Before the Arbiter for Financial Services

Case ASF 085/2022

CH ('the Complainant')

vs

Momentum Pensions Malta Limited

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

Sitting of 22 January 2024

The Arbiter,

Having seen the **Complaint** made against Momentum Pensions Malta Limited ('MPM' or 'the Service Provider') relating to the Momentum Malta Retirement Trust ('the Retirement Scheme' or 'Scheme'), this being a personal retirement scheme licensed by the Malta Financial Services Authority ('MFSA'), established in the form of a trust and administered by MPM as its Trustee and Retirement Scheme Administrator ('RSA').

The Complaint, in essence, relates to the Complainant's claims of significant losses suffered on his Retirement Scheme due to the alleged inappropriate investments allowed by the Service Provider on the advice of an unlicensed investment adviser. He alleged, in this regard, that:

- the Retirement Scheme was invested in high-risk structured notes aimed for professional investors only, which were outside his low to medium risk profile;
- MPM did not act in his best interests and did not fulfil its legal duties as Trustee to have a diverse, low-risk portfolio with reasonable and disclosed charges.

- MPM failed to warn him of the financial dangers of his investments and, also, accepted dealing instructions which were not signed by him.

The Complainant further claimed that MPM failed to fully disclose fees, provide him with all precontractual information, and allow his right to a 30-day cooling off period.

The Complaint[1]

The Complainant explained the reasons for which he feels MPM let him down in a letter of complaint addressed to the Arbiter, as attached to his Complaint Form filed with the Office of the Arbiter for Financial Services ('OAFS') on 5 July 2022.[2]

In the said letter, the Complainant explained that his pension fund was originally worth £482,986.05 when it was transferred to MPM on 3 January 2013. After fees and commissions to *Continental Wealth Management* ('CWM'), *Private Pensions Solutions SL* ('PPS'), and MPM were deducted, the amount of £473,043.29 was invested into the *Generali Portfolio Bond* [3] ('the Policy'). In May 2018, he transferred out of the Policy because of extremely high charges, and all assets were sold at that time and all losses realised. The surrendered value of the Policy was £232,877.46.

He added that he became aware, through the Financial Press and other media, that despite MPM's previous assurances to him that they were '*trying to help'*, they had however failed him and hundreds of others in their duties as Trustees to ensure that his pension fund was safe.

The Complainant submitted that the purpose and objective of a pension is to provide an income in retirement and so it should be invested in appropriate assets to achieve this aim. He claimed that the Policy and structured notes purchased by MPM were however not suitable to fulfil this objective. The Policy alleged was an unnecessary wrapper and an additional layer of costs to the pension fund, designed only to pay 8% commission to the (unregulated) adviser. The Complainant asserted that MPM failed to act in his best interests and to

[1] Complaint Form on Page (P.) 1-4 with extensive supporting documentation on P. 5-121.
[2] P. 116-121.
[3] A life assurance policy issued by Generali International Limited.

fulfil their legal duties as his Trustee to have a diverse, low risk portfolio with reasonable and disclosed charges.

The Complainant noted that MPM tried to put the blame on others, namely, CWM and *Trafalgar International GmbH* ('Trafalgar'). He claimed that if the said parties were appointed as 'Introducers' of MPM, as is his understanding, then MPM had a duty under the Retirement Pensions Act 2011 ('RPA') part D.1 to carry out due diligence in order to ensure that its introducers acted within the rules of the RPA.

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

The Complainant explained that he now knows that CWM was not licensed for insurance, investment, or pension advice in any jurisdiction and that Trafalgar only had an insurance mediation licence – and that this licence was not transferrable from Trafalgar to CWM or anyone who worked as 'advisers' at CWM. He claimed that, indeed, no licence agreement between Trafalgar and CWM existed. He continued that MPM had not carried out due diligence on this company which is a Cyprus-based firm which was regulated in Germany for insurance mediation. In this regard, he referred to a decision in a previous award delivered by the Arbiter numbered case 073/2019.

The Complainant referred to the Special Funds (Regulation) Act ('SFA'), Chapter 450 of the Laws of Malta and alleged that under Article 24(2)(b) of the SFA, it is sufficiently clear that it was in the MFSA regulations that MPM had a duty to ensure that CWM and/or Trafalgar was subject to an adequate level of regulatory supervision. He however claimed that CWM had no regulation for investments (or indeed insurance) in any jurisdiction from any regulatory authority.

It was explained that MPM only cancelled terms of business with CWM in August 2017 with CWM ceasing trading on 29 September 2017. The Complainant was of the understanding that MPM had, however, prior knowledge of serious concerns regarding CWM and Trafalgar and was aware of large losses within the members' pension funds as far back as 2015, but yet still failed to investigate

whether he had been affected and did anything to inform him or to try to mitigate his financial losses or to inform the MFSA.

The Complainant continued to explain that MPM had terms of business with three companies - *Inter Alliance World Net Insurance Agents*, *Trafalgar*, and *Global Net* - all on exactly identical terms. He asserted that these three companies were in fact all one and the same, operating out of an address in Cyprus. It was alleged that these three companies chose, and approved, a very narrow selection of structured notes to be purchased as investments. The Complainant submitted that since each person should be treated as an individual, his investments should not be the same of another person who has different needs. He insisted that MPM, however, allowed this narrow selection of structured notes for their members via these three companies.

The Complainant claimed that MPM failed to adhere to the MFSA rules for service providers and submitted that the RSA retains ultimate responsibility to ensure compliance by anyone acting on its behalf and with applicable licence conditions. He insisted that Trafalgar could not have been CWM's principal, and that CWM were not authorised representatives in Spain as there were no passporting rights at all from Trafalgar.

The Complainant continued to state that MPM have a duty of care under the Pension Laws to ensure the suitability and legality of any Introducers, etc., with whom they issued terms of business.

He noted that the Generali Policy application form, Section 9, clearly states that MPM appoints the Portfolio Manager (identified as Anthony Downs of CWM) and that they take full responsibility for the selection of the investment instruments.

He added that the MPM Trust Deed, on page 29 (clause 9.5), states that:

> '*Where the investments are member directed the RSA shall approve the appointment of the investment advisor, if applicable which shall be subject to an agreement setting out the terms of the service, roles and responsibilities of the parties*'.[4]

[4] P. 118

The Complainant noted that a trustee needs to ensure that the applicant's funds are invested in a prudent manner and in the best interests of the member and should act as a *bonus paterfamilias.* He claimed that MPM failed to do this.

He further claimed that one of the dealing instructions he obtained, that was passed by MPM, was not even signed by him. He accordingly claimed that this shows that no due diligence was undertaken.

He continued that on page 8 of the MPM application form, under *'Declarations… Number 6'*, it is stated that:

> *'I accept that I or my designated professional advisor 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'*.[5]

He added that this document also shows that he has a low to medium appetite for risk. The Complainant asserts that MPM should, therefore, have used its power and discretion to question and stop the unsuitable professional-only investments which were purchased with his pensions and to act to protect his pension fund but failed to do so.

The Complainant submitted that he requested that his risk profile was to be set at medium and it would be his understanding that as part of the RSA's '*Know Your Customer'* due diligence MPM should have had procedures in place to establish a member's risk profile independently of the IFA. He claimed that MPM failed to do this and did not even adhere to the risk profile in its own Application Form.

The Complainant submitted that all of the investments made with his pension transfer of almost £483,000 were into high-risk, professional-investor-only structured notes. He claimed that every purchase is for a structured note (no diversification), into assets ranging from 1 year to 5-year terms (no liquidity), in breach of MPM's own guidelines of the time which required that no more than 40% should be in assets with liquidity greater than 6 months.

[5] P. 119

He claimed that these investments do not reflect his risk profile as he is most definitely a retail investor who knew nothing at all about structured notes/term sheets/underlyings/coupons/barriers, etc., until his money was lost.

He further noted that these are complex products and that in all honesty, he still does not understand them even today after attempting to thoroughly understand what they are and how they destroyed such a large proportion of his pension.

The Complainant noted that MPM question the fact that he knew about losses sooner. He rebutted that, indeed, it was obvious that investments were not performing as he was led to believe by CWM, who explained these as *'paper losses'*. He added that, in fact, MPM reinforced such explanation as at the bottom of the annual statement it clearly stated that:

> *'Certain underlying assets within the investment may show a value that reflects an early encashment value, or potentially a zero value, prior to maturity date. This will not reflect the true current performance of such underlying assets'.*[6]

He submitted that this disclaimer from MPM, and the fact that they had not communicated any concerns, led him to believe that his pension was safe and that the explanation of paper losses and market performance was plausible. He added that, in addition, there were also discussions that Leonteq[7] were going to provide compensation for losses on their products.

The Complainant noted that MPM have recently changed their guidelines which now state:

> *'Additional requirements -Investments must be suitable for retail customers - Non-Retail investment(s) will only be considered at the discretion of the Trustees and where the requirements for the identification of a Member as a Professional Client (Gibraltar) or Professional Member (Malta), as defined in relevant Regulations or Rules, have been met'*.[8]

[6] Ibid.
[7] As explained further on in this decision, no reference to investments in Leonteq were traced among the Complainant's portfolio
[8] *Ibid*.

The Complainant submitted that he was never supplied with, and is unable to find, all of the term sheets for the structured notes invested into within his pension fund. He was however able to find a few on the internet that he believes are in his purchases, or similar – the *RBC Autocall note*, one for Commerzbank and *RBC Gold Miners* which are clearly marked *'For Professional Investors Only'*. He submitted that looking at literature for all structured notes and reading information available online, including previous rulings by the Arbiter, he could see that these products are all in fact for professional investors only.

He continued that the investments in his portfolio were all high risk, illiquid and with no diversification/mix of guaranteed or capital protected products. He added that MPM in its own declarations state that it read all offering documents and accepted the risks.

The Complainant referred to the Pension Rules for Service Providers 2011, Part B4, 1.4(b), which he noted state that:

> *'The Service Provider shall act with due skill, care and diligence. Such action shall include: (b) Where applicable, taking all reasonable steps to obtain, when executing orders, the best possible result for its clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order'*.[9]

He furthermore cited from the Trusts and Trustees Act where he noted that this stated that *'in so investing or otherwise applying trust property, a trustee shall act as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust and by exercising reasonable care, skill and caution'*.[10]

He submitted that, as part of its due diligence, and given it had complete discretion over the investments made, MPM should have surely obtained and understood the term sheets relating to these investments, particularly for a retail investor with a medium risk profile in a pension fund which should not be at risk.

[9] *Ibid*.
[10] P. 120

The Complainant reiterated that 100% of the investments that MPM passed as compliant and suitable for him as a retail investor, and suitable for his pension fund, were high risk and only suitable for professional investors having a significant chance of extreme losses. He asserted that allowing any of these high risk, illiquid investments to be made proved that MPM failed in its fiduciary duties.

He stated that he believes that MPM failed to act on information that was readily available to it. He further asserted that not telling him about the risks, purchasing unsuitable assets, and not raising concerns regarding the type and risk of investments being made confirms MPM's failure to fulfil its legal duty to act in his best interests. It was submitted that this equates to wilful negligence as MPM should have rejected them given the investments did not match his investor status, risk profile or its own guidelines. He submitted that a pension fund should never be exposed to the possibility of losing a significant proportion or the entire sum.

The Complainant also referred to the MFSA Consultation Document on amendments to the Pension Rules, issued under the RPA (MFSA REF: 09-2017), which he noted stated on page 4 that:

'It considers that the RSA remains responsible for current retail members and in particular they ensure that the investments made reflect the risk profile of such members'. [11]

He added that he noticed that the same consultation document also states on page 8 that from on-sites conducted, the MFSA were concerned to note:

'That in a number of instances, the assets of members (who are mostly retail investors) are being placed in investments such as speculative derivatives, structured notes and units in Professional Investor Funds (PIFs) on a regular basis. These type of investments are more apt and suitable for investors with higher risk appetite, such as professional investors'.[12]

He pointed out that MPM, however, allowed 100% of his pension fund to be invested in such products without raising any concerns or communicating with

[11] *Ibid*.
[12] *Ibid*.

him in light of his status as a retail investor. He submitted that MPM accordingly failed to act in his best interest to use its discretion and act in a prudent manner or with the diligence and attention of a Reasonable Person. He further added that MPM's actions, or lack thereof, have not satisfied his reasonable and legitimate expectations in any way.

The Complainant went on to cite Section B.4 (1.7) of the Pension Rules for Service Providers as stating:

> *'The service provider shall, before offering any services to the members, provide in writing a description of the nature and amount of any direct or indirect charges or fees a member or beneficiary will or may be expected to bear in relation to the scheme or fund and investments within the scheme or fund (if applicable)'.*[13]

He also cited Section B.4.1.3(f) of the same Pension Rules as providing that:

> *'The Service Provider shall act honestly, fairly and with integrity. Such action shall include – avoiding the imposition of unfair and unreasonable charges on the scheme and its Contributors and Members and Beneficiaries, and on the Retirement Fund and its Investors, as applicable, also taking into account, where applicable, the charges levied on any underlying investments in which the Scheme or Retirement Fund invests'.*[14]

He also cites the same Pension Rules as providing, in Section B.4.1.17(a), that:

> *'The Scheme Administrator will be liable to the Scheme, Member(s), Beneficiary(ies) and Contributor(s) of the scheme for any loss suffered by them resulting from its fraud, wilful default or negligence, including the unjustifiable failure to perform in whole or part its obligations.'* [15]

The Complainant submitted that MPM also failed to fulfil its fiduciary duties under the Civil Code, Chapter 16 of the Laws of Malta. Reference was also made to the MFSA Trusts and Trustees Act, Cap. 331, Code of Conduct, part 6.0 on Integrity and Ethics, which he cited as stating that:

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

> *'Trustees, whether corporate or individual persons, must conduct business with integrity at all times and should not attempt to avoid or contract out of their responsibilities under this Code. They must exercise their fiduciary duties prudently and competently and, subject to the terms of the trust, consider the rights of all classes of beneficiaries when making decisions affecting the administration of the trust. They should invest, distribute or otherwise manage each trust's assets in accordance with the law and the trust instrument. They must deal fairly with all clients and seek to ensure that clients are not misled as to the service being provided and the duties and obligations of the service provider. Trustees should treat the interests of beneficiaries as paramount (subject to any legal obligations to other persons or bodies) and should always act with due care, skill and diligence.'*[16]

The Complainant submitted that MPM did not deal with him *'fairly'* or *'equitably'* as they previously paid restitution to others for the same failings.

In summary, he stated that the losses his pension fund has suffered are totally due to the extreme wilful and continuing negligence of MPM as his trustees, and they are therefore fully responsible for this loss given, he claimed, that they:

- Failed to act in his best interests.
- Failed to act within their investment guidelines.
- Failed to ensure investments were within his risk profile and status.
- Failed to fully disclose fees and provide all precontractual information.
- Failed to allow his legal right of a 30-day cooling off period.
- Failed to ensure that the companies that they issued terms of business to were qualified, had the correct legal licences and necessary regulations, etc., to operate.
- Failed to communicate to him any concerns at any time over the huge losses or inappropriate investments made within his portfolio.
- Failed to act to mitigate losses to his pension fund.
- Failed to obtain or act upon related investment Term Sheets and failed to investigate the associated risks.
- Failed to treat him fairly and equitably.

[16] *Ibid*.

- Failed to fulfil its fiduciary duties under section 1124A of the Civil Code, Chapter 16 of the Laws of Malta, and the Trusts and Trustees Act.

The Complainant believes there has been a breach of trust arising from MPM's neglect to act in his best interests and perform its obligations as laid out in the Retirement Pensions Act 2011 part B.4.1.17.

The Complainant added that:

- He believes that MPM were negligent with regard to managing his pension fund and failed, as his Trustees, to take reasonable care to avoid causing loss to his fund. He claimed that the behaviour and failings of MPM in the circumstances did not meet the standard of care which a reasonable person would meet in the circumstances.
- MPM failed in its compliance with the Retirement Pensions Act, 2011.
- He, as a member, suffered extreme financial loss which is ongoing, and which a reasonable person in the circumstances could have expected to foresee and prevent.

The Complainant remarked that the MFSA has found, identified and acted on the same underlying fundamental failures as contained within his complaint as part of its investigations into the complaints it had received pertaining to the same or similar issues as his regarding the trustee's failures. He considered it is thus inconceivable that MPM continue to deny complete responsibility for his monetary loss.

He concluded by reiterating that MPM did not act with the obligations and duties applicable to the RSA and Trustee and that its actions, or lack of action, directly resulted in his pension fund losses.

Remedy requested

The Complainant explained that on 3 January 2013, the amount of £482,986.05 was transferred to MPM. After fees and commissions, £473,043.29 was invested into the Generali Policy.

He further explained that in May 2018, after surrendering the Policy because of its extremely high charges, the remaining value was of £232,877.46.

The financial compensation sought by the Complainant is of £240,165.83 - the difference between the initial value invested and the value after surrendering the Policy when all losses were realised. [17, 18]

The Complainant respectfully requested the Arbiter to rule against MPM with costs.

Having considered, in its entirety, the Service Provider's reply, including attachments,[19]

Where the Service Provider explained and submitted the following:

Introduction and background

1. MPM is licensed by the MFSA to act as the RSA and Trustee of the Scheme, this being a licensed Personal Retirement Scheme. MPM is not licensed to provide investment advice.

2. The Complainant completed the MPM Application Form, dated 11th October 2012, together with his advisor, Anthony Downs, as per the form.

3. By letter dated 8th November 2012, MPM sent the Policy application received from the Complainant's adviser to *Generali International Limited* ('Generali'). Anthony Downs is once again named as advisor on this form.

4. That, in addition, the Complainant completed the Generali Online Service Registration Request form which enabled him to access his Generali account online and see his investment valuations, transactions and underlying holding at any point in time. It was submitted that the Complainant himself stated that he used the Generali online account to review his investments on an ongoing basis from as early as December 2013.

5. That by email dated 6th May 2013, MPM informed the Complainant that funds were received from the previous pension scheme(s) and that they

[17] Initial value invested of £473,043.29 less the Policy's value at surrender of £232,877.46
[18] It is to be noted that the quantification of the remedy sought by the Complainant does not take into account withdrawals and fees.
[19] P. 127-137, with attachments from P. 138-168.

were invested in accordance with his instructions. Copies of the Client Account Statement and the Scheme Particulars were attached.

6. That by letter dated 30th January 2013, further documentation requested by Generali was sent by MPM to Generali. By letter dated 12th February 2013, the Generali Policy document including their fees was issued to the Complainant.

7. That dealing instructions were received by MPM from the Complainant's appointed advisor until 2017, when he appointed a new advisor. The majority of the dealing instructions were submitted after 2015 by Dean Stogsdill and Anthony Downs in their capacity as employee and regulated advisor of Trafalgar.

8. Annual member statements were sent to the Complainant each year.

9. Following MPM's communication on terms of business being suspended/terminated with CWM and Trafalgar, the Complainant contacted MPM in relation to CWM.

10. Subsequently, in October 2017, the Complainant appointed Stuart Langan as his new advisor who carried out a full review of the Complainant's portfolio and proposed a revised investments strategy, including a review of his investment holdings and subsequently the decision to surrender the Complainant's Generali Insurance Policy.

11. That a dealing instruction was subsequently submitted by Langan and confirmed by email by the Complainant that he *'accepted the suggested strategy identified and will not be changing anything on the Form'*,[20] that is, the attached dealing instruction.

12. During October 2017 to early 2018, the Complainant requested from MPM copies of all dealing instructions which had been submitted, the Momentum Scheme Trust Deed and Generali Policy documentation which were provided to the Complainant.

[20] P. 128

13. That on the 11th December 2017, MPM received a Letter of Authority signed by the Complainant authorising MPM to discuss, communicate and liaise with Angie Brooks from *Pensions Life* which was assisting CWM members in seeking compensation from CWM/Trafalgar.

14. That in January 2018, MPM received a request for the Generali policy to be surrendered and reinvested in an investment platform.

15. That in March 2018, the Complainant's advisor confirmed (with the Complainant in copy) that he wished to surrender the Policy, attaching a valuation and confirming that the Complainant accepted the Policy Surrender Fee of GBP 24,834.77. A full valuation statement of the Generali portfolio was included in this email which, it was submitted, clearly showed the current valuation, investment holding and values and also the surrender penalty. MPM hence submitted that the Complainant had full visibility of the investment portfolio.

16. On 23rd February 2018, the Complainant lodged a formal complaint with Generali and included a summary of events which had occurred - referred to as *'My Pension Story'*. MPM explained that this was provided to it in May 2018 by Generali, after having first obtained the Complainant's permission to share this document. MPM further explained that by a letter dated 20th April 2018, Generali provided their response to the Complainant.

17. Through a letter dated 4th May 2018, from Generali, MPM was informed that the proceeds following the surrender were paid to the Complainant's account. The total amount paid and referred to in the letter was £232,877.46. The funds were subsequently reinvested with MPM as requested.

18. By letter dated 27th January 2022, the Complainant made a complaint in writing to MPM which was replied to by MPM through a letter dated 11th April 2022.

19. With respect to the amount of the alleged loss, MPM contests the amount alleged by the Complainant and shall be submitting evidence in this respect.

Competence and prescription

20. MPM pleaded that the conduct complained of in the Complaint occurring after the coming into force of Cap. 555 (on the 18 April 2016) is prescribed pursuant to article 21(1)(c) of Chapter 555 of the Laws of Malta.

21. MPM submitted that there is no doubt that, at the latest, in May 2018, the Complainant was fully aware of the losses sustained upon surrender of the Policy. It added that, as stated earlier in its reply, by letter dated 8th May 2018 from Generali to MPM, MPM was informed that the proceeds following the surrender were paid to the Complainant's account. The total amount paid and referred to in the letter is GBP232,877.46 after the payment of the surrender penalty mentioned. MPM identified the amount invested in 2013 as GBP473,043.29. It added that, furthermore, the Complainant was provided with a Generali valuation statement which clearly showed the valuation and holdings in place at this time.

    It added that from 2017 onwards, the Complainant appointed a new advisor, who reviewed his portfolio and in conjunction with the Complainant agreed to the revised investment strategy proposed. The Complainant confirmed his agreement to the proposed strategy by email, which included a dealing instruction being submitted instructing the sale of a significant number of investments held at this time.

22. MPM continued that from October 2017 and in 2018, the Complainant requested and was provided with all dealing instructions which had been submitted for and on his behalf by CWM, a copy of the Generali application form and policy document and a copy of the Trust Deed. MPM hence submitted that the Complainant had full visibility at this time and had online access to the Generali account to view his investments and transactions.

23. MPM noted that, however, the Complainant only registered a complaint in writing with it on the 27th January 2022.

24. MPM therefore submitted that the Complainant's complaint with it was registered in writing beyond the two-year period set out in article 21(1)(c)

of Chapter 555 of the Laws of Malta and the Complainant's Complaint should therefore be rejected.

25. Without prejudice, MPM also replied that the evidence will irrefutably show that the Complainant was aware of the losses much earlier than May 2018 and as far back as 2013, and this on the basis of the following:

    a. By email dated 11/09/2017, the Complainant wrote to MPM (in reply to MPM's email informing him of the suspension of terms of business with CWM) enquiring about compensation. MPM highlighted that it is important to note that the Complainant did not raise any complaint against MPM in this email. [21]

    b. By email dated 17/09/2019, the Complainant stated that he first started to be concerned about CWM and his pension in 2013. MPM cited from it as follows: *'I first started to be concerned about CWM and my pension in 2013…'*.[22] MPM submitted that this email together with its attachments, are particularly important, as MPM will prove throughout the proceedings.

       MPM noted that attached to the email of the 17/09/2019 is a document titled *'My Pension Story'* which MPM claim *inter alia* confirms that the Complainant held regular meetings with his advisors and that he raised concerns with them in 2013. It cited the following extracts, whilst submitting that these show that the Complainant was aware as early as 2013 about the performance of his investments and that he discussed it regularly with his advisors on a 6-monthly basis remotely and face to face:

       '… Having returned to Doha I continued to have infrequent contact with AD and DS. We roughly scheduled 6 monthly meetings coinciding with my vacations. I was also given access to the Generali website where I could see the performance of my pension fund. In a meeting we held in December 2013 I raised my concerns that most

[21] P. 152
[22] P. 130

of my investments were in the red. AD and DS said that it was mostly to do with the way in which Generali prepared their valuations…

I continued to keep track of my pension performance infrequently. Access to the internet from my accommodation was poor and I could not access the Generali site from the offices. When I did manage to check I could see that the fund was continuing to perform poorly. We didn't have a face to face meeting until after my retirement to my home in Spain in August 2015.

When we did have our next meeting I again raised my concerns about the performance of my fund. I think it was at this meeting that I was told there was a problem with one of the note providers, Leonteq. I was further told that Leonteq had admitted that they had one or two traders who had breached their code of business and prepared notes that were unsuitable and that these had failed. I was led to believe that this was where my losses had come from. I was also told that discussions were ongoing with Leonteq with a view to the value of these notes being reimbursed, probably in the form of different investments to the same value.

We continued meeting on a six monthly basis and at one of the meetings I noted that there was £100,000 in my cash account and requested that this be put to work but in unit trusts and suchlike. This request was carried out and most of them seemed to perform reasonably. There were/still are structured notes in my fund and I was advised to let these run. …'.[23]

c. MPM submitted that the Complainant also notes in his Pension Story that *'During the time I was in Doha in March of 2014 I was asked to sign an empty dealing instruction … I was a bit wary of signing an open instruction but went ahead and signed'*.[24]

26. MPM continued to explain that, furthermore, by email dated 13th February 2018, the Complainant lodged a complaint against Generali, cited as

[23] P. 130 & 131
[24] P. 131

follows: *'Formal letter of complaint regarding the conduct and performance of Generali related to my Momentum Malta Retirement Trust (CH) PF79 Portfolio: PF791138'*.[25]

MPM cite that the complaint to Generali in February 2018 stated as follows:

> *'The above plan commenced on 30 January 2013 with Total Contributions of £473,043.29 as of 11 January 2018 the value of my fund was £258,024.00 with a surrender value of £231,746.32'*.[26]

MPM continued that, in addition, the document titled 'My Pension Story' was included as an attachment in this email, showing this document was drafted by the Complainant prior to the 13th February 2018.

MPM submitted that in his formal complaint to Generali, by referencing his knowledge of the same matters complained of by other complaints to *Old Mutual International* ('OMI'), the Complainant complained as follows:

> *'The problems complained about remain the same in both cases:*
> - *Low-risk investors put into high-risk, professional-investor-only structured notes*
> - *Generali allowed investors to have their retirement funds used to purchase RBC, Commerzbank, Nomura and Leonteq structured products – many of which failed and caused horrendous losses*
> - *Commissions were paid to the adviser – Continental Wealth Management – which was neither licensed for insurance nor for investment*
> - *Investment instructions were accepted from Continental Wealth Management even though it had no investment license'.*

27. MPM added that the Complainant's complaint to Generali in February 2018 also refers to complaints submitted in relation to OMI relating to the following matters:

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

- *'That investments were made into high-risk professional-investor-only funds. Many of these failed and caused huge losses to victims' funds.*
- *That OMI paid commissions/fees to CWM who not only held no investment licence – but also held no licence of any kind.*
- *The victims' signatures were repeatedly forged on dealing instructions.*
- *The victims were duped into a false sense of security when losses started to be reported on their statement by the scammers claiming these were not genuine losses but only 'paper losses'.*
- *The victims had no idea how high the charges and commissions were as these were not disclosed either by the scammers or by OMI.*
- *The victims were not consulted as to whether they wanted or needed an entirely useless and exorbitantly expensive insurance bond.*
- *The victims were unaware that tied agents are illegal in Spain.*
- *The victims were unaware of the huge fees and commissions which were concealed by both the scammers and OMI'.*[27]

MPM claimed that this clearly evidences that the Complainant had knowledge in February 2018 (and before then, as he himself states) of the matters complained of.

28. MPM further noted that on the 11th December 2017, the Complainant signed a Letter of Authority for *Pension Life*, authorising MPM to provide information as requested to Angie Brooks who was representing CWM complainants.

29. MPM submitted that, in the complaint to MPM, the Complainant states that he first had knowledge of the matters complained about on the 27 January 2022. MPM submitted that this is clearly not the case and that the Complainant first had knowledge well before the 27 January 2022 as explained earlier in its submissions.

[27] P. 132

30. MPM continued that, in the Complaint, the Complainant stated: *'In May 2018 I transferred out of the Generali Bond, so all assets were sold at that time, therefore all losses are realized'*.[28] It highlighted that the Complainant therefore confirms that all assets were sold in May 2018 and losses realised at that time.

    The Complainant is further cited as going on to state that he *'… recently became aware, through the Financial Press and other Media that despite Momentum's previous assurances to me that they were "trying to help" they have failed me, and hundreds of others, in their duties as Trustees to ensure that my Pension Fund was safe.'* [29]

    MPM respectfully replied that the Complainant was certainly aware of the matters complained of in May 2018 and even before May 2018 as he himself repeatedly confirms in 'My Pension Story' and also in his complaint to Generali.

    MPM submits that the Complainant was aware of the matters complained of at the latest in May 2018 and, therefore, if he wanted to complain and make allegations to the effect that MPM *'failed [him]'*, he should have done so at the time. It submitted that the *'Financial Press and other Media'* should have no bearing on who the Complainant attributes responsibility to – it is either MPM who is responsible for the loss (which MPM replies that it is not), or it is not.

31. MPM continued that, additionally, in the Complaint, the Complainant states, with reference to the annual member statements sent by MPM:

    > *'This disclaimer from Momentum and the fact that they had not communicated any concerns led me to believe that my pension was safe and that the explanation of paper losses, and market performance was plausible'*.[30]

    MPM replies that this contradicts what the Complainant himself has stated about raising concerns as early as 2013, as mentioned earlier in its reply.

[28] *Ibid*.
[29] *Ibid*.
[30] P. 133

MPM emphasises that, in any event, in May 2018 the loss was crystallised, as the Complainant himself states in the Complaint.

32. MPM stated that, furthermore, and without prejudice to that submitted earlier in its reply, it considers the Complaint prescribed pursuant to article 21(1)(b) of Chapter 555 of the Laws of Malta.

    With respect to conduct occurring before the entry into force of the Act (on 18 April 2016), MPM submits that the Complaint is time-barred. It noted that the abovementioned article 21(1)(b) came into force on the 18 April 2016 – however the Complaint was filed on the 5th July 2022 and therefore beyond the two-year period mentioned in article 21(1)(b) of Cap. 555.

33. Without prejudice, MPM further replied that the Complaint is prescribed pursuant to article 2156(f) of Cap. 16 of the Laws of Malta.

34. MPM submits that the Complaint should therefore be rejected by the Arbiter.

Reply to allegations raised by the Complainant

35. MPM noted that the Complainant alleges that MPM failed to act in his best interest and fulfil its duties as trustee to have a diverse, low-risk portfolio with reasonable and disclosed charges. MPM replied that, in the first place, the attitude to risk selected by the Complainant on the MPM application form was up to *'medium risk'*. MPM replied that, additionally, with respect to the MPM charges, adviser charges and Generali policy charges, these were disclosed to the Complainant, as it will prove throughout the proceedings.

36. MPM continued to note that the Complainant states that an RSA retains ultimate responsibility to ensure compliance by the member or any person acting on his behalf with the objective of the compliance of the retirement scheme. MPM replied that the Complainant must reference the rule or law he is allegedly quoting from. It reserved the right to reply further when this clarification is provided.

37. MPM noted further that, in the Complaint, the Complainant raises the allegation that CWM was not licensed for insurance, investment or pension advice and that Trafalgar only had an insurance mediation license. It added that the Complainant further alleges that MPM did not carry out any due diligence on this company.

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

    MPM explained that from 2015, advisors, including Anthony Downs, were individual employees of Trafalgar (referred to as 'members' by Trafalgar, but Trafalgar had confirmed to MPM that they were employees). As employees of Trafalgar, they were operating under Trafalgar licences. Trafalgar's licence was stated to confirm that: *'Trafalgar International GmbH is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24'*.[31]

    MPM stated that this will be amply proved throughout the proceedings, including by communications sent by Trafalgar themselves to MPM.

    MPM insisted that any investment trades placed for and on behalf of the Complainant by his advisor (employed and regulated by Trafalgar) from 2015 onwards, were therefore reviewed and strictly controlled via Trafalgar's head office in Germany. MPM stated that, as will be proved, this was confirmed by Trafalgar itself. MPM added that, furthermore, Trafalgar as a regulated entity was also responsible for advising the Complainant on his existing portfolio from 2015 onwards as the appointed regulated advisor.

    MPM insisted that, from 2015, CWM was not an unlicensed investment advisor. The Complainant's advisor was an employee of Trafalgar (as confirmed by Trafalgar themselves) and was indeed regulated under Trafalgar's authorisation within the regulatory environment in Germany and hence licensed to provide insurance mediation activities.

[31] P. 134

38. That Trafalgar made various confirmations to MPM in writing, (as per the copy attached to the reply),[32] that: (i) Trafalgar provides regulation and compliance for transactions that fall under the remit of their licence; and (ii) the list of advisors are employees of Trafalgar and members of GlobalNet (Trafalgar's administration company).

    MPM highlighted that from the confirmation provided by Trafalgar, it emerges that any investment trades placed for and on behalf of the members by advisors employed and regulated by Trafalgar from 2015 onwards, were therefore reviewed and strictly controlled via their head office in Germany, a regulated entity, and that Trafalgar not only rate the risk but they go further as part of its duty of care to their clients (that is, the MPM members they were advising).

39. MPM added that, subsequently, Trafalgar also provided MPM with a copy of the Trafalgar Members Agreement entered into with the individual advisors for MPM's satisfaction, (as per the copy attached to its reply).[33] It was explained that this agreement sets out in detail the practices which the advisor was to carry out, including that the advisor had to ensure that all clients received the documentation referred to in the agreement.

40. MPM submitted that, without prejudice to that stated previously, at the time that the Complainant became a member of the scheme, there was no law or rule requiring MPM to carry out any due diligence or ensure that CWM/Trafalgar was licensed. MPM reiterated that it has fulfilled all obligations incumbent upon it from time to time. In particular, MPM replied that there was no obligation for it to verify whether CWM or the advisor appointed by the Complainant were regulated or whether it was authorised to provide advice.

41. MPM noted that the Complainant quoted article 24 of the Special Funds Act (Chapter 450 of the Laws of Malta). MPM replied that this law has been repealed and that, in any event, this provision is not relevant as it refers to asset managers.

[32] P. 162 - 165
[33] P. 166 - 168

42. MPM noted that the Complainant also alleged that '*As each person should be treated as an individual, my investments should not be the same as another person who has different needs. But Momentum allowed this narrow selection on Structured Notes for their members via these three companies'*.[34]

    MPM stated that, in the first place, it will not divulge information pertaining to another member and that the Complainant must prove his allegation. MPM further replied that, additionally, the investments proceeded with for the Complainant were in line with his attitude to risk and in line with MPM's investment guidelines applicable at the time.

43. With respect to the Generali Policy application form, and the allegation that MPM appoints the portfolio manager (in this case, Anthony Downs), MPM replied that on this application MPM appears as trustee for the Complainant and appointed the advisor as directed by the Complainant, which coincides with the advisor named on the MPM application form signed by the Complainant himself.

44. MPM noted that the Complainant also refers, in the Complaint, to the MPM trust deed (page 29, section 9.5). MPM replied that the Complainant is quoting from the trust deed which was updated in 2017 and, therefore, was not applicable before 2017.

45. It noted that the Complainant further alleges that he obtained a dealing instruction, passed by MPM, that was not signed by him. MPM replied that the Complainant himself confirmed that he had signed a 'blank' dealing instruction. MPM submitted that, accordingly, the Complainant must clarify what he is alleging in this respect against MPM, and MPM reserved the right to reply further.

46. It noted that the Complainant further goes on to state:

[34] P. 135

a. That MPM should have assessed his risk profile independently of his advisor. MPM replied that MPM relied on the risk profile chosen by the Complainant himself;

b. MPM should have stopped the unsuitable professional-only investments purchased. MPM replied that the portfolio of investments was in line with the Complainant's attitude to risk and, in any event, the Complainant must prove which investments were *'professional-only investments'*;

c. All investments were into *'high-risk, professional investor-only structured notes … Every purchase is for a structured note (no diversification) into assets ranging from 1 year to 5 year terms (no liquidity) and breaching Momentum own guidelines of the time that no more than 40% should be in assets with liquidity greater than 6 months.'* [35] MPM replied that the statement is inaccurate, as shall be proved throughout these proceedings.

47. MPM added that the Complainant referred to a consultation document relating to rules which came into effect in July 2019. MPM replied that any such rules clearly did not apply to the Complainant, who surrendered in May 2018. It was stated that, furthermore, the reference to the MFSA consultation document is not specific to MPM and therefore no inference can be drawn against MPM on this basis.

48. MPM noted that in the Complaint, the Complainant refers to *'section B.4 (1.7) of the Pension Rules for Service Providers'*[36] and to section B.4.1.3(f) without however stating how MPM has allegedly failed vis-à-vis the said rules.

49. It noted further that the Complainant alleges that MPM is not dealing with him fairly because it has paid restitution to others for the same failings. MPM replied that, in the first place, this is purely gratuitous. MPM replied further that each case must be assessed on its own merits and due process

[35] P. 136
[36] *Ibid*.

must be followed before the Arbiter with respect to the Complainant's Complaint.

50. MPM also noted that in the list of failings, which the Complainant made in his Complaint, he inter alia refers to MPM's alleged failure to disclose fees and provide pre-contractual information; and to allow him the 30-day cooling off period. MPM replied that, in the first place, any such allegation is prescribed pursuant to article 21 (1)(b) of Cap. 555 of the Laws of Malta. MPM replied that furthermore, the Complainant appears to be referencing rules which came into effect in 2019 and therefore clearly did not apply to the Complainant's surrendered policy.

51. MPM replied that it has at all times fulfilled its obligations with respect to the Complainant.

Momentum does not provide investment advice

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

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

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

MPM's Concluding remarks in its reply

54. MPM submitted that:

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

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

c. The Complaint is prescribed pursuant to article 21 of Cap. 555 of the Laws of Malta as clearly emerges from this reply and as will be further proved throughout the proceedings.

55. Consequently, MPM respectfully requested the Arbiter to reject the Complainant's claims, with expenses.

Preliminary

Competence of the Arbiter

The Service Provider, in Section B of its reply, raised the preliminary plea that the Arbiter has no competence to hear this Complaint based **on Article 21(1)(b) and Article 21(1)(c) of Chapter 555 of the Laws of Malta** (the 'Act') as well as on **Article 2156(f) of Chapter 16 of the Laws of Malta**.[37]

In Section C of its reply, it also raised the plea that the matter raised in relation to the 30-day cooling off period is also prescribed pursuant to article 21(1)(b) of the Act.[38]

The Arbiter is considering these pleas as follows:

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

Article 21(1)(b) of the Act stipulates that:

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

[37] P. 129 - 133
[38] P. 136 also arguing that the 30-day cooling off period came into effect in 2019

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

This provision stipulates that a complaint related to the '*conduct*' of the financial service provider which occurred before the entry into force of the Act **shall be made not later than two years** from the date when this paragraph comes into force. **This paragraph came into force on the 18 April 2016.**

With respect to the Complainant's claim regarding the lack of full disclosure of fees and the alleged failure of MPM to allow him the thirty-day cooling off period, (which aspects were not referred to, nor elaborated on, further by the Complainant during the proceedings of the case), it is considered that these specifically relate, and strictly applied, to conduct at the time of the acquisition of his pension scheme and underlying policy. The Complainant became a member of the Retirement Scheme following his application for membership of 11 October 2012 and the underlying Generali Policy was then acquired on 30 January 2013.[39]

With respect to the part of the Complaint involving these two specific aspects, (that is, the disclosure of fees and the cooling off period), the Arbiter accepts that these relate to *'conduct which occurred before the entry into force of this Act'* and that a complaint about such conduct was required to *'be made by not later than two years from the date when this paragraph comes into force'* as provided for in article 21(1)(b) of the Act. Given that the complaint to the OAFS on these aspects was not raised by 18 April 2018, MPM's plea that the complaint on fees and the cooling off period are aspects which are prescribed under article 21(1)(b) of the Act is therefore accepted by the Arbiter.

The Arbiter however notes that the Complaint made by the Complainant covers a far wider key aspect than the issue of fees and the cooling off period. Indeed, a key and main aspect of the Complaint involves the alleged unsuitability of the investments that were permitted within the Complainant's portfolio as well as the matters surrounding the appointment and oversight of the actions of his advisers as summarised at the start of this decision.

[39] P. 192 & 237

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.

The Arbiter notes that various material positions in the disputed structured note investments still featured and formed part of the Complainant's investment portfolio after 18 April 2016, as clearly emerges from the transaction statements presented with the Complaint. [40, 41]

The conduct complained of with respect to the disputed investments involves the conduct of the Service Provider **as trustee and retirement scheme administrator of the Scheme**, which role MPM occupied since the Complainant became a member of the Scheme and it **continued to occupy such role beyond the coming into force of Chapter 555 of the Laws of Malta.**

The Arbiter considers that article 21(1)(b) is, in the circumstances of this case, not applicable to the key aspect referred to above given that the Complaint involves the conduct of the Service Provider during its tenure as trustee and administrator of the Scheme, which conduct goes beyond the period when the Act came into force, and it involves investment products which still featured and formed part of the Complainant's portfolio after 18 April 2016. This is apart from the fact that CWM/Trafalgar were also still involved with the Complainant's Scheme up until 2017.

The said conduct complained of cannot thus be considered to have occurred before 18 April 2016 but is rather considered to have been conduct that is continuing in nature as per article 21(1)(d) of the Act.

The Arbiter is accordingly dismissing the submissions made by MPM with reference to article 21(1)(b) in respect of the key aspect involving the disputed investment instruments and his advisors. The Arbiter shall consider next the plea raised with respect to article 21(1)(c) of the Act.

[40] P. 13 *et seq.* and P. 25 *et seq.*
[41] Table A in the decision further on also refers.

Plea relating to Article 21(1)(c) of Chapter 55 of the Laws of Malta

Article 21(1)(c) of the Act stipulates that:

> *'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act, if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of'.*

Therefore, the Complainant had two years to complain to the Service Provider '*from the day on which the complainant first had knowledge of the matters complained of*'.

The matters complained of involve the substantial losses experienced by the Complainant on his Retirement Scheme. In his Complaint Form filed with the OAFS, the Complainant sought compensation for *'the difference between the initial invested value and the value after surrendering the bond when all losses were realised*'.[42]

It is clear and undisputed that the Complainant was aware of concrete problems with his pension in 2017 and, by 2018, he had full knowledge of all the losses actually realised following the sale of the last two remaining structured notes in February 2018[43] and the eventual surrender of his Generali policy underlying his Scheme shortly thereafter in May 2018. Indeed, prior to the surrender of the Generali Policy, the Complainant had already made a detailed formal complaint in writing with Generali through his email of 23 February 2018 about his significant losses[44] – which complaint will be considered in further detail in this decision due to its significance for the purposes of article 21(1)(c).

The date of *'27/01/2022'* indicated by the Complainant in his Complaint Form to the OAFS - in reply to the question as to when he first had knowledge of the matters complained of[45] - is evidently not correct nor relevant. This date just reflects the date of *'a letter dated 27 January 2022, sent by email'* by the

[42] P. 2
[43] As per the details included in the *'Cash Account Transaction Report'* - P. 50
[44] P. 258 - 266
[45] P. 1

Complainant to MPM following which MPM provided its formal position (through its letter of 11 April 2022) to the Complainant's grievances. [46]

For the reasons explained, the Complainant is considered to have had first knowledge of the losses, being the matter complained of, much earlier in 2017/2018.[47] Hence, the Arbiter accepts the Service Provider's submission that *'There is no doubt that, at the latest, in May 2018, the Complainant was fully aware of the losses sustained upon surrender of the bond'*.[48]

As to the date when the Complainant made a complaint in writing with it, MPM highlighted, in its reply, that the Complainant *'only registered a complaint in writing with Momentum on the 27th January 2022'*.[49] It accordingly argued that the Complaint is prescribed pursuant to article 21(1)(c) of the Act as more than two years had passed since the date when the Complainant first had knowledge of the matters complained of (in 2017 or by latest May 2018) and his letter of 27th January 2022.

Whilst the Arbiter agrees with the Service Provider's determination as to when the Complainant first had knowledge of the matters complained of, however, he does not concur that the date of 27th January 2022 is the proper date applicable for the purposes of article 21(1)(c) of the Act (as to the date when a complaint was registered in writing with MPM). This is for the reasons amply explained below.

If the Arbiter had to limit himself to the partial and simplistic analysis as MPM is suggesting, one could simplistically, but wrongfully, reach the position advocated by the Service Provider. Such analysis would, however, be incomplete and inadequate. The Arbiter considers that this aspect needs to be deliberated and studied closely and in-depth, with cognisance taken of all the relevant important matters that have emerged in this case in order to reach the proper conclusion. This is even more so when the plea of prescription has such a material implication to the parties and thus cannot be considered lightly or superficially.

[46] P. 7 referring to complaint by letter dated 27 January 2022, presumably document p. 6
[47] P. 1
[48] P. 129
[49] P. 130

The Arbiter indeed needs to ensure that the provisions of the law, including those relating to his competence under article 21 of the Act, are truly addressed with respect to the particular case under consideration.

A key question that the Arbiter considered in this case is whether the Complainant's letter of 27th January 2022 is the appropriate one to take for the purpose of article 21(1)(c) as claimed by MPM or whether the Complainant had already communicated his grievances and claims formally to MPM earlier.

The spirit in which Chapter 555 is written clearly indicates that what is important is that the consumer makes the service provider formally aware of the substance of the complaint.[50] The substance of the complaint will vary from case to case, but it can always be deemed to have been communicated to the service provider when the latter is made aware of the reasons for which the consumer is dissatisfied.

The Arbiter notes that, as acknowledged and referred to by the Service Provider itself, there were certain other material, formal communications (prior to the letter of 27 January 2022), that MPM was in receipt of (with the Complainant's specific consent) way back in 2018. Indeed, it has emerged that formal communications exchanged earlier in 2018 clearly implicated the Service Provider. The said communications reflect, in essence, the substance of the Complaint being considered before the Arbiter.

Having carefully considered the particular circumstances of this case and the nature of the correspondence and communications sent by the Complainant in 2018, the Arbiter indeed resolves that the communications sent by the Complainant in 2018, can *de facto* be deemed as a complaint documented in writing with the financial services provider for the purposes of the Act.

This decision is based taking into consideration various factors as highlighted, including the following:

[50] Article 21(2) of the Act indeed binds the Arbiter to *'decline to exercise his powers under this Act where […] it results that the customer failed to communicate the substance of the complaint to the financial service provider concerned and has not given that financial service provider a reasonable opportunity to deal with the complaint prior to filing a complaint with the Arbiter'*.

a) The Complainant - a retail consumer whose occupation was described as *'Project Manager'* in his Application Form for Membership into the Scheme and whose knowledge in financial services thus appears limited - had first sent an email to MPM on the 11th September 2017 pointing out certain losses suffered on his pension scheme and querying when he was to receive compensation for losses suffered on the Leonteq structured notes as he was led to believe that *'Apparently Leonteq has now agreed that reimbursement will be made to all affect and that the payments have started'*.[51]

b) More importantly, on the 23rd February 2018,[52] the Complainant sent a formal complaint by email to *Generali Worldwide Insurance Company Limited* ('Generali').

   Generali replied by letter on the 20th April 2018 which was sent to the Complainant *'C/O [Care Of] The Momentum Malta Retirement Trust, Momentum Pensions Malta Limited […]'*.[53]

   MPM had indeed received a copy of the Complainant's complaint of 23rd February 2018 (and Generali's reply). The receipt by MPM of the complaint of 23rd February 2018 is confirmed by way of the email from Generali dated 14th May 2018[54] and, also, in MPM's final submissions where MPM stated that the said complaint of 23 February 2018 *'… was provided to Momentum in May 2018 by Generali, <u>after having first obtained the Complainant's permission</u> to share this document'*.[55]

c) Not only had MPM received the Complainant's formal complaint of 23rd February 2018 - which complaint covers similar key issues to those raised in the Complainant's letter of 27 January 2022[56] - but MPM had even, at the time, discussed the Complainant's claims with Generali.

   In an email dated 8 May 2018, regarding the formal complaint Generali received from certain members of the Retirement Scheme (which included

[51] P. 152
[52] P. 258
[53] P. 398
[54] P. 255
[55] P. 418 - Emphasis added by the Arbiter
[56] P. 258 – 266 and P. 6

the above-mentioned complaint of February 2018 by the Complainant), Generali stated *inter alia* to MPM that *'We have discussed the claims with your Mr Davies some weeks ago'*.[57]

d) It is clear from the evidence submitted that MPM was thus amply aware of, and had received, in a formal manner, the Complainant's dissatisfactions with the way his pension was dealt with and the losses he had suffered including the claims made regarding the unsuitability of his disputed investments.

e) The Arbiter indeed notes that the substance of the complaint made by the Complainant to the Service Provider (in his letter of January 2022) is, in essence, the same or intrinsically similar to that of the complaint made by the Complainant in 2018 - in that, they both relate to the inappropriateness of the structured note investments undertaken and allowed within his pension arrangement and the quality of the investment advisor on whose dealing instructions were made which led to the alleged loss of funds suffered by him.

If one looks at the complaint made in 2018, the Complainant lists the key alleged failures as follows:

'- Low-risk investors put into high-risk, professional-investor-only structured notes

- Generali allowed investors to have their retirement funds used to purchase RBC, Commerzbank, Nomura and Leonteq structured products – many of which failed and caused horrendous losses

- Commissions were paid to the adviser – Continental Wealth Management – which was neither licensed for insurance nor for investment

- Investment instructions were accepted from Continental Wealth Management even though it had no investment license'.[58]

[57] P. 256
[58] P. 259

The Complainant also noted that similar complaints had been made and that the gist of these was:

' - *That investments were made into high-risk professional-investor-only funds. Many of these failed and caused huge losses to victims' funds.*

- *That* [Generali] *paid commissions/fees to CWM – an unlicensed firm – but also held no license of any kind.*

- *As a result of the huge un-disclosed commission paid to CWM – an unlicensed firm* – [Generali] *imposes crippling early surrender charges on the victims'.* [59]

In the complaint submitted to MPM on the 27th January 2022, the Complainant identified '*severe losses that my pension fund has suffered due to your firm accepting business from an unlicensed advisory firm*' and the fact that '*all of the investments made within my retail portfolio were passed by yourselves, Momentum, into inappropriate high risk structured notes*' as the base reasons for his complaint.[60]

The above-mentioned aspects are reflected in the Complaint to the Arbiter - as per the summary of the key alleged failures made by the Complainant in his Complaint Form as indicated earlier above.[61]

It is further noted that the aspect about the unsuitability of the investments was indeed emphasised by the Complainant during the hearing of the 18th October 2022, where the Complainant declared on oath that '[MPM] *allowed Continental Wealth Management to put the majority of my pension value into unsuitable investments*'.[62]

f) The Arbiter further notes that in the reply sent by Generali to the Complainant, which was communicated to MPM, Generali stated as follows:

'If you believe that relevant information about the Portfolio was either misrepresented or not properly explained to you/the Trustee at the time

[59] P. 260.
[60] P. 6
[61] P. 121
[62] P. 169

> *of their application you should seek redress directly from CWM or your Trustee. Again, legally, if there is an issue with the Portfolio itself, which is denied, the correct person to complain to Generali Worldwide is the Trustee. In turn, the Trustee owes you fiduciary duties in respect of the money you provided to them on trust …*
>
> *…*
>
> *We have corresponded with both your Trustee and Trafalgar International GmbH ('Trafalgar') following your complaint …*
>
> *…*
>
> *The Trustees are entirely responsible for any losses incurred on the Portfolio as a result of the actions undertaken by CWM.'* [63]

The Arbiter points out that it is accordingly rather disingenuous for the Service Provider to declare at multiple instances that the Complainant only submitted a formal complaint to it in January 2022 with respect to the matters forming the subject of the present Complaint.

From the exposition above, it is clear that the Service Provider was made aware of the Complainant's key dissatisfactions relating to the administration of the Scheme and the losses he had suffered much earlier than January 2022.

Even though the letter of February 2018 was, at the time, sent by the Complainant to the attention of Generali (and the AILO - *Association of International Life Offices*),[64] the fact remains that, with the Complainant's permission, Generali made MPM aware of the Complainant's complaint and claims made in February 2018.

It is unclear why, despite the serious matters raised, MPM remained silent and did not treat such material communications as a complaint against its conduct, when it most appropriately and reasonably had an obligation to deem it so.

There is indeed no reasonable justification why MPM did not issue to the Complainant its formal position and rebuttal of the serious claims made when it knew of its responsibilities and there were such blatant and clear implications involving it as trustee and RSA of the Scheme. By the very nature of its roles, MPM was reasonably implicated with respect to the serious claims

[63] P. 400 & 402 – Emphasis added by the Arbiter
[64] P. 259

made by the Complainant in the said complaint of February 2018. MPM was furthermore expressly and unequivocally mentioned and implicated in Generali's reply of 20 April 2018 as highlighted above. This was even acknowledged by the Service Provider in its final submissions where it noted that

'In this reply [of 20th April 2018], Generali made it clear to the Complainant that they were attributing responsibility to Momentum (which position is clearly not shared by Momentum) ...'.[65]

Yet, MPM issued no formal communication rebutting the serious allegations raised and only chose to issue its rebuttal in 2022 (through its letter of 11 April 2022), as if it needed to await some further formal communications from the Complainant for it to reply to the grave claims made.[66]

The serious issues on the disputed investments (which are the subject of this Complaint before the Arbiter) were ultimately raised and communicated formally in 2018 and subsequently similarly raised again in 2022, as highlighted above.

MPM's own faults and/or non-action in treating the communications of 2018 as a valid complaint, cannot however be now used by MPM as a pretext to justify the plea of prescription as it is attempting to do.

It is unacceptable for a service provider to employ delaying tactics and try to avoid a complaint and claims of compensation against it through improper actions (of not replying to a complaint about its conduct that it is unquestionably aware of), only for it to then conveniently raise the plea of prescription when a case is brought against it.

As highlighted in other previous decisions, it is deemed *'very unprofessional for a service provider to make all in its powers to hinder a complaint against it, procrastinate and then raise the plea of lack of competence on the pretext*

[65] P. 419
[66] P. 7.

that the action is 'time-barred'. It is a long accepted legal principle that no one can rest on his own bad faith'.[67]

It is a duty of the fiduciary, in this case the Trustee, '*to carry out his obligations with utmost good faith and to act honestly in all cases*'.[68] This obligation is reiterated in the Trusts and Trustees Act:

> *'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'.* [69]

The Arbiter concludes that, for all intents and purposes, the complaint with the financial services provider is reasonably and justifiably deemed to have taken effect in 2018 - which is within the two years referred to in Article 21(1)(c) of the Act from when he first had knowledge of the matters complained of (in 2017/ 2018) as outlined above.[70]

For the reasons stated, the plea relating to Article 21(1)(c) of the Act is therefore also being rejected, noting in particular that the two-year period referred to in this Article refers to the time when the complaint is registered with the Service Provider not when it is registered with the Office of the Arbiter

Plea relating to Article 2156(f) of Chapter 16 of the Laws of Malta

The Service Provider also raised the plea that the Complaint is prescribed pursuant to Article 2156(f) of the Civil Code, Chapter 16 of the Laws of Malta. This provision of the law states that:

> '*The following actions are barred by the lapse of five years:*

[67] P. 15 of the case decided by the previous Arbiter against MPM of 28 July 2020 - https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf
[68] Civil Code, Chapter 16 of the Laws of Malta, Article 1124A(4).
[69] Trusts and Trustees Act, Chapter 331 of the Laws of Malta, Article 21(1).
[70] In satisfaction of Article 21(2)(b) of the Act which provides that *'An Arbiter shall decline to exercise his powers under this Act where … (b) it results that the customer failed to communicate the substance of the complaint to the financial service provider concerned and has not given that financial service provider a reasonable opportunity to deal with the complaint prior to filing a complaint with the Arbiter'*.

(f) Actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;'

In this regard, the Arbiter firstly notes that, as indicated above, the Complainant was aware of the loss he had suffered in 2017/2018. The Arbiter notes the events concerning CWM which took place in September 2017, when the Complainant also wrote to the Service Provider enquiring about his losses and the possibility of compensation. This was followed by the communications made in 2018, where material claims were raised in respect of the disputed investments, as already considered above.

The Complaint with the OAFS was filed on 5 July 2022. Accordingly, not more than 5 years had passed since the last redemption/maturity of the remaining structure note investments within his portfolio (in February 2018) and/or the effective surrender of the policy and crystallisation of all the Complainant's losses in May 2018.

For the reasons stated above, the plea relating to Article 2156(f) of the Civil Code is also being rejected and the Arbiter is proceeding to consider the merits of the case next.

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.[71]

The Complainant

The Complainant, born in 1947, is of British nationality and resided in Spain at the time of his application for membership as per the details contained in MPM's Application Form dated 11 October 2012.[72]

[71] Cap. 555, Art. 19(3)(b)
[72] P. 206 - 214

His occupation was indicated as *'Project Manager'* in the said form.[73]

The Complainant was accepted by MPM as a member of the Retirement Scheme on 25 October 2012.[74]

The Complainant's risk profile in the MPM Application form was indicated as *'Low to Medium Risk'* with his attitude to investment risk defined as *'Comfortable with risk and prepared to take a longer-term view, that may include periods of ups and downs, to help grow the portfolio over time'*.[75]

His *'Attitude to Risk'* was stipulated as *'Medium'* in the Annual Member Statement for the year ended 2016 issued by MPM.[76] It is not clear why the risk profile was changed from 'Low to Medium' to 'Medium'.

During the course of the proceedings it was not indicated, nor has it emerged, that the Complainant was a professional investor. The Complainant can accordingly be regarded as a retail customer.

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 and authorised by the MFSA.[77]

Continental Wealth Management ('CWM') was indicated as the Complainant's appointed professional adviser in respect of his Scheme account.[78] CWM provided investment advice to the Complainant with respect to the selection and composition of the investments underlying his Scheme.

The investments within his Scheme were accordingly directed by the member who received investment advice from CWM as his investment adviser, with the investments undertaken subject to the oversight and acceptance of MPM as the trustee and RSA of the Scheme.

[73] P. 206
[74] P. 102
[75] P. 92
[76] P. 102
[77] https://www.mfsa.mt/financial-services-register/
[78] P. 207

The Retirement Scheme's Underlying Investments

The Complainant's Retirement Scheme, acquired a life policy on 30 January 2013,[79] the *Generali Professional Portfolio Bond* ('the Policy' or 'Generali Plan') issued by *Generali International Limited* based in Ireland, within which the underlying investment portfolio was held.[80] An initial premium of GBP 473,043.29 was paid into the General Plan for investment in January 2013.[81]

The Generali Plan was surrendered on 04 May 2018, with a total surrender payment of GBP 232,877.46.[82] The difference between the initial premium and the surrender value amounts to GBP 240,165.83, which represents the compensation claimed by the Complainant, without regard to fees and withdrawals.

Following the surrender of the Generali Plan, the Complainant still remained a member of the Retirement Scheme as explained by the Service Provider[83] and reflected in the Scheme's Bank Account statement (which indicates other transactions undertaken within the Retirement Scheme after May 2018).[84]

The investment transactions (excluding FX positions) that were allowed to be undertaken within the Generali Plan - as emerging from the '*Generali Cash Account Transaction Report*' covering the period '01/01/13 to 16/04/18' are summarised in Table A below:[85]

[79] P. 149
[80] P. 56 & 195
[81] P. 26 & 192
[82] P. 115
[83] P. 175 – Para. 20 of the Solemn Declaration prepared by the Managing Director of MPM
[84] P. 53
[85] P. 26 - 50

Table A

Transactions as per the Generali Cash Account Transaction Report in GBP*

		Date Bought	Purchase Amount GBP	Date Sold/ Matured	Sale Amount GBP	Profit/Loss Excl. Int. GBP	Tot. Interest received GBP**	Profit/ Loss Incl. Int GBP
		14/02/2013	65,000					
				30/03/2016	7,200			
SN	*RBC Capital Markets 4yr*	04/07/2013	9,000	14/02/2017	31,831.92	-34,968.08		
SN	*Nomura International 5yr*	21/02/2013	60,000	24/02/2015	72,000	12,000		
SN	*Commerzbank AG 1yr*	22/02/2013	140,000	24/02/2014	140,000	0		
				08/08/2013	70,884			
				18/03/2014	68,000			
		01/03/2013	60,000	16/02/2017	53,796			
SN	*RBC Capital Markets*	18/03/2013	140,000	02/02/2018	7,700	380		
SN	*Commerzbank AG 1yr 6m*	30/08/2013	68,000	15/04/2014	68,000	0		
		31/10/2013	6,000	05/11/2014	11,700			
		25/03/2014	50,000	19/02/2015	23,835			
		17/04/2014	50,000	02/11/2015	2,163.73			
SN	*RBC Capital Markets 2yr*	13/05/2014	38,000	18/04/2016	125.56	-106,176		
SN	*RBC Capital Markets 3 yr*	18/03/2014	14,000	26/02/2015	14,000	0		
		21/03/2014	50,000					
		13/05/2014	47,520	23/03/2015	50,000			
		26/02/2015	5,000	13/05/2015	48,000			
		03/03/2015	15,000	01/03/2017	7,761.40			
		27/03/2015	14,000	31/03/2017	4,375.70			
SN	*Commerzbank AG*	07/05/2015	17,000	19/05/2017	17,000	-21,383		
SN	*Nomura International*	29/04/2014	34,000	29/04/2015	34,000	0		
SN	*EFG Financial Products 1.5yr*	23/10/2014	5,000	29/01/2015	5,000	0		
		29/01/2015	3,544.40					
		04/03/2015	13,368	23/01/2017	5,193.01			
		04/03/2015	24,000	16/02/2017	7.93			
		08/05/2015	18,472	08/05/2017	2,673.19			
SN	*EFG Financial Products*	01/06/2015	24,000	01/06/2017	24,000	-51,510.27		
SN	*EFG Financial Products 2 yr*	06/03/2015	23,000	04/08/2016	20,136.50	-2,863.50		
SN	*Notenstein Private Bank 3yr*	22/05/2015	24,000	02/02/2018	1,852.80	-22,147.20		
	Total Realised Profit/ Loss on Structured Notes (Exclusive/Inclusive of Dividends received)					**-226,668**	**90,006.12**	**-136,662**

Fd	*Vam Fund (Lux)*	26/02/2016 21/08/2017	4,999.92 19,999.89	11/11/2017	25,450.62	450.81	-	
Fd	*IFSL Brooks MacDonald*	01/05/2016 22/08/2017	10,000 10,000	10/11/2017	21,337.32	1,337.32	-	
Fd	*Ishares Gold Products UCITS*	18/07/2016	9,991.94	02/11/2017	7,492.70	-2,499.24	-	
Fd/ Other	*Standard Life UK*	22/07/2016 21/08/2017	5,000 8,000	09/11/2017	13,121.86	121.86	-	
Fd	*Gemini Investment Funds*	19/08/2016 23/02/2017	21,000 25,000	10/11/2017 10/11/2017	21,754.27 23,570.96	-674.77	-	
Fd	*Rathbone Unit Trust Mgt Ltd*	22/02/2017	25,000	13/11/2017	24,451.33	-548.67	-	
Fd	*Schroder Unit Trusts Ltd*	23/02/2017 22/08/2017	10,000 17,000	10/11/2017	10,196.79 17,258.80	455.59	-	
Fd	*Veritas Asset Mgt Ltd*	27/02/2017 23/08/2017	10,000 10,000	11/11/2017	19,984.66	-15.34	-	
Fd	*Global Diversified Alpha Fund*	28/02/2017	5,000	25/11/2017	4,089.78	-910.22	-	
Fd	*Fidelity Funds*	18/08/2017	18,000	06/11/2017	18,379.50	379.50	-	
Fd	*JPMorgan Asset Mgt*	21/08/2017	17,000	09/11/2017	19,255.21	2,255.21	-	
	Total Realised Profit on Funds					**352.05**	0	352.05
	Total Realised Loss on Overall Investment Portfolio (Exclusive / Inclusive of Dividends received)					**-226,316**	**90,006.12**	**-136,310**

* The *Generali Cash Transactions Report* did, at times, not feature the full name/ISIN No. of the structured notes. Transactions in respect of notes which featured the same name in the *Generali Cash Transactions Report* were included together (for illustration purposes only) in the above table. To note that albeit having the same name, the featured multiple transactions under the same structured note in the above table could involve separate tranches/issues and thus distinct notes bearing a different ISIN No and features. As to dividend transactions these could, at times, not be so easily traced to their respective note in light of the general details featured in the Cash Transactions Report. For ease of reference and sake of accuracy, only the sum of the total dividends is accordingly being reproduced in the above table.

** Total dividends received from the structured notes: GBP 90,006.12[86]

[86] Made up of the sum of:
2975+3500+2975+1700+202.5+2975+1445+1700+202.5+127.5+2975+1445+1700+202.5+140+127.5+140+
1250+140+1000+202.5+1250+140+765+127.5+1080+760+140+1250+140+1000+202.5+1250+140+765+127.5+
1080+500+140+41.5+1250+140+1000+41.5+202.5+1250+140+765+41.5+127.5+1080+500+140+1250+1000+
202.5+1250+380+765+127.5+1080+502.5+450+575+1000+280+202.5+1250+380+127.5+402+502.5+340+
436.8+407.44+48.72+450+575+1000+280+202.5+1250+380+127.5+402+502.5+340+436.8+407.44+48.36+575
+450+1000+280+202.5+1250+380+402+502.5+340+48.72+436.8+450+575+407.44+280+1000+1250+380+402
+502.5+340+436.8+48.72+450+575+407.44+280+402+380+502.5+340+48.72+436.8+450+407.44+280+380+

The Arbiter notes that the Complainant only presented a *Generali Cash Account Transactions Report* in GBP. However, from the breakdown of the investment portfolio provided by MPM in its submissions,[87] it transpires that the Complainant had other investment transactions in structured notes denominated in EUR. Apart from an investment of Eur22,445 invested into a fund, the Blackrock Global Funds, the following investments in Euro was also undertaken in other structured notes:

a) Eur14,000 invested into EFG Financial Products 1yr;
b) Eur10,000 invested into EFG Financial Products 2yr;
c) Eur20,000 invested into EFG Financial Products 1.5yr;
d) Eur46,000 invested into Commerzbank AG 2yr;
e) Eur23,000 invested into Commerzbank AG 2 yr.

According to the information included in the table provided by the Service Provider, the Complainant also suffered an overall net loss (inclusive of income received) on the investments in the EUR account.[88]

In its table, the Service Provider indeed indicated an overall Net Realised Loss on all the investment portfolio (both denominated in GBP and EUR), inclusive of dividends received, of GBP 168,993.72.

The figure of the Net Realised Loss indicated by MPM of GBP 168,993.72 reflects, in substance, the losses calculated by the OAFS as summarised in Table A above, when adjusted to also take into account the net losses arising on the EUR denominated investments as indicated in MPM's table.[89]

The substantial losses suffered on the disputed structured note investments (both individually and on a collective basis), clearly emerges from the said information.

The Arbiter is adopting this figure of GBP 168,993.72 as the correct figure of losses incurred on the investment portfolio, excluding fees, withdrawals and surrender charges of the policy done at the initiative of the Complainant.

402+502.5+340+48.72+436.8+450+407.44+280+380+402+502.5+340+48.72+450+407.42+436.8+280+402+340+407.44+48.72+436.8+48.72+407.44+48.72+407.44

[87] P. 345

[88] Of approx. GBP30k

[89] P. 345

It clearly emerges that the investment portfolio held within the Complainant's Retirement Scheme account indeed comprised, at times exclusively of structured note ('SN') investments with such portfolio containing material investment positions in structured notes, apart from material exposures to the same issuer.[90]

Observations and Conclusions

Background and application of aspects raised in similar cases

The Arbiter has previously exhaustively considered multiple complaints against the Service Provider similar to that raised by the Complainant. The Arbiter would like to, in particular, refer to the single decision issued to over thirty complainants on 28 July 2020,[91] as well as other multiple cases such as case 073/2019, 076/2019, 070/2019 and 074/2020.[92] The said decisions were also all confirmed by the Court of Appeal (Inferior Jurisdiction) with numbers 39/2020 LM, 37/2021 LM, 38/2021 LM, 39/2021 LM and 124/2021 LM respectively.

For the sake of streamlining the decision, avoiding repetition, and deciding the case in an expeditious manner as he is obliged to do in terms of Chapter 555, the Arbiter shall not reproduce here details of the same or similarly applicable background and analysis, namely with respect to the following aspects already extensively covered in the said decisions:

- the legal framework as explained in the section titled *'The Legal Framework'* of the said decisions;

[90] For example, material exposures to RBC and Commerzbank as issuer.
[91] https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf
[92] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20073-2019%20-%20PG%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20076-2019%20-%20MN%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20070-2019%20-%20GA%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20074-2020%20-%20EP%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

- responsibilities of MPM as explained in the section titled the *'Responsibilities of the Service Provider'*;

- the observations on structured notes as outlined in the *'Preliminary observations'* for *'Investment into Structured Notes'* as applicable.

For all intents and purposes, these same sections are, in essence, considered relevant and applicable also to the case in question with the exception of pertinent details specifically applicable to the case (such as the extent of loss, the particular underlying life assurance policy and the exact investments forming part of the investment portfolio).

Other observations and comments below, however, also refer in respect of the disputed investments in the case under consideration.

The nature of the disputed investments

The ISIN number of the structured notes were listed in a table produced by the Service Provider during the proceedings of the case[93] (apart from the copies of certain dealing instructions presented).[94]

As part of his Complaint Form, the Complainant presented three Fact Sheets in respect of structured notes. Only one Fact Sheet, however, matched the ISIN number of a structured note held within the Complainant's portfolio – that is, that in respect of the *RBC Gold Miners Phoenix Note* within ISIN No. XS0846969359.[95]

Other Fact Sheets[96] presented by the Complainant are accordingly not valid for the purposes of this decision as they do not reflect the ISIN numbers of structured notes featuring within the Complainant's portfolio (as per the table of investments provided by MPM).[97]

[93] P. 345
[94] P. 86, 249, 353-379
[95] P. 110 -113; P. 345
[96] P. 104 – 108
[97] P. 345

Following general searches, the OAFS traced two other facts sheets of structured notes featuring within the Complainant's portfolio – with ISIN No. XS0882837247[98] and ISIN No. XS1015499921.[99]

The relevant fact sheets produced and those sourced all reflect features of the structured notes (which led to the same material losses) as described in the *'Preliminary observations'* for *'Investment into Structured Notes'* extensively considered in other cases as referred to above.

Given the above, the extent of the losses emerging on various of the structured notes on the Complainant's portfolio, as well as the events occurring at the time involving the same period and parties (particularly the same adviser CWM), the Arbiter has no reason to believe that the nature of the other structured notes allowed within the Complainant's portfolio were any different and did not have overall the same or similar features to that considered as mentioned above.

It is sufficiently evident that MPM had permitted structured products that were complex products by their nature and hence not compatible with the Complainant's profile as a retail investor.

No evidence has indeed emerged or been produced by the Service Provider that the structured notes that were allowed to be invested into within his Retirement Schemes were retail products. The disputed products in question were furthermore of high risk as reflected in the material losses ultimately experienced on these products.

Excessive exposures resulting in the disputed investment portfolio and lack of compliance with applicable investment guidelines/rules

As clearly emerging from Table A above, the portfolio **contained, at times, predominant if not exclusive exposure to structured note investments as well as material exposures to the same issuer**.

As outlined in MPM's Application Form for Membership, MPM had to *'undertake appropriate oversight of any investment instruction provided to 'them]'*[100] and

[98] https://www.portman-associates.com/wp-content/uploads/2013/01/RBC-Low-Hurdle-Fact-Sheet.pdf
[99] https://www.portman-associates.com/wp-content/uploads/2014/04/RBC-10-Fixed-Income-Energy-Note.pdf
[100] P. 235

had to *'consider [the member's] investment preferences and ensure [his] retirement fund is managed in line with the relevant regulatory requirements of … the Malta Financial Services Authority'.*[101] The said form further provided that:

> *'The Retirement Scheme Administrator will retain ultimate power and discretion with regards to the investment decisions…The Retirement Scheme Administrator furthermore shall ensure that any investments are made within the diversification parameters established under the prevailing legislation whilst at the same time, having due regard to any Member's 'Letter of Wishes'. However, it is clear that the Retirement Scheme Administrator will use his absolute discretion at all times and will place any investments in the best interests of the Member and the Beneficiaries as explained in Clause 13.1 of the Trust Deed'.*[102]

The Arbiter considers that it cannot reasonably be concluded that such high and unjustifiable exposures that were allowed to occur by MPM within the Complainant's Retirement Scheme reflected the above and the requirement for his pension fund to be *'invested in a prudent manner and in the best interests of the member'* as MPM, in its capacity as Trustee and RSA of the Scheme, was bound to ensure in terms of the applicable MFSA Rules.[103]

The permitted allocation is, furthermore, also considered as not being reflective of, and in conformity with, the MFSA's rules applicable at the time - as similarly analysed and concluded in the section titled *'The permitted portfolio composition'* in the Arbiter's afore-mentioned previous decisions.[104]

Other matters

As to the claim that the Complainant had not signed all the trading deals, these are serious allegations which had to be specifically proven by specific facts and, in the case of allegations of false or copied signatures, the Arbiter must be

[101] P. 236
[102] *Ibid.*
[103] Rule 2.7.1, in Part B.2.7 titled *'Conduct of Business Rules related to the Scheme's Assets'* outlined in the Directives issued under the Special Funds (Regulation) Act applicable at the time.
[104] That is, for example, in the single case decided by the Arbiter on 28 July 2020 and the other OAFS cases with numbers ASF 073/2019, 076/2019, 070/2019 and 074/2020.

comforted in such a way as to accept the allegation. No sufficient evidence has, however, emerged for the Arbiter to accept such an allegation.

Additional observations

It is noted that as part of its submissions the Service Provider has, in this case, also filed copies of two legal opinions drafted for MPM dated 30 March 2022 and 19 December 2019 in respect of the application and interpretation of the investment restrictions under the regulatory framework.[105]

The Arbiter notes that such legal opinions make, *inter alia*, much emphasis on the point that, at the time of the disputed investments, the investment restrictions were not applicable and were not to be interpreted as applicable at the member's account but had to be applied generally on the Scheme.

The Arbiter has already considered such an aspect in previous decisions – as outlined, for example, under the section titled *'Context of entire portfolio and substance of MPM's Investment Guidelines'* in case ASF 076/2019.[106]

The Arbiter also makes reference to his recent comments and observations in Case ASF 021/2022 and Case 045/2022 (involving the same Scheme and Service Provider) where it was noted that in the covering letter of April 2011 to the Scheme's Certificate of Registration, which formed part of the registration conditions of the Scheme, the MFSA had itself stipulated that:

> '…*The Standard Operating Conditions forming part of the Directives for Occupational Retirement Schemes, Retirement Funds and related parties issued under the SFA will apply separately to each member's individual fund…*'[107]

Once the Scheme had individual member accounts which operated in the same or similar manner to member-directed schemes, where the individual member account had his/her own tailored individual and distinct investment portfolio as selected by the respective member and the appointed adviser, then it should

[105] P. 320-323 & 324-336

[106] https://financialarbiter.org.mt/sites/default/files/oafs/oafs-decisions/ASF%20076-2019%20-%20MN%20vs%20Momentum%20Pensions%20Malta%20Limited.pdf

[107] Quote under the section titled *'Additional Observations'* of OAFS Case ASF 021/2022 & Case 045/2022 xxx vs Momentum Pensions Malta Ltd of October and November 2023 respectively.

have been clear that the same standards and safeguards were to apply for such members. Indeed, **any other interpretation would have defeated the safeguards that the regulatory requirements were intended to achieve for the protection of the members in respect of investments and applicable diversification requirements**.

The said legal opinions do not change the Arbiter's position and the Arbiter accordingly stands by the position taken as outlined in this decision and relevant previous decisions as referred to above.

Final Remarks

As highlighted in other decisions, 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. It has also satisfactorily resulted that the permitted investment portfolio was not reflective of, and in conformity with, the

Complainant's profile nor in conformity with the applicable principles and parameters and the requirements and conditions specified in the rules and MPM's documentation.

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 oversight functions with respect to the Scheme and the investment portfolio structure.

It is considered that the Service Provider ultimately failed to act with the prudence, diligence and attention of a *bonus paterfamilias.*[108]

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[109] of the Complainant who had placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

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

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

Cognizance needs to be taken 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 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 Complainant's Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by Momentum Pensions Malta Limited for part of the realised losses experienced 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, and taking into consideration the risk attitude of the Complainant, the Arbiter considers it fair, equitable and reasonable for Momentum Pensions Malta Limited, to be held responsible for seventy per cent of the sum of the Net Loss incurred by the Complainant within his whole portfolio of underlying investments suffered on the underlying Generali Plan.[110, 111]

[110] As indicated earlier in the decision, under the section titled *'The Retirement Scheme's Underlying Investments'*, the Net Realised Loss on the whole investment portfolio is calculated to amount to GBP 168,993.72 as indicated by MPM (P.345). Seventy per cent of the Net Realised Loss – 70% of GBP 168,993.72 – amounts to GBP 118,295.60.

[111] A rate of seventy per cent is, in this case, being applied in the computation of compensation in light of the 'Low to Medium' risk profile selected by the Complainant in his Application Form for Membership into the Retirement Scheme – P. 209

In accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter accordingly orders Momentum Pensions Malta Limited to pay to the Complainant the sum of GBP 118,295.60 (hundred-and-eighteen-thousand, two hundred-and ninety-five-pounds sterling and sixty pence).

With interest at the rate of 5.25% p.a.[112] from the date of this decision till the date of payment.[113]

The costs of these proceedings are to be borne by the Service Provider.

Alfred Mifsud
Arbiter for Financial Services

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

[112] Equivalent to the current Bank of England Bank Rate.
[113] It is to be noted that in case this decision is appealed, should this decision be confirmed on appeal, the interest is to be calculated from the date of this decision.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.

Costs of the proceedings

In terms of article 26(3)(d) of Cap. 555 of the Laws of Malta ('the Act'), the Arbiter has adjudicated by whom the costs of the proceedings are borne and in what proportion, taking into consideration the particular circumstances of the case.

The costs of the proceedings are not limited to the payment of any applicable cost of filing the Complaint with the Office of the Arbiter for Financial Services (presently Eur25), but may also include any reasonable lawful professional and legal fees paid by the Complainant limited to the acts filed during the proceedings of the case. Such professional fees should not include any contingency judicial fees and charges.

The extent of tariffs and fees in respect of professional or consultancy services rendered to customers in relation to the claims or proceedings under the Act, that may be lawfully and reasonably requested as part of the said costs of proceedings, are not defined in the current provisions of the Act. However, the Arbiter expects these to be benchmarked on tariffs and fees as stipulated and applicable for Civil Court proceedings in Malta under the Code of Organization and Civil Procedure.