

Before the Arbiter for Financial Services

Case ASF 065/2022

OL

(‘the Complainant’)

vs

Momentum Pensions Malta Limited

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

Sitting of the 10 January 2023

The Arbiter,

Having seen the **Complaint** made against Momentum Pensions Malta Limited (‘MPM’ or ‘the Service Provider’) relating to the Momentum Malta Retirement Trust (‘the Retirement Scheme’ or ‘Scheme’), this being a personal retirement scheme licensed by the Malta Financial Services Authority (‘MFSA’), established in the form of a trust and administered by MPM as its Trustee and Retirement Scheme Administrator.

The Complaint, in essence, relates to the Complainant’s claims that the Service Provider acted negligently and failed to act in her best interests and in line with its duty of care as trustee, as it allowed an unlicensed advisor within her pension structure and the Service Provider did not ensure that her funds were invested in a prudent manner. The Complainant alleged that unsuitable, non-retail, investments involving high-risk structured notes were allowed within her Retirement Scheme in breach of the investment guidelines.

The Complainant claimed that she experienced losses on her Retirement Scheme. She explained that in just two years, her initial investment of GBP20,905.68 dropped considerably to GBP13,550.26 and in light of this, she

decided to withdraw all available funds and close her account in 2018, which left her with a loss of GBP7,355.42 on her pension.

The Complainant further explained that, in October 2017, she was aware of significant issues involving pensions handled by Continental Wealth Management ('CWM') and MPM. She tried to find out from CWM about these problems, but no reply was forthcoming. She contacted MPM a few times, most significantly in September 2017 and 2018 when she received the official notification of the cessation of business between MPM and CWM.

The Complainant further explained that she only discovered the real scale of the negligence after other similarly affected clients successfully claimed against MPM with the Office of the Arbiter for Financial Services ('OAFS') following their action at rooting out the truth and scale of MPM's negligent failure.

The Complainant noted that she had wrongly assumed that the matters were just down to CWM. She noted that her knowledge of pensions is very limited, and only realised what MPM's role should have been when she spoke to others.

The Complainant submitted that MPM had Terms of Business with CWM to trade and deal in pensions despite that CWM had no licence to trade.

She remarked that in its final response, MPM stated that CWM was regulated under Trafalgar's licence. The Complainant submitted that this was not true as *Trafalgar International GmbH* was only licensed for insurance advice and according to Trafalgar's licensing body, CWM was neither licensed nor regulated.¹

The Complainant explained that she had wrongly assumed that by informing her back in 2017, MPM was going to help her, but this did not turn out to be the case.

The Complainant made reference to her formal complaint with MPM of 24 January 2022 and MPM's response. She noted that MPM did not accept that it was at fault and the Service Provider had argued that it was her duty to find an appropriate advisor. She submitted that, however, MPM did not mention that it had allowed an unlicensed company to trade for them.

¹ Page (P). 4 & 7

The Complainant stated that MPM remarked that she had signed all trading deals. She claimed that this was however not true as to her knowledge she only signed one document at the start of the policy in 2015.

It was further submitted that it was not true either that her attitude to risk was high/very high as alleged by MPM. She claimed that this must have been changed or altered after filling out her original paperwork.

The Complainant submitted that irrespective of this, the fact remained that this was a pension arrangement and MPM had allowed the purchase of very high-risk structured notes by an unlicensed party, CWM. She noted that such investments carried an extremely high risk of substantial losses.

The Complainant further claimed that her pension was unknowingly and systematically destroyed given that between 80-100% of her pension was, at times, invested into unsuitable high-risk investments, not appropriate for a retail pension member.

She alleged that MPM accordingly failed to act in her best interests and to fulfil its legal duties as her trustee.

The Complainant claimed that she did not realise the level of stalling, mismanagement and sheer negligence on MPM's part in allowing such matters to continue.

She submitted that MPM had every chance to inform her of any concerns which MPM was aware of back in 2017. The Service Provider could have taken action to mitigate her losses but failed to do so.

The Complainant further submitted that her pension should have allowed her to retire with a modest income but, instead, she was left with virtually nothing and faced with the very real prospect of hardship in her retirement years.

The Complainant claimed that MPM failed to ensure that the funds were invested in a prudent manner and also failed in its duty of care to always act in her best interests.

The Complainant made reference to the disclosure contained in MPM's Application Form. She submitted that MPM should have used its knowledge, power and discretion to question and stop the unsuitable professional only

investments and act to protect her pension fund. She claimed that MPM however failed to do this.²

She submitted that MPM is also guilty of not carrying out due diligence on the investments undertaken within her pension scheme and also failed to operate according to its own guidelines.

The Complainant noted that she is aware that there is a time limit for making such a Complaint, but she asked the Arbiter to consider her Complaint given that she only became aware of MPM's failures in December 2021, after MPM denied all blame throughout the various dealings she had with the Service Provider.

The Complainant noted that her initial investment was GBP20,905.68, whilst her pension commencement lump sum (PCLS) together with the final income drawdown only amounted to GBP13,550.26. She claimed that this accordingly resulted in an actual loss of GBP7,355.42.

The Complainant requested the restoration of all the mishandled funds, which were poorly invested, and a refund of all the fees, costs and disbursements.³

Having considered, in its entirety, the Service Provider's reply, including attachments,⁴

Where, in summary and in essence, the Service Provider submitted that:

1. In November 2015, *Trafalgar International GmbH* ('Trafalgar') filed an *SEB Asset Management Bond* ('SEB') application form for, and on behalf of, the Complainant.
2. On receipt of the funds, and after payment of the adviser fees agreed to by the Complainant, the balance of GBP18,795.40 was transferred to SEB.
3. On 10 December 2015, MPM sent all policy documentation to the Complainant, including the charges schedule. It submitted that the Complainant was therefore aware of the fee structure and amount invested.

² P. 8

³ P. 4

⁴ P. 27-96

4. The first dealing instruction signed by the Complainant which was received from Trafalgar, provided for the purchase of two collective investment funds, the *VAM Managed Funds* and the purchase of three structured notes whose underlying was based on Indices or Exchange Traded Funds.

The Guarantors of the structured notes were diversified across *Leonteq*, *Notenstein* and under a Triparty Collateral Management Secured Structured Products (TCM).

Subsequent dealing instructions involved the purchase of two other funds, namely *Rathbone Luxembourg Funds SICAV – Multi Asset Enhanced Growth Portfolio* and *Gemini Investment Funds plc*.

5. MPM noted that, as can be seen from the Factsheets, it was not the case that MPM allowed the purchase of ‘*very high-risk structured notes*’, as the notes were based on Indices or ETFs. It submitted that the Complainant did not provide evidence to support this allegation.

MPM claimed that the investments were made in line with both its investment guidelines and MFSA rules.

It further noted that when the Complainant decided to surrender, she was not invested in any structured notes and actually made a net realised gain on the structured notes.

Claim that no loss was suffered

6. MPM submitted that the Complainant did not suffer any investment loss on her pension fund and therefore had no interest or basis on which to complain.
7. Only two of the Complainant’s investments realised losses of GBP200 and GBP367 – the *Leonteq 5 yr Credit Linked Note on 4 Indices* and the *Gemini fund* when sold in 2017. All other investments returned a profit, and the net realised gain on the Complainant’s investments was, in fact, GBP882.22.

8. MPM further explained that the decrease in value of the SEB policy was a result of fees payable to SEB over the term of the policy, adviser fees agreed to and payable to Trafalgar and fees payable to MPM.

All fees were disclosed at point of inception in 2015 and the adviser fees were instructed for payment by the Complainant in 2016. An early surrender penalty was also charged in line with the SEB Fee Schedule, and it was the Complainant who decided to surrender the policy after having sought advice from Trafalgar.

9. MPM thus submitted that the Complainant's allegation that she suffered an *'actual loss'* of GBP7,355.42 is unfounded and incorrect.

Submission on Competence and Prescription

10. The Service Provider submitted that the Complaint is prescribed pursuant to article 21(1)(b) of Chapter 555 of the Laws of Malta ('the Act').

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

11. MPM further submitted, without prejudice, that the Complaint is prescribed pursuant to article 21(1)(c) of the Act (a period of decadence).

In her Complaint, the Complainant states that she was:

'aware in October 2017 that there were significant issues with pensions handled by Continental Wealth Management and Momentum Pensions Malta'.

The Complainant further stated that she contacted MPM:

'a few times, most significantly in September 2017 and October 2018'.⁵

⁵ P. 29

MPM submitted that the Complainant, however, only complained to it on 24 January 2022.

In her Complaint, the Complainant stated that she only found out the scale of the negligence after other similarly affected clients claimed against MPM before the Arbiter. MPM however questioned why the Complainant did not also file her claim at the same time other members filed their complaint, as far back as 2018, if this was really the case.

In May 2018, the sum of GBP15,080 was paid by SEB to MPM directly to the Complainant as retirement benefits. The Complainant was subsequently provided with a client transaction statement which showed the amount paid to her.

MPM submitted that the Complainant was therefore aware of the value of her policy on 24 May 2018.

The Complainant was, furthermore, cognisant of the claims being made against MPM including the allegations surrounding CWM and their alleged lack of licensing. Yet, she did not complain to MPM nor file a claim before the Arbiter until 2022.

MPM accordingly reiterated that, in any event, the Complainant did not suffer any investment loss and her instructed investments resulted in a net realised gain.

12. It was not factual what the Complainant stated that:

*'In just 2 years, my initial investment of £20,905.68 dropped considerably it stood at £13,550.26 as of 31/03/2017! I decided in light of these events, I would close my account with MPM. I withdrew all available funds.'*⁶

MPM noted that the Complainant invested a sum of GBP18,795.40 as clearly shown on the Client Statement and the SEB Transaction Statement where the investments were consistently valued in excess of GBP16,000.

⁶ P. 30

The Complainant also did not decide to surrender in March 2017 but completed a request to withdraw her retirement only on 29 March 2018.

Even though the Complainant closed her account with MPM, she did not complain to it at any point in time, and only did so on 24 January 2022.

13. MPM referred to the Complainant's statement that she was aware about a time limit for making a complaint.

The Complainant was however contradicting herself – on the one hand, alleging that she only found out about the scale of negligence when other members filed claims against MPM; whilst, on the other, stating that she only became aware of MPM's failure in December 2021.

Replies to other allegations raised by the Complainant

14. With reference to the allegations made by the Complainant regarding the licensing status of CWM and Trafalgar, MPM submitted that the Complainant herself appointed her adviser who was the proper respondent to her claims.

MPM provided some background information regarding the licensing status of Trafalgar, the relationship between CWM and Trafalgar and the latter's head office in Germany.

At the time the Complainant became a member, there was no law or rule requiring MPM to carry out any due diligence or ensure that CWM/Trafalgar was licensed. MPM argued that there was no obligation for it to verify whether CWM was a regulated entity/authorised to provide advice.

15. With reference to the Complainant's allegations that she only signed one document, MPM submitted that the Complainant must clarify what she is alleging. If she is alleging that her signature on the dealing instructions was forged, then this falls outside the competence of the Arbitrator.

MPM further replied that it does not, and has not, completed dealing instructions and has no awareness or line of sight of what discussions and arrangements took place between the Complainant and her adviser.

With respect to the attitude to risk and the allegation made by the Complainant that this was changed/altered, MPM submitted that the Complainant must once again clarify what the allegation is and whether this is directed towards MPM.

It further submitted that the attitude to risk was selected by the Complainant on the application form which she had signed. MPM also confirmed that the sale and purchase of investments, in light of the portfolio held at each point in time, were in line with her attitude to risk.

MPM submitted that, accordingly, it fulfilled its obligations with respect to the Complainant at all times.

MPM does not provide advice

16. MPM reiterated that it is not licensed and does not provide investment advice, nor did it provide investment advice to the Complainant as clearly emerging from the application form and the declarations signed by the Complainant, as well as the terms and conditions outlined in the said form.

Final remarks

17. MPM submitted that it is not responsible for the payment of any amount claimed by the Complainant, and it has, at all times, fulfilled its obligations.
18. It submitted that it has not acted negligently, nor has it breached any of its obligations.
19. It reiterated that the Complainant did not suffer any investment loss and requested the Arbiter to reject the Complainant's claims.

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

Considers:

The Arbiter notes that in its reply to the Complaint, the Service Provider raised the plea that the Arbiter did not have the competence to hear this Complaint. The said plea was raised with reference to Article 21(1)(b) and 21(1)(c) of the Arbiter for Financial Services Act (Cap. 555), ('the Act').

The Arbiter shall accordingly consider the plea as to his competence first.

Preliminary Plea regarding the competence of the Arbiter

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

‘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 her signed Application Form, which was received by MPM on 13 April 2015.⁷

The Arbiter notes that certain transactions within her Retirement Scheme occurred after the date of the coming into force of the Act.⁸

The Retirement Scheme indeed remained in operation until this was encashed by the Complainant in May 2018, following the redemption of her investments in the years 2017 and 2018.⁹ This is evidenced from the Policy Valuation Statement issued by SEB¹⁰ and Client Account Statement issued by MPM,¹¹ and as ultimately confirmed by both parties themselves.¹²

⁷ P. 81-89

⁸ As per the Policy Valuation Statement dated 17 May 2018 – P. 61-67

⁹ P. 62 & 66

¹⁰ P. 61-67

¹¹ P. 73

¹² P. 4, 29 & 72

In its letter of 24 May 2018, MPM also confirmed to the Complainant that *'your Membership within the Scheme will now cease'*.¹³

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 not applicable to the case in question.

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

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

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

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

Such matters relate to the losses that the Complainant claimed she has suffered on her Retirement Scheme. The Complainant claimed a loss of GBP7,355.42.¹⁴

The shortfall alleged by the Complainant was ultimately crystallised by the time of the surrender of her Retirement Scheme.

The Arbiter considers that, for the purposes of Article 21(1)(c) of the Act, the Complainant accordingly first had knowledge of the matters complained of by the time of the closure of her Retirement Scheme account. The closure of the Complainant's Retirement Scheme occurred in May 2018 as evidenced by the official documents produced during the case.¹⁵

¹³ P. 72

¹⁴ P. 4

¹⁵ P. 72

The Complainant filed her complaint with the Service Provider through her letter dated January 2022.¹⁶ This is more than two years after the day she is deemed to first had knowledge of the matters complained of.

Given that the complaint filed with the financial services provider is beyond the period prescribed in Article 21(1)(c) of Chapter 555 of the Laws of Malta, the Arbiter considers that the plea made by the Service Provider as based on Article 21(1)(c) of the Act should be upheld in the particular circumstances of this case.

For the stated reasons, the Arbiter declares that he does not have the competence to deal further with this Complaint.

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

**Dr Reno Borg
Arbiter for Financial Services**

¹⁶ P. 10