barrier Express Cert 7.37%* of GBP 17,000 on 23 September 2015 which was sold on 13 May 2016 for GBP 13,260. The total interest received on this investment was of GBP 935 (two payments of GBP 467.5). A realised loss of -GBP 2,805 (incl. of div./int.) thus resulted on this investment.
- h) Purchase of *Leonteq EX Cert HZNP, INSY, Kite, YY* of GBP 4,650 on 02 February 2017. No details emerged from the said statement as to the redemption of this investment.

It is noted that according to the same '*Historical Cash Account Transactions*' statement, the following investments into other instruments (funds) were also undertaken:

- a) Purchase of *Old Mutual Global Absolute RTN Gov BD A GBP* of GBP 10,000 on 18 May 2016 which was sold on 26 April 2018 for GBP 10,783.12 thus resulting in a realised profit of +GBP 783.12.
- b) Purchase of *Old Mut Inv Mgt Old Mutual Henderson EURP* of GBP 7,000 on 19 May 2016 which was sold on 26 April 2018 for GBP 9,072.30 thus resulting in a realised profit of +GBP 2,072.30.
- c) Purchase of *Marlborough Int Special Situations F ACC GBP* of GBP 5,000 on 28 November 2017 which was sold on 28 June 2019 for GBP 4,644.15 thus resulting in a realised loss of -GBP 335.85.
- d) Purchase of *Marlborough Intern Marlborough UK Micro F ACC GBP* of GBP 5,000 on 28 November 2017 which was sold on 28 June 2019 for GBP 4,887.50 thus resulting in a realised loss of -GBP 112.50.
- e) Purchase of *Rathbone Unit TST Mul* of GBP 5,000 on 04 December 2017 which was sold on 30 April 2018 for GBP 4,933.75 thus resulting in a realised loss of -GBP 66.25.
- f) Purchase of *TC New Horizon ICA Global Balanced* of GBP 13,998.85 on 27 June 2019. No details emerged from the said statement as to the redemption of this investment.

For ease of reference, the above transactions are summarised in Table A below.

Table A

Transactions as per the 'Historical Cash Account Transactions' statement till 23.02.22

		Date Bought	Purchase Amount GBP	Date Sold/ Matured	Sale Amount GBP	Profit/Loss Excl. Int. GBP	Tot. Interest received GBP	Profit/Loss Incl. Int GBP
SN	<i>Leonteq 3 Years Multi Barrier Express Cert</i>	12/06/15	17,000	30/05/18	1,503.88	-15,496.12	3842.82	-11,653.3
SN	<i>Commerzbank 2Y AC Phoenix WO 883 CHK LKOD PBR</i>	19/06/15	17,000	19/06/17	7,022.02	-9,977.98	2720	-7,257.98
SN	<i>Leonteq Express Achillion Pharma Arena Pharm Clovis GW</i>	02/07/15	1,948	30/06/17	664.28	-1,283.72	0	-1,283.72
SN	<i>Leonteq 9.83% MLT Barr Clovis Lumber Peabody Tidewater</i>	13/07/15	17,000	29/04/16	2,159.00	-14,841.00	1188.3	-13,652.7
SN	<i>TCM Blue June 1</i>	16/07/15	17,000	16/01/17	4,907.06	-12,092.94	2172.6	-9,920.34
SN	<i>EFGI 1.5Y MB Cert 8% June 1</i>	20/07/15	17,000	23/01/17	4,053.44	-12,946.56	2040	-10,906.6
SN	<i>Leonteq DBS 1.5Y Multi Barrier Express Cert 7.37%</i>	23/09/15	17,000	13/05/16	13,260	-3,740.00	935	-2,805
SN	<i>Leonteq EX Cert HZNP, INSY, Kite, YY</i>	02/02/17	4,650					
	Total Realised Profit/ Loss on Structured Notes (Exclusive / Inclusive of Interest)					-70,378.32		-57,479.6
Fd	<i>Old Mutual Global Absolute RTN Gov BD A GBP</i>	18/05/16	10,000	26/04/18	10,783.12			783.12
Fd	<i>Old Mut Inv Mgt Old Mutual Henderson EURP</i>	19/05/16	7,000	26/04/18	9,072.30			2,072.30
Fd	<i>Marlborough Int Special Situations F ACC GBP</i>	28/11/17	5,000	28/06/19	4,664.15			-335.85
Fd	<i>Marlborough Intern Marlborough UK Micro F ACC GBP</i>	28/11/17	5,000	28/06/19	4,887.50			-112.50
Fd	<i>Rathbone Unit TST Mul</i>	04/12/17	5,000	30/04/18	4,933.75			-66.25
Fd	<i>TC New Horizon ICA Global Balanced</i>	27/06/19	13,998.85					
	Total Realised Profit on Funds							2,340.82

The substantial losses suffered on the disputed structured note investments (both individually and on a collective basis), clearly emerges from the said table. The said losses in Table A above, reflect, in essence, the figures as summarised in the table produced by MPM during the proceedings of the case.⁷²

(It is noted that in the table produced by MPM, the *Leonteq EX Cert* structured note was indicated as resulting in a complete loss on the capital invested of GBP 4,650, whereas the fund investment into *TC New Horizon ICA Global Balanced* yielded a realised profit of GBP 626.⁷³ It is calculated that the total realised losses resulting on the overall portfolio of investments thus amount to GBP 59,162.78 according to the said additional information).⁷⁴

It clearly emerges that the investment portfolio held within the Complainant's Retirement Scheme account indeed comprised, at times, exclusively of structured note ('SN') investments with such portfolio containing material investment positions in structured notes, apart from material exposures to the same issuer.⁷⁵

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 Complainant. The Arbiter would like to, in particular, refer to the single decision issued to over thirty complainants on 28 July 2020,⁷⁶ as well as other multiple cases such as case 073/2019, 076/2019, 070/2019 and 074/2020.⁷⁷ The said decisions were also all

⁷² Doc. titled 'RF12' – P. 204.

⁷³ *Ibid.*

⁷⁴ Based on the figures in Table A in the decision and other outstanding figures taken from the table produced by MPM (P.204) – i.e. -GBP 57,479.6-GBP4,650+GBP2340.82+GBP626 = -GBP59,162.78

⁷⁵ For example, material exposures to Leonteq as issuer.

⁷⁶ <https://financiarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf>

⁷⁷ <https://financiarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20073-2019%20-%20PG%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf>

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

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

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.

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 the case (such as the extent of loss, the particular underlying life assurance policy and the exact investments forming part of the investment portfolio).

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

The ISIN of a number of structured notes emerged from the '*Securities Trade Confirmation Advice*' produced during the proceedings of the case as follows:⁷⁸

- for *Leonteq 3 Years Multi Barrier Express Cert* (ISIN No. CH0266713368);⁷⁹

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

⁷⁸ P. 33 - 52

⁷⁹ P. 50

- for *Commerzbank 2Y AC Phoenix WO 883 CHK LKOD PBR* (ISIN No. XS1237269870);⁸⁰
- for *Leonteq Express Achillion Pharma Arena Pharm Clovis GW* (ISIN No. CH0279928045);⁸¹
- for *Leonteq 9.83% MLT Barr Clovis Lumber Peabody Tidewater* (ISIN No. XS1249337657);⁸²
- for *TCM Blue June 1* (ISIN No. CH0266685913);⁸³
- for *EFGI 1.5Y MB Cert 8% June 1* (ISIN No. CH0283708896);⁸⁴
- for *Leonteq DBS 1.5Y Multi Barrier Express Cert 7.37%* (ISIN No. XS1249309797);⁸⁵
- for *Leonteq EX Cert HZNP, INSY, Kite, YY* (ISIN No. CH0351354490).⁸⁶

It is noted that as part of its submissions, the Service Provider only produced the fact sheet in respect of just one structured note investment – in respect of the *Leonteq 3 Years Multi Barrier Express Cert* (ISIN No. CH0266713368).⁸⁷

The Arbiter notes that another structured note – that is, the *Commerzbank 2Y AC Phoenix* (ISIN No. XS1237269870) – featured in another case where the OAFS had traced the fact sheet through general searches over the internet.⁸⁸

Given the above, the extent of the losses emerging on various of the structured notes on the Complainant’s portfolio, as well as the events occurring at the time involving the same period and parties (particularly the same adviser CWM), the Arbiter has no reason to believe that the nature of the other structured notes allowed within the Complainant’s portfolio did not have overall 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*’ extensively considered in other cases as referred to above.

⁸⁰ P. 52

⁸¹ P. 48

⁸² P. 47

⁸³ P. 51

⁸⁴ P. 49

⁸⁵ P. 46

⁸⁶ P. 44

⁸⁷ P. 139 - 145

⁸⁸ Page 74 of the case against MPM of 28 July 2020 - <https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf>

It is sufficiently evident that MPM had permitted structured products that were complex products by their nature and hence not compatible with the Complainant's profile as a retail investor – who had just basic experience (deposit accounts) in investments as indicated above.⁸⁹

No evidence has indeed emerged or been produced by the Service Provider that the structured notes that were allowed to be invested into within his Retirement Schemes were retail products. The disputed products in question were furthermore of high risk as reflected in the material losses ultimately experienced on these products.

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

As clearly emerging from Table A above, the portfolio **contained, at times, predominant if not exclusive exposure to structured note investments as well as material exposures to the same issuer.**

The Arbiter considers that it cannot reasonably be concluded that such high and unjustifiable exposures that were allowed to occur by MPM within the Complainant's Retirement Scheme reflected in any way the requirement for his 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'*.

The permitted allocation is, furthermore, also considered as not being either reflective of, and in conformity with, MPM own's Investment Guidelines 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.⁹⁰

Other matters

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

⁸⁹ P. 30

⁹⁰ 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.

As to the claim that the Complainant had not signed all the trading deals and that his risk profile was also changed, these are serious allegations which had to be specifically proven by specific facts and, in the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation. No sufficient evidence has however emerged for the Arbiter to accept such allegation.

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.⁹¹

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 ASF 076/2019.⁹²

The Arbiter makes also reference to his recent comments and observations in Case ASF 021/2022 and Case 045/2022 (involving the same Scheme and Service Provider) where it was noted that in the covering letter of April 2011 to the Scheme's Certificate of Registration, which formed part of the registration conditions of the Scheme, the MFSA had itself stipulated that:

'... *The Standard Operating Conditions forming part of the Directives for Occupational Retirement Schemes, Retirement Funds and related parties*

⁹¹ P. 186 - 189 & 190 - 202

⁹² <https://financiarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20076-2019%20-%20MN%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf>

issued under the SFA will apply separately to each member's individual fund

...⁹³.

Once the Scheme had individual member accounts which operated in the same or similar manner to member-directed schemes, where the individual member account had his/her own tailored individual and distinct investment portfolio as selected by the respective member and the appointed adviser, then it should have been clear that the same standards and safeguards were to apply for such members. 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 Complainant, 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.**

⁹³ Quote under the section titled 'Additional Observations' of OAFS Case ASF 021/2022 & Case 045/2022 xxx vs Momentum Pensions Malta Ltd of October and November 2023 respectively.

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 Complainant's best interests amongst others. It has also satisfactorily resulted that the permitted investment portfolio was not reflective of, and in conformity with, the Complainant's profile nor in conformity with the applicable principles and parameters and the requirements and conditions specified in the rules and MPM's own documentation.

The Complainant 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 his 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 Complainant 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*.⁹⁴

⁹⁴ Cap. 331 of the Laws of Malta, Art. 21(1)

The Arbiter also considers that the Service Provider did not meet the *'reasonable and legitimate expectations'*⁹⁵ of the Complainant who had placed his 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.

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 Member 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 Complainant's Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by Momentum Pensions Malta Limited for part of the realised losses experienced on his 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, and taking into consideration the risk attitude of the Complainant, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited to be held responsible for

⁹⁵ Cap. 555, Article 19(3)(c)

sixty per cent of the sum of the Net Loss incurred by the Complainant within his whole portfolio of underlying investments.^{96 97}

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter accordingly orders Momentum Pensions Malta Limited to pay to the Complainant the sum of GBP 35,497.67 (thirty-five thousand, four hundred and ninety-seven pounds sterling and sixty-seven pence).

With interest at the rate of 5.25% p.a.⁹⁸ from the date of this decision till the date of payment.⁹⁹

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

**Alfred Mifsud
Arbiter for Financial Services**

⁹⁶ As indicated earlier in the decision, under the section titled *'The Retirement Scheme's Underlying Investments'*, the Net Loss on the whole investment portfolio is calculated to amount to GBP 59,162.78. Sixty per cent of the said Net Loss – 60% of GBP 59,162.78 – amounts to GBP 35,497.67.

⁹⁷ A rate of sixty per cent is, in this case, being applied in the computation of compensation instead of the percentage of seventy per cent applied in some other cases, due to the Arbiter's approach in applying a higher rate of compensation to those with a lower risk profile and which accordingly merited higher protection from the service provider. Such approach was also done in another recent case decided upon by the Arbiter, namely case ASF 021/2022 against Momentum Pensions Malta Limited - <https://financialarbiter.org.mt/sites/default/files/oafs/decisions/549/ASF%20021-2022%20-%20AM%20%26%20KM%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf>

⁹⁸ Equivalent to the current Bank of England Bank Rate.

⁹⁹ It is to be noted that in case this decision is appealed, should this decision be confirmed on appeal, the interest is to be calculated from the date of this decision.