Before the Arbiter for Financial Services

Case ASF 093/2022

ER ('the Complainant')

vs

Momentum Pensions Malta Limited

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

Sitting of 31 January 2024

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 on her Retirement Scheme due to the Service Provider's failure to act in her best interests and to fulfil its duties as trustee and administrator of her Scheme. Particular reference was made to the alleged inappropriate investments that were allowed by MPM on the advice of an unlicensed investment adviser where it was alleged, in this regard, that:

- the Retirement Scheme was invested in complex, unsuitable high-risk structured notes aimed for professional investors only, which were outside her low to medium-risk attitude and her profile of an unsophisticated, inexperienced retail investor;

- that MPM did not act in her best interests and did not fulfil its legal duties as Trustee to have a diverse, low-risk and liquid investment portfolio;

The Complainant further claimed, *inter alia*, that MPM failed to disclose fees and provide her with all pre-contractual information.

The Complaint[1]

The Complainant explained that her pension fund was originally worth £43,333 when it was transferred to MPM in 2013. After fees and commissions to MPM, *Continental Wealth Management* ('CWM') and *Private Pensions Solutions SL* ('PPS'), an amount of £40,796.68 was invested into a *Skandia International Portfolio Bond*[2] (the 'Skandia Plan' or 'Policy'). In February 2020, she surrendered the Skandia Plan because of extremely high charges which were eroding what was left in her plan, ending up with a surrender value of £13,766.

She added that she recently became aware, through the Financial Press and other media, that despite MPM's previous assurances to her that they were 'trying to help', they had failed her, and hundreds of others, in their duties as Trustees to ensure that her pension fund was safe.

The Complaint stated that whilst she had known for some time that there were failed investments, she had previously been in discussions with both CWM and MPM and was assured that MPM was a respected and regulated company she could trust and that MPM was not at fault but rather Leonteq was to blame for the poorly performing investments.

She added that Stewart Davies from MPM assured her many times that they were trying to be 'helpful' and 'assist' her. The Complainant noted that both MPM and Trafalgar offered her 'compensation' of £962.50 each to offset some of the losses.

She claimed that Stewart Davies consistently gave her the impression that he was going beyond the call of duty to assist. She referred to emails exchanged between herself and Stewart Davies attached to the Complaint,[3] and extracts of

[1] Complaint Form on Page (P.) 1-5 with extensive supporting documentation on P. 6 - 74.
[2] A life assurance policy issued by Skandia Life Ireland Limited.
[3] P. 25 - 26

correspondence with CWM,[4] which she said she now knows to be full of untruths and inaccuracies.

The Complainant stated that the purpose and objective of a pension is to provide an income in retirement and accordingly it should be invested in appropriate assets to achieve this aim. She claimed that the 'Insurance' Bond and structured notes purchased by MPM were not suitable to fulfil this objective. She thus claimed that MPM failed to act in her best interests and to fulfil their legal duties as her Trustees to have a diverse, low-risk portfolio with reasonable and disclosed charges.

The Complainant alleged that MPM gave terms of business to *Inter Alliance World Net Insurance Agents* ('Inter Alliance')/Trafalgar. She claimed that if they were appointed as 'Introducers' of MPM, as is her understanding, then MPM had a duty under the Retirement Pensions Act 2011 (the 'RPA'), part D1, to carry out due diligence to ensure that its introducers act within the rules of the RPA.

She added that it is also clear that an RSA shall retain ultimate responsibility to ensure compliance by the member or any person acting on its behalf (i.e., CWM/Trafalgar) with the objective of the retirement scheme and with any applicable licence conditions and provisions of the law.

The Complainant explained that she was now aware that CWM was not licensed for insurance, investment or pension advice in any jurisdiction and that Trafalgar only had an insurance mediation licence – with this licence not transferrable from Trafalgar to CWM or anyone who worked as 'advisers' at CWM. She further claimed that no licence agreement existed between Trafalgar and CWM. She alleged that MPM did not carry out due diligence on this company and referred to a decision in a previous award delivered by the Arbiter numbered 073/2019.

The Complainant also made reference to the Special Funds (Regulation) Act ('SFA'), Chapter 450 of the Laws of Malta, and claimed that under article 24(2)(b) of the SFA, it was clear that MPM had a duty to ensure that CWM and/or Inter Alliance/Trafalgar were subject to an adequate level of regulatory supervision. She claimed that CWM had, however, no regulation for investments (or indeed insurance) in any jurisdiction from any regulatory authority.

[4] P. 14

The Complainant explained that MPM only cancelled terms of business with CWM in August 2017, with CWM then ceasing trading on 29 September 2017. The Complainant claimed that MPM had, however, 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, but yet MPM still failed to investigate whether she had been affected or do anything to inform her or to try to mitigate her financial losses or inform the MFSA.

The Complainant explained that MPM had terms of business, on exactly identical terms, with three companies - *Inter-Alliance World Net Insurance Agents*, *Trafalgar* and *Global Net*. She asserted that these three companies were one and the same, all operating out of an address in Cyprus. It was further alleged that these three companies chose and approved a very narrow selection of structured notes to be purchased as investments.

The Complainant submitted that since each person should be treated as an individual, her investments should not have been the same as those of another person with different needs. She insisted that MPM, however, allowed this narrow selection of structured notes for their members via these three companies.

The Complainant claimed that MPM failed to adhere to the MFSA's rules for service providers and submitted that the RSA retains ultimate responsibility to ensure compliance with applicable licence conditions by anyone acting on her behalf. She re-iterated that CWM/Trafalgar did not hold the necessary licences and insisted that Trafalgar could have not been CWM's principal and that CWM were not authorised representatives in Spain as there were no passporting rights.

The Complainant continued to state that MPM had a duty of care under the Pension Laws to ensure the suitability and legality of any introducers with whom it entered into terms of business. She added that the MPM Trust Deed, on page 29 (clause 9.5), states 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'.[5]

The Complainant noted that a trustee needs to ensure that the applicant's funds are invested in a prudent manner and in the best interests of the member. They should act as a *bonus paterfamilias*. She claimed that MPM, however, failed to do this.

The Complainant submitted that the only dealing instruction she obtained, that was allowed by MPM, was not even stamped and checked by MPM to confirm if it was suitable for her investment profile. She observed that this shows that MPM was not monitoring CWM in any way allowing them to place unsuitable trades with no due diligence at all. She submitted that MPM should have, therefore, used its power and discretion to question and stop the unsuitable professional-only investments which were purchased and to act to protect her pension fund but, however, failed to do so.

The Complainant explained that she is an unsophisticated, inexperienced, retail customer. She submitted that as part of the RSA's 'Know Your Customer' checks, MPM should have had procedures in place to establish a member's risk profile independently to the IFA. She claimed that MPM failed to do this.

It was claimed that the investments made within her pension of approximately £41,000 were all into high-risk, professional-investor-only structured notes. She reiterated that every purchase was for a structured note (no diversification), into assets ranging from 1-year to 5-year terms (no liquidity) and that these were in breach of MPM's own guidelines which required that no more than 40% should be in assets with liquidity greater than 6 months.

She claimed that these investments do not reflect her risk profile as she is most definitely a retail investor who knew nothing at all about structured notes/term sheets/underlying(s)/coupons/barriers etc until her money was lost.

It was further claimed that these are complex products and that in all honesty she still does not understand them even today after attempting to thoroughly

[5] P. 15

understand what they are and how they destroyed such a large portion of her pension.

The Complainant noted that MPM questioned the fact that she knew about losses sooner. She however noted that it was obvious that investments were not performing as she was led to believe by CWM, who explained the losses as *'paper losses'* or blamed a *'rogue trader'* from Leonteq.[6] She added that, in fact, MPM reinforced the explanation of paper losses given that at the bottom of the annual statement, it was 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'*.[7]

She claimed that this disclaimer from MPM and the fact that MPM had assured her that they were trying to resolve matters before her 55th birthday led her to believe that her pension was safe and that the explanation of paper losses was plausible. She added that, in addition, there were also discussions that Leonteq were going to provide compensation for losses on their products.

The Complainant further noted that MPM have recently changed their guidelines which now state:

> *'Additional requirements: - Investments must be suitable for retail consumers. - Non-Retail investment(s) will only be considered at the discretion of the Trustees and where the requirements for the identification of a Member as a Professional Client (Gibraltar) or Professional Member (Malta), as defined in relevant Regulations or Rules, have been met.'* [8]

The Complainant submitted that she had never been supplied with, and is unable to find, all of the term sheets for the structured notes used as investments within her pension fund. She noted that a previous case before the Arbiter bearing number 026/2020, however, includes at least seven of the notes used in her portfolio. She questioned how these same structured notes can be

[6] P. 16
[7] P. 17
[8] *Ibid.*

suitable for two completely different individuals with different needs. It was noted that by looking at the literature for all the structured notes, and reading information available online, including previous rulings by the Arbiter, she could see that these products are all, in fact, for professional investors only.

The Complainant emphasised that the investments in her portfolio were all high risk, illiquid and with no diversification/mix of guaranteed or capital protection.

The Complainant referred to the Pension Rules for Service Providers 2011, Part B4, 1.4(b), which she quoted as stating 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'.*[9]

She furthermore cited from the Trusts and Trustees Act where she quoted this as stating that:

> *'in so 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]

She submitted that, as part of its due diligence, and given that it had complete discretion over the investments made, MPM should have surely obtained and understood the term sheets relating to these investments, and that a retail investor in a pension fund should not be at such risk.

The Complainant reiterated that 100% of the investments that MPM allowed for her as a retail investor and which it considered suitable for her pension fund were high risk and suitable only for professional investors with a significant chance of extreme losses. She asserted that allowing any of these high-risk, illiquid investments to be made proves that MPM failed in its fiduciary duties.

[9] P. 17
[10] P. 17 & 18

She stated that she believes that MPM failed to act on information that was readily available to it and asserted that by not telling her about the risks, purchasing unsuitable assets, and not raising concerns regarding the type and risk of investments being made confirmed that MPM failed to fulfil its legal duty to act in her best interests.

She further submitted that this equates to wilful negligence as 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 the entire investment sum.

The Complainant referred to the MFSA Consultation Document on amendments to the Pension Rules, issued under the RPA (MFSA REF: 09-2017), which she quoted as stating, on page 4, that:

> *'It 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'*. [11]

She added that the same Consultation Document also states, on page 8, that from on-site visits undertaken the MFSA was concerned to note:

> *'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'.*[12]

She submitted that MPM, however, allowed 100% of her fund to be invested in such products without raising any concerns or communicating with her in light of her status as a retail investor. She submitted that MPM accordingly failed to act in her best interest, to use its discretion and act in a prudent manner or with the diligence and attention of a reasonable person. It was further pointed out that MPM's actions, or lack thereof, have not satisfied her reasonable and legitimate expectations in any way.

[11] P. 18
[12] *Ibid*.

The Complainant went on to cite Section B.4 (1.7) of the Pension Rules for Service Providers as stating that:

> *'The service provider shall, before offering any services to the member, provide in writing a description of the nature and amount of any direct or indirect charges or fees a member or beneficiary will or may be expected to bear in relation to the scheme or fund and investments within the scheme or fund (if applicable)'.*[13]

She also cited Section B.4.1.3(f) of the same Pension Rules as providing 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 it's 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'.*[14]

She also cited the same Pension Rules as providing, in Section B.4.1.17(a), that:

> *'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 its fraud, wilful default or negligence, including the unjustifiable failure to perform in whole or part its obligations'.*[15]

The Complainant submitted that furthermore, MPM failed to fulfil its fiduciary duties under the Civil Code, Chapter 16 of the Laws of Malta. Reference was made to the MFSA Trusts and Trustees Act, Cap. 331, Code of Conduct, part 6.0 on Integrity and Ethics, which she cited as stating 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*

[13] *Ibid.*
[14] *Ibid*.
[15] *Ibid*.

> *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'.*[16]

The Complainant submitted that MPM is not dealing with her *'fairly'* or *'equitably'* as it previously paid restitution to others for the same failings.

In summary, she stated that the losses suffered on her pension fund are totally due to the extreme wilful and continuing negligence of MPM as her trustees, and that MPM are therefore fully responsible for the losses given, she claimed, MPM:

- Failed to act in her best interests;
- Failed to act within their investment guidelines;
- Failed to ensure investments were within her risk profile and investment status;
- Failed to fully disclose fees and provide all precontractual information;
- Failed to ensure that the companies that they issued terms of business to were qualified, had the correct legal licences and necessary regulations etc. 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 obtain or act upon related investment Term Sheets and failed to investigate the associated risks;
- Failed to treat her fairly and equitably;

[16] *Ibid*.

- Failed to fulfil its fiduciary duties under section 1124A of the Civil Code, Chapter 16 of the Laws of Malta and the Trusts and Trustees Act.

The Complainant believes 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.

The Complainant added that:

- She believes that MPM was negligent with regard to managing her pension fund and failed, as her Trustees, to take reasonable care to avoid causing loss to her fund. She claimed that the behaviour and failings of MPM in the circumstances did not meet the standard of care which a reasonable person would meet in the circumstances.
- MPM failed in its compliance with the Retirement Pensions Act, 2011.
- As a member, she suffered extreme financial loss which a reasonable person could have expected to foresee and prevent in the circumstances.

The Complainant remarked that the MFSA has found, identified and acted on the same underlying fundamental failures as contained within her complaint as part of its investigations of complaints pertaining to the same or similar issues as her's regarding the trustee's failures. She considered that it is thus inconceivable that MPM continue to deny complete responsibility for her monetary loss.

She concluded by reiterating that MPM did not act within its obligations and duties applicable to it as RSA and Trustee and that MPM's actions, or lack thereof, directly resulted in her pension fund losses.

Remedy requested

The Complainant noted that, as indicated in her Member Account statement of 2020, she had invested £4,750.04 from a small private pension from *Legal & General* and £38,582.96 from a civil service pension, amounting to £43,333 overall. She further noted that she received £10,582.74 on the closure of her Scheme as per the final figure indicated in the same statement.

The Complainant accordingly claimed that the loss amounted to £32,750.26 and requested compensation of the said amount.[17, 18]

She respectfully requested the Arbiter to rule against MPM with costs.[19]

Having considered, in its entirety, the Service Provider's reply, including attachments,[20]

Where the Service Provider explained and submitted the following:

Introduction and background

1. MPM is licensed by the MFSA to act as the RSA and Trustee of the Momentum Malta Retirement Trust ('the Scheme') this being a licensed Personal Retirement Scheme. MPM is not licensed to provide investment advice.

2. The Complainant completed the MPM application form, dated 6 July 2013, together with her advisor Dean Stogsdill as per the Application Form.

3. By letter dated 6 August 2013, MPM sent the Policy application received from the Complainant's adviser to *Skandia Life Ireland Limited* ('Skandia'). Dean Stogsdill is once again named as advisor on this form operating under *Inter Alliance World Net Insurance Agents and Advisers*. The form was also signed by Flora Parker from Inter Alliance.

4. By letter dated 6 November 2013, the Skandia policy documents and its charges schedule were sent to the Complainant.

5. Annual member statements were sent to the Complainant each year, showing the value of her investment in line with regulatory requirements.

6. By emails dated 10 September 2017 and 3 October 2017, MPM informed the Complainant that the Terms of Business with CWM were being suspended and then terminated.

[17] P. 2
[18] The amount lost that was indicated by the Complainant does not exclude fees and other charges applied on her Scheme and underlying Policy.
[19] P. 19
[20] P. 79 - 88, with attachments from P. 89 - 192

7. Over the course of 2017 and 2018, the Complainant exchanged correspondence *inter alia* with MPM with respect to the losses she suffered. MPM submitted that the Complainant's awareness of her losses will also be evidenced further in its response and submissions.

   MPM claimed that it tried to assist the Complainant. It added that the Complainant herself acknowledged the assistance provided to her numerous times during 2017 and 2018. It added that during this time the Complainant was also liaising with Mark Farnsworth from Trafalgar.

8. On the 13 October 2017, the Complainant submitted a complaint to Trafalgar but did not complain to MPM.

9. By email on the 29 November 2017, the Complainant was also sent, at her request, the then-current *Quilter International* Valuation Statement dated 29 November 2017.[21] MPM submitted that this clearly showed the initial investment, the then-current policy valuation and, also, the then-current assets held in her portfolio at that date. MPM claimed that the Complainant was fully aware of the valuation and her investment holding at that time.

10. It added that by another email on the 29 November 2017, the Complainant requested the ability to *'see historical valuations dating back to when I first invested the money'*.[22] It was stated that MPM confirmed to her that she could do this through access to the Quilter Online Portal and assisted the Complainant with the online registration. In addition, it was stated that MPM also sent her a Quilter International transaction statement showing all transactions for 2017.

11. By email dated 18 January 2018, the Complainant confirmed as follows *'Hi thanks for that I received the email and now have online service. Thanks for your help'*.[23] MPM submitted that, hence, from this point forward the Complainant had accessed her account and was able to see the current valuation and all trades and transactions on her account from inception.

[21] Skandia was eventually acquired by Old Mutual International and eventually re-branded/ changed its name to Quilter International - https://www.quilter.com/about-us/quilters-history/?Region=uk&Role=cust
[22] P. 80
[23] *Ibid*.

12. MPM further explained that on the 22 January 2018, the Complainant confirmed that she was a member of a Facebook group page and cited her words as follows: *'which has been set up for victims of the alleged scams carried out by CW ... <u>It is being recommended that we should make formal complaints and as you have been so honest and helpful I am torn and not sure what to do</u>'*.[24]

13. On 26 January 2018, MPM wrote to the Complainant, attaching again a then-current Quilter International Valuation of her policy. MPM stated that, in this correspondence, it confirmed they were trying to assist by, as quoted, *'establish[ing] a strategy to take this forward to at least hold the position, and perhaps improve it somewhat ahead of your 55th birthday'* and to assist the Complainant by outlining a number of potential options. The Complainant responded to this email on 31 January 2018 acknowledging *inter alia 'the catastrophic losses'*.[25]

14. That on 12 February 2018, the Complainant *inter alia* thanked Stewart Davies stating as follows: *'That sounds great. Thank you. Let me know when you've finalized everything and hopefully we can draw all this to a close and I can start hopefully recovering a little of my money.'*[26]

15. By email of 11 April 2018, the Complainant emailed to enquire about fees on her policy where she stated that *'I have finally had an opportunity to have a look online at my policy and its transactions'*.[27]

16. MPM further explained that the Complainant also exchanged emails with Mark Farnsworth during April 2018, which clearly show that she was aware then of the matters being complained of. It was stated that on 3 April 2018, Mark Farnsworth from Trafalgar confirmed to the Complainant as follows: *'I have to remind you that my remit is to help you with the investments that you have remaining and understanding your options going forward'*.[28]

    The Service Provider stated that on 26 April 2018, Mark Farnsworth confirmed that the Complainant was *'willing to work with me going*

[24] P. 80 – Emphasis added by MPM
[25] P. 80
[26] *Ibid*.
[27] P. 81
[28] *Ibid*.

forward'.[29] MPM submitted that these exchanges confirm that the Complainant was liaising with Trafalgar on the investments and her options going forward, and that this was ongoing since at least April 2018.

17. MPM pointed out that the Complainant received a contribution payment from Trafalgar and also from MPM itself. The agreed contribution was paid to the Complainant on 9 May 2018 and a client statement was issued to her in confirmation of the payment.

    The Service Provider underlined that, at the time, it had clearly and unequivocally informed the Complainant in a number of communications that the contribution was to *'offset the Ongoing Bond charges and ultimate surrender costs at 55'* which was confirmed following a number of communications.[30] It added that by email on 26 May 2018, the Complainant confirmed she was *'happy to go ahead'* after having received a statement showing the contributions made to her.[31]

18. That during January 2020, the Complainant informed MPM that she wished to fully surrender her policy. MPM noted that, on 31 January 2020, as part of her correspondence with MPM, the Complainant then stated that:

    'I have had a heart-breaking experience as 75% of my pension was scammed and most of the rest of it has disappeared due to extremely high charges imposed by the parties involved in this awful crime'.[32]

19. MPM further explained that by email on 5 February 2020, it also confirmed the current and surrender value of the Quilter International Policy to the Complainant, which she elected to proceed to surrender.

20. The Service Provider added that by letter dated 1 February 2022, the Complainant made a complaint in writing to MPM and that MPM replied through its letter dated 19 April 2022.

21. MPM noted that the Complaint was filed before the Arbiter on 15 July 2022.

[29] *Ibid*.
[30] P. 81
[31] *Ibid*.
[32] *Ibid*.

22. MPM contested the amount of the alleged loss by the Complainant, claiming she failed to take into account any of the fees paid or interest received by her. MPM replied that the net realised loss is GBP19,083.98. It added that, furthermore, the Complainant received contribution payments in the amount of GBP 1,925 and a refund of GPB 525, which it claimed are not taken into account in the net realised loss calculation – MPM included its own calculation of losses in the document attached to its reply, marked as 'Doc CP19'.[33]

Competence and prescription

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

24. With respect to the allegations relating to conduct occurring before the entry into force of the Act (on 18 April 2016), the Service Provider pleaded that the Complaint is prescribed. It submitted that Article 21(1)(b) came into force on 18 April 2016, and that the Complaint was filed on 15 July 2022 and, therefore, beyond the two-year period mentioned in article 21(1)(b) of Chapter 555 of the Laws of Malta.

25. Without prejudice, the Service Provider pleaded further that, with respect to the allegations relating to conduct occurring after the coming into force of Chapter 555 (on the 18 April 2016), the Complaint is prescribed pursuant to article 21(1)(c) of Chapter 555 of the Laws of Malta.

26. MPM noted that the Complainant stated that she *'… recently became aware, through the Financial Press and other Media that despite Momentum's previous assurances to me that they were "trying to help" they have failed me, and hundreds of others, in their duties as Trustees to ensure that my Pension Fund was safe'*.[34]

    MPM replied that the Complainant was certainly aware of the matters complained of at least in October 2017, when she complained to Trafalgar. It submitted that, therefore, if she wanted to complain and make allegations to the effect that MPM had failed her, she should have done so

[33] P. 185
[34] P. 82

at the time. It further submitted that the *'Financial Press and other Media'* should have no bearing on who the Complainant attributes responsibility to and emphasised that it is either MPM who is responsible for the loss (which it submitted that it is not), or it is not.

27. MPM noted that the Complainant admitted that she had known about the *'failed investments for some time'*. It further noted that she also stated that she was *'… in discussions with both CWM and Momentum'*.[35] MPM made reference, in this respect to the submissions it made earlier in its reply.

28. With respect to the Complainant's statement that MPM assured her that *'… they were not at fault and that it was poorly performing investments through Leonteq to blame'*,[36] as well as the Complainant's statement that MPM assured her that MPM was not to blame, MPM submitted that the Complainant must prove this. It claimed that it was the Complainant herself who raised the point of the Leonteq and *Old Mutual International* litigation. MPM further submitted that at that point in time Stewart Davies only replied to her query.

29. The Service Provider noted that the Complainant quoted from an email on page 14 of the Complaint where she stated, the communications are *'… full of untruths and inaccuracies'*.[37] MPM submitted that this email was not sent by MPM and that MPM was not in copy in this correspondence.

30. It was further noted that the Complainant also alleges that she was led to believe by CWM that the losses were *'paper losses'* and that this was reinforced by the disclaimer at the bottom of the annual statement sent by MPM. It replied that the Complainant herself raised the issue of losses suffered with Trafalgar in October 2017. MPM claimed that she was, therefore, clearly aware at that time that the losses were not *'paper losses'* as she alleges. It submitted that this has also been amply evidenced in points stated earlier in its reply.

[35] *Ibid*.
[36] *Ibid*.
[37] P. 83

31. MPM submitted that it is amply clear that the Complaint is prescribed and should accordingly be rejected by the Arbiter.

Reply to allegations raised by the Complainant

32. MPM noted that the Complainant alleges that MPM failed to act in her best interest and fulfil its duties as trustee to have a diverse, low-risk portfolio with reasonable and disclosed charges. MPM replied that, in the first place, the attitude to risk selected by the Complainant on the MPM application form was up to *'medium risk'*. MPM further replied that, additionally, with respect to the charges, this complaint is, in the first place, prescribed pursuant to Article 21(1)(b) of Chapter 555 of the Laws of Malta. It submitted that, in any event, the policy charges were disclosed to the Complainant.

33. MPM noted that the Complainant states that an RSA retains ultimate responsibility to ensure compliance by the member or any person acting on his behalf with the objective of the retirement scheme. MPM replied that the Complainant must reference the rule or law she is allegedly quoting from. MPM reserved the right to reply further when this clarification is provided.

34. It was noted that the Complainant raised the allegation that CWM was not licensed for insurance, investment or pension advice and that Trafalgar only had an insurance mediation license. The Complainant also alleged that MPM did not carry out any due diligence on this company.

    MPM stated that the Complainant appointed Dean Stogsdill as her advisor and submitted that Dean Stogsdill advised the Complainant to invest in the products in her portfolio. MPM accordingly considered Dean Stogsdill to be the proper respondent to this claim.

    MPM explained that, from 2015, advisors including Dean Stogsdill, were individual employees of Trafalgar (referred to as 'members' by Trafalgar, but Trafalgar had confirmed to MPM that they were employees). As employees of Trafalgar, they were operating under Trafalgar licences. MPM submitted that Trafalgar's licence confirms 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'.[38]

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

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

MPM insisted that any investment trades placed for, and on behalf of, the Complainant by his advisor from 2015 onwards, employed and regulated by Trafalgar, were therefore reviewed and strictly controlled via Trafalgar's head office in Germany. It stated that, as will be proved, this was confirmed by Trafalgar itself. MPM added that, furthermore, Trafalgar as a regulated entity was also responsible for advising the Complainant on her existing portfolio from 2015 onwards as the appointed regulated advisor.

MPM reiterated that, from 2015, CWM was not an *'unlicensed investment advisor'*. It reiterated further that the Complainant's advisor was an employee of Trafalgar (as confirmed by Trafalgar themselves) and was indeed regulated under Trafalgar's authorisation within the regulatory environment in Germany and hence licensed to provide insurance mediation activities. It reiterated that hence, from any investment trades placed for, and on behalf of, the Complainant by her adviser from 2015 onwards, these were advised on by an employee of Trafalgar and regulated by Trafalgar, and were, therefore, reviewed and strictly controlled via Trafalgar's head office in Germany. It further reiterated that, as will be proved, this was confirmed by Trafalgar itself.

MPM further emphasised that they were also responsible for regulated advice on the Complainant's existing portfolio from this point onwards.

[38] P. 84

35. MPM submitted that Trafalgar made various confirmations to MPM in writing, (as per 'Doc CP 21' attached to its reply),[39] including *inter alia* that: (i) Trafalgar provides regulation and compliance for transactions that fall under the remit of their licence; and (ii) the list of advisors are employees of Trafalgar and members of GlobalNet (Trafalgar's administration company).

    It highlighted that, from the confirmation provided by Trafalgar, it emerges that any investment trades placed for, and on behalf of, the members by advisors, employed and regulated by Trafalgar from 2015 onwards, were therefore 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 (that is, the MPM members they were advising).

36. MPM added that, subsequently, Trafalgar also provided MPM with a copy of the Trafalgar Members Agreement entered into with the individual advisors for MPM's satisfaction (as per 'Doc. CP22' attached to its reply).[40]

37. MPM explained that this agreement, signed by the advisors, and as provided by Trafalgar, also clearly states that the advisor will ensure that all clients receive the following documentation: Terms of Business, Key Features Document, Trafalgar Key Fact Documents, Client Confirmation Form, Illustration and a business card. It explained further that the same agreement sets out in detail the practices which the advisor was to carry out, including that the advisor had to ensure that all clients received the documentation referred to in the agreement.

38. MPM submitted that, without prejudice to that stated previously, and as it shall prove throughout the proceedings, at the time that 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/Trafalgar was licensed. MPM reiterated that it has fulfilled all obligations incumbent upon it from time to time. It replied that, in particular, there was no obligation for it to

[39] P. 186 - 188
[40] P. 189 - 192

verify whether CWM or the advisor appointed by the Complainant was regulated or whether it was authorised to provide advice.

39. MPM submitted that it is pertinent to note that its terms of business, provided to all members at application stage, and the terms accepted by members on signing the contractual declaration to join the Scheme, explicitly and clearly described how MPM provides its services. It highlighted that the Terms of Business included a specific section on investments and the role and responsibilities of the member and adviser.

40. MPM added that this is borne out of SOC Part B.2.6.2, which provides examples of what it signifies for a scheme administrator to act in the best interests of 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 series are to be provided'*.[41]

41. MPM noted that the Complainant quoted article 24 of the Special Funds Act (Chapter 450 of the Laws of Malta). It pointed out that this law has, however, been repealed and that, in any event, this provision is not relevant as it refers to asset managers.

42. The Service Provider further noted that the Complainant also alleged 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'.[42]

    MPM refuted this allegation and submitted that if the Complainant alleges that MPM has any such prior knowledge, she must then prove it. It further replied that as soon as concerns arose with respect to CWM (not Trafalgar), MPM actioned them by suspending and then subsequently terminating its terms of business with CWM.

43. MPM also noted that the Complainant further alleged that

[41] P. 85
[42] *Ibid*.

'*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 on Structured Notes for their members via these three companies'*.[43]

MPM stated that, in the first place, it will not divulge information pertaining to another member and that the Complainant must prove her allegation. It 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.

44. The Service Provider further noted that, in the Complaint, the Complainant also referred 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 this was not applicable before 2017.

45. MPM noted that the Complainant further alleges that she obtained a dealing instruction that was allowed by MPM and that was not stamped and checked by it to confirm if it was suitable for her investment profile. MPM replied that the copy of the alleged dealing instruction attached to the Complaint is not a full copy of the document. It further replied that the Complainant must provide a full and clear copy of the document so that MPM can then reply to her allegation.

46. The Service Provider noted that the Complainant goes on to state that MPM should have assessed her risk profile independently of her advisor. MPM replied that it relied on the risk profile chosen by the Complainant herself and that furthermore, MPM is not authorised to provide investment advice, and neither to establish a member's risk profile.

47. MPM noted that the Complainant further alleged that all investments were into *'high-risk, professional investor-only structured notes … Every purchase is for a structured note (no diversification) into assets ranging from 1 year to 5 year terms (no liquidity) and breaching Momentum own guidelines of*

[43] *Ibid*.

the time that no more than 40% should be in assets with liquidity greater than 6 months'.[44]

MPM replied that its decisions were based on the information available to it at the time the decision was made. It submitted that it did not have the benefit of hindsight and 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. It noted that in 2014, RBC, for example (based on market capitalisation), was in the top fifteen largest banks globally.

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

c) The interest rates were higher as the members didn't benefit from capital growth if the underlying equities increased in value. The rates offered were, therefore, 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. MPM submitted that 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. It further pointed out that the shares were not penny shares.

e) The structured notes had short maturities 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. The investment was thus viewed as prudent based on the information available to MPM.

[44] P. 86

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

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

49. MPM further noted that in the Complaint (p. 17), the Complainant refers to *'section B.4.1.4b of the Pension Rules for Service Providers and to the Trust and Trustees Act'* and that she also stated 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 …'*.[45]

MPM replied that copies of all term sheets were obtained prior to the investments being proceeded with and that these were investments which were recommended to the Complainant by her appointed advisor. It furthermore referred to what it has already stated in its reply.

It noted that, at p. 18 of her complaint, the Complainant refers to additional rules, without specifying how MPM allegedly breached these rules.

50. MPM noted that the Complainant refers to a consultation document relating to rules which came into effect in July 2019. It 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 added that, in any event, during 2019, only one asset was purchased (on advice from Trafalgar) and this returned a profit to the Complainant.

51. MPM further noted that the Complainant also alleges that it is not dealing with her fairly because it has paid restitution to others for the same failings. It replied that, in the first place, this was purely gratuitous and stated that each case must be assessed on its own merits and due process must be followed before the Arbiter with respect to her Complaint.

[45] P. 87

Momentum submitted that it does not provide investment advice

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

53. MPM highlighted that it is not licensed to and does not provide investment advice and, furthermore, did not provide investment advice to the Complainant. MPM submitted that this was clear from the application form, which specifically requests the details of the Complainant's professional advisor. Attention was brought to the fact that the Complainant also declared that she acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice.

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

Conclusion

54. MPM accordingly concluded that:

    a) It is not responsible for the payment of any amount claimed by the Complainant and it has, at all times, fulfilled its obligations with respect to the Complainant;

    b) It has not acted negligently, nor has it breached any of its obligations in any way;

    c) The Complaint is prescribed pursuant to article 21 of Cap. 555 of the Laws of Malta as clearly emerges from its reply and as will be further proved throughout the proceedings.

55. Consequently, MPM respectfully requested the Arbiter to reject the Complainant's claims, with expenses.

Preliminary

Competence of the Arbiter

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

In Section C of its reply, it also raised the plea that the aspect of charges raised by the Complainant is also prescribed pursuant to article 21(1)(b) of the Act.[46]

The Arbiter is considering these pleas as follows:

Plea relating to Article 21(1)(b) of Chapter 55 of the Laws of Malta

Article 21(1)(b) 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.*'

This provision stipulates that a complaint related to the '*conduct*' of the financial service provider which occurred before the entry into force of the 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.**

With respect to the Complainant's claim regarding the lack of full disclosure of fees, (which aspect was not referred to, nor elaborated on, further by the Complainant during the proceedings of the case), it is considered that this specifically relates, and strictly applied, to conduct at the time of the acquisition of her pension scheme and underlying policy. The Complainant became a member of the Retirement Scheme on 30 July 2013 and the underlying Skandia Policy was then acquired on 22 October 2013.[47]

[46] P. 83
[47] P. 158 & 278

With respect to the part of the Complaint involving the disclosure of fees, the Arbiter accordingly accepts that this relates 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 this aspect was not raised by 18 April 2018, MPM's plea that the complaint on fees is prescribed under article 21(1)(b) of the Act is therefore accepted by the Arbiter.

The Arbiter, however, notes that the key and main aspect of the Complaint 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 her advisers as summarised at the start of this decision.

In the case of a financial investment, the conduct of the service provider cannot be determined from the date when the transaction took place and it is for this reason that the legislator departed from that date and laid the emphasis on the date when the conduct took place.

The Arbiter notes that various positions in the disputed structured note investments still featured and formed part of the Complainant's investment portfolio after 18 April 2016, as clearly emerges from the table of investments presented by MPM (titled 'DOC CP19') during the proceedings of the case. [48]

The conduct complained of with respect to the disputed investments involves the conduct of the Service Provider **as trustee and retirement scheme administrator of the Scheme**, which role MPM occupied since the Complainant became a member of the Scheme and it **continued to occupy such role beyond the coming into force of Chapter 555 of the Laws of Malta.**

The Arbiter considers that article 21(1)(b) is, in the circumstances of this case, not applicable to the key aspect referred to above given that the Complaint involves the conduct of the Service Provider during its tenure as trustee and administrator of the Scheme, which conduct goes beyond the period when the Act came into force, and it involves investment products which still featured and

[48] P. 185

formed part of the Complainant's portfolio after 18 April 2016. This is apart from the fact that CWM was also still involved with the Complainant's Scheme up until September 2017 and with Trafalgar beyond that period.

The said conduct complained of cannot thus be considered to have occurred before 18 April 2016 but is rather considered to have been conduct that is continuing in nature as per article 21(1)(d) of the Act.

The Arbiter is accordingly dismissing the submissions made by MPM with reference to article 21(1)(b) in respect of the key aspect involving the disputed investment instruments and her advisers. The Arbiter shall consider next the plea raised with respect to article 21(1)(c) of the Act.

Plea relating to Article 21(1)(c) of Chapter 55 of the Laws of Malta

Article 21(1)(c) of the Act 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.'*

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

The matters complained of involve the substantial losses experienced by the Complainant on her Retirement Scheme. In her Complaint Form filed with the OAFS, the Complainant sought compensation of the amount of GBP 32,750.26 being the difference between the initial amount invested (in October 2013) indicated as GBP 43,333 and the amount of GBP 10,582.74 she received on the closure of her Scheme (in February 2020).[49]

MPM submitted, in its reply, *'…that the Complainant was certainly aware of the matters complained of at least in October 2017, when she complained to*

[49] P. 2. Note that this figure however does not take into account fees and charges paid on the Scheme and underlying Policy.

Trafalgar…'.[50] In its reply, it noted that the Complainant made a complaint in writing to it by way of a letter dated 1 February 2022.[51]

The Complainant explained in her Complaint to the OAFS dated 15 July 2022, that she *'… recently became aware, through the Financial Press and other Media that despite that Momentum previous assurances to me that they were 'trying to help' they have failed me … in their duties as Trustees to ensure that my Pension Fund was safe'*.[52]

The date of *'08/01/2021'* indicated by the Complainant in her Complaint Form to the OAFS - in reply to the question as to when she first had knowledge of the matters complained about [53] - is however, evidently not correct nor relevant for the purposes of the said article in the circumstances.

It is clear and undisputable that the Complainant was aware of the losses on her pensions much earlier than 2021. Indeed, various exchanges have emerged in late 2017 and early 2018 where the Complainant herself acknowledged the substantial losses. In her email dated 13 October 2017 to Trafalgar, which was about *'Pension losses'* as per the subject matter of the said email, the Complainant claimed that:

> *'… I have lost the majority of my pension'*.[54]

Furthermore, in her email of 7 January 2018 to MPM, the Complainant *inter alia* stated that:

> *'I've lost basically everything I had …'*.[55]

The Arbiter accordingly agrees with the Service Provider's determination as to when the Complainant first had knowledge of the matters complained of. However, the Arbiter does not concur with the Service Provider that the date of 1 February 2022 is the proper date applicable for the purposes of article 21(1)(c) of the Act (as to the date when a complaint was registered in writing with MPM). This is for the reasons amply explained below.

[50] P. 82
[51] P. 6, 7 & 82
[52] P. 14
[53] P. 1
[54] P. 128
[55] P. 127

If the Arbiter had to limit himself to the partial and simplistic analysis as MPM is suggesting, one could simplistically, but wrongfully, reach the position advocated by the Service Provider. Such analysis would, however, be incomplete and inadequate.

The Arbiter considers that this aspect needs to be deliberated and studied closely and in depth, with cognisance taken of all the relevant important matters that have emerged in this case in order to reach the proper conclusion. This is even more so when the plea of prescription has such a material implication to the parties and thus cannot be considered lightly or superficially.

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

A key question that the Arbiter considered in this case is whether the Complainant's letter of 1 February 2022 is the appropriate one to take for the purpose of article 21(1)(c) as claimed by MPM or whether the Complainant had already communicated her grievances and claims formally to MPM earlier.

The spirit in which Chapter 555 is written clearly indicates that what is important is that the consumer makes the service provider formally aware of the substance of the complaint.[56] The substance of the complaint will vary from case to case, but it can always be deemed to have been communicated to the service provider when the latter is made aware of the reasons for which the consumer is dissatisfied.

The Arbiter notes that, as acknowledged and referred to by the Service Provider itself, there were certain other material, formal communications with MPM way back in 2018 and thus prior to the letter of 1 February 2022. Indeed, it has emerged that formal communications exchanged earlier in 2018 clearly implicated the Service Provider and reflected key aspects of the Complaint being considered before the Arbiter.

[56] Article 21(2) of the Act indeed binds the Arbiter to *'decline to exercise his powers under this Act where […] it results that the customer failed to communicate the substance of the complaint to the financial service provider concerned and has not given that financial service provider a reasonable opportunity to deal with the complaint prior to filing a complaint with the Arbiter'*.

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

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

a) Context - The Complainant is a retail consumer whose occupation was described as *'Teacher'* in her Application Form for Membership into the Scheme and whose knowledge in financial services is thus limited. [57] During the hearing of 22 November 2022, the Complainant testified *inter alia* that:

> *'… I noticed within a couple of years that a lot of money was lost. I did not fully understand, I am not a financial professional. I did not really understand what was going on. I was told several different stories. I was told that they were just paper losses, not to worry and that the investments would come back. Being a retail customer, I did not have a clue about finance …'.*[58]

b) The Complainant had sent an email to MPM on 7 January 2018 to Stewart Davies[59] (then, Group Chief Executive Officer of MPM),[60] where she provided Stewart Davies with a copy of her original complaint of 13 October 2017 sent to Trafalgar. In her email of 7 January 2018, the Complainant asked Stewart Davies *inter alia* if he *'had any idea what is happening'*, highlighting that she was *'being bounced from pillar to post'* and that it was *'all really upsetting'* including that she had *'lost basically everything [she] had'*.[61]

c) In her original complaint sent to Trafalgar of 13 October 2017, (which was sent to MPM on 7 January 2018), the Complainant had clearly highlighted her dissatisfaction and concerns in respect of her pension scheme where

[57] P. 89
[58] P. 193
[59] P. 127
[60] P. 148
[61] P. 127

she had unequivocally made certain material statements and allegations including that:

> *'... I have lost the majority of my pension …*
>
> *… I have a few concerns …*
>
> *…* ***I was given the impression that CWM was allegedly involved in a scam and were responsible for <u>putting our money into high risk investments when we had specifically asked for medium to low risk investments</u>*** *…*
>
> *… I notice that you (Trafalgar) were* ***responsible for <u>overseeing and checking all investments made by CWM</u> and I was wondering why these illegal investments were missed*** *…*
>
> *…* ***Why didn't alarm bells ring****? ...'.* [62]

d) Furthermore in her email of 22 January 2018[63] to the same Stewart Davies above referred to, the Complainant informed him that she was being advised to make a formal complaint to MPM but was refraining from doing so as *'you have been so honest and helpful I am torn and not sure what to do'*.[64]

At that point, there is no doubt that MPM was fully aware of the substance of her complaint, had a responsibility to inform the Complainant of her rights to complain, and failed to acknowledge the material allegations made and reply affirmatively denying their responsibility. Instead, they continued to deflect responsibility onto other parties. The Complainant eventually revised her assessment of honesty and helpfulness by the Service Provider.[65]

e) It is clear from the evidence submitted that MPM had received in a formal manner, and was amply aware of, the Complainant's dissatisfactions with the way her pension was dealt with and the losses she had suffered

[62] P. 128 – Emphasis added by the Arbiter
[63] P. 148
[64] *Ibid*.
[65] P. 194

including the claims made regarding the unsuitability of her disputed investments being of high risk and not reflective of her risk profile.

f) The Arbiter indeed notes that a key aspect of the complaint made by the Complainant to the Service Provider (in her letter of 1 February 2022), involves, in essence, the same key issue raised by the Complainant in her communication of 2018 – that is, the inappropriateness of the high risk investments undertaken and allowed within her pension arrangement which led to the alleged loss of funds suffered by her.

The said aspect is indeed reflected in the Complaint to the Arbiter - as per the summary of the complaint indicated earlier above.

g) The Arbiter further notes that even in their reply to the Complainant of 19 April 2022, MPM acknowledged that *'From our records it shows that you made contact with Momentum regarding the losses in your investments in 2017 … You continued to liaise with Momentum through 2018…'*. [66] It is thus undisputed that MPM was aware of the Complainant's grievances at the time.

h) It is noted that rather than rebutting the allegations made about the unsuitable investments, MPM (together with Trafalgar), paid to the Complainant GBP 962.50 each, in early 2018. MPM '*also waived all Trustee fees going forward on the Pension Scheme, and … waive[d] the termination fee payment when [she] took [her] retirement benefits in February 2020 … to assist [her] with regards to [her] investment losses incurred'*.[67]

This further confirms that MPM was aware of the Complainant's grievances about the losses suffered so much so that it proceeded to issue a *'contribution payment'*.[68]

As mentioned above, the material allegations made about her investments had also been formally raised and received by MPM at the time.

[66] P. 8
[67] *Ibid.*
[68] P. 81

From the exposition above, it is clear that the Service Provider was made aware of the Complainant's key dissatisfactions relating to the administration of her Scheme and the losses she had suffered much earlier than February 2022.

MPM failed to consider the serious claims made by the Complainant (which were formally received). It also failed to treat the claims made as a complaint in respect of her Scheme when the claims made clearly involved MPM's role and duties as trustee and RSA of the Scheme and its monitoring obligations with respect to the investments. The same claims are now the subject of the complaint before the Arbiter.

MPM's failures at the time cannot now be used to raise the plea of prescription by alleging that a formal complaint was not made considering the particular circumstances of this case. MPM was, in 2018, clearly aware of the substance of her complaint but chose to remain silent and not reply to the grave allegations raised by the complainant at the time but instead proceeded to issue a *'contribution payment'*.[69]

It is unclear why, despite the serious matters raised, MPM remained silent and did not treat such material communications as a complaint against its conduct, when it most appropriately and reasonably had an obligation to deem it so.

There is indeed no reasonable justification why MPM did not issue to the Complainant its formal position and rebuttal of the serious claims made when it knew of its responsibilities and there were such clear implications involving it as trustee and RSA of the Scheme. By the very nature of its roles, MPM was reasonably implicated with respect to the serious claims made by the Complainant in the said complaint of October 2017 (which MPM was in receipt of in 2018).

Yet, MPM issued no formal communication rebutting the serious allegations raised and only chose to issue its rebuttal in 2022 (through its letter of 19 April 2022), as if it needed to await some further formal communications from the Complainant for it to reply to the grave claims made.[70]

[69] In its reply, MPM described *'that the contribution was "to offset the Ongoing Bond charges and ultimate surrender costs at 55"'* – P. 81
[70] P. 7.

The serious issues on the disputed investments (which are the subject of this Complaint before the Arbiter) were ultimately, in essence, raised and communicated formally in 2018 and subsequently similarly raised again in 2022, as highlighted above.

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

It is unacceptable for a service provider to employ delaying tactics and try to avoid a complaint and claims of compensation against it through frivolous and improper actions only for it to then conveniently raise the plea of prescription when a case is brought against it.

As highlighted in other previous decisions, it is deemed *'very unprofessional for a service provider to make all in its powers to hinder a complaint against it, procrastinate and then raise the plea of lack of competence on the pretext that the action is "time-barred". It is a long accepted legal principle that no one can rest on his own bad faith'*.[71]

As indicated in the Trusts and Trustees Act:

> *'Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias, act in utmost good faith and avoid any conflict of interest'.* [72]

The Arbiter concludes that in terms of the equity, fairness and reasonableness that drive his adjudication in terms of his powers under Chapter 555 of the Laws of Malta, the complaint with the financial services provider is deemed to have taken effect in 2018 - which is within the two years referred to in Article 21(1)(c) of the Act from when she first had knowledge of the matters complained of as outlined above.

[71] P. 15 of the case decided by the Arbiter against MPM of 28 July 2020 - https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf
[72] Trusts and Trustees Act, Chapter 331 of the Laws of Malta, Article 21(1).

For the reasons stated, the plea relating to Article 21(1)(c) of the Act is therefore also being rejected and the Arbiter shall proceed to consider the merits of the case next.

The Merits of the Case

The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.[73]

The Complainant

The Complainant, born in XXXX, 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 dated 6 July 2013.[74]

Her occupation was indicated as *'Teacher/ Owner'* in the said form.[75] It is further noted that during the hearing of 22 November 2022, the Complainant testified that *'I am XXXXXXXXXXX in Spain …'*.[76]

The Complainant was accepted by MPM as a member of the Retirement Scheme on 30 July 2013.[77]

The Complainant's risk profile in the MPM Application form was indicated as *'Low Risk'* and *'Medium Risk'*.[78]

Her *'Attitude to Risk'* was stipulated as *'Medium'* in the Annual Member Statement for the year ended 2016 issued by MPM.[79] It is unclear why this was indicated as medium when the application form included both low and medium risk.

[73] Cap. 555, Art .19(3)(b)
[74] P. 89 - 97
[75] P. 89
[76] P. 195
[77] P. 278
[78] P. 92. As both Low Risk and Medium Risk boxes were chosen it is fair to assume that the risk profile chosen was somewhere between Low to Medium Risk.
[79] P. 278.

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

Particularities of the Case

The Retirement Scheme in respect of which the Complaint is being made

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta and authorised by the MFSA.[80]

Continental Wealth Management ('CWM') was indicated as the Complainant's appointed professional adviser in respect of her Scheme account.[81] 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 accordingly directed by the member who received investment advice from CWM as her investment adviser, with the investments undertaken subject to the oversight and acceptance of MPM as the trustee and RSA of the Scheme.

The Retirement Scheme's Underlying Investments

The Complainant's Retirement Scheme, acquired a life policy on 22 October 2013,[82] the *European Executive Investment Bond* ('the Policy') issued by *Skandia International Limited*, within which the underlying investment portfolio was held.[83] An initial premium of GBP 40,796.68 was paid into the Policy for investment in October 2013.[84]

The Policy was surrendered in 2020, and all the money for a total of GBP 10,582.74 was withdrawn from the Scheme in February 2020 leaving a zero balance into the Scheme.[85]

The investment transactions (excluding FX positions) that were allowed to be undertaken within the Policy over the period October 2013 to February 2020 as

[80] https://www.mfsa.mt/financial-services-register/
[81] P. 90
[82] P. 158
[83] *Ibid*.
[84] P. 158 & 290
[85] P. 21

emerging from the Table of Investments produced by the Service Provider during the proceedings of the case are as follows:[86]

a) Purchase of *RBC 2Y Retail Income GBP* (a structured note with ISIN No. XS0964845266) of GBP 15,000 on 15 October 2015, which was sold/matured on 2 November 2015 for GBP 5,409.32. The indicated total interest received on this investment was of GBP 2,550.75. A realised loss of -GBP 7,039.93 (incl. of div./int.) was thus indicated on this investment;

b) Purchase of *Commerzbank 10% GBL Phar INC NT* (a structured note with ISIN No. XS0977428985) of GBP 15,000 on 15 October 2013, which was sold/matured on 13 November 2014 for GBP 6,687. The indicated total interest received on this investment was of GBP 1,500. A realised loss of -GBP 6,813 (incl. of div./ int.) was thus indicated on this investment;

c) Purchase of *Nomura Global Phoenix 5Y* (a structured note with ISIN No. XS0982016700) of GBP 10,000 on 15 October 2013, which was sold/matured on 28 September 2014 for GBP 9,200. No interest was indicated as having been received. A realised loss of -GBP 800 was thus indicated as resulting on this investment;

d) Purchase of *Leonteq 1.5Y Multibarrier* (a structured note with ISIN No. CH02456555904) of GBP 9,800 on 05 September 2014, which was sold/matured on 23 April 2015 for GBP 9,800. The indicated total interest received on this investment was of GBP 450. A realised profit of +GBP 450 was indicated as resulting on this investment;

e) Purchase of *Leonteq Express Cert Herbalifie, Mann Sarepta Therapeutics* (a structured note with ISIN No. CH0259240692) of EUR 4,000 on 17 November 2014, which was sold/matured on 25 November 2016 for EUR 366. The indicated total interest received on this investment was of EUR 800. A realised loss of -EUR 2,834 was indicated. The realised loss on this investment (incl. of div./int.) in GBP, was further indicated as amounting to -GBP 2,209.87;

[86] P. 185

f) Purchase of *Leonteq Barrier Discount on Sarepta Therapeutic* (a structured note with ISIN No. CH0259240734) of EUR 4,200 on 17 November 2014, which was sold/matured on 26 September 2016 for EUR 8,782.20. No interest was indicated to have been received on this investment. A realised profit of EUR 4,582.20 was indicated as resulting on this investment. The realised profit in GBP, was further indicated as amounting to +GBP 4,074.36;

g) Purchase of *EFG Red April 5* (a structured note with ISIN No. CH0273397270) of EUR 6,000 on 24 April 2015, which was sold/matured on 8 May 2017 for EUR 795.47. The indicated total interest received on this investment was of EUR 1,200. A realised loss of -EUR 4,004.53 (incl. of div./ int.) was indicated as resulting on this investment. The realised loss in GBP, was further indicated as amounting to -GBP 2,702.07;

h) Purchase of *EFG Red April 6* (a structured note with ISIN No. CH0273397429) of EUR 7,000 on 24 April 2015 which was sold/matured on 08 May 2017 for EUR 259.74. No interest was indicated to have been received on this investment. A realised loss of - EUR 6,740.26 was indicated as resulting on this investment. The realised loss in GBP, was further indicated as amounting to - GBP 4,970.14;

h) Purchase of *Marlborough Intern High Yield Fxd Int A Inc* (a collective investment scheme with ISIN No. GG00BCF5NP92) of GBP 6,000 on 10 November 2015 which was sold/matured on 02 August 2016 for GBP 5,821.04. The indicated total interest received was of GBP 764.76. A realised profit of +GBP 585.80 was indicated as resulting on this investment;

h) Purchase of *Old Mutual Global Comp Ass* (a collective investment scheme with ISIN No. IE00BYNWCV54) of GBP 7,000 on 03 October 2016 which was sold/matured on 9 May 2019 for GBP 7,065.72. No interest was indicated as having been received. A realised profit of +GBP 65.72 was indicated as resulting on this investment;

i) Purchase of *Leonteq 4 Year Step-Up Autocall* (a structured note with ISIN No. CH0345408238) of EUR 356.80 on 08 December 2016, which was sold/matured on 6 December 2017 for EUR 520. No interest was indicated

to have been received. A realised profit of +EUR 163.20 was indicated. The realised profit in GBP, was further indicated as amounting to +GBP 203.08;

j) Purchase of *TC New Horizon ICA Global Balanced* (a collective investment scheme with ISIN no. IE00BJ1F3H46) of GBP 12,463.10 on 23 July 2019, which was sold/matured on 25 February 2020 for GBP 12,535.16. No interest was indicated as having been received. A realised profit of +GBP 72.06 was thus indicated as resulting on this investment.

The total *'Net Realised Loss'* resulting on the investment portfolio from the said transactions, as indicated by the Service Provider in its submission Doc CP 19,[87] amounts to -GBP19,083.98. This equates to approx. 47% of the premium invested into the Skandia Plan.[88]

The substantial losses suffered on the disputed structured note investments (both individually and on a collective basis), clearly emerges from the said information.

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

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,[89] as well as other multiple cases such as case 073/2019, 076/2019, 070/2019 and 074/2020.[90]

[87] P. 185
[88] GBP 19,083.98 of GBP 40,796.68
[89] https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf
[90] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20073-2019%20-%20PG%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

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

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

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

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

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

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

The nature of the disputed investments

Following general searches, the OAFS traced a number of facts sheets of structured notes featuring within the Complainant's portfolio – such as with XS0964845266,[91] ISIN No. XS0977428985[92] and ISIN No. XS0982016700.[93]

The relevant fact sheets sourced all reflect features of the structured notes (which led to the same material losses) as described in the *'Preliminary observations'* for *'Investment into Structured Notes'* extensively considered in other cases as referred to above.

Given the above, the extent of the losses emerging on various of the structured notes on the Complainant's portfolio, as well as the events occurring at the time involving the same period and parties (particularly the same adviser CWM), the Arbiter has no reason to believe that the nature of the other structured notes allowed within the Complainant's portfolio were any different and did not have overall the same or similar features to that considered as mentioned above.

It is sufficiently evident that MPM had permitted structured products that were complex products by their nature and hence not compatible with the Complainant's profile as a retail investor.

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 Retirement Schemes were retail products. The disputed products in question were furthermore of high risk (and thus not reflective of the Complainant's low to medium risk profile), due to the very nature of their own features and as also reflected in the material losses ultimately experienced on these products.

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

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

[91] https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-Retail-Fixed-Income-Notes-Fact-Sheet1.pdf
[92] https://www.portman-associates.com/wp-content/uploads/2014/11/Commerzbank-Diversified-recovery.pdf
[93] https://www.scribd.com/document/366660737/Nomura-Global-Phoenix-Autocallable-Factsheet

The Arbiter considers that it cannot reasonably be concluded that such high and unjustifiable exposures that were allowed to occur by MPM within the Complainant's Retirement Scheme reflected in any way the requirement for her pension fund to be *'invested in a prudent manner and in the best interests of the beneficiaries'* as MPM, in its capacity as Trustee and RSA of the Scheme, was bound to ensure as also specified in the MPM Application Form.[94]

The permitted allocation is, furthermore, also considered as not being either reflective of, and in conformity with, MPM own's Investment Guidelines[95] 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.[96]

Additional observations

It is noted that as part of its submissions, the Service Provider has, in this case, also filed copies of two legal opinions drafted for MPM dated 30 March 2022 and 19 December 2019 in respect of the application and interpretation of the investment restrictions under the regulatory framework.[97]

The Arbiter notes that such legal opinions make, *inter alia*, much emphasis on the point that, at the time of the disputed investments, the investment restrictions were not applicable and were not to be interpreted as applicable at the member's account but had to be applied generally on the Scheme.

The Arbiter has already considered such an aspect in previous decisions – as outlined, for example, under the section titled *'Context of entire portfolio and substance of MPM's Investment Guidelines'* in case ASF 076/2019.[98]

The Arbiter also makes reference to his recent comments and observations in Case ASF 021/2022 and Case 045/2022 (involving the same Scheme and Service Provider) where it was noted that in the covering letter of April 2011 to the

[94] P. 92
[95] *Ibid.*
[96] That is, for example, in the single case decided by the Arbiter on 28 July 2020 and the other OAFS cases with case numbers ASF 073/2019, 076/2019, 070/2019 and 074/2020.
[97] P. 212 - 224 & 225 - 228
[98] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20076-2019%20-%20MN%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

Scheme's Certificate of Registration, which formed part of the registration conditions of the Scheme, the MFSA had itself stipulated that:

> '…*The Standard Operating Conditions forming part of the Directives for Occupational Retirement Schemes, Retirement Funds and related parties issued under the SFA will apply separately to each member's individual fund…*'.[99]

Once the Scheme had individual member accounts which operated in the same or similar manner to member-directed schemes, where the individual member account had his/her own tailored individual and distinct investment portfolio as selected by the respective member and the appointed adviser, then it should have been clear that the same standards and safeguards were to apply for such members. Indeed, **any other interpretation would have defeated the safeguards that the regulatory requirements were intended to achieve for the protection of the members in respect of investments and applicable diversification requirements**.

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

Final Remarks

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

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had clear duties to check and ensure that the portfolio composition recommended by the investment adviser provided a suitable level of diversification and was *inter alia* in line with the applicable requirements **in order to ensure that the portfolio composition was one enabling the aim of**

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

the 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 and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others.

It has also satisfactorily resulted that the permitted investment portfolio was not reflective of, and in conformity with, the Complainant's profile nor in conformity with the applicable principles and parameters and the requirements and conditions specified in the rules and MPM's 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.*[100]

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[101] 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.

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.

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

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, and taking into consideration the risk attitude of the Complainant, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited to be held responsible for seventy per cent of the sum of the Net Loss incurred by the Complainant within her whole portfolio of underlying investments suffered on the underlying Policy.[102, 103]

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 13,358.79 (thirteen thousand, three hundred-and-fifty-eight-pounds sterling and seventy-nine pence).

With interest at the rate of 5.25% p.a.[104] from the date of this decision till the date of payment.[105]

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

Alfred Mifsud
Arbiter for Financial Services

[102] As indicated earlier in the decision, under the section titled *'The Retirement Scheme's Underlying Investments'*, the Net Realised Loss on the whole investment portfolio was GBP 19,083.98 as indicated by MPM (P. 185). Seventy per cent of the Net Realised Loss – 70% of GBP 19,083.98 – amounts to GBP 13,358.79.

[103] A rate of seventy per cent is, in this case, being applied in the computation of compensation in light of the 'Low to Medium' risk profile selected by the Complainant in her Application Form for Membership into the Retirement Scheme – P. 92

[104] Equivalent to the current Bank of England Bank Rate.

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

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.

Costs of the proceedings

In terms of article 26(3)(d) of Cap. 555 of the Laws of Malta ('the Act'), the Arbiter has adjudicated by whom the costs of the proceedings are borne and in what proportion, taking into consideration the particular circumstances of the case.

The costs of the proceedings are not limited to the payment of any applicable cost of filing the Complaint with the Office of the Arbiter for Financial Services (presently Eur25) but may also include any reasonable lawful professional and legal fees paid by the Complainant limited to the acts filed during the proceedings of the case. Such professional fees should not include any contingency judicial fees and charges.

The extent of tariffs and fees in respect of professional or consultancy services rendered to customers in relation to the claims or proceedings under the Act, that may be lawfully and reasonably requested as part of the said costs of

proceedings, are not defined in the current provisions of the Act. However, the Arbiter expects these to be benchmarked on tariffs and fees as stipulated and applicable for Civil Court proceedings in Malta under the Code of Organization and Civil Procedure.