

Before the Arbiter for Financial Services

Case No. 089/2019

YM

(‘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 3 May 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 submitted that the value of his Scheme had substantially reduced in value claiming that the failure in his Scheme and in the duty of care by MPM were in view of the following two key points:

- all of the investments were done in structured products, which he noted were originally described to him as income notes, that he has now come to understand are high risk investments suitable for '*professional investors only*', when his risk profile was Low, Medium to High Medium as per page 4 of MPM's Application Form for Membership;¹
- MPM accepted fund transfer instructions from companies, Continental Wealth Management ('CWM')/Premier Pension Solutions/Stephen Ward, with whom it had '*terms of business*', who were not licensed to provide investment advice in Spain.

The Complainant explained that in November 2013, MPM were entrusted with GBP44,000 from his UK pension funds which were invested into the Old Mutual International European Executive Bond. He claimed that the value of the investment was reduced by 60% of the original sum in less than two years due to MPM failing to honour their duties and commitments as trustee. The Complainant explained that the value had now reduced to around GBP17,000.

Due to the investment's low value, charges almost exceeded any gains at approximately 10%, with MPM and Old Mutual International ('OMI') continuing to drawdown fees at the same rate. The Complainant claimed that, at the same time, prohibitive exit fees by MPM and OMI have made it not viable to leave the Scheme.

The Complainant submitted that MPM, in its duties as trustee, received transfer instructions from unlicensed advisors and permitted investment exclusively into structured notes. He also mentioned that this also included '*changing the Risk Profile*'.²

The Complainant made reference to MPM's Scheme Particulars and quoted the following:

'In accordance with the Trustees, the Administrator will ensure that the Scheme Assets are invested in the best interests of the Member and that the Scheme Assets are properly diversified'.³

¹ A fol. 4 & 37

² A fol. 7

³ *Ibid.*

He also made reference to MPM's Application Form and quoted the following:

'The trustees need to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries.'

'Singular structured products should be avoided ... are acceptable as part of an overall portfolio.'

'Upon submission of said strategy, Momentum Pensions Malta Ltd. will consider the investment preferences and ensure that each Member's Scheme is managed in line with the relevant regulatory requirements of HMRC and the Malta Financial Services Authority.'

*'The trustee will retain ultimate power and discretion with regards to the investment decisions.'*⁴

The Complainant highlighted the following examples as failures in MPM's duty of care:

1. Alleged misleading statements in MPM's annual member statement of 2014 when the investment value had fallen by 25%. It was submitted that there was clearly something going wrong when MPM stated:

'Please note that certain underlying asset classes within the Investment, such as fixed term assets, may show a value that reflects the early encashment value, or potentially a zero value, prior to the maturity date. This will not reflect the true performance of the underlying assets.'

'We recommend that you discuss the Statement with your Professional Adviser and review your portfolio and risk profile to ensure that they are still aligned to your retirement goals.'

2. MPM's Annual Member Statement for 2015 featured, for the first time, his Risk Profile as *'Medium High'* even though in his MPM's Application Form this was indicated as *Low Medium to High Medium*. The Complainant submitted that this was suspicious given the timing as *'Medium High'* might accommodate accepting a wholly structured product investment.

⁴ *Ibid.*

The Complainant referred to the response received by MPM in respect of his complaint and noted the following:

- a. That with respect to MPM's statements referring to his refusal to let them share his complaint with Trafalgar, he stated that Trafalgar had told him to direct the complaint to MPM. He further submitted that he could have considered sharing information with Trafalgar but, on the basis of their communication, they could not be trusted as they are not licensed to give investment advice and so he has not accepted any of their advice;
- b. That with reference to the dealing instructions, MPM had considered that his investment instructions as submitted at the time provided diversification across a number of issuers and a significant range of underlying. The Complainant submitted that his risk profile, however, did not match investing in structured products only.
- c. That with reference to MPM's statement that his advisor, CWM, was appointed representative of Trafalgar International GmbH, the Complainant submitted that Trafalgar are not licensed to provide investment advice in Spain, nor were CWM, with whom MPM had terms of business.

Reference was made to various documents, statements and email communications as evidence supporting his complaint.⁵

The Complainant also pointed out that MPM maintained that his complaint should be with the advisors, CWM, now Trafalgar, after their demise. He submitted that, likewise, Trafalgar are not licensed to provide investment advice in Spain and that Trafalgar told him to direct the complaint to MPM.⁶

The Complainant requested that his pension scheme is restored back to its opening value of GBP44,190. He also requested that MPM's management charges totalling GBP3,000 (GBP500 per annum for the years since inception to-date), be returned as it was submitted that MPM has provided no value whilst his money had been in their trust. The Complainant also asked to be

⁵ A fol. 8

⁶ A fol. 4 & 55

compensated for the lost gains and asked for 2% per annum, that is, GBP5,000 lost. The exit fees were also requested to be waived.⁷

In its reply, MPM essentially submitted the following:⁸

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 preliminary, 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'.

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 17 October

⁷ A fol. 4

⁸ A fol. 146-150

2019, 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. That without prejudice to the above, if the Arbiter determines that the conduct complained of occurred after the entry into force of Cap. 555, more than two years have 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.
8. That in spite of this, MPM is not aware of any attempt by the Complainant to initiate proceedings against CWM or its officials, which advised the Complainant to invest in products which have led to the Complainant's alleged losses. 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.

That, furthermore, it is aware that the Complainant received compensation from CWM in 2015. It was also submitted that his statement on page 3 of the complaint form that he first had knowledge of the matters complained of in 2016 is therefore rebutted.

That any business introduced by CWM to MPM fell within the MFSA's Pension Rules for Service Providers as they relate to RSAs. MPM further replied that it does not work on a commission basis and that it 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.

MPM noted that the Complainant alleges, without substantiating such allegation in any manner, that the *'total value of that investment was reduced [...] due to the failing of Momentum to honour their duties and commitments as the "Trustee"'*.⁹

MPM replied that the Complainant has not brought any evidence to substantiate the causal link between MPM's alleged failures and the alleged losses sustained. In any event, MPM refutes the Complainant's claim that it failed to honour its duties and replied that, as will be proven, all investment guidelines were observed and all its obligations were fulfilled.

9. It was also stated that the Complainant also complains of the *'charges'* which *'almost exceed any gains'* and of the *'prohibitive Momentum and OMI exit charges'* which allegedly *'have made it unviable to leave the scheme'*. MPM submitted that the Complainant was informed of all applicable and associated fees and charges as per the policy documents sent to the Complainant on 2 December 2013 and the Premier Pension Solution SL fee structure which he signed on the 24 September 2013.

MPM submitted that the Complainant had never complained about the same. It further submitted that it is unacceptable that he should raise this complaint six years after having received all information, and also after he agreed to the investment. (Reference was made to the Fee Schedule attached and marked as *'Appendix 3'* to its reply and the email dated 2 December 2013 attached and marked as *'Appendix 4'*.)¹⁰

10. That the Complainant further complains that *'all the investments were in structured products, originally described to me as income notes, that I have*

⁹ A fol. 147

¹⁰ A fol. 148, 176 & 177

*now come to understand are high risk investments, "suitable for professional investors only".*¹¹

MPM refutes that it had provided any investment advice including advice to invest in any structured products (whether described as income notes or otherwise) and any allegedly high risk investments which supposedly, according to the Complainant, are only suitable for professional investors. MPM submitted that any advice provided to the Complainant was provided by CWM, i.e. his appointed advisor, and not by MPM. It was further submitted that, in any case, and without prejudice to the above, MPM considers that the Complainant's investment instructions as submitted to MPM by the Complainant and his advisor provided diversification across a number of issuers and a significant range of underlyings.

11. That the Complainant states *'My risk profile was Low/Medium to High Medium'*.¹² MPM clarified that the Complainant's highest risk category was *'Medium/High Risk'* which, as set out in the Momentum application form, means that *'there is a chance of more aggressive growth of your investment over the longer term but with an increased possibility of your investment value declining'*.¹³ MPM submitted that without prejudice to that stated in its reply, the investments made were in line with the Complainant's risk profile and in line with the guidelines applicable at the time of the Complainant's application.

12. That the Complainant further alleges that MPM accepted fund transfer instructions from companies, including, CWM and Premier Pension Solutions, which were not licensed to provide investment advice in Spain. MPM replied that it is the Complainant who is responsible to appoint a suitable advisor to provide investment advice, prior to transferring any existing retirement fund. It furthermore noted that (i) it is not in a position to reply to allegations directed towards Trafalgar and/or CWM; and (ii) Mr Anthony Downs and Flora Parker, both from CWM, declared that they had the appropriate regulatory authorisation to act as adviser.

¹¹ A fol. 148

¹² *Ibid.*

¹³ *Ibid.*

13. MPM refutes allegations that it did not act in accordance with the Scheme Particulars and any other obligations undertaken by MPM in the Complainant's favour through any other documentation made available to the Complainant. It submitted that, in any case, it is up to the Complainant to specify which obligations were so breached, in what manner and to bring evidence to substantiate such claim. MPM noted the Complainant quotes from the Momentum Scheme Particulars and the Momentum application form but fails to identify how MPM allegedly breached its obligations or what it undertook to perform in the afore-mentioned documents.
14. That, furthermore, it fails to understand how the wording in the annual statements could be deemed '*misleading*', particularly considering the wording cited by the Complainant himself whereby MPM recommends for the Complainant to '*discuss this Statements with your Professional Adviser and review your portfolio and risk profile to ensure that they are still aligned to your retirement goals*'. Reference was made to the copies attached to its reply marked as '*Appendix 5*'.¹⁴ It further submitted that the Complainant's failure to take heed of such recommendation and any losses suffered as a consequence should not be attributed to MPM. MPM noted that apart from the annual statements providing an annual update on the value of the investments at year end, the Complainant has also received the welcome letter dated 8 October 2013.
15. MPM submitted that it is unclear what the Complainant's allegation is regarding '*changing the Risk Profile*' and the subsequent statement which reads '*In the Momentum Annual Member Statement, ref. 2015 for the first time the Risk Profile is stated, in this case Medium High, even though the application was Low Medium to High Medium. This is suspicious given the timing, as Medium High might accommodate accepting a wholly structured product investment*'.¹⁵ MPM reserved the right to reply further if and when clarification is provided (without Complainant being allowed to widen the scope of his complaint).

¹⁴ A fol. 149 & 178

¹⁵ A fol. 149

16. MPM refuted the Complainant's claim that it provides '*no value*' in relation to the fees it charges for services rendered. MPM submitted that the fees charged by it are for the annual administration of the fund in line with MFSA and HMRC guidelines and the scheme rules. It was noted that as stated in its reply, the Complainant was aware of the fees chargeable and had never complained about the same.

Momentum does not provide investment advice

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

18. That it is not licensed to and does not provide investment advice and, furthermore, did not provide investment advice to the Complainant.

19. That this is clear from the application forms (attached as Appendix 1 and 2 to its reply) which specifically request the details of the Complainant's professional adviser. It was pointed out that the Complainant also declared that he acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice (as per declaration 8 on page 6 of the application form).

20. 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 of the application form).

Conclusion

21. MPM stated 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.

MPM also argued that it is not clear how the Complainant has calculated the figure claimed by him. The Service Provider submitted that the Complainant must clarify whether this amount takes into account the payment of fees and charges as well as the current value of investments.

MPM reserved the right to comment on the sum claimed by the Complainant at a later stage if and when such clarification is provided.

22. MPM submitted that it has not acted negligently, nor has it breached any of its obligations in any way.

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

Having heard the parties and seen all the documents and submissions

Considers:

Preliminary Plea regarding the competence of the Arbiter

Pleas number 3 and 4¹⁶ raised in the reply submitted by the service provider relate to the competence of the Arbiter under Article 21(1)(b) and (c) of Chapter 555 of the Laws of Malta.

The service provider submits in this regard 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 17 October 2019, therefore, beyond the two-year time period allowed by Article 21(1)(b). MPM submitted that for this reason, the complaint cannot be entertained.

MPM submitted further that without prejudice to the above, if the Arbiter determines that the conduct complained of occurred after the entry into force of Cap. 555, more than two years have 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.

Since the question of competence has been raised, the Arbiter will deal with these pleas first.

¹⁶ A fol. 146 and 147

Article 21(1)(b) of Chapter 555 of the Laws of Malta stipulates:

'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.'

Article 21(1)(b) provides 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 refers to the date when the alleged misconduct took place. The Complaint in question in essence relates to the investments undertaken under CWM at the time when MPM was in control as trustee of the Retirement Scheme.

In its reply, the Service Provider highlighted that it was aware that the Complainant received compensation from CWM in 2015 and, accordingly, rebutted the Complainant's statement in his complaint form that he first had knowledge of the matter complained of in 2016.¹⁷ In his complaint form to the Office of the Arbiter for Financial Services, the Complainant had indicated the 1 June 2016 as the date when he first had knowledge of the matter complained about.¹⁸

However, during the hearing of 16 September 2020, the Complainant stated *inter alia* that:

'I am being asked to confirm whether in 2015 I received a form of compensation from Continental Wealth Management. I reply no, they offered some payments and after about three payments the whole thing was very questionable. It was coming out of the pension fund. It was very unsatisfactory. I did not sign any agreement with CWM. They tried to compensate me for further losses. It was

¹⁷ A fol. 147

¹⁸ A fol. 3

£500 a month for three months, £1,500 in all. They were paid probably about 2016. I could give the exact date afterwards'.¹⁹

It was further stated during the same hearing, that:

'The payments by CWM were made with respect to the same losses that I am claiming now'.²⁰

In its additional note of submissions, MPM stated that:

'As Complainant himself confirmed under oath, he did receive three payments from CWM, each in the amount of GBP500. Complainant could not recall the exact dates when payments were received, but he said they were around 2015/2016. In fact, the payments made to him by CWM were made in: November 2015, December 2015; and January 2016'.²¹

The Service Provider also submitted that the Complainant was *'clearly aware of the issues with respect to his portfolio at least in November 2015, that is before Chapter 555 entered into force'.²²*

The complainant states in his note of final submissions that the compensation he received from CWM should not exculpate the service provider from its obligations as Trustee.

The question of competence as contemplated in Article 21(1)(b) of Chapter 555 of the Laws of Malta limits the competence of the Arbiter. The Arbiter was prohibited by law to take cognizance of complaints which are filed beyond the date of 18 April 2018 if the conduct complained of took place before the coming into force of the Act.

Taking into consideration the various submissions made by the parties involved throughout the proceedings of the case and especially the testimony of the Complainant during the hearing of 16 September 2020,²³ as referred to above in this decision, the Arbiter considers that, in this particular case, there is validity to the Service Provider's claim made in terms of Article 21(1)(b) of the Act.

¹⁹ A fol. 197-198

²⁰ A fol. 198

²¹ A fol. 277

²² *Ibid.*

²³ A fol. 196

In this regard, there is sufficient basis on which it can be considered that by 2015, the Complainant was aware of the problems and issues relating to his investment portfolio, which are the subject of this Complaint. From the valuation statements provided, it emerges that by 2015 all of the contested structured notes had matured or been redeemed and the losses on such products were realised by that date.

According to the statements provided, the following transactions in structured notes investments were undertaken:

- a. a purchase of GBP17,000 into the *RBC Biotechnology Income Note* on 13/11/2013, which investment was sold in 24/06/2014 for GBP9,000 and 15/07/2014;²⁴
- b. a purchase of GBP17,000 into the *Commerzbank Tech Pioneers Fixed Income* on 13/11/2013 which investment matured for GBP1,399.1 on 18/06/2015;²⁵
- c. a purchase of GBP9,000 into the *Nomura East to West 9* on 13/11/2013, which investment had a full call/early redemption for GBP10,350 on 18/06/2015;²⁶
- d. a purchase of GBP8,820 into the *Nomura 10% Energy Income Note Issue 2* on 03/07/2014, which investment matured for GBP383.23 on 27/07/2015;²⁷
- e. a purchase of GBP8,000 into the *Nomura 10% US Retail Income Note* on 24/07/2014, which investment matured for GBP3,298.87 on 26/08/2015.²⁸

The Investment Report dated 30/09/2015, presented during the proceedings of this case, indicate that, as at the report's date, the portfolio was '100%' into cash.²⁹

²⁴ A fol. 18 & 90

²⁵ A fol. 18, 90 & 61

²⁶ A fol. 18, 90 & 61

²⁷ A fol. 18; A fol. 57-61 (OMI Statement as at 30/06/2015) & A fol. 67

²⁸ A fol. 18 & 67

²⁹ A fol. 69-70

According to the *'Transaction Account Detail'* statement dated 31/12/2015, a purchase of GBP6,000 was made respectively into two collective investment schemes - on 3/11/2015 into the *Polar Capital Fund Healthcare Opps GBP NAV* and on 05/11/2015 into the *Marlborough Fund Managers Special Situations Acc A GBP*.³⁰ The *Investment Report* dated 31/12/2015 in turn shows an unrealised gain on these two funds.³¹

According to the *Valuation Statement* dated 30 June 2019,³² the portfolio constituted the said two funds which, as at the date of the said valuation statement, continued to experience an unrealised profit,³³ as well as another investment, the *OMI IE GBP Compass Portfolio 4*, which also had an unrealised gain at the time.³⁴

The losses complained about by the Complainant accordingly all involve the structured note investments which had matured or been redeemed by end 2015, at which time the Complainant started receiving compensation payments by CWM as indicated above.

Moreover, no details were provided, nor emerged, on what basis the Complainant is claiming that he first became aware of the issues complained about on the 1 June 2016, as indicated in his complaint.

In light of the evidence emerging with respect to the structured note investments as indicated above and on the basis of the compensation payments the Complainant started receiving from CWM by end 2015, the Complainant can be reasonably deemed to have had knowledge of the matters complained of by the end of 2015.

The Complainant filed a formal complaint with the OAFS dated 22 September 2019 and received on 17 October 2019.³⁵ This is later than two years from the coming into force of Article 21(1)(b) of the Act.

³⁰ A fol. 81

³¹ (An unrealised gain of +2.98% on the Marlborough Fund and +3.92% on the Polar Fund) - A fol. 76-78

³² A fol. 83

³³ (An unrealised gain of +36.91% on the Marlborough Fund and +53.19% on the Polar Fund) - A fol. 86

³⁴ (An unrealised gain of +1.23%) - A fol. 86

³⁵ A fol. 1 & 6

The Arbiter accordingly considers that the plea made by the Service Provider as based on Article 21(1)(b) of Chapter 555 of the Laws of Malta can be upheld in the circumstances of this particular case.

Since this plea has been upheld, there is no need for the Arbiter to consider plea number 4.

For the above-stated reasons, the plea made by the Service Provider as to the competence of the Arbiter in terms of Article 21(1)(b) of Chapter 555 of the Laws of Malta is being accepted and the Arbiter declares that he does not have the competence to deal further with this complaint.

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

**Dr Reno Borg
Arbiter for Financial Services**