

Before the Arbiter for Financial Services

Case ASF 080/2022

RU

(‘the Complainant’)

vs

Momentum Pensions Malta Limited

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

Sitting of 18 April 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 substantial losses suffered on her Retirement Scheme due to the Service Provider alleged negligence and failure in its duty of care and fiduciary duties in its role of trustee, where the Complainant namely alleged:

- That high-risk investments into structured notes which were not reflective of her profile, attitude to risk, and investment guidelines were made within her Scheme;
- That she was not made aware of the applicable cooling-off period;
- That there was a lack of disclosure of fees and charges; and

- That she was treated unfairly as she was ignored due to the small size of her Scheme's account.

The Complaint

The Complainant explained that the complaint involves MPM's wilful and ongoing negligence, and failure in its duty of care and fiduciary duties as trustee of her QROPS pension. She claimed this is with reference to the '*Retirement Pensions Act 2011 B.1.5.1*'.¹

The Complainant submitted that the trustee's failure occurred from her initial transfer of funds, on 30 January 2015, till the date of her complaint.

She submitted that total losses in the amount of GBP 16,909.05 were suffered on her Scheme given that the Scheme's *Present Value* as at February 2022, was down to GBP 1,127.80 from her *Original Transfer Value* of GBP 18,036.85.

Further Background provided by the Complainant

The Complainant explained that she moved to Spain in 2006 and was a stay-at-home mum, cleaning tourist apartments to make ends meet.

In 2013, her *Merill Lynch* pension was transferred into a QROPS scheme, *NZ Endeavour*, on the advice of Neil Hathaway at *Continental Wealth Management*.

The sum transferred was GBP 21,152.55, which after fees amounted to GBP 19,033.21.

In July 2014, MPM's Scheme was recommended as an alternative to *NZ Endeavour*. On 29 January 2015, her *NZ Endeavour* account was closed and an electronic transfer of GBP 18,036.55 was made to MPM with structured notes purchased on her behalf.

She noted that, in the subsequent year, and due to her concerns about the impact of Brexit, she emailed twice for a valuation but there was no response from MPM.

¹ Page (P.) 7

Her main reason for transferring her pension into MPM's QROPS scheme was that it supposedly gave her the right to bequeath her pension pot to her children and that she would also be able to access her pension earlier.

Alleged failure of fiduciary duties

The Complainant submitted that MPM failed in its fiduciary duties under section 1124A, Chapter 16 of the Civil Code Laws of Malta.

She noted that the MFSA Trust and Trustees Cap. 331, Code of Conduct 6.0 Integrity and Ethics, stated that:

*'Trustees, whether corporate or individual persons, must conduct business with integrity at all times and should not attempt to avoid or contract out of their responsibilities under this Code. They must exercise their fiduciary duties **prudently and competently and, subject to the terms of the trust, consider the rights of all classes of beneficiaries when making decisions affecting the administration of the trust.** They should invest, distribute or otherwise manage each trust's assets in accordance with the law and the trust instrument. They must deal fairly with all clients and seek to ensure that clients are not misled as to the **service being provided and the duties and obligations of the service provider.** Trustees should treat the interests of beneficiaries as paramount (subject to any legal obligations to other persons or bodies) and should always act with due care, skill and diligence'.²*

The Complainant submitted that the losses suffered of GBP16,909.05 are due to MPM's failure to exercise due care, skill and prudence in the diversification of investments, risk and its own guidelines.

She claimed that her trustees failed to perform due diligence in matters related to the investment of the assets as laid out in the Retirement Pensions Act, 2011, B4 1.4(b). She further claimed that MPM's behaviour and failings did not meet the standard of care a reasonable person would apply in the circumstances.

Alleged high-risk investments

Reference was made to the investment guidelines in MPM's Application Form.

² P. 8

The Complainant noted that this stated that the trustee needs to ensure that the applicant's funds are invested in a prudent manner and in the member's best interests.

The Complainant also quoted Part B.4, 1.4(b) of the Pension Rules for Service Providers.³

She explained that she totally trusted her trustees to make investments in her best interests and that her pension plan would grow in line with the 6-8% return promised.

It was claimed that the investments made on her behalf were however mainly structured notes which were not capital protected and were clearly marked as '*for professional investors only – not for retail distribution*', and these should have never been used.⁴ The Complainant further submitted that the investments were obviously very high risk and entirely unsuitable for any pension – irrespective of her or any individual pension investor's risk profile.

She claimed a '*low to medium risk*' had been stipulated on her initial consultation form but investments were made on her behalf into high-risk professional investor-only structured notes which did not fall into her chosen risk profile.

The Complainant further submitted that these investments should have been reviewed by MPM to ensure they matched her risk profile and investment status. She claimed that MPM should have rejected them on the grounds that they were high-risk, illiquid purchases but this did not happen, and the structured notes were approved by her trustee.

The Complainant noted that MPM stated that '*Structured Notes will only be accepted at their discretion*'.⁵ She submitted that, in accepting such purchases on her behalf, MPM accordingly failed to act both in her best interests and in accordance with its own guidelines, as laid out in its Application Form.

³ Which she noted that '*The Service Provider shall act with due skill, care and diligence. Such action shall include: (b) Where applicable, taking all reasonable steps to obtain, when executing orders, the best possible result for its clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order*' – P. 8

⁴ P. 8

⁵ *Ibid.*

The Complainant further submitted that MPM should have used its power and discretion to question the unsuitable professional investor-only investments and act to protect her pension fund.

Claims about fees and charges

The Complainant noted that the Retirement Pensions Act, 2011, part B.4.1.3(f) states that:

'Trustees should avoid unfair or unreasonable charges on members also taking into account the charges levied on underlying investments'.⁶

She submitted that the combination of high-risk investment failures and high charges on such purchases resulted in a complete destruction of her pension fund and a situation where she is now only paying fees and charges.

It was claimed that she had no communication from MPM about when items were being sold in order to fund fees and commissions.

She further claimed that it was fairly obvious from her running balance that she will soon have absolutely nothing left in her pension as almost everything that can be sold to pay for charges has been sold.

The Complainant alleged that no attempt whatsoever was made to fully disclose fees nor provide contract information and that her account was now seemingly in limbo with nothing being done to alert her as to what her options are.

Claim relating to the legal right to cancel

The Complainant claimed that she was never made aware of the 30-day period during which she could withdraw from the contract. She quoted the following in this regard:

'A member is given a period of 30 days to withdraw from the contract entered into with the scheme. Pursuant to regulation 7 of the Distance Selling (Retail Financial Services) Regulations (S.L. 330.07), the member must be given a period of 30 calendar days to withdraw from the distance contract relating to personal

⁶ P. 9

pension arrangements, without incurring any penalty and without having to give any reason'.⁷

Claim regarding the fair treatment of all members and beneficiaries

The Complainant pointed out that:

'Trustees/Custodians should act honestly, fairly and with integrity as laid out in the Retirement Pensions Act 2011 part B 4.1.3(a)(c)(e).'

She explained that her initial transfer into the QROPS scheme was significantly less than many other clients of MPM and believed that because of this, her account was discarded. It was noted that the desecration of the value of her pension now meant that no advisor was interested in taking it on.

The Complainant explained that this became explicitly obvious when in the summer of 2021, after a phone call with her advisor at *Trafalgar* to discuss the dire situation of her pension, she was told that there was nothing he could do because under a new EC Directive she had to appoint her own advisor.

She noted that there was no advice on how to do this and she was ignored despite three emails to MPM to get an official statement of the change in law and the process taken to appoint a new advisor.

The Complainant considered that this was due to the fact that she is now not worth bothering about. She felt this was the final insult epitomizing MPM's failure to act honestly, fairly and with integrity from the very beginning.

Summary of her complaint

The Complainant submitted that the losses suffered on her pension fund are totally due to the extreme wilful and continuing negligence of MPM as trustees and that MPM should, therefore, be fully responsible for her losses.

The Complainant re-iterated that MPM failed to:

- act in her best interests
- act within its own investment guidelines

⁷ *Ibid.*

- ensure investments were within her risk profile and investment status
- fully disclose fees and provide all pre-contractual information
- allow her the legal right of a 30-day cooling-off period
- communicate to her any concerns at any time about the huge losses or inappropriate investments being made within her portfolio
- mitigate losses to her pension fund
- treat her fairly and equitably
- fulfil its fiduciary duties under section 1124(a) of the Civil Code Chapter 16 of the Laws of Malta and the Trusts and Trustees Act.

Therefore, she considered that a breach of trust results from MPM's neglect to act in her best interests and perform its obligations. Reference was made to the Retirement Pensions Act, 2011, part B.4.1.17.

The Complainant believed that MPM was negligent with regard to managing her pension fund and, as trustee, failed to take reasonable care to avoid causing loss to her pension.

She claimed that MPM's behaviour and failings did not meet the standard of care which a reasonable person would meet in the circumstances and failed in its compliance with the Retirement Pensions Act, 2011.

The Complainant submitted that she has suffered financial loss as a member of the Scheme, which was ongoing, and which a reasonable person could, in the circumstances, be expected to foresee and prevent.

She noted that it was inconceivable that MPM continues to deny complete responsibility for her monetary loss when investigations into other complaints pertaining to the same or similar issues regarding the trustee's failures, found the same underlying fundamental failures indicated in her Complaint.

She considered that MPM did not act within its obligations and duties applicable as a Retirement Scheme Administrator and Trustee and that its actions, or lack of action, directly resulted in her pension fund losses.

Remedy requested

The Complainant requested the Arbiter to rule against MPM with costs and to take an in-depth look into MPM's practices in order to both protect future QROPs investors and also protect the wider reputation of the Maltese financial services industry.⁸

For the losses incurred due to MPM's alleged ongoing negligence and failure in its duty of care, the Complainant sought financial remedy for the total amount (inclusive of fees) of GBP16,909.05.⁹

Reply filed outside the prescribed time limits

MPM's reply was filed outside the time limits established by law and the Service Provider was therefore contumacious.

During the hearing of 4 October 2022, the Service Provider was informed about its contumacy the Arbiter gave it the opportunity to justify its contumacy.¹⁰

The Arbiter considered this matter in detail, also with reference to a decision by the Court of Appeal relevant to the issue in question and the principles established by the Courts regarding contumacy as further explained in his decision.¹¹ As also outlined in his decision, the Arbiter still considered the Service Provider to be contumacious and resolved that its reply cannot accordingly be admitted. The Arbiter, therefore, ordered his administrative staff to remove the reply of the Service Provider from the file of the case.¹²

The Arbiter further noted the following:

*'Regarding contumacy, our Courts have also established the principle that contumacy is considered to be a contestation and therefore the Complainant has to prove his case. The Arbiter will follow this principle and will also allow the Service Provider to file a note of submissions **within the confines of contumacy** at a later stage in these proceedings'.¹³*

⁸ P. 4 & 10

⁹ P. 11

¹⁰ P. 82

¹¹ P. 88 - 90

¹² P. 90

¹³ *Ibid.*

MPM subsequently filed a note of submissions where some points raised were clearly outside the confines of contumacy and were a clear attempt to raise pleas which considering that the Service Provider was contumacious, the Arbiter could not consider.

For instance, the Service Provider, in its note of final submissions, raised the plea of decadence under Article 21(1)(b)(c)/(d). This plea falls outside the confines of contumacy, and it has been established even by our courts that the note of final submissions cannot serve the defendant to raise pleas that it was not allowed to raise because of the contumacy of the defendant (service provider). Therefore, the Arbiter cannot consider this 'plea' because it falls outside the scope of the final note of submissions of a contumacious party. The note of submissions of a contumacious party may only refer to the facts of the case as submitted by the Complainant. Therefore, there is nothing that can stop the Arbiter from considering the merits of the case.

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.¹⁴

The Complainant

The Complainant, born in 1969, is of British nationality and resided in Spain at the time of her application for membership as per the details contained in MPM's Application Form.¹⁵

The Complainant's occupation was indicated as '*Villa Rental Manager*' in the said form. In her Complaint to the OAFS, she described herself as a '*stay-at-home mum, cleaning tourist apartments to make ends meet*'.¹⁶

It was not indicated, nor has it emerged, during the case that the Complainant was a professional investor. The Complainant can accordingly be regarded as a retail client.

¹⁴ Cap. 555, Art .19(3)(b)

¹⁵ P. 24 & 37

¹⁶ P. 7

The Complainant was accepted by MPM as a Scheme member in August 2014.¹⁷

Her risk profile was indicated as '*Medium*' out of the five options available of '*Low*', '*Lower to Medium*', '*Medium*', '*Medium to High*', and '*High*' in the Application Form for Membership.¹⁸ Her '*Attitude to Risk*' was stipulated as '*Low*' in the Annual Member Statement dated 31 December 2021.¹⁹

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.²⁰

Continental Wealth Management was indicated as the Complainant's appointed professional adviser.²¹ The said adviser provided investment advice to the Complainant with respect to the selection and composition of the investments underlying the Scheme. The investments within the Scheme were accordingly directed by the member and her investment advisor subject to the oversight and acceptance of MPM as the trustee and RSA of the Scheme.

The Retirement Scheme's Underlying Investments

An account was opened with *Capital Platforms Malaysia*, with which the Scheme held the underlying investment portfolio.

The investment transactions allowed to be undertaken within the said account, as emerging from the *Transaction History* statement presented during the case, for the period March 2015 till February 2022, are summarised in Table A below.²²

¹⁷ P. 25

¹⁸ P. 23 & 39

¹⁹ P. 25

²⁰ <https://www.mfsa.mt/financial-services-register/>

²¹ P. 15

²² P. 18 - 21

Table A – Investment transactions between Mar 2015 till Feb 2022

Name of Investment	Date bought	CCY	Purchase amount	Date sold/Matured	Maturity/Sale price	Realised Capital Loss/ Profit (exclusive dividends/ interest)
<i>Commerzbank 2Y Autocall Nt Worst GBP</i>	04/02/2015	GBP	5,000	01/03/2017	1,940.35	-3,059.65
<i>EFG 2Y Multi Barrier Rev Conv Nt GBP</i>	04/02/2015	GBP	3,000	22/04/2015	3,000	0
	24/02/2015	GBP	2,936.10	16/02/2017	0.95	-2,935.15
<i>Leonteq 1Y Multi Barr Rev Conv GBP</i>	04/02/2015	GBP	2,922.30	23/04/2015	3,000	+77.70
<i>Leonteq 2Y Multi Barr Rev Conv GBP</i>	03/03/2015	GBP	3,000	10/03/2017	1,316.20	-4,416.20
	29/04/2015	GBP	2,732.40			
<i>RBC 5Y Phoenix Autocallable Nt GBP</i>	29/04/2015	GBP	3,000	05/05/2020	584.83	-2,415.17
<i>Marlborough UK Micr Grwth A GBP Cap</i>	15/05/2018	GBP	3,999.99	18/07/2019	3,617.09	-382.90

Table B below in turn outlines *inter alia* the realised capital loss/profit on the respective investments held within the Complainant's investment portfolio, when taking into account any respective dividends/interest received.

Table B – Realised Capital Loss/ Profit on investments inclusive of dividends/interest

Name of Investment	Realised Capital Loss/ Profit (exclusive dividends/ interest) - GBP	Total Dividends/ Interest received - GBP -	Realised Capital Loss/ Profit (inclusive of dividends/ interest) - GBP -	% of Realised Capital Loss/ Profit (incl. of div./int.) against initial capital invested
<i>Commerzbank 2Y Autocall Nt Worst GBP</i>	-3,059.65	900 ²³	-2,159.65	-43.19%
<i>EFG 2Y Multi Barrier Rev Conv Nt GBP</i>	-2,935.15	602.40 ²⁴	-2,332.75	-39.30%

²³ P. 18-20 – Coupons of: £112.50 on 28/05/15; £112.50 on 28/08/15; £112.50 on 30/11/15; £112.50 on 01/03/16; £112.50 on 31/05/16; £112.50 on 31/08/16; £112.50 on 30/11/16; £112.50 on 01/03/17

²⁴ P. 18-20 – Coupons of: £120 on 22/04/15; £60.30 on 14/05/15; £60.30 on 13/08/15; £60.30 on 13/11/15; £60.30 on 12/02/16; £60.30 on 14/05/16; £60.30 on 14/08/16; £60.30 on 15/11/16; £60.30 on 16/02/17

<i>Leonteq 1Y Multi Barr Rev Conv GBP</i>	+77.70	60.90 ²⁵	+138.60	+4.74%
<i>Leonteq 2Y Multi Barr Rev Conv GBP</i>	-4,416.20	840 ²⁶	-3,576.20	-62.39%
<i>RBC 5Y Phoenix Autocallable Nt GBP</i>	-2,415.17	0	-2,415.17	-80.51%
<i>Marlborough UK Micr Grwth A GBP Cap</i>	-382.90	0	-382.90	-9.57%
		Total	-GBP 10,728.07	

As indicated in Table B above, the total cumulative net loss (inclusive of coupons received) on the investment portfolio amounts to -GBP 10,728.07.

According to the statement of 'Transaction History' produced during the proceedings of the case, the Scheme had on 30/02/2015, an 'Incoming Transfer' of GBP 18,036.85 which amount was available for investment.²⁷

The amount of total net loss (inclusive of coupons received) suffered by the Complainant on her investment portfolio thus equates to a loss of 60% of the total investible amount.²⁸ The losses were compounded further through the fees applicable to the Scheme and its underlying structure including any fees paid to the investment advisor.

Observations and Conclusions

Background and application of aspects raised in similar cases

The Arbiter has previously exhaustively considered multiple complaints²⁹ 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 2020,³⁰ as well as other multiple cases such as case 073/2019, 076/2019 and 070/2019.³¹ The said decisions were also all

²⁵ Coupon of £60.90 on 23/04/15

²⁶ P. 18-20 – Coupons of: £105 on 08/06/15; £105 on 08/09/15; £105 on 08/12/15; £105 on 08/03/16; £105 on 08/06/16; £105 on 08/09/16; £105 on 08/12/16; £105 on 10/03/17

²⁷ P. 20

²⁸ GBP 10,728.07 of GBP 18,036.85 = 59.5%

²⁹ Of over 55 cases

³⁰ <https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf>

³¹ <https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20073-2019%20-%20PG%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf>

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

confirmed by the Court of Appeal (Inferior Jurisdiction) with numbers 39/2020 LM, 37/2021 LM, 38/2021 LM, and 39/2021 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:

- (i) the references to any underlying life assurance policy made in the said decisions (which is not applicable to the case in question as instead of the said insurance policy an account was opened with *Capital Platforms Malaysia* as detailed above) and
- (ii) other pertinent details specifically applicable to the respective case (such as the extent of loss and the exact investments forming part of the investment portfolio).

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

The nature of the disputed investments and her allegations regarding the inadequacy of the investments permitted within her Scheme

In her complaint to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant clearly indicated that the disputed investments involved the '*structured notes*' that '*were approved by my trustees*'.³²

In its note of submissions, MPM submitted *inter alia* that '*the complainant has failed to bring even one shred of evidence to prove her investments were into structured notes; that they were for professional investors only; or that they were high risk*'.³³

This is however considered a rather weak submission and contestation by the Service Provider, which the Arbiter cannot give much credence to in the particular circumstances of this case. This is also in the context of the previous multiple complaints already considered in front of the Arbiter (as mentioned above), involving the same Scheme and structure, same investment advisor, same time period, same issuers and terminology of the underlying investment products, and similar issues raised.

It is observed on this point that the Service Provider did not itself state that the investments comprising the Complainant's portfolio were not structured products. Instead, it only stated that the Complainant has not provided evidence to prove her investments were in structured notes.

MPM has not itself indicated and explained what was the type and nature of the investments comprising the Complainant's portfolio.

It is furthermore noted that in its formal complaint to the Service Provider dated 24 January 2022, the Complainant specifically referred to her investments being structured notes, where she *inter alia* noted that:

*'All of the investments made within my retail pension portfolio were passed by yourselves, Momentum, into inappropriate high-risk structured notes, putting all of my pension funds at a very high and unacceptable risk of being destroyed.'*³⁴

In its reply to the Complainant,³⁵ it is also noted that the Service Provider, having '*undertaken a thorough review and investigation of the issues*' raised by the

³² p. 8

³³ p. 97

³⁴ p. 12

³⁵ As distinct from the reply which the Arbiter excluded due to the contumacy of the Service Provider.

Complainant in her Complaint, did not dispute that the Complainant's investments were not made into structured notes but only replied the following:

'All investment instructions were signed by you and submitted by your appointed adviser, on the understanding that you were advised and had approved the trade. We reviewed the instructions, including your signature to ensure there was no material differences from your signature on the Momentum application or Proof of Identity provided. We also reviewed your instructions against our Investment Guidelines in place at the point of receiving your signed instruction in order to proceed with your instruction'.³⁶

The Arbiter also notes that, as evidence of the investments held within her investment portfolio, the Complainant provided (as an attachment to the Complaint filed with the OAFS), the *'Transaction History'* statements, which *inter alia* included the names of the investments undertaken within her portfolio.³⁷ Such investments were summarised in Table A above.

Whilst no fact sheets, ISIN numbers or offering documents were provided or emerged in respect of the majority of the listed investments,³⁸ **the Arbiter however has no reason to believe that the mentioned investments (indicated in Table A above) issued by Commerzbank, EFG, Leonteq and RBC are not structured products as indicated by the Complainant.** The remaining investment, the *'Marlborough UK Micr Grwth A GBP Cap'* is the only investment which is considered not to be a structured product, given that the nature of this investment is that of a collective investment scheme or fund.³⁹

The above conclusion by the Arbiter is also based taking into consideration a number of factors altogether, including the following:

- (i) the similarities between the name of the listed instruments to those of other numerous structured products that the Arbiter had previously already considered in other multiple complaints involving MPM;

³⁶ P. 15

³⁷ P. 18 - 20

³⁸ Including from general searches over the internet.

³⁹ A general search over the internet with the name of such product provided, for example, the following:
<https://markets.ft.com/data/funds/tearsheet/summary?s=GB00B8F8YX59:GBP>

- (ii) the use of terminology, such as '*Autocall*' or '*Autocallable*', '*Multi Barrier*' and '*Reversible Notes*', which featured in the name of the instruments comprising the Complainant's portfolio as listed in Table A above, which terminology is typically associated with structured note investments;⁴⁰
- (iii) the extent of similar substantial losses on the individual investments as outlined in Table B above;
- (iv) that the Complaint involves the same pension structure and investment advisor; and
- (v) the same issuers (Commerzbank, EFG, Leonteq and RBC) that have also commonly featured in the structured products disputed by other investors as allowed within the same Scheme.

All the relevant considerations and, also, on the balance of probabilities, all point and lead to one conclusion, this being, that the said products cannot be considered any different than the structured notes with the same features as described in other multiple cases already considered by the Arbiter as outlined above.

Indeed, the Service Provider has not submitted any proof to contest otherwise as it should have done if this was not the case.

The Arbiter accordingly accepts the Complainant's submission that the structured products allowed by MPM within her Retirement Scheme (which formed the majority of her investment portfolio as outlined further below), were of high risk.

This is also clearly evidenced by the extent of the individual losses experienced on the respective investments as indicated in Tables A and B above. The Arbiter accordingly further concludes that the disputed investments were indeed not reflective of her profile and attitude to risk.

⁴⁰ <https://www.risk.net/definition/autocallable>
<https://www.finra.org/investors/alerts/reverse-convertibles-complex-investment-vehicles>
<https://www.investopedia.com/articles/bonds/08/reverse-convertible-note.asp>

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 bulk (over 90%) of the investible premium was, over a short period of three months, invested mostly into instruments issued by Commerzbank, EFG, Leonteq and RBC (all considered structured notes).

Apart from the high collective exposure to structured notes, it is also noted that the said investments comprised high percentages of the total investible amount of GBP 18,036.85, even individually as outlined in Table C below.

Table C

Name of Investment	Date bought	CCY	Purchase amount	Date sold/Matured	Capital invested as a % of the Total Investible Amount
Commerzbank 2Y Autocall Nt Worst GBP	04/02/2015	GBP	5,000	01/03/2017	27.72%
EFG 2Y Multi Barrier Rev Conv Nt GBP	04/02/2015	GBP	3,000	22/04/2015	16%
	24/02/2015	GBP	2,936.10	16/02/2017	-
Leonteq 1Y Multi Barr Rev Conv GBP	04/02/2015	GBP	2,922.30	23/04/2015	16.20%
Leonteq 2Y Multi Barr Rev Conv GBP	03/03/2015	GBP	3,000	10/03/2017	31.7%
	29/04/2015	GBP	2,732.40		
RBC 5Y Phoenix Autocallable Nt GBP	29/04/2015	GBP	3,000	05/05/2020	16.63%

The Arbiter considers that it cannot reasonably be concluded that such high collective exposure to the said instruments, as well as to the individual high exposures to the same issuers that were allowed to occur by MPM within the Complainant's Retirement Scheme, reflected in any way the requirement for her 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.⁴¹

⁴¹ P. 66

The permitted allocation is, furthermore, also considered as not being either reflective of and in conformity with, MPM own's Investment Guidelines⁴² 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.⁴³

Other matters

With respect to the other matters raised by the Complainant, such as regarding the fees and charges, the legal right to cancel, and the unfair treatment, the Arbiter considers that he has no sufficient basis and evidence on which he can reasonably consider and accept the Complainant's allegations given that such matters have not been adequately substantiated.

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 advisor 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

⁴² *Ibid.*

⁴³ That is, for example, in the single case decided by the Arbiter on 28 July 2020 and ASF case 073/2019, 076/2019 and 070/2019.

to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by Momentum Pensions Malta Limited for part of the realised losses experienced on her pension portfolio.

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited, to be held responsible for seventy per cent of the net realised losses sustained by the Complainant on her overall investment portfolio in structured products.

This is calculated to amount to a compensation of GBP7,241.62.⁴⁴

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Momentum Pensions Malta Limited to pay seven thousand, two hundred and forty-one-pounds sterling and sixty-two pence as compensation to the Complainant.

As part of the amount of compensation awarded to the Complainant,⁴⁵ the Service Provider is also being ordered, (taking into consideration the relatively small amount of her Original Transfer Value into the Scheme and the particular circumstances of this case), to also:

- a. repay to the Complainant a sum equivalent to MPM's own annual Scheme fees charged annually since the time the last remaining investment within her investment portfolio was sold/matured;⁴⁶ and**
- b. repay (or waive) any own exit fees applicable to the Scheme,**

in case the Complainant intends to surrender her Retirement Scheme upon reaching the permitted age.

⁴⁴ 70% of GBP 10,345.17 (the latter figure calculated as the sum of the realised capital loss/profit inclusive of coupons received on the respective structured note investments - i.e., the sum of GBP -2,159.65; -2,332.75; +138.60; -3,576.20; -2,415.17 as per Table B above).

⁴⁵ Which in total still amounts to less than the extent of compensation requested by the Complainant.

⁴⁶ That is, inclusive of, and starting from, the year 2020 onwards given that the last remaining investment, the *RBC 5Y Phoenix Autocallable nt GBP* was sold/matures in 2020 as per Table A in this decision.

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

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

**Dr Reno Borg
Arbiter for Financial Services**