Before the Arbiter for Financial Services

Case No. 026/2020

OT

('the Complainant' or 'the Member')

vs

Momentum Pensions Malta Limited

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

or 'the Retirement Scheme Administrator'

or 'the Trustee')

Sitting of the 19 October 2021

The Arbiter,

PRELIMINARY

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'). The Retirement Scheme is established in the form of a trust and administered by MPM as its Trustee and Retirement Scheme Administrator.

The Case in question

The Complainant claimed that his QROPS scheme lost a significant value. He made the following allegations:[1]

[1] *A fol.* 4

- That transferring his pension fund to the QROPS scheme was not permitted under UK tax laws;
- That his returns from his remaining funds which are still invested with MPM will be far inferior compared to the retirement returns he could have received from his final salary pension scheme;
- That he never received annual statements in 2015/2016 and had to chase to get information regarding his investment;
- That he had no understanding where his funds had been invested and lost by MPM. He referred to an opening balance on his transfer of final salary scheme of GBP54,079.84 and to a balance of GBP18,220.18 on the 31/12/18;
- That MPM and their associated partners/trustees have failed to provide any reasonable level of investment strategy and support for a person approaching retirement age;
- That MPM's and their associated partners/trustees direct actions resulted in the losses he incurred, the potential for which he was not made fully aware of but instead was lured by talks of higher returns.

The Complainant explained that he owned a holiday home in Spain but he had always been and still was a UK Tax resident and always lived in the UK apart from the holidays. He noted that he was told by his advisor that it did not matter that he was a UK tax resident, and it was okay for him to transfer the funds into a QROPS.

The Complainant further noted that he was told by the advisor that he was going to get far higher returns and little risk from the QROPS compared to the returns from his Final Salary Pension Scheme.

The Complainant explained that he was now 57 years old and would like to retire but he could not because of the losses in capital and potential income that he had incurred.

The Complainant noted that he had received MPM's final response to his complaint but did not accept MPM’s reply. He attached a copy of his formal

complaint letter to MPM dated 8 July 2019, wherein he made the following claims:[2]

- That his formal complaint was *'against severe losses my pension fund has suffered due to your firm accepting business from an unlicensed advisory firm – Continental Wealth Management – using unqualified advisers, and Trafalgar International who are only licensed for Insurance Mediation'*;

- That the Trustee failed *'to act in my Best Interests and have a Duty of Care'*;

- That his *'fund was invested in high-risk, professional-investor-only structured notes when I was, and am, a low/medium risk, retail investor'*;

- That the said *'investments are totally unsuitable and I was additionally put into a Bond, purchased by you, which is expensive and has a lock in period which I cannot get out of without paying huge penalties',* where it was further claimed that *'The charges in this Bond are excessive and you again have not taken your fiduciary responsibilities seriously which is to limit costs and risks on my pension fund, which is supposed to be safe and provide an income stream in retirement'*;

- That *'However, the most important and serious part of my claim, is that I was and always have been a UK Tax Resident and have lived in the UK all my life (I had a holiday home only in Spain), and was advised at the time that it did not matter. I am now aware that transferring my pension scheme funds into a QROP's for a UK Tax Resident is not only fraudulent but illegal!!'*;

- That MPM *'have been aware of these issues since early 2015, and have already settled a compensation claim with more than one other Member whose situation was identical to mine …'*;

- That MPM has *'failed in your duties as the Trustee of my pension fund/ investment and have failed to follow your own guidelines'*. [3]

Compensation requested

[2] *A fol.* 7
[3] *A fol.* 8

The Complainant requested to receive compensation for his loss of capital and for the loss of future income compared to his final salary pension scheme (his previous Rolls Royce Pension Scheme). He estimated this loss to be in excess of GBP140,000 when allowing for the loss of future returns.[4]

In its reply, MPM essentially submitted the following: [5]

1. That MPM is licensed by the Malta Financial Services Authority to act as the Retirement Scheme Administrator ('RSA') and Trustee of the Scheme. That the Scheme is licensed as a Personal Retirement Scheme.

2. That Continental Wealth Management ('CWM') is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH ('Trafalgar'). Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union.

3. That MPM is not linked or affiliated in any manner to CWM, Trafalgar or Global Net.

4. That MPM is not licensed to provide investment advice.

   Competence and 'prescription'

5. That primarily, and in terms of article 21(1)(b) of Chapter 555 of the Laws of Malta:

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

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

[4] *A fol.* 4
[5] *A fol.* 104-109

The Service Provider submitted that this complaint relates to conduct which occurred before the entry into force of Chapter 555. Article 21(1)(b) came into force on the 18 April 2016. The complaint was filed on the 25 February 2020, therefore, beyond the two-year time period allowed by article 21(1)(b). MPM submitted that for these reasons, the complaint cannot be entertained.

6. MPM further noted that without prejudice to the above, and also preliminarily, if the Arbiter determines that the conduct complained of is conduct which occurred after the entry into force of Cap. 555, MPM respectfully submitted that more than two years had lapsed since the conduct complained of took place and, therefore, pursuant to article 21(1)(c) of Chapter 555 of the Laws of Malta, the Complaint cannot be entertained.

Reply to the Complainant's complaints

7. MPM noted that, in the first place, the Complainant appointed CWM as his adviser. It referred to the copy of its application form in relation to the Scheme (attached as Appendix A to its reply)[6] as well as the application form of Skandia Life Ireland Limited (attached as Appendix B to its reply).[7]

It was submitted that, in spite of this, MPM is not aware of any attempt by the Complainant to initiate proceedings against CWM or its officials. Additionally, MPM cannot reply with respect to any advice the Complainant received from CWM or with respect to any discussions which the Complainant may have had with CWM. MPM noted that it is not answerable for any information, advice or assurance provided by CWM.

MPM further noted that CWM has ceased trading and is no longer operating and that this was the only reason why the Complainant has filed a claim against MPM and not against CWM. MPM submitted that it is CWM and/or Trafalgar who is the proper respondent to this claim.

MPM further replied that any business introduced by CWM to MPM fell within the MFSA's Pension Rules for Service Providers, as they relate to

[6] *A fol.* 105 & 110
[7] *A fol.* 105 & 120

RSAs. MPM further replied that it does not work on a commission basis and neither receives commissions, nor pays commissions to any third parties. MPM explained that it charges a fixed fee for the services it provides - this fee does not change, regardless of the underlying investment (which the Complainant was advised to invest in by CWM). It was noted that MPM accordingly did not stand to make any gain or benefit as a result of the Complainant investing in any particular underlying investments.

8. MPM noted that according to the section titled *'Describe the complaint in your own words'*, the Complainant's complaint appears to relate mainly to the following, *'I now know that transferring my funds into a QROP's was not permitted under UK Tax Laws'.*[8] In the subsequent section titled *'Describe clearly the reason or reasons why your financial services provider has let you down'*, the Complainant submitted *'Transferring my pension funds into a QROP's scheme was not permitted under UK Tax Laws [...]'*.[9]

   MPM submitted that, firstly, it is not clear whether this complaint is directed at MPM and/or CWM, particularly in view of the fact that the Complainant himself confirms that it was CWM, as his appointed investment adviser, that had provided the advice in question. MPM noted that the Complainant states, *'I explained at the time that I was a UK Tax Resident, but was told by the advisor that it did not matter & it was ok to transfer the funds into a QROP's. I was told by the advisor that I was going to get far higher returns & little risk from a QROP's compared to the returns from my Final Salary Pension Scheme'.*[10] MPM submitted that indeed, the Complainant neglects to indicate MPM's alleged failings in this respect.

   MPM submitted that, secondly, it does not give any investment, legal or tax advice and referred to clause 3.1 on page 7 of Appendix A to its reply.[11] It noted that indeed, as it has already stated, the Complainant himself confirms that it was CWM which proffered such advice not MPM. MPM submitted that, as per paragraph 7 above, it cannot be held responsible for advice and/or assurance given by any third parties, including CWM as the

[8] *A fol.* 105
[9] *A fol.* 4
[10] *A fol.* 106
[11] *A fol.* 106 & 116

appointed investment adviser. It submitted that indeed, clause 3 of the Terms and Conditions listed in MPM's Application Form provides, *'The Client hereby confirms that MPM is not responsible for any advice provided by such third parties'*.[12]

MPM submitted that, furthermore, and without prejudice to the foregoing, the address included on the Complainant's application form with MPM was an address in Spain. It noted that the same address was used in the Complainant's application form with Skandia Ireland International Limited. MPM submitted that even on this basis, MPM cannot be held liable for any potential liability which may arise in this respect.

9. MPM submitted that in the next section of the Complainant's application titled *'Describe clearly the reason or reasons why your financial services provider has let you down'*, the Complainant alleges that he *'never received annual statements in 2015/2016 and had to chase to get information regarding my investment'*.[13]

MPM submitted that contrary to that held by the Complainant, he was in possession of the Annual Member Statements for the years 2015 and 2016. It was noted that MPM forwarded these statements to the Complainant in two separate emails, one dated 29 March 2016 and the other sent on 14 May 2017. MPM attached the said statements in Appendix C to its reply.[14]

10. MPM stated that as to his subsequent allegation that the Complainant has *'no understanding of where my funds have been invested/lost by Momentum [...]'*[15] the annual statements not only provide such information but also that the covering email stipulates that members (including therefore, the Complainant) are to discuss the performance of the investments with the investment advisor, with a view, of not only obtaining an in-depth understanding of the investments held at any point in time but, also, to ensure that the member's investment portfolio and risk profile remain in alignment with the member's retirement goals.

[12] *Ibid.*
[13] *A fol.* 106
[14] *A fol.* 106 & 135-140
[15] *A fol.* 106

11. MPM noted that the Complainant then goes on to state that: *'Momentum and their associated partners/trustees have failed to provide any reasonable level of investment strategy and support for a person approaching retirement age, and unfortunately their direct actions have resulted in the losses I have incurred, the potential of which I was not made fully aware of, but was lured by the talk of higher returns in the future'*.[16]

    MPM submitted that it was CWM, as the Complainant's investment advisor, together with the Complainant himself, who set and agreed on the Complainant's investment strategy. MPM replied that, moreover, the Complainant fails to substantiate the link between MPM's alleged *'direct actions'* and the losses incurred by the Complainant. It noted that the Complainant even fails to explain what the alleged *'direct actions'* consist of.

    MPM submitted that, furthermore, it is once again unclear who *'lured'* the Complainant *'by the talk of higher returns in the future'*.[17] It noted that, indeed, whilst this part of the Complaint seems to now be directed at MPM, the Complainant, in the previous section titled *'Describe the complaint in your own words'*, directs this complaint to his investment adviser. In the latter section, the Complainant states: *'I was told by the advisor that I was going to get far higher returns and little risk from a QROP's compared to the returns from my Final Salary Pension Scheme'*.[18]

    MPM submitted that, in any case, it categorically refutes the allegation that it somewhat *'lured'* the Complainant into making any investment decisions. MPM reiterated that, indeed, it does not even provide investment advice, let alone *'lure'* individuals into making any investment decisions.

12. MPM noted that the Complainant attaches a letter sent to it dated 8 July 2019. MPM submitted that it has already largely replied to the statements made therein, and it shall, therefore, limit the subsequent paragraphs of this reply to address any other remaining allegations and/or issues.

[16] *A fol.* 107
[17] *Ibid.*
[18] *Ibid. - Emphasis added by MPM*

13. MPM noted the Complainant states that MPM failed *'as [his] Trustee to act in [his] Best Interests and have a Duty of Care'*, and that MPM failed to follow its own guidelines.[19] It further noted that the Complainant subsequently states that MPM *'again have not taken your fiduciary responsibilities seriously which is to limit costs and risks on my pension fund, which is supposed to be safe and provide an income stream in retirement'*.[20] MPM replied that it has, at all times, fulfilled all of its obligations with respect to the Complainant, whether fiduciary or otherwise, and that it has observed all guidelines, including investment guidelines.

14. MPM also noted that the Complainant alleges that his investments were *'totally unsuitable'*.[21] MPM refutes such statement and again reiterates, firstly, that it does not provide investment advice and, secondly, that it has observed all guidelines, including investment guidelines.

15. MPM referred to the Complainant's allegation that the *'[...] Bond [...] expensive and had a lock-in period which I cannot get out of without paying huge penalties. The charges in this Bond are excessive [...]'*.[22] MPM submitted that the Complainant was well aware of the charges at the time when he became a member of the Scheme as these were clearly stated in the policy documentation sent to the Complainant, which includes a fee schedule. Reference was made in this regard to the fee schedule dated 22 July 2013 attached as Appendix D to its reply.[23]

16. MPM refuted to entertain the Complainant's allegation that MPM has *'already settled a compensation claim with more than one other Member'*.[24] It submitted that, firstly, any alleged settlement agreement is strictly confidential and secondly, any settlement agreement entered into with any third party has no bearing whatsoever on these proceedings.

17. MPM noted that in the section titled *'Describe clearly the remedy you are seeking'*, the Complainant states that he is seeking compensation for *'my*

[19] *A fol.* 107
[20] *Ibid.*
[21] *Ibid.*
[22] *A fol.* 108
[23] *A fol.* 108 & 141
[24] *A fol.* 108

losses of capital & for the loss of future income compared to my Final Salary Pension Scheme (Rolls Royce Pension Scheme)'.[25] It further noted that the Complainant then indicates that *'this loss is estimated to be in excess of £140,000, when allowing for the loss of future returns'*.[26]

MPM submitted that it is not clear how the Complainant has calculated the figure claimed by him. It submitted that in any case, MPM is from the very outset also refuting any liability with respect to any hypothetical earnings claimed by the Complainant.

Momentum does not provide investment advice

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

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

20. MPM noted that this is clear from the application forms attached to its reply which specifically request the details of the Complainant's professional adviser. It was pointed out that the Complainant also declared on the application form that he acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice. MPM referred to declaration 8 on page 6 of the application form.

21. MPM submitted that to further reinforce the point that MPM does not provide investment advice, an entire section of the terms and conditions of business (attached to the application form), is dedicated solely to this point (as per page 7-8 of the application form).

Conclusion

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

[25] *Ibid.*
[26] *Ibid.*

23. MPM submitted that it has not breached its duty of care or any fiduciary and/or other duties and obligations in any way.

24. MPM pointed out that the Complainant must show that it was MPM's actions or omissions which caused the loss being alleged. MPM replied that in the absence of the Complainant proving this causal link, MPM cannot be found responsible for the Complainant's claims.

MPM accordingly requested the Arbiter to reject the Complainant's claims.

Having heard the parties and seen all the documents and submissions made including the affidavit, the notes of submissions, the additional submissions made and respective attachments,

Further Considers:

Given that the Service Provider raised the question of competence and also made certain comments relating to the substance of the Complaint, the Arbiter will deal with these aspects first.

Substance of Complaint

The Arbiter notes that, in its reply, MPM submitted that the Complainant's Complaint mainly related to his claim that the transfer of his funds into a QROPS was not permitted under UK Tax Laws.[27]

Whilst this aspect was raised by the Complainant in the Complaint Form to the OAFS and also highlighted in the formal letter of complaint dated 8 July 2019 to the Service Provider, the Arbiter considers that this was, however, not the only aspect raised by the Complainant in his complaint against MPM.

Apart from submissions on the claim relating to the transfer of funds into a QROPS, MPM itself made various other submissions in its reply on other important aspects such as, *inter alia,* on the regular reporting made to the Complainant, the licensing status of CWM, the suitability of the investments and

[27] As per para. 6 of MPM's reply – A *fol.* 105

the adherence with the investment guidelines which were all aspects raised by the Complainant in the Complaint Form or attachments thereto.

The Arbiter would like to highlight that this is a complaint filed by a retail consumer of financial services within the structure of Chapter 555 of the Laws of Malta.

The procedure established by Chapter 555 of the Laws of Malta is an informal one and cannot be likened, for instance, to the formal procedure of the Superior Courts, because the intention behind the special law is to offer an informal forum to consumers who are not expected to be law experts and not expected to file a complaint in a legalistic manner. The complaint form offered by the OAFS is intended to help clients and it could be further supplemented by attachments where necessary.

The Arbiter has to take a holistic approach to the complaint in order to act reasonably and fairly.

The Service Provider should accordingly consider the complaint made by the Complainant in such context and not expect the client, who chose to file the complaint himself, (as allowed within the parameters of the law), to draft his complaint in a legalistic manner or with the knowledge and expertise of a professional in the field.

Having reviewed the Complaint Form and the attachments filed by the Complainant with the Complaint Form, the Arbiter does not agree with MPM that *'the Complainant's complaint appears to relate mainly to the following 'I now know that transferring my funds into a QROP's was not permitted under UK Tax Laws''*,[28] given that other aspects were raised, which were also covered in the submissions made by MPM in its reply as outlined above and therefore being accepted by it as well.

Having reviewed the case in question, the Arbiter considers that whilst he shall not delve into claims made in this complaint against CWM - given *inter alia* that CWM is not a party to this complaint or eligible as a financial service provider under Cap. 555 of the Laws of Malta - the Arbiter shall, however, consider the

[28] *A fol.* 105

alleged shortcomings in respect of MPM in respect of its duties as Trustee and Retirement Scheme Administrator of the Retirement Scheme.

The Arbiter considers that, apart from the claim relating to the transfer of funds to the Scheme being allegedly not permitted under UK tax laws, the other key alleged shortcomings in respect of MPM, in substance and, in essence, also involve, in the particular circumstances of this case, the following claims:

- That MPM accepted the services of CWM when this was an unlicensed investment advisor;
- That MPM failed in its duty of care as the investment portfolio had to be in line with the member's profile, attitude to risk and in line with the applicable investment guidelines;
- That there was lack of information on where his funds were invested and losses incurred, including lack of receipt of the annual statements for 2015/2016.[29]

The formal letter of complaint reflected the key alleged shortcomings in the first two bullet points described above which were also covered in MPM's reply.

These same allegations were also, in essence, raised by the Complainant during the hearing of 30 June 2020 where he *inter alia* noted that *'I do believe that Momentum should have offered some sort of duty of care. In the guidelines, the portfolio must be in line with the member's underlying attitude to risk'*, and also stated that *'I do have concerns that Momentum were using the services of CWM when they were not licenced to act in the way there were'*.[30]

It is, furthermore, noted that in its letter to the Complainant of 24 September 2019, the Service Provider itself, *inter alia* did not limit itself to the claim that the transfer was not permitted under UK Tax Laws, but actually stated the following:

'… your complaint is regarding:

(i) the specific investments recommended to you;

[29] *A fol.* 4
[30] *A fol.* 7 & 153

(ii) the suitability of such investments (based on the investment advice provided to you); and

(iii) alleged forgery of your signature of the dealing instructions provided by you to CWM.'[31]

Hence, the Arbiter considers that there are a number of key aspects that need to be considered, as further explained above, as part of the substance of this complaint in addition to the claim that the transfer was not permitted.

The Arbiter shall consider the said matters accordingly including other allegations emerging in the Complaint and covered by MPM in its reply (such as in relation to the charges applicable on the underlying European Executive Investment Bond) as considered appropriate. [32] The Arbiter needs however to first consider the preliminary plea raised by the Service Provider in relation to his competence on this Complaint before considering such.

Preliminary Plea regarding the Competence of the Arbiter

The Service Provider raised the preliminary plea that the Arbiter has no competence to consider this case based on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta.

Plea relating to Article 21(1)(b) of Chapter 555 of the Laws of Malta

Article 21 (1)(b) states that:

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

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

Firstly, the Arbiter notes that it took over two months for the Service Provider to send the Complainant a reply to his formal complaint.[33] The Arbiter does not

[31] *A fol.* 20
[32] *A fol.* 7 & 108
[33] The Complainant's formal complaint dated 8 July 2019 was answered by the Service Provider through a letter dated 24 September 2019 - *A fol.* 16

see a valid reason why the Service Provider took so long to send a reply and related documents.

The Arbiter deems it as very unprofessional for a service provider to make all in its powers to hinder a complaint against it, procrastinate and then raise the plea of lack of competence on the pretext that the action is '*time-barred'*. It is a long accepted legal principle that no one can rest on his own bad faith.

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

The law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

Consequently, the Arbiter has to determine whether the conduct complained of took place before the 18 April 2016 or after, in accordance with the facts and circumstances of the case.

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

In this case, the conduct complained of involves the conduct of the Service Provider **as trustee and retirement scheme administrator of the Scheme**, which role MPM occupied since the Complainant became member of the Scheme and **continued to occupy beyond the coming into force of Chapter 555 of the Laws of Malta.**

Even if, for argument's sake only, the Arbiter had to limit himself to the question of the investment portfolio, (which is not the case because the Complainant raised other issues and the Service Provider had other obligations apart from the oversight of the portfolio as explained later in this decision), the Service Provider did not prove in this particular case that the products invested into no longer formed part of the portfolio **after** the coming into force of Chapter 555

of the Laws of Malta. The onus of proof for such evidence rests with the Service Provider.[34]

It is also noted that the complaint in question involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the advisor of the Complainant in relation to the Scheme. The Service Provider itself declares that it no longer accepted business from CWM **as from September 2017**.[35] CWM was, therefore, still accepted by the Service Provider and acting as the investment advisor to the Complainant after the coming into force of Chapter 555 of the Laws of Malta.

It has thus emerged that CWM was only replaced in September 2017 when MPM no longer accepted business from CWM. The responsibility of MPM in this regard is explained later on in this decision.

The Arbiter considers that the actions related to the Retirement Scheme complained about cannot accordingly be considered to have occurred before 18 April 2016 and therefore the plea as based on Article 21(1)(b) cannot be upheld.

Article 21(1)(c)

The Service Provider alternatively also raises the plea that Article 21(1)(c) of Chapter 555 should apply. Article 21(1)(c) stipulates:

'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.'

In that case, 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*'.

[34] Furthermore, the Arbiter notes that the structured notes - being the products predominantly constituting his portfolio of investments as will be considered later in this decision - still formed part of the Complainant's portfolio after 18 April 2016 as per the Table of Investments presented by the Service Provider itself - *A fol.* 236
[35] Para. 44, Section E of the affidavit of Stewart Davies, Director of MPM – *A fol.* 167

In its Reply before the Arbiter for Financial Services, the Service Provider only submitted that more than two years have lapsed since the conduct complained of took place and did not elaborate any further as to why the compliant cannot be entertained in terms of the said article.

In its additional submissions, MPM noted that without prejudice to its plea relating to Article 21(1)(b), '*the complaint is also prescribed on the basis of [article 21(1)(c)]'*, submitting that '*The complainant received annual member statements from the start of his investment (Appendix C attached to the reply filed by Momentum), and yet he only filed a complaint with Momentum in July 2019 (as emerges from the documentation filed with the original complaint)*'.[36]

First of all, the Arbiter wants to underline the fact that the timeframes established under Article 21(1)(b)(c)(d) of Chapter 555 of the Laws of Malta are not 'prescriptive' periods but periods of decadence and therefore different rules apply. However, it is not necessary to enter into these legal distinctions in this particular case.

It is noted that the fact that the Complainant was sent an Annual Member Statement, as stated by the Service Provider in its notes of submissions, could not be considered as enabling the Complainant to have knowledge about the matters complained of. This taking into consideration a number of factors including that the said Annual Member Statement was a highly generic report which only listed the underlying life assurance policy.

The Annual Member Statement issued to the Complainant by MPM included no details of the specific underlying investments (that is, the structured notes) held within the policy which had a material bearing to the performance of the Retirement Scheme. Hence, the Complainant was not in a position to know, from the Annual Member Statement he received, what investment transactions were actually being carried out within his portfolio of investments and their respective performance.

It is also noted that the Annual Member Statement sent to the Complainant by the Service Provider had even a disclaimer highlighting that certain underlying investments may show a value reflecting an early encashment value or

[36] *A fol.* 233

potentially a zero value prior to maturity and that such value did not reflect the true performance of the underlying assets.

The disclaimer reads as follows:

'*Investment values are provided to Momentum Pensions Malta Limited by the Investment Platforms, who are responsible for the accuracy of this information. Every effort has been made to ensure that this statement is correct but please accept this statement on this understanding.*

Certain underlying assets with the Investment, may show a value that reflects an early encashment value or potentially a zero value prior to the maturity date. This will not reflect the true current performance of such underlying assets.'[37]

Such a disclaimer did not reveal much to the Complainant about the actual state of the investments and the whole scenario could not have reasonably enabled the Complainant to have knowledge about the matters being complained of.

It has not emerged nor been determined either during this case that the disputed investments had all matured or been sold prior to 8 July 2017, that is, more than two years before the date of his formal complaint with the Service Provider of 8 July 2019. It is noted that indications that there were issues with the investment advisor became more evident as from September 2017 when MPM terminated its terms of business with CWM.

Therefore, the Service Provider did not prove that the Complainant raised the complaint '*later than two years from the day on which the complainant first had knowledge of the matters complained of*' and the complaint is accordingly considered within the two-year period established by Art. 21(1)(c) of Chapter 555.

For the above-stated reasons, this plea is also being rejected and the Arbiter declares that he has the competence to deal with the Complaint.

[37] *A fol.* 137 & 140

The Merits of the Case

The Arbiter will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.[38]

The Complainant

The Complainant, born in 1962, of British nationality[39] was indicated as tax resident in Spain at the time of application for membership as per the details contained in the *Application Form* for Membership of the Momentum Malta Retirement Trust ('the Application Form for Membership').[40] The Complainant's occupation was left blank in the said Application Form.

It was not indicated, nor has it emerged, during the case that the Complainant was a professional investor.

The Complainant was accepted by MPM as member of the Retirement Scheme on 1 October 2013.[41]

The risk categories of *'Low Risk'* and *'Medium Risk'* were selected to reflect his risk profile out of the five categories available of *'No Risk'*, *'Low Risk'*, *'Medium Risk'*, *'Med/High Risk'*, and *'High Risk'* in the Application Form for Membership.[42]

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator[43] and acts as the Retirement Scheme Administrator and Trustee of the Scheme.[44]

The Legal Framework

The Retirement Scheme and MPM are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules

[38] Cap. 555, Art. 19(3)(b)
[39] *A fol.* 122
[40] *A fol.* 110
[41] *A fol.* 143
[42] *A fol.* 113
[43] *https://www.mfsa.mt/financial-services-register/result/?id=3453*
[44] *A fol.* 190 - Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015.[45]

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by MFSA under the RPA.

As confirmed by the Service Provider, registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and, hence, the framework under the RPA became applicable as from such date.[46]

Despite not being much mentioned by MPM in its submissions, the Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also much relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA, in light of MPM's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.

Indeed, Article 1(2) of the TTA provides that:

'*The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A*',

[45] *Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/*
[46] As per pg. 1 of the Affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 January 2016 attached to his affidavit – *A fol.* 156 & 182-186

with Article 43(6)(c) in turn providing that:

'*A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement schemes …'.*

Particularities of the Case

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

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA[47] as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011[48] and under the Retirement Pensions Act in January 2016.[49]

As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme '*was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap. 331) on the 23 March 2011*'[50] and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011*'.[51]

The Scheme Particulars specify that:

'The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death'.[52]

[47] https://www.mfsa.mt/financial-services-register/result/?id=3454
[48] Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's Affidavit).
[49] Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's Affidavit).
[50] Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit) - *A fol.* 188
[51] Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit) - *A fol.* 190
[52] *Ibid.*

The case in question involves a member-directed personal retirement scheme where the Member was allowed to appoint an investment advisor to advise him on the choice of investments.

The assets held in the Complainant's account with the Retirement Scheme were used to acquire a whole of life insurance policy for the Complainant.

The life assurance policy acquired was called the European Executive Investment Bond issued by Skandia International ('the OMI Bond').[53] [54]

The premium in the said policy was in turn invested in a portfolio of investment instruments under the direction of the Investment Advisor and as accepted by MPM.

The said investments underlying the policy at times comprised solely or predominantly of structured notes as indicated in the table of investments forming part of the '*Investor Profile*' presented by the Service Provider during the proceedings of the case.[55]

The '*Investor Profile*' presented by MPM in respect of the Complainant also included a table with the '*current valuation'* as at 12/08/2019. The said table indicated a loss (excluding fees) of -GBP24,415 as at that date.[56] The loss experienced by the Complainant is higher when taking into account the fees incurred and paid within the Scheme's structure. The loss, inclusive of fees, indeed amounts to -GBP34,547 on the total amount invested of GBP52,736 based on a *'current valuation at 12/08/2019'* of GBP18,189.[57]

It is to be noted that MPM does not explain whether the loss indicated in the '*current valuation*' for the Complainant relates to realised or paper losses or both.

[53] *A fol.* 120
[54] Skandia International eventually rebranded to Old Mutual International - *https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandia-international-rebrands-to-old-mutual-international/*
[55] The 'Investor Profile' is attached to the Additional Submissions document presented by MPM - *A fol.* 236
[56] *Ibid.*
[57] *Ibid.*

Investment Advisor

Continental Wealth Management ('CWM') was the investment advisor appointed by the Complainant.[58] The role of CWM was to advise the Complainant regarding the assets held within his Retirement Scheme.

In its reply to this complaint, MPM explained *inter alia* that CWM '*is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH*'.[59]

In its submissions, it was further explained by MPM that '*CWM was appointed agent of Trafalgar International GmbH ('Trafalgar') and was operating under Trafalgar International GmbH licenses*',[60] and that Trafalgar '*is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'*.[61]

Underlying Investments

As indicated above, the investments undertaken within the life assurance policy of the Complainant were summarised in the table of investment transactions included as part of the '*Investor Profile*' provided by the Service Provider.[62]

The investment purchases undertaken within the Complainant's portfolio as reflected in the said *'Investor Profile'* are summarised (in their order of execution) below:[63]

- a structured note investment for the amount of GBP20,000 into the *RBC 2Y Retail Income GBP* (ISIN no. XS0964845266);
- a structured note investment for the amount of GBP20,000 into the *Commerzbank 10% GBL Phar Inc NT* (ISIN no. XS0977428985);

[58] As per pg. 2 of MPM's reply to the OAFS in respect of the Complainant (*A fol.* 105) and Section 5 of the Application Form for Membership (*A fol.* 111).
[59] Pg. 1 of MPM's reply to the OAFS - *A fol.* 104
[60] Para. 39, Section E, titled *'CWM and Trafalgar International GmbH'* of Stewart Davies' affidavit - *A fol.*165
[61] *Ibid.*
[62] Attachment to the additional submissions made by MPM in respect of the Complainant - *A fol.* 236
[63] *A fol.* 236

- a structured note investment for the amount of GBP12,000 into the *Nomura Global Phoenix 5Y AC* (ISIN no. XS0982016700);
- a structured note investment for the amount of GBP11,760 into the *Leonteq 1.5Y Multi Barrier* (ISIN no. CH0245655904);
- a structured note investment for the amount of GBP4,756 into the *Leonteq Express Cert Herbalife, Mann Sarepta Therapeutics* (ISIN no. CH0259240692);
- a structured note investment for the amount of GBP1,982 into the *Leonteq Barrier Discount on Sarepta Therapeutics* (ISIN no. CH0259240734);
- a structured note investment for the amount of GBP3,571 into the *Leonteq Barrier Discount Sarepta Therapeutics* (ISIN no. CH0259240734);
- a structured note investment for the amount of GBP5,824 into the *EFG Red April 5* (ISIN no. CH0273397270);
- a structured note investment for the amount of GBP5,824 into the *EFG Red April 6* (ISIN no. CH0273397429);
- an investment into a collective investment scheme for the amount of GBP10,000 into the *OMI IE GBP Compass Portfolio 4;*
- an investment into a collective investment scheme for the amount of GBP5,000 into the *Gemini Investment Principal Ast Allocation C*;
- a structured note investment of GBP455 into the *Leonteq 4 Year Step-Up Auto Call.*

During the tenure of CWM, the investment portfolio was accordingly clearly invested at times solely or predominantly into structured notes.

Further Considerations

Responsibilities of the Service Provider

MPM is subject to the duties, functions and responsibilities applicable as a Retirement Scheme Administrator and Trustee of the Scheme.

Obligations under the SFA, RPA and directives/rules issued thereunder

As indicated in the MFSA's Registration Certificate dated 28 April 2011 issued to MPM under the SFA, MPM was required, in the capacity of Retirement Scheme Administrator, '*to perform all duties as stipulated by articles 17 and 19 of the Special Funds (Regulation) Act, 2002 … in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the [SFA]*'.

The obligations of MPM as a Retirement Scheme Administrator under the SFA are outlined in the Act itself and the various conditions stipulated in the original Registration Certificate which *inter alia* also referred to various Standard Operational Conditions (such as those set out in Sections B.2, B.5, B.7 of Part B and Part C) of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act*, *2002'* ('the Directives').

In terms of the said Registration Certificate issued under the SFA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the SFA, the regulations and the Directives issued thereunder.

Following the repeal of the SFA and issue of the Registration Certificate dated 1 January 2016 under the RPA, MPM was subject to the provisions relating to the services of a retirement scheme administrator in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the RPA. As a Retirement Scheme Administrator, MPM was subject to the conditions outlined in the '*Pension Rules for Service Providers issued under the Retirement Pensions Act*' ('the Pension Rules for Service Providers') and the '*Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' ('the Pension Rules for Personal Retirement Schemes').

In terms of the said Registration Certificate issued under the RPA, MPM was also required to assume and carry out, on behalf of the Scheme, any functions and obligations applicable to the Scheme under the RPA, the regulations and the Pension Rules issued thereunder.

One key duty of the Retirement Scheme Administrator emerging from the primary legislation itself is the duty to *'act in the best interests of the scheme'* as outlined in Article 19(2) of the SFA and Article 13(1) of the RPA.

From the various general conduct of business rules/standard licence conditions applicable to MPM in its role as Retirement Scheme Administrator under the SFA/RPA regime respectively, it is pertinent to note the following general principles:[64]

a) Rule 2.6.2 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that '*The Scheme Administrator* ***shall act with due skill, care and diligence – in the best interests of the Beneficiaries*** …'.

   The same principle continued to apply under the rules issued under the RPA. Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, and which applied to MPM as a Scheme Administrator under the RPA, provided that '*The Service Provider* ***shall act with due skill, care and diligence*** …'.

b) Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that '***The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries*** …'.

   The same principle continued to apply under the rules issued under the RPA. Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provided that '***The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries*** *and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document.*';

c) Rule 2.6.4 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA provided that '*The Scheme Administrator shall organise and control its affairs in a responsible*

[64] Emphasis added by the Arbiter.

*manner and **shall have adequate operational, administrative** and financial procedures **and controls in respect of its own business and the Scheme** to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed …'.*

The same principle continued to apply under the rules issued under the RPA. Standard Condition 4.1.7, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, provided that '*The Service Provider shall organise and control its affairs in a responsible manner and **shall have adequate operational, administrative** and financial procedures **and controls in respect of its own business and the Scheme** or Retirement Fund, as applicable, to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed*.'

Standard Condition 1.2.2, Part B.1.2 titled '*Operation of the Scheme*, of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, also required that '***The Scheme shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative** and financial procedures **and controls to ensure compliance with all regulatory requirements**'*.

Trustee and Fiduciary obligations

As highlighted in the section titled '*The Legal Framework*' above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta, is also relevant for MPM considering its capacity as Trustee of the Scheme. This is an important aspect on which not much emphasis on, and reference to, has been made by the Service Provider in its submissions.

Article 21 (1) of the TTA which deals with the '*Duties of trustees*', stipulates a crucial aspect, that of the ***bonus paterfamilias***, which applies to MPM. The said article provides that:

*'(1) **Trustees shall in the execution of their duties and the exercise of their powers and discretions act <u>with the prudence, diligence and attention of a bonus paterfamilias</u>,** act in utmost good faith and avoid any conflict of interest'.*

It is also to be noted that Article 21 (2)(a) of the TTA, further specifies that:

'Subject to the provisions of this Act, trustees shall carry out and administer the trust according to its terms; and subject as aforesaid, the trustees shall ensure that the trust property is vested in them or is under their control and shall, so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage *…'.*

In its role as Trustee, MPM was accordingly duty bound to administer the Scheme and its assets to high standards of diligence and accountability.

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property '*as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality*'.[65]

As has been authoritatively stated:

'*Trustees have many duties relating to the property vested in them. These can be summarized as follows:* ***to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'***.[66]

The fiduciary and trustee obligations were also highlighted by MFSA in a recent publication where it was stated that:

'In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries*. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular,* ***the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligation****'.*[67]

[65] Ganado Max (Editor), '*An Introduction to Maltese Financial Services Law*',) Allied Publications 2009) p. 174.
[66] *Op. cit.,* p. 178
[67] Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 December 2017) p. 9.

Although this Consultation Document was published in 2017, MFSA was basically outlining principles established both in the TTA and the Civil Code which had already been in force prior to 2017.

The above are considered to be crucial aspects which should have guided MPM in its actions and which shall accordingly be considered in this decision.

Other relevant aspects

One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments**. As acknowledged by the Service Provider whilst MPM's duties did not involve the provision of investment advice, however, MPM did '*… **retain the power to ultimately decide whether to proceed with an investment or otherwise***'.[68]

Once an investment decision is taken by the member and his/her investment advisor and such decision is communicated to the retirement scheme administrator, MPM explained that, as part of its duties,

***'The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed)** …'*.[69]

MPM had accordingly the final say prior to the placement of a dealing instruction, in that, if MPM was satisfied that the level of diversification is suitable and in order, and the member's portfolio as a whole is in line with his attitude to risk and investment guidelines '*the dealing instruction will be placed with the insurance company and the trade will be executed. **If the RSA is not so satisfied, then the trade will not be proceeded with***'.[70]

This, in essence, reflected the rationale behind the statement reading:

'*I accept that I or my designated professional adviser may suggest investment preferences to be considered, however, **the Retirement Scheme administrator***

[68] Para. 17, Page 5 of the affidavit of Stewart Davies - *A fol.* 160
[69] Para. 31, Page 8 of the affidavit of Stewart Davies - *A fol.* 163
[70] Para. 33, Page 9 of the affidavit of Stewart Davies (*A fol.* 164) & Para. 17 of Page 5 of the said affidavit also refers (*A fol.* 160).

will retain full power and discretion for all decisions relating to the purchase, retention and sale of the investments *within my Momentum Pensions Retirement Fund*', which featured in the '*Declarations*' section of the Application Form for Membership signed by the Complainant.[71]

The MFSA regarded the oversight function of the Retirement Scheme Administrator as an important obligation where it emphasised, in recent years, the said role.

The MFSA explained that it:

'… is of the view that as specified in SLC 1.3.1 of Part B.1 (Pension Rules for Retirement Scheme Administrators) of the Pension Rules for Service Providers, the RSA, in carrying out his functions, shall act in the best interests of the Scheme members and beneficiaries. The MFSA expects the RSA to be diligent and to take into account his fiduciary role towards the members and beneficiaries, at all times, irrespective of the form in which the Scheme is established. The RSA is expected to approve transactions and to ensure that these are in line with the investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'.[72]

The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment advisor stating that:

'the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments'. [73]

Despite that the above-quoted MFSA statements were made in 2018, an oversight function applied during the period relating to the case in question as explained earlier on.

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[71] *A fol.* 115

[72] Pg. 7 of the MFSA's Consultation Document dated 16 November 2018 titled '*Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act*' (MFSA Ref. 15/2018) - https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/.

[73] Pg. 9 of MFSA's Consultation Document dated 16 November 2018 titled *'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' (MFSA Ref. 15/2018).*

As far back as 2013, MPM's Investment Guidelines indeed also provided that:

'***The Trustee need 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*** *…*',[74]

whilst para. 3.1 of the section titled 'Terms and Conditions' of the Application Form for Membership into the Scheme also provided *inter alia* that

'… ***in its role as Retirement Scheme Administrator [MPM] will exercise judgement as to the merits or suitability of any transaction*** *…*'.[75]

Other Observations and Conclusions

Allegations in relation to fees

The Complainant claimed that the fees for the underlying OMI bond were prohibitively expensive.[76]

The Complainant has not provided any further basis, explanations and/or evidence in respect of the said allegation and accordingly the Arbiter considers that there is insufficient basis and evidence for him to consider further this allegation.

On the point of fees, the Arbiter would, however, like to make a general observation. The Arbiter considers that the trustee and scheme administrator of a retirement scheme, in acting in the best interests of the member as duty bound by law and rules to which it is subject to, is required to be sensitive to, and mindful of, the implications and level of fees applicable within the whole structure of the retirement scheme and not just limit consideration to its own fees.

In its role of a *bonus paterfamilias,* the trustee of a retirement scheme is reasonably expected to ensure that the extent of fees applicable within the

[74] Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies (*A fol.* 203). The same statement is also included in page 9 of the Scheme Particulars of May 2018 (also attached to the same affidavit) - *A fol.* 195
[75] *A fol.* 116
[76] *A fol.* 4 & 11

whole structure of a retirement scheme is reasonable, justified and adequate overall when considering the purpose of the scheme.

Where there are issues or concerns, these should reasonably be raised with the prospective member or member as appropriate. Consideration would in this regard need to be given to a number of aspects including: the extent of fees vis-à-vis the size of the respective pension pot of the member; that the extent of fees is not such as to inhibit or make the attainment of the objective of the Scheme difficult to be actually reached without taking excessive risks; neither that the level of fees motivate investment in risky instruments and/or the construction of risky portfolios.

Claim that transfer was not permitted under UK tax laws

The Complainant claimed *inter alia* that the transfer of his pension fund to the Retirement Scheme, as a QROPS, was not permitted under UK tax laws.

He pointed out that he only owned a holiday home in Spain and had always been a resident in the UK and was a *'UK Tax Resident'*.[77]

The Complainant provided no further basis nor any further details of the provisions of the UK tax laws on which he was claiming his transfer was not permitted.

Moreover, the Arbiter noted that, in his Application Form for Membership, the Complainant himself indicated *'Spain'* as being his *'Tax Residence'*.[78]

In the circumstances, the Arbiter considers that there is no sufficient basis on which he can consider this matter further.

Key considerations relating to other principal alleged failures

The Arbiter will now consider the remaining key alleged failures as indicated above and whether there were any shortcomings in MPM's duties and

[77] *A fol.* 4
[78] *A fol.* 110

responsibilities as a trustee and retirement scheme administrator of the Scheme in relation to the following allegations:

- MPM accepting the services of CWM when this was an unlicensed investment advisor;
- MPM failing in its duty of care as the investment portfolio had to be in line with the member's profile, attitude to risk and in line with the applicable investment guidelines;
- The lack of information on where his funds were invested and losses incurred, including lack of receipt of the annual statements for 2015/2016.[79]

General observations

On a general note, it is clear that MPM did not provide investment advice in relation to the underlying investments of the member-directed scheme. The role of the investment advisor was the duty of other parties, such as CWM.

This would reflect on the extent of responsibility that the financial adviser and the RSA and Trustee had in this case as will be later seen in this decision.

However, despite that the Retirement Scheme Administrator was not the entity which provided the investment advice to invest in the contested financial instruments, **MPM had nevertheless certain obligations to undertake in its role of Trustee and Scheme Administrator. The obligations of the trustee and retirement scheme administrator in relation to a retirement plan are important ones and could have a substantial bearing on the operations and activities of the scheme and affect direct, or indirectly, its performance**.

Consideration thus needs to be made as to whether MPM failed in any relevant obligations and duties, and if so, to what extent any such failures are considered to have had a bearing or otherwise on the financial performance of the Scheme and the resulting losses for the Complainant.

A. The appointment of the Investment Advisor

[79] *A fol.* 4

It is noted that the Complainant chose the appointment of CWM to provide him with investment advice in relation to the selection of the underlying investments and composition of the portfolio within the member-directed Scheme.

However, from its part, MPM allowed and/or accepted CWM to provide investment advice to the Complainant within the Scheme's structure.

There are a number of aspects which give rise to concerns on the diligence exercised by MPM when it came to the acceptance of, and dealings with, the investment adviser as further detailed below.

Inappropriate and inadequate material issues involving the Investment Advisor

i. *Incomplete and inaccurate material information relating to the advisor in MPM's Application Form for Membership*

Apart from accepting an application for membership with incomplete details (as various parts, such as details of the *'Occupation'*, *'Nationality'* and *'Home/Work Tel'* of the Complainant) were left unanswered,[80] it is considered that **MPM accepted and allowed inaccurate and incomplete material information relating to the Advisor to prevail in its own Application Form for Membership**.

MPM should have been in a position to identify, raise and not accept the material deficiencies arising in the Application Form.

If inaccurate and incomplete material information arose in the Application Form for Membership in respect of such a key party, it was only appropriate and in the best interests of the Complainant, and reflective of the role as Trustee as a *bonus paterfamilias*, for MPM to raise and flag such matters to the Complainant and not accept such inadequacies in its form. **MPM had ultimately the prerogative whether to accept the application, the selected investment advisor and also decide with whom to enter into terms of business**.

The section titled '*Professional Adviser's Details*' in the Application Form for Membership in respect of the Complainant indicated *'CWM'* as the company name for the professional adviser.[81]

[80] *A fol.* 110
[81] *A fol.* 111

In the same section of the Application Form, the adviser was indicated as having a registered address in Spain and that it was regulated with the question *'Is the company regulated?'* ticked as *'Yes'*. The name of the regulator of the professional adviser was indicated as '*ICCS*'.

The Arbiter considers the reference to ICCS as regulator of CWM to be inadequate and misleading.

With respect to the reference to '*ICCS*' such reference was not defined or explained in the Application Form. Neither was such reference ever explained or referred to during the comprehensive submissions made by the Service Provider during the proceedings of the case. It has not emerged either that ICCS is, or was, a regulatory authority for investment advisors in Spain or in any other jurisdiction. It appears that '*ICCS*' could be an acronym for the '*Cypriot Insurance Companies Control Service*'. The Cypriot Insurance Companies Control Service is involved in the insurance sector in Cyprus.[82] No evidence of any authorisation or any form of approval issued by such to CWM has however ever been mentioned by the Service Provider nor produced by it during the proceedings of the case.

Indeed, no evidence was actually submitted by MPM of CWM being truly regulated.

The reference to ICCS could not have thus reasonably provided any comfort to MPM that this was a regulator of CWM and neither that there was some form of regulation and adequate controls and/or supervision on CWM equivalent to that applicable for regulated investment services providers.

ii. *Lack of clarity/convoluted information*

It is noted that the lack of clarity and convolution relating to the investment adviser has also prevailed in the Application Form submitted in respect of the acquisition of the underlying policy, that is, the one issued by Skandia International.

[82] http://mof.gov.cy/en/directorates-units/insurance-companies-control-service

MPM, as Trustee of the Scheme had clear sight of the said application and had indeed signed the application for the acquisition of the respective policy in its role as trustee.

It is noted that the Application Form of the policy provider refers to, and includes, the stamp of another party as financial advisor. The first page of the said application form includes a section titled '*Financial adviser details*' and a field for '*Name of financial adviser*', with such section including a stamp bearing the name of '*Inter-Alliance Worldnet'* ('Inter-Alliance') apart from reference to *'Continental Wealth Management'*.[83]

Inter-Alliance is then featured in the section titled '*Financial adviser declaration*' of the said form which section also includes the same stamp of Inter-Alliance (with a PO Box in Cyprus), in the part titled *'Financial adviser stamp*'.

There is accordingly a lack of clarity on the exact entity ultimately taking responsibility for the investment advice being provided to the Complainant. For the reasons explained, the information on the financial adviser is also somewhat inconsistent between that included in MPM's application form and the application form of the issuer of the underlying policy.

iii. *No proper distinctions between CWM and Trafalgar*

It is also unclear why the Annual Member Statements aimed for the Complainant and produced by MPM for the years ended 31 December 2015 and 31 December 2016 indicated '*Continental Wealth Management*' as '*Professional Adviser*' whilst at the same time indicated another party, '*Trafalgar International GmbH*' as the '*Investment Adviser'*. [84]

No indication or explanation of the distinction and differences between the two terms of '*Professional Adviser*' and '*Investment Adviser*' were either provided or emerged nor can reasonably be deduced.

Besides the lack of clarity on the entity taking responsibility for the investment advice and the lack of clear distinction/links between the indicated distinct parties in the application forms and statements, it has also not emerged that

[83] *A fol.* 120
[84] *A fol.* 137-140

the Complainant was provided with clear and adequate information regarding the respective roles and responsibilities between the different mentioned entities throughout.

If CWM was acting as an appointed agent of another party, such capacity, as an agent of another firm, should have been clearly reflected in the application forms and other documentation relating to the Scheme. Relevant explanations and implications of such agency relationship and respective responsibilities should have also been duly indicated without any ambiguity.

It is also noted that during the proceedings of this case, MPM has not provided evidence of any agency agreement between CWM and Inter-Alliance and/or Trafalgar.

In the reply that MPM sent directly to the Complainant in respect of his formal complaint, MPM itself explained that '*Momentum in its capacity as Trustee and RSA, in exercising its duty to you ensured: The full details of the Scheme, including all parties' roles and responsibilities were clearly outlined to you in the literature provided ensuring no ambiguity,*[85] *including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules*'.[86]

The Arbiter does not have comfort that such a duty has however been truly achieved in respect of the advisor for the reasons amply explained above.

iv. *No regulatory approval in respect of CWM*

Despite that the Application Form for Membership indicates CWM as being regulated, no evidence has however emerged during the proceedings of this case about the regulatory status of CWM. As indicated earlier, MPM only referred to the alleged links between CWM and Trafalgar and only indicated authorisations issued to Trafalgar International GmbH (and not CWM) by IHK, (the Chamber of Commerce and Industry in Frankfurt) with the '*Insurance*

[85] Emphasis added by the Arbiter.
[86] Section 3, titled '*Overview of Momentum Controls in place in exercising a duty to all members*' in MPM's reply to the Complainant in relation to the complaint made in respect of the Scheme - *A fol.* 19

Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'.[87]

MPM's statement that CWM '*was operating under Trafalgar International GmbH licenses*'[88] has not been backed up by any evidence during the proceedings of this case. No comfort can be thus taken either from the authorisation/s held by Trafalgar.

Indeed, no evidence of any authorisation held by CWM in its own name or as an agent of a licensed institution, authorising it to provide advice on investment instruments and/or advice on investments underlying an insurance policy has, ultimately been produced or emerged during the proceedings of this case.

In the absence of such, **the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM '*was authorised to trade in Spain and in France by Trafalgar International GmbH*',[89] are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant**.

This also taking into consideration that:

(i) Trafalgar is itself no regulatory authority but a licensed entity itself;

(ii) the inconsistency and lack of clarity in respect of the investment advisor, including its regulatory status in the Application Forms as well as the confusing and unclear references in the statements relating to the advisor as indicated above;

(iii) legislation covering the provision of investment advisory services in relation to investment instruments, namely the Markets in Financial

[87] Copy of authorisations issued to Trafalgar were specifically referred to in para. 39 Section E, titled '*CWM and Trafalgar International GmbH*' in the affidavit of Stewart Davies - *A fol.* 166

[88] Para. 39, Section E titled *'CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies - *A fol.* 165

[89] Pg. 1, Section A titled *'Introduction'*, of the Reply of MPM submitted before the Arbiter for Financial Services - *a fol.* 104

Instruments Directive (2004/39/EC) already applied across the European Union since November 2007.

No evidence was provided that CWM, an entity indicated as being based in Spain, held any authorisation to provide investment advisory services, in its own name or in the capacity of an agent of an investment service provider under MiFID.

Article 23(3) of the MiFID I Directive, which applied at the time, indeed provided specific requirements on the registration of tied agents.[90]

No evidence of CWM featuring in the tied agents register in any EU jurisdiction was either produced or emerged.

Neither was any evidence produced of any exemption from licence under MiFID or that CWM held an authorisation or exemption under any other applicable European legislation for the provision of the contested investment advice.

The Service Provider noted *inter alia* that '*CWM was appointed agent of Trafalgar International GmbH*'.[91]

The nature of the agency agreement that CWM was claimed to have was not explained nor defined, and it was not indicated either in terms of which European financial services legislation such agency agreement was in force and permitted the provision of the disputed investment advice. Nor evidence of any agency agreement existing between CWM and any other party was produced during the proceedings of this case as indicated above.

Other observations & synopsis

[90] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN

[91] Para. 39, Section E titled '*CWM and Trafalgar International GmbH*' of Stewart Davies's affidavit - *A fol.* 165

As explained above, albeit being selected by the Complainant, the investment adviser was however accepted, at MPM's sole discretion, to act as the Complainant's investment advisor within the Scheme's structure.

The responsibility of MPM in accepting and allowing CWM to act in the role of investment advisor takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM. As indicated above, MPM accepted CWM when, as verified in the Complainant's Application Form for Membership, it was being stated in MPM's own application form that CWM was a regulated entity. However, no evidence has transpired that this was the case as amply explained above.

MPM allowed and left uncontested, in its own Application Form for Membership of the Retirement Scheme and during the tenure of CWM, key information with respect to the regulatory status of the investment advisor.

The Service Provider argued *inter alia* in its submissions that it was not required, in terms of the rules, to require the appointment of a regulated advisor during the years 2013-2015 under the SFA regime and until the implementation of Part B.9 titled '*Supplementary Conditions in the case of entirely Member Directed Schemes*' of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA updated in December 2018, where the latter clearly introduced the requirement for the investment advisor to be regulated.[92]

The Arbiter notes in this regard that in his affidavit, Steward Davies highlighted that:

'There was no law or rule requiring Momentum to carry out any due diligence or ensure that CWM/Trafalgar was licensed'. [93]

However, the Arbiter strongly believes that the aspect of scrutinising an investment advisor known to the RSA and Trustee to be operating in relation to a retirement scheme, impinges on the RSA and Trustee and their duty of care and professional diligence. This goes beyond the mere legalistic approach of shedding off responsibility by interpreting regulatory rules, which are in the

[92] *A fol.* 166
[93] *Ibid.*

first place intended to establish the minimum standards expected of a licensed operator, in such a way as to avoid responsibility.

The Arbiter wants to underscore that the compliance with regulatory rules does not substitute the further obligations that an RSA and Trustee of a retirement scheme have towards the members of the scheme. As amply stated earlier in this decision under the section titled *'The legal framework'*, a Trustee must act diligently and professionally in the same way as a bonus paterfamilias. A *bonus paterfamilias* does not abdicate from his responsibilities to suit his interests.

The appointment of an entity such as CWM as investment advisor meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where an adequately regulated advisor is appointed. An adequately regulated financial advisor is subject to, for example, fitness and properness assessments, conduct of business requirements as well as ongoing supervision by a financial services regulatory authority. MPM, being a regulated entity itself, should have been duly and fully cognisant of this. It was only in the best interests of the Complainant for MPM to ensure that the Complainant had correct and adequate key information about the investment advisor.

Besides the issue of the regulatory status of the advisor, MPM also allowed and left uncontested important information, which was convoluted, misleading, unclear and lacking, as explained above, with respect to the investment advisor, namely in relation to:

- **CWM's alleged role as agent of another party, and the respective responsibilities of CWM and its alleged principal;**
- **the entity actually taking responsibility for the investment advice given to the Complainant as more than one entity was at times mentioned with respect to investment advice;**
- **the distinctions between CWM, Inter-Alliance and Trafalgar.**

It is also to be noted that apart from the above, MPM had itself a business relationship with CWM, having accepted it to act as its introducer of business.

Such relationship gave rise to potential conflicts of interest, where an entity whose actions were subject to certain oversight by MPM on one hand was, on the other hand, channelling business to MPM.

Even in case where, under the previous applicable regulatory framework, an unregulated advisor was accepted by the trustee and scheme administrator to provide investment advice to the member of a member-directed scheme (on the basis of clear understanding by the member of such unregulated status and implications of such, and the member's subsequent clear consent for such type of advisor), **one would, at the very least, reasonably expect the retirement scheme administrator and trustee of such a scheme to exercise even more caution and prudence in its dealings with such a party in such circumstances.**

This is even more so when the activity in question, that is, one involving the recommendations on the choice and allocation of underlying investments, has such a material bearing on the financial performance of the Scheme and the objective to provide for retirement benefits.

It would have accordingly been only reasonable, to expect the trustee and retirement scheme administrator, as part of its essential and basic obligations and duties in such roles, to have an even higher level of disposition in the probing and querying of the actions of an unregulated investment adviser in order to ensure that the interests of the member of the scheme are duly safeguarded and risks mitigated in such circumstances.

The Arbiter does not have comfort that such level of diligence and prudence has been actually exercised by MPM for the reasons already stated in this section of the decision.

B. <u>The permitted portfolio composition</u>

Investment into Structured Notes

Preliminary observations

The sale of, and investment into, structured notes is an area which has attracted various debates internationally including reviews by regulatory authorities over

the years. Such debates and reviews have been occurring even way back since the time when the Retirement Scheme was granted registration in 2011.

The Arbiter considers that caution was reasonably expected to be exercised with respect to investments in, and extent of exposure to, such products since the time of the Scheme's registration. Even more so when taking into consideration the nature of the Retirement Scheme and its specific objective.

Nevertheless, the Complainant's investment portfolio constituted at times solely or predominantly of structured notes as detailed in the section titled *'Underlying Investments'* above.

A typical definition of a structured note provides that:

'*A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index*'.[94]

A structured note is further described as

'*a debt obligation – basically like an IOU from the issuing investment bank – with an embedded derivative component; in other words, it invests in assets via derivative instruments'*.[95]

The Complainant presented a fact sheet of the *Leonteq 4 Years Step-Up Autocall*[96] which reflects a structured note bought in November 2016 indicated in the table of investments presented by the Service Provider during the proceedings of the case.[97]

As part of the investigatory powers granted under Cap. 555, the Office of the Arbiter for Financial Services was also able to trace fact sheets publicly available over the internet in respect of some other structured notes featuring in the Complainant's investment portfolio. These are the fact sheets in respect of the

[94] https://www.investopedia.com/terms/s/structurednote.asp
[95] https://www.investopedia.com/articles/bonds/10/structured-notes.asp
[96] *A fol.* 80-82
[97] *A fol.* 236

structured notes with ISIN XS0964845266[98] and XS0982016700[99] which formed part of the Complainant's portfolio.[100]

Apart from *inter alia* the credit risk of the issuer and the liquidity risk, other risks that are typically highlighted (for structured notes with no guarantees on the return of the original capital invested), include the risk that the investor could possibly receive less than the original amount invested or potentially even losing all of the investment as was the case in respect of the fact sheets sourced by the OAFS.

The underlying asset to which the structured notes were linked to typically comprised stocks or indices. A particular feature emerging of the type of structured notes invested into, involved the application of capital buffers and barriers. For example, the fact sheets sourced described and included warnings that the invested capital was at risk in case of a particular event occurring. Such event typically comprised a fall, observed on a specific date of more than a specified percentage, in the value of any underlying asset to which the structured note was linked. The fall in value would typically be observed on maturity/final valuation of the note.

The fact sheets indeed highlighted the risk that where the performance of the worst performing underlying measured a fall of a percentage (of 50%) as specified in the respective fact sheet, investors would receive a capital amount equivalent to the performance of the worst performing asset and capital would be lost.

It is accordingly clear that there were certain specific risks in the structured products invested into and there were material consequences if just one asset, out of a basket of assets to which the note respectively was linked, fell foul of the indicated barrier. **The implication of such a feature should have not been overlooked nor discounted. Given the said particular features neither should have comfort been derived regarding the adequacy of such products just from**

[98] https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-Retail-Fixed-Income-Notes-Fact-Sheet1.pdf

[99] https://www.scribd.com/document/366660737/Nomura-Global-Phoenix-Autocallable-Factsheet

[100] *A fol.* 236

the fact that the structured notes were linked to a basket of quoted shares or indices.

Excessive exposure to structured products and to single issuers in respect of the Complainant's portfolio

The portfolio of investments in respect of the Complainant comprised at times solely or predominantly of structured products. This clearly emerges from the Table of Investments forming part of the '*Investor Profile*' provided by the Service Provider as detailed in the section titled *'Underlying Investments'* above.

In addition, high exposures to the same single issuer/s, both through a singular purchase and/or through cumulative purchases in products issued by the same issuer emerged in the Complainant's portfolio.

Even in case where the issuer of the structured product was a large institution, the Arbiter does not consider this to justify or make the high exposure to single issuers acceptable even more so in the Scheme's context. The maximum limits relating to exposures to single issuers outlined in the MFSA rules and MPM's own Investment Guidelines did not make any distinctions according to the standing of the issuer. Hence, the maximum exposure limits to single counterparties should have been applied and ensured that they are adhered to across the board.

Context of entire portfolio and substance of MPM's Investment Guidelines

For the avoidance of doubt and with reference to the emphasis made by the Service Provider for investments to be seen in the context of the entire portfolio,[101] the Arbiter would like to point out that consideration has indeed been duly made of the entire investment portfolio held in the Complainant's individual account within the Scheme including how such portfolio was constituted at inception and (to the extent possible on the basis of the information provided), how the constitution of the portfolio progressed over the years.

Furthermore, the Arbiter has also considered what percentage of the policy value each respective underlying investment constituted at the time of their

[101] Affidavit of Steward Davies - *A fol.* 163

respective purchase, on the basis of the information provided by the Service Provider itself in the table of *'Investor Profile'* attached to its submissions.[102] Consideration was then further made of how the said percentage allocation, reflected the maximum limits outlined in the investment restrictions and diversification requirements in the MFSA Rules as well as MPM's own Investment Guidelines that were applicable at the time of purchase.

It is to be pointed out that in the case of a member directed scheme, each member would have his/her own individual account within the retirement scheme, with such account having its own specific and distinct investment portfolio. Hence, it is only reasonable and correct for the principles, including the investment restrictions specified for the Retirement Scheme to have been applied and adhered to at the level of the individual account. Failure to do so would have meant that the safeguards emanating from the investment conditions and diversification requirements would have not been adopted and ensured in practice in respect of the individual member's portfolio, defeating the aim of such requirements in the first place.

The application of investment restrictions at a general level, that is at scheme level without application on an individual account basis, would only make sense and be reasonable in the context of, and where, the members of such a scheme are participating in the same portfolio of assets held within the scheme and not in the circumstance where the members have their own individual separate investment portfolios, as was the case in question.

An analogy can be made in this regard to the market practice long adopted in the context of collective investment schemes, namely, in respect of *stand-alone schemes*[103] and *umbrella schemes*.[104] Whilst investment restrictions would be applied at scheme level in the case of a stand-alone scheme (given that the investors into such scheme would be participating, according to their respective share in the scheme, in the performance of the same underlying investment portfolio), in the case of an umbrella fund, the investment restrictions are not applied at scheme level but at the sub-fund level and would indeed be tailored

[102] *A fol.* 236

[103] i.e., a collective investment scheme without sub-funds.

[104] i.e., a collective investment scheme with sub-funds, where each sub-fund would typically have its own distinct investment policies and separate and distinct investment portfolios.

for each individual sub-fund given that each sub-fund would have its own distinct and separate investment portfolio and investment policy.

As to the substance of MPM's Investment Guidelines, it is noted that the Service Provider seemed to somehow downplay the importance and weighting of its own Investment Guidelines by stating that these were just to provide guidance *'but should not be applied so strictly so as to stultify the ultimate objective, that the investment is placed in the best interests of the member'*.[105]

Apart that it is contradictory to infer that by not adhering with the guidelines one would be acting in the best interests of the member - given that the scope of such guidelines should have been, in the first place, to ensure that the portfolio is diversified and risks are spread and thus to ensure the best interests of the member - it has, in any case, not been demonstrated or justified in any way what instances were somehow deemed appropriate by the Service Provider where it was more in the best interests of the member to depart and not comply with the investment guidelines rather than to ensure adherence thereto.

It is further to be noted that the specific parameters and limits outlined in MPM's Investment Guidelines were themselves stipulated in MPM's key documentation and as specified in the same documentation, MPM itself had to ensure adherence with the specified limits and conditions in its role of Trustee of the Retirement Scheme.

Furthermore, no qualifications or any disclaimers regarding the compliance or otherwise with such guidelines have emerged in this case. Neither has it emerged in what circumstances, divergences could possibly be permitted, if at all. Hence, the stipulated Investment Guidelines were binding and should have been followed accordingly. Even if one had to, for the sake of the argument only (which was not the case as outlined above), somehow construe that these were *'just'* guidelines and not strict rules as the Service Provider tried to argue,[106] one would in any case reasonably not expect any major departure from the limits and maximum exposures specified in the stipulated guidelines.

[105] *A fol.* 164 - Para. 32 of the affidavit of Stewart Davies.
[106] *A fol.* 164 - Para. 32 of the affidavit of Stewart Davies.

With respect to the Complainant's portfolio, it is considered that not only were various investments not reflective of MPM's Investment Guidelines but, on multiple occasions, there were material departures from such guidelines where the maximum limits were materially exceeded as outlined further below.

Portfolio not reflective of the MFSA rules

The high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio, jarred with the regulatory requirements that applied to the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'*, ('the Directives') which applied from the Scheme's inception in 2011 until the registration of the Scheme under the RPA on 1 January 2016. The applicability and relevance of these conditions to the case in question was highlighted by MPM itself.[107]

SOC 2.7.1 of Part B.2.7 of the Directives required *inter alia* that the assets were to '*be invested in a prudent manner and in the best interest of beneficiaries …*'.

SOC 2.7.2 in turn required the Scheme to ensure *inter alia* that, the assets of a scheme are '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole*'[108] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[109]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[110] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*[111] where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit

[107] Para. 21 & 23 of the Note of Submissions filed by MPM - *A fol.* 220
[108] SOC 2.7.2 (a)
[109] SOC 2.7.2 (b)
[110] SOC 2.7.2 (c)
[111] SOC 2.7.2 (e)

institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.[112]

Despite the standards of SOC 2.7.2, MPM allowed the portfolio of the Complainant to comprise at times solely or predominantly of structured products.

In the case of the Complainant, it has also clearly emerged that individual exposures to single investments and issuers were at times even higher than 30%, this being the maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above. It is noted that the investment portfolio included, for example, an exposure of 37.92% of the policy value to single structured notes at the time of purchase (such as in the case of the *RBC 2Y Retail Income* and the *Commerzbank 10% GBL Phar Inc NT* respectively) and collective exposures to a single issuer above 30% of the policy value (such as to EFG) through multiple purchases).[113]

The table of investments further indicates material positions into seemingly high-risk investments where the high risk is reflected in the high rate of return - for example of 14%, 10% and 8.5% as featuring in the name and fact sheets of the structured notes constituting the Complainant's investment portfolio.

*Portfolio not reflective of MPM's **own** Investment Guidelines*

In its submissions MPM produced a copy of the Investment Guidelines marked 'January 2013' and 'Mid-2014', which guidelines featured in the Application Form for Membership, and also Investment Guidelines marked '2015', '2016', 'Mid-2017', 'Dec-2017' and '2018' where, it is understood the latter respectively also formed part of the Scheme's documentation such as the Scheme Particulars issued by MPM.

[112] SOC 2.7.2 (h)(iii) & (v)
[113] *A fol.* 236

Despite that the Service Provider claimed that the investments made in respect of the Complainant were in line with the Investment Guidelines, **MPM has however not adequately proven such a claim**.

It is unclear how a portfolio composition solely or predominantly invested in structured notes truly satisfied certain conditions specified in MPM's own Investment Guidelines such as:

(i) **The requirement that the member's assets had to be '*predominantly invested in regulated markets*'**.

This was a condition which prevailed in all of the presented MPM's Investment Guidelines since January 2013 till that of 2018.[114]

The said requirement of being '*predominantly invested in regulated markets*' meant, and should have been construed to mean, that investments had to be predominantly invested in listed instruments, that is financial instruments that were admitted to trading. With reference to industry practice, the terminology of '*regulated markets*' is referring to a regulated exchange venue (such as a stock exchange or other regulated exchange).

The term '*regulated markets*' is in fact commonly referred to, defined and applied in various EU Directives relating to financial services, including diversification rules applicable on other regulated financial products.[115] Hence, the interpretation of '*regulated markets*' has to be seen in such context.

The reference to '*predominantly invested in regulated markets*' cannot be interpreted as referring to the status of the issuers of the products and it is typically the product itself which has to be traded on the regulated market and not the issuer of the product.

[114] Investment Guidelines attached to the affidavit of Stewart Davies - *A fol.* 203-214

[115] Such as UCITS schemes - the Undertakings for Collective Investments in Transferable Securities (UCITS) Directive (Directive 2009/65/EC as updated). The Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EC as repealed by Directive 2014/65/EU) also includes a definition as to what constitutes a '*regulated market*'.

Moreover, a look through approach, could not either be sensibly applied to the structured notes for the purposes of such condition taking into consideration the nature and particular features of the structured notes invested into as explained above.

No evidence was submitted that predominantly the portfolio, which comprised solely/mostly of structured notes, constituted listed structured notes in respect of the Complainant. On its part, the Service Provider did not prove that the portfolio of the Complainant was '*predominantly invested in regulated markets*' on an ongoing basis.

Furthermore, when investment in unlisted securities was itself limited to 10% of the Scheme assets, as stipulated throughout MPM's own Investment Guidelines for 2013 to 2018, it is unclear how the Trustee and Scheme Administrator chose to allow higher exposures (as indicated in this section) to structured notes, a debt security, which are typically unlisted.

(ii) **The requirement relating to the liquidity of the portfolio.**

The Investment Guidelines of MPM marked January 2013 required no more than a '*maximum of 40% of the fund*[116] *in assets with liquidity of greater than 6 months*'.

This requirement remained, in essence, also reflected in the Investment Guidelines marked 'Mid-2014' which read '*Has a maximum of 40% of the fund in assets with expected liquidity of greater than 6 months,*' as well as in the subsequent Investment Guidelines marked 2015 till 2018 which were updated by MPM and tightened further to read a '*maximum of 40% of the fund in assets with expected liquidity of greater than 3 months but not greater than 6 months*'.

It is evident that the scope of such requirement was to ensure the liquidity of the portfolio as a whole by having the portfolio predominantly (that is, at least 60%) exposed to liquid assets which could be easily redeemed within a short period of time, that is 3-6 months (as reflected in the

[116] The reference to '*fund*' is construed to refer to the member's portfolio.

respective conditions) whilst limiting exposure to those assets which take longer to liquidate to no more than 40% of the portfolio.

With reference to the fact sheets sourced in the Complainant's portfolio, it is noted that the structured notes invested into typically had a maturity or investment term of 2 to 5 years as evidenced in the product fact sheets. The bulk of the assets within the policy was, at times, invested into a few structured notes as featuring in the table of investments presented by MPM. It is unclear how the 40% maximum limit referred to above could have been satisfied in such circumstances where the portfolio was predominantly invested into structured notes which themselves had long investment terms.

It is further noted that the possibility of a secondary market existing for structured notes meant that a buyer had to be first found in the secondary market in case one wanted to redeem a holding into the structured note prior to its maturity. Indeed, the fact sheet of the Nomura structured note stated *inter alia* that the structured note was *'intended to be held for the entire period'* of its investment terms of 5 years.[117]

The secondary market furthermore could not have provided an adequate level of comfort with respect to liquidity.

There are indeed various risks highlighted in relation to the secondary market as highlighted in the fact sheets sourced.

MPM should have been well aware about the risks associated with the secondary market. It has indeed itself seen the material lower value that could be sought on such market in respect of the structured notes invested into.

The lower values of the structured notes on the secondary market were indeed affecting the value of the Scheme as can be deduced from the respective Annual Member Statements that MPM itself produced.

[117] https://www.scribd.com/document/366660737/Nomura-Global-Phoenix-Autocallable-Factsheet

Hence, no sufficient comfort about liquidity could have possibly been derived with respect to the secondary market in case of unlisted structured notes.

The Arbiter is not accordingly convinced that the conditions relating to liquidity were being adequately adhered to either, nor that the required prudence was being exercised with respect to the liquidity of the portfolio, when considering the above-mentioned aspects and when keeping into context that the portfolio of investments that was allowed to develop within the Retirement Scheme was, at times, solely/ predominantly invested into the said structured notes.

It is also to be noted that <u>even if one had to look at the composition of the Complainant's portfolio purely from other aspects, there is still undisputable evidence of non-compliance with other requirements detailed in MPM's own Investment Guidelines</u>. This is particularly so with respect to the requirements applicable regarding the proper diversification, avoidance of excessive exposure and permitted maximum exposure to single issuers.

Table A below shows some examples of excessive single exposures allowed within the portfolio of the Complainant as emerging from the respective '*Table of Investments*' forming part of the '*Investor Profile*' produced by MPM as part of its submissions.

Table A – Examples of Excessive Exposure to a Single Issuer of Structured Notes ('SNs')

Exposure to single issuer in % terms of the policy value at time of purchase	*Issuer*	*Date of purchase*	*Description*
37.92%	RBC	Oct 2013	1 SN issued by RBC constituted 37.92%, at the time of purchase in Oct 2013.

Exposure to single issuer in % terms of the policy value at time of purchase	*Issuer*	*Date of purchase*	*Description*
37.92%	Commerzbank	Oct 2013	1 SN issued by Commerzbank constituted 37.92%, at the time of purchase in Oct 2013.
Over 31.70%	EFG	Apr 2015	2 SNs issued by EFG respectively constituted 15.85% each of the policy value at the time of purchase in April 2015. (This is over and above the previous already existing high exposure to EFG through other earlier previous purchases).

The fact that such high exposures to single investments and single counterparties was allowed in the first place indicates, in itself, the lack of prudence and excessive exposure and risks to single counterparties that were allowed to be taken on a general level, particularly, when no capital guarantees were involved.

Indeed, no evidence has been produced during the proceedings of this Case that these products had underlying guarantees. **The extent of losses experienced actually indicate that there were no guarantees on the capital invested (which guarantees could have possibly justified high exposures) as otherwise such losses on the principal would have not occurred. (As indicated above, the exposures allowed by MPM were even higher than the 30% maximum limit on deposits held with any one bank as reflected in MFSA's rules).**

The Arbiter notes that the Service Provider has, along the years, revised various times the investment restrictions specified in its own '*Investment Guidelines*' with respect to structured products, both in regard to maximum exposures to

structured products and maximum exposure to single issuers of such products. The exposure to structured notes and their issuers was indeed progressively and substantially reduced over the years in the said Investment Guidelines.

The specified maximum limit of 66% of the portfolio value in structured notes having underlying guarantees which featured in the '*Investment Guidelines*' marked 2015[118] was reduced to 40% of the portfolio's value in the '*Investment Guidelines*' marked December 2017[119] and subsequently reduced further to 25% in the '*Investment Guidelines*' for 2018.[120]

Similarly, the maximum exposure to single issuers for '*products with underlying guarantees*', that is structured products as referred to by MPM itself, in the '*Investment Guidelines*' marked Mid-2014 and 2015 specifically limited maximum exposure to the same issuer default risk to no more than (33.33%), one third of the portfolio. The maximum limit to such products was subsequently reduced to 25%, one quarter of the portfolio, in the '*Investment Guidelines'* marked 2016[121] and mid-2017,[122] reduced further to 20% in the '*Investment Guidelines*' marked December 2017 and subsequently to 12.5% in the '*Investment Guidelines*' for 2018.

Even before the Investment Guidelines of Mid-2014, MPM's Investment Guidelines of January 2013 <u>still limited exposure to individual investments (aside from collective investment schemes) to 20%</u>.

In the case reviewed, there were instances where the extent of exposure to single issuers was even higher than one third of the policy value as amply indicated in the above table.

There is clearly no apparent reason, from a prudence point of view, justifying such high exposures. Indeed, the Arbiter considers that the high exposure to structured products as well as to single investments/issuers in the Complainant's portfolio jarred, and did not reflect to varying degrees with one

[118] MPM's Investment Guidelines '2015' as attached to the affidavit of Stewart Davies
[119] MPM's Investment Guidelines 'Dec-2017' as attached to the affidavit of Stewart Davies
[120] MPM's Investment Guidelines '2018' as attached to the affidavit of Stewart Davies
[121] MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies
[122] MPM's Investment Guidelines 'Mid-2017' as attached to the affidavit of Stewart Davies

or more of MPM's own investment guidelines applicable at the time when the investments were made, most particularly with respect to the following guidelines:[123]

Investment Guidelines marked 'January 2013':
○ ***Properly diversified*** *in such a way as to* ***avoid excessive exposure****:*
▪ *If* ***individual investments*** *or equities are considered then* ***not more than 20% in any singular asset****, aside from collective investments.*
▪ *…*
▪ ***Singular structured products should be avoided due to the counterparty risk*** *but are acceptable as part of an overall portfolio.*
Investment Guidelines marked 'Mid-2014':
• *Where* ***products with underlying guarantees*** *are chosen,* ***no more than one third of the overall portfolio to be subject to the same issuer default risk****.*
In addition, ***further consideration needs to be given to*** *the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to* ***avoid excessive exposure****:* • *...* • ***To any single credit risk***

[123] Emphasis in the mentioned guidelines added by the Arbiter.

Investment Guidelines marked '2015':
• *Where **products with underlying guarantees** are chosen, i.e. **Structured Notes**, these will be **permitted up to a maximum of 66% of the portfolio's values**,*
*with **no more than one third** of the portfolio to be **subject to** the **same issuer default risk**.*
*In addition, **further consideration needs to be given to** the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to **avoid exposure**:* • *...* • ***To any single credit risk**.*
Investment Guidelines marked '2016' & 'Mid-2017':
• *Where **products with underlying Capital guarantees** are chosen, **i.e., Structured Notes**, these will be **permitted up to a maximum of 66% of the portfolio's values**,*
*with **no more than one quarter** of the portfolio to be **subject to** the **same issuer/ guarantor default risk**.*
• ***Where no such Capital guarantee exists**, investment will be **permitted up to a maximum of 50% of the portfolio's value**.* *…*
• *In addition, **further consideration needs to be given to** the following factors:* • *…*

• ***Credit risk of underlying investment**;* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to **avoid exposure**:* • *…* • ***To any single credit risk**.*

Besides the mentioned excessive exposure to single issuers, it is noted that additional investments into structured notes were observed[124] to have been allowed to occur within the Complainant's portfolio, in excess of the limits allowed on the overall maximum exposure to such products.

MPM's Investment Guidelines of 2015, 2016 and mid-2017 specifically mentioned a maximum limit of 66% of the portfolio value to structured notes. In the case reviewed, the Service Provider still continued to allow in 2015 and 2016 further investments into structured products at one or more instances when the said limits should have applied. The additional investments also occurred despite the portfolio being already exposed to structured notes more than the said percentage at the time when the additional purchase was being made.

For the reasons amply explained, the Arbiter has no comfort that MPM's role as RSA and Trustee in ensuring the Scheme's investments are managed in accordance with relevant legislation and regulatory requirements and in accordance with its own documentation, has been truly achieved by MPM generally, and at all times, in respect of the Complainant's investment portfolio.

*Portfolio invested into Structured Products **Targeted for Professional Investors***

Besides the issues mentioned above, there is also the aspect relating to the nature of the structured products and whether the products allowed within the portfolio comprised structured notes aimed solely for professional investors.

[124] '*Table of Investments'* in the '*Investor Profile'* provided by MPM refers - *A fol.* 236

The Service Provider has not claimed that the Complainant, whose occupation was not even indicated in the Application Form for Membership, was a professional investor. No details have either emerged indicating the Complainant not being a retail investor.

The fact sheets sourced by the OAFS as indicated above clearly specify that the products were targeted for professional investors only.

With respect to the structured products issued by RBC, for example, the fact sheet clearly indicates that the investment was '*For Professional Investors Only'* with the '*Target Audience*' for such product being specified as '*Professional Investors Only*' as outlined in the '*Key Features*' section of the fact sheet.[125]

The references to '*Professional Investors only*' in the Fact Sheets cannot be referred to the marketed documentation and it is clear that such fact sheets were issued purposely for those investors who were eligible to invest in the product. It is also clear that such products were not aimed for retail investors but only for professional investors.

It is therefore considered that, in the case of the Complainant's portfolio, there is sufficient evidence resulting from multiple instances which show that his portfolio generally included investments not appropriate and suitable for a retail client and, hence, against his profile of a retail investor. It is clear that there was a lack of consideration by the Service Provider with respect to the suitability and target investor of the structured notes.

Such lack of consideration is not reflective of the principle of acting with '*due skill, care and diligence*' and '*in the best interests of*' the member as the relevant laws and rules mentioned above obliged the Service Provider to do.

Other observations & synopsis

The Service Provider did not help its case by not providing detailed information on the underlying investments as already stated in this decision. Although the Service Provider filed a *Table of Investments,* it did not provide adequate information to explain the portfolio composition and justify its claim that the

[125] https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-Retail-Fixed-Income-Notes-Fact-Sheet1.pdf

portfolio was diversified. It did not provide fact sheets in respect of the investments comprising the portfolio of the Complainant, and it did not demonstrate the features and the risks attached to the investments.

Various aspects had to be taken into consideration by the Service Provider with respect to the portfolio composition. Such aspects include, but are not limited to:

- the nature of the structured products being invested into and the effects any specific features of such products would have had on the investment as detailed above;
- the potential rate of returns as indicative of the level of risk being taken;
- the level of risks ultimately exposed to in the respective product and in the overall portfolio composition; and
- not the least, the issuer/counterparty risk being taken.

The extent of losses experienced on the capital of the Complainant's portfolio is in itself indicative of the failure in adherence with the applicable conditions on diversification and avoidance of excessive exposures. Otherwise, material losses, which are reasonably not expected to occur in a pension product whose scope is to provide for retirement benefits, would have not occurred.

Apart from the fact that no sensible rationale has emerged for limiting the composition of the pension portfolio solely/predominantly to structured products, no adequate and sufficient comfort has either emerged that such composition reflected the prudence expected in the structuring and composition of a pension portfolio.

Neither that the allocations were in the best interests of the Complainant or reflective of his risk profile of *'Low Risk'* and *'Medium'* Risk which, in itself, gives rise to potential confusion and inconsistencies. It is noted that the *'Attitude to Risk'* in the Annual Member Statements was indeed inconsistent with the Risk Profile indicated in the Application Form as it only indicated the risk attitude of the Complainant as *'Medium'* when the application form showed the Complainant being of low/medium risk. In any case, the portfolio is not

considered to be reflective of a medium risk profile let alone of the risk profile of the Complainant.

In the circumstance where the portfolio of the Complainant was solely/ predominantly invested into structured products with a high level of exposure to single investments/issuers, and for the reasons amply explained above, the Arbiter does not consider that there was proper diversification nor that the portfolio was at all times '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole*',[126] and '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[127]

Apart from the fact that the Arbiter does not have comfort that the portfolio was reflective of the conditions and investment limits outlined in the MFSA's Rules and MPM's own Investment Guidelines, **it is also being pointed out that over and above the duty to observe specific maximum limits relating to diversification as may have been specified by rules, directives or guidelines applicable at the time, the behaviour and judgement of the Retirement Scheme Administrator and Trustee of the Scheme is expected to, and should have gone beyond compliance with maximum percentages and was to, in practice, reflect the spirit and principles behind the regulatory framework and in practice promote the scope for which the Scheme was established.**

The excessive exposure to structured products and their issuers nevertheless clearly departed from such principles and cannot ultimately be reasonably considered to satisfy and reflect in any way a suitable level of diversification nor a prudent approach.

This is even more so when considering the crucial aim of a retirement scheme being that to provide for retirement benefits – an aspect which forms the whole basis for the pension legislation and regulatory framework to which the Retirement Scheme and MPM were subject to. The provision of retirement benefits was indeed the Scheme's sole purpose as reflected in the Scheme Particulars.

[126] SOC 2.7.2(a) of Part B.2.7 of the Directives.
[127] SOC 2.7.2(b) of Part B.2.7 of the Directives.

C. <u>The Provision of Information</u>

Whilst no evidence has emerged that the Complainant has not received the Annual Member Statements for the years 2015/2016 as claimed, however, the Arbiter would like to comment on the lack of information alleged by the Complainant regarding his investments and his alleged lack of *'understanding of where my funds have been invested/lost'*.[128]

With respect to reporting to the member of the Scheme, MPM mentioned and referred only to the Annual Member Statement in its submissions. As explained above, the said annual statements issued by the Service Provider to the Complainant are however highly generic reports which only listed the underlying life assurance policy and included no details of the underlying investments, that is, the structured notes comprising the portfolio of investments.[129]

Hence, the extent and type of information sent to the Complainant by MPM as a member of the Scheme in respect of his underlying investments is considered to have been lacking and insufficient.

SOC 9.3(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes of 1 January 2015 already provided that, in respect of member-directed schemes, '*a record of all transactions (purchases and sales) occurring in the member's account during the relevant reporting period should be provided by the Retirement Scheme Administrator to the Member at least once a year and upon request …*'.

It is noted that the Pension Rules for Personal Retirement Schemes under the RPA became applicable to MPM on 1 January 2016 and that, as per the MFSA's communications presented by MPM,[130] Part B.9 of the said rules did not become effective until the revised rules issued in 2018.

Nevertheless, it is considered that even where such condition could have not strictly applied to the Service Provider from a regulatory point of view, the Service Provider as a Trustee, obliged by the TTA to act as a *bonus paterfamilias* and in the best interests of the members of the Scheme, should have felt it its

[128] *A fol.* 4
[129] *A fol.* 137-140
[130] MFSA's letter dated 11 December 2017, attached to the Note of Submissions filed by MPM in 2019.

duty to provide and report fully to members adequate information on the underlying investment transactions.

Moreover, prior to being subject to the regulatory regime under the RPA, the Service Provider was indeed already subject to regulatory requirements relating to the provision of adequate information to members such as the following provisions under the SFA framework:

- Standard Operating Conditions 2.6.2 and 2.6.3 of Section B.2 of the Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002[131] respectively already provided that:

  '2.6.2 *The Scheme Administrator shall act with due skill, care and diligence in the best interests of the Beneficiaries. Such action shall include:*

  …

  b) ensuring that contributors and prospective contributors are provided with adequate information on the Scheme to enable them to take an informed decision…';

  '2.6.3 *The Scheme Administrator shall ensure the adequate disclosure of relevant material information to prospective and actual contributors in a way which is fair, clear and nor misleading. This shall include:*

  …

  b) reporting fully, accurately and promptly to contributors the details of transactions entered into by the Scheme …'.

There is no apparent and justified reason why the Service Provider did not report itself on key information such as the composition of the underlying investment

[131] Condition 2.2 of the Certificate of Registration issued by the MFSA to MPM dated 28 April 2011 included reference to Section B.2 of the said Directives.

portfolio which it had in its hands as the trustee of the underlying life assurance policy held in respect of the Complainant.

The general principles of acting in the best interests of the member and those relating to the duties of trustee as already outlined in this decision[132] and to which MPM was subject to, should have prevailed and should have guided the Service Provider in its actions to ensure that the Member was provided with an adequate account of the underlying investments within his portfolio.

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainant **cannot** just be attributed to the under-performance of the investments as a result of general market and investment risks and/or the issues alleged against one of the structured note providers, as MPM has *inter alia* suggested in these proceedings.[133]

There is sufficient and convincing evidence of deficiencies on the part of MPM in the undertaking of its obligations and duties as Trustee and Retirement Scheme Administrator of the Scheme as amply highlighted above which, at the very least, impinge on the diligence it was required and reasonably expected to be exercised in such roles.

It is also evidently clear that such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced. The actions and inactions that occurred, as explained in this decision, enabled such losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.

Had MPM undertaken its role adequately and as duly expected from it, in terms of the obligations resulting from the law, regulations and rules stipulated thereunder and the conditions to which it was subject to in terms of its own Retirement Scheme documentation as explained above, such losses would have been avoided or mitigated accordingly.

[132] The section titled '*Responsibilities of the Service Provider*'.
[133] For example, in the reference to litigation filed against Leonteq - *A fol.* 168

The actual cause of the losses is indeed linked to and cannot be separated from the actions and/or inactions of key parties involved with the Scheme, with MPM being one of such parties.

In the particular circumstances of the cases reviewed, the losses experienced on the Retirement Scheme are ultimately tied, connected and attributed to events that have been allowed to occur within the Retirement Scheme which MPM was duty bound and reasonably in a position to prevent, stop and adequately raise as appropriate with the Complainant.

Final remarks

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

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

It is considered that, had there been a careful consideration of the contested structured products and extent of exposure to such products and their issuers, the Service Provider would and should have intervened, queried, challenged and raised concerns on the portfolio composition recommended and not allow the overall risky position to be taken in structured products as this ran counter to the objectives of the retirement scheme and was not in the Complainant's best interests amongst others.

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

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

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly, when it came to the dealings and aspects involving the appointed investment adviser; the oversight functions with respect to the Scheme and portfolio structure; as well as the reporting to the Complainant on the underlying portfolio. It is also considered that there are various instances which indicate non-compliance by the Service Provider with applicable requirements and obligations as amply explained above in this decision.

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[134] of the Complainant who had placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

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

Cognisance needs to be taken, however, of the responsibilities of other parties involved with the Scheme and its underlying investments, particularly, the role

[134] Cap. 555, Article 19(3)(c)

and responsibilities of the investment advisor to the Member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be partially held responsible for the losses incurred.

Compensation

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

In the particular circumstances of this case, considering that the Service Provider had the last word on the investments and acted in its dual role of Trustee and Retirement Scheme Administrator, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited, to be held responsible for seventy percent of the net realised losses sustained by the Complainant on his investment portfolio.

The Arbiter notes that the latest valuation and list of transactions provided by the Service Provider in respect of the Complainant is not current. Besides, no detailed breakdown was provided regarding the status and performance of the respective investments within the disputed portfolio.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for the purpose of this decision in order for the performance on the whole investment portfolio to be taken into consideration.

The Service Provider is accordingly being directed to pay the Complainant compensation equivalent to 70% of the sum of the Net Realised Loss incurred within the whole portfolio of underlying investments constituted under Continental Wealth Management and allowed by the Service Provider.

The Net Realised Loss calculated on such portfolio shall be determined as at the date of this decision and calculated as follows:

(i) For every such investment it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised) inclusive of any realised currency gains or losses. Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

(ii) In case where an investment in (i) above is calculated to have rendered a profit after taking into consideration the amount realised (inclusive of any total interest or other total income received from the respective investment and any realised currency gains or losses), such realised profit shall be accumulated from all such investments and netted off against the total of all the realised losses from the respective investments calculated as per (i) above to reach the figure of the Net Realised Loss within the indicated portfolio.

The computation of the Net Realised Loss shall accordingly take into consideration any realised gains or realised losses arising within the portfolio.

In case where any currency conversion/s is/are required for the purpose of finally netting any realised profits/losses within the portfolio which remain denominated in a different currency such conversion shall, if and where applicable, be made at the spot exchange rate sourced from the European Central Bank and prevailing on the date of this decision. Such a direction on the currency conversion is only being given in the very particular circumstances of this case for the purpose of providing clarity and enabling the calculation of the compensation formulated in this decision and avoid future unnecessary controversy.

(iii) Investments which were constituted under Continental Wealth Management in relation to the Scheme and are still held and remain open within the current portfolio of underlying investments as at, or after, the date of this decision are not the subject of the compensation stipulated above. This is without prejudice to any legal remedies the Complainant might have in future with respect to such investments.

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders Momentum Pensions Malta Limited to pay the indicated amount of compensation to the Complainant.

A full and transparent breakdown of the calculations made by the Service Provider in respect of the compensation as decided in this decision should be provided to the Complainant.

With legal interest from the date of this decision till the date of payment.

The expenses of this case are to be borne by the Service Provider.

Dr Reno Borg
Arbiter for Financial Services