Before the Arbiter for Financial Services

Case ASF 100/2022

WM ('the Complainant')

vs

Momentum Pensions Malta Limited

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

Sitting of 29 February 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 alleged negligence and failures of MPM to fulfil its duties of care and fiduciary duties as trustee and RSA of her Retirement Scheme, particularly when:

- her investment into the Scheme's underlying policy (issued by Skandia) should not have been permitted as it was below the minimum investment stipulated in Skandia's policy rules;

- she was not provided with the legal right to cancel the Skandia Policy within the 30-day cooling-off period;

- MPM allowed her funds within the Skandia Policy to be invested prior to her receiving the 30-day cancellation right;

- The sale of the Skandia Policy was not done in her best interests given her particular situation at the time of sale and the nature of her previous final salary pension plan;
- MPM did not undertake due diligence on the introducers (that is, her advisers CWM/ Trafalgar), in line with the pension rules;
- MPM allowed all of her funds within the Skandia Policy to be invested into high-risk, illiquid structured notes designed for professional investors despite that she was an unsophisticated investor. She further claimed in this regard that the investments were made against MPM's own investment guidelines and the requirement that the Scheme assets had to be invested in her best interests and be properly diversified.

The Complaint[1]

The Complainant explained that the complaint against MPM concerns the ongoing negligence and failures of MPM's duties of care and fiduciary duties as the Trustee of her Qualifying Recognised Overseas Pension Scheme ('QROPS'). She claimed such failures took place since the initial transfer of her funds on 7 March 2014 until the day of her complaint.

The Complainant further explained that in 2013 she was living in Turkey when she was contacted by *Continental Wealth Management* ('CWM'), who advised her that because she had lived outside the United Kingdom ('UK') for more than 5 years, she should transfer her pension from the UK to a Malta QROPS held with MPM for tax benefits.

She noted that MPM, as Trustee and RSA, invested GBP 40,394.46 into a *Skandia European Investment Bond* ('the Skandia Policy' or 'the underlying Policy'). She requested the full Policy document since she understood that there were various other pages that had not been sent to her and which she was still waiting for.

The Complainant submitted that her investment into the Policy should not have been allowed according to Skandia's policy rules. She claimed that the factsheet

[1] Complaint Form on Page (P.) 1-8 with extensive supporting documentation on P. 9-129.

titled *'Skandia Executive Investment at a glance'* mentions that the minimum investment into this policy was only of GBP 50,000.

The Complainant continued to explain that the Policy documents attached to the Complaint were received by her from MPM on 27 March 2014 (with MPM having received them on 25 March 2014). She contended that she should have had up to 24 April 2014 to cancel.

The Complainant further alleged that from 7 March 2014 to 25 March 2014, before the 30-day cancellation right was received, MPM allowed 100% of her funds to be invested into high-risk, illiquid structured notes. She insisted that she should have had 30 days to cancel before any investments were authorised by MPM. She questioned how she could have cancelled the Policy if the monies were already invested, unbeknownst to her.

The Complainant reiterated that MPM never offered her legal right and option to cancel within 30 days before allowing 100% of her funds to be invested. She explained that if she had been aware of the extremely high charges of this Policy and its extreme unsuitability for pensions, she would have exercised this legal right of cancellation had such information been given to her on time before any investments were made. She submitted that, accordingly, MPM failed in its duty of care.

The Complainant further explained that she is an unsophisticated investor and claimed that from the initial conversations she had understood that transferring the pension would give her protection, tax efficiency and growth. She stated that she was clear that she had no other pension fund or investments on which to rely in retirement. She added that she was also heavily pregnant and desperate for money at the time given that she had debts and was worried about how she would manage with a new baby and very little money.

She further explained that she was also told that she would be allowed to take GPB 3,000 cash out of the money transferred from her old pension if she went ahead. She stated that she now realised that this was totally illegal. It was further claimed by the Complainant that the advisor fees were inflated in order for CWM to send her the said cash. She alleged that MPM again failed in their duty of care and to take care of her interests.

The Complainant explained that her old pension was an indexed-linked final salary scheme, and now realised that a QROPS could never replace her old scheme.

Reference was also made to the Retirement Pensions Act, 2011 ('RPA'), part D.1, which the Complainant noted required the Service Provider to carry out due diligence in order to ensure that its introducers act within the Pension Rules. She stated that this, however, clearly did not happen.

The Complainant went on to explain that in 2016 she received a statement and was shocked to see that her initial investment of GBP 40,394.40 had dropped to GPB 16,749.98.

The Complainant continued that, upon contacting CWM about this, the explanation given to her was that the statement from MPM showed the secondary market value which was the price if sold early/at the time instead of holding through to maturity. She noted that they had explained that the low secondary market value reflects the volatile market conditions and depressed investment conditions globally at the time, and were not selling her investments as, ideally, they were to be held until maturity or look for alternative strategies as her pension moves forward. She stated that she was informed that, given the time, the investments would make a correction and her Policy would move forward. She added that they told her that she still had some nine years before she could take an income and they will continue to monitor performance and inform her regularly as things progress. The Complainant referred to email communications she attached to her Complaint in this regard.

The Complainant further explained that she then received news that MPM was no longer in business with CWM, but she noted that no reasons and no alert to any potential problems with the investments were given at the time by Stewart Davies of MPM. She stated that in such communications Stewart Davies just stated that:

> *'CWM is an authorised representative/agent of Trafalgar International GMBH … For the avoidance of any doubt, the Pension Fund remains under the control of Momentum … In addition, as already advised, Trafalgar*

> *International GMBH, remain the default adviser, as CWM's original principal, CWM being their authorised representative in Spain and France'*.[2]

The Complainant stated that at the time she believed that MPM had her best interests at heart but no longer felt that this was true. She explained that she had recently found out that, initially, all of her pension was invested in structured notes against MPM's own investment guidelines. She stated that the said guidelines state that structured notes will only be accepted at the discretion of the Trustees. Reference was made to Points 1, 7, 8, and 12 of the said guidelines.

The Complainant highlighted that these structured notes have a risk disclaimer which stipulates that these products are designed for professional investors and not for the retail market.

She submitted that she has only received one detailed sheet from CWM for the *'RBC Online large caps'* note, which she attached to her Complaint. She continued that having read a previous ruling by the Arbiter, she believes the Arbiter may have the required documents. She pointed out that, again, the scheme particulars set out that:

> *'The Administrator will ensure that the Scheme Assets are invested in the best interests of the Member and are properly diversified, in line with the prevailing rules'*.[3]

The Complaint explained that having read the Arbiter's ruling in January 2022 for cases like hers, she now understood that MPM had failed in their legal obligation to act in her best interest as laid out in the Retirement Pensions Act 2017 part 8.1.3.1; to exercise due diligence as laid out in the Retirement Pensions Act 2011 part B.4.1.4(b) and to fulfil the compliance obligations as laid out in the Retirement Pensions Act.

She claimed that the losses totalling GBP 32,665.98 that her pension fund has suffered were totally due to the extremely early, wilful and ongoing negligence of her Trustees. Therefore, she considered MPM as fully responsible for a reimbursement payment.

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[2] P. 3
[3] *Ibid*.

Reference was also made to the Retirement Pensions Act 2011, part B.1.5.1 and to the 'Liability' provisions at 4.1.17. The Complainant stated that these indicate that:

> *'the Scheme Administrator will be liable to the scheme, Members, Beneficiary's and Contributors 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 in part of its obligations'*.[4]

She claimed that MPM took the decision to agree on compensation and contact some members offering refunds of fees or the waiving of MPM and *Old Mutual International* ('OMI') fees in return for signing a gagging agreement and withdrawing complaints. The Complainant claimed that this, however, has not been offered to all affected members. This was not considered as acting fairly and with integrity as per the Retirement Pensions Act 2011.

Remedy requested

The Complainant claimed that as of 1 July 2022, her valuation stood at GBP 7,738.42, reflecting a loss of 80.87%. She, therefore, believed that MPM should compensate her for her losses of GBP 32,665.98 and, thus, put her back in the position when she transferred her funds.[5]

Having considered, in its entirety, the Service Provider's reply, including attachments,[6]

where the Service Provider explained and submitted the following:

Introduction and background given by MPM in its reply

1. As a preliminary point, MPM noted that a number of the documents attached to the Complaint are unclear or illegible. MPM requested clear copies to be provided and reserved the right to reply further when such

[4] P. 4
[5] *Ibid*.
[6] P. 135-189

copies are provided. Furthermore, it noted that the Complainant should also provide the entire email chain.

2. That MPM is licensed by the Malta Financial Services Authority to act as the Retirement Scheme Administrator ('RSA') and Trustee of the Scheme which scheme is licensed as a Personal Retirement Scheme. It highlighted that MPM is not licensed to provide investment advice.

3. MPM explained that the Complainant completed the MPM application form, dated 9/12/2013, together with her advisor Dawn Kirby, who is named on the application form.

4. That by letter dated 24 December 2013, MPM sent the investment application to *Skandia Life Ireland Limited* ('Skandia'). It noted that Dawn Kirby is once again named as advisor on this form, operating under CWM/ *Inter Alliance World Net Insurance Agents and Advisers* ('IAWIA'). It further noted that the forms were also signed by Dawn Kirby and Flora Parker for and on behalf of IAWIA.

5. That by letter dated 10 March 2014, Skandia informed MPM that the bond (policy) application had been accepted.

6. That by email dated 26 March 2014, MPM sent the policy documents and client account statement to the Complainant. It noted that the policy charges were included in the policy documentation.

7. MPM submitted that annual member statements were sent to the Complainant each year showing the value of her investment in line with regulatory requirements.

8. It noted that during 2016, the Complainant received a statement from CWM. MPM claimed that it is clear from CWM's email dated 7/01/2016 to the Complainant that CWM sent annual statements to all their clients in January each year, before the annual statements sent out by MPM. It added that CWM informed the Complainant as follows:

   '*We have completed the end of year pension statements for your policy, as it is the beginning of the year we are sending out statements*

to all clients. Statements from Momentum Pensions will follow in the next couple of months'.[7]

9. MPM further explained that the Complainant confirmed that she contacted CWM in relation to the loss as it appeared on the statement, citing her as stating that:

> '*In 2016 I received a statement and was shocked to see my initial investment of £40,394 had dropped to £16,749.98*'.[8]

MPM noted that the Complainant attached a statement dated 31/12/2015 and 31/12/2016, each showing all assets held as at the valuation date. The Service Provider further claimed that the correspondence dated 7/01/2016 clearly confirms CWM provided its clients with annual statements. It noted that the Complainant was also provided with a transaction statement showing all transactions on her policy, as well as assets purchased within her portfolio.

MPM submitted that it is amply clear from the evidence already submitted by the Complainant herself that as early as 2016, she was, in her own words, '*shocked*' about her portfolio because she exchanged correspondence with CWM in this respect regarding the values and losses shown. MPM submitted further that she also confirms this herself in the Complaint, where she stated that:

> '*In 2016 I received a statement and was shocked to see my initial investment of £40,394.40 had dropped to £16,749.98. Upon contacting Continental Wealth about this the explanation given was the statement from Momentum shows the secondary market value …*'[9]

MPM submitted that in the first place, what the email stated (attached to the Complaint) is that: '*The current secondary market value is £17,050.41*' – MPM stressed that there is thus no mention of a statement from MPM with respect to the secondary market value. It submitted that furthermore,

[7] P. 136

[8] *Ibid.*

[9] *Ibid.*

at that point in time, the Complainant did not contact MPM or raise any concerns with MPM about the valuation.

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

11. With respect to the amount of the alleged loss, MPM contested the amount alleged by the Complainant. It submitted that, furthermore, as a gesture of goodwill, MPM assisted the Complainant to rebate Trafalgar fees, to cancel the fund adviser fees, and in order to assist with value recovery, MPM also waived its 2018 fee.

Competence and prescription

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

13. Without prejudice, MPM replied that the complaint is also prescribed pursuant to Article 2156(f) of Chapter 16 of the Laws of Malta.

14. MPM submitted that the Complaint should, therefore, be rejected by the Arbiter.

Reply to allegations raised by the Complainant

15. MPM replied that, in the first place, the Complainant herself confirmed in her Complaint that she was contacted by CWM and received advice from them to transfer her pension from a UK pension scheme to a Malta QROPS. MPM replied that it is not answerable or responsible for any advice provided by CWM.

16. The Service Provider noted that the Complainant alleged that her investment should not have been allowed because the minimum investment into the Skandia Policy was not less than GBP50,000. MPM replied that, in the first place, this claim is prescribed pursuant to Article 21(1)(b) of Chapter 555 of the Laws of Malta. MPM submitted that additionally, with respect to the acceptance of the Policy based on an initial premium below £50,000, this was a Skandia/OMI acceptance criteria which

was thus a matter for Skandia/OMI to decide upon. MPM submitted that it did not make any special request for Skandia/OMI to accept the product.

17. MPM noted that the Complainant alleges that she was not given the thirty-day right to cancel. Additionally, the Complainant further alleges that had she been aware of the Policy charges, she would have exercised her right to cancel. MPM replied that, in the first place, this complaint is prescribed pursuant to Article 21(1)(b) of Chapter 555 of the Laws of Malta; and that, in any event, both the cooling-off period/right to cancel as well as the Policy charges were indeed made known to the Complainant as per fol. 62-77 attached to her complaint. It added that, furthermore, the Complainant was aware of the investments and assets which were purchased because she signed the initial dealing instruction.

18. The Service Provider noted that the Complainant further states in her Complaint that: '*I was also told they would allow me to take £3000 cash out of the money transferred from my old pension if I went ahead*'.[10] MPM pointed out that, in the first place, this is not an arrangement which MPM was a party to. It submitted that MPM was not copied in the various email exchanges which the Complainant attached to her Complaint regarding the transfer.

    MPM reiterated that the said correspondence was only between the Complainant and CWM. It further noted that this was agreed to only by and between the Complainant and CWM. MPM submitted that it is clear that the Complainant had no qualms about coming to an agreement with CWM to take £3,000 in cash, under the pretext that it was an adviser fee. MPM insisted that it had no knowledge of this arrangement.

    MPM further noted that the fee paid was £2,629 (and not £3,000) and subsequently, from the evidence submitted by the Complainant herself, she complained to CWM that the amount was less than the amount agreed, and CWM then paid the difference to her directly.

19. With respect to the Complainant's allegation that due diligence was not carried out in accordance with the Pension Rules, MPM replied that, as it

[10] P. 137

shall prove, 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. It submitted that, in any event, they were licensed. MPM reiterated that it has fulfilled all obligations incumbent upon it from time to time.

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

MPM claimed that this is borne out by SOC Part B2.6.2, 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 services are to be provided'*.[11]

20. MPM noted that the Complainant further stated that, having read the '*arbiters ruling in January 2022 for cases like mine I now understand that Momentum have failed their legal obligation to act in my best interest …*'.[12] It noted that the Complainant also states that she allegedly only understood MPM to have failed in its obligations towards her when she read the decisions of the Arbiter. MPM replied that decisions handed down by the Arbiter apply only between the parties thereto. It stressed that the Complainant either attributed responsibility to MPM or not and that she cannot depend on the success of claims brought by third parties against MPM to claim that it was when she found out about MPM's alleged failures in her regard.

21. The Service Provider further noted that the Complainant alleges that she *'recently found'* that initially all of her pension was invested in structured notes, against MPM's own investment guidelines. MPM noted that the

[11] P. 138
[12] *Ibid.*

copy of the guidelines attached to the Complaint were the guidelines which applied as at 2018, and not at the time the investment was made.

With respect to the Complainant's allegation that she *'recently found'* that initially, all of her pension was invested in structured notes, MPM replied that this could not be correct. It stated that on the basis of the statements and valuations which the Complainant herself attached to the Complaint, it is clear that as far back as 2016, the Complainant knew that she was invested in structured notes. MPM reiterated that the Complainant did not only find out recently.

The Service Provider replied that, at the relevant point in time, 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 explained that those decisions were based *inter alia* on the following rationale:

a. That the structured notes were offered by very large and reputable fully regulated investment banks and not by small investment houses. MPM stated that, by way of example, in 2014 RBC was (based on market capitalisation), in the top fifteen largest banks globally.

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

c. The interest rates were higher as the members did not benefit from capital growth if the underlying equities increased in value, and the rates offered, therefore, were higher as the return was in the form of income in place of the upside of capital growth.

d. The underlying investments composing the structured notes were checked and verified at the point in time that an instruction was placed to ensure they were listed on the major stock exchanges in the world including the NYSE, Nasdaq, London Stock Exchange – MPM explained that this provided further comfort that these instruments had been through a rigorous due diligence exercise as an entry

requirement to be admitted to such stock markets. It further added 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 viewed as prudent based on the information available to MPM.

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

With respect to the reference made to the '*Scheme Assets*' being invested in the best interest of the member and properly diversified, MPM furthermore replied that this applies at the Scheme level and not at a member level.

22. With respect to the Complainant's allegations relating to compensation and fee rebates, MPM noted that it had indeed rebated fees for the Complainant in 2018 as a gesture of goodwill and without admission of liability. It submitted that allegations of *'gagging agreements'* are entirely unfounded and must be proved by the Complainant.

23. MPM replied that it has at all times fulfilled its obligations with respect to the Complainant.

MPM's submission that it does not provide investment advice

24. 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.

25. It submitted that it is not licensed to, and does not provide, investment advice and that, furthermore, it did not provide investment advice to the Complainant.

26. MPM also submitted that this is clear from the application form which specifically requests the details of the Complainant's professional adviser. It added that the Complainant also declared that she acknowledged that

the services provided by MPM did not extend to financial, legal, tax or investment advice.

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

MPM's concluding remarks

28. MPM replied that it is not responsible for the payment of any amount claimed by the Complainant and that it has at all times fulfilled its obligations with respect to the Complainant.

    It insisted that it has not acted negligently and neither has it breached any of its obligations in any way. MPM accordingly 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 as the conduct complained of is prescribed based **on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta** ('the Act'), and that the Complaint is also prescribed pursuant to **Article 2156(f) of Chapter 16 of the Laws of Malta**.

The Arbiter is considering these pleas as follows:

Plea relating to Article 21(1)(b) of Chapter 555 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 article thus provides 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 the said paragraph came into force. **This paragraph came into force on 18 April 2016.**

The Complaint with the Office of the Arbiter for Financial Services ('OAFS') was received on 22 July 2022.[13]

Having considered the submissions made and the particular circumstances of this case, the Arbiter considers that there are a number of alleged failures made by the Complainant with respect to the conduct of the Service Provider which specifically relates to, and strictly applied, in 2013 and 2014 at the time when:

(i) the Complainant made an application to become a member of the Retirement Scheme (this being 9 December 2013);[14]

(ii) she joined the Scheme shortly thereafter;

(iii) applied with the Scheme's trustee (on 9 December 2013) for the acquisition of the *European Executive Investment Bond* issued by *Skandia International* ('the Skandia Policy')[15] and,

(iv) when the underlying Skandia insurance policy was acquired by the Scheme for the Complainant (on 7 March 2014).[16]
As to the latter, the Complainant herself confirmed that the *'bond documents … were received by [her] by email from Momentum on the 27th March 2014'*.[17, 18]

The following alleged failures (which were listed at the start of this decision as forming part of the summary of the key alleged failures arising from the Complaint to the OAFS) are, in the circumstances, indeed considered by the Arbiter as a complaint specifically about conduct which occurred before 18 April 2016:

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[13] P. 1
[14] P. 172
[15] P. 151-163
[16] P. 178 - 189
[17] P. 2
[18] Email dated 27 March 2014 from MPM to the Complainant enclosing *'a copy of the Policy Document …'* also refers – P. 34

- The claim that her investment into the Scheme's underlying policy should not have been permitted as it was below Skandia's minimum investment threshold;

- The claim that she was not provided with the legal right to cancel the Skandia Policy within the 30-day cooling-off period;

- The claim that MPM allowed her funds within the Skandia Policy to be invested prior to her receiving the 30-day cancellation right;

- The claim that the sale of the Skandia Policy[19] was not done in her best interests (and that an initial fee payment to the investment adviser was inflated illegally).

With respect to the part of the Complainant's complaint involving the above-mentioned aspects, the Arbiter accordingly accepts MPM's plea that these relate to *'conduct which occurred before the entry into force of this Act'* and that a complaint about such conduct was required to *'be made by not later than two years from the date when this paragraph comes into force'* as provided for in article 21(1)(b) of the Act.

Given that the Complaint to the OAFS on these aspects was not raised by 18 April 2018, the Arbiter accordingly accepts the Service Provider's plea that the said aspects are prescribed under article 21(1)(b) of the Act.

The Arbiter, however, notes that the Complaint made by the Complainant covers a wider key aspect than the issues mentioned above. Indeed, a key aspect of the Complainant's complaint involves the alleged unsuitability of the investments that were permitted within the Complainant's portfolio as well as the alleged lack of due diligence undertaken with respect to her advisers (CWM/Trafalgar), as also summarised at the start of this decision.

Apart from that, no adequate justification was provided by the Service Provider regarding the pleas of prescription involving the said two key aspects, no

[19] It is to be noted that the claim about the sale of the Skandia Policy (a distinct insurance product), is considered as a separate and distinct claim to that about the unsuitability of the structured note investments undertaken within the said policy. Hence, any non-consideration of the claim about the sale of the Skandia Policy does not prejudice the claim about the unsuitability of the underlying structured note investments as the context, nature and implications of such claims are different and distinct and need to be considered separately.

adequate basis has emerged throughout the proceedings which could justify the pleas of prescription raised by MPM also in respect of these key matters.

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 material 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 transaction statements presented with the Complaint. [20, 21]

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 roles MPM occupied since the Complainant became a member of the Scheme and it **continued to occupy 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 two key aspects 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 (that is the disputed structured note investments) which still featured and formed part of the Complainant's portfolio after 18 April 2016 as per the table of investments produced by the Service Provider.[22] Additionally, CWM/Trafalgar was also still involved with the Complainant's Scheme up until September/October 2017.[23]

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.

[20] P. 296
[21] Table A in the decision further on also refers.
[22] P. 296. Table A below also refers.
[23] MPM suspended and then terminated its terms of business with CWM as notified by emails dated 10 September 2017 and 3 October 2017 - P. 136

The Arbiter is accordingly dismissing the submissions made by MPM with reference to article 21(1)(b) in respect of the two key aspects involving the disputed investment instruments and her appointed investment adviser. The Arbiter shall consider next the other pleas raised by MPM.

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 Service Provider claimed *inter alia* that more than two years had lapsed given that the Complainant only made a complaint in writing to MPM on 17 March 2022. It claimed that the Complainant, however, had knowledge of the matters complained of much earlier than 17 March 2020. In essence, MPM claimed that this was the case given that the Complainant:[24]

(a) was in receipt of the Annual Member statements which showed the value of her investment as well as valuations/transaction statements in respect of the underlying Skandia policy;

(b) was in communication with CWM regarding her losses as far back as in 2016;

(c) was informed by MPM in September and October 2017 about the suspension and then termination of terms of business with CWM;

[24] As per the Solemn declaration of Susan Brooks (particularly, P. 195-199), and MPM's final submissions (particularly, P. 333-335).

(d) was, in March 2018, in communication with Stewart Davies of MPM about what could be done in the situation and the Complainant had herself acknowledged at the time how *'little'* she had in her pension;[25]

(e) had received a draft proposal on 5 April 2018 from Stewart Davies of MPM with *'his suggestion for a way forward in order to negate costs to assist'*;[26]

(f) had already complained to *Quilter International* on 16 September 2019.[27]

As to the date when the Complainant first had knowledge of the matters complained of, it is noted that the Complainant indicated the date of 17 March 2022 in her Complaint Form, this being the same date of her latest formal complaint of 17 March 2022.[28]

It is further noted that during the hearing of 25 October 2022, the Complainant testified that in her communications of 2016, she understood that her pension was safe as she understood that the drop in value of her pension was *'… if I was to sell my pension at that day in 2016, that was what the value would be that day, not what it would be upon retirement'*.[29]

She again testified during the said hearing that *'I realised early this year that this was not the case; the pension is not going to recover'*.[30]

It is also noted that in her Complaint to the OAFS, the Complainant referred to the *'arbiters ruling in January 2022 for cases like [hers]'*, where she noted that *'I now understand that Momentum have failed their legal obligation(s) …'*.[31]

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[25] P. 335

[26] *Ibid.*

[27] *Skandia International* changed its name to *Old Mutual International* where the latter eventually rebranded to *Quilter International* :
https://www.wealthbriefing.com/html/article.php?id=160291#:~:text=Skandia%20International%2C%20including%20Royal%20Skandia,Skandia%20businesses%20to%20Old%20Mutual.
https://www.forthcapital.com/eu/articles/old-mutual-international-has-rebranded-as-quilter-international#:~:text=Part%20of%20the%20Quilter%20family,owned%20by%20Old%20Mutual%20plc.

[28] P. 1 & 9

[29] P. 190

[30] *Ibid.*

[31] P. 3

The Arbiter notes that it is clear that the Complainant was aware of the issues being complained of earlier than the indicated date of first knowledge on the Complaint submitted to the OAFS.

Firstly, the Arbiter points out that the arbiter's decisions and/or court of appeal rulings that the Complainant referred to in her complaint to the OAFS[32] and also referred to in her latest complaint of 17 March 2022 to MPM,[33] did not give rise to any new knowledge about her losses.[34] Hence, for the purposes of article 21(1)(c) of the Act, the Arbiter cannot accept the Complainant's statements that she had first knowledge of the matters complained of on *'17/03/2022'*.

Secondly, with reference to the Service Provider's submissions and statements made as to the date when the Complainant is considered to have had first knowledge of the matters complained of, that is, the substantial losses on her pension, the Arbiter would like to point out that there are certain submissions made by the Service Provider on this aspect which are refuted and others which are accepted as outlined in further detail below.

The Arbiter outrightly refutes MPM's claims that the Complainant had first knowledge of the matters complained of when she was in receipt of the Scheme's Annual Member statements, valuations and transaction statements in respect of the underlying Skandia policy and when she was in communication with CWM regarding her losses in 2016. This is in view that:

- As already extensively considered by the Arbiter in other decisions,[35] the Annual Member statements issued by MPM, (a copy of which was not even produced during the proceedings of this case), were too general in nature and accordingly did not enable the Complainant to have knowledge of the matters complained of;

[32] *Ibid*.

[33] P. 9

[34] This stance is also reflected in earlier decisions taken by the Arbiter (such as in case ASF 084/2022 and ASF 010/2023), where it was pointed out that the Arbiter's and the Court of Appeal decisions did not add fresh knowledge to the matters complained of, this being the extensive losses suffered, but only decided that the conduct of the service provider was a contributing factor to the losses incurred by the complainants.

[35] Such as the single decision issued on 28 July 2020 for multiple cases against MPM – the paras. (on page 17/18) dealing with Annual Member Statements under the section *'Article 21(1)(c)'* of the said decision in particular refer:
https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf

- It is evident that the *'Transaction Account'* statements on *'Fol. 115 and 117'* referred to by MPM in its submissions,[36] do not even provide or give rise to details as to the losses being the subject of this Complaint;

- Whilst it is true that the Complainant was in communications with CWM in respect of the drop in value, the situation about the losses was rather fluid at the time, and indeed it cannot reasonably be stated that the Complainant had knowledge of the losses on her pension, not only because the losses were still not yet crystallised at the time (as all the losses on the structured notes actually materialised in 2017, 2018 and even in 2020),[37] but also when considering the positive feedback, downplaying of potential losses and reassurances about the performance of her investments that were provided by her investment adviser at the time in 2016 as evidenced below.

  For example, it is noted that in CWM's email dated 7 January 2016 to the Complainant, CWM indeed stated that:

  > *'Your current policy value is £44,480.74 which is the once all the investments have been held to maturity and have completed without any defaults on the barriers. The current secondary market value is £17,050.41 which is the value if all the assets were sold today and liquidated, which is not an option as this is a pension which is to be held for your retirement from age 55 or later.*
  >
  > *The investment assets shown on the valuation have solid secondary market values except for RBC Large Tech which is showing a low value at the moment but we expect these to rise over the next 12 months or so. You are not turning 55 and still have another 9-10 years before you can access any funds from the scheme and we will continue to monitor as time progresses and the investments mature'.*[38]

  In CWM's email of 30 March 2016, CWM furthermore noted *inter alia* that:

[36] P. 334
[37] The table of investments provided by MPM (P. 296) and Table A further on in this decision refer
[38] P. 101 – Emphasis added by the Arbiter

'… The statement from Momentum shows the secondary market value which is the price received if sold early/today instead of holding through to maturity. The low secondary market value reflects the current volatile market conditions and depressed investment conditions globally, suffice to say that we are not selling your investments but ideally holding them until maturity or looking for alternative strategies for you to choose as your pension moves forward.

Suffice to say that although this isn't the type of short term issue we want to see, <u>I feel that given the time we have that this will make a correction and your policy will move forward</u>. You still have some 9 years before you can take an income and we will continue to monitor performance and inform you regularly as things progress'.[39]

Even in later emails, such as CWM's email of 30 November 2016, the (paper) loss in value at the time were just downplayed to losses arising only if the policy was to be liquidated at the time:

'… there has been growth on the policy, and <u>the depressed secondary market value is only relevant if the policy is liquidated today</u>'.[40]

- As indicated above, it is amply clear that most of the structured notes had not even matured or been sold by 2016, but the losses on the disputed products actually materialised in the years 2017, March 2018 and May 2020;[41]

- Ultimately, in its reply of 30 May 2022, MPM itself stated that:

'From our records it is noted that in March and April 2018 you exchanged email correspondence with us specifically regarding your pension and investments showing knowledge of the loss made for at least three years. In February 2018 you requested and received a valuation on your account as at 21st March 2018, which showed clearly the 'Total Premiums Paid', 'Total withdrawals to-date' in March

[39] P. 111 – Emphasis added by the Arbiter
[40] P. 127 – Emphasis added by the Arbiter
[41] P. 296

> *2018 and 'Current Total Current Market Value'.* ***We therefore believe you had full knowledge of losses to your investments at this time in 2018.*** *Moreover, in September and October 2019 you complained to both Momentum and OMI with regard to these same facts …'.*[42]

Hence, it is evident that the Complainant can only be truly considered to have had first knowledge of the matters complained of in March 2018, taking into consideration the time when most of her losses subject of this Complaint had actually materialised[43] and her exchanges with Stewart Davies of March 2018.[44] The period of March 2018, was ultimately indicated by MPM itself as the time when the Complainant is considered to have had *'full knowledge of losses'* on her investments as outlined above.

Having determined the time when the Complainant is considered to have had first knowledge of the matters complained of, the Arbiter shall next determine whether more than two years had lapsed from such date to the time when a complaint was formally made with the Service Provider.

It is noted that, in this case, two complaints were filed by the Complainant with the Service Provider:

(i) one indicated as a *'formal complaint'* with MPM on 17 March 2022 which was replied to by MPM on 30 May 2022;[45] and

(ii) a complaint sent by email dated 16 September 2019 (to which the Service Provider did not issue its formal position in respect of the serious allegations and claims made therein).[46] The background and submissions made by MPM with respect to such email will be considered in further detail below.

It is noted that the complaint sent by the Complainant by email dated 16 September 2019 to MPM, was indeed not referred to in the Service Provider's reply. Reference to this email was, however, made in the subsequent solemn

[42] P. 11 – Emphasis added by the Arbiter
[43] P. 296 and Table A below also refer
[44] P. 293
[45] P. 9 & 10 - 13
[46] P. 309 - 310

declaration sent by Susan Brooks (Managing Director of MPM) during the proceedings of the case and also in the Service Provider's final submissions.[47]

It is further noted that the complaint of 16 September 2019 was sent by the Complainant by email using a new name, WM, instead of her previous one as W?.

In the solemn declaration of Susan Brooks, MPM highlighted the following:

> *'In September 2019, an email was received from a person named 'WM (previously W?)'. However, the email address did not match the address on file nor did it match the email address we had previously corresponded with Ms W? on in relation to investment. Furthermore, we had no record of receiving any evidence of name change for this Member to WM. For GDPR purposes and also in line with our protocols for protection against fraud and Member identity (including the risk of her details being posted on social media website like the CWM Complaints Facebook page), we could not respond using our usual protocols. For this reason, we asked for the complaint to be filed in writing, so we could verify the signature and address. Mr Davies made it explicitly clear that he would 'acknowledge the complaint as soon as I have the original, and my Compliance Team will thereafter respond. However, I confirm this was never received'.*[48]

In its final submissions, MPM reiterated the said submissions by Susan Brooks and further highlighted that:

> *'In fact, the Complainant submitted her complaint in writing to Momentum, from the email address held on file for this particular member, dated 17 March 2022'*.[49]

The Arbiter, however, cannot reasonably accept the submissions made by the Service Provider as to why it ignored and did not follow the complaint of 16 September 2019. **Indeed, the Arbiter considers that there are no sufficient valid reasons as to why the email of 16 September 2019 was not treated as a valid formal complaint by the Complainant nor adequate justifications of**

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[47] Point 7 of the solemn declaration of Susan Brooks (P. 197) and point 5 of its final submissions (P. 335)
[48] P. 197
[49] P. 336

MPM's failure to communicate formally, at the time, its position with respect to the serious allegations and claims made in the said email of September 2019. This is so for various reasons including the following:

a) In the email of 16 September 2019, the Complainant indicated her name as *'WM (was W?)'* and also signed as *'WM (previously W?)'*.[50] She clearly indicated the subject matter of the email as a *'Formal Complaint'* and also indicated the correct Policy Number *'5004XXXX'* in respect of which she was complaining. The said policy number matched and reflected the one issued in respect of her Skandia Policy.[51]

b) In his reply of 16 September 2019, Stewart Davies, the then Group Chief Executive Officer of MPM did not raise or highlight any issues whatsoever about the unmatching email address nor about the lack of evidence or requirements needed in respect of the name change, let alone the other matters indicated in Susan Brooks submissions as referred to above. In the said email, Stewart Davies only just replied as follows:

   'Ms. WM, we have corresponded previously.

   Could I please ask you the place the complaint in writing and signed please, as you are making certain representations which I wish to have confirmed in a signed letter.

   I will then acknowledge the complaint as soon as I have the original, and my Compliance Team will thereafter respond.' [52]

   In addition, it is unclear why such a material matter was not followed up by the trustee as should have been reasonably and adequately done by the Service Provider.

c) It is noted that the key matters complained of in the complaint of 16 September 2019 are, in essence, identical or very similar to the ones contained in the other complaint sent on 17 March 2022.[53]

[50] P. 311
[51] P. 064 & 309
[52] P. 309
[53] P. 9

It is further noted that the Service Provider seems to justify its action in sending its formal reply and position only after receiving the complaint of 17 March 2022, as the latter was sent *'from the email address held on file for this particular member'*,[54] that is, *'XXXX.??XX@hotmail.com'*.[55]

However, it is noted that even in her email of 17 March 2022, the Complainant similarly indicated her name as *'WM (W?)'* and signed the email as *'WM previously W?'*.[56] Yet, this time round MPM sent a formal reply as per its letter dated 30 May 2022, addressing its reply to *'Dear Ms W?'*.[57]

d) On 16 September 2019, and so on the same date as the first complaint submitted to MPM, the Complainant also sent a formal complaint to the underlying policy provider, which by the time had changed its name to *Old Mutual International*,[58] complaining *inter alia* about the same key alleged failures – the unsuitability of the investments and the investment adviser.[59]

Old Mutual International had no difficulty sending a formal reply to the complaint made by the Complainant where the email address *'WMXXXXXXXXX@hotmail.co.uk'* was used.[60]

Furthermore, it seems that the Service Provider was in receipt or aware of the said complaint made by the Complainant directly with *Old Mutual International* on 16 September 2019 and the reply subsequently provided by Old Mutual International of 3 October 2019, so much so that MPM itself referred to, and provided a copy of, such communications in its own submissions.[61]

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[54] P. 336
[55] P. 10
[56] P. 9 & 309-310
[57] P. 10
[58] *Skandia International* changed its name to *Old Mutual International* where the latter eventually rebranded to *Quilter International* :
https://www.wealthbriefing.com/html/article.php?id=160291#:~:text=Skandia%20International%2C%20including%20Royal%20Skandia,Skandia%20businesses%20to%20Old%20Mutual.
https://www.forthcapital.com/eu/articles/old-mutual-international-has-rebranded-as-quilter-international#:~:text=Part%20of%20the%20Quilter%20family,owned%20by%20Old%20Mutual%20plc.
[59] P. 312
[60] P. 312-316 & 317-319
[61] Para. 7 in the Solemn declaration of Susan Brooks (P. 197) & Docs. *'CK30'* and *'CK31'* attached to such declaration (P. 312-316 & P. 317-319)

Additionally, it is noted that in the said reply, Old Mutual International specifically stated:

> *'Our policyholder, Momentum Pensions (Malta), has asked us to send this response directly to you'*.[62]

In the circumstances, there is, accordingly, no valid justification for MPM's failure to consider and communicate its formal position in respect of the serious issues communicated formally to it in September 2019. If MPM was so concerned about the validity of the said email of September 2019, it should have in the first place clearly raised the issues and difficulties it was finding at the time and the requirements to validate the new name and new email address; followed upon such matter until it was addressed to its satisfaction; and, in any eventuality, MPM could have easily communicated its position using the email held on its records at the time. Given the seriousness of the complaint it could, and should, have used all possible means of communication with their client, including verbal means of communication, to authenticate the complaint. After all, their acknowledgement of same date address to *'W?'* admits:

> ***'Ms. WM, we have corresponded previously'.***[63]

MPM's own faults and/or non-action in treating the communication of 2019 as a valid complaint against it cannot be now used by MPM as a pretext to justify the plea of prescription raised in its reply.

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'*.[64]

For the reasons amply mentioned, the Arbiter is satisfied that the complaint of 16 September 2019 is, *de facto*, a valid complaint registered in writing with the financial services provider where the Service Provider was formally made aware

[62] P. 317
[63] P. 309
[64] 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

of the substance of the Complainant's complaint, for the purposes of the provisions of the Act.

Given that the complaint of September 2019 was not later than two years from the time on which the Complainant first had knowledge of the matters complained of (which as indicated above is considered to be in March 2018), **the Arbiter is rejecting the Service Provider's plea relating to Article 21(1)(c) of the Act.**

Plea relating to Article 2156(f) of Chapter 16 of the Laws of Malta

The Service Provider also raised the plea that the Complaint is prescribed pursuant to Article 2156(f) of the Civil Code, Chapter 16 of the Laws of Malta. This provision of the law states that:

> '*The following actions are barred by the lapse of five years:*
>
> *(f) Actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;*'

Apart from that, it is amply clear that not even five years had lapsed from the date when the Complainant first became aware of the matters complained of (that is March 2018, where certain negotiations were even ongoing at the latest until 5 April 2018)[65] and her complaint to the OAFS (received on 22 July 2022), the Arbiter considers that there is also no validity to the Service Provider's plea raised in terms of the Civil Code.

This is also when taking into consideration article 2160 of the Civil Code which provides that:

> *'2160. (1) The prescriptions established in articles 2147, 2148, 2149, 2156 and 2157 shall not be effectual if the parties pleading them, do not of their own accord declare on oath, during the cause, that they are not debtors, or that they do not remember whether the thing has been paid.'*

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[65] P. 196, 287 & 293

In the particular circumstances of this case, no such declaration on oath has been provided during the proceedings, and the plea raised in terms of article 2156(f) by MPM is therefore not acceptable.

For the reasons stated above, the plea relating to Article 2156(f) of the Civil Code is also being rejected.

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.[66]

The Complainant

The Complainant, born in 19XX, is of British nationality and resided in XXXX at the time of her application for membership as per the details contained in MPM's Application Form dated 9 December 2013.[67]

Her occupation was listed as *'Housewife'* in the said form.[68]

Her risk profile in the MPM Application form was listed as *'Low risk'* and *'Medium risk'* with the said risk profiles respectively defined as '*There is a small degree of risk to your capital which may go down as well as up – any growth is likely to be moderate'* and *'There is some risk to your capital which may go down as well as up – there is potential for growth over the longer term'*.[69]

The Fact Find Form issued by CWM, indicates that the Complainant did not have any investments and that *'The client is transferring for protection, tax efficiency and growth'*.[70] The said fact find also indicates *inter alia* that *'Growth will be achieved by using protected and/or guaranteed products'*.[71]

Her attitude to risk in CWM's Fact Find was indicated as *'balanced to adventurous'*.[72]

[66] Cap. 555, Art. 19(3)(b)
[67] P. 141 - 149
[68] P. 141
[69] P. 144
[70] P. 51
[71] *Ibid.*
[72] *Ibid.*

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.[73]

Continental Wealth Management ('CWM') was indicated as the Complainant's appointed professional adviser in respect of her Scheme account.[74] 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, the *European Executive Investment Bond* ('the Policy') issued by *Skandia International* within which the underlying investment portfolio was held, as per the application dated 9 December 2013.[75, 76]

According to Skandia's Welcome Letter of 10 March 2014 sent to MPM as trustee of the Scheme and Policyholder of the said Policy,[77] a premium of GBP 40,394.46 was paid into the Skandia Policy for investment in March 2014.[78]

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[73] https://www.mfsa.mt/financial-services-register/

[74] P. 142

[75] P. 151 – 163

[76] As indicated in an earlier footnote, *Skandia International* changed its name to *Old Mutual International* where the latter eventually rebranded to *Quilter International*. As indicated by the Service Provider *'Quilter was rebranded to Utmost International'* – P. 196

[77] MPM was the Policyholder in respect of the Skandia Policy – P. 178 - 189

[78] P. 176

The Complainant had a EUR and a GBP account within the said Policy. The Policy was denominated in GBP.[79]

The investment transactions (excluding FX positions) that were allowed to be undertaken within the Policy, as emerging from the documents produced by the parties to the Complainant during the proceedings of the case are summarised in Table A below.

[79] P. 153 & 176

Table A

Investment Portfolio as per the *'Historical Cash Account Transactions'* statement issued by Quilter International for the period *'01/01/2012'* to *'12/07/2022'* (and other information emerging from the table of investments produced by MPM as indicated in the Notes)[80]

EUR Account		Date Bought	Purchase Amount	Date Sold/ Matured	Sale Amount	Profit/Loss Excl. Int.	Tot. Interest received	Profit/Loss Incl. Int
SN	*EFG Red March 3 – 7.84% Income* (ISIN no. CH0273392818)	07/04/2015	EUR 8,803.80	18/06/2015	EUR 9,000	EUR +196.20	EUR 171.90	EUR +368.10
SN	*Leonteq TCM Blue 2Y Multi Barr…* (ISIN no. CH0266684452)	07/04/2015	EUR 8,526.10	06/03/2017	EUR 3,321.88	EUR -5,204.22	EUR 2,860	EUR -2,344.22
SN	*Commerzbank 2Y AC RCB Worst of TLW…* (ISIN no. DE000CBOFGC6)	24/04/2015	EUR 8,000	24/04/2017	EUR 2,313.44	EUR -5,686.56	EUR 1,216	EUR -4,470.56
SN	*Leonteq 1.5Y on Ariad Pharma…* (ISIN no. CH0283710215)	14/08/2015	EUR 9,000	14/02/2017	EUR 1,162.26	EUR -7,837.74	-	EUR -7,837.74
Total Realised Loss Overall on EUR Investment Portfolio (Exclusive / Inclusive of Dividends received)								**EUR -14,284.42**
GBP Account								
SN	*Commerzbank 10% PA GBL Pharma* (ISIN no. XS1035007969)	21/03/2014	GBP 20,000	23/03/2015	GBP 20,000	GBP -	GBP 2,000	GBP +2,000
SN	*RBC Large Tech Income 8%* (ISIN no. XS1015512533)	25/03/2014	GBP 20,000	26/03/2018	GBP 3,829.16	GBP -16,170.84	GBP 3,200	GBP -12,970.84
SN	*EFG Red 2 Jan* (ISIN no. CH0259242714)	23/01/2015	GBP 2,000	23/01/2017	GBP 546.63	GBP -1,453.37	GBP 320	GBP -1,133.37
SN	*Leonteq 5Y Express Cert GAP…* (ISIN no. CH0266685236)	15/05/2015	GBP 2,000	15/05/2020	GBP 408.98	GBP -1,591.02	-	GBP -1,591.02
Fund	*Gemini Investment Principal Asset Allocation*	23/08/2016	GBP 2,000	*09/06/2022	*GBP 1,919.08	GBP -80.92	-	GBP -80.92
Total Realised Loss Overall on GBP Investment Portfolio (Exclusive / Inclusive of Dividends received)								**GBP -13,776.15**

Notes to Table A: *Information available only from the table produced by MPM [81]

ISIN Nos. indicated are also reproduced from MPM's table of investments [82]

Other figures taken and/or calculated from the *'Historical Cash Account Transactions'* statement as reflected in Table A above match the information produced by MPM in its own table under 'Doc. CK23'

SN = Structured Note

[80] P. 016 - 032 & P. 296
[81] P. 296
[82] *Ibid.*

The substantial losses suffered on the disputed structured note investments (both individually and on a collective basis), clearly emerges from Table A above. The said losses indicated in Table A, reflect, in essence, the figures as summarised in the table produced by MPM during the proceedings of the case.[83] MPM calculated the *'Net Realised Loss'* overall (for both the GBP and EUR portfolio) in the currency of denomination of the Policy in GBP as amounting in total to -GBP 22,895.89.[84]

From the above table, it also clearly emerges that the investment portfolio held within the Complainant's Retirement Scheme indeed comprised, at times exclusively, or otherwise predominantly of structured note ('SN') investments. The said portfolio also clearly contained material investment positions in structured notes, apart from material exposures to the same issuer.[85, 86]

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,[87] as well as other multiple cases such as case 073/2019, 076/2019, 070/2019 and 074/2020.[88] The said decisions were also all

[83] Doc. titled 'CK23' to MPM's submissions – P. 296
[84] The conversion rates from EUR to GBP were not provided. However, MPM included a note stating that *'NON GBP Assets converted to GBP using FX rates applied by OMI/ Quilter International'* - P. 296
[85] For example, material exposures to Leonteq, RBC and Commerzbank as issuers.
[86] Exposure to the *RBC Large Tech Income* structured note for example comprised 49.5% of the Complainant's available premium for investment (i.e., an investment of GBP 20,000 from the premium of GBP 40,394.46). The Complainant suffered a net realised loss of -GBP 12,970 (equivalent to 32% of the policy premium) on the said RBC note in March 2018 as indicated in Table A above.
[87] https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf

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

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

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

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

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

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

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

For all intents and purposes, these same sections are, in essence, considered relevant and applicable also to the case in question with the exception of pertinent details specifically applicable to 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.

The nature of the disputed investments

The ISINs of the disputed structured notes are listed in Table A above, as per the information provided during the proceedings of the case.

It is noted that as part of its submissions, the Service Provider chose not to produce any fact sheets in respect of the structured note investments allowed within the Complainant's portfolio and instead just included a Key Investor Information document in respect of an unrelated investment fund, the *'Morningstar Global Defensive Fund'* to highlight the type of disclosure included for *'low to medium risk'* funds.[89]

[89] With ISIN No. IE 00BD85VN75 - P. 299 - 300

On the other hand, the two fact sheets produced by the Complainant in respect of a Leonteq and Commerzbank structured note[90] could not be verified or matched with any of the ISIN numbers of the structured notes featuring within her portfolio.

Whilst, from general searches over the internet, the OAFS could not readily trace fact sheets in respect of the structured notes listed in Table A above, it is however noted that two of the structured notes – that is, the *Commerzbank 10% Pharma* (with ISIN No. XS1035007969) and *RBC Large Tech Income* (with ISIN No. XS1015512533) – featured in other cases where valid fact sheets were produced before the OAFS.[91, 92] Such structured notes had features as described in the *'Preliminary observations'* for *'Investment into Structured Notes'* as extensively considered in other cases as referred to above.

Further to the above and in light of the extent of 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 did not have overall the same or similar features of the notes (which led to the same material losses) as described in the other cases referred to 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 – a *'housewife'* who described herself as an *'unsophisticated investor'*;[93] who, it emerged had no other investments and thus very limited investment experience if at all; and who, during the hearing of 25 October 2022, described herself as not being *'very savvy when it comes to the explanations; basically, I do not understand the details of a pension scheme … I am just a normal person; I do not have financial training …'*.[94]

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[90] P. 36 - 38 & 42 - 44

[91] Page 37 of the case ASF 021/2022 against MPM of 13 October 2023 – https://financialarbiter.org.mt/sites/default/files/oafs/decisions/549/ASF%20021-2022%20-%20AM%20%26%20KM%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

[92] These are also reflected in the single case decided by the Arbiter of 28 July 2020 – Page 74of the said case refers: https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf

[93] P. 3 & 141

[94] P. 191

No evidence has indeed emerged or been produced by the Service Provider that the structured notes that were allowed to be invested within her Retirement Scheme were retail products and reflective of her profile and risk attitude. The disputed products in question were furthermore of high risk as reflected in the high rate of returns offered and 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 Table A above, the portfolio **contained, at times, predominant if not exclusive exposure to structured note investments as well as material exposures to the same issuer as already highlighted and detailed above**.

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 MPM's Application Form.[95]

The permitted allocation is, furthermore, also considered as not being either reflective of, and in conformity with, MPM own's Investment Guidelines[96] 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.[97]

Other matters

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

[95] P. 144

[96] *Ibid*.

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

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.[98]

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.[99]

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 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…*'.[100]

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.

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[98] P. 241-244 & 245-257

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

[100] 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.

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 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, the nature and features thereof 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 and attitude

to risk, nor in conformity with the applicable principles and parameters and the requirements and conditions specified in the rules and MPM's own documentation.

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

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

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

It is considered that the Service Provider ultimately failed to act with the prudence, diligence and attention of a *bonus paterfamilias.*[101]

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[102] 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.

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

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.

Reference is furthermore made to the Service Provider's request, in its final submissions, wherein MPM stated as follows:

> *'… that Momentum waived fees (as stated in this note of submissions), including the surrender cost, and if the Hon Arbiter orders the payment of any compensation, this should therefore be deducted from any amount of compensation so ordered. Furthermore, and always without prejudice, since it is publicly available knowledge that a settlement has been reached in the Leonteq proceedings, any compensation which Complainant may receive as a result of this settlement should also be deducted from any amount of compensation which the Hon Arbiter may order. The same applies to any compensation received by the Complainant from the group action claim she has joined against OMI'*.[103]

The Arbiter would like to make certain observations in this regard. Firstly, it is noted that the rebate/waiving of fees, as also indicated in MPM's reply, was *'a gesture of good will'* [104] on MPM's part. Furthermore, such action strictly relates to, and was limited to the rebate/waiving of fees.

The Arbiter's determination of compensation at the end of this decision is primarily based on the performance of the investment portfolio (exclusive of the various fees and charges which applied on the Scheme and on the underlying policy which would, if taken into account, increase much further the value of the overall loss actually suffered by the Complainant on her Scheme).

Hence, the Arbiter does not agree with, and rejects, MPM's submission that any fees waived/rebated at the time should be deducted from the amount of

[103] P. 340
[104] Para 12 of its reply – P. 136

compensation, taking also into consideration the methodology used in determining the compensation granted in this decision.

The Arbiter notes MPM's submissions about the Leonteq proceedings[105] and shall reflect this aspect in the decision on compensation as formulated below.

As to the other scant submission about the group action claim, the Arbiter notes that apart that this aspect is not included on the loss calculation, and was only raised in MPM's final submissions, no evidence nor tangible details have been provided about *inter alia* the nature and extent of such claim, the Complainant's participation in such nor the status thereof.

The Arbiter is accordingly not in a position to take such matter into consideration in this decision.

Compensation

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

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, 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 percent of the sum of the Net Loss incurred by the Complainant within

[105] Which were also referred to in the Solemn Declaration of Susan Brooks (P. 212 – 213)

her whole portfolio of underlying investments as calculated by the Arbiter in this decision.[106, 107]

The Arbiter considers that any future net proceeds,[108] that may be derived from the *Leonteq proceedings* relating to the Leonteq investments previously held within the Complainant's investment portfolio and included in the computation of the net loss, are, however, to be allocated as 30% to the Complainant with the remaining 70% retained by the Service Provider.

Further to the above, and 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 18,192 (eighteen thousand, one hundred and ninety-two pounds sterling). Future net proceeds (if any), received by the trustee in respect of the *Leonteq* investments are however to be assigned accordingly as stipulated above.

Whilst the Arbiter is not accepting the Complainant's request for account to be taken, of all the fees and charges suffered on her Scheme in the calculation of the award of compensation, the Arbiter, however, considers that certain additional fees ought to be rebated/waived.

Apart from the rebate/waiver of fees already done by MPM, the Arbiter considers that when taking into consideration the small initial pension pot of the Complainant, the extent of material losses suffered on her Scheme and the

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[106] As indicated earlier in the decision, under the section titled *'The Retirement Scheme's Underlying Investments'*, the Complainant suffered a Net Realised Loss as follows: (i) a Net Realised Loss inclusive of dividends/interest received of EUR 14,284.42 on the whole EUR investment portfolio and (ii) a Net Realised Loss inclusive of dividends/interest received of GBP 13,776.15 on the whole GBP investment portfolio. As at 26 February 2024, the EUR/ GBP spot rate issued by the European Central Bank was of 0.85495.

https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/index.en.html

The loss of EUR 14,284.42 converted into GBP at the said rate is calculated as GBP 12,212.47. The overall net realised loss in GBP on the whole portfolio is thus calculated as GBP 25,988.62 (being the sum of GBP 12,212.47 and GBP 13,776.15). Seventy percent of the said Net Loss – 70% of GBP 25,988.62 – amounts to GBP 18,192.

[107] A rate of seventy per cent is, in this case, being applied in the computation of compensation taking into consideration the Complainant's low to medium risk profile which accordingly merited higher protection from the service provider.

[108] That is, any proceeds resulting after payment of any applicable legal fees/costs.

nature of the deficiencies identified on the part of the Service Provider as indicated above, the Arbiter considers that it is also fair, equitable and reasonable for MPM to waive/refund certain fees as outlined below. The Arbiter is, in this regard, and in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, further directing Momentum Pensions Malta Limited to also:

a. **waive or refund MPM's own exit fee applicable to the Retirement Scheme and**

b. **waive and/or refund MPM's own annual fee (calculated on a *pro rata* basis) from the date of redemption of her last remaining underlying investment[109] till the date of surrender of the Complainant's Scheme (in the case of no other investments held or featuring in her investment portfolio).**

With interest at the rate of 5.25% p.a.[110] from the date of this decision till the date of payment.[111]

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

Alfred Mifsud
Arbiter for Financial Services

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

[109] As per Table A above, the last investment within the Complainant's investment portfolio was redeemed on 09/06/2022.
[110] Equivalent to the current Bank of England Bank Rate.
[111] 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.

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.