Before the Arbiter for Financial Services

Case ASF 056/2022

JT ('the Complainant')

vs

Momentum Pensions Malta Limited (C 52627) ('MPM' or 'the Service Provider')

Sitting of 22 September 2023

The Arbiter,

Having seen **the Complaint**[1] relating to the claim that a pension fund transferred by the Complainant to MPM in 2016 amounting to GBP 155,813 has remained uninvested in cash liquid form with Quilter, denying the Complainant the possibility to register growth in his pension fund although he had accepted a Medium categorisation in his risk profile.

In the process, he claims that his pension funds have reduced to GBP 133,790.98 through withdrawals of GBP 7,475 and other erosion of GBP 14,548 which he claims is unexplained. The Complainant is seeking a remedy from the Service Provider of about 30% - 40% of the original invested amount which, according to him, represents the growth net of all expenses he would have obtained had his pension fund been properly invested in accordance with his risk profile.

The Complaint, in essence, states that MPM, in its capacity of Trustee and Retirement Scheme Administrator ('RSA') of the Scheme, were negligent in accepting 100% Cash Investment yielding no revenue or growth, while the Scheme was incurring considerable regular costs. Complainant claims that this

[1] Page (P.) 1 - 80

highly irregular action, which should have been flagged or noticed and questioned by MPM and their failure to do so, was also a failure of duty of care that they owed him as his Trustees and RSA.[2]

The Complaint

The Complaint was filed with the Office of the Arbiter for Financial Services (OAFS) on 18 May 2022.[3]

The Complainant applied on 25 October 2016 to become a member of the Momentum Malta Retirement Trust (the Scheme) of which MPM were the Trustees and the RSA.

Following the necessary checks, he was accepted as a Member on 02 November 2016, with the Spanish branch of AES Financial Services Limited trading as AES International being appointed as the financial investment advisor. The person from AES servicing the Complainant's account was Mr Phill Pennick. At the time, Complainant was residing in Spain while AES were licensed (in 2017) by the UK Financial Conduct Authority (FCA) to act as investment advisors and had passported under EU rules its UK licence to operate also in Spain.

By agreement with the Complainant and his Advisor AES, the pension fund was to be invested through an insurance policy held with Old Mutual International (OMI) (Ireland) which subsequently became known as Quilter and is currently known as Utmost International.

An initial premium of GBP 155,813 was paid to OMI on 28 December 2016. A statement following this premium shows that no investments were made until 28 April 2022. At the time this first investment was made, the cash balance had reduced to GBP 133,385.83 mainly through regular charges made to the account defined as Administration Charge; Regular Policy Management Charge; Ongoing Service Charge; TT charges; MTM Charge (GBP 895 p.a.) and what appears to be 'Across Policy Partial Withdrawal Process' of GBP 3,000 on 29 November 2021.[4]

[2] P. 3
[3] P. 1
[4] P. 61 - 67

Consequently, the erosion of GBP 22,427.17[5] is attributable to the said withdrawal of GBP 3,000 and GBP 19,427.17 to charges incurred from 28 December 2016 till 28 April 2022, approximately, GBP 3,600 p.a.

Complainant claims having completed the application form to become a member of the Scheme on 14 October 2016[6] and that in it he indicated a medium risk profile defined as *'there is some risk to the capital with the potential for a reasonable return over the longer term'*[7].

In the application, Mr Phill Pennick was indicated as Investment Advisor as representative of AES. The Complainant also submitted a copy of the dealing form issued by OMI which seems signed in blank,[8] and an OMI 12-page form 'STARTING OR ADDING TO YOUR OLD MUTUAL INTERNATIONAL IRELAND BOND' signed on same date of 14 October 2016 by Complainant as Life Assured and on 29 November 2016 by representatives of MPM as trustees. It is to be noted that panel G INVESTMENT CHOICE: CHOOSING INVESTMENTS was not completed. In this form, AES International was named as introducer and Mr Phill Pennick as Investment Advisor.[9]

The Reply of the Service Provider

In their reply, MTM essentially submitted the following:[10]

'***Throughout his complaint the Complainant has not substantiated explicitly what duties he alleges Momentum have failed to uphold and how he believes we failed to uphold these duties.***

We agree that the Complainant transferred his pension to Momentum in 2016. On 25 October 2016 the Complainant's Momentum application form ('Momentum Form') was sent to us.

On the Momentum Form the financial and investment adviser was listed as Mr Phill Pennick from AES Financial Services Limited trading as AES International

[5] Being amount originally invested GBP 155,813 less the cash balance of GBP 133,385.83 on 28 April 2022 when the first investment was made
[6] P. 44 -57
[7] P. 17
[8] P. 29
[9] P. 43
[10] P. 86 – 91 and attachments

('AES'). Hence AES were appointed as the Complainant's Adviser and we note that a fee of 1% p.a. was agreed as payable to AES for their ongoing Advisory Services. This fee was paid until 2021, when they were removed as the Complainant's appointed Adviser.

AES is established in the United Kingdom and has been authorised and regulated by the Financial Conduct Authority ('FCA') since 17 April 2007. AES is authorised and licensed by the FCA to provide investment and insurance related advice under the Markets in Financial Instruments Directive (MiFID) and Insurance Mediation Directive ('IMD') (now Insurance Distribution Directive) as was transposed in the UK. At the time of the Complainant joining the Scheme in 2016, AES had passported its licensing permissions into Spain where the Complainant resided. AES had passported its activities into Spain under the freedom of services (MiFID and IMD Outward service) and freedom of **establishment (MiFID and IMD Outward Branch).**

We agree that the Complainant's pension transfer money was invested through an insurance policy held with Old Mutual International ('OMI') Ireland, (since known as Quilter International and now known as Utmost International). After the Complainant was accepted as a member of the Scheme, the OMI Investment application form ('OMI Form'), completed by the Complainant and his AES Adviser, and signed by the Complainant was submitted to us and sent on to OMI for processing. Upon reviewing the OMI Form, the fund choice section (at section G) was not completed by the Complainant and his appointed adviser at the time of the Complainant submitting his OMI Form. This is not unusual.

The Complainant refers in his complaint to a 'Risk Assessment Form', however we are not sure what form the Complainant is referring to here as it is not a Momentum form and he must explain this further. We understand this may be an Adviser fact find form utilised by his Adviser in carrying out their regulated advisory services to the Complainant as their client.

The Complainant further refers to 'the signed Dealing Instruction Form, as requested'. Momentum, again need the Complainant to explain what he is referring to here. If these are the Dealing Instructions or they are the emails referring to 'Blank DI' that were attached in his complaint (the documents set

out at pages 20-29 of the Complainant's Arbiter pack), Momentum respectfully submits that:

(i) Firstly, these are not documents we have ever received from or on behalf of the Complainant and therefore we confirm they were never submitted to Momentum by the Complainant's adviser.

(ii) Secondly, the majority of the documents attached to the Complaint relating to dealing instructions, are either illegible (we refer to the document attached at page 23 of the Arbiter Complaint pack) or they are blank and incomplete (we refer to the document attached at page 29 of the Arbiter Complaint pack). The Complainant provides no evidence of how these are linked to his complaint against Momentum. From the parts of these documents which Momentum can read, these are referring to an individual named Mr Kristoffer Taft and a firm called Pennick Blackwell, we refer to pages 21, 25 and 27 of the Arbiter Complaint pack. None of these details match the name of the Complainant's adviser firm we hold on record.

The Complainant appointed Mr Pennick employed by AES and hence the evidence submitted does not match the name of the financial Adviser's firm held on our records. Momentum fails to understand why the Complainant was taking advice or had a relationship with Pennick Blackwell when as clearly shown in the Momentum Form and OMI Form (both attached to this response) AES was appointed as the Complainant's adviser. On reviewing Pennick Blackwell website online, linked to the website as detailed below, we note Mr Phill Pennick is the CEO of this Adviser Firm. We cannot see any Spanish regulatory licensing for this firm and note that AES International are shown on the webpage. Momentum has no relationship with Pennick Blackwell and only a relationship with AES with whom we have Terms of Business in place since 2014.

(iii) Finally, the emails attached at pages 21, 25 and 27 are either addressed to 'Hi TT' or signed off by 'TT'. This is clearly to an individual named 'TT' and not the Complainant. Momentum therefore submits that these attached documents are not relevant to the Complainant's complaint.

Regulated Advice:

In relation to investment advice and submission of Dealing Instructions, Momentum confirms that the regulated adviser, AES in this case, are the firm the Complainant appointed to provide him with advice. AES are regulated and legally obligated to advise the Complainant on investment options suitable to the Complainant and to assist the Complainant to select investments following this advice. AES are also responsible for facilitating the instruction of the investments chosen by submitting the dealing instruction to Momentum, signed by the Complainant, for placement with the investment company.

Furthermore, AES were responsible and were paid for the ongoing advice to the Complainant in relation to his investments and for reviewing the investments market on an ongoing basis. A MiFID Adviser is legally obligated to carry out ongoing reviews, at least on an annual basis and providing annual valuations to the Complainant. Furthermore, as a firm regulated by the FCA, it is clear where an ongoing advice fee is being paid there is an ongoing relationship with the client, this is clearly the case here between the Complainant and AES. This relationship confers the need to undertake a periodic assessment of suitability and in order to complete a suitability assessment an updated Know Your Client (KYC) process is required (i.e., the adviser updates their fact find). The adviser will need to know what their client's current situation is to be able to advise. In most circumstances this will mean that there is an obligation to complete at least an annual review and as detailed above this is a specific requirement under MiFID.

The following is a rule detailed in the FCA handbook at COBS 9A.3.9 which states: '54(13) Investment firms providing a periodic suitability assessment shall review, in order to enhance the service, the suitability of the recommendations given at least annually. The frequency of this assessment shall be increased depending on the risk profile of the client and the type of financial instruments recommended.'

Hence Momentum fails to understand how, if this had been done at any point, the Complainant was not aware of his cash or how no communication occurred with AES, whilst they were appointed by the Complainant over a 4-

5-year period. If these reviews did not occur, this is regulatory failing on behalf of AES.

Momentum cannot comment on the Complainant's wife pension arrangements.

The selection of a risk profile is discussed and agreed between the Complainant and his appointed regulated investment adviser when they are looking at the Complainant's investment strategy. Momentum is not privy to these discussions. A Member may elect not to invest owing to market conditions or a desire to see the markets stabilise. Momentum cannot give investment advice and cannot make a Member invest. This is the responsibility of the Complainant having taken advice of his adviser. As shown amply below, Momentum issued communications to both the Complainant and AES, his adviser, which provided the Complainant with knowledge of his investments and the Complainant also had access to the Quilter International Client portal. Therefore, Momentum fails to understand, how he believed he was invested if no positive action with AES was taken to do so, and no investments were indicated in the annual benefit statements issued to him.

Momentum provided annual benefit statements to the Complainant and AES, showing the Complainant valuation on a yearly basis. We stated clearly in the communication to the Member with AES in copy:

'Should you require a more detailed analysis of the investment portfolio to ensure your portfolio and risk profile remain aligned to your retirement goals or have any queries in relation to this statement, please contact your appointed Investment Adviser in the first instance.'

Furthermore, for statements issued for the Scheme Year 2019 onwards the actual underlying investment of cash held was clearly shown. The covering email also confirmed the statement included a breakdown of investment holdings. In all instances AES were included in the emails directly to their Adviser Support Services or the Adviser directly, as per their correspondence email address requested. Hence again we cannot accept that the Complainant nor his Adviser were not aware as the Statements were issued to the Members existing email and AES.

Finally, and importantly, in addition to all of the above communications, Momentum acting in the member's interest also wrote directly to AES on two separate occasions notifying them that the Member/Complainant was invested in cash. These communications were in December 2018 and October 2020. In both communications, we clearly stated:

"As the Member's appointed adviser, we ask you to please review the above Member's investment strategy to ensure this as required and to liaise with the Member accordingly."

AES acknowledged the email as we receive an email back from them to say it had been passed to 'Phil Pennick team to contact the below clients ASAP'. Again, we reiterate, in addition to these two communications, AES also received the Complainant's annual benefit statements and had full visibility both on the statements and on the Quilter International Investment Portal of what the Complainant was invested in.

Momentum's Investment Policy in our Scheme Particulars provided to all Members, also makes it clear that to invest, a Member's adviser must submit dealing instructions to the Trustees and specifically to our Dealing Team signed by the Member. We also fail to understand how the Complainant did not know he was invested if he did not sign any dealing instructions.

It is pertinent to also note that the Complainant also had full visibility of his Scheme Investment portfolio through the Quilter International Client Portal. Quilter confirmed to us that in July 2019 the Complainant set up access to his investment provider's portal and with this also had the ability to review how his investments were held at any time from the date of access onwards.

In 2021, Mr Pennick moved to a new advisory firm and was appointed again as the Complainant's Investment Adviser by the Complainant in October 2021 and AES were removed. Momentum also fails to understand if the Complainant had no relationship with his adviser during this period, why he elected to reappoint the same Adviser four years later.

Investment Losses

Momentum do not agree with the Complainant's losses and the Complainant must provide evidence of this, furthermore, he is claiming arbitrary growth percentages without any basis, timeline or allowance.

Momentum do not provide investment advice and are not involved in the discussions held between the Complainant and the Adviser. Momentum submit that it did bring this to the Adviser's attention specifically and via the annual members statement on multiple occasions and also to the attention of the Complainant via the annual statements provided. This enabled them both to review the investments. Furthermore, in October 2021, the Complainant appointed a new MiFID licensed Adviser Firm and at this point his investments would have been reviewed as part of onboarding a new client. Subsequently, new trade instructions were not submitted until April 2022.

We also reiterate, the Adviser was also expected and indeed required under their FCA regulation to ensure that the Complainant's investments are reviewed on an ongoing basis.

Momentum would like to add that during 2018, 2019 and 2020, the investment markets saw turbulent market conditions owing to a number of market disruptions, not least Covid and Members over this period decided with their Adviser to remain in cash and not to risk their capital. As stated previously, Momentum cannot force a Member to invest and Members do elect not to invest during market disruptions and we carried out our duties by writing to AES and also issuing Annual Statements to both the Complainant and AES.

The Member had selected and appointed his financial and investment advisor prior to joining the Scheme. These advisers were appointed by the Complainant (as detailed above) and it is the role of these appointed advisers to provide the Complainant with financial and investment advice based in their investment strategy which should have been agreed in previous discussions between appointed advisers and the Complainant. Momentum administers the investment instructions it receives from the Complainant via his appointed advisers.

Momentum submits that the Complainant's complaint properly lies with his appointed financial adviser.

Momentum also attached correspondence that they were copied into by the Complainant which was an email to Pennick Blackwell requesting their complaints procedure. It is a possibility that the Complainant may have lodged a complaint with this firm on the same subject matter, or possibly even with his previous adviser firm AES.

Conclusion

Momentum replies that it is not responsible for the payment of any amount claimed by the Complainant.

The Complainant must show that it was Momentum's actions or omissions which caused the loss he is alleging. Otherwise, Momentum cannot be found responsible for Complainant's claims.

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

The Hearings

The first hearing was held on 28 November 2022. The Complainant was represented by his wife TT who gave the following evidence:

'Our case is based on the fact that JT's pension money from a UK pension was not invested once moved to Momentum Pensions as was our intent. And we entrusted this money with Momentum Pensions to whom we paid fees and for five years they said that they did not receive dealing instructions so that the money was not invested and, with all the fees that we paid to the financial adviser, and Momentum Pensions and later, Quilter, where the money was sent, we lost a lot of money.

We feel that with regards to Momentum Pensions and our complaint to them, looking at the situation, we feel that the Scheme Administrator has failed us. They say in their documentation that they act with skill and care and diligence, and in the best interest of the beneficiaries. And we feel let down in this case.

They also say that they have the power to ultimately decide whether to proceed with an investment or otherwise. But, in our case, they say that they did not even receive the dealing instruction. We cannot prove this, but we accept the situation that they never received the dealing instruction. They told us last time that the dealing instruction does not always arrive at the same time as the other paperwork. But we feel that there must surely be some checklist, some system they use in order to make sure that they have received all the necessary documentation and instructions so that the clients' pension can be invested.

I know that they said twice that they did contact AES International to raise the issue, but they did not contact us, and although they had replied to say that, yes, they raised the issue with the financial adviser and were looking at the investment strategically, it just ended there, twice within the five-year period. There was no kind of follow up closing the loop.

They must have been … to the fact that it had been quite unusual for someone to want their pension set in cash, having moved it from a very good pension scheme, having moved to Inter Pension Scheme where there was going to be some sort of investments. On the certificates of membership, it clearly states that JT was a medium risk investor, 'investor' being the operative word here. I feel that there was no intention for JT's money to remain in cash, and I think that this was fairly obvious to Momentum Pensions, but they did not follow up appropriately.

They could have contacted us. If it is quite common for a dealing instruction not to arrive initially when everything else is set up for your membership, how long does it normally take for the dealing instruction to arrive? Is it months, is it years? Is it hours, is it days? If they had questioned it, at the start, when our membership was being made – followed it up with the financial adviser or even us – it could have been something that could have been captured instead of going on for five years.

I know that they have said previously that we received an annual email – statement – telling us of the state of the pension and we did receive this. But our interpretation was that maybe the markets were not good. We accept that sometimes the investments go down, sometimes the investments go up; but we had no inclination or knowledge for one minute that the money had not been

invested. It just would not make sense to anyone to remove cash out of one pension scheme into another pension scheme for there to be no growth. That would be a ridiculous scenario.

On some of the later annual statements, there was an improvement in the amount of information given, and we can see that there was the word 'cash'. We saw that as cash being invested into the pension where then it would be further invested in the marketplace. So, we did not think that was clear. And, on these new statements, not once - it was a generic kind of statement – do they say, 'Mr JT, are you aware that this pension being held in cash is costing you money? You need to contact your financial adviser immediately.'

We know that Momentum Pensions cannot give investment advice – and we understand that – but they also have a duty of care, and they can question; they can choose – as I have noticed in previous cases brought to the Arbiter – that some investments were not really suitable for some of the complainants and, in this situation, Momentum Pensions should have been alerted to these. I think likewise it is the same for us. We feel that the process, the system, the administration failed us.

The only reason we actually became aware of it was because of Brexit as it happened. We were sent an email from the financial adviser – this was the only communication we had from him – saying that due to Brexit, AES International could not represent us anymore, and he could carry on as our financial adviser if we moved to Abbey Wealth which is regulated by the Bank of Ireland. We were happy to do this. We thought that made sense and we signed accordingly.

Then, we were offered a new financial adviser from Abbey Wealth, and we just thought that this was part of the current transition process. It was then that we had a video meeting just like this and he brought this stuff from Quilter showing how much money had been lost and he was very embarrassed, he felt very bad for us and explained what happened.

So, that was the first we actually heard of it.

JT's pension is still with Momentum Pensions as it happens. It has now been appropriately invested in the market and we are doing well at the moment. But that is the way of the world.

There are various bits that we brought up with last time with Momentum Pensions' scheme, for example, 'Will ensure that the proposed trade on the dealing instruction when considered in the context of the entire portfolio assures a suitable level of diversification is in line with the Member's attitude to risk.'

This thing in cash does not bear any resemblance to JT's attitude to risk. And, also, that Momentum Pensions does have the final say in the placement of any dealing instruction, or not, as in this case; it just did not happen.

The Scheme Administrator should not merely accept the proposed investments but should require information and assess such investments. I think at the beginning of JT's membership, Momentum Pensions's lack of dealing instruction should have been followed up and questions should have been asked and this would never have happened.

We have wasted five years and lost a lot of money.'[11]

On being cross-examined, Mrs TT confirmed that annual statements from 2019 onwards showed money was still in cash.[12] Complainant interpreted the word 'cash' as the original amount given to MPM, so he did not ask for an explanation from the financial advisor.

"We interpreted the word 'cash' as the cash we had given to Momentum Pensions to be invested as a pension".[13]

When asked how the loss they are seeking as remedy was calculated, Mrs TT said:

"The figure was a calculation that was provided to us by the new financial adviser when he was showing us the money at Quilter and the losses. And he did a quick projection, working on averages over that period, so that was the first loose figure we came up with. Since then, it was suggested to us that a

[11] P. 150 - 153

[12] In previous year's statement, the value of the portfolio was disclosed without disclosure of composition of underlying investments. However, the statement of Scheme Bank Transaction in the annual statement would show that no actual cash drawings were made to fund any investments. Also, Statements made reference to on-line access provided by the investment providers to check the underlying investments.

[13] P. 153

more realistic rate would be 20% over that period as opposed to 35% to 40% which we accept. We are not financial experts."[14]

Prior to the second hearing held on 10 January 2023, the Service Provider filed a solemn declaration[15] where, essentially, they reiterated their position stating that:

Annual statements were sent to Complainant with a copy to AES as his nominated Investment Advisor.

1. From 2019 onwards the statement clearly showed the cash position of the investment portfolio.

2. Members were asked to consult their Advisors for more detailed analysis.

3. Complainant had as from 31 July 2019 gained online access to the investment under his insurance policy with OMI. Through such online access customers had the facility for real time access to their portfolio which at the time showed 'Cash'. Such online access was also available to AES and Mr Pennick as his appointed investment adviser.

4. It resulted that over 5 years, Complainant did not seek advice nor discuss the investments with his appointed adviser to whom he was paying fees for such service. This notwithstanding when Mr Pennick changed employment from AES to Abbey Wealth, they retained him as their adviser.

5. MPM wrote to AES on two separate occasions notifying them that the policy was still invested in cash and queried if this was as required by the Complainant. MTM received a response from AES stating that the matter was forwarded to Mr Pennick and his team to contact the Complainant.

6. That during the period in question, given the market conditions during this time, it was not irregular for a member to wish to remain in cash.

7. Complainant was aware that investment decisions must be directed by him through signed instructions on the advice of his appointed Adviser, but he failed to submit any such instructions. Furthermore, Complainant

[14] P.154
[15] P. 156 - 163

did not submit any evidence that AES or Mr Pennick did not communicate with him as they had confirmed they would do (as in 6. above).

8. The appointed Adviser in terms of Momentum application and OMI Investment application was AES who were duly licensed and not Pennick Blackwell who were unlicensed.

9. MPM did not receive any dealing instructions from Pennick Blackwell and even if they had received them, they would have rejected them as such instructions should come from the appointed licensed advisor AES.

10. Complainant did not suffer any loss on investments as he and/or his appointed adviser had never given instructions to make any such investments. In the period 2018 – 2020 investment markets were particularly turbulent, and a significant number of members opted to stay in cash.

11. One should not assume positive returns during periods when one is invested especially during the period of market disruption and turbulence such as the Covid 19 pandemic. In fact, the assertion that their portfolio is doing well[16] at the moment because it has been invested is factually incorrect as evidence submitted[17] shows investment had accumulated a loss of nearly GBP 5,000 as at 21 December 2022.

12. Losses caused by fees should not be considered as all fees were all properly disclosed at the point of joining the Scheme and these are incurred irrespective of the nature and asset composition of underlying investments.

Finally, the Service Provider stated that:

"with AES as his appointed and paid adviser, it is against them that the Complainant should (and probably already has) direct(ed) their complaint".[18]

[16] In the hearing of 10 January 2023 (p. 204), the Complainant clarified that she had actually said '*not doing so well in the market. But that is the way of the world*.'
[17] P. 198
[18] P. 163

On cross-examination at the hearing of 10 January 2023, the representative of the Service Provider said the following of relevance:

"Asked whether we accept that the reason that the Complainant did not react to the Annual Statements being sent out was because he did not realise that his pension had not been invested, that he did not know that there had been an error, I say, no. I do not accept that.

Asked whether I agree that AES international and Pennick Blackwell are irrelevant to this complaint which was already established that it was with Momentum Pensions, I say, no, I do not agree … We detailed our writing to AES International on two separate occasions querying the lack of dealing instructions and the fact that we said that it was not irregular for other Members to have their funds held in cash during this period.

Asked whether other clients gave us written instruction to hold their funds in cash, I say that we wrote to AES International not because we did not receive a dealing instruction. We wrote to AES because we noticed - on two separate occasions – that after we sent the Annual Member Statements, which showed that the asset was in cash, it remained in cash. So, we wanted to reach out to your adviser to draw his attention to the fact that the asset was in cash and whether that was what was intended by Mr JT; and not because he did not submit a dealing instruction. We wanted to draw the attention of Mr JT's adviser (who obviously knew but we wanted to reiterate) that the funds were in cash. And we asked Mr JT's adviser to reach out to him to reassess the position and to ensure that the actual asset in cash continues to align with the investment strategy that the complainant would have discussed with his adviser. So, that was the reason that we reached out to AES on two separate occasions. And, in fact, they did confirm that they were going to speak to Mr JT. Whether they did it or not is something that I cannot answer."[19]

<u>Final Submissions</u>

In their final submissions, the Complainant asserts that the Service Provider failed him in keeping his funds in cash while he was incurring substantial charges and

[19] P. 202

missing out on potential growth had the funds been invested in line with his medium risk profile.
He argues that the fact that MPM wrote to AES International on two separate occasions querying the lack of dealing instructions to invest the cash, was not sufficient to exonerate them from their obligations as Trustees to act in good faith and in his best interest.

He argues that sending two emails without a concluded response to AES International during a 5-year period and did not communicate their concern and lack of confirmation with Complainant, their Member, does not comply with the duty for the ***"Scheme administrator to act with due skill, care and diligence – in the best interests of the Beneficiaries".***

He also contended that the RSA leaving the investment totally in cash had failed the obligation to ensure a suitable level of diversification in line with the Member's attitude to risk. He quoted the legal duty of the RSA and Trustee to verify and monitor investments in the individual Member account to ensure they are diversified, and should not merely accept the proposed investments but should acquire information and assess such investments.

Ultimately, he quantified his losses as follows:

Incurred charges GBP 26,172 including MPM own fees of GBP 6,115.

Forfeiture of potential growth of 20% over the period in question on the original sum invested equivalent to GBP 31,162

Total loss GBP 57,334.

In their final submissions, the Service Provider repeated the arguments already made in the reply and the hearings and concluded as follows:

"***Momentum is not responsible for the Complainant failing to seek advice from AES as his appointed regulated adviser and for his decision to submit a dealing instruction to another unregulated third-party firm. Momentum is also not responsible for AES and the Complainant's failure to review the portfolio on an ongoing basis, despite AES being legally obliged to do and contractually paid to provide this service, and the Complainant having a vested interest to do so also. The Complainant appointed AES and paid for their services, he had direct access***

to the Quilter Portal which has been confirmed by Utmost (previously known as Quilter) where he could have reviewed his investments at any point in time, he received annual benefit statements from Momentum, signed all the terms of the pension and therefore should have some liability for failing to ensure that he was properly invested.

Momentum maintains its position that it has not failed in its duties to the Complainant. The Complainant states that Momentum has breached its trustee duties and claim that he is entitled to redress, but in light of the above it is clear, it is AES and the Complainant himself who were directly responsible for a failure to invest, and no substantiated evidence was provided at any stage by the Complainant, that any investment loss occurred, only unfounded assumptions. The adviser was licensed and regulated and under a regulatory duty as well to provide him with ongoing investment advice in respect to his pension based on his personal circumstances, wishes and requirements. AES were properly appointed by the Complainant and also subject to our due diligence requirements and there was no reason to believe they would not keep the Complainant properly advised."[20]

They also pointed out that during the potential period of investment from 28 December 2016 till 26 April 2022 (when funds were actually invested), the change in the FTSE 100 index was only positive 4%,[21] and Complainant expecting remedy for loss of 20% growth is unrealistic and unsupported by the growth of the index he chose to base his claim upon.

Analysis and considerations

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

The Arbiter considers:

<u>The Merits of the Case</u>

[20] P. 211

[21] Confirmed by Arbiter's own research

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.[22]

The Complaint and all pleas raised by the Service Provider relating to the merits of the case are being considered together by the Arbiter to avoid repetition.

The Arbiter must be guided by what the statute says about the responsibilities of the Trustee and RSA.

(i) Provisions of the TTA and other pertinent aspects

At the outset, the Arbiter makes reference to Article 21 of the TTA relating to *'Duties of trustees'* as well as to Article 30 of the TTA relating to *'Liability for breach of trust'*, which are considered particularly relevant to the aspect raised.

Article 21(1) and (2)(a) of the TTA, in particular, provide that:

> *'(1)* ***Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias,*** *act in utmost good faith and avoid any conflict of interest'.*
>
> *'(2)(a) Subject to the provisions of this Act,* ***trustees shall carry out and administer the trust according to its terms; and subject as aforesaid, the trustees shall ensure*** *that the trust property is vested in them or is under their control and shall,* ***so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage*** *…'.*[23]

Moreover, has to consider this complaint in the light of the requirements to which the Retirement Scheme was subject to with respect to *inter alia* **diversification, prudence and liquidity,** as detailed hereunder:

- The MFSA's investment principles and regulatory requirements which originally applied to the Retirement Scheme, were specified in Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for*

[22] Cap. 555, Art. 19(3)(b)
[23] Emphasis added by the Arbiter

Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002', ('the Directives'). The said Directives applied from the Scheme's inception until its registration under the Retirement Pensions Act ('RPA').[24]

SOC 2.7.1 of Part B.2.7 of the Directives required *inter alia* that the assets were to '*be invested in a prudent manner and in the best interest of beneficiaries …*'.

SOC 2.7.2 in turn required that the assets of a scheme are '*invested in order to ensure the security, quality, liquidity, and profitability of the portfolio as a whole*'[25] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[26]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[27] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*[28] where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.[29]

- The Arbiter also notes that the Scheme eventually became subject to the '*Pension Rules for Personal Retirement Schemes issued in terms of the*

[24] The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.
[25] SOC 2.7.2 (a)
[26] SOC 2.7.2 (b)
[27] SOC 2.7.2 (c)
[28] SOC 2.7.2 (e)
[29] SOC 2.7.2 (h)(iii) & (v)

Retirement Pensions Act 2011' (Pension Rules') when it was registered under the Retirement Pensions Act ('RPA').[30]

It is noted that Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules provided that:

'***The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries*** *and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document*'.[31]

The investment restrictions for member-directed schemes under the RPA were outlined in Part B.2 titled *'Investment Restrictions of a Personal Retirement Scheme'* and Part B.9, *'Supplementary Conditions in the case of entirely Member Directed Schemes'* of the Pension Rules.

It is further noted that SLC 3.2.1 (ii) and (iii) of the Pension Rules provided *inter alia* that the Retirement Scheme Administrator shall ensure that the assets of the scheme are: *'… **properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole**';* and *'… **sufficiently liquid** and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits'.*[32]

Taking into consideration the above provisions regarding the duty of the Trustee and RSA, the Arbiter has to decide on the following aspects:

a. Was the fact that the funds remained totally in cash form a failure on the part of the Trustee and RSA to ensure that the investment portfolio reflected the Member's risk profile and its obligations for ensuring proper diversification? Basically, do these diversification obligations apply only

[30] The *Retirement Pensions Act* (Cap.514) eventually replaced the *Special Funds (Regulation) Act, 2002* when it came into force in January 2015. The *Retirement Pensions (Transitional Provisions) Regulations, 2015* provided any scheme/person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

[31] The same principle was reflected in Rule 2.7.1 of Part B.2.7 titled *'Conduct of Business Rules related to the Scheme's Assets'* of the *'Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'* which applied to STM Malta as Scheme Administrator at the time it was subject to the Special Funds (Regulation) Act.

[32] SLC 3.2.1 (ii) and (iii) of Part B of the Pension Rules.

once the funds are invested or should they also apply if the funds remain uninvested for an untypical long period of time?

b. If the diversification obligations resulting from point a. above apply only for the period when the portfolio is properly invested, did the Service Provider act in the best interest of their customer when they only pointed this out to the appointed Investment Advisor by two separate emails over a period of 5 years.

c. Is the Complainant correct in blaming the Service Provider for their failure to inform him directly, not just via the Investment Advisor, that the funds remained uninvested for an unduly long period of time and in the meantime incurring not inconsiderable annual charges eroding the capital of the pension fund; and if so should the Service Provider be responsible not only for the potential gains had the funds been invested but also for the charges incurred while the funds lay idle in cash form.

The Arbiter will proceed to consider these points in more detail.

Was the fact that the funds remained totally in cash form a failure on the part of the Trustee and RSA to ensure that the investment portfolio reflected the Member's risk profile and its obligations for ensuring proper diversification? Basically, do these diversifications obligations apply only once the funds are invested or should they also apply if the funds remain uninvested for an untypical long period of time?

The obligation to ensure proper diversification in the investment portfolio clearly is designed to apply for the period when the portfolio is invested and not for the period when the funds are still in cash form as transferred by the life assured and Member of the Scheme. Cash does not need diversification as long as it is maintained in the base currency of the account which is also the currency of the original transfer, in this case, GBP. Diversification provisions are meant to ensure that the portfolio is not unduly exposed to concentration and liquidity risks which are not applicable in case of cash balances that can be invested at a moment's notice.

The above-quoted restriction:

'in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks',

evidently applies to the portion of liquidity in an investment portfolio maintained through normal deposits with licensed institutions, and not to the initial transfer of funds which is held by the investment manager in its own name (or clients account) awaiting investment instructions. This applies even if, as in this case, the cash remains uninvested for an untypically long period of time.

If the diversification obligations resulting from point a. above apply only for the period when the portfolio is properly invested, did the Service Provider act in the best interest of their customer when they only pointed this point to the appointed Investment Advisor by two separate emails over a period of 5 years.

The obligation of the Trustee and RSA to act always and consistently in the interest of the member client and exercise their powers and discretions with the prudence, diligence and attention of a *bonus paterfamilias,* act in utmost good faith and avoid any conflict of interest, is the basic tenet on which the relationship between a client and a trustee is built.

On the other hand, the Trustee and RSA has no power to take investment decisions on behalf of their member client. Their obligation is to ensure that investment decisions are taken by their client upon receiving proper advice from the appointed adviser, and that such investments are in line with the risk profile identified as appropriate to reach the investment objective of the client member.

The fact that the funds remained uninvested for an untypical long period of time was not lost on the Trustee and RSA as they did in fact point this out to the appointed investment advisor twice over the course of the relationship spanning over 5 years until the funds were finally invested. MPM can have no way of proving or disproving that the Investment Advisor did actually communicate this matter with their client (the Complainant), as one can fairly assume that he would do. Whether the Service Provider can be faulted for not acting and protecting the Complainant's best interest when they failed to communicate this state of affairs directly to the Complainant will be considered hereunder.

However, the Arbiter notes that the Complainant acted in a way indicating blind faith in Mr Pennick who confusingly acted wearing different hats. On establishment of the relationship, he was communicating with the Complainant wearing the hat of Pennick Blackwell and Complainant had no hesitation in following his advice signing forms where indicated even though Pennick Blackwell were not appointed as investment advisors.

Then, on the application form to become a member of the Scheme, Mr Pennick was nominated as the Adviser acting on behalf of AES international (who were licensed for such activity by the FCA) and the email address was given as phill.pennick@aesinternational.com.[33]

Eventually, when Mr Pennick moved from AES to AFS Wealth Management & Insurers Advisers of Ireland, the Complainant filed with MPM a Change of Adviser Form dated 20 July 2021,[34] again nominating Mr Pennick as their adviser on behalf of AFS Wealth Management & Insurance Advisers with email given as phill.pennick@awmwealthadvisors.com .

The Complainant seemed to follow Mr Pennick wherever he went, irrespective of performance.

Is the Complainant correct in blaming the Service provider for their failure to inform him directly, not just via the Investment Advisor, that the funds remained uninvested for an unduly long period of time and in the meantime incurring not inconsiderable annual charges eroding the capital of the pension fund; and if so should the Service Provider be responsible not only for the potential gains had the funds been invested but also for the charges incurred while the funds lay idle in cash form.

The Service Provider argued that having informed twice (over a span of five years) the appointed Invested Advisor about non-investment of the funds in the absence of specific investment instructions, they properly discharged their duty of care as they had every reason to believe that the Advisor was actually regularly consulting the Complainant, as was his obligation to do through a service that the Complainant was paying for.

[33] P. 93
[34] P. 191

The Service Provider also states they had reason to believe that the decision to stay totally liquid was a conscious decision given the turbulence of the markets, especially in the period 2018 - 2020.

Furthermore, the Complainant was being informed directly by the Service Provider of this state of affairs by submitting annual statements that as from 2019 clearly showed a 100% cash position. Also, that client had been given online access to his portfolio thus having real time access to information on the underlying investments in his portfolio.

The Arbiter finds that while it would have been preferable for communications with the Investment Advisor to be also copied to the Complainant, the case made by the Complainant that the Service Provider failed him in not doing so is not very convincing. The argument that annual statements showing a reducing cash balance were interpreted as the value of the underlying investments in and of itself weakens the case for compensation of missed growth resulting from non-investment of the funds. The evident assumption is that if the Complainant was interpreting the reducing value of the portfolio as normal market movement in the negative direction, he can hardly now make a case for missed growth.

Further, as the Complainant's case for missed growth was based on the performance of the main UK index FTSE 100 (even though a balanced risk profile would not be compatible with a 100% total equity investment and liquid or fixed income investments with prevailing very low interest rates would have had to make a good part of the portfolio to reflect the balanced approved), it is confirmed that during the period from end 2016 until April 2022, the FTSE 100 had a positive performance of only 4% and nowhere near the 20% growth expected as part of the compensation requested.

As to the question of charges eroding the value of the cash fund, no case has been made by the Complainant that these charges were not those disclosed to him on accepting membership of the Scheme and the Life Policy of OMI, or that he was promised that these charges would not apply until funds were actually invested.

It should be noted that according to the Complainant's own submissions,[35] 42% of the GBP 26,172 charges complained of consisted of Advisor Fees which the

[35] P. 207

Complainant maintains that he never had spoken to over the 5 years irrespective of the apparent blind faith in him earlier described. One can hardly expect a licensed Advisor receiving such fees and not even holding a minimum of one annual review meeting following receipt of the annual statement that was also copied to the Adviser.

It is accordingly hard to find fault in the Service Provider's assumption that the decision to stay liquid was a conscious decision taken by the Complainant upon advice of the paid adviser.

Decision

For the reasons stated throughout this decision, the Arbiter considers the Complaint as not being fair, equitable and reasonable in the particular circumstances and substantive merits of the case,[36] and is hereby dismissing it.

Recommendation

The Arbiter makes a recommendation (non-binding) to the Service Provider that going forward it allows a fair discount on its own fees to take into account the fees it has received when in fact there was not any supervision to do as Trustees, given the non-investment of the funds.

In the spirit of this recommendation, the Arbiter decides that each party bears its own costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services

[36] Cap. 555, Article 19(3)(b)