Before the Arbiter for Financial Services

Case ASF 096/2022

NS ('the Complainant')

Vs

Momentum Pensions Malta Limited

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

Sitting of 3rd November 2023

The Arbiter,

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

The Complaint, in essence, relates to the Complainant's claims of significant losses suffered due to MPM's alleged failure to fulfil its duties as trustee and RSA of the Scheme as required in terms of its licence conditions and the provisions of the law. She claimed that MPM failed to act in her best interests, with due skill, care and diligence and in a prudent manner.

The Complainant alleged, in this regard, that MPM was negligent and failed to take reasonable care of her pension plan primarily given that:

a) MPM failed to ensure that her money was invested in a prudent manner given that her Retirement Scheme was allegedly invested in unsuitable high-risk structured notes not compatible with the Scheme's objective, her profile and attitude to risk.

She submitted that the structured notes were only suitable for professional investors and were of high risk when she was only a retail investor with a medium-risk attitude. She claimed that the investments in question were also illiquid and provided no diversification in her portfolio;

b) MPM failed to take action to inform her of the risks of the investments and failed to mitigate her losses despite knowing about the large losses on other members' pension plans;

c) The Retirement Scheme acquired an unnecessary insurance wrapper which just added high costs to the Scheme. She further claimed that MPM failed to clearly highlight in a manner which was fair, clear and not misleading, the high underlying charges applicable on such wrapper and failed also to provide her with a cooling off period on the said policy;

d) MPM failed to carry out adequate due diligence on her advisers, *Continental Wealth Management* ('CWM') and *Trafalgar International GmbH* ('Trafalgar') to ensure that they were properly regulated and carried out their functions in compliance with the applicable requirements.

The Complaint[1]

The Complainant explained that in 2014, she transferred her pension fund, the *Evergreen Retirement Trust* in New Zealand, to the Retirement Scheme offered by MPM in Malta. Following the deduction of fees and commissions involved in the transfer, the value of her pension fund stood at GBP 44,284.13.

An official complaint to MPM was made on 2 November 2017 when she realised how badly her fund had been reduced. A final answer from MPM was received on 29 January 2018, wherein MPM denied all liability and suggested that she should complain to her advisers, Trafalgar. The Complainant noted that MPM went at length to stress that MPM was not responsible in any way blaming either the advisers, *Old Mutual International* ('OMI') or herself.

[1] Complaint Form on Page (P.) 1-5 with extensive supporting documentation on P. 6-162.

The Complainant acknowledged that it has been over four years (since the reply received from MPM and the Complaint made to OAFS), but she felt upset at the time and thought she had no choice but to accept the decision.

She explained that after seeing the recent decisions against MPM, she realised that MPM was not telling the truth and accordingly requested her pension plan to be reinstated back to its original value with growth together with reimbursement of fees paid for the early exit of the expensive underlying policy.

The Complainant submitted that the purpose and objective of a pension is to provide an income in retirement and the plan should be invested in appropriate assets to achieve this aim. She claimed that the underlying insurance policy (referred to as the 'Insurance Bond') and the purchased structured note investments were however not suitable to fulfil such objective.

The Complainant claims that the Scheme's underlying insurance policy was an unnecessary wrapper and an additional layer of costs to the Scheme designed only to pay 8% commission to the (unregulated) advisor.

She claimed that MPM failed to act in her best interests and to fulfil its legal duties as trustees. The Complainant submitted that MPM have a duty under the Retirement Pensions Act 2011 to carry out due diligence in order to ensure that its introducers act within the rules of the said act. She also submitted that a Retirement Scheme Administrator is to retain ultimate responsibility to ensure compliance by the member or any person acting on his behalf (i.e., CWM/ Trafalgar) with the objective of the compliance of the retirement scheme and with any applicable license conditions and provisions of the law.

The Complainant alleges that her previous advisers, CWM, were not licensed for insurance, investment, or pension advice in any jurisdiction and that Trafalgar only had an insurance mediation licence, which was not transferable to CWM or anyone working as advisers with CWM. She claimed that no license agreement existed between Trafalgar and CWM and yet MPM advised her that *'Trafalgar ultimately have responsibility with respect to the investment advice provided and any actions taken by CWM'*.[2] She complained that MPM did not carry out the required due diligence on these entities to ensure they were properly regulated.

[2] P. 6

The Complainant referred to the Special Funds (Regulation) Act (particularly article 24(2)(b) of the said act relating to the registration of asset managers)[3] and claimed that, in terms of the said article, MPM had a duty to ensure that CWM and/or Trafalgar were subject to an adequate level of regulatory supervision but instead, CWM had *'zero regulation'* for *the* provision of investments or insurance services.

The Complainant explained that MPM only cancelled terms of business with CWM in August 2017. CWM then ceased trading on 29 September 2017. She claimed that MPM had prior knowledge of serious concerns regarding CWM and Trafalgar and was aware of large losses within the members' pension funds as far back as 2015. She claimed that MPM failed to investigate whether she had been affected and did not do anything to inform her or mitigate her losses.

The Complainant noted that MPM had terms of business with three companies – *Inter Alliance World Net Insurance Agents*, *Trafalgar International GmbH* and *Global Net*. She claimed that these three companies were all one and the same operating out of an address in Cyprus and had chosen and approved a very narrow selection of structured notes for purchase as investments. She claimed that MPM allowed this narrow selection of structured notes for their members via these three companies.

It was further claimed that MPM failed to adhere to the MFSA's pension rules for service providers with respect to business introducers and failed to police CWM in any way. She claimed that as an RSA, MPM retained ultimate responsibility to ensure compliance by anyone acting on her behalf. She claimed that CWM/Trafalgar did not hold the necessary licences and submitted that Trafalgar could have not been CWM's principal. She explained that CWM were not Trafalgar's authorised representatives in Spain and France as there were no passporting rights.

The Complainant claimed that MPM has a duty of care under the pension laws to ensure the suitability and legality of any introducers and other parties with whom it entered into terms of business. She pointed out that the Application

[3] Article 24(2)(b) of the Special Funds (Regulation) Act provides that: *'(2) A person shall not be registered as an asset manager under the provisions of this Act unless it is a company - … (b) in the case of a company operating outside Malta, which is established in a country where in the opinion of the Authority the company will be subject to an adequate level of regulatory supervision'*.

Form identifying the investment adviser (page 2, section 5 of the said form) stated that the appointment of any financial adviser was subject to the trustee's approval.

She also referred to section 8, page 4 of the *'Investment Guidelines'* section of the Application Form and noted that this states that the Trustee needs to ensure that the applicant's funds are invested in a prudent manner and in the best interests of the member. The Complainant claimed that MPM however failed to do this.

Reference was also made to page 29 (section 9.5) of the Scheme's trust deed, which the Complainant noted stated that:

'Where the investments are member-directed the RSA shall approve the appointment of the investment advisor, if applicable which shall be subject to an agreement setting out the terms of the service, roles and responsibilities of the parties'.[4]

She also referred to section 9.7 of the trust deed which she noted stated that:

'The RSA shall have the right of action against the Investment Advisor for any breach of duty in terms of the relative agreement between the parties or at law'.[5]

The Complainant highlighted that MPM is the sole policyholder of the OMI policy and it had signed to accept the terms and conditions of such policy. She stated that the terms provided that:

'We the Company appoint the Fund Adviser detailed above (Trafalgar) to act on our behalf for the purpose of making Investment Decisions'.[6]

She also referred to clause 5, page 8, Declaration section of MPM's Application Form, which the Complainant noted that stated

'I accept that I or my designated professional adviser may suggest investment preferences to be considered, however, the Retirement Scheme Administrator will retain full power and discretion for all decisions relating to the purchase,

[4] P. 8
[5] *Ibid.*
[6] *Ibid.*

retention and sale of the investments within my Momentum Pensions Retirement Fund'.[7]

The Complainant submitted that MPM should therefore have used its powers and discretion to question and stop the unsuitable professional-only investments and to act to protect her pension fund, however, failed to do so.

She requested that her risk profile be set at medium and considered that as part of the RSA's *'Know Your Customer'* due diligence, MPM should have had procedures in place to establish a member's risk profile independently to the financial adviser. The Complainant alleged that MPM however failed to do this and that all of the investments were instead made into high-risk, professional-investor-only structured notes. She claimed that these investments did not fall within her 'medium' risk profile nor her classification as a retail investor.

The Complainant explained that the losses vaguely shown by MPM's annual statements were dismissed by CWM as *'paper losses'*. She submitted that she had accepted the explanation that the value of investments falls at the start but then they mature in full and possibly with bonuses as this sounded reasonable to her.

She noted that MPM reinforced such explanation given that at the bottom of the Annual Statements it stated that:

'Certain underlying assets within the investment may show a value that reflects an early encashment value, or potentially a zero value, prior to maturity date. This will not reflect the true current performance of such underlying assets'.[8]

The Complainant submitted that the said disclaimer from MPM and the fact that MPM had not communicated any concerns or details of any loss of funds led her to believe that her pension was safe. She noted that when she transferred her pension from her former pension provider, she did not hand over her life savings to someone to squander but was reassured that it was being handled by a well-known trustee whose duty was to look after the funds as if it was their own.

[7] P. 9
[8] *Ibid.*

The Complainant also noted that she is now aware that 'Term Sheets' are issued for all structured notes but claimed that she was never provided with any such documents.

Whilst she did not have copies of the term sheets, she noted that from internet searches she found that the first four investments bought in December 2014, comprising 95% of her fund (GBP 42,309 out of her premium of GBP 44,284.13) was invested into structured notes that appeared in other decisions of the Arbiter, namely, Case 70/2019, 73/2019 and 101/2019.

The Complainant submitted that the structured notes in question are intended solely for professional investors. She pointed out that MPM had admitted in its response that it should review the investments to ensure they match the member's risk profile. The investments, however, were allegedly all high-risk, illiquid and with no diversification.

She pointed out MPM had declared that they see all the offering documents and understand the risks.

The Complainant noted that Part B.4, 1.4(b) of the Pension Rules for Service Providers state that:

'The Service Provider shall act with due skill, care and diligence …'.[9]

She also pointed out that the Trusts and Trustees Act states that in investing or otherwise applying trust property, *'a trustee shall act as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust and by exercising reasonable care, skill and caution'*.[10]

It was submitted that as part of their due diligence and given that they had complete discretion over the investments made, MPM should have obtained and understood the Term Sheets relating to her investments.

It was further noted that, Section I, *'Investment Choice'*, of the OMI investment form, indicated that illiquid investments were not permitted investments for the *European Executive Bond*.[11]

[9] P. 10
[10] *Ibid.*
[11] This being the name of the OMI policy

The Complainant reiterated that 100% of the investments that MPM passed as compliant and suitable for her as a retail investor and suitable for her pension fund, were of high risk and suitable only for Professional Investors with a significant chance of extreme losses. She submitted that MPM failed in its fiduciary duties in allowing any of these high-risk, illiquid investments.

The Complainant submitted that MPM failed to act on the information that was readily available to it and, indeed, it had admitted that it had no access to the Term Sheets. Reference was made to Section N, declaration of the trustees, which she claimed provided confirmation of the trustee's obligations.

She submitted that by not telling her about the risks and purchasing unsuitable assets, as well as not raising concerns regarding the type and risk of investments being made, confirmed MPM's failure to fulfil its legal duty to act in her best interests. She submitted that this equates to wilful negligence.

The Complainant submitted that MPM should have rejected the investments as they did not match her investor status, risk profile or its own guidelines. She submitted that a pension fund should never be exposed to the possibility of losing a significant portion or all of its entire sum.

The Complainant referred to the MFSA's Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act (MFSA Ref: 09-2017), which she noted came into force in July 2019. She stated that on page 4, the said document states that the MFSA *'… considers that the RSA remains responsible for current retail members and in particular they ensure that the investments made reflect the risk profile of such members'*.[12]

She further noted that page 8, section 2.6 of the said Consultation Document stated that the MFSA was concerned, from the on-site visits conducted,

'That in a number of instances, the assets of members (who are mostly retail investors) are being placed in investments such as speculative derivatives, structured notes and units in Professional Investor Funds (PIFs) on a regular basis. These types of investments are more apt and suitable for investors with higher risk appetite, such as professional investors'.[13]

[12] P. 11
[13] *Ibid.*

The Complainant submitted that, however, MPM allowed 100% of her fund to be invested in such PIF's without raising any concerns or communicating with her despite her status as a retail investor. She reiterated that MPM failed to act in her best interest, to use its discretion or to act in a prudent manner or with the diligence and attention of a Reasonable Person. She further claimed that MPM's actions or lack of them, did not satisfy her reasonable and legitimate expectations in any way.

She questioned why MPM did not review her risk profile and fact find which clearly showed that she had no other investments at the time and that she was not a sophisticated investor. She was a retail investor who required capital protection and her pension fund to grow with a view to provide income in retirement.

Reference was made to Section B.4, (rule 1.7) of the Pension Rules for Service Providers regarding the provision of information on fees and charges to members before the offer of any service.

The Complainant highlighted that the guidelines applicable at the time of her application stipulated, with respect to the role of administrator, that:

'*The Administrator will ensure the scheme assets are invested in the best interests of the member and are properly diversified*' in line with prevailing rules.[14]

She highlighted that the Investment Guidelines also stipulated that:

'The Trustee and Administrator needs to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification relevant to the investment portfolio'.[15]

The Complainant submitted that there was, however, no diversification at all.

It was submitted that the unnecessary and expensive 'wrapper' life insurance bond, was issued to and held by MPM. She claimed that these life insurance

[14] P. 12
[15] *Ibid.*

bonds have already been ruled, by the Spanish Supreme Court and in a DGS ruling, as illegal to sell in Spain, where CWM operated.

She noted that the *European Investment Bond* was passed as suitable by MPM, where the terms and conditions of the policy as well as its fees were accepted and signed for by MPM. She pointed out that, as the holder of the policy, all communication about the policy is sent to MPM.

The Complainant submitted that MPM should have made the extremely high underlying charges of the policy clear to her in a manner which was fair, clear and not misleading as required in the Pension Rules. She noted that Section B.4.1.3(f) of the Pension Rules for Service Providers issued in terms of the Retirement Pensions Act, 2011 states that:

'The Service Provider shall act honestly, fairly and with integrity. Such action shall include – avoiding the imposition of unfair and unreasonable charges on the scheme and its Contributors and Members and Beneficiaries, and on the Retirement Fund and its Investors, as applicable, also taking into account, where applicable, the charges levied on any underlying investments in which the Scheme or Retirement Fund invests'. [16]

The Complainant also referred to section B.4.1.17 of the Pension Rules which she noted states that:

'(a) The Scheme Administrator will be liable to the Scheme, Member(s) Beneficiary(ies) and Contributor(s) of the scheme – for any loss suffered by them resulting from it's fraud, wilful default or negligence, including the unjustifiable failure to perform in whole or part its obligations'.[17]

She alleged that MPM failed to fulfil its fiduciary duties under the Civil Code, Chapter 16 of the Laws of Malta. The Complainant also claimed that the Trust and Trustees Act, Code of Conduct (section 6.0, Integrity and Ethics) required that the trustee *'… must exercise their fiduciary duties prudently and competently … They must deal fairly with all clients and seek to ensure that clients are not misled as to the service being provided … Trustees should treat*

[16] P. 12 & 13
[17] P. 13

the interests of beneficiaries as paramount…and should always act with due care, skill and diligence'.[18]

The Complainant claimed that MPM did not deal with her *'fairly'* or *'equitably'* as they have previously been ordered to pay compensation to others.

She claimed that the losses her pension fund suffered were totally due to the extreme wilful negligence of Momentum as her trustees, and that therefore they are fully responsible for this loss.

In summary, she submitted that MPM:

- Failed to act in her best interests
- Failed to act within its investment guidelines
- Failed to ensure investments were in line with her risk profile and investment status
- Failed to fully disclose fees and provide all Pre-Contractual Information
- Failed to allow her legal right of a 30-day cooling-off period
- Failed to ensure that the companies that they issued terms of business to were qualified, had the correct legal licences and necessary regulations to operate
- Failed to communicate to her any concerns at any time over the huge losses or inappropriate investments being made within her portfolio
- Failed to act to mitigate losses to her pension fund
- Failed to treat her fairly and equitably
- Failed to 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.'[19]

She therefore believed that there has been a breach of trust arising from MPM's neglect to act in her best interests and perform its obligations as laid out in the Retirement Pensions Act, 2011 part B.4.1.17.

[18] *Ibid.*
[19] P. 13.

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

She considered that the behaviour and failings of MPM did not meet the standard of care that a Reasonable Person would meet in the circumstances. She claimed that MPM failed to comply with the Retirement Pensions Act, 2011, and that a Reasonable Person could have foreseen and prevented the extreme financial loss she suffered.

The Complainant submitted that it was inconceivable that MPM continues to deny complete responsibility for her monetary loss, despite that the MFSA has found and identified and acted on the same underlying fundamental failures outlined in her complaint.

For the reasons mentioned she considered that MPM did not act within its obligations and duties applicable to an RSA and Trustee and its actions or lack thereof have directly resulted in her pension fund losses.

Remedy requested

The Complainant requested *'full restitution, no fees to exit and interest'*.[20]

She noted that her initial transfer value was GBP 44,699.13, and that if one calculates interest at a yearly 4% when she surrendered her pension plan in 2020, her plan should have stood at GBP 56,511.

The Complainant noted that she received the amount of GBP 18,264 on the surrender of her plan, which surrender was made to stop further losses. She requested compensation of GBP 37,877.[21]

Having considered, in its entirety, the Service Provider's reply, including attachments,[22]

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

[20] P. 2.
[21] *Ibid.*
[22] P. 167 - 186.

1. MPM is licensed by the MFSA to act as the RSA and Trustee of the Scheme. The Scheme is licensed as a Personal Retirement Scheme.

2. MPM is not licensed to provide investment advice.

3. The Complainant completed the Momentum Application Form dated 07/8/2014 together with her advisor, Neil Hathaway, who is named on the application form.

4. MPM sent a welcome letter and its Scheme Particulars to the Complainant by email dated 19 August 2014.

5. The bond application to *Skandia Life Ireland Limited* was sent by Momentum by letter dated 20th August 2014, where the Complainant's financial adviser once again is named, operating under *Inter-Alliance World Net Insurance Agents and Advisers*. The form was also signed by Flora Parker from *Inter-Alliance World Net Insurance Agents and Advisers*.

6. MPM sent the policy documents and client account statement to the Complainant by email dated 11 December 2014. The policy charges were included in the policy documentation.

7. Annual Member Statements were sent to the Complainant each year showing the value of her investment in line with regulatory requirements.

8. MPM informed the Complainant by emails dated 10 September 2017 and 3 October 2017 that terms of business with CWM were being suspended and then terminated.

9. By a letter of 6th April 2020, she was informed by MPM that the Scheme no longer held any benefits on her behalf.

10. MPM contests the amount of the loss alleged by the Complainant. It noted that as a gesture of goodwill, it had rebated its 2017 fees, suspended its 2018 fee and waived its termination fee.

Competence and prescription

11. MPM submitted that the conduct complained of is prescribed pursuant to articles 21(1)(b) and 21(1)(c) of Chapter 555 of the Laws of Malta.

12. It further submitted that the Complaint is prescribed pursuant to article 2156(f) of Chapter 16 of the Laws of Malta.

13. It accordingly submitted that the Complaint should be rejected by the Arbiter.

Reply to the allegations raised by the Complainants

14. MPM noted that the Complainant alleged that it failed to carry out due diligence to ensure that the *'introducers act within the rules of the Pensions Act'*.[23] It also noted that the Complainant further alleged that CWM was not licensed to provide advice, and that Trafalgar only had an insurance mediation license.

    MPM submitted that the Complainant appointed Neil Hathaway as her adviser and that it was Neil Hathaway who advised the Complainant to invest in the products in her portfolio. Accordingly, it submitted that Neil Hathaway is the proper respondent to the claim.

    MPM noted that as from 2015, CWM's advisers including Neil Hathaway were individual employees of Trafalgar (referred to as 'members' by Trafalgar, but Trafalgar has confirmed to MPM they were employees). As employees of Trafalgar, they were operating under Trafalgar's licences, which state that *'Trafalgar International GmbH is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation Licence 34D Broker licence number D-FE9C-BELBQ-24'*.[24]

    MPM stated that this will be amply proved throughout the proceedings, including by communications sent by Trafalgar to MPM.

    It submitted that CWM was not an *'unlicensed investment adviser'*.[25] The Complainant's adviser was an employee of Trafalgar (as confirmed by Trafalgar themselves) and was regulated under Trafalgar's authorisation within the regulatory environment in Germany and hence licensed to provide insurance mediation activities.

[23] P. 168
[24] *Ibid*.
[25] *Ibid.*

It noted that any investment trades placed for and on behalf of the Complainant by her adviser from 2015 onwards as employed and regulated by Trafalgar, were therefore reviewed and strictly controlled via Trafalgar's Head Office in Germany. This was confirmed by Trafalgar itself. Furthermore, Trafalgar as the regulated entity was also responsible for advising the Complainant on her existing portfolio from 2015 onwards as the appointed regulated adviser.

MPM explained that from 2015, CWM was not an *'unlicensed investment adviser'*. The Complainant's adviser was an employee of Trafalgar (as confirmed by Trafalgar themselves) and was regulated under Trafalgar's authorisation within the regulatory environment in Germany and hence licensed to provide insurance mediation activities. Hence, any investment trades placed for and on behalf of the Complainant by her adviser from 2015 onwards, involved advice by an employee of Trafalgar and were regulated by Trafalgar therefore, reviewed and strictly controlled via Trafalgar's Head Office in Germany. MPM reiterated that this was confirmed by Trafalgar themselves.

MPM submitted that furthermore, Trafalgar was also responsible for regulated advice on the Complainant's existing portfolio from this point onwards. All structured notes which expired with a loss, expired during 2017 and during this point Trafalgar was responsible for the advice on her portfolio between 2015 to 2017. The final note expired in 2020 with a profit.

15. Trafalgar made various confirmations to MPM in writing including *inter alia* that: (i) Trafalgar provides regulation and compliance for transactions that fall under the remit of their license and (ii) the list of advisers are employees of Trafalgar and members of GlobalNet (Trafalgar's administration company).

It claimed that, from the confirmation provided by Trafalgar, it transpires that any investment trades placed for, and on behalf of, the members by advisers employed and regulated by Trafalgar from 2015 onwards, were reviewed and strictly controlled via their Head Office in Germany, a

regulated entity and that Trafalgar not only rated the risk but they went further as part of its duty of care to their clients (i.e. MPM's members).

16. MPM noted that Trafalgar subsequently also provided it with a copy of Trafalgar Members Agreements entered into with the individual advisers for MPM's satisfaction.

17. The mentioned agreement signed by the advisers, as provided by Trafalgar, clearly states that the adviser will ensure that all clients receive the following documentation: Terms of Business; Copy illustration; Key Features Document; Trafalgar Key Facts Documents; Client Confirmation Form; Business Card.

18. The said agreement also set out in detail the practices which the adviser was to carry out, including that the adviser had to ensure that all clients received the documentation referred to in the agreement.

19. Without prejudice to its previous submissions, MPM further submitted that, at the time the Complainant became a member of the Scheme, there was no law or rule requiring MPM to carry out any due diligence or ensure that CWM or Trafalgar was licensed. In particular, there was no obligation to verify whether CWM or the adviser appointed by the Complainant was regulated or whether it was authorised to provide advice. Nevertheless, MPM insists that it has fulfilled all obligations incumbent upon it from time to time.

20. MPM noted that its Terms of Business, which are communicated to all members at application stage and are accepted by members on joining the Scheme, explicitly and clearly describe how MPM provides its services. The Terms of Business include a specific section on investments and the role and responsibilities of the member and the adviser.

21. MPM noted that SOC Part B2.6.2 of the rules provides examples of what it signifies for a scheme administrator to act in the best interests of the members – namely by (a) executing instructions and decisions in a prompt and timely fashion; and … (d) acting in accordance with the terms of the

scheme document and any other document describing how its services are to be provided.

22. Reference was made to the quote of article 24 of the Special Funds Act (Chapter 450 of the Laws of Malta) made by the Complainant in her Complaint. MPM replied that this law has been repealed and that in any event, this provision is not relevant as it refers to asset managers.

23. It was noted that the Complainant also alleges that *'… Momentum had prior knowledge of serious concerns re CWM and Trafalgar and were aware of large losses within their members' pension funds as far back as 2015 and yet still failed to investigate whether I had been affected'*.[26] MPM refuted such allegation and submitted that if the Complainant alleges that MPM has any such prior knowledge, then she must prove it. MPM replied that as soon as concerns arose with respect to CWM (not Trafalgar) it actioned them by suspending and then subsequently terminated its terms of business with them.

24. MPM noted that the Complainant alleges that MPM had *'… TOB with three companies – on all exactly identical terms (Inter Alliance World Net Insurance Agents, Trafalgar International GmbH, and Global Net'*.[27] MPM refuted this.

25. MPM noted that the Complainant also alleges that *'As each person should be treated as an individual, my investments should not be the same as another person who has different needs. But Momentum allowed this narrow selection of Structured Notes for their members via these three companies'*.[28] MPM submitted in the first place that it will not divulge information pertaining to another member and that the Complainant must prove her allegation. MPM replied that, additionally, the investments proceeded with for the Complainant were in line with her attitude to risk and in line with MPM's investment guidelines applicable at the time.

[26] P. 170
[27] *Ibid.*
[28] *Ibid.*

26. MPM noted that the Complainant also refers, in her Complaint, to MPM's trust deed (page 29, section 9.5). MPM replied that the Complainant is quoting from the trust deed which was updated in 2017 and therefore was not applicable before 2017.

27. It further noted that on page 8 of the Complaint, the Complainant refers to MPM being the policyholder of *'the Old Mutual International Insurance bond, not me'*.[29] MPM replied that no bond was held for the Complainant with OMI but rather with *Skandia Life Ireland Limited*, as proved by the documentation attached to her own Complaint. Furthermore, the Complainant signed both the application form and the fund adviser form, in which she confirmed the matters in section J of the application (p. 63 of the Complaint) and section 1 of the fund adviser form (p. 67 of the Complaint).

28. MPM submitted that the Complainant goes on to state that MPM should have established her risk profile independently of her adviser. MPM replied that it relied on the risk profile chosen by the Complainant herself. Furthermore, it submitted that MPM is not authorised to provide investment advice, including establishing a member's risk profile. The Complainant went through a financial fact-finding exercise with *Inter Alliance World Net Insurance Agents and Advisers*.

29. MPM noted that the Complainant also alleges that the losses on the annual statements were dismissed as 'paper losses' and that this was reinforced by the disclaimer at the bottom of the annual statement sent by MPM. The Complainant was free to enquire about the valuations provided with her adviser or even with MPM, but she did not raise any complaints in this respect on the point of *'paper losses'* prior to her complaint with MPM.

30. It further noted that the Complainant refers to the fact that MPM's guidelines have recently been amended to refer to investments being suitable for retail consumers. MPM replied that MPM's guidelines are updated as and when necessary, including to reflect any changes in the applicable rules and regulations.

[29] *Ibid.*

31. With respect to her investments, the Complainant alleges that the insurance bond and structured notes purchased were not suitable to fulfil the objective of providing an income on retirement. MPM noted furthermore, that she stated that structured notes are for professional investors only and that the investments were all high-risk, illiquid and with no diversification.

    MPM replied that at the relevant point in time, MPM's decisions were based on the information available to it at the time the decision was made. MPM did not have the benefit of hindsight. Those decisions were based on *inter alia* the following rationale:

    a) The structured notes were offered by very large and reputable fully regulated investment banks and not by small investment houses.

    b) The notes paid interest per quarter, which was aligned to a retiree's need for an income.

    b) The interest rates were higher not owing to the risk but as the members didn't benefit from capital growth if the underlying equities increased in value. The rates offered therefore were higher as the return was in the form of income in place of the upside of capital growth.

    d) The underlying investments composing the structured notes were checked and verified at the point in time that an instruction was placed to ensure they were listed on the major stock exchanges in the world including the NYSE, Nasdaq, London Stock Exchange – this provided further comfort that these instruments had been through a rigorous diligence exercise as an entry requirement to be admitted to such stock markets. The shares were not penny shares.

    e) The structured notes had short maturities typically 1-3 years and hence at the time, it was considered that there was minimal risk of barrier events occurring and falls of 50% - 60% in share value occurring for companies quoted on major stock exchanges and the investment was viewed as prudent based on the information available to Momentum.

f) Barrier events were tested at maturity or at stated observation dates not daily.

32. MPM noted that in her Complaint (p.10), the Complainant refers to 'section B.4.1.4b of the Pension Rules for Service Providers and to the Trusts and Trustees Act and states that *'… as part of their due diligence, and as they had complete discretion over the investments made, Momentum should have obtained and understood the Term Sheets relating to these Investments …'*.[30] MPM replied that copies of all term sheets were obtained prior to the investment being proceeded with, investments which were recommended to the Complainant by her appointed adviser.

It further noted that at the last part of her Complaint (pg. 12 and 13), the Complainant refers to additional rules, without specifying how MPM has allegedly breached these rules.

33. It further noted that the Complainant refers to a Consultation Document relating to rules which came into effect in July 2019. MPM submitted that, in the first place, no inference can be drawn against MPM simply by reference to an MFSA Consultation Document, which is not specific to MPM. It replied that, in any event, the last asset purchased for the Complainant was in 2015. It further referred to the reply in para. 30 above.

34. MPM noted that the Complainant further states that MPM should have made the charges clear to her. MPM replied that, in the first place this Complaint is prescribed pursuant to article 21(1)(b) of Cap. 555 of the Laws of Malta. It replied that, in any event, the policy charges were disclosed to the Complainant.

With respect to the allegation that the thirty-day cooling off period was not provided, MPM replied that this Complaint is once again prescribed pursuant to article 21(1)(b) of Cap. 555 of the Laws of Malta, and in any event, the cooling off period/right to cancel was indeed made known to the Complainant. It submitted that, furthermore, instructions (including the initial instruction) were counter-signed by the Complainant.

[30] P. 172

MPM's Conclusion

35. MPM submitted that it has, at all times, fulfilled all its obligations with respect to the Complainant and observed all laws, rules and guidelines, including investment guidelines.

36. It re-iterated that it is not licensed to and does not provide investment advice and, furthermore, did not provide investment advice to the Complainant.

37. MPM submitted that this is clear from the application form which specifically requests the details of the Complainant's professional adviser. The Complainant further declared that she acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice.

38. To reinforce the point that it does not provide investment advice, MPM noted that an entire section of the terms and conditions of business as attached to the application form, is dedicated solely to this point.

39. MPM concluded that it is accordingly not responsible for the payment of any amount claimed by the Complainant and that it has, at all times, fulfilled its obligations with respect to her. It insisted that it has not acted negligently and neither has it breached any of its obligations in any way. It thus requested the Arbiter to reject the Complainant's claims.

Preliminary

Preliminary Pleas regarding the competence of the Arbiter

The Service Provider raised, in its reply, the plea of prescription *'pursuant to articles 21(1)(b) and 21(1)(c) of Cap. 555 of the Laws of Malta'* as well as *'article 2156(f) of Cap. 16 of the Laws of Malta'*.[31]

MPM did not provide further details in its reply as to the basis of its assertions other than pointing out, towards the end of its reply, that the Complainant's allegations involving fees and charges and the lack of provision of the cooling off

[31] P. 168

period were aspects which were prescribed in terms of article 21(1)(b) of Chapter 555 of the Laws of Malta ('the Act').[32]

It is noted that in its final submissions, the Service Provider only referred to its plea of prescription raised in terms of article 21(1)(b) and highlighted that this involved a period of decadence as upheld in previous decisions of the Arbiter which accordingly could not be interrupted or suspended.

In the same final submissions, MPM again just made reference to the policy charges and the aspect of the cooling off period that were made known to the Complainant in 2014 and submitted *'that these complaints are time barred pursuant to article 21(1)(b) of Cap. 555'*.[33]

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

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

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

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

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

It is noted that the fees in question on the *European Executive Investment Bond* ('the underlying policy') issued by *Skandia International* are fees that the Complainant has been provided and should have been aware of at the time of the application for acquisition of the policy signed by the Complainant on

[32] Para. 34 of its reply – P. 172
[33] P. 351

'07/08/2014'.[34, 35] The thirty-day cooling off period, furthermore, applied at the time of the acquisition of the policy.

With respect to the part of the Complainant's Complaint involving these two specific aspects, that is, the matter of fees and that of the cooling off period, the Arbiter accepts that these relate to *'conduct which occurred before the entry into force of this Act'* and that a complaint about such conduct was required to *'be made by not later than two years from the date when this paragraph comes into force'* as provided for in article 21(1)(b) of the Act. Given that the Complaint to the OAFS on these aspects was not raised by 18 April 2018, the Arbiter accordingly accepts the Service Provider's plea that the complaint on fees and the cooling off period are aspects which are prescribed under article 21(1)(b) of the Act.

The Arbiter however notes that the Complaint made by the Complainant covers far wider key aspects than the issue of fees and the cooling off period. Indeed, the main focus of the Complainant's involves the alleged unsuitability of the investments that were permitted within the Complainant's portfolio as well as the matters surrounding the appointment and oversight of the actions of their advisers as summarised at the start of this decision.

Apart that no justification was provided by the Service Provider regarding the pleas of prescription involving the above-mentioned key aspects, it has furthermore not emerged, throughout the proceedings, any adequate basis which could justify the pleas of prescription raised by MPM.

The key conduct complained of, as highlighted above, involves conduct which falls under article 21(1)(d) of the Act, as it is conduct continuing in nature and is thus considered to have occurred beyond the entry into force of the Act. This is so much so that the Complainant's investment portfolio still included the disputed structured notes (after 18 April 2016 as emerging from the *'Historical Cash Account Transactions'* statement),[36] apart from the fact that CWM/ Trafalgar were also still involved with the Complainant's Scheme up until 2017.

[34] P. 54, 56 & 65
[35] P. 86 – 89, & 174 -179
[36] P. 126 - 128

In its reply, MPM itself stated that:

'All Structured Notes which expired with a loss expired during 2017 and during this point Trafalgar were responsible for the advice in her portfolio between 2015 to 2017'.[37]

As also outlined in its reply, MPM *'informed the Complainant that terms of business with CWM were being suspended and then terminated'* by way *of 'emails dated 10th September 2017 and 3rd October 2017'*.[38] Hence, article 21(1)(b) of the Act does not apply for the mentioned key aspects of the Complaint.

As to article 21(1)(c) of the Act, this stipulates that:

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

The Complainant filed a formal complaint with the Service Provider on 2 November 2017,[39] as also acknowledged in MPM's reply of 29 January 2018. Accordingly, the complaint with the financial services provider was thus registered not later than the two years referred to in article 21(1)(c) of the Act.[40]

Lastly, with reference to article 2156(f) of Cap. 16, which refers to the lapse of five years, the Arbiter notes that not even five years had lapsed from the events occurring in late 2017 and MPM's reply of 29 January 2018 till the date of the Complaint filed with the Office of the Arbiter for Financial Services ('OAFS') on 14 July 2022.[41]

Accordingly, for the reasons amply mentioned, the Arbiter dismisses the pleas of prescription with respect to the mentioned key aspects of the Complaint and only accepts them with respect to the matters involving the fees and

[37] P. 169
[38] P. 167
[39] P. 158
[40] P. 15
[41] P. 1

cooling off period. In the circumstances, the Arbiter determines that he has the competence to hear the remaining key aspects of the Complaint as outlined above and shall proceed to consider the merits of the case with respect to such aspects next.

The Merits of the Case

The Arbiter will decide the Complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.[42]

The Complainant

The Complainant, born in 1958, of British nationality resided in Spain at the time of her application for membership, as per the details contained in MPM's Application Form dated 07/08/2014.[43]

Her occupation was indicated as *'Life Coach'* in the said form as also confirmed during the hearing of 25 October 2022.[44]

The Complainant was accepted by MPM as member of the Retirement Scheme on 19 August 2014.[45]

Out of a five-risk rating classification, ranging from *'Low'*, *'Lower to Medium'*, *'Medium'*, *'Medium to High'* and *'High'*, her risk profile in MPM's Application form was indicated as '*Medium'* risk, described as '*There is some risk to the capital with the potential for a reasonable return over the longer term'*.[46]

Her *'Attitude to Risk'* was also stipulated as *'Medium'* in the Annual Member Statement issued by MPM.[47]

During the course of the proceedings, it was not indicated, nor has it emerged, that the Complainant was a professional investor. In its Complaint to the OAFS,

[42] Cap. 555, Art .19(3)(b)
[43] P. 304 - 312
[44] P. 188 & 305
[45] P. 31
[46] P. 306
[47] P. 31

the Complainant indeed stated that she was not a sophisticated investor, *'had no other investments at that time'* and considered herself as a retail investor.[48]

The *'Confidential Client Fact Find'* compiled by CWM in respect of the Complainant dated 7/8/2014,[49] that was presented during the proceedings of the case, indeed indicates that the only investments held by the Complainant were *'Premium Bonds'* of just *'2000'* [50] with her experience only being classified by the adviser as *'Basic (deposit accounts)'*.[51]

The status of the Complainant as a retail client was not contested by MPM. The Complainant can accordingly be regarded as a retail client.

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.[52]

Continental Wealth Management ('CWM'), with an address in Spain was indicated as the '*Professional Adviser'* in the Scheme's Application Form for Membership.[53] CWM was also indicated as the Complainant's appointed *'Professional Adviser'* with *'Trafalgar International GmbH'* indicated as *'Investment Adviser'* in the Annual Member Statement.[54]

The regulator of CWM was indicated, in the Scheme's Application Form, as being *'Interalliance Worldnet'*.[55]

CWM provided investment advice to the Complainant with respect to the selection and composition of the investments underlying her Scheme.

The investments within her Scheme were 'directed' by the member on the investment advice received from CWM/Trafalgar as her investment adviser. The

[48] P. 11
[49] P. 45 - 50
[50] P. 47
[51] P. 49
[52] https://www.mfsa.mt/financial-services-register/
[53] P. 305
[54] P. 31
[55] P. 305

investments were in turn subject to the acceptance and oversight of MPM as the trustee and RSA of the Scheme.

The funds from the Complainant's previous pension plan, *Evergreen*, that were received into the Retirement Scheme on 14 November 2014 amounted to GBP 44,699.13.[56]

An *'Income Drawdown'* of GBP 18,264.12 was done by the Complainant on 5 March 2020 as evidenced from MPM's statement dated 6 April 2020, leaving her balance into the Scheme to zero.[57] The Complainant then ceased to be a member of the Scheme in April 2020. In a letter dated 6 April 2020, MPM notified the Complainant that:

'This payment has now fully exhausted your funds and, as the Momentum Malta Retirement Trust no longer holds any benefits on your behalf, your Memberhsip within the Scheme will now cease'.[58]

The Retirement Scheme's Underlying Investments

In August 2014, an application was signed (by MPM as trustee and the Complainant as the 'Life Assured'), for the purchase of a life assurance policy issued by *Skandia International*.[59] The Retirement Scheme acquired the said policy, named as the *'European Executive Investment Bond'* ('the policy') in December 2014.[60]

The initial total premium transferred into the policy for investment, in December 2014, amounted to GBP 44,284.13.[61] The disputed investment portfolio of structured notes was held within the said policy.

The investment transactions that were allowed to be undertaken within her policy - as emerging from the *'Historical Cash Account Transactions'* covering the period since inception to '02/03/2018' - are summarised in Table A below.[62]

[56] P. 39
[57] *Ibid.*
[58] P. 43
[59] P. 54 - 66
[60] P. 86
[61] *Ibid.*
[62] P. 121 - 128

Table A

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold/Matured	Maturity/ Sale price	Realised Capital Loss/ Profit (exclusive dividends/ interest)	% of Realised Loss or Profit on Capital
SN	*Commerzbank 1Y6M AC Phoenix Worst*	05.12.14	GBP	13,977.60	03.05.17	9,469.44	-4,508.16	-32.25%
SN	*Leonteq November COSI Blue 1*	05.12.14	GBP	6,897.10	25.02.15	7,000	+102.90	+1.49%
SN	*Leonteq November COSI Blue 2*	05.12.14	GBP	6,435.80	16.11.15	6,593.30	+157.50	+2.45%
SN	*Leonteq 1.5Y MB EXP Cert on Herbalife & Inven.*	15.12.14	GBP	15,000	15.06.17	2,650.65	-12,349.35	-82.3%
SN	*EFG Red 2 Jan*	28.01.15	GBP	1,894.20	23.01.17	546.63	-1,347.57	-71.1%
SN	*Leonteq 7.20% Multi Barrier Reverse Convertible*	13.03.15	GBP	6,489.00	10.03.17	1,535.58	-4,953.42	-76.3%
SN	*Investec 6Y 90% Cap Protected Growth Note DEC 15*	08.12.15	GBP	7,000	Position still open as at the date of the statement. In its reply, MPM noted that the final note expired in 2020 with a profit (P.169). This profit was later indicated as a mere amount of GBP 56 (P.284).			

As summarised in Table A above, it clearly emerges that the Complainant suffered material losses both individually on single investments (where the extent of loss on three investments individually exceeded 70% of the initial capital respectively invested into such products), and even collectively on her overall portfolio of investments.[63]

According to the information contained in the statement of 02/03/2018 and the indication by the Service Provider of a realised profit of GBP 56 on the last remaining investment, the total realised capital loss (excluding dividends/ interest received) totalled -GBP 22,842.10, whilst even inclusive of dividends/

[63] The total realised loss (exclusive dividends) as at the date of the statement provided, of 02/03/2018, comprised of - GBP 22,898.10. The extent of profit on the last remaining investment (i.e., t*he Investec 6Y 90% Cap Protected Growth*) was of just GBP 56 (P. 284), leaving a total realised loss (excl. div) of – GBP 22,842.10.

interest received of GBP 6,373.33,[64] the total realised loss (inclusive of div./int.) still amounted to a material sum of -GBP 16,468.77. The latter is equivalent to 37% of the initial premium invested of GBP 44,284.13. The total realised loss of -GBP 16,468.77 tallies with the amount of the total realised loss indicated by the Service Provider itself in its submissions.[65]

From the information included in Table A above, it further clearly emerges that the investment portfolio held within the Complainant's Retirement Scheme account indeed comprised exclusively of structured note ('SN') investments with such portfolio containing material investment positions into single investment instruments (such as in *Commerzbank 1Y 6M AC Phoenix Note* of 31.56% and in *Leonteq 1.5Y MB Exp Cert on Herbalife* of 33.87%),[66] apart from material exposures to the same issuers (such as 31.56% of the initial premium to *Commerzbank* and a staggering 63.98% of the initial premium to *Leonteq*).[67]

Observations and Conclusions

Background and application of aspects raised in similar cases

The Arbiter has previously exhaustively considered multiple complaints against the Service Provider similar to that raised by the Complainant. The Arbiter would like to, in particular, refer to the single decision issued to over thirty complainants on 28 July 2020,[68] as well as other multiple cases such as case 073/2019, 076/2019, 070/2019 and 074/2020.[69] The said decisions were also all

[64] 6 payments of GBP 356.8 (for a total of GBP 2,140.80) on the *Commerzbank Note*; a payment of GBP 157.50 on *Leonteq COSI Blue 1*; 3 payments of GBP 175 (for a total of GBP 525) on *Leonteq COSI Blue 2*; 6 payments of GBP 375 (for a total of GBP 2250) on *Leonteq Herbalife*; 8 payments of GBP 40 (for a total of GBP 320) on *EFG Red*; and 8 payments of GBP 122.50 (for a total of GBP 980) on *Leonteq Multi Barrier*.

[65] P. 284

[66] The investment of GBP 13,977.60 into *Commerzbank 1Y6M AC Phoenix* comprised 31.56% of the initial premium available for investment of GBP 44,284.13; The investment of GBP 15,000 into *Leonteq 1.5Y MB Exp Cert on Herbalife* comprised 33.87% of GBP 44,284.13.

[67] GBP 6,897.10 into *Leonteq November COSI Blue 1* + GBP 6,435.80 into *Leonteq November COSI Blue 2* and GBP 15,000 into *Leonteq 1.5Y MB Exp Cert on Herbalife* = GBP 28,332.90. The total exposure to Leonteq thus amounted to 63.98% of the initial premium of GBP 44,284.13.

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

[69] 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
https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20070-2019%20-%20GA%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

confirmed by the Court of Appeal (Inferior Jurisdiction) with numbers 39/2020 LM, 37/2021 LM, 38/2021 LM, 39/2021 LM and 124/2021 LM respectively.

For the sake of streamlining the decision, avoiding repetition, and deciding the case in an expeditious manner as he is obliged to do in terms of Chapter 555, the Arbiter shall not reproduce here details of the same or similarly applicable background and analysis, namely with respect to the following aspects already extensively covered in the said decisions:

- the legal framework as explained in the section titled *'The Legal Framework'* of the said decisions;
- responsibilities of MPM as explained in the section titled the *'Responsibilities of the Service Provider'*;
- the observations on structured notes as outlined in the *'Preliminary observations'* for *'Investment into Structured Notes'* as applicable.

For all intents and purposes, these same sections are, in essence, considered relevant and applicable also to the case in question with the exception of pertinent details specifically applicable to each case (such as the extent of loss, the particular underlying life assurance policy and the exact investments forming part of the investment portfolio of each complainant).

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

The nature of the disputed investments

The ISIN number of the structured notes emerged from the dealing instructions provided:[70]

- for *Commerzbank Note* (ISIN No. XS1123280767);
- for *Leonteq Nov COSI Blue 1* (ISIN No. CH0256091643);
- for *Leonteq Nov COSI Blue 2* (ISIN No. CH0256091650);
- for *Leonteq inv. of GBP 15,000* (ISIN No. CH0259241278);

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

[70] P. 318 & 325

- for *EFG Red* (ISIN No. CH0259242714).

As part of its submissions The Service Provider only produced just one Fact Sheet, for the structured note investment with ISIN No. CH0256091650.[71]

From the said fact sheet, the extent of the losses indicated above and the events occurring at the time involving the same period and parties, it sufficiently emerges that the nature of the structured notes allowed within the Complainants' portfolios had the same or similar features of the notes (which led to the same material losses) as described in the *'Preliminary observations'* for *'Investment into Structured Notes'* which were extensively considered in other cases as referred to above.

It is evident that MPM had permitted structured products that were complex products by their nature and hence not compatible with the Complainant's profile as a retail investor who had no, or very limited investment experience as indicated above.

No evidence has indeed emerged, or been produced by the Service Provider, that the structured notes that were allowed to be invested into within her Scheme were retail products.

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

As clearly emerging from Table A above, the Complainant's investment portfolio **comprised of exposure exclusively to structured notes investments as well as material investment positions into single structured note investments, apart from material exposure to the same issuers**.

The Arbiter considers that it cannot reasonably be concluded that such unjustifiable exposures 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 duty bound to ensure.

[71] P. 326 - 331

The permitted allocation is, furthermore, also considered as not being either reflective of, and in conformity with, MPM's own Investment Guidelines[72] 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.[73]

Other matters

Whilst the Arbiter has taken into consideration the other aspects raised by the Complainant in her Complaint, particular focus has been placed on the key determining aspect of the investment portfolio as amply considered in this decision.

Additional observations – The investment portfolio and defence provided

Despite that the Service Provider claimed, in its reply, *'that copies of all term sheets were obtained prior to the investment being proceeded with'*,[74] it however chose to not produce the said Fact Sheets in respect of the Complainant's investment portfolio, and just presented instead one single fact sheet as indicated above.

The Service Provider did not provide evidence substantiating that the products it allowed within the Complainant's investment portfolio were for retail investors – something which it could have easily presented in its defence if it really had any such term sheets.

The Arbiter notes that the Service Provider incredulously keeps defending the selection and approval of the investments within the member's investment portfolio despite the glaring issues identified and amply documented.

The justifications provided by MPM in its reply,[75] as well as the extensive additional submissions made in the Solemn Declaration of MPM's Managing Director,[76] highlighting the reasons why MPM permitted the disputed structured note investments at the time, provide in themselves an indication of the

[72] P. 307

[73] That is, for example, in the single case decided by the Arbiter on 28 July 2020 and the other OAFS cases with numbers ASF 073/2019, 076/2019, 070/2019 and 074/2020.

[74] P. 172

[75] Particularly para. 31 of MPM's reply - P. 171/172

[76] Particularly para. 69 of the Solemn Declaration by a senior official of MPM - P. 208/209

superficial and inadequate analysis undertaken in respect of the disputed products.

The explanations provided by the Service Provider indeed indicate the fallacious considerations about the purported 'safety' and 'prudence' of such products which, in reality, were far from being the case, as ultimately reflected in the extensive losses suffered by the Complainant on such products.

In its submissions, MPM claims *inter alia* that it *'did not have the benefit of hindsight'* [77] and that:

'… At the time of accepting the instruction [it] could equally be viewed (especially given the term of the investment was 1-2 years), that the capital protection in place on the structured notes means that even if all underlying shares or equities dropped in share price by up to 50-60%, the member would not suffer any loss as his capital was protected'.[78]

MPM further highlighted that *'… at the time, it was considered that there was minimal risk of barrier events occurring and fall of 50%-60% in share value occurring for companies quoted on major stock exchanges …'*.[79]

It accordingly appears that, in not highlighting any issues and permitting the investments, MPM itself took a wager and the risky approach that the barrier event will not likely be triggered, when it was, or should have been clearly aware that a barrier event was a real possibility (which indeed turned out to be a reality for those products which suffered extensive losses).

The material implications of the occurrence of a barrier event were clearly and amply highlighted in the risk factors of the Fact Sheets of the structured notes. MPM was, or should have been, amply aware of the mechanics and high risks associated with such complex products, as ultimately disclosed in the Fact Sheets. It cannot claim the benefit of hindsight in such circumstances, nor avoid liability for the negligent approach taken with respect to such investments.

[77] P. 171
[78] P. 208
[79] P. 171

Even in the same Fact Sheet produced by the Service Provider itself it was ultimately highlighted that:

'The risk of loss related to this Product is similar to an investment in the worst performing Underlying. Therefore, the Investor could lose the total capital invested if the Barrier Event has occurred and if the value of the Underlying with the Worst Performance falls to zero*.*

…

*… **Products involve a high degree of risk**, including the potential risk of expiring worthless …'*.[80]

The Arbiter sees absolutely no prudence in MPM's approach. It is amply clear that given the nature of the structured notes in question, no comfort could have been derived about their safety or protection of the capital invested; nor that they provided some form of diversification from the basket of underlying quoted shares listed on major indices in light of the barrier events; but rather that such products were clearly of high risk as reflected in the disclosure and high coupon rates (notwithstanding MPM's poor attempt to discount their risks by stating that '*the interest rates were higher not owing to the risk but as the members didn't benefit from capital growth if the underlying equities increased in value …*');[81] and were clearly suitable only for a certain type of targeted investors and not as pension products.

The relatively small pension pot of a retail client, as the Complainant, of just over GBP 40,000 was unjustifiably and unreasonably invested exclusively in these complex products, with excessive exposures featuring to single notes and to the same issuers as detailed above. The complexity of the products was enough reason for a Trustee and RSA to consider such products unsuitable, irrespective of their judgement on the probabilities of the barrier being broken to deliver the substantial losses they actually delivered.

The Arbiter considers that the extensive submissions made in the Solemn declaration of MPM's Managing Director provides no comfort or justification for

[80] P. 329 – Emphasis added by the Arbiter
[81] P. 171

the identified glaring failures of the Service Provider.[82] The Arbiter's comments below further refer.

Additional observations – Legal Opinions

It is noted that as part of its submissions, the Service Provider has, in this case, also filed copies of two legal opinions drafted for MPM dated 30 March 2022 and 19 December 2019 in respect of the application and interpretation of the investment restrictions under the regulatory framework.[83]

The Arbiter notes that such legal opinions make, *inter alia*, much emphasis on the point that, at the time of the disputed investments, the investment restrictions were not applicable and were not to be interpreted as applicable at the member's account but had to be applied generally on the Scheme. Such arguments however cannot be considered valid in the context of a Scheme which accepts member directed accounts and where thus each individual member has his/her own distinct investment portfolio which is different to that of other members. Indeed, any such suggestion goes against the logic of a member directed scheme.

The Arbiter has already considered such an aspect in previous decisions – as outlined, for example, under the section titled *'Context of entire portfolio and substance of MPM's Investment Guidelines'* in Case ASF 076/2019 – and outrightly refuted such notion.[84]

The Arbiter makes also reference to his recent comments and observations in Case ASF 021/2022[85] (involving the same Scheme and Service Provider) where it was noted that in the covering letter of April 2011 to the Scheme's Certificate of Registration, which formed part of the registration conditions of the Scheme, the MFSA had itself stipulated that:

[82] P. 194 - 210
[83] P. 239 - 242 & 243 - 255
[84] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20076-2019%20-%20MN%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf
[85] Case ASF 021/2022 AM & KM vs Momentum Pensions Malta Limited (Delivered on 18 September 2023) https://financialarbiter.org.mt/sites/default/files/oafs/decisions/549/ASF%20021-2022%20-%20AM%20%26%20KM%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

> '… *The Standard Operating Conditions forming part of the Directives for Occupational Retirement Schemes, Retirement Funds and related parties issued under the SFA will apply separately to each member's individual fund…*'.[86]

Any other interpretation would have indeed defeated the safeguards that the regulatory requirements were intended to achieve for the protection of the members in respect of investments and for the adequate application of the diversification requirements.

The said legal opinions do not change the Arbiter's stance and the Arbiter accordingly stands by the position taken as outlined in this decision and other relevant previous decisions as referred to above.

Final Remarks

As highlighted in other decisions, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had clear duties to check and ensure that the portfolio composition recommended by the investment adviser provided a suitable level of diversification and was *inter alia* in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme. The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

It is considered that, had there been a careful consideration of the contested structured products and extent of exposure to such products and their issuers, the Service Provider would, and should have, intervened, queried, challenged

[86] Quote under the section titled *'Additional Observations'* of OAFS Case ASF 021/2022 xxx vs Momentum Pensions Malta Ltd of October 2023.

and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others. It has also satisfactorily resulted that the permitted investment portfolio was not reflective of, and in conformity with, the Complainant's profile, attitude to risk and investment objectives, nor in conformity with the applicable principles and parameters and the requirements and conditions specified in the rules and MPM's own documentation.

The Complainant ultimately relied on MPM as the Trustee and Retirement Scheme Administrator of the Scheme as well as other parties within the Scheme's structure, to achieve the scope for which the pension arrangement was undertaken, that is, to provide for retirement benefits and also reasonably expect a return to safeguard her pension.

Whilst losses may indeed occur on investments within a portfolio, a properly diversified and balanced and prudent approach, as expected in a pension portfolio, should have mitigated any individual losses and, at the least, maintain rather than substantially reduce the original capital invested.

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly when it came to the oversight functions with respect to the Scheme and the investment portfolio structure.

It is considered that the Service Provider ultimately failed to act with the prudence, diligence and attention of a *bonus paterfamilias.*[87]

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[88] of the Complainant who had placed her trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

[87] Cap. 331 of the Laws of Malta, Art. 21(1)
[88] Cap. 555, Article 19(3)(c)

Conclusion

For the reasons stated earlier on in this decision, the Arbiter considers the complaint to be fair, equitable, and reasonable in the particular circumstances and substantive merits of the case and is accepting it in so far as it is compatible with this decision.

Cognizance needs to be taken of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role and responsibilities of the investment adviser to the Member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the losses incurred.

Compensation

Being mindful of the key role of Momentum Pensions Malta Limited as Trustee and Retirement Scheme Administrator of the Momentum Malta Retirement Trust and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Complainant's Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by Momentum Pensions Malta Limited for part of the realised losses experienced on 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 sum of the Net Realised Loss incurred by the Complainant within her whole portfolio of underlying investments.[89]

[89] 70% of the Total Realised Loss of GBP 16,468.77 as calculated above in this decision.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter accordingly orders Momentum Pensions Malta Limited to pay to the Complainant the sum of GBP 11,528.14 (eleven thousand, five hundred and twenty-eight pounds sterling and fourteen pence).

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.

Alfred Mifsud
Arbiter for Financial Services