

**Before the Arbiter for Financial Services**

**Case No. 101/2019**

**TS**

**(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 1 June 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'), established in the form of a trust and administered by MPM as its Trustee and Retirement Scheme Administrator.

**Having considered, in its entirety, the Complaint Form including attachments, filed by the Complainant,**

Where, in summary and in essence, the Complainant claimed that:

He sustained a substantial loss on his Retirement Scheme of GBP52,312 by 18 October 2019 on his initial premium of GBP87,614.46.<sup>1</sup> The Complainant

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<sup>1</sup> A fol. 6

claimed that the losses incurred on his Retirement Scheme were due to the ongoing negligence of MPM as the trustee of the Scheme.

He alleged *inter alia* that:

- MPM accepted business from Continental Wealth Management ('CWM'), which acted as his investment advisor in relation to the underlying investments of the Scheme, and which firm turned out to be an unlicensed investment advisory firm;
- MPM accepted dealing instructions with forged or photocopied signatures;
- the investments undertaken under CWM, at the time when MPM was in control as trustee of the Retirement Scheme, were done, without his consent, in high-risk instruments with such investments not being reflective of his low to medium risk profile and thus his portfolio was not invested in a prudent manner, was neither in his best interests, nor within the provisions of the applicable rules and MPM's Investment Guidelines.
- crippling fees and commissions in relation to his Retirement Scheme had reduced further the Scheme's value.

The Complainant requested the return of his initial investment of GBP87,614.46, together with all fees and charges, as if he was never invested. He also requested to opt out of the pension fund with no exit fee payable or with MPM paying the exit fee. The Complainant also made a request for the payment of a return of 4% growth per annum.<sup>2</sup>

**Having considered in its entirety the Service Provider's reply, including attachments,<sup>3</sup>**

Where, in summary and in essence, the Service Provider:

Refuted all the allegations made against it and replied that it was not responsible for any amount claimed by the Complainant as it claimed that it fulfilled, at all times, all its obligations with respect to the Complainant. The Service Provider submitted that it has not acted fraudulently or negligently nor breached any of

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<sup>2</sup> A fol. 4

<sup>3</sup> A fol. 158-162

its duties or obligations, also pointing out that the Complainant must prove the causal link between the alleged losses and MPM's actions or omissions.

It further submitted that CWM was a company registered in Spain and before it ceased to trade, acted as advisor to the Complainant. MPM claimed that CWM was authorised to trade in Spain and in France by Trafalgar International GmbH ('Trafalgar'). MPM further noted that it was not linked or affiliated in any manner to CWM or Trafalgar and that it is not licensed to provide investment advice.

Moreover, the Service Provider raised a preliminary plea namely that the Complaint relates to the conduct which occurred before the entry into force of Chapter 555 ('the Act') and, given that the Act came into force on the 18 April 2016, and the Complaint was filed on the 25 November 2019,<sup>4</sup> the Complaint was therefore beyond the two-year time period allowed by Article 21(1)(b) of the Act and could accordingly not be entertained.

MPM also submitted that, without prejudice to its submissions with respect to Article 21(1)(b), more than two years have lapsed since the conduct complained of took place, and the complaint could not be entertained either in terms of Article 21(1)(c) of the Act.

MPM submitted that it was CWM who advised the Complainant to invest in products which led to the Complainant's alleged losses. MPM further stated that it did not provide investment advice and that it was the Complainant who appointed CWM as his advisor. MPM accordingly claimed that it was not answerable with respect to the advice provided by CWM and that CWM/Trafalgar were the proper respondents to the Complainant's claim.

Moreover, it stated that its fees are fixed and that it neither receives commissions nor pays commissions to third parties. The Complainant was well aware of the applicable fees, which were specified in the policy documentation at the time of joining the Scheme.

With respect to the allegation of *'dealing instructions using forged or photocopied signatures,'* it is not clear whether such allegation is being made

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<sup>4</sup> The Complaint Form, dated 17 August 2019, was received by the Office of the Arbiter for Financial Services on 22 November 2019 and not on 25 November 2019.

against it or against CWM and, in any case, it noted that MPM does not complete dealing instructions as such instructions are simply provided to MPM by CWM.<sup>5</sup>

MPM further submitted that although the dealing instructions were alleged to have been made without the Complainant's consent, these, however, included the Complainant's signature, which signature matched that on the verified proof of identity document provided to MPM.

Also, the investment strategy was set and agreed to between CWM and the Complainant. MPM also stated that the investments were diversified and MPM observed all Investment Guidelines.

Moreover, the various allegations made by the Complainant were unsubstantiated.

Furthermore, MPM stated that it provided the Complainant with various communications. Apart from the welcome letter, MPM provided the Complainant with annual statements, which statements included an update on the value of the investments at each year and included a recommendation to discuss the performance of the investments with the investment advisor in order to ensure that the Complainant's investment portfolio and risk profile remain aligned with his retirement goals.

It also stated that its services did not extend to financial, legal, tax or investment advice, and that this was acknowledged by the Complainant in the declarations included in the Scheme's Application Form and in the disclosures included in the terms and conditions attached to the said form.

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

**Further Considers:**

*Preliminary Pleas regarding the competence of the Arbitrator*

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<sup>5</sup> A fol. 160

Pleas number 3 and 4<sup>6</sup> 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.

**Since the question of competence has been raised, the Arbiter will deal with it first.**

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

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

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

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 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 is 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.

Furthermore, in considering this plea, it is pertinent to note that in his final submissions of 28 September 2020, the Complainant *inter alia* remarked as follows:

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<sup>6</sup> A fol. 158 and 159

*'To reply to Mr Davies as to why my complaint was made as late as 2018, my initial concerns were made as far back as 2014 emails were sent to CWM, Trafalgar and subsequently to Momentum'.<sup>7</sup>*

It is also relevant to note that, in an email communication sent by the Complainant to CWM dated 08/04/2016, which was produced during the proceedings of the case, the Complainant had himself stated *inter alia* the following:

*'To say I'm disappointed would be to say the least.*

*I thought I was using a professional company who had many years' experience.*

*It appears that all you are doing is losing the hard-earned investment I made over my working years, the charges in effect you have made, appear to be for Pouring my money down the drain.*

*The contact before this year you made with me was in the same vein losses, I believe you stated that you would be looking at the position of the investments to bring them up to the initial investment I made'.<sup>8</sup>*

This means that the Complainant was aware of the losses more than a year before the entry into force of the Act.

Moreover, a review of the statements provided by the Complainant, particularly, the '*Historical Cash Account Transactions*' statement issued by Old Mutual International ('OMI') covering the period 18/12/2013 to 29/01/2018, as well as the '*Portfolio Valuation*' statement issued by OMI as at 09/10/2018, provide further insight of the Complainant's investment portfolio, the transactions undertaken and performance of the respective investments including when the losses actually materialised.<sup>9</sup>

Details of the investments that were purchased and the ensuing realised losses or profits (excluding dividends) on the respective investments following their redemption/maturity, as emerging from the official statements produced by the Complainant, are summarised in the table below:

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<sup>7</sup> A fol. 325

<sup>8</sup> A fol. 55

<sup>9</sup> A fol. 85-96 & A fol. 107-108

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold	Maturity/ Sale price	Realised Capital Loss/ Profit (excluding dividends)
SN	RBC Festive Income Note	13/01/2014	GBP	35,000	05/11/2014	29,575	-5,425
SN	BNP Athena Worst 5Y AC Safe	21/01/2014	GBP	16,000	21/07/2014	16,800	800
SN	Commerzbank US Energy Inc Note	31/01/2014	GBP	35,000	30/01/2015	2,898.70	-32,101.30
SN	Nomura 10% PA US Retail Inc	26/08/2014	GBP	18,000	26/08/2015	7,422.46	-10,577.54
SN	RBC Ecommerce Income AC Note	14/11/2014	EUR	10,000	23/08/2016	9,260	-740
SN	Leonteq 9% Multi Barrier Rev Conv 4 Equities	17/11/2014	EUR	13,000	06/04/2016	10,608	-2,392
SN	Leonteq November COSI Blue 2	24/11/2014	EUR	12,979	15/01/2016	9,620	-3,359.20
SN	Leonteq 2Y Multi Barrier Cert	19/12/2014	GBP	3,000	17/03/2015	3,000	0
SN	Commerzbank Yellow March 1	30/03/2015	GBP	3,000	31/03/2017	937.65	-2,062.35
Fund F	Marlborough Intern Marlborough Multi Income	11/09/2015	GBP	3,000	Open position as at 09/10/2018		
SN	EFG Euro STX 50 Price IDX Ishares FTSE 100, S&P 50	09/10/2015	GBP	5,000	Open position as at 09/10/2018		
SN	Exane Recovery Cert On SX5E SPX Nominal X UKX - Oct 18	21/10/2015	GBP	4,730	08/10/2018	7,090.38	2,360.38
Fund	Dominion Global TR Luxury Consumer C	19/01/2016	EUR	9,000	19/07/2016	8,509.38	-490.62
Fund	OMI IE EUR JP Morgan Global Balanced	13/09/2016	EUR	5,803	Open position as at 09/10/2018		
Fund	OMI IE USD Franklin Strategic Income	13/09/2016	USD	7,909	Part-sell on 18/08/2017 receiving USD844.89 (A fol. 95). Open position of remaining investment as at 09/10/2018		
Fund	OMI IE USD Pictet USA Index	13/09/2016	USD	6,589	Open position as at 09/10/2018		
Fund	Gemini Investment Principal Ast Allocation C	16/09/2016	GBP	8,000	Open position as at 09/10/2018		

**From a review of the said transactions, it results that the main losses suffered and claimed by the Complainant did actually materialise by end of the year 2015,<sup>10</sup> and in early 2016 prior to the coming into force of the Act.<sup>11</sup>**

With respect to those investments which still featured in the portfolio after the coming into force of the Act, it is noted that the realised losses (exclusive of dividends) were relatively minor<sup>12</sup> compared to the overall claimed losses, and in total realised losses which nearly match the amount of realised profit made on another investment as indicated in the same statements/table above.<sup>13</sup> The valuation statement as at 9/10/2018 further indicates relatively minor unrealised losses<sup>14</sup> which are countered by unrealised gains<sup>15</sup> on the remaining fund investments whose position was still open as at the date of this statement.<sup>16</sup>

**Taking into consideration the various submissions made by the parties throughout the proceedings of the case including the declaration of 28 September 2020 made by the Complainant, the communication of 8 April 2016 referred to above, and the period when the claimed losses on the Complainant's investment portfolio were actually realised, the Arbiter considers that in this particular case there is validity to the Service Provider's plea as based on Article 21(1)(b) of the Act.**

**In this regard, there is sufficient basis on which it can be concluded that the conduct complained of occurred prior to the coming into force of the Act with the Complainant being aware and concerned of such losses at that stage.**

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<sup>10</sup> A total capital loss (excl. dividends) of GBP5,425 + GBP32,101 + GBP10,577 = GBP48,103

<sup>11</sup> Additional realised losses, prior to the coming into force of the Act, of EUR 2,392 and EUR 3,359, (approximately GBP1,930 and GBP2,572 respectively according to the closing EUR to GBP rate as at the date of respective sale).

<sup>12</sup> A realised loss (excl. div) of: -EUR 740 incurred on 23/08/2016 on the '*RBC Ecommerce Income AC Note*'; -EUR 490.62 incurred on the '*Dominion Global TR Luxury Consumer C*'; and -GBP2,062 incurred on 31/03/2017 on the '*Commerzbank Yellow March 1*'.

<sup>13</sup> A realised profit (excl. div) of GBP 2,360 (GBP7,090 less GBP4730) arising on 8/10/2018 from the '*Exane Recovery Cert Im SX5E SPX Nominal X UKX*' - A fol. 112

<sup>14</sup> As at 09/10/18, an unrealised loss (excl. div) of: -GBP569.21 on the '*EFG Euro STX 50 Price IDX Ishares FTSE 100, S&P 50*'; -GBP 173.24 on the '*Marlborough Intern Marlborough Multi Income F GBP*' and -GBP 357.09 on the '*Gemini Investment Principal Ast Allocation C*' - A fol. 108.

<sup>15</sup> As at 09/10/2018, an unrealised profit (excl. div) of: EUR 418.65 on the '*OMI IE EUR JP Morgan Global Balanced*'; USD 1,867 on the '*OMI IE USD Pictet USA Index*'; and USD 35 on the remaining balance of the '*OMI IE USD Franklin Strategic Income*' (which had a market value of USD7,116.13 as at that date) - A fol. 108

<sup>16</sup> A fol. 108



The Complainant filed a formal complaint with the OAFS dated 17 August 2019, and received on 22 November 2019.<sup>17</sup> This is later than two years from the coming into force of Article 21(1)(b) of the Act.

**Therefore, the Arbiter, considering the circumstances of this particular case, accordingly upholds the plea made by the Service Provider as based on Article 21(1)(b) of Chapter 555 of the Laws of Malta and declares that he does not have the competence to consider the merits of this case.**

Since the Arbiter has declared that he has no competence, there is no need to consider plea number 4.

**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**

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<sup>17</sup> A fol. 1 & 5