

Before the Arbiter for Financial Services

Case ASF 110/2022

QP (Complainant)

Vs

Momentum Pensions Malta
Limited

(Reg No C52627)

(Service Provider or MPM)

Sitting of 26 October 2023

The Arbiter

Complainant submitted a complaint¹ on 14 September 2022, whereby he complained that:

'I have an investment fund in my portfolio, which I have discovered is outside my risk profile of medium, I recently discovered it has a risk factor of 6 high and also has associated high fees. I believe my trustee has a responsibility to highlight this to me, prior to the investment being purchased. The fund in question is Fidelity "LU0251123260" which has suffered heavy losses. I also challenged my financial advisor over this matter whose response was "I have not recommended any fund to you for investment, simply provided information on funds that may be suitable" Momentum have stated in their reply: my financial advisor is fully qualified, I question this as my advisor also stated in the same email to me "Since agreeing to administer your Momentum Account" no mention of Advisor. Momentum have also failed to provide any evidence to prove my advisor is certified as being qualified to provide financial

¹ Pages (p.) 1 - 66

advice in France. Momentum have stated they are happy the fund was ok because it balanced out the risk in my portfolio at 15% of the total investment. At the time of the investment my fund was worth circa £400,000 the amount invested in the fund was £75,000 which represents 18.75%, furthermore my other investments are all medium risk 4 there are no low-risk investments to balance out this high risk investment.²

He accuses the Services Provider that they:

1. Failed to highlight a high risk was being invested in which was outside my risk profile
2. Failed to highlight high associated fees related to such fund
3. Made an investment decision based on what is a suitable risk, i.e., 18.75% of fund can be high risk- without his approval
4. Failed to check my Financial Advisor is qualified to provide investment advice in France.

The 4th complaint was not included in the Complaint filed with MPM on 07 August 2022 and, therefore, in accordance with Article 21(2)(b) of ACT Chapter 555 of the Laws of Malta, the Arbiter shall not consider this item in processing and adjudicating this Complaint.³

In essence, the Complaint focused on one particular investment of GBP75,000 which, at the time of the Complaint, was showing an unrealised market loss of GBP19,339.45.^{4 5}

The Complainant argued that the investment in Fidelity Funds – Emerging Markets A GBP was too risky for his risk profile and, according to its Key Investor Information Document (KIID), it was categorised 6/7 in the risk table meaning it was outside the Medium Risk Profile (3/5) he had declared in the membership

² P. 2

³ The Service provider still explained and proved during the process of the hearing that the Investment Advisor was in fact properly licensed.

⁴ P. 28

⁵ In spite of this unrealised loss, the overall portfolio was showing a profit of about GBP19,000. (P. 28)

application form.⁶ Medium risk was defined as having *'some risk to the capital with the potential for a reasonable return over the longer term'*.

Reply of the Service Provider

The Service Provider submitted in reply to the Complaint:

1. The Complainant signed the Momentum application form dated 16 April 2015.
2. The Complainant is a member of the Momentum Malta Retirement Trust (the 'Scheme'), which Scheme operates as a member-directed scheme. Momentum is the licensed Retirement Scheme Administrator ('RSA') for the Scheme. A scheme which is entirely member-directed, such as the present one, may permit its members to direct the investment of their individual accounts based on one of the grounds listed in Rule B.8.2 of the Pension Rules for Personal Retirement Schemes ('PRS Rules'). In the present case, the Complainant appointed an investment advisor to advise him on the choice of investments.⁷ Investment advice was not, at any point, provided by Momentum. Momentum is not licensed to, and does not provide, investment advice.
3. The Complainant appointed TSG Insurance Services S.A.R.L. ('TSG') trading as The Spectrum IFA Group as his financial and investment advisor (in substitution of his previously appointed advisors, Continental Wealth Management).⁸ As will be evidenced during the proceedings, TSG is duly authorised in France and this in accordance with Directive 2014/65/EU⁹ and Directive (EU) 2016/97.¹⁰
4. By means of a dealing instruction dated 21/04/2021, which was directed by the Complainant, and advised on and submitted by TSG as his appointed MiFID regulated adviser, Momentum was instructed to sell

⁶ P. 15

⁷ Rule B.8.2(a) of the PRS Rules.

⁸ The Complainant had filed complaint number 038/2018 before the Arbiter, which complaint had not been upheld by the Arbiter.

⁹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)

¹⁰ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast)

two assets and purchase €70,000 in the Fidelity Emerging Markets A GBP.¹¹ In addition, a 'Client Investment Trade Fee Instruction' for the trades noted on the dealing instruction was submitted which was completed by TSG and signed by both the Complainant and TSG (see Doc. PA1).

5. By means of a further instruction note dated 06/05/2021, which was again directed by Complainant, and advised on and submitted by TSG, instructing the purchase of a further GBP14,135.73 in the same Fidelity Emerging Markets A GBP.¹² Prior to the investment, the Complainant was again informed of the relative fees by means of the 'Client Investment Trade Fee Disclosure', which document was completed by TSG and signed both by the Complainant and by TSG.¹³

In each trade fee disclosure (referred to in the paragraphs 4 and 5 of this reply),¹⁴ the Complainant confirmed with his signature: (i) that the adviser provided him with detailed information on each of the investments he wished to purchase, including a Key Investor Information document or equivalent document; (ii) that he reviewed and understood the documents provided before signing the declaration; (iii) that he agreed to the payment of the fees referred to, including adviser fees/commissions and that he understood that the fees would be deducted from the investments; and (iv) that he understood there would be additional dealing costs applied by the investment company.

From the adviser's end, it was confirmed that for each investment purchase, the adviser reviewed any contractual and legal requirement, including client classification rules imposed under law or regulation in the jurisdiction of the product manufacturer/fund manager and/or under the member's current jurisdiction at the time of investment, and, furthermore, confirmed that the Complainant was eligible to invest in the investment. Furthermore, the adviser confirmed that the Trade Fee

¹¹ A copy of the instruction note is attached and marked 'Doc. PA1'

¹² A copy of the instruction note is attached and marked 'Doc. PA2'

¹³ See documents PA1 and PA2 attached hereto.

¹⁴ See documents PA1 and PA2 attached hereto.

Disclosure *'represents a true and accurate disclosure of all fees payable to the investment(s), including a full disclosure of Adviser remuneration.'*

6. By email dated 29/04/2022, Momentum sent to the Complainant the annual member statement with respect to the year 2021.¹⁵
7. The Complainant has asserted that Momentum failed to provide evidence that his financial advisor is qualified to provide investment advice in France. In the first place, Momentum replies that this was not mentioned in the complaint in writing submitted by Complainant to Momentum. Momentum therefore replies that the Arbiter should not take cognizance of this part of the Complainant's complaint. Without prejudice to the aforementioned, Rule B.8.6(a)¹⁶ requires the RSA to carry out due diligence on the investment advisor firm and approve such advisor. Momentum confirms that due diligence was carried out on TSG, and TSG was approved by it.

Furthermore, rule B.8.6(b) requires the RSA to ensure that, as part of the due diligence referred to in rule B.8.6(a):

- i. The advisor is authorised for the activity in the country of establishment. In the case of TSG, the country of establishment is France, where the Complainant resides;
- ii. The investment advisor must be (where the product is an insurance-based investment product) duly authorised in accordance with Directive 2014/65/EU¹⁷ and Directive (EU) 2016/97.¹⁸

Momentum's due diligence exercise carried out with respect to TSG and also by review of their regulatory permission in France by reference to the Orias Website, which is the French Register of Intermediaries in France.

¹⁵ A copy is attached and marked 'Doc. PA3'.

¹⁶ Falling under Section B.8 (Supplementary conditions in the case of entirely member directed schemes)

¹⁷ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)

¹⁸ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast).

The Orias website clearly shows under the main activity of intermediation, TSG is registered as

1. An Insurance and Reinsurance Broker registered in 2007, noted on the ORIAS Register as COA.
2. A Financial Investment Advisor registered in 2011 and, noted on the ORIAS Register as CIF.

In this respect, reference is made to the attached extract which confirms that TSG is licensed as an insurance broker and a financial investment adviser.¹⁹

8. The Complainant has alleged that Momentum failed '*to highlight a high risk was being invested in which was outside my risk profile*' and that Momentum made an investment decision '*based on what is suitable risk, i.e., 18.75% of funds can be high risk – without my approval*'. The Complainant alleges that the investment into the Fidelity Fund was outside his risk profile of 'medium'.

Momentum replies that, having reviewed the proposed investment prior to purchase, Momentum accepted to proceed with it because the risk in the Complainant's portfolio following the purchase was in line with Complainant's attitude to risk. This will be evidenced by Momentum during the proceedings.

Pursuant to Momentum's Investment Policy as published in Momentum's Scheme Particulars, and pursuant to standard portfolio management practice: (i) it is the member's portfolio (not each investment considered individually) that must be in line with the member's risk profile.

Additionally, pursuant to rule B.3.2.1 of the PRS Rules, the assets must be diversified in such a way to avoid accumulations of risk in the portfolio as a whole.²⁰ Upon receipt of the said dealing instructions, Momentum carried out and complied with all internal processes and checks including

¹⁹ Extract attached and marked 'Doc. PA6'.

²⁰ In terms of Rule B.8.10 of the PRS Rules, the Pension Rules for Personal Retirement Schemes, apply to a member directed Scheme, in the same manner and to the same extent, unless specified otherwise, as they apply to a Retirement Scheme which is not a member directed Scheme, subject to the list in Rule B.8.10 itself.

ensuring both the dealing instruction and Client Investment Trade Fee Disclosure were signed by Complainant and completed and submitted by his appointed regulated investment adviser.

Furthermore, it is categorically rebutted that the investments were made without Complainant's approval. The allegation is astounding in light of the fact that the Complainant signed dealing instructions and trade fee disclosures (see paragraphs 4 and 5 of this reply) and that the investments were directed by the Complainant on the advice of his duly authorised adviser. Momentum confirmed by email on the 26 April 2021 and 7 May 2021 that the trades were placed with the investment provider whilst attaching the trade instructions.²¹

9. The Complainant further alleged in his complaint that Momentum failed '*to highlight high associated fees related to such fund*'. Momentum replies that all information relating to fees and costs was provided to the Complainant in line with rule B.8.5(b) of the PRS Rules.²² As already stated in this reply (see paragraph 5), the Complainant confirmed in the Client Investment Trade Fee Disclosure that he agreed to the payment of the fees referred to, including adviser fees/commissions and that he understood that the fees would be deducted from the investments; and (iv) that he understood there would be additional dealing costs applied to the investment company.
10. Momentum replies 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.
11. Momentum has not acted negligently, nor has it breached any of its obligations in any way.
12. Momentum respectfully requests the Arbiter to reject the Complainant's claims.

²¹ Copies of the emails dated 26/04/2021 and 07/05/2021 are attached hereto and marked 'Doc. PA4' and 'Doc. PA5' respectively

²² See Doc. PA1, PA2 and PA 3.

With expenses.²³

Hearings

The first hearing was held on 30 January 2023. The Complainant informed that he does not need to add anything and rested his case.

The Service Provider then opted to submit a sworn declaration by Susan Brooks, Managing Director of MPM. In the sworn declaration she stated:

- i. I am the managing director of Momentum Pensions Malta Limited ('Momentum'). I was appointed director with effect from the 31 December 2015.
- ii. In the first place, I confirm all statements in the reply filed by Momentum before the Hon. Arbiter, as well as the documents attached thereto.

A. Background

- iii. The Momentum application form was signed by Complainant on the 16 April 2015.²⁴
- iv. The Complainant is a member of the Momentum Malta Retirement Trust (the 'Scheme'), which Scheme operates as a member-directed scheme. Momentum is the licensed Retirement Scheme Administrator ('RSA') for the Scheme.
- v. As already stated in Momentum's reply, the Scheme is entirely member-directed. A member-directed scheme may permit its members to direct the investment of their individual accounts based on one of the grounds listed in rule B.8.2 of the Pension Rules for Personal Retirement Schemes.
- vi. In this present case, the Complainant himself appointed an investment advisor to advise him on the choice of investments (rule B.8.2(a) of the Pension Rules for Personal Retirement Schemes). At no point in time was advice provided by Momentum. Momentum is not licensed to, and does not provide investment advice.

²³ p. 37 - 42

²⁴ Attached to complainant's complaint a fol. 13 onwards

B. The Complainant's Advisor

- vii. The Complainant has alleged that Momentum failed to check whether his financial advisor is qualified to provide investment advice in France. I can confirm that this is entirely unfounded. In the first place, and as already stated in Momentum's reply, this point was not raised when the Complainant submitted his complaint in writing to Momentum. For the sake of completeness, however, I confirm as follows:
- i. Complainant appointed TSG Insurance Services S.A.R.L. ('TSG') trading as The Spectrum IFA Group as his financial and investment advisor (in substitution of his previously appointed advisors, Continental Wealth Management);²⁵
 - ii. Momentum had carried out the necessary checks to confirm that TSG is indeed duly authorised in France and this in accordance with Directive 2014/65/EU²⁶ and Directive (EU) 2016/97.²⁷ Following the due diligence carried out on TSG, TSG was approved by Momentum.
 - iii. TSG's regulated status is confirmed by a director of TSG itself, Michael Lodhi.²⁸ Reference is made to the attached correspondence from Michael Lodhi (attached hereto and marked 'Doc. PA7'), wherein he confirms inter alia that TSG is licensed under MiFID and IDD licence and authorisation by ORIAS in France, where the Complainant resides.
8. The dealing instructions which form the subject matter of this complaint were signed by the advisor Mr Anthony Farrell. It is confirmed that Mr Anthony Farrell is mandated by TSG and all advice given by Mr Farrell is reviewed and approved by TSG and is advice given for and on behalf of

²⁵ The Complainant had filed complaint number 038/2018 before the Arbitrator, which complaint had not been upheld by the Arbitrator

²⁶ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)

²⁷ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast).

²⁸ See attached 'Doc. PA8' which confirms that Michael Lodhi is a director of TSG.

TSG (please refer to point 3 of the email attached hereto and marked 'Doc. PA7').

It is further confirmed that TSG is Complainant's advisor and is fully registered under MiFID to advise Complainant in relation to his current investments, including the Fidelity Fund LU0251123260 (that is the fund which forms the subject matter of Complainant's complaint). Please see point 2 of the email attached and marked 'Doc. PA7'.

9. The ORIAS website (that is, the website of the French regulator), confirms that Mr Farrell is registered as an intermediary of TSG (see attached extract on document marked 'Doc. PA9').
10. I therefore confirm that the requirements of Rule B.8.6(a) and (b)²⁹ of the Pension Rules for Personal Retirement Schemes have been fulfilled by Momentum.

C. The investments and related fees

11. Pursuant to the dealing instruction dated 21/04/2021, Momentum was instructed to sell assets and purchase €70,000 in the Fidelity Emerging Markets A GBP.³⁰ The instruction note was signed by the Complainant and by Mr Farrell for TSG. The Fund is a GBP Fund.

The '*Client Investment Trade Fee Instruction*' (forming part of Doc. PA1) for the trades noted on the dealing instruction was also signed by both the Complainant and Mr Farrell for TSG.

In the short declaration which formed part of the *Client Investment Trade Fee Instruction* (Doc. PA1) signed by the Complainant, he confirmed the following

- '*I confirm my Adviser has provided me with detailed information on each of the investment(s) I wish to purchase, outlined above, including a Key Investor Information document or equivalent document.*

²⁹ Falling under Section B.8 (Supplementary conditions in the case of entirely member-directed schemes)

³⁰ A copy of the instruction note is attached to Momentum's reply and marked 'Doc. PA1'.

- *I confirm I have reviewed and understand the documents provided before signing this declaration. I confirm my agreement to the payment of the above fees, including Adviser fees/commission and I understand the said fees will be deducted from the investments.*
- *I understand there will be additional dealing costs applied by the investment company, which is a fee payable to the investment company for the placing of the trades.'*

Hence the Complainant confirmed that his Adviser had provided with detailed information which included a Key Investor Information document (KIID) and he had reviewed and understood it and agreed to the fee stated and understood the fees stated.

12. Furthermore, on the 26/04/2021 (Doc. PA4 attached to Momentum's reply), Momentum wrote and confirmed to the Complainant that his investment instruction had been placed with his investment provider and the instruction was attached to the email. It was confirmed stated that: *'In case of trades relating to the purchase of new investments, your adviser has already provided you with information on each of the investments including, for example, a Key Investment Information document or equivalent, and a full disclosure of fees and costs payable to the respective investment(s).'*
13. On the 28 April 2021, the Complainant wrote to his advisor after having checked the trade himself on his policy account (forming part of Doc. PA10, attached hereto) and stated: *'The investment in Fidelity is now showing, however for some reason they have only purchased £60,684.27 and not the £70,000 requested. If they are intending to top it up, I noticed there is enough cash to go to £75,000.'*
14. Mr Farrell subsequently queried this with Momentum by email on the 30 April 2021 (Doc. PA10 attached hereto) and Momentum responded on the same date confirming that: *'In the dealing instruction we received the order was to buy €70,000, that is approximately £60.864.27'*.
15. Subsequent to this correspondence, the Complainant 'topped up' the investment in his Fidelity to exactly £75,000 by providing Momentum

with a further dealing instruction dated 06/05/2021 and submitted to Momentum by his appointed investment Adviser. This further investment instruction was for GBP14,135.73 in the same Fidelity Emerging Markets A GBP.³¹ Hence, the Member clearly wished to invest a fixed amount in this Fund and was actively involved in directing this investment. Once again, the '*Client Investment Trade Fee Instruction*' (forming part of Doc. PA2) for the trades noted on the dealing instruction was signed by both the Complainant and by Mr Farrell for TSG and again declared a KIID for the Fund was provided and he was aware of the fees again.

Furthermore, on the 7 May 2021, Momentum wrote and confirmed to the Complainant also attaching the signed investment instruction confirming it was placed with the investment provider.³²

16. Therefore, in both cases, and with respect to both instructions, the Complainant was informed of all relative fees **before** the investment he instructed was proceeded with.
17. I confirm **that no entry fee** was in fact deducted from the Complainant's investment in the Fidelity Fund. The fees shown on the KIID are the maximum permitted by the Fund Manager on the current KIID (see Doc. PA11 attached hereto). To evidence that the full amount was invested, and no entry fee was applied, attached are the Contract Notes (forming part of Doc. PA10 attached hereto) which were generated by Quilter International when the trades were purchased; and which were available to the Complainant through his log in to the Quilter International. The annual ongoing fee was also clearly disclosed on the Fee and Commission and on the KIID document.
18. Additionally, the director of TSG also confirmed that: **prior** to the submission of the dealing instruction by TSG, Mr Farrell had provided Complainant with the then current KIID document for the fund in question; and that it was sent by email to Complainant on 21 April 2021 (see point 5 of the email attached and marked 'Doc. PA7').

³¹ A copy of the instruction note is attached to Momentum's reply and marked 'Doc. PA2'.

³² See Doc. PA5 attached to Momentum's reply

19. It is also confirmed by TSG that the dealing instruction submitted to Momentum and the fee and commission disclosure signed by Mr Farrell, was submitted and signed on behalf of TSG on an advised basis (see point 4 of the email attached and marked 'Doc. PA7').
20. The applicable fees were also indicated in the annual member statement sent to the Complainant by Momentum for the year ended 31 December 2021 (see Doc. PA 3 attached to Momentum's reply).
21. The Complainant has alleged that Momentum did not highlight to him that '*a high risk was being invested in which was outside my risk profile*'. The Complainant therefore alleges that the investment into the Fidelity Emerging Markets A GBP was outside his risk profile of 'medium'.
22. I confirm that the investment was reviewed by Momentum prior to proceeding with the instructed purchase. Momentum accepted to proceed with it because the risk in the Complainant's **portfolio** following the purchase was in line with Complainant's attitude to risk.
23. Momentum's investment policy (as stated in Momentum's scheme particulars) states that it is the member's portfolio (not each investment considered individually) that must be in line with the member's risk profile. The Scheme Particulars confirm under the *Investment Policy and Main Underlying Investment* sections of the Scheme Particulars, in relation to the assessment of an investment instruction, that: '*This assessment will be based on current information made available by the respective fund/investment manager to the Trustee at the time of receiving the instruction and based on a reasonable assessment by the Trustees of the **overall risk of the Member's current portfolio** incorporating this instruction.*' This is also in adherence to standard investment portfolio management practice.

This was therefore made clear to the Complainant and again it is pertinent to note that the Complainant had a fully regulated MiFID Adviser appointment to advise him on any investment the Complainant as the member wanted to direct.

24. In carrying out this assessment, a number of factors are taken into consideration. In the Complainant's case, this included, at the point of receipt of the instruction, computing a reasonable assessment of the weighted average risk of the portfolio using KIID (or other such documentation were provided by the Fund Managers) and computing this using Momentum Scale of 1-5 (the Complainant falls in the medium risk bracket, so equal to or greater than 3 but less than 4). Reference is made to Doc. PA13 attached hereto, where a summary of the weighted average risk computation is set out to confirm the weighted average of Complainant's portfolio was in line with his Attitude to Risk.
25. I confirm another key part of the assessment which was carried out was a qualitative assessment of the investment in light of the overall portfolio including a review of the type of investments, the level of overall diversification of the portfolio by reviewing the investments to see the diversification across the different jurisdictions, sectors, industries, etc. which are taken into consideration as in their totality, these qualitative assessments reducing the overall risk of the portfolio and are key as part of the assessment to ensure the Complainant portfolio was diversified.
26. In the case of the Complainant's portfolio (see Doc. PA13 attached hereto), firstly attention is drawn to the two balanced (i.e. medium risk funds) held by the Complainant. Both funds are:
- Managed by highly regarded reputable Fund Managers named Blackrock and Brooks MacDonald;
 - The Brooks MacDonald Fund (see Doc. PA11 attached hereto) is structured as a Fund of Funds – meaning the Fund itself is invested in other funds, hence diversifying further the Complainant's portfolio. In fact, the following is confirmed in relation to this fund (Doc. PA12 attached hereto): *'The Sub-Fund will invest at least 70% in a range of open and closed-ended funds to obtain an exposure to a mix of fixed income securities, shares and alternatives assets.'* To further support this, a breakdown of the current Asset Allocation, Regional diversification and Sector Diversification has been attached and which can clearly be seen to be widely

diversified and hence reducing the risk to the Portfolio across Asset type, sector and region and currency (forming part of Doc. PA11). Once again, I confirm that this is standard investment portfolio management.

- I confirm the BlackRock Balance Growth Portfolio (see Doc. PA11) is a balanced growth fund and that the fund itself operates like a Fund of Funds and as can be seen from the current top ten holdings, made up of Fund which include (i) BlackRock Global Funds – US Flexible Equity Fund; (ii) BlackRock Continental European Fund; (iii) BlackRock ICS Sterling Liquid environmentally Aware Fund; and (iv) iShares Global Corp Bond UCITS ETF USA.
- With regards the Fidelity Fund – Emerging Markets Fund, I confirm it is a UCITS and the underlyings are invested across emerging markets as was clearly stated in the name. The KIID clearly states (see Doc. PA14 attached hereto): *'The fund will invest at least 70% in company shares in countries in areas experiencing rapid economic growth including Latin America, South-East Asia, Africa, Eastern Europe (including Russia) and the Middle East. These regions include emerging markets.'* See also Doc. PA15 attached hereto which is the relevant information from the most recent marketing communication issued in January 2023. The total investment made up less than 18% of the Complainant's portfolio and was also a very widely diversified fund and take this into account alongside both the quantitative and overall qualitative assessment carried out on a reasonable basis, the portfolio as a whole was deemed in line with the Complainant's Attitude to Risk, very well diversified and in line with the Scheme Guidelines. Furthermore the Member confirmed he had reviewed and understood the KIID and was advised by a MiFID Regulated Adviser.

27. Finally, I confirm that in my experience and from reviewing investments constructed and managed by fully regulated and licensed discretionary fund managers who actively manage Medium/Balanced risk rated investments as part of their risk rated portfolio, also hold investment

which have KIID risk ratings at 5 and 6 out of 7 as an overall percentage of their portfolio. As an example, reference is made to Doc. PA12 to TAM (UK and Spanish regulated and licensed DFM) Premier Balanced Portfolio. As can be seen from their top holdings 17% of their Balanced Portfolio is made up of BNY Mellon Dynamic U.S. Equity Fund and Xtrackers S&P 500 Equal Weight UCITS ETF both of which have a risk rating of 6 out of 7 (see Doc. PA12 attached hereto).³³

Susan Brooks was cross-examined by the Complainant in the second hearing on 27 February 2023.

'Asked why Momentum allowed a high-risk investment to be purchased without red flagging that there was an issue that it did not meet the criteria of the complainant's risk profile, I say that the complainant said in his complaint that he was not aware at all in relation to the risk grading which has been evidenced to the contrary.

The complainant was aware at the point that he signed both dealing instructions after the risk grading of the investment. In fact, he submitted the same fund twice; the second one at your instruction to top it up to 75 as part of the declaration signed. He signed that he had read and that his advisor, who is a MiFID regulated advisor, had explained to him all about the investments including giving him the KID document which the complainant said in his evidence that he did not receive. But in the declarations provided, twice he declared, twice that he did – there are only three declarations. And has also been confirmed by the director of TSG that the complainant was provided with that KID document.

The first part of my response is that the reason why Momentum did not flag it here is that the complainant was perfectly aware at the point of submitting it to us as confirmed by him and as confirmed by TSG that he was provided with the KID document.

The second reason is that the investment made up less than 20% - around 17% - of his overall portfolio. He had instructed it twice; in fact, he specifically wanted to invest £75,000 or £70,000 into the investment, and when we carried out the risk grading on the overall portfolio, as explained is how we measure risk in our investment policy, in our Scheme Particulars which it is very clearly

³³ p. 71 – 77 with attachments p. 78 -112

stated that we measure risk as a whole of his portfolio. So, as a whole of his portfolio, taking into account this percentage of the fund which was advised by his MiFID advisor and signed for by the complainant, he was in line with his attitude to risk.

The complainant says that he did not sign anything with Momentum regarding anything other than his risk profile. Asked whether Momentum has got any documentation where he signed or agreed to go outside that risk profile or any documentation that states that he was prepared to take high risk to a certain level of percentage of his funds because he states that he is completely unaware of this amount that Momentum could be able to put into a high-risk fund, the 17% or 18% but he did not agree that with Momentum.

Asked why we feel that we could make these decisions on his behalf without him agreeing to this, I say that we have two signed disclosures from the complainant where he says:

'I confirm that my advisor has provided me with detailed information on each of the investments I wish to purchase outlined above including a Key Investor Information document or an equivalent document.

I confirm I have reviewed and understood the documents provided before signing this instruction.'

I say that the complainant signed this declaration twice: in April and in May 2021. Again, we refer to our investment policy, in the Scheme Particulars, where we make it clear that we will review the risk of the portfolio, of the dealing instruction taken in its totality with the portfolio as a whole. And that is stated in our investment policy in our Scheme Particulars. The complainant's advisor, who is a MiFID advisor, who has responsibility for ensuring that his investments as a whole are in line with his attitude to risk and they advised him accordingly because the totality of his portfolio was in line with his attitude to risk.

The complainant says that his advisor has badly advised him with a fund of high risk; Momentum, as his safety net, to stop high risk investments from being made, did not flag it to him; did not say to him that his financial advisor had given him bad advice and that is a risk that he should not be taking. He says that Momentum has the due diligence and duty of care to stop these things from happening and we have not done any effort: we did not send an

email telling him that potentially he had taken a high-risk investment and we did nothing to protect him from making a bad decision.

I say that he was provided with a KID document which is clearly intended for a retail investor to outline to them the fund and the risk rating of the fund. He instructed it twice; in fact, he came back to his adviser after the first investment was made, he came to his advisor a second time requesting more money was put into the fund. He was fully aware of what he was investing in.

In terms of the red flagging, the complainant had a MiFID adviser, he had confirmed he knew the risk rating, it made up a percentage of his portfolio. The overall portfolio was in line with his attitude to risk. He was fully aware of this; he made the decision with the MiFID adviser; he directed it.³⁴

Final Submissions

In his final submission of 08 March 2023, the Complainant submitted:

'I believe that Momentum failed to fulfil its fiduciary duties under the civil code chapter 16 of the Laws of Malta.

The losses my pension fund has suffered are totally due to the extreme early, wilful and continuing negligence of Momentum as my trustees, therefore they are fully responsible for this loss. They have –

- *Failed to act in my best interests*
- *Failed to act within their investment guidelines*
- *Failed to ensure investments were within my risk profile and investment status*
- *Failed to provide all Pre-Contractual Information*
- *Failed to communicate to me any concerns at any time over the losses or inappropriate investment being made within my portfolio*
- *Failed to act to mitigate losses to my pension fund*
- *Failed to obtain or act upon related investment Term Sheets and failed to investigate the risks associated*

³⁴ P. 113 -115

- *Momentum failed to fulfil its fiduciary duties under section 1124(A) of the civil code chapter 16 of the Laws of Malta and the Trust and Trustee Act a1.*³⁵

In their final submissions, MPM repeated their position as stated in earlier submissions and concluded:³⁶

‘Momentum submits that the Complainant has entirely failed to prove his complaint against Momentum. In a fundamental shift of the onus of proof, Momentum has disproved each one of the Complainant’s allegations. The burden was on the Complainant to prove his (unfounded and spurious) allegations against Momentum – this he entirely failed to do. On the other hand, Momentum has submitted incontrovertible evidence to show: (i) the Complainant’s advisor was a regulated advisor; (ii) that all the fees were disclosed to the Complainant; (iii) that Complainant approved and directed the investments himself; (iv) that the investments, as forming part of his portfolio, were in line with Complainant’s attitude to risk.

*Momentum additionally submits that the Complainant has not even made an attempt to prove the causal link between Momentum’s alleged failures and the alleged loss suffered by him – indeed, Momentum submits that it would be **impossible for the Complainant to do so**, because in his own words and according to his complaint, the fund is still held by him. No loss has been realised by him. His complaint is based on a dip in the value of the purchased fund which dip is, allegedly (as one must understand his complaint), a result of Momentum’s failures (as set out in paragraph 1 of this note of submissions) and which he has failed to prove. This must be considered to be the basis of his complaint against Momentum.*

*In conclusion, Momentum submits that the Complainant’s complaint ought to be rejected in its entirety; and furthermore, that the Hon. Arbiter should order **all costs and expenses** to be paid by the Complainant for inter alia raising serious allegations against Momentum which he then made no effort to prove. If the Complainant feels that he has been badly advised, this is not a complaint which he can direct towards Momentum.’*

³⁵ P. 116

³⁶ P. 131 - 132

The Arbiter

Having reviewed all documents and heard the parties

Further considers that:

1. The Complainant was advised on the risk profile of the investment he is complaining of by his Investment Advisor who was properly licensed.
2. The Complainant had copies of the KIID which showed that the investment complained of had a somewhat higher risk than his overall risk portfolio for the entire portfolio.
3. That the Complainant in full knowledge of the KIID made a second purchase of the investment complained of to increase his exposure to GBP 75,000.
4. That the Service Provider correctly argued that the risk profile applies to the portfolio as a whole and not to the individual components thereof.
5. That overall risk profile of the portfolio was not materially out of synch with the medium risk profile that the investor had chosen.³⁷
6. That whilst the Trustee and RSA have an obligation to ensure that the overall portfolio risk profile stays aligned with the risk appetite of their member, this should not be interpreted as a strictly rigid alignment.

Decision

In view of the above, the Arbiter does not find that the Trustee and Retirement Scheme Administrator have failed their fiduciary duties by not objecting to the choice made by the Complainant and his Adviser, on a well-informed basis, of the investment being complained of, and considers the complaint solely and unfairly motivated by an attempt to recover losses made on an investment the performance of which did not meet their expectations.

The Arbiter also notes that the Complainant has not effectively incurred a realised loss on the investment subject of this Complaint and that overall, the

³⁷ P. 109

portfolio is making a positive return.³⁸ The Arbiter cannot condone a situation where profits are for the Complainant and losses are for the Service Provider.

The Arbiter also dismisses the complaint about high fees related to such fund especially given that there has been sufficient proof that the Complainant was not charged any entry fee³⁹ even though the KIID provided for a maximum entry fee of 5.25%.⁴⁰ The annual management charge of 1.91% was disclosed and is not considered excessive for the type of investment involved.

The Arbiter also finds objectionable the allegation that the investment concerned was made without Complainant's approval when, in fact, the deal was instructed and signed for both by the Complainant and his Adviser.

The Arbiter also notes that all investments in the portfolio were entrusted to fund managers of great international repute (BlackRock, Fidelity and Brooks MacDonald).

In view of the above, the Arbiter hereby dismisses the Complaint with costs for the Complainant.

Alfred Mifsud
Arbiter for Financial Services

³⁸ P. 28

³⁹ P. 74, paragraph 17

⁴⁰ P. 96