**Before the Arbiter for Financial Services**

**Case ASF 139/2022**

**MO ('the Complainant')**

**vs**

**Momentum Pensions Malta Limited**

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

**Sitting of 23 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 his Retirement Scheme due to the alleged failure of MPM to act in his best interests and to fulfil its fiduciary duties as trustee and RSA of his Retirement Scheme, particularly when:

- it allowed inappropriate investments to be made within his Scheme on the advice of an unlicensed investment advisor where such investments comprised high-risk structured notes aimed for professional investors only, outside his low to medium-risk profile and status of a retail investor;

- it accepted dealing instructions which were not signed by him and allowed an investment portfolio which was not properly diversified nor invested in a prudent manner;

- it failed to warn him of the inappropriate investments and of the significant losses arising on his Scheme;

- it failed to fully disclose fees and provide him with all precontractual information.

*The Complaint*[1]

The Complainant submitted that MPM failed to act in his best interests and to fulfil its legal duties as his trustees.

He explained that MPM allowed an unlicensed advisor, *Continental Wealth Management* ("CWM"), to manage his fund and invest large percentages of his fund into structured products aimed at professional investors only. He claimed that, at times, 100% of his pension fund was invested into structured products.

The Complainant submitted that the advisor was allowed to invest without approval by MPM using dealing notes bearing a copy of his signature.

He explained that MPM eventually changed the advisor to *Trafalgar International GmbH* ("Trafalgar"), who again was not licensed for investment advice. He claimed that when he complained, he was told that he and his advisor were to blame, not MPM.

The Complainant submitted that the losses suffered on his pension fund are totally due to the extreme early wilful negligence of MPM as his trustee, and therefore MPM was fully responsible for the losses. He submitted that MPM:

- Failed to act in his best interests
- Failed to act within their investment guidelines
- Failed to ensure investments were within his risk profile and investment status
- Failed to fully disclose fees and provide all precontractual information
- Failed to ensure that the companies that they issued terms of business to were qualified, had the correct legal licences and necessary regulations to operate

[1] Complaint Form on Page (P.) 1 - 6 with extensive supporting documentation on P. 7 - 90

- Failed to communicate to him any concerns at any time over the huge losses or inappropriate investments being made within his pension fund
- Failed to act to mitigate losses to his pension fund
- Failed to obtain or act upon related investment term sheets and to investigate the associated risks
- Failed to fulfil its fiduciary duties under section 1124A of the Civil Code, Chapter 16 of the Laws of Malta, and the Trusts and Trustees Act.

In addition, the Complainant referred to a note titled *'Complaint to OAFS re MPML – July 2022'*, attached as part of the documentation to his Complaint, which included further details concerning his Complaint.[2] The Complainant included information in the said note which he asked the Arbiter to consider in respect of his complaint against MPM as follows:

- He explained that he wishes to claim back his pension losses, including fees paid to MPM, as MPM has not fulfilled the duties which he paid them for.

- It was further explained that his pension fund was officially worth £207,045.83 when it was transferred to MPM in September 2012. He then took a pension commencement lump sum and the amount left, of £142,646.04 was invested into a *Generali Bond*. By October 2017, the valuation was £56,950, and at the time of his Complaint, the valuation before exit penalties and MPM fees was just £43,769.49.

- The Complainant explained that after investing his money through his advisory firm, CWM, he discovered to his horror that his pension fund was decreasing in value rapidly, and he wrote a complaint letter by email which was duly acknowledged. He added that at this time he had absolutely no knowledge of the complex web and links between all of the companies involved with his pension.

- He continued to explain that he sent a letter of complaint to MPM on 2 November 2017 and finally had a reply on 13 February 2018 with MPM defending its own position, claiming no responsibility and even referring to the 'Leonteq claim' which they advised would result in investors getting repaid. The Complaint added that he has enclosed several emails from MPM

[2] P. 41 - 44

discussing the issue regarding Leonteq, leading him to believe that he was getting compensation because of a rogue trader, but after being told this many times it came to absolutely nothing.

- The Complainant added that he was obviously disappointed with MPM's response but believed what MPM had told him was the truth. He further added that at this time, his wife was seriously ill and was still at the time of his Complaint. He explained that even if they had known of all the details, they did not have the energy or the resources to have taken it any further.

- He explained that in 2021, he was made aware that MPM had not been following the rules and laws in Malta and that complaints to the Arbiter had been upheld. He read some of the decisions on the OAFS website and noted that these complaints are the same as his own, where it seems MPM tried to say that nothing was their fault.

- He claimed that MPM failed to act in his best interest and to fulfil their legal duties as his Trustees.

- The Complainant submitted that MPM has *'a duty under the Retirement Pensions Act 2011, part D.1'*, to carry out due diligence in order to ensure that its introducers act within the rules of the Pension Act. He added that MPM had terms of business with CWM up to September 2017 when MPM withdrew them and had terms of business with Trafalgar until 2017. He claimed that MPM was, however, very aware there were problems with buying unsuitable products as far back as 2016, as per certain emails from Stewart Davies.

- The Complainant continued that in 2018 he found that MPM had again changed his advisor when he received the 2018 annual statement. His investment advisor was named *AISA Direct Limited*, in United Kingdom ('AISA'). He submitted that he never received any information about this company from neither MPM nor AISA until June 2022, when he began to receive emails every two to three days requesting that he sign a document appointing AISA as his advisor from MPM. Not having any information about this advisor, he did not reply.

- The Complainant explained that his understanding is that CWM was not licensed for insurance, investment or pension advice in any jurisdiction and that Trafalgar only had an insurance mediation licence which was not transferrable from Trafalgar to CWM or anyone who worked as 'advisors' at CWM. He insisted that, indeed, no licence agreement between Trafalgar and CWM existed. He added that neither was there a licence held by IAWIIA, despite that it was claimed that such licence existed, and that CWM was regulated by them prior to Trafalgar taking over. He continued that when CWM was closed, he was automatically transferred to Trafalgar as his 'default advisor' with this being accepted and authorised by MPM. It was claimed that MPM do not seem to have carried out due diligence on this company, which he noted was a Cyprus-based firm regulated in Germany for insurance mediation but which licence, however, did not extend to any other entity or jurisdiction.

- The Complainant submitted that an RSA shall retain ultimate responsibility to ensure compliance by the member or any person acting on his behalf (i.e., CWM/Trafalgar) with the objective of the retirement scheme and with any applicable licence conditions and provisions of the law.

- The Complainant made reference to Article 24 of the Special Funds (Regulation) Act ('SFA'), Chapter 450 of the Laws of Malta, as amended up until Legal Notice 426 of 2007, and submitted that from sub-article (2)(b) it is sufficiently clear that it was in the MFSA regulations that MPM had a duty to ensure that CWM and/or Trafalgar was subject to an adequate level of regulatory supervision. He submitted further that MPM have a duty of care under the Pension Laws to ensure the suitability and legality of any introducers etc. with whom they issued terms of business.

- The Complainant underlined that in the Generali bond application, at Declaration Number 6(viii), Generali signed to take *'full responsibility for the selection of investment instruments'*.[3]

- It was underlined further that, until recently, the many failings of his trustee, MPM, were unknown to him. He noted that MPM blamed various parties

[3] P. 42

including himself, CWM, Trafalgar, Leonteq, Generali and Old Mutual. The Complainant submitted that MPM did not make him aware of any concerns or shared any paperwork or communicated with him other than very basic one-page annual statements, which showed very little detail and zero concern.

- The Complainant noted that MPM's own investment guidelines state that the trustee needs to ensure that the applicant's funds are invested in a prudent manner and in the best interests of the member. He submitted that MPM, however, failed to do this. It was further noted that the 2013 guidelines state that they must be 1) properly diversified and 2) not more than 20% in a single asset other than collective investments.

- The Complainant submitted that his pension was invested solely in structured notes, which he has learned are high-risk and only for professional investors.

- He further submitted that MPM allowed these transactions to take place and should have given its written authority for purchases and sales. He continued that in the response to his complaint, MPM mentioned that it has controls in place to ensure that dealing instructions received by it were signed by him, ensuring the investments met his investment strategy, attitude to risk, and in line with Scheme's investment guidelines.

- The Complainant submitted that MPM, however, contradicts itself by stating that:

  '*Momentum had controls in place to ensure that the Dealing instructions received by Momentum were signed by you as the Member/Client, ensuring the investment was as directed by you in meeting your investment strategy and your attitude to risk and was then reviewed against the Scheme Investment guidelines*'.[4]

  Prior to that statement, MPM nevertheless says:

  '*On reviewing your instructions, we noted the initial instructions were not signed by you but submitted directly by your advisor. Having reviewed the*

[4] *Ibid*.

*assets instructed within each of these instructions, we can confirm they resulted in an overall profit to your portfolio. We note all other instruction received by Momentum including your signature, which matched your signature on your initial proof of identification provided to us*'.[5]

- The Complainant submitted that the investments are clearly not suitable. He added that the structured notes that were bought at the outset for him represented 97% of the initial premium with only two notes bought on 2 October and 20 September 2012 (indicated as *RBC Phoenix Auto* for £38,000 and *RBC Capital Markets 1 year Rev Convertible* for a staggering £100,000). The Complainant added that guidelines for January 2013 state that exposure to single issuers should be limited to no more than 20% and be properly diversified to avoid excessive exposure. He further pointed out that the dealing instruction was not even signed by him.

- The Complainant highlighted that MPM should, therefore, have used its power and discretion to question and stop these unsuitable professional-only investments and act to protect his pension fund but failed to do so.

- The Complainant submitted that he requested a low to medium risk profile and that it was his understanding that as part of the RSA's *'Know Your Customer'* due diligence, MPM should have had procedures in place to establish a member's risk profile independently to the financial advisor. He claimed that MPM failed to do this and did not even refer to his Fact Find form which clearly showed he had no other investments. He reiterated that all of the investments made were into high-risk, professional-investor-only structured notes. He submitted that these investments do not fall into his risk profile as he is most definitely a retail investor with no previous investment experience. He added that his pensions were in company-defined benefits schemes and private personal pensions with large insurance companies.

- The Complainant further submitted that the losses were vaguely shown in MPM's annual statements and were dismissed by CWM as *'paper losses'* with him being told that the investments would recover at maturity, and that these were just values if one wanted to cash in early. He stated that this explanation

[5] *Ibid*.

appeared plausible at the time and that, in fact, MPM reinforced such explanation as at the bottom of the annual statement it clearly stated:

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

It was added that this disclaimer from MPM and the fact that they had not communicated any concerns or details of any loss of funds led him to believe that his pension was safe. He noted that MPM questioned why he did not raise the issue of losses with them directly, but MPM had itself endorsed the statement from CWM that the values may appear low prior to the maturity date.

- The Complainant explained that he is certainly not experienced in this field but has now learned that each investment has a term sheet detailing the investment risks etc. He submitted that he has been unable to find any term sheets for the structured notes used as investments within his pension fund, as these were never shown to him by MPM. He knows however that *RBC Capital Markets* offer professional-only structured notes. He explained further that he has searched for the ISIN numbers but has been unable to find them. He, however, attached to his Complaint sample term sheets from the providers that issued the structured notes used for his investments. He clarified, however, that these term sheets were fully available to MPM as it confirmed it had seen all the literature and it was fully aware he was not a professional investor.

- The Complainant claimed that the Pension Rules for Service Providers 2011 Part B.4.1.4(b) state that:

> *'The Service Provider shall act with due skill, care and diligence. Such action shall include (b) Where applicable, taking all reasonable steps to obtain, when executing orders, the best possible result for its clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order*'.[6]

[6] P. 43

- The Complainant also referred to the Trusts and Trustees Act and claimed that this provided that in investing or otherwise applying trust property, a trustee is required to act as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust and by exercising reasonable care, skill and caution.

- The Complainant submitted that, therefore, as part of its due diligence, and since it had complete discretion over the investments made, MPM should have obtained and understood the term sheets relating to these investments. He claimed that MPM's compliance department proceeded with the purchases without raising any queries or concerns.

- The Complainant reiterated that all of the investments that MPM passed as compliant and suitable for him as a retail investor and suitable for his pension fund were high-risk and suitable only for professional investors and had a significant chance of extreme losses. He added that MPM failed in its fiduciary duties in allowing any of these high-risk, illiquid investments to be made.

- The Complainant added that the transaction history reports (attached to the Complaint) clearly show that when the assets were sold/matured it was mostly at a greatly decreased price than when purchased. He added that the proceeds from maturity of such notes was then used to buy further structured notes.

- The Complainant noted that the Pension Rules for Service Providers state that '*The Service Provider shall act with due skill, care and diligence and in my best interests*'.[7] He submitted that MPM should have thus never allowed these investments to be made.

- The Complainant reiterated that MPM failed to act in his best interest, to use its discretion or to act in a prudent manner or with the diligence and attention of a *bonus paterfamilias*. He continued that their actions or lack of did not satisfy his reasonable and legitimate expectations in any way.

- The Complainant cited MPM's own guidelines as stating:

[7] *Ibid*.

'*ROLE OF ADMINISTRATOR – The Administrator will ensure the scheme assets are invested in the best interests of the member and are properly diversified, in line with prevailing rules*.

*INVESTMENT GUIDELINES – The Trustee and Administrator needs to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification relevant to the investment portfolio.*' [8]

- The Complainant submitted that there was no diversification at all. He added that with regards to risk factor all were professional-investor-only and extremely high risk.
- The Complainant noted that the Pension Rules for Service Providers issued in terms of the Retirement Pensions Act 2011, Section B.4.1.3(f) stated:

'*The Service Provider shall act honestly, fairly, and with integrity. Such action shall include – avoiding the imposition of unfair and unreasonable charges on the scheme and its Contributors and Members and Beneficiaries, and on the Retirement Fund and its Investors as applicable, also taking into account, where applicable, the charges levied on any underlying investments in which the Scheme or Retirement Fund invests.*' [9]

The Complainant also cited Section B.4.1.17(a) of the same stating as follows:

'*The Scheme Administrator will be liable to the Scheme, Member(s), Beneficiary(s) and Contributor(s) of the scheme for any loss suffered by them resulting from its fraud, wilful default or negligence, including the unjustifiable failure to perform in whole or in part its obligations*.' [10]

- The Complainant submitted that by its nature, a pension fund should be accessible as one's life plans change. He submitted that his change of life began with his move to Spain which benefitted his wife to begin with but slowly she started with other medical conditions. He added that the crisis of 2008/9 created financial problems for them.

[8] P. 43 & 44
[9] P. 44
[10] *Ibid*.

He explained that he was unable to work because of caring for his wife as her mobility degraded, then in 2014 she was diagnosed with rheumatoid arthritis which caused her pain in all her joints meaning she was unable to walk far or stand up for any real length of time.

He explained that this was a very difficult time for them both and impacted their wellbeing and mental state greatly. He continued that from 2019 onwards she has had 6 fractures to her lumbar and sacral vertebrae and a number of slipped discs due to osteoporosis. He added that her bones are so brittle that she cannot have an operation and has to rely on high doses of pain relief, and she is affected by the side effects and needs other medication to combat such.

- The Complainant claimed that MPM failed to fulfil its fiduciary duties under the Civil Code, Chapter 16 of the Laws of Malta.

- He reiterated that the losses suffered on his pension fund are totally due to the extreme early, wilful negligence of MPM as his Trustee, and that, therefore, MPM are fully responsible for this loss. He reiterated that they have failed him as per the bullet points highlighted earlier.

- He added that he believes MPM was negligent with regard to managing his pension fund and failed as his trustees to take reasonable care to avoid causing loss to his funds. He added that the behaviour and failings of MPM in the circumstances did not meet the standard of care that a reasonable person would meet in the circumstances. He reiterated that MPM failed in its compliance with the Retirement Pensions Act 2011.

*Remedy requested*

The Complainant submitted that all calculations in the remedy he is requesting have been collated from the quarterly reports listed on the *Generali/Utmost* website.

He submitted that his initial investment of £142,000, which was reduced by a drawdown of £6,000, stood at £42,000 at the time of his complaint.

He pointed out that there were 15 investments in 5 different companies (*RBC*, *Nomura*, *Commerzbank*, *EFG* and *VAM*).

When taking into account the dividends received and redemption amount on his investments, as well as fees and charges taken by MPM and Generali, he calculated his loss as £94,000.

The Complainant noted that there have been no investments within his Scheme since the end of December 2016, yet MPM continue to take fees and charges from his pension fund.

The Complainant declared that he is seeking £94,000 in compensation from MPM.

**Having considered, in its entirety, the Service Provider's reply, including attachments,**[11]

Where the Service Provider explained and submitted the following:

*Introduction and background*

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

2. That the Complainant completed and signed the MPM application form dated 16/07/2012 and was accepted a member of the Scheme on the 25 July 2012.

3. That by letter dated 4 September 2012, MPM sent the completed insurance policy application to *Generali International Limited* ('Generali'). This completed form was received from CWM/*Inter Alliance World Net* ('Inter Alliance'), who were the financial advisors named on this policy and specifically from Anthony Downs who was named advisor on the form.

   The Generali application form is specific to insurance policies established by Trustees of pension schemes which are Qualifying Recognised Overseas Pension Schemes ('QROPS') as opposed to an insurance policy established

[11] P. 95 - 99, with attachments from P. 100 - 131.

by an individual person. MPM noted that the application was signed on the 28 August 2012 by CWM/Inter Alliance as the licensed insurance advisors advising on this policy. It further added that on the same date (i.e., 28 August 2012) the Complainant and Anthony Downs also signed the Generali source of funds and wealth questionnaire.

4. MPM submitted that annual member statements were sent to the Complainant.

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

*Defence*

6. MPM submitted that, in the first place, the Complainant has already received compensation payments from CWM with respect to his losses.

7. Without prejudice, MPM pleaded that the Complaint is prescribed pursuant to article 21(1)(b) and article 21(1)(c) of Chapter 555 of the Laws of Malta and, also, pursuant to article 2156(f) of Chapter 16 of the Laws of Malta.

8. MPM submitted that it is not responsible for the payment of any amount to the Complainant and that the Complaint should therefore be rejected by the Arbiter.

*Reply to allegations raised by the Complainant*

9. Without prejudice to the above, MPM replied as follows to the Complainant's allegations:

10. It noted that the Complainant refers to the emails from MPM in relation to proceedings to be filed against Leonteq.[12] It noted further that the Complainant states that these emails led him to believe that he was going to get compensation. MPM further noted that the emails in question were sent to the Complainant in October and December 2016. MPM replied that the Complainant was, therefore, already aware of losses at the time.

[12] P. 84 & 85

MPM replied that, furthermore, with respect to the litigation involving Leonteq, it is to be noted that civil proceedings before the High Court of Justice of the Isle of Man were indeed initiated by Quilter against *inter alia Leonteq Securities AG*. It was added that MPM updated the Complainant with the facts known to it at the time. MPM further noted that the proceedings initiated involving Leonteq are directly related to the losses suffered by the Complainant on his Leonteq structured notes.

11. MPM refuted the Complainant's allegation that he had no knowledge of the '*complex web of links between all the companies involved with my pension*'.[13]

12. MPM noted that the Complainant states that '*Last year we were made aware that Momentum have not been following the rules and laws in Malta, and that complaints to the Arbiter have been upheld*'.[14] MPM replied that the Complainant either attributed responsibility to MPM for his losses, or not. It submitted that the success or otherwise of third-party complaints to the Arbiter is irrelevant. It continued that these should have no bearing on who the Complainant attributes responsibility to and that it is either MPM who is responsible for the loss (which MPM replied it is not), or it is not.

13. Reference was made to the Complainant's allegation that MPM was '*… aware there were problems with buying unsuitable products as far back as 2016*'.[15] MPM refuted this allegation and submitted that if the Complainant alleges that MPM has any such prior knowledge, then he must prove it. MPM replied that as soon as concerns arose with respect to CWM (not Trafalgar), it actioned them by suspending and then subsequently terminating its terms of business with them.

14. MPM noted that in the Complaint, the Complainant raises the allegation that CWM was not licensed for insurance, investment or pension advice

[13] P. 96
[14] *Ibid*.
[15] *Ibid*.

and that Trafalgar only had an insurance mediation licence. It noted further that the Complainant also states that no licence was held by IAWIA.

MPM replied that the Complainant appointed Anthony Downs as his advisor. It noted that Anthony Downs advised the Complainant to invest in the products in his portfolio. MPM submitted that, accordingly, Anthony Downs is the proper respondent to this claim.

15. It was noted that the Complainant alleges that in 2018 he found out that MPM had '*changed my advisor when I received the 2018 annual statement*'. MPM replied that the Complainant himself signed the 'change in advisor' form.

16. MPM noted that, in the first place, as shall be proved throughout the proceedings, at the time that the Complainant became a member of the Scheme, there was no law or rule requiring MPM to carry out any due diligence or ensure that CWM/Trafalgar was licensed. MPM reiterated that it has fulfilled all obligations incumbent upon it from time to time. MPM replied that, in particular, there was no obligation for it to verify whether CWM or the advisor appointed by the Complainant was regulated or whether it was authorised to provide advice.

    MPM further replied that, in any event and without prejudice, CWM was licensed as a branch of IAWIA and as from 2015, Trafalgar took over the clients and CWM advisors became employees of Trafalgar as it shall prove.

17. MPM noted that the Complainant quoted article 24 of the SFA. MPM replied that this law has been repealed and that, in any event, this provision is not relevant <u>as it refers to asset managers</u>.

18. MPM noted that on page 2 of the Complaint, the Complainant alleged that '*the advisor was allowed to invest without approval by Momentum using dealing notes with a copy of my signature*'.[16] MPM submitted that, in the first place, the Complainant must clarify what his precise allegation against MPM is in this respect. MPM replied that, without prejudice, this particular

[16] P. 97

complaint is also prescribed pursuant to article 21(1)(b) of Chapter 555 of the Laws of Malta.

19. With respect to the reference to declaration number (viii) in the Generali application form (attached to its reply),[17] MPM replied that the application was for trustees. It added that, however, at the point of each instruction (save for the first three, which in any event MPM submitted returned a profit), the instructions were signed by the Complainant and this process was in place to ensure the members had been advised on their investments prior to directing the investments.

20. MPM noted that the Complainant also alleges that he was only provided with one-page annual statements showing very little detail. MPM replied that, in the first place, it was only required to provide members with a total valuation. It added that, however, MPM went further than this to ensure that the member could access and view his investments at all times. MPM submitted that, accordingly, on 26 January 2013, the Complainant completed an online registration form which MPM forwarded to Generali. MPM added that Generali also confirmed that they provided him with log-in details.

21. MPM noted that the Complainant alleges that MPM failed to ensure that his funds were invested in a prudent manner and in his best interests. It noted further that, in this respect, the Complainant also referred to the 2013 MPM guidelines. It added that the Complainant alleges that his pension was invested in structured notes which, he has learned, are high risk and only for professional investors. It added that the Complainant further alleges that the investments did not fall into his risk profile and that there was no diversification.

    MPM replied that, in the first place, the Complainant must prove his allegations, which are refuted by MPM. It added that, furthermore, MPM's decisions were based on the information available to it at the time the decision was made and in compliance with applicable rules, laws and guidelines, as it shall prove throughout the course of the proceedings.

[17] P. 109

22. MPM noted that the Complainant goes on to state that MPM should have assessed his risk profile independently of his advisor. MPM replied that it relied on the risk profile chosen by the Complainant himself. It added that, furthermore, MPM is not authorised to provide investment advice, including establishing a member's risk profile.

23. MPM further noted that the Complainant also alleges that he was led to believe by CWM that the losses were 'paper losses' and that this was reinforced by the disclaimer at the bottom of the annual statement sent by MPM. It replied that the Complainant however received payments from CWM during 2016, and he was therefore aware at that time that the losses were not 'paper losses'.

24. MPM noted that at page 44 of the Complaint, the Complainant also states that MPM failed to disclose fees and provide all contractual information. 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. It submitted that, in any event, the policy charges were disclosed to the Complainant.

25. The Service Provider further pointed out that the complaint submitted by the Complainant to MPM in writing differs from that made before the Arbiter, as it shall prove.

*Momentum does not provide investment advice*

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

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

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

*Concluding remarks by MPM in its reply*

29. MPM reiterated that:

    a. 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;

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

30. MPM respectfully requested the Arbiter to reject the Complainant's claims.

**Preliminary**

***Competence of the Arbiter***

The Service Provider, in Section B of its reply, raised the preliminary plea that the Arbiter has no competence based **on article 21(1)(b) and article 21(1)(c) of Chapter 555 of the Laws of Malta** (the 'Act') as well as pursuant to **article 2156(f) of Chapter 16 of the Laws of Malta**. The Service Provider also replied that the Complainant has already received payments in compensation for his losses.

**The plea relating to article 21(1)(b) of Chapter 555 of the Laws of Malta was rejected by decree dated 20 September 2023, for the reasons therein stated,** namely on the basis that: [18]

a) the Retirement Scheme was still in operation and various disputed investments were still existing and featuring within the Complainant's investment portfolio after the date of the coming into force of the Act on 18 April 2016, as per the table of investments presented by the Service Provider;[19]

[18] P. 317 - 318
[19] P. 187

b) 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;

c) ample evidence has emerged in the case in question that the conduct complained of met the requirements of article 21(1)(d) in that it was continuing in nature and the conduct continued after 18 April 2016.

The Arbiter would like to add that article 21(1)(b) is accordingly not applicable particularly so with respect to the key allegations (which shall be the focus of this decision). The said key allegations involve the alleged inappropriate structured note investments and inadequacy of his investment portfolio, as well as the matters alleged by the Complainant with respect to the regulatory status of his investment advisor (which advisor remained appointed until MPM suspended/terminated its terms of business held with CWM, as notified in September and October 2017).[20]

By the same decree, the Arbiter requested the Parties to submit further information and submissions with regard to the pleas relating to article 21(1)(c) of Chapter 555 of the Laws of Malta and article 2156(f) of Chapter 16 of the Laws of Malta. The Arbiter is considering these pleas next.

***Plea relating to Article 21(1)(c) of Chapter 555 of the Laws of Malta and Article 2156(f) of Chapter 16 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.'*

[20] P. 95

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*'.

In this case, the Complainant filed two complaints with the Service Provider, one dated 2 November 2017,[21] and the other dated 10 March 2022.[22] A complaint with the OAFS was eventually registered on 22 November 2022.[23]

The subject matter of the said two complaints is, in essence, the same in that the Complainant complained about the inappropriate investments made in his pension fund (i.e., the high-risk structured notes), and the alleged status of his advisor as an *'unlicensed advisory firm'*.[24] These are the key aspects also being considered in this Complaint before the Arbiter as outlined above. The complaint of 10 March 2022 with MPM includes in addition some other submissions where it was *inter alia* claimed by the Complainant that *'Your previous assurance that your company had done nothing wrong prevented me from taking further action'* and, also, reference to the Arbiter's decisions against the Service Provider and the appeals lost by MPM in this regard.[25]

In his Complaint Form to the OAFS, the Complainant indicated that the date when he had first knowledge of the matters complained of was 11 December 2020.[26] He further clarified at a later stage of the proceedings, that this date was indicated because he had conducted *'research from that date'*.[27]

On its part, the Service Provider contested the date indicated by the Complainant and argued that the Complainant had first knowledge of the matters complained of much earlier.

In its submissions,[28] MPM submitted *inter alia* that the Complainant was aware of realised losses on his investments in structured notes through his discussions with Anthony Downs of CWM way back in 2015 and indeed received payments

[21] P. 164
[22] P. 7
[23] P. 1
[24] P. 7 & 164
[25] P. 7
[26] P. 1
[27] P. 323
[28] P. 311 - 312

in 2016 from CWM following discussions of such losses.[29] MPM further submitted, *inter alia*, that *'… it is clear that the payments were in compensation'*.[30]

In its final submissions, the Service Provider further highlighted that *'the main losses … had been realised by June and July 2015'*, and that *'… the Complainant was already discussing losses with his advisor during the middle of 2015'*, but *'he only complained to Momentum on the 2 November 2017, that is more than two years from when he had knowledge of the losses which he was discussing with his advisor'*.[31]

The Arbiter also notes that whilst the Complainant stated in his submissions, that he considered the complaint made on 10 March 2022 as his official complaint with MPM,[32] the Service Provider submitted that *'the complaint filed by the Complainant on the 2 November 2017 should be considered his official complaint'*.[33] This aspect will be considered in detail further below given the implications with respect to the pleas raised by the Service Provider with respect to his competency.

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, given the lapse of 5 years from the day on which action could be exercised.[34]

In essence, MPM submitted that:

> *'… the Complainant first complained to Momentum on the 2 November 2017, and … subsequently filed his complaint to the Hon Arbiter on the 22 November 2022. The complaint to the Hon Arbiter was therefore submitted more than five years after he had knowledge of the matters complained of'*.[35]

In its final submissions, MPM further stated *inter alia* that:

[29] P. 311
[30] P. 312
[31] P. 392
[32] P. 321
[33] P. 388
[34] P. 96, 312 & 392
[35] P. 312

*'Momentum submits that the Complainant could have exercised the action against Momentum at least on the 2 November 2017 (or even earlier, since Complainant was discussing his losses with his advisor during 2015, and received payments in compensation during 2016). However, he only proceeded to file his OAFS complaint on the 22 November 2022, that is beyond the 5 year period envisaged by article 2156(f) of Cap. 16'*.[36]

The quoted 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*;'

**Having considered the particular circumstances of this Complaint and the submissions provided, the Arbiter determines that there are issues regarding his competence in either of the two scenarios presented and arising before him with respect to this Complaint.**

This is in view of the following:

(i) **If (for the sake of the argument only), the Arbiter had to adopt the complaint made on 10 March 2022 as the official formal complaint made by the Complainant with MPM, as the Complainant requested in his submissions, competency issues arise in terms of article 21(1)(c) of Cap.555. This is given that the complaint registered in writing with the financial services provider in March 2022 is later than two years from the day on which the Complainant is deemed to have had first knowledge of the matters complained of, which is considered to rather be in 2017**.

The Arbiter considers that the Complainant had first knowledge of the matters complained of, that is, the losses suffered on his pension scheme, earlier than the date of *'11/12/2020'* he indicated in his Complaint Form. The said date indicated by the Complainant is not relevant and cannot reasonably be taken into account for the purposes of Article 21(1)(c) of the

[36] P. 392

Act, given the material relevant events occurring before such date. This is particularly so when:

(a) the research undertaken in 2020 highlighted by the Complainant and previous decisions of the Arbiter or court of appeal did not give rise to any new knowledge about his losses;[37]

(b) the substantial losses were namely all realised by the year 2017 as emerging from the table of investments presented by the Service Provider.[38] The last remaining structured note featuring within the disputed investment portfolio, which matured/sold in April 2019, was a relatively minor investment (of only GBP4,000) and which, in any case, yielded no loss as it had broken even;

(c) the Complainant was notified about the termination by MPM of the terms of appointment of his investment advisor, CWM, in October 2017, by which time it is considered he became aware about the realisation of substantial losses that he will be left with in regard to his pension scheme. The discussions he had with his advisor in 2015, and most particularly in 2016, regarding the recovery investments, possible solutions and the ongoing *'good will payments'* [39] that were to be provided by CWM and reviewed in 2017 (as per the email of Anthony Downs, CEO of CWM dated 14 January 2016),[40] were clearly by then not going to materialise or substantially affect the realised losses already incurred at the time.

(d) the Complainant had indeed already communicated formally with the Service Provider in November 2017, complaining about his *'total known loss to date: £99,000'* [41] which amount of indicated loss is close to that complained of in his complaint form to the Arbiter of GBP 94,000.[42]

[37] 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's 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 who had made and brought their case in a timely manner.
[38] P. 187
[39] P. 135
[40] P. 137
[41] P. 164
[42] P. 3

Hence, the Arbiter cannot accept the date indicated by the Complainant, of 11/12/2020, as to when he had first knowledge of the matters complained of for the reasons explained above. Consequently, competency issues in terms of article 21(1)(c) of the Act clearly arise even if one had to take the complaint of 10 March 2022 as the official complaint, which, in any case, the Arbiter does not consider to be the appropriate one for the purposes of the Act as considered next.

(ii) **In its submissions, the Service Provider argued that the Complainant's formal complaint of 2 November 2017 is the official formal complaint made by the Complainant with MPM (for the purposes of this case).**

**Whilst in such scenario there would be no competency issues in terms of article 21(1)(c) of the Cap. 555 (as considered by the Arbiter further below), issues nevertheless arise in terms of article 2156(f) due to the lapse of the prescriptive period of five years applicable in terms of the said article.**

**Having considered the context, nature and substance of the complaint of 2 November 2017, the Arbiter accepts MPM's submissions that the Complaint of November 2017 is the official complaint made with the Service Provider for the purposes of article 21(1)(c) of the Act**.

This is also in light of the formal reply sent by MPM to the Complainant dated 13 February 2018,[43] where MPM had acknowledged his *'formal complaint dated 2nd November 2017'* and provided reasons and its position for not accepting his complaint at the time and, also, directed the Complainant to refer his complaint to the OAFS in case he was not satisfied with its reply.[44]

**Whilst accepting that the complaint of 2 November 2017 is the official complaint for the purposes of considering the pleas raised by MPM, the Arbiter, however, rejects MPM's claim that the complaint made by the Complainant of 2 November 2017 was registered in writing with it later than two years from the day on which the Complainant first had**

[43] P. 381 – 386
[44] P. 385

**knowledge of the matters complained of. This is due to several reasons** including the following:

- Firstly, with respect to the matters raised on the advisor, MPM had only suspended and terminated its terms of business with CWM as notified to the Complainant *'By emails dated 10th September 2017 and 3rd October 2017'*, as it explained in its own reply. Hence, only just one month had passed from MPM's termination of business with CWM and the Complainant's Complaint of 2nd November 2017;

- As to the investment portfolio, the Complainant furthermore had various positions (five) in structured notes which only matured or were sold in the year 2017 or later, (three of which at a loss in January 2017 with the last structured note maturing even later in April 2019) as per the table of investments presented by the Service Provider during the proceedings of the case; [45]

- The extent of losses and net overall position on the disputed investment portfolio in structured notes was thus not clearly determinable before 2017 let alone two years prior to the complaint of 2 November 2017;

- The relationship between the Complainant and the Service Provider was a continuous one, so much so that the alleged wrongful conduct of the Service Provider in the disputed structured products continued in 2017, and with respect to the advisor up until October 2017 as described above.

  Whilst the Complainant had certain discussions with his investment advisor regarding the reduction in value of his pension scheme, as shall be considered further below, however, this does not detract from the fact that the conduct complained of was continuing in nature. The submission of a complaint during the period of operation of a continuing conduct [as per Article 21(1)(d) of the Act] before such

[45] P. 187

conduct comes to an end should not operate to prejudice the consumer.

- With respect to the discussions held by the Complainant with CWM regarding the reduction in value in his pension scheme, it is noted that during the hearing of 16 January 2023, the Complainant *inter alia* testified that:

> *'Asked when I discussed my losses with him, I say that I do not recall the exact dates, but it would have been 2015 when suddenly there was a dramatic fall in the value of my fund. Asked when in 2015, I say it was some time towards the middle and the end of the year'.* [46]

Whilst it is true that the Complainant was in discussions with Anthony Downs of CWM in 2015, it cannot, however, either be said that at the time, there was sufficient clarity of the extent of losses resulting on the disputed investment portfolio.

Apart from the reasons already mentioned earlier on, the situation was, at the time, rather fluid and unclear given the ongoing discussions occurring between the advisor and the Complainant regarding recovery investments in finding solutions and even the payments offered by CWM over various months, which were also to be subsequently reviewed.

It is indeed noted that in an email sent by Anthony Downs, CEO of CWM on 14 January 2016 to the Complainant, CWM stated that:

> *'I can confirm CWM will pay 500 GBP per month* ***starting from Feb for 12 months and then reviewed****.*
>
> ***I will be in contact next week regarding a recovery fund and will give you updates every two months going forward*** *…'* [47]

[46] P. 134
[47] P. 137

Such discussions continued even as late as 14 April 2016 where, Anthony Downs, in his email of 14 April 2016, informed the Complainant that:

> *'I apologise for the delay in sending the 500 Euros to your account this month. This was an oversight with accounts and I shall make sure that payments are received on time going forward.*
>
> ***With regard to the recovery investments, we have been working on this to find the solution that benefits you the most*** *and at the same time is acceptable to Generali.* ***I attach a recovery option that has been approved by Generali and gives you the chance to receive 225%*** *in the EVEN 30 index …'* [48]

Accordingly, it cannot be said that the Complainant had awareness of the matters complained of when, at the time, there were still: (i) ongoing discussions with the advisor about potential material positive outcomes from other recovery investments (ii) a number of regular payments that were yet to be received from the advisor which payments were intended to be reviewed in February 2017, and (iii) various other structured note investments within the investment portfolio were yet to mature or be sold as outlined above.

Furthermore, it transpired later at the end of 2016,[49] that the payments from CWM had stopped (with apparently no explanation provided) even before the expiry of the 12-month period over which such payments were to be made and then reviewed. The Complainant eventually realised that the indicated payments from the advisor were not going to all materialise also following MPM's termination of the terms of business with CWM that occurred in October 2017.

**Hence, in the circumstances, the Complainant cannot be deemed to have had knowledge of the matters complained of before 2 November 2015,**

[48] P. 139 – Emphasis added by the Arbiter
[49] P. 135 & 140

**that is, two years before his complaint of 2 November 2017 as argued by the Service Provider.**

**In this case, the Arbiter accordingly decides that the complaint with the financial services provider was registered within the two-year period referred to in Article 21(1)(c) of the Act and thus rejects the plea made by MPM in terms of Article 21(1)(c) for the reasons amply mentioned.**

**This notwithstanding, the Arbiter considers that there are valid submissions by the Service Provider in terms of article 2156(f) of the Civil Code.**

**As outlined above the Complainant is deemed to have had knowledge of the matters complained of by October 2017. Even if one had to take into consideration the later date of his complaint with the Service Provider, being 2 November 2017, the five years stipulated in article 2156(f) of Cap. 16 would have lapsed unless so interrupted and/or suspended in terms of law.**

**No sufficient and strong evidence substantiating such interruption or suspension of prescription is, however, considered to have emerged in the case in question, including as to whether there were any negotiations taking place between the parties which could have suspended prescription in terms of Article 2125(d) of the Civil Code. Furthermore, the statements made by MPM for the purposes of article 2160 of the Civil Code are noted.[50]**

**The Arbiter accordingly is, in the particular circumstances of this case, accepting the plea of the Service Provider made in terms of Article 2156(f) of the Civil Code and decides that the Complaint before him is prescribed in terms of the Civil Code for the reasons mentioned.**

## Decision

[50] P. 99, 145 & 392. The denial of any amount due in the official reply was confirmed by Solemn Declaration of Susan Brooks which was subjected to cross-examination during the hearing of 27 February 2023 (p. 301)

For the reasons explained, the Arbiter upholds the plea of prescription raised by the Service Provider on the basis of Article 2156(f) of Chapter 16 of the Laws of Malta and is accordingly dismissing this Complaint.

In view of the above, the Arbiter is not considering the merits of the case with respect to the alleged inadequate investments and the contested appointment of the indicated investment advisor. This is without prejudice to any right the Complainant may have to seek justice before another court or tribunal competent to hear his case.

The Arbiter makes particular reference to the Complainant's contention that the dealing instruction notes had a copy of his signature.[51] As this implies fraud, the Arbiter declares that he has no competence to investigate fraud and such issues should be referred to the competent authorities for criminal activities.

As the case is being decided on a preliminary plea, each party is to bear its own costs of these proceedings.

**Recommendation**

The Arbiter however wishes to recommend, (in a non-binding manner and without prejudice and obligation), that the Service Provider considers, on its own will, to act and give an appropriate redress in those cases[52] whose complaints cannot be heard by the Arbiter for reason of prescription, but which have similar features to those cases previously decided by the Arbiter which were confirmed by the Court of Appeal (Inferior Jurisdiction).[53]

It is commendable to note the trend in other countries, such as in the UK, where once an Arbiter/Ombudsman decides various cases in favour of consumers which involve a recurring or systemic issue, then the industry is encouraged to take measures for appropriate redress even in the absence of a direct complaint

[51] P. 2
[52] Such as the one of the Complainant
[53] Such as, *inter alia*, civil court cases 15/2021 LM, 37/2021 LM and 38/2021 LM - https://ecourts.gov.mt/onlineservices/Judgements

from a consumer who has suffered detriment or was disadvantaged from such issues.[54]

**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 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.

[54] The UK Financial Conduct Authority (FCA) Complaints Handling Rules DISP 1.3.6 requires the firm to consider whether, following the identification of such recurring or systemic problems, *"it ought to act with regard to the position of customers who may have suffered detriment from, or been potentially disadvantaged by, such problems but who have not complained and, if so, take appropriate and proportionate measures to ensure that those customers are given appropriate redress or a proper opportunity to obtain it."* - https://www.handbook.fca.org.uk/handbook/DISP/1/3.html