Before the Arbiter for Financial Services

Case No. 047/2018

DG

('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 28 July 2020

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.

Having considered the particular circumstances of this case, the Arbiter decided to deal with this case separately from those cases made against the Service Provider in relation to the Scheme that were treated together in terms of Article 30 of Chapter 555 of the Laws of Malta. This decision was taken given certain particularities of the case in question.

The Case in question

The Complainant submitted that his complaint is that MPM are culpable for the losses to his pension fund by accepting business from an unlicensed advisory firm, Continental Wealth Management, who it was claimed used unqualified advisers, forged dealing instructions and invested in high-risk, professional-investor-only structured notes when he had stipulated that he was a low/medium risk retail investor. The Complainant alleged that these investments were made without his knowledge or consent.

It was further submitted that MPM failed in their duty to ensure the company they were dealing with was reputable. The Complainant submitted that by accepting instructions which he claimed were obviously forged and in a higher risk category than he had agreed to, they are responsible for the severe damage that has been done to his pension fund. It was claimed that his signature on all of the dealing instructions was clearly copied as they were all identical even down to the star mark showing where to sign. The Complainant submitted that anyone who looked at these signatures would be able to tell that they had been copied.

The Complainant asked for the amount of money that he claimed has been lost through these high-risk investments to be returned to him along with compensation for the extortionate fees that were charged and continue to be charged on his investments.

The Complainant noted that the original transfer value of his policy was £87,986 and now had an approximate current valuation of £41,000. The Complainant also stated that he received approximately £8,900 from Continental Wealth Management before they went out of business. The Complainant stated that he, therefore, lost approximately £38,000 of his original fund and that was the minimum amount that he wanted to be returned to him.

In its reply, MPM essentially submitted the following:

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.

5. That MPM shall address each of the issues raised by the Complainant in the Complaint.

6. MPM submitted that without prejudice to its defence that it is not responsible for the Complainant's claims, more than two years have lapsed since the conduct complained of took place and that therefore pursuant to Article 21(1)(c) of Chapter 555 of the Laws of Malta, the Complaint cannot be entertained.

7. MPM noted that the Complainant's application form identified Neil Hathaway from CWM as the Complainant's professional adviser and that the application form (page 4) included a declaration by Neil Hathaway confirming that the investment advice is within the investment guidelines.

8. MPM submitted that the appointment of CWM as the Complainant's adviser is also confirmed on the application submitted to Skandia Life Ireland Limited (which later changed its name to Old Mutual International Ireland Limited ('OMI')). MPM noted that on this form, Anthony Downs (or Alan Gorringe or Neil Hathaway) of CWM is also listed as the person with whom contact must be made in case the need to clarify investment

choice details arises. MPM further noted that on page 11 of the form, Neil Hathaway from CWM accepted to be appointed as fund adviser and made the declaration set out on page 12. MPM noted that the appointment of CWM as fund adviser is also confirmed in the fund adviser form.

9. MPM noted that the Complainant's investment risk profile was chosen by the Complainant and his adviser and that the chosen risk profile was 'Low' and 'Medium'.

10. MPM explained that the member and the adviser appointed by the member select investments, and the adviser ensures that the investments comply with the member's risk profile. It was noted that the RSA then reviews this in line with the risk profile on file, to ensure that it broadly reflects the risk profile and offers diversification.

11. MPM replied that 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 with MPM.

12. MPM submitted that it had controls in place to ensure that the dealing instructions received by MPM were signed by the Complainant, ensuring the investment was directed by them and the adviser appointed by the Complainant, in line with the attitude to risk and was then reviewed against the Scheme investment guidelines. MPM noted that the dealing instructions were submitted by the appointed adviser, CWM, and met MPM's Investment Guidelines.

13. MPM noted that it is aware that OMI, the bond provider, is considering legal action against one of the structured note providers (Leonteq Securities AG ('Leonteq')), for losses incurred by the ultimate holders of the bonds, such as the Complainant. MPM pointed out that it is pertinent to note that it is OMI, and not MPM, who is pursuing this litigation against Leonteq.

14. MPM noted that it charges a fixed fee for the services it provides and that this fee does not change, regardless of the underlying investment (which the Complainant was advised to invest in by CWM). MPM stated that the fee is fixed and is not calculated on the basis of the amount invested and

that accordingly, MPM did not stand to make any gain or benefit as a result of the Complainant investing in any particular underlying investments.

15. MPM further replied that fees were disclosed to the Complainant. It was noted that the Complainant refers to 'extortionate fees' in his complaint, however he acknowledged MPM's fees on the 16/04/2013 and was also informed of all the Skandia Life Ireland Limited fees as per the documents attached to its reply.

16. MPM noted that the Complainant alleges that the dealing instructions were '*obviously forged*' and that his signature on all of the dealing instructions '*was clearly copied*'.

17. MPM submitted that dealing instructions are not completed by MPM. MPM further noted that it has no awareness or line of sight of what discussions and arrangements take place between the Complainant and his appointed adviser, CWM, regarding dealing instructions.

18. MPM pointed out that whilst the Complainant must prove that he did not sign the dealing instructions, MPM replied that it would not have accepted documents of this nature.

19. It was submitted that it is clear from the Skandia Life Ireland Limited application form that the Complainant had appointed Neil Hathaway as his fund adviser, and he accepted that appointment by signing the application form. It was stated that furthermore, the Complainant appointed the fund adviser to manage his investments. MPM also pointed out that it is acknowledged by the fund adviser that the adviser will be responsible to the applicant for investment decisions in relation to the proposed policy.

20. MPM replied that it is its duty to ensure that the Complainant's signature on the dealing instructions is verified against the proof of identification provided to MPM. It was submitted that in all cases involving the Complainant's dealing instructions, such verification was made by MPM.

21. MPM submitted that Trafalgar was licensed as an insurance intermediary and consultant, as well as an investment intermediary and referred to documentation attached to its reply, which had been provided to MFSA. It was noted that Trafalgar entered into an agency agreement with CWM.

22. MPM 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 noted that it no longer accepted business from CWM as from September 2017 and is aware that CWM ceased trading on or around 29 September 2017.

    MPM pointed out that it is not aware of any attempt by the Complainant to initiate proceedings against CWM or its officials and/or Trafalgar and/or Global Net, who advised the Complainant to invest in products which have led to the Complainant's losses.

23. MPM noted that the Complainant states in his complaint that he received £8,900 from CWM '*before they went out of business*'. MPM claimed that this compensation was paid in tranches to the Complainant commencing as far back as April 2015. It was submitted that the Complainant himself therefore held CWM responsible for the losses he suffered and started receiving compensation 3 years ago.

24. MPM submitted that any business introduced by CWM to it fell within the MFSA's Pension Rules for Service Providers as they relate to RSAs.

25. It was noted that the Complainant was provided with annual member statement for the years ended 2013 to 2016 (inclusive). MPM noted that notwithstanding the yearly statement sent to the Complainant, no complaint was ever raised with MPM before November 2017.

26. MPM replied that it does not work on a commission basis and it neither receives commissions, nor pays commissions to any third parties.

27. MPM submitted that as already stated in its Reply, it is not licensed to and does not provide investment advice and, furthermore, it did not provide investment advice to the Complainant.

28. It was noted that this is clear from the application form which specifically requests the details of the Complainant's professional adviser, Neil Hathaway of CWM (page 2 thereof). MPM also noted that a declaration is also made by the adviser, and signed by the adviser, on the application itself (page 4). It was also 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 as per the declaration 8 on page 6 of the said form.

29. MPM noted that to further reinforce the point that MPM does not provide investment advice, it was submitted that an entire section of the terms and conditions of business as attached to the application form, is dedicated solely to this point, as per page 7 of the application form.

30. MPM submitted that it has not committed any fraud, nor has it acted negligently. MPM stated that it has not breached any of its obligations in any way and submitted that the losses sustained by the Complainant are attributable to the adviser appointed by the Complainant.

31. 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.

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

Further Considers:

Preliminary Plea regarding the Competence of the Arbiter

The Service Provider raised the plea that the Arbiter does not have the competence to consider this case because it is time-barred under Article 21(1)(c) of Chapter 555. 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.'

The Act came into force on 18 April 2016. As to the '*conduct of a financial service provider*' the law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

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 April 2013, upon the member's acceptance into the Scheme, and continued to occupy after the coming into force of the Act. It is noted that the Complaint in question also involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the adviser of the Complainant.

In terms of Article 21(1)(c), the Complainant had two years to complain to the Service Provider '*from the day on which the complainant first had knowledge of the matters complained of*'.

In its reply, MPM noted *inter alia* that the '*Complainant states in his complaint that he received £8,900 from CWM "before they went out of business". This compensation was paid in tranches to the Complainant commencing as far back as April 2015. The Complainant himself therefore held CWM responsible for the losses he suffered and started receiving compensation 3 years ago*'.

It is noted, however, that the Complainant only confirmed that he received the indicated sum from CWM '*before they went out of business*', and this before September 2017. The Complainant did not specify how, and for what reasons, he received such compensation; neither did he specify the date/s, or over

which period such compensation was received. From its part, the Service Provider alleged that the Complainant received compensation from CWM '*as far back as April 2015*'. It did not, however, explain or indicate in respect of which matter/s such compensation was made nor did it substantiate its claims in this regard that compensation commenced '*as far back as April 2015*'. Indeed, during the proceedings of this case, the Arbiter has not met any evidence that can be taken into consideration with respect to the said claims and statements made.

In the absence of information and lack of evidence about such claims, the Arbiter is, in the particular circumstances of this case and on the basis of the information emerging during the proceedings, not in a position to arrive to a reasonable conclusion that the Complainant first had knowledge of the matters complained of in this complaint in relation to MPM, in 2015, as seems to be suggested by the Service Provider. Nor is it considered that there is sufficient basis on which the Arbiter can consider that the Complainant just held CWM solely responsible for the losses suffered.

As to the other matters raised, it is noted that in its reply, the Service Provider also referred to the annual member statements for the years ended 2013 and 2016 and noted that '*notwithstanding the yearly statements sent to the complainant, no complaint was ever raised with Momentum before November 2017*'.

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 held within the policy, which investments contributed to the losses and are being disputed by the Complainant. 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.

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

The disclaimer read 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****.*'

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

Moreover, the Arbiter, makes reference to Case Number 137/2018 against MPM,[1] whereby it results that the Service Provider itself declared in July 2015, in reply to a member's concern regarding losses, that:

'… *whilst we, as Trustees, will review and assess any losses,* ***these can only be on the maturity of the note,***[2] *as any valuations can and will be distorted ahead of the expiry'.*[3]

The Service Provider did not prove the date of maturity of the structured notes comprising the portfolio of the Complainant.

[1] Decided today
[2] Emphasis of the Arbiter
[3] Case Number 137/2018 (*a fol.* 7 of the file)

According to a table presented by the Service Provider attached to its Additional Submissions certain structured notes were still within his portfolio after the coming into force of the Act.[4]

The Arbiter has also discovered from Case Number 127/2018 against MPM,[5] that the Service Provider sent communication to all members of the Scheme with respect to the position with CWM.[6] In this regard, in September 2017, members were notified by MPM about the suspension of the terms of business that MPM had with CWM. Later, in October 2017, MPM also notified the members of the Scheme about the full withdrawal of such terms of business with CWM.

The Complainant made a formal complaint with the Service Provider on the 3 November 2017 and, therefore, within the two-year period established by Art. 21(1)(c) of Chapter 555.

Moreover, 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*'.

It is incumbent on the Service Provider to prove to the satisfaction of the Arbiter this plea but with the information submitted during these proceedings it did not succeed to do so.

It is also noted that not even two years had passed from the coming into force of Chapter 555 of the Laws of Malta and the date when the formal complaint was made by the Complainant with the Service Provider.

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*'.

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

[4] *A fol.* 186 – 'Doc. MM1' to MPM's Additional Submissions
[5] Decided today
[6] Case Number 127/2018 (*a fol.* 53 of the file)

Preliminary plea regarding the request to expunge documents

MPM requested the Arbiter to expunge from the record of the proceedings certain documentation filed in 2019 and not take cognisance of any new allegations raised by the Complainant against Momentum as it was *inter alia* submitted that the Complainant cannot change the basis of his complaint.

The Arbiter accepts the submission that no new allegations could be raised by the Complainant and will only consider the complaint as originally filed.

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.[7]

The Arbiter is considering all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555[8] which stipulates that he should deal with the complaints in '*an economical and expeditious manner'.*

The Complainant

The Complainant, born in 1962, is of British nationality and resided in Spain at the time of application for membership as per the details contained in the *Application for Membership of the Momentum Malta Retirement Trust* ('the Application Form for Membership').

The Complainant's occupation was indicated as '*Editor*' in the said Application Form. It was not proven, during the case, that the Complainant was a professional investor. The Complainant can accordingly be treated as a retail client.

The Complainant was accepted by MPM as member of the Retirement Scheme on 22 April 2013.

[7] Cap. 555, Art 19(3)(b)
[8] Art. 19(3)(d)

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[9] and acts as the Retirement Scheme Administrator and Trustee of the Scheme.[10]

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 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.[11]

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.[12]

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[9] *https://www.mfsa.mt/financial-services-register/result/?id=3453*

[10] Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

[11] *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/*

[12] As per pg. 1 of the affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1January 2016 attached to his affidavit.

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*',

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[13] as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011[14] and under the Retirement Pensions Act in January 2016.[15]

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*'[16] and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011*'.[17]

[13] *https://www.mfsa.com.mt/financial-services-register/result/?id=3454*
[14] Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).
[15] Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).
[16] Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).
[17] Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

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'.[18]

The case in question involves a member-directed personal retirement scheme where the Member was allowed to appoint an investment adviser 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 for the Complainant was called the European Executive Investment Bond issued by Skandia International[19]/Old Mutual International ('OMI').[20]

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

The underlying investments in respect of the Complainant comprised substantial investments in structured notes as indicated in the table of investments forming part of the '*Investor Profile*' presented by the Service Provider in respect of the Complainant during the proceedings of the case.[21]

The '*Investor Profile*' presented by the Service Provider for the Complainant also included a table with the '*current valuation'* as at 28/01/2018. The said table indicated a loss (excluding fees) of GBP35,020 as at that date. The loss experienced by the Complainant is thus higher when taking into account the fees incurred and paid within the Scheme's structure. It is to be noted that the Service Provider does not explain whether the loss indicated in the '*current valuation*' for the Complainant relates to realised or paper losses or both.

[18] *Ibid.*
[19] 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/*
[20] Welcome Letter dated 20 May 2013 issued by Skandia International refers.
[21] The '*Investor Profile'* is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant.

Investment Adviser

Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainant.[22] The role of CWM was to advise the Complainant regarding the assets held within his Retirement Scheme.

It is noted that in the notices issued to members of the Scheme in September and October 2017, MPM described CWM as '*an authorised representative/agent of Trafalgar International GMBH*', where CWM's was Trafalgar's '*authorised representative in Spain and France*'.

In its reply, 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*'.[23]

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*'[24] 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'*.[25]

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*' information sheet provided by the Service Provider.[26]

The extent of investments in structured notes, indicated as '*SN*' in the column titled '*Asset Type*' in the said table of investment transactions, was substantial as can be seen in the said table.

[22] As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant.
[23] Pg. 1 of MPM's reply to the OAFS.
[24] Para. 39, Section E titled *'CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies.
[25] *Ibid.*
[26] Attachment to the '*Additional submissions*' made by MPM in respect of the Complainant.

The said table indicates that the portfolio of investments for the Complainant involved substantial investments in structured notes with the portfolio comprising at times solely or predominantly of structured notes during the tenure of CWM as investment adviser.

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:[27]

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*** …'.

[27] Emphasis added by the Arbiter.

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 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*' in this decision, 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 with the prudence, diligence and attention of a bonus paterfamilias,*** *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*'.[28]

[28] Ganado Max (Editor) ,'*An Introduction to Maltese Financial Services Law*', Allied Publications 2009) p.174.

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'***.[29]

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 pater familias in the performance of his obligations****'.*[30]

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**.

[29] *Op. cit.,* p. 178

[30] Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 December 2017) p. 9.

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***'.[31]

Once an investment decision is taken by the member and his investment adviser 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)** …'.*[32]

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***'.[33]

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 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.

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

[31] Para. 17, page 5 of the affidavit of Stewart Davies
[32] Para. 31, Page 8 of the affidavit of Stewart Davies
[33] Para. 33, Page 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers.

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'.[34]

The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment adviser 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'. [35]

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.

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*** *…*',[36]

[34] 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/.

[35] 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).*

[36] Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies. The same statement is also included in page 9 of the Scheme Particulars of May 2018 (also attached to the same affidavit).

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*** …'.

Other Observations and Conclusions

Allegations relating to the signature on the dealing instructions

In his formal complaint to the Service Provider, allegations were made that MPM accepted investments which were not authorised by the Complainant where it was claimed that the dealing investment instruction forms were forged.

This is a serious allegation which had to be specifically proven by specific facts and in the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation. However, the Complainant making this allegation did not provide enough evidence to the Arbiter to accept his allegation.

Nonetheless, the Arbiter would like to comment on the practice adopted by the Service Provider.

Communications relating to dealing instructions seem to have only occurred between MPM and the investment adviser without the Complainant being in copy or made promptly and adequately aware of the investment instructions given by the investment adviser and executed by MPM. It has indeed not emerged during the proceedings of the case that the Complainant was being adequately and promptly notified by MPM about material developments relating to his portfolio of investments within the Scheme as would reasonably be expected in respect of a consumer of financial services.

Not even the statements issued annually by MPM to the Member of the Scheme provided details of the underlying investments. The Annual Member Statements were indeed generic in nature and only mentioned the underlying policy. Such statements did not include details of the investment transactions undertaken over the respective period nor details about the composition of

the portfolio of investments as at the year end. In its capacity as Trustee and Scheme Administrator, MPM had full details of the investment transactions undertaken and the composition of the portfolio but yet did not report about such and neither did it ensure that the Member had received such information.

The procedures used and methods of communications adopted by MPM, indeed enabled a possible situation such as that claimed by the Complainant. The serious allegations about the forged dealing instructions could have been easily avoided and/or at least addressed in a timely manner with simple measures and safeguards adopted by the trustee and scheme administrator.

In the context of member-directed schemes such measures could have involved, for example, accepting communications either from the Complainant or with the Complainant being in copy in certain communications involving dealing instructions/confirmation of execution; and/or the Member being adequately and promptly informed by MPM of the purchases and redemptions being made within the portfolio of investments.

This highlights the apparent lack of adequate controls and administrative procedures implemented by MPM which reasonably put into question MPM's adherence with the requirements to have adequate, operational, administrative procedures and controls in place in respect of its business and that of the Scheme as it was required to do in terms of Rule 2.6.4 of Part B.2.6 of the Directives under the SFA and Standard Condition 4.1.7, Part B.4.1 of the Pension Rules for Service Providers issued under the RPA as well as Standard Condition 1.2.2, Part B.1.2 of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA during the respective periods when such rules applied as outlined above.

The lack of adequate controls and administrative procedures is not just an aspect that features with respect to the handling of dealing instructions and verification of consent by the Member of such instructions, but also on other aspects involving the ongoing activities of the Scheme Administrator. This is particularly so with respect to the controls on the verification of compliance with the Investment Guidelines and also the reporting to the Member amongst others as shall be considered below in this decision.

Allegations in relation to fees

In his Complaint Form, the Complainant also made reference to '*the extortionate fees that were charged and continue to be charged*'.

With respect to the fees being high, the Arbiter considers that there is insufficient evidence for him to determine whether, in the particular circumstances of the case, the contested fees were either reflective of or, on the other hand, not in line with market practice.

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 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 be reasonably 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 are 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.

Key considerations relating to the principal alleged failures

The Arbiter will now consider the principal alleged failures. As indicated above, the principal alleged failures of the Service Provider can, in essence, be construed to relate to:

(i) MPM allegedly accepting business and/or allowed the appointment of CWM as an unlicensed investment adviser;

(ii) MPM allegedly allowing an unsuitable portfolio of underlying investments to be created within the Retirement Scheme which portfolio comprised high risk structured products of a non-retail nature which was not in line with his risk profile.

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 adviser 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 Adviser

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 his 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. **MPM even had itself an introducer agreement with CWM**.

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 Adviser

i. *Inaccurate, incorrect and unclear information relating to the adviser in MPM's Application Form for Membership*

It is considered that **MPM accepted and allowed inaccurate, incorrect and unclear information relating to the Adviser to prevail in its own Application Form for Membership** in respect of the Complainant. MPM should have been in a position to identify, raise and not accept the material deficiencies included in the Application Form.

If inaccurate, unclear and incorrect material information was made in the Application Form for Membership on 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 adviser 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's name of the professional adviser.

In the same section of the Application Form, CWM was indicated as having a registered address in Spain and that it was regulated. In the same section '*InterAlliance Worldnet*' ('Inter-Alliance') was identified as being the regulator of the professional adviser.

The Arbiter considers the reference to Inter-Alliance as regulator to be inadequate and misleading.

With respect to the reference to '*Inter-Alliance*' 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 Inter-Alliance are, or were, a regulatory authority for investment advisers in Spain or in any other jurisdiction. It appears that 'InterAlliance Worldnet', an abbreviation apparently for '*Inter Alliance WorldNet Insurance Agents & Advisers Ltd*' was a service provider itself in Cyprus, but clearly it was not a regulatory authority.[37]

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

The reference to Inter-Alliance could also not have 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 relating to the adviser in the Application Form of the Underlying Policy*

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/Old Mutual International.

MPM, as Trustee of the Scheme, had clear sight of the said application and had indeed signed the application for the acquisition of the policy for the Complainant 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 adviser. The first page of the said application form includes a section titled '*Financial adviser details*' and a

[37] https://international-adviser.com/iaw-fined-cypriot-regulator/

field for '*Name of financial adviser*', with such section including a stamp bearing the name of Inter-Alliance with a P.O. Box address in Cyprus. The two entities, both CWM and Inter-Alliance, are then featured in the section titled '*Financial adviser declaration*' of the said form with the same stamp of Inter-Alliance, again featuring here in the part titled *'Financial adviser stamp*' in the same section.

There is accordingly a lack of clarity on the exact entity ultimately taking responsibility for the investment advice 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, Inter-Alliance and/or Trafalgar*

It is unclear why the Annual Member Statement sent by MPM to the Complainant for the years ending December 2015 and 2016 indicated in the same statement '*Continental Wealth Management*' as '*Professional Adviser*' whilst at the same time indicated another party, '*Trafalgar International GmbH*' as the '*Investment Adviser'*.

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, the lack of clear distinction and links between the indicated parties, it has also not emerged that clear and adequate information was provided 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 should have also been duly indicated without any ambiguity.

Indeed, during the proceedings of this case MPM has not provided evidence of any agency agreement between CWM and Inter-Alliance nor between CWM and Trafalgar.

In the reply that MPM sent 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*[38]*, including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules*'.[39]

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

iv. *No regulatory approval in respect of CWM*

During the proceedings of this case no evidence has emerged about the regulatory status of CWM. As indicated earlier, MPM provided no details about Inter-Alliance, and in its submissions only referred to the alleged links between CWM and Trafalgar. MPM only provided a copy of the authorisations issued to Trafalgar International GmbH in Germany which just indicated that Trafalgar (and not CWM) held an authorisation as at 05.02.2016 as '*Investment intermediary*' and '*Insurance intermediary and insurance consultant*' from IHK Frankfurt am Main, the Chamber of Commerce and Industry in Frankfurt with the '*Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53*'.[40]

With respect to authorisations issued by IHK, the Arbiter makes reference to Case 068/2018 and Case 172/2018 against MPM,[41] in which replies issued by

[38] Emphasis added by the Arbiter.

[39] 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 Momentum Malta Retirement Trust.

[40] Copy of authorisations issued to Trafalgar were attached to the Reply of MPM submitted before the Arbiter for Financial Services and/or specifically referred to in para. 39 Section E, titled '*CWM and Trafalgar International GmbH*' in the affidavit of Stewart Davies.

[41] Decided today. The information obtained from these cases is part of the Arbiter's function to 'investigate' and to make the necessary research to obtain all the facts necessary for the better administration of justice.

IHK in 2018 to queries made in respect of CWM was produced. In this regard, it is noted that in an email from IHK dated 19 April 2018, IHK indicated *inter alia* that it was not aware of an official affiliation between CWM and Trafalgar and that Trafalgar held the financial investment intermediation licence (34f para. 1 GewO) from June 2013 until March 2016 where the licence was '*not extendable'* and *'even back then it did not cover the activities of another legal personality*'.[42]

Similarly, in a letter dated 20 April 2018 issued by IHK it was *inter alia* noted by IHK that:

'*Trafalgar International GmbH is a German limited company headquartered in Frankfurt am Main. The company currently holds a licence under 34d para.1 German Trade Law (German: Gewerbeordnung, GewO) (insurance intermediation). The German licence as an insurance intermediary cannot be extended to another legal personality and it does not authorize the licence holder to regulate other insurance or financial investment intermediaries.'*[43]

MPM's statement that CWM '*was operating under Trafalgar International GmbH licenses*'[44] has not been backed up by any evidence during the proceedings of this case and has actually been contradicted by communications issued by IHK as indicated above. It is accordingly clear that no comfort can either be taken 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*',[45] are rather vague, inappropriate and do not provide sufficient comfort of an adequate**

[42] Email from IHK dated 19 April 2018 – *a fol.* 166/167 of Case Number 068/2018 against MPM decided today
[43] Letter from IHK dated 20 April 2018 – *a fol.* 12/13 of Case Number 172/2018 against MPM decided today
[44] Para. 39, Section E titled *'CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies.
[45] Pg. 1, Section A titled '*Introduction',* of the Reply of MPM submitted before the Arbiter for Financial Services.

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. Similarly, Inter-Alliance was not a regulatory authority;

(ii) the lack of clarity as to the regulatory status of the investment adviser included in the Application Form for Membership in respect of the Complainant as well as the confusing and unclear references in the sections relating to the investment adviser in other documentation as indicated above;

(iii) legislation covering the provision of investment advisory services in relation to investment instruments, namely the Markets in Financial 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.[46]

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.

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

The Service Provider noted *inter alia* that '*CWM was appointed agent of Trafalgar International GmbH*'.[47]

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

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

The responsibility of MPM in accepting and allowing CWM to act in the role of investment adviser 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 so, as amply explained above.

MPM allowed and left uncontested incorrect, misleading and unclear key information to feature in its own Application Form for Membership of the Retirement Scheme with respect to the regulatory status of the investment adviser. In so doing, it abetted a fundamentally wrong impression and perception that the investment adviser being selected was regulated when, in reality, no evidence has emerged that CWM was indeed a regulated entity.

The Service Provider argued *inter alia* in its submissions that it was not required, in terms of the rules, to require the appointment of an adviser which was regulated during the years 2013-2015 under the SFA regime and until the

[47] Para. 39, Section E titled '*CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies.

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 adviser to be regulated.

However, the Arbiter believes that MPM as Trustee had in any case the obligation to act with the required diligence of a *bonus paterfamilias* throughout, and was duty bound to raise with the respective member, and not itself accept, material aspects relating to the investment adviser, which it should have reasonably been in a position to know that where incorrect, misleading and inappropriate. Instead it chose to allow and accept such material incorrect, misleading and inappropriate information relating to the adviser to even prevail in its own application form.

The appointment of an entity such as CWM as investment adviser meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where an adequately regulated adviser is appointed. An adequately regulated financial adviser 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 adviser.

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

- **CWM's alleged role as agent of another party, and the respective responsibilities of CWM and its alleged principal/s;**

- **the entity actually taking responsibility for the investment given to the Complainant, as more than one entity was at times being mentioned with respect to investment advice;**

- **the distinctions between CWM and Inter-Alliance/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 adviser was allowed by the trustee and scheme administrator to provide investment advice to the member of a member-directed scheme, **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 MPM, as part of its essential and basic obligations and duties as a retirement scheme administrator and trustee of the Scheme, to have an even higher level of disposition in the probing and querying of the actions of an unregulated investment adviser in order to also 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. The permitted portfolio composition

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 exposure to structured notes allowed within the Complainant's portfolio was extensive, with the insurance policy underlying the Scheme being fully invested into such products.

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*'.[48]

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'*.[49]

The Arbiter notes that various fact sheets of structured notes that featured in the portfolio of the Complainant, as sourced by the Office of the Arbiter for Financial Services ('OAFS'), highlighted a number of risks in respect of the capital invested into these products.

Apart from *inter alia* the credit risk of the issuer and the liquidity risk, the fact sheets of the said structured products also highlighted risk warnings about the notes not being capital protected, warning that the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment.

[48] https://www.investopedia.com/terms/s/structurednote.asp
[49] https://www.investopedia.com/articles/bonds/10/structured-notes.asp

A particular frequent feature emerging of the type of structured notes invested into, involved the application of capital buffers and barriers. In this regard, the fact sheets of such products 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 percentage specified in the respective fact sheet, 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 specified percentage in the fall in value in the fact sheets sourced in the case of the Complainant was typically 50% of the initial value. The underlying asset to which the structured notes were linked typically comprised stocks or indices.

The said fact sheets further included a warning, on the lines of:

'*If any stock has fallen by more than 50% (a Barrier breach) then investors receive the performance of the Worst Performing Stock at Maturity*'.[50]

Such features and warnings featured, in essence, in the fact sheets of similar structured notes.

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

The Arbiter would also like to make reference to a particular communication presented in another separate case made against MPM which is relevant to the case in question. In this regard, it is particularly revealing to note the statements made by Trafalgar itself, in its email communication dated 17

[50] Example – Fact Sheet of the RBC Festive Income Note - https://www.portman-associates.com/wp-content/uploads/2013/11/RBC-Festive-Fixed-Income-FACTSHEET.pdf

September 2017 to CWM w**herein MPM was in copy**, and which communication was presented in Case Number 185/2018 against MPM.[51]

In the said case, MPM did not contest that such communication was untrue or did not exist, but only challenged the way in which the said email was obtained by the complainant.

The email sent by Trafalgar's official *inter alia* stated the following:

'***Structured Notes – It is my opinion we need to get as far away from these vehicles as possible. They have no place in an uneducated investor's portfolio and when they breech their barriers untold amounts of damage is done***'.[52]

Such a statement indeed summarily highlighted the pertinent issues with respect to investments in structured notes which are relevant to the case in question.

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

As indicated above, the portfolio of investments in respect of the Complainant comprised at times solely or predominantly of structured products. Such excessive exposure to structured products occurred over a long period of time. This clearly emerges from the Table of Investments forming part of the '*Investor Profile*' provided by the Service Provider for the Complainant.

In addition, the said table indicates investments resulting in high exposures to the same single issuer/s, both through a singular purchase and through cumulative purchases in products issued by the same issuer.

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 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

[51] Decided today
[52] Emphasis added by the Arbiter

to single counterparties should have been applied and ensured that they are adhered to across the board. The credit risk of the respective issuer was indeed still one of the risks highlighted in various fact sheets of structured products invested into.

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, jars 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.[53]

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*'[54] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[55]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[56] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*[57] 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

[53] Para. 21 & 23 of the Note of Submissions filed by MPM in 2019.
[54] SOC 2.7.2 (a)
[55] SOC 2.7.2 (b)
[56] SOC 2.7.2 (c)
[57] 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.[58]

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

In the case of the Complainant it has also clearly emerged that individual exposures to single 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. The structured products invested into were also not indicated, during the proceedings of this case, as themselves being traded in or dealt on a regulated market. The portfolio also included material positions into high risk investments. The high risk is reflected in, for example, the high rate of return of 9%/ 10% p.a. which featured in the name of some structured products invested into as indicated in the Complainant's 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.

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**.

The investment portfolio in the case reviewed was solely or predominantly invested in structured notes for a long period of time. It is unclear how a

[58] SOC 2.7.2 (h)(iii) & (v)

portfolio composition solely 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.[59]

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.[60] Hence, the interpretation of '*regulated market*s' 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.

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.

No evidence was submitted that predominantly the portfolio, which comprised solely/predominantly of structured notes, constituted listed structured notes in respect of the Complainant. The fact sheets sourced

[59] Investment Guidelines attached to the affidavit of Stewart Davies.

[60] 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'*.

by the OAFS of structured notes forming part of the Complainant's portfolio, actually indicated that the products in question were not listed on an exchange. On its part, the Service Provider did not prove either 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 much higher exposures (as will be indicated further below) to structured notes, a debt security, which were themselves 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*[61] *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 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 Complainant's portfolio, it is noted that the structured notes invested into typically had a maturity or investment term of 1-2 years as evidenced in the product fact sheets. The bulk of the assets

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

within the policy was, at times, invested into a few structured notes. 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 fact sheets of the said unlisted structured products included reference to the possibility of a secondary market existing for such structured notes. In this regard, a buyer had to be found in the secondary market in case one wanted to redeem a holding into such structured note prior to its maturity.

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

There were indeed various risks highlighted in relation to the secondary market as amply reflected in the risk warnings emerging in the said fact sheets.

The said risk warnings highlighted the risks related to the availability of such market (as the secondary market had to be in the first place offered by the issuer), as well as the limitations of the said market. They also highlighted the lower price that could be sought on this market.

In this regard, there was the risk that the price of the structured note on the secondary market could be well below the initial capital invested.

For example, the notes issued by RBC typically included the risk disclaimer that:

'***Any secondary market provided by Royal Bank of Canada is subject to change and may be stopped without notice and investors may therefore be unable to sell or redeem the Notes until their maturity. If the Notes are redeemed early, they may be redeemed at a level less than the amount originally invested***'.

Similar warnings feature in the fact sheets of structured notes issued by other issuers.

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 was indeed affecting the value of the Scheme as can be deduced from the respective Annual Member Statements that MPM itself produced.

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, 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 solely invested in the said structured notes.

It is also to be noted that 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.

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 just one example of excessive single exposures allowed within the portfolio of the Complainant. Other instances of excessive exposures exist within the portfolio as clearly emerging from the respective '*Table of Investments*' forming part of the '*Investor Profile*' produced by MPM as part of its submissions.

Table A – Example 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*	*Description*
79.26%	Commerzbank	1 SN issued by Commerzbank constituted 79.26% of the policy value at the time of purchase in May 2013.

Irrespective of whether or not the particular investment indicated had actually yielded a profit, **the fact that such high exposure to a single counterparty 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**.

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[62] was reduced to 40% of the portfolio's value in the '*Investment*

[62] MPM's Investment Guidelines '2015' as attached to the affidavit of Stewart Davies

Guidelines' marked December 2017[63] and, subsequently, reduced further to 25% in the '*Investment Guidelines*' for 2018.[64]

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[65] and mid-2017,[66] 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 still limited exposure to individual investments (aside from collective investment schemes) to 20%.

In the case reviewed, there was even instances where the extent of exposure to single issuers was even higher than one third of the policy value as indicated in the above Table. There is clearly no apparent reason, from a prudence point of view, justifying such high exposure to single issuers.

Indeed, the Arbiter considers that the high exposure to structured products and single issuers in the Complainant's portfolio jarred and did not reflect to varying degrees with one 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:[67]

[63] MPM's Investment Guidelines 'Dec-2017' as attached to the affidavit of Stewart Davies
[64] MPM's Investment Guidelines '2018' as attached to the affidavit of Stewart Davies
[65] MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies
[66] MPM's Investment Guidelines 'Mid-2017' as attached to the affidavit of Stewart Davies
[67] Emphasis in the mentioned guidelines added by the Arbiter.

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***
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**.*
<u>Investment Guidelines marked '2016' & 'Mid-2017':</u>
• *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 also noted that additional investments into structured notes were observed[68] to have been allowed to occur within the Complainant's portfolio, in excess of the limits allowed on the 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 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.

In the reply, the Service Provider sent in relation to the Complainant's formal complainant, MPM stated that:

'*In relation to investments, Momentum's role as a RSA and Trustee is to ensure the Scheme's investments are managed in accordance with relevant legislation and regulatory requirements, as well as in accordance with the Trust Deed and Rules and T&C*'.[69]

For the reasons amply explained, the Arbiter has no comfort that the above has been truly achieved generally, and at all times, by MPM 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

[68] '*Table of Investments'* in the '*Investor Profile'* provided by MPM refers.
[69] Section 1, '*Background'/'Overview of the Scheme'* of MPM's formal reply to the Complainant in relation to the complaint

the portfolio comprised structured notes aimed solely for professional investors.

The Service Provider has not claimed that the Complainant was a professional investor. No details have either emerged indicating the Complainant not being a retail investor.

With respect to the Complainant's portfolio, the OAFS traced a number of Fact Sheets in respect of several structured products which featured in his portfolio. The fact sheets in question were sourced by the OAFS through research undertaken over the internet with the specific ISIN number of the respective structured note featuring in the respective portfolio. The ISIN number was obtained from the dealing instruction sheets presented by the Complainant. Multiple fact sheets of different structured products have been sourced accordingly with respect to the Complainant's portfolio.[70]

The fact sheets in question specify that the products were targeted for professional investors only.

With respect to the structured products issued by RBC, for example, the fact sheets clearly indicate that such investments were '*For Professional Investors Only'* and *'not suitable for Retail distribution*' with the '*Target Audience*' for these products being specified as '*Professional Investors Only*' as outlined in the '*Key Features*' section of the respective fact sheet.

It is clear that such fact sheets were issued purposely for those investors who were eligible to invest in such products. It is also clear that such products were not aimed for retail investors but only for professional investors.

The Service Provider has not produced any fact sheets of the structured notes that were invested into in the Complainant's portfolio. Neither were any fact sheets targeted for retail investors presented by MPM.

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

[70] Structured Notes with ISIN No: XS1116370088; XS0933152513; XS0932055618; XS0994921129; XS1000868247; XS1003262729.

a retail client. 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 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 events or barriers that may form part of the key features of such products, would have on the investment if and when such events occur as already 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 at times solely or 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 despite his risk profile.

In the circumstance where the portfolio of the Complainant was at times, solely or predominantly invested in structured products with a high level of exposure to single issuer/s, 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*'[71] and '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[72]

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.

[71] SOC2.7.2(a) of Part B.2.7 of the Directives.
[72] SOC2.7.2(b) of Part B.2.7 of the Directives.

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.

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

With respect to reporting to the member of the Scheme, MPM mentioned and referred only to the Annual Member Statement in its submissions. 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.

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 …*'. [73]

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,[74] 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

[73] The said condition was further revised and updated as per condition 9.5(e) of Part B.9 of the Pension Rules for Personal Retirement Schemes indicated as *'Issued: 7 January 2015/Last updated: 28 December 2018'*
[74] MFSA's letter dated 11 December 2017, attached to the Note of Submissions filed by MPM in 2019

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 duty to provide members with detailed statements and information on the underlying investments.

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[75] 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 …'.

[75] 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.

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 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,[76] 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.

The provision of details on the underlying investments could have ultimately enabled the member of the Scheme to highlight any transactions on which there were any issues.

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.

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.

[76] The section titled '*Responsibilities of the Service Provider*'.

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.

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 clear duties to check and ensure that the portfolio composition recommended by the investment adviser 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 portfolios.

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 Service Provider failed to act with prudence, diligence and attention of a *bonus paterfamilias.*[77]

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[78] 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.

[77] Cap. 331 of the Laws of Malta, Art. 21(1)
[78] Cap. 555, Article 19(3)(c)

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[79] 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 and responsibilities of the investment adviser to the Member of the Scheme. Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be only 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 per cent of the losses sustained by the Complainant on his investment portfolio as stipulated hereunder.

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,

[79] Cap. 555, Article 19(3)(b)

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 Complainant for the purpose of this decision.

Given that the complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of Continental Wealth Management acting as adviser, compensation shall be provided solely on the investment portfolio existing and constituted under Continental Wealth Management in relation to the Scheme.

The Service Provider is 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 existing and constituted under Continental Wealth Management and allowed within the Retirement Scheme by the Service Provider.

The Net Realised Loss calculated on such portfolio shall be determined as follows:

(i) For every such investment within the said portfolio which, at the date of this decision, no longer forms part of the Member's current investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), 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, as at the date of this decision.

In case where any currency conversion/s is/are required for the purpose of (a) finally netting any realised profits/losses within the portfolio which remain denominated in different currencies, and/or (b) crystallising any remaining currency positions initiated at the time of Continental Wealth Management, 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 such cases for the purposes 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.

Because of the novelty of this case, each party is to bear its own legal costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services