Before the Arbiter for Financial Services

Case No. 076/2019

MN

('the Complainant' or 'the Member')

vs

Momentum Pensions Malta Limited

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

or 'the Retirement Scheme Administrator'

or 'the Trustee')

Sitting of the 6 April 2021

The Arbiter,

PRELIMINARY

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

The Case in question

The Complainant claimed that his original investment of GBP172,624 into the Retirement Scheme had fallen in value by over GBP90,000 to GBP80,843, and submitted that MPM had not acted according to the agreed terms and conditions.

The Complainant noted that MPM had to act in his best interests and had a duty of care where, according to the agreed terms and conditions, MPM had to ensure that the Scheme's assets are invested in the best interests of the Member and had to be properly diversified.[1]

It was claimed that as scheme administrator, MPM had to exercise judgement as to the merits or suitability of any transaction.

It was further claimed that MPM had to comply with local and HMRC regulations and had to provide an oversight role in respect of any investment requests and ensure all decisions are consistent with his attitude to risk.

The Complainant also claimed that his adviser to the scheme, Continental Wealth Management ('CWM'), had no licence to offer pensions advice or to provide him financial advice, and that MPM accordingly did not undertake its duty of care in accepting investments by CWM.

It was pointed out that before MPM accepted transactions involving his pension fund, there were investments by other clients of CWM into the Retirement Scheme that had lost significant amounts. The Complainant submitted that had MPM acted in his best interests, it would have accordingly rejected these transactions.

It was further submitted that despite MPM acknowledging his status as a low-risk investor, MPM still accepted transactions which were for professional investors and of very high risk.

The Complainant also submitted that MPM accepted copies of transaction instructions without checking whether the signatures were genuine or photocopied on.

The Complainant claimed that MPM did not provide oversight, did not ensure decisions were consistent with his attitude to risk, did not act in his best interests or exercise judgement on his behalf.

[1] *A fol.* 4

Background provided by the Complainant

In his attachment to the Complaint Form (marked as '1'), the Complainant explained that he moved to live and work in Spain with his family in 2008. He noted that by 2012, he was settled and intended to stay in Spain and was given information about QROPS by other British people in the area, after which he was contacted by Continental Wealth Management ('CWM') as financial advisers.

The Complainant noted that he was eventually persuaded to transfer his teacher's pension into the Retirement Scheme, with advice provided by CWM. The Complainant explained that after he made some checks together with his wife, he decided to transfer his 25 years of teacher's pension and a smaller AVIVA pension into the Retirement Scheme.

The Complainant further explained that during his discussions with CWM, as financial advisers, he made it clear that he wished to be in the lowest-risk category available with respect to investments and that whilst he wished his pension fund to grow, the speed of growth was immaterial compared to the safety of his fund.

The Complainant noted that it was explained to him that CWM was approved and regulated by MPM who was the trustee of his fund, adding an extra layer of protection as MPM would prevent CWM from acting against his interests and that the pension fund would be kept in a bond issued by Generali International who had an international reputation as a finance group and, thus, he could be rest assured of complete protection and security.

The Complainant further explained that he was told that he would have internet access and would be able to check his funds any time he wanted to, but this did not happen at first, and explained that he could not view his funds and relied on the advisers to keep him informed. He further explained that during the first two years, it seemed progress was being made but his internet access to statements had not been sorted but, occasionally, he would receive a phone call informing him that an investment had matured and would be re-invested.

The Complainant explained that once he got access to his statements by 2014, he could see that the fund value was falling, but this was explained to him as *'paper loss'*. It was noted that on their annual visits, this *'paper loss'* was

dismissed and he was told that as the investment ended, because of the type of investment they were in, they would, as a minimum, revert to their original value - unless they lost more than 50% of their value, which would be an unprecedented level of loss. The Complainant further remarked that as someone completely inexperienced in these matters, he had to trust the checks he had done on QROPS with HMRC and FCA ; and the fact that he had trustees, MPM in Malta and an international company Generali, which would ensure all investment advice was legal and sound and that they would inform him of any unsound advice or investment and they would regulate the actions of CWM.

The Complainant explained that for personal reasons, he returned to the UK in June 2016 and he remained in contact with CWM as he was also concerned about the worsening situation with his pension fund.

It was noted that during a skype call in 2017, CWM explained that the issues with his pension were due to Leonteq's illegal activity, but that the matters will be resolved by the solicitors, and Leonteq were keen to resolve the situation (which he was told affected a group of clients, not just himself), out of court and that the Complainant's pension funds would be restored to the previous levels. The Complainant further explained that at that point, although he was very concerned, he did not see any option other than to trust CWM and the process of protection through MPM that as trustees would not allow any illegal activity which put his pension at risk. It was noted that, out of the blue, on 29 September 2017, he however received an email that CWM had their licence withdrawn and that his new financial advisers were 'Trafalgar'. The Complainant noted that when he contacted Trafalgar, he was eventually informed that Trafalgar could not advise him as he was no longer resident in Spain.

The Complainant submitted that the key to moving his pension to a QROPS rested on what he understood to be the assurance of multiple layers of protection, checks and balances, which seemingly were written into the Scheme. It was noted that, in particular, the Retirement Scheme's Particulars stated that the investment portfolio had to be *'in line with the underlying member's attitude to risk as indicated on the application form or revised risk profile'*.[2]

[2] *A fol.* 8

The Complainant submitted that it was explained to him by advisers of CWM, that MPM would not allow CWM to invest outside his risk profile. It was noted that the Complainant believed this to be the case in view of the details included in the Scheme Particulars.

The Complainant noted that he was of the understanding that MPM, as the trustees of the QROPS, will protect the investments and recognise his non-professional status, ensure that CWM did not invest illegally or irresponsibly and, also, ensure that all investments were in line with his risk profile.

The Complainant stated that MPM's terms and conditions stipulated that:

'We will comply with all local and HMRC regulations in respect of your retirement assets and as Retirement Scheme Administrator will provide an oversight role in respect of any investment requests, we will ensure that all decisions are consistent with your attitude to risk and compliant with local guidelines.

As RSA we will act in your best interests and will consider any expression of wishes from you the member, making an appropriate decision in line with our role and responsibilities.

Momentum does not provide investment advice; in its role as RSA it will exercise judgement as to the merits or suitability of any transaction.

Any requests for transfers into the scheme and subsequent investment preferences provided will be considered by Momentum in its role as RSA and acted upon in line with its duties as RSA and in line with these T&C's.' [3]

The Complainant further explained that on 22 January 2019, he submitted a formal complaint to MPM and received their response on 31 May 2019. The Complainant remarked that their response ignores the elements of the Terms and Conditions which he agreed to and which state their responsibilities as trustees as quoted above.

The Complainant submitted that he depended on layers of checks and balances and, since he was a lay-person, he depended on MPM as the professional trustees who he claimed had the professional knowledge that he did not have

[3] *A fol.* 8 & 9

and whom he paid substantial annual fees to *'exercise judgement as to the merits or suitability of any transaction'*.[4]

The Complainant further submitted that as a lay person, he did not know what structured products are and depended on the explanation of the financial adviser and the protection of his trustees. He further claimed that the reference to structured products, as a type of investment which he wished to hold within his retirement fund, was not signed by himself and could have been added on at any time. He further noted that he could not recall any such reference when signing the Application Form for membership.

The Complainant submitted that MPM's Investment Guidelines stated that the portfolio had to be in line with the member's attitude to risk, and MPM, as administrators of his pension, had to ensure that CWM were legal and acting in his best interest and monitor investments to ensure that they were within his stated risk profile.

The Complainant noted that he later discovered that he was one of up to a thousand victims of this scam and discovered a social media support group set up by and for victims. He further explained that later, he understood that CWM did not have any license to give advice on pension funds, that their 'sister company' and agents' licences did not give CWM authorisation to act and that he had been lied to. The Complainant remarked that, as a lay person, he depended on MPM as trustees of his Scheme not to accept instructions or investments from unregulated and illegal advisers, to ensure that investments were within his risk profile and to exercise judgement regarding merits and suitability of transactions.

The Complainant submitted that high-risk professional investor transactions sent by unregulated advisers clearly had no merit and were entirely unsuitable for a pension fund and for a low-risk client. He further remarked that he now understood that the fees attached to a QROPS mean that funds under GBP500,000 are not economically viable, so he claimed that MPM should have not accepted the transfer of his funds into a QROPS in the first place.

[4] *A fol.* 9

The Complainant noted that he also understood that CWM investments had suffered heavy losses over several years and this went unchallenged by MPM, even prior to them accepting the transfer of his pension fund.

It was noted that he was of the belief that MPM and CWM had already agreed compensation in at least one case, where a client had discovered CWM was not licensed to provide investment advice and that MPM was at fault in not challenging the huge losses she had suffered.

The Complainant also noted that copies of dealing instructions accepted by MPM were apparently signed by him with a remarkably consistent signature, including the instruction dated 8 May 2017, by which time he was back in the UK and could have not signed such transaction. It was remarked that these too appear to have been left unchallenged by MPM.

Summary of alleged failures

The Complainant submitted that, in summary, MPM failed to meet its stated terms in acting as trustee to the QROPS as:[5]

1) MPM should have never accepted instructions from CWM in the first place and had ample evidence of other clients' failing schemes;

2) MPM should have immediately questioned the fees and costs involved compared to the value of the fund, as he claimed that QROPS are not suitable for funds under GBP500,000;

3) MPM failed in their role of providing oversight in respect of investment requests given that the instructions were in some cases undated, in others unsigned and for those signed, the signature was exactly the same and would have been clearly seen as photocopied if any oversight was being provided;

4) MPM failed in their role to exercise judgement as to the merits or suitability of the transactions as there was no diversity in the pension fund, most of the fund was invested into structured notes and the investments were not suitable for a low-risk pension fund;

[5] *A fol.* 10

5) MPM clearly failed to ensure all decisions were consistent with his attitude to risk despite that the investment policy clearly stated *'Low Risk'*, and he made it clear that his wish was to have the lowest risk possible. The Complainant noted that his financial adviser had insisted that *'No Risk'* was not an option and further claimed that the reference to '*structured products*' was probably not entered on the scheme's documents when he signed but, as a lay person, if this was written he would have relied on the '*oversight'* and '*judgement*' of the trustee;

6) the investments were not suitable for retail consumers despite that MPM's guidelines state that *'Non-Retail investment will only be considered at the discretion of the Trustees and where the requirements of a Member as a Professional Client, have been met'*.[6]

Complainant's request

The Complainant submitted that his total known loss from the original transfer amounted to GBP91,781. He requested that account is taken of a fair 5% growth each year, and calculated that his pension fund should, on this basis, have grown at approximately GBP8,500 per year for the past six years. The Complainant accordingly calculated his overall loss as GBP142,781,[7] and asked to be put back in the position he should have been had MPM's negligence not taken place.[8]

In his additional submissions, the Complainant stated that his '*Original Investment Value'* was of GBP172,624 and the *'Current Surrender Value'* as at 23/04/2020 was GBP75,854 and, thus, indicated a *'Current known loss at: £96,770'*.[9]

The Complainant further stated that with an average 5% growth per year over seven years, the simple interest would amount to GBP60,418, and he accordingly claimed that the overall loss amounts to GBP157,188.[10]

[6] *A fol.* 10
[7] *A fol.* 4 & 7
[8] *A fol.* 10
[9] *A fol.* 121
[10] *Ibid.*

In its reply, MPM essentially submitted the following: [11]

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

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

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

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

Competence and prescription

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

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

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

   The Service Provider submitted that this complaint relates to conduct which occurred before the entry into force of Chapter 555, Article 21(1)(b) came into force on the 18 April 2016. The complaint was filed on the 13 September 2019, therefore, beyond the two-year time period allowed by article 21(1)(b). MPM submitted that for these reasons, the complaint cannot be entertained.

[11] *A fol.* 44-47

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

Reply to the Complainant's complaints

7. MPM noted that in the first place, the Complainant appointed CWM as his adviser as he himself also admits. Reference was made to the copy of MPM's application form in relation to the Scheme (attached as Appendix 1 to its reply)[12] as well as the application form of Generali International Limited (attached as Appendix 2 to its reply).[13]

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

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

   MPM replied that any business introduced by CWM to MPM fell within the MFSA's Pension Rules for Service Providers as they relate to RSAs. MPM further replied that it does not work on a commission basis and that it neither receives commissions, nor pays commissions to any third parties. MPM explained that it charges a fixed fee for the services it provides - this

[12] *A fol.* 45 & 48
[13] *A fol.* 45 & 58

fee does not change, regardless of the underlying investment (which the Complainant was advised to invest in by CWM).

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

MPM submitted that the first four paragraphs of the Complainant's complaint (in his document attached to the Complaint Form and marked '1'), relate to his dealings with CWM. MPM further submitted that it cannot comment or reply since it was not involved in any discussions held between the Complainant and CWM. It was further noted that MPM is not answerable for any information which CWM provided directly to the Complainant.

8. MPM noted that on the second page of the complaint (document marked '1'), the Complainant refers to the terms and conditions in MPM's application form, however, he does not state how MPM allegedly breached the terms and conditions he refers to.

9. MPM noted that the Complainant stated the following: *'As a lay person, how would I know what Structured Products are? I depended on the explanation of the financial adviser, backed up by the protection of my trustees'*.[14] MPM submitted that MPM's application form, which the Complainant signed, indicated that structured products are a type of investment which he wished to be held in his fund.

10. MPM noted that the Complainant refers to MPM's investment guidelines, which state that the portfolio must be in line with the underlying member's attitude to risk. It was further noted that the Complainant states that it was clear from the guidelines that MPM *'were my professional security, ensuring CWM were legal and acting in my interest and monitoring investments to ensure they were within my stated risk profile'*.[15]

    MPM replied that it did indeed abide by the guidelines. The Service Provider noted that the Complainant seems to make the assumption that

[14] *A fol.* 45
[15] *Ibid.*

his portfolio was not in line with his attitude to risk. MPM replied that this is not the case and that the Complainant's portfolio did indeed reflect his risk profile.

11. MPM remarked that the Complainant alleges that he later discovered that he was one of many victims of *'this scam'*. It was noted that in this context, he appears to be referring to CWM not to MPM.

12. MPM noted that the Complainant also stated that he understands that the *'fees attached to QROPS mean that funds under £500,000 are not economically viable, so Momentum Malta should not have accepted the transfer...'*.[16]

    MPM replied that this is not correct and that MPM's entry level and, indeed, most of the industry's entry level is £40,000. It was also submitted that furthermore, the Complainant himself agreed to the schedule of fees (as per Appendix 5 to its reply).[17]

13. MPM questioned what was being alleged by the Complainant by his statement that *'I note that copies of dealing instructions accepted by Momentum, were apparently signed by me with a remarkably consistent signature, including instruction dated 8 May 2017, by which time I was back in the UK and could not have signed. These too appear to have been unchallenged by Momentum'*.[18]

    MPM submitted that it is unclear what the Complainant's complaint was in this regard and whether he is alleging that his signature was forged.

14. MPM noted that the Complainant alleges that MPM *'failed to meet its stated terms in acting as Trustees to the QROPS'* and lists the following points:

    - MPM should never have accepted instructions from CWM. MPM replied that this is unfounded, and the Complainant is only stating this with the benefit of hindsight - noting that the Complainant himself chose CWM as his advisers. MPM further noted that the same could be stated in his

[16] *A fol.* 46
[17] *A fol.* 105
[18] *A fol.* 46

regard - that he should not have chosen CWM to act as his advisers. It was submitted that in any event, reference is made to paragraph 7 above.

- QROPS is not suitable for funds under £500,000. MPM noted that in this respect, reference is made to paragraph 12 above.

- MPM allegedly failed in its stated role of providing oversight for investment requests, including because the Complainant's signature is photocopied. MPM submitted that dealing instructions are not completed by MPM. It noted that MPM has no awareness or line of sight of what discussions and arrangements take place between the Complainant and his appointed adviser, CWM, regarding dealing instructions. MPM submitted that it is its duty to ensure that the Complainant's signature on the dealing instructions is verified against the proof of identification provided to MPM. It was submitted that in all cases involving the Complainant's dealing instructions, such verification was made by MPM.

- MPM allegedly failed to ensure all decisions were consistent with his attitude to risk. MPM replied that it was the Complainant himself who agreed to invest in the products. Furthermore, MPM replied that it has at all times fulfilled all its obligations with respect to the Complainant and observed all guidelines, including investment guidelines, as will be proved.

15. MPM additionally replied that the following documents were sent to the Complainant: the letter dated 1 March 2013 (attached and marked as 'Appendix 3' to its reply);[19] annual member statements for 2013-2016 inclusive ('Appendix 4');[20] and the welcome letter dated 18 December 2012 ('Appendix 6').[21]

[19] *A fol.* 90
[20] *A fol.* 97
[21] *A fol.* 106

Momentum does not provide investment advice

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

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

18. MPM noted that this is clear from the application forms (attached to Appendix 1 and 2 to its reply),[22] which specifically request the details of the Complainant's professional adviser. It was pointed out that the Complainant also declared on the application form that he acknowledged that the services provided by MPM did not extend to financial, legal, tax or investment advice. MPM made reference in this regard to declaration 9 on page 6 of the application form.

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

Conclusion

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

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

[22] *A fol.* 48 & 58

21. MPM submitted that it has not committed any fraud, nor has it acted negligently. MPM stated that it has not breached any of its obligations in any way.

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

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

Further Considers:

Preliminary Plea regarding the Competence of the Arbiter

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

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

Article 21 (1)(b) states that:

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

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

Firstly, the Arbiter notes that it took over four months for the Service Provider to send the Complainant a reply to his formal complaint.[23] The Arbiter does not see a valid reason why the Service Provider took so long to send a reply and

[23] The Complainant's formal complaint dated 22 January 2019 was answered by the Service Provider on 31 May 2019.

related documents, even if it had to deal with various other complaints around the same time.

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

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

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

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

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

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

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

The onus of proof for such evidence rests with the Service Provider.[24]

The Arbiter also makes reference to the comments made further below relating to the maturity of such products.

It is also noted that the complaint in question involves the conduct of the Service Provider during the period in which CWM was permitted by MPM to act as the adviser of the Complainant in relation to the Scheme. The Service Provider itself declares that it no longer accepted business from CWM **as from September 2017.**[25] CWM was therefore still accepted by the Service Provider and acting as the investment adviser to the Complainant after the coming into force of Chapter 555 of the Laws of Malta. It has thus emerged that CWM was only replaced in September 2017 when MPM no longer accepted business from CWM. The responsibility of MPM in this regard is explained later on in this decision.

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

Article 21(1)(c)

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

Article 21(1)(c) stipulates:

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

[24] The table of investments presented by the Service Provider (*A fol.* 236) indicated various Structured Note ('SN') investments bearing a maturity date in 2017. The said table also indicates just two sales of structured notes (out of various purchases of SNs) over the period 2013.01.19 till 2017.05.08 - *A fol.* 236

[25] Para. 44, Section E, of the affidavit of Stewart Davies, Director of MPM – *A fol.* 164

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

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

In its additional submissions, MPM noted that without prejudice to its plea relating to Article 21(1)(b),

'*the complaint is also prescribed on the basis of [article 21(1)(c)]*', submitting that:

'*The complainant received annual member statements from the start of his investment (Appendix 4 attached to the reply filed by Momentum), and yet he only filed a complaint with Momentum in January 2019 (as emerges from the documentation filed with the original complaint)*'.[26]

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

Even considering the only point raised by the Service Provider (which just covers one of the number of aspects complained about by the Complainant), it is noted that the fact that the Complainant was sent an Annual Member Statement, as stated by the Service Provider in its notes of submissions, could not be considered as enabling the Complainant to have knowledge about the matters complained of. This, taking into consideration a number of factors including that the said Annual Member Statement was a highly generic report which only listed the underlying life assurance policy. The Annual Member Statement issued to the Complainant by MPM included no details of the specific underlying investments held within the policy.

[26] *A fol.* 231

Hence, the Complainant was not in a position to know, from the Annual Member Statement he received, what investment transactions were actually being carried out within his portfolio of investments.

It is also noted that the Annual Member Statement sent to the Complainant by the Service Provider had even a disclaimer highlighting that certain underlying investments may show a value reflecting an early encashment value or potentially a zero value prior to maturity and that such value did not reflect the true performance of the underlying assets.

The disclaimer read as follows:

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

Certain underlying assets with the Investment, may show a value that reflects an early encashment value or potentially a zero value prior to the maturity date. This will not reflect the true current performance of such underlying assets.'[27]

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

The Arbiter also notes that the Service Provider sent a communication to the Complainant with respect to the position with CWM.[28] In this regard, in September 2017, the Complainant was notified by MPM about the suspension of the terms of business that MPM had with CWM.

It is further noted that, in his Complaint Form to the OAFS, the Complainant indicated 29/09/2017 as the date when he first had knowledge of the matters he was complaining about.[29] The indicated date is indeed reflective of the developments occurring at the time of the suspension of the terms of business

[27] *A fol.* 101
[28] Email dated 10 September 2017 sent by Stewart Davies - *A fol.* 130
[29] *A fol.* 3

by MPM with CWM, as mentioned above, and any subsequent updates and verification of his portfolio thereafter.

The Complainant in this case made a formal complaint with the Service Provider through a formal complaint dated 22 January 2019 and, thus, within the two-year period established by Art. 21(1)(c) of Chapter 555.

Therefore, the Service Provider did not prove that the Complainant in the said case raised the complaint '*later than two years from the day on which the complainant first had knowledge of the matters complained of*'.

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

Subject of Complaint

Preliminary Consideration

In the attachment (marked as '1') to his complaint form to the Office of the Arbiter for Financial Services, the Complainant stated that:

'This is a complaint to the Office of the Arbiter for Financial Services in respect of Momentum Malta Pensions, Momentum Malta Retirement Scheme, Continental Wealth Management, Generali'.[30]

It is noted that Continental Wealth Management was indicated in MPM's reply and in the Scheme's Application Form for Membership, as a company being based in Spain. It is also further noted that despite indicated as being based in an EU member state, the regulatory status of CWM is unclear and has not been determined as considered further on in this decision.

With respect to Generali International Limited ('Generali International'), this being the issuer of the underlying policy acquired by the Retirement Scheme,[31] it is noted that Generali International was indicated as an entity based in Guernsey, Channel Islands.

[30] *A fol.* 7
[31] *A fol.* 92

During the case it has not been indicated, nor any evidence has emerged, that CWM and/or Generali International were ever licensed or otherwise authorised by the Malta Financial Services Authority ('MFSA').

The definition of a *'financial services provider'*, against whom a complaint can be made and considered by the Arbiter under Cap. 555. Arbiter for Financial Services Act ('the Act'), is stipulated under Article 2 of the Act.

The said article provides that:

'"financial services provider" means a provider of financial services which is or has been licensed or otherwise authorized by the Malta Financial Services Authority in terms of the Malta Financial Services Authority Act or any other financial services law, including but not restricted to investment services, banking, financial institutions, credit cards, pensions and insurance, which is or has been resident in Malta or is or has been resident in another EU/EEA Member State and which offers or has offered its financial services in and, or from Malta ...'.

In this respect, the Arbiter considers that neither CWM nor Generali International fall under the definition of a *'financial services provider'* under the Act and, accordingly, the Arbiter has no jurisdiction in their regard. The Arbiter cannot accordingly consider a complaint in respect of CWM and/or Generali as requested in the attachment to the Complaint Form.

The Complaint is thus being considered by the Arbiter only in respect of MPM and the Retirement Scheme, which are respectively duly licensed by the MFSA as stipulated later on in this decision.

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.[32]

[32] Cap. 555, Art. 19(3)(b)

The Complainant

The Complainant, born in 1959, is of British nationality and resided in Spain at the time of application for membership as per the details contained in the *Application for Membership of the Momentum Malta Retirement Trust* ('the Application Form for Membership').[33]

The Complainant's occupation was indicated as '*Translator*' in the said Application Form. During the case, it has also emerged that the Complainant had *'25 years of teacher's pension'* and, accordingly, his previous occupation was as a teacher.[34]

It was not indicated, nor has it emerged during the case, that the Complainant was a professional investor and, accordingly, the Complainant can be regarded as a retail client.

The Complainant was accepted by MPM as member of the Retirement Scheme on 18 December 2012.[35]

The Service Provider

The Retirement Scheme was established by Momentum Pensions Malta Limited ('MPM'). MPM is licensed by the MFSA as a Retirement Scheme Administrator[36] and acts as the Retirement Scheme Administrator and Trustee of the Scheme.[37]

The Legal Framework

The Retirement Scheme and MPM are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws

[33] *A fol.* 49
[34] *A fol.* 7
[35] *A fol.* 104
[36] *https://www.mfsa.mt/financial-services-register/result/?id=3453*
[37] *A fol.* 187 - Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).

of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015.[38]

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

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

As confirmed by the Service Provider, registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and hence the framework under the RPA became applicable as from such date.[39]

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

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

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

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

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

[38] *Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA - https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/*

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

Particularities of the Case

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

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA[40] as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011[41] and under the Retirement Pensions Act in January 2016.[42]

As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme '*was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap. 331) on the 23 March 2011*'[43] and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011*'.[44]

The Scheme Particulars specify that:

'*The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death*'.[45]

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

The assets held in the Complainant's account with the Retirement Scheme were used to acquire a life insurance policy for the Complainant called the Professional Portfolio Plan issued by Generali International Limited ('Generali').[46]

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[40] https://www.mfsa.com.mt/financial-services-register/result/?id=3454
[41] Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).
[42] Registration Certificate dated 1 January 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit).
[43] Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).
[44] Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).
[45] *Ibid.*
[46] *A fol.* 90-96

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

The underlying investments comprised substantial investments in structured notes as indicated in the table of investments forming part of the '*Investor Profile*' presented by the Service Provider during the proceedings of the case.[47]

The '*Investor Profile*' presented by the Service Provider for the Complainant also included a table with the '*current valuation'* as at 22/03/2019.[48] The said table indicates that the *'Total Amount Invested*' was GBP172,624 and that as at the date of the valuation (22/03/2019) the Scheme had a loss (excluding fees) of GBP60,684. The loss experienced by the Complainant is higher when taking into account the fees incurred and paid within the Scheme's structure. It is to be noted that the Service Provider does not explain whether the loss indicated in the '*current valuation*' relates to realised or paper losses or both.

Investment Adviser

Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainant.[49] The role of CWM was to advise the Complainant regarding the assets held within his Retirement Scheme.

It is noted that in the notice issued to the Complainant by MPM in September 2017, MPM described CWM as '*an authorised representative/agent of Trafalgar International GMBH*'.[50]

In its reply to this complaint, MPM explained *inter alia* that CWM

'*is a company registered in Spain. Before it ceased to trade, CWM acted as adviser and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH*'.[51]

[47] The '*Investor Profile'* is attached to the Additional Submissions document presented by the Service Provider in respect of the Complainant - *A fol.* 236
[48] *A fol.* 236
[49] As per pg. 1/2 of MPM's reply to the OAFS in respect of the Complainant.
[50] *A fol.* 130
[51] Pg. 1 of MPM's reply to the OAFS.

In its submissions, it was further explained by MPM that:

'*CWM was appointed agent of Trafalgar International GmbH ('Trafalgar') and was operating under Trafalgar International GmbH licenses*',[52] and that Trafalgar '*is authorised and regulated in Germany by the Deutsche Industrie Handelskammer (IHK) Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53'*.[53]

Underlying Investments

As indicated above, the investments undertaken within the life assurance policy of the Complainant were summarised in the table of investment transactions included as part of the '*Investor Profile*' provided by the Service Provider.[54]

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

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

Further Considerations

Responsibilities of the Service Provider

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

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

As indicated in the MFSA's Registration Certificate dated 28 April 2011, issued to MPM under the SFA, MPM was required, in the capacity of Retirement Scheme Administrator,

[52] Para. 39, Section E titled *'CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies.
[53] *Ibid.*
[54] Attachment to the '*Additional submissions*' made by MPM in respect of the Complainant - *A fol.* 236

'*to perform all duties as stipulated by articles 17 and 19 of the Special Funds (Regulation) Act, 2002 … in connection with the ordinary or day-to-day operations of a Retirement Scheme registered under the [SFA]*'.

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

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

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

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

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

From the various general conduct of business rules/standard licence conditions applicable to MPM in its role as Retirement Scheme Administrator under the

SFA/RPA regime respectively, it is pertinent to note the following general principles:[55]

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

   The same principle continued to apply under the rules issued under the RPA.

   Rule 4.1.4, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015, issued in terms of the RPA, and which applied to MPM as a Scheme Administrator under the RPA, provided that:

   '*The Service Provider* ***shall act with due skill, care and diligence*** …'.

b) Rule 2.7.1 of Part B.2.7 titled '*Conduct of Business Rules related to the Scheme's Assets*', of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA, provided that:

   '***The Scheme Administrator shall arrange for the Scheme assets to be invested in a prudent manner and in the best interest of Beneficiaries*** …'.

   The same principle continued to apply under the rules issued under the RPA.

   Standard Condition 3.1.2, of Part B.3 titled '*Conditions relating to the investments of the Scheme*' of the Pension Rules for Personal Retirement Schemes dated 1 January 2015 issued in terms of the RPA, provided that:

   '***The Scheme's assets shall be invested in a prudent manner and in the best interest of Members and Beneficiaries*** *and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Constitutional Document and Scheme Document*';

[55] Emphasis added by the Arbiter.

c) Rule 2.6.4 of Part B.2.6 titled '*General Conduct of Business Rules applicable to the Scheme Administrator*' of the Directives issued under the SFA, which applied to MPM as a Scheme Administrator under the SFA provided that:

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

The same principle continued to apply under the rules issued under the RPA.

Standard Condition 4.1.7, Part B.4.1 titled '*Conduct of Business Rules*' of the Pension Rules for Service Providers dated 1 January 2015, issued in terms of the RPA, provided that:

'*The Service Provider shall organise and control its affairs in a responsible manner and* ***shall have adequate operational, administrative*** *and financial procedures* ***and controls in respect of its own business and the Scheme*** *or Retirement Fund, as applicable, to ensure compliance with regulatory conditions and to enable it to be effectively prepared to manage, reduce and mitigate the risks to which it is exposed*.'

Standard Condition 1.2.2, Part B.1.2 titled '*Operation of the Scheme*, of the Pension Rules for Personal Retirement Schemes dated 1 January 2015, issued in terms of the RPA, also required that:

'***The Scheme shall organise and control its affairs in a responsible manner and shall have adequate operational, administrative*** *and financial procedures* ***and controls to ensure compliance with all regulatory requirements***'.

Trustee and Fiduciary obligations

As highlighted in the section of this decision titled '*The Legal Framework*' above, the Trusts and Trustees Act ('TTA'), Chapter 331 of the Laws of Malta is also relevant for MPM considering its capacity as Trustee of the Scheme. This is an

important aspect on which not much emphasis on, and reference to, has been made by the Service Provider in its submissions.

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

The said article provides that:

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

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

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

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

The trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property '*as a fiduciary acting exclusively in the interest of the beneficiaries, with honesty, diligence and impartiality*'.[56]

As has been authoritatively stated:

'*Trustees have many duties relating to the property vested in them. These can be summarized as follows:* ***to act diligently, to act honestly and in good faith and with impartiality towards beneficiaries, to account to the beneficiaries and to provide them with information, to safeguard and keep control of the trust property and to apply the trust property in accordance with the terms of the trust'***.[57]

[56] Ganado Max (Editor), '*An Introduction to Maltese Financial Services Law*',) Allied Publications 2009) p. 174.
[57] *Op. cit.,* p. 178

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

*'**In carrying out his functions, a RSA [retirement scheme administrator] of a Personal Retirement Scheme has a fiduciary duty to protect the interests of members and beneficiaries**. It is to be noted that by virtue of Article 1124A of the Civil Code (Chapter 16 of the Laws of Malta), the RSA has certain fiduciary obligations to members or beneficiaries, which arise in virtue of law, contract, quasi-contract or trusts. In particular, **the RSA shall act honestly, carry out his obligations with utmost good faith, as well as exercise the diligence of a bonus paterfamilias in the performance of his obligations**'.*[58]

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

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

Other relevant aspects

One other important duty relevant to the case in question relates to **the oversight and monitoring function of the Service Provider in respect of the Scheme including with respect to investments**.

As acknowledged by the Service Provider, whilst MPM's duties did not involve the provision of investment advice, however, MPM did '*… **retain the power to ultimately decide whether to proceed with an investment or otherwise***'.[59]

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

'The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level

[58] Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 December 2017) p. 9.
[59] Para. 17, page 5 of the affidavit of Stewart Davies

of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed) *…'.*[60]

MPM had accordingly the final say prior to the placement of a dealing instruction, in that, if MPM was satisfied that the level of diversification is suitable and in order, and the member's portfolio as a whole is in line with his attitude to risk and investment guidelines,

'*the dealing instruction will be placed with the insurance company and the trade will be executed.* ***If the RSA is not so satisfied, then the trade will not be proceeded with***'.[61]

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

'*I accept that I or my chosen professional adviser may suggest investment preferences to be considered, however,* ***the Retirement Scheme administrator will retain full power and discretion for all decisions relating to the purchase, retention and sale of the investments*** *within my Momentum Retirement Fund*',

which featured in the '*Declarations*' section of the Application Form for Membership signed by the Complainant.[62]

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

The MFSA explained that it:

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

[60] Para. 31, Page 8 of the affidavit of Stewart Davies
[61] Para. 33, Page 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers.
[62] Point 6 of the Declarations section - *A fol.* 54

investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'.[63]

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

'the MFSA also remains of the view that the RSA is to be considered responsible to verify and monitor that investments in the individual member account are diversified, and the RSA is not to merely accept the proposed investments, but it should acquire information and assess such investments'. [64]

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

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

'***The Trustee needs to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification*** *…*',[65]

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

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

Other Observations and Conclusions

Allegations relating to the signature on the dealing instructions

[63] Pg. 7 of the MFSA's Consultation Document dated 16 November 2018 titled '*Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions act*' (MFSA Ref. 15/2018) - https://www.mfsa.com.mt/publications/policy-and-guidelines/consultation-documents-archive/.
[64] Pg. 9 of MFSA's Consultation Document dated 16 November 2018 titled *'Consultation on Amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act' (MFSA Ref. 15/2018).*
[65] Investment Guidelines titled January 2013, attached to the affidavit of Stewart Davies. The same statement is also included in page 9 of the Scheme Particulars of May 2018 (also attached to the same affidavit).

In his formal complaint to the Service Provider, allegations were made that MPM accepted dealing instructions without checking whether the signatures were genuine or photocopied.

This is a serious allegation which had to be specifically proven by specific facts and in the case of allegations of false or copied signatures, the Arbiter must be comforted in such a way as to accept the allegation.

However, the Complainant making this allegation did not provide enough evidence to the Arbiter to accept his allegation.

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

Communications relating to dealing instructions seem to have only occurred between MPM and the investment adviser without the Complainant being in copy or made promptly and adequately aware of the investment instructions given by the investment adviser and executed by MPM.

It has indeed not emerged during the proceedings of the case that the Complainant was being adequately and promptly notified by MPM about material developments relating to his portfolio of investments within the Scheme as would reasonably be expected in respect of a consumer of financial services.

Not even the statements issued annually by MPM to the Member of the Scheme provided details of the underlying investments. The Annual Member Statements were indeed generic in nature and only mentioned the underlying policy. Such statements did not include details of the investment transactions undertaken over the respective period nor details about the composition of the portfolio of investments as at the year end. In its capacity as Trustee and Scheme Administrator MPM had full details of the investment transactions undertaken and the composition of the portfolio but yet did not report about such and neither did it ensure that the Member had received such information.

The procedures used and methods of communications adopted by MPM, indeed, enabled a possible situation such as that claimed by the Complainant. The serious allegations about the dealing instructions could have been easily

avoided and/or at least addressed in a timely manner with simple measures and safeguards adopted by the trustee and scheme administrator.

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

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

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

Allegations in relation to fees

In his complaint to the OAFS, the Complainant complained about the fees and costs associated with his Scheme and submitted that the Service Provider should have immediately questioned the fees and costs compared to the value of his fund.

The Complainant has however not provided any further basis and explanation for such allegation nor any evidence about such claim.

In the circumstances, the Arbiter considers that there is insufficient basis and evidence regarding the allegations made in respect of fees.

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

In its role of a *bonus paterfamilias,* the trustee of a retirement scheme is reasonably expected to ensure that the extent of fees applicable within the whole structure of a retirement scheme is reasonable, justified and adequate overall when considering the purpose of the scheme. Where there are issues or concerns these should reasonably be raised with the prospective member or member as appropriate. Consideration would in this regard need to be given to a number of aspects including: the extent of fees vis-à-vis the size of the respective pension pot of the member; that the extent of fees are not such as to inhibit or make the attainment of the objective of the Scheme difficult to be actually reached without taking excessive risks; neither that the level of fees motivate investment in risky instruments and/or the construction of risky portfolios.

Key considerations relating to the principal alleged failures

The Arbiter will now consider the principal alleged failures.

As indicated above, the Complainant raised a number of main aspects in his Complaint where, in essence, he alleged that MPM did not act in his best interests and failed in its duty of care claiming that:

(i) MPM should have never accepted instructions from CWM as it was claimed *inter alia* that CWM had no licence to offer pensions or financial advice;

(ii) MPM failed in its judgement as to the merits or suitability of the investment transaction by not ensuring that the investments were diversified and consistent with his attitude to risk as a low-risk investor. The Complainant

claimed that his portfolio was mostly invested into structured notes and that these investments were not suitable for a low-risk pension fund, claiming that these were for professional investors and not suitable for retail investors and also of very high risk.

General observations

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

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

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

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

A. The appointment of the Investment Adviser

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

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

The Arbiter has also knowledge that **MPM even had itself an introducer agreement with CWM and makes reference to the cases against MPM decided by him on the 28 July 2020**.

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

Inappropriate and inadequate material issues involving the Investment Adviser

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

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

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

The section titled '*Professional Adviser's Details*' in the Application Form for Membership in respect of the Complainant indicated '*Continental Wealth Management*' ('CWM') as the company's name of the professional adviser.

In the same section of the Application Form, CWM was indicated as having a registered address in Spain and that it was regulated, where '*ICCS*' was mentioned as being the regulator of the professional adviser.

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

With respect to the reference to '*ICCS*' such reference was not defined or explained in the Application Form. Neither were such reference ever explained

or referred to during the comprehensive submissions made by the Service Provider during the proceedings of the case. It has not emerged either that ICCS are, or were, a regulatory authority for investment advisers in Spain or in any other jurisdiction. It appears that '*ICCS*' could be an acronym for the '*Cypriot Insurance Companies Control Service*'. The Cypriot Insurance Companies Control Service is involved in the insurance sector in Cyprus.[66]

No evidence of any authorisation or any form of approval issued by such to CWM has however ever been mentioned by the Service Provider and, even more, neither produced by it during the proceedings of the case.

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

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

ii. *Lack of clarity and no proper distinctions between CWM and Trafalgar*

It is unclear why the Annual Member Statements sent by MPM to the Complainant for the years ending December 2015 and 2016, indicated in the same statement '*Continental Wealth Management*' as '*Professional Adviser*' whilst at the same time indicated another party, '*Trafalgar International GmbH*' as the '*Investment Adviser*'. [67]

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

Besides the lack of clarity on the entity responsible for the investment advice and the lack of clear distinction/links between the indicated parties, it has not emerged that the Complainant was provided with clear and adequate

[66] http://mof.gov.cy/en/directorates-units/insurance-companies-control-service
[67] Attachments to the Reply submitted by MPM before the Arbiter for Financial Services.

information regarding the respective roles and responsibilities between the different mentioned entities.

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

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

In the reply that MPM sent directly to the Complainant in respect of his formal complaint, MPM itself explained that:

'*Momentum in its capacity as Trustee and RSA, in exercising its duty to you ensured:*

***The full details of the Scheme, <u>including all parties' roles and responsibilities were clearly outlined to you in the literature provided ensuring no ambiguity</u>[68], including but not limited to the initial application form and T&C, the Scheme Particulars and Trust Deed and Rules*'.**[69]

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

iii. *No regulatory approval in respect of CWM*

During the proceedings of this case, no evidence has emerged about the regulatory status of CWM. In its submissions, MPM only referred to the alleged links between CWM and Trafalgar. In the affidavit of Stewart Davies, reference was made to the authorisations issued to Trafalgar International GmbH in Germany where reference was made that Trafalgar (and not CWM) was authorised and regulated by IHK, the Chamber of Commerce and Industry in

[68] Emphasis added by the Arbiter.
[69] Section 3, titled '*Overview of Momentum Controls in place in exercising a duty to all members*' in MPM's reply to the Complainant in relation to the complaint made in respect of the Scheme - *A fol.* 14

Germany with the '*Insurance Mediation licence 34D Broker licence number: D-FE9C-BELBQ-24 and Financial Asset Mediator licence 34F: D-F-125-KXGB-53*'.[70]

MPM's statement that CWM '*was operating under Trafalgar International GmbH licenses*',,[71] has not been backed up by any evidence during the proceedings of this case. No comfort can be thus taken from the authorisation/s held by Trafalgar.

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

In the absence of such, **the mere explanations provided by MPM regarding the regulatory status of CWM, including that CWM '*was authorised to trade in Spain and in France by Trafalgar International GmbH*'[72], are rather vague, inappropriate and do not provide sufficient comfort of an adequate regulatory status for CWM to undertake the investment advisory activities provided to the Complainant**.

This also taking into consideration that:

(i) Trafalgar is itself no regulatory authority;

(ii) the lack of clarity as to the regulatory status of the investment adviser in the Application Form for Membership as well as the confusing and unclear references in the statements relating to the adviser as indicated above;

(iii) legislation covering the provision of investment advisory services in relation to investment instruments, namely, the Markets in Financial Instruments Directive (2004/39/EC) already applied across the European Union since November 2007.

[70] para. 39, Section E, titled '*CWM and Trafalgar International GmbH*' in the affidavit of Stewart Davies - *A fol.* 162/163.
[71] Para. 39, Section E, titled *'CWM and Trafalgar International GmbH'* of the affidavit of Stewart Davies - *A fol.* 162
[72] Pg. 1, Section A, titled '*Introduction*', of the Reply of MPM submitted before the Arbiter for Financial Services.

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

Article 23(3) of the MiFID I Directive, which applied at the time, indeed provided specific requirements on the registration of tied agents.[73]

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

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

The Service Provider noted *inter alia* that '*CWM was appointed agent of Trafalgar International GmbH*'.[74]

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

Other observations & synopsis

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

The responsibility of MPM in accepting and allowing CWM to act in the role of investment adviser takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM. As indicated

[73] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN
[74] Para. 39, Section E, titled 'CWM and Trafalgar International GmbH' of the affidavit of Stewart Davies.

above, MPM accepted CWM when, as verified in the Complainant's Application Form for Membership, it was being stated in MPM's own application form that CWM was a regulated entity but no evidence has transpired that this was so, as amply explained above.

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

The Service Provider argued *inter alia* in its submissions that it was not required, in terms of the rules, to require the appointment of a regulated adviser during the years 2013-2015 under the SFA regime and until the implementation of Part B.9 titled '*Supplementary Conditions in the case of entirely Member Directed Schemes*' of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA updated in December 2018, where the latter clearly introduced the requirement for the investment adviser to be regulated.[75]

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

'There was no law or rule requiring Momentum to carry out any due diligence or ensure that CWM/ Trafalgar was licensed'. [76]

However, the Arbiter strongly believes that the aspect of scrutinising an investment adviser known to the RSA and Trustee to be operating in relation to a retirement scheme, impinges on the RSA and Trustee and their duty of care and professional diligence. This goes beyond the mere legalistic approach of shedding off responsibility by interpreting regulatory rules, which are in the first place intended to establish the minimum standards expected of a licensed operator, in such a way as to avoid responsibility.

The Arbiter wants to underscore that the compliance with regulatory rules does not substitute the further obligations that an RSA and Trustee of a retirement scheme have towards the members of the scheme. As amply stated earlier in this decision under the section titled *'The legal framework'*, a Trustee

[75] *A fol.* 163
[76] *Ibid.*

must act diligently and professionally in the same way as a *bonus paterfamilias*. A *bonus paterfamilias* does not abdicate from his responsibilities to suit his interests.

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

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

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

It is also to be noted that apart from the above, MPM had itself a business relationship with CWM, having accepted it to act as its introducer of business. Such relationship gave rise to potential conflicts of interest, where an entity whose actions were subject to certain oversight by MPM on one hand was on the other hand channelling business to MPM.

Even in case where, under the previous applicable regulatory framework, an unregulated adviser could have been allowed by the trustee and scheme administrator to provide investment advice to the member of a member-

directed scheme (on the basis of clear understanding by the member of such unregulated status and implications of such, and the member's subsequent clear consent for such type of adviser), **one would, at the very least, reasonably expect the retirement scheme administrator and trustee of such a scheme to exercise even more caution and prudence in its dealings with such a party in such circumstances.**

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

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

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

B. The permitted portfolio composition

Investment into Structured Notes

Preliminary observations

The sale of, and investment into, structured notes is an area which has attracted various debates internationally including reviews by regulatory authorities over the years. Such debates and reviews have been occurring even way back since the time when the Retirement Scheme was granted registration in 2011.

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

Nevertheless, the exposure to structured notes allowed within the Complainant's portfolio was extensive, with the insurance policy underlying the Scheme being at times solely invested into such products and such instruments being the predominant investments within his portfolio as detailed in the section of this decision titled *'Underlying Investments'* above.

A typical definition of a structured note provides that:

'*A structured note is a debt security issued by financial institutions; its return is based on equity indexes, a single equity, a basket of equities, interest rates, commodities or foreign currencies. The return on a structured note is linked to the performance of an underlying asset, group of assets or index*'.[77]

A structured note is further described as '*a debt obligation – basically like an IOU from the issuing investment bank – with an embedded derivative component; in other words, it invests in assets via derivative instruments'*.[78]

Whilst the Complainant has presented no fact sheets in respect of his underlying investments, as part of the investigatory powers granted under Cap. 555 to the Arbiter, information was sourced (from a general search over the internet) of fact sheets in respect of some of the structured note investments featuring in the Complainant's portfolio.

These are the fact sheets in respect of the following structured notes with ISIN XS0876902452,[79] XS0882837247,[80] XS0875788878,[81] XS0846969359,[82]

[77] https://www.investopedia.com/terms/s/structurednote.asp
[78] https://www.investopedia.com/articles/bonds/10/structured-notes.asp
[79] https://www.portman-associates.com/wp-content/uploads/2013/02/Commerzbank-1Y-Pharmaceutical-Fact-Sheet.pdf
[80] https://www.portman-associates.com/wp-content/uploads/2013/01/RBC-Low-Hurdle-Fact-Sheet.pdf
[81] https://www.portman-associates.com/wp-content/uploads/2013/02/Nomura-East-to-West-5-Fact-Sheet.pdf
[82] https://www.portman-associates.com/wp-content/uploads/2013/02/RBC-Gold-Miners-3-Fact-Sheet-ISSUE-3.pdf

XS0964845266,[83] XS1035007969,[84] XS1015512533,[85] XS1015499921,[86] XS1048446188,[87] which formed part of the Complainant's portfolio.[88]

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

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

The fact sheets indeed highlighted the risk that where the performance of the worst performing underlying measured a fall of a percentage (of 40 or 50%) as specified in the respective fact sheet, investors would receive a capital amount equivalent to the performance of the worst performing asset and capital would be lost.

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

[83] https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-Retail-Fixed-Income-Notes-Fact-Sheet1.pdf
[84] https://www.portman-associates.com/wp-content/uploads/2014/03/Commerzbank-10-Fixed-Global-Pharma-Income-Note-2-FACTSHEET.pdf
[85] https://www.portman-associates.com/wp-content/uploads/2014/03/RBC-Large-Tech-FIXED-INCOME-FactSheet.pdf
[86] https://www.portman-associates.com/wp-content/uploads/2014/04/RBC-10-Fixed-Income-Energy-Note.pdf
[87] https://www.portman-associates.com/wp-content/uploads/2014/03/Nomura-9-1Y-US-Technology-Income-FACTSHEET.pdf
[88] *A fol.* 236

have comfort been derived regarding the adequacy of such products just from the fact that the structured notes were linked to a basket of quoted shares or indices.

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

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

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

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

Moreover, one cannot have comfort that the structured notes were in themselves diversified through the exposure to their underlying as remarked by the Service Provider in its *'Investment Guidelines Commentary'* provided with its submissions,[89] given that as emerging from the risks highlighted in the fact sheets of the structured notes, the risk of loss was similar to an investment in the worst performing underlying. Accordingly, the maximum exposures applicable to single securities (stock) would have been more sensibly applied for such type of structured products.

[89] *A fol.* 236

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

For the avoidance of doubt, and with reference to the emphasis made by the Service Provider for investments to be seen in the context of the entire portfolio,[90] the Arbiter would like to point out that consideration has indeed been duly made of the entire investment portfolio held in the Complainant's individual account within the Scheme including how such portfolio was constituted at inception and (to the extent possible on the basis of the information provided), how the constitution of the portfolio progressed over the years.

Furthermore, the Arbiter has also considered what percentage of the policy value each respective underlying investment constituted at the time of their respective purchase, on the basis of the information provided by the Service Provider itself in the table of *'Investor Profile'* attached to its submissions.[91] Consideration was then further made of how the said percentage allocation, reflected the maximum limits outlined in the investment restrictions and diversification requirements in the MFSA Rules as well as MPM's own Investment Guidelines that were applicable at the time of purchase.

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

The application of investment restrictions at a general level, that is at scheme level without application on an individual account basis, would only make sense and be reasonable in the context of, and where, the members of such a scheme are participating in the same portfolio of assets held within the scheme and not

[90] Section D of Steward Davies's affidavit - *A fol.* 160-162
[91] *A fol.* 236

in the circumstance where the members have their own individual separate investment portfolios, as was the case in question.

An analogy can be made in this regard to the market practice long adopted in the context of collective investment schemes, namely in respect of *stand-alone schemes*[92] and *umbrella schemes*.[93] Whilst investment restrictions would be applied at scheme level in the case of a stand-alone scheme (given that the investors into such scheme would be participating, according to their respective share in the scheme, in the performance of the same underlying investment portfolio), in the case of an umbrella fund, the investment restrictions are not applied at scheme level but at the sub-fund level and would indeed be tailored for each individual sub-fund given that each sub-fund would have its own distinct and separate investment portfolio and investment policy.

As to the substance of MPM's Investment Guidelines, it is noted that the Service Provider seemed to somehow downplay the importance and weighting of its own Investment Guidelines by stating that these were just to provide guidance *'but should not be applied so strictly so as to stultify the ultimate objective, that the investment is placed in the best interests of the member'*.[94]

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

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

[92] i.e. a collective investment scheme without sub-funds.
[93] i.e. a collective investment scheme with sub-funds, where each sub-fund would typically have its own distinct investment policies and separate and distinct investment portfolios.
[94] *A fol.* 161 - Para. 32 of the affidavit of Stewart Davies.

of the Retirement Scheme.[95] Furthermore, no qualifications or any disclaimers regarding the compliance or otherwise with such guidelines have emerged in this case. Neither has it emerged in what circumstances, divergences could possibly be permitted, if at all.

Hence, the stipulated Investment Guidelines were binding and should have been followed accordingly. Even if one had to, for the sake of the argument only (which was not the case as outlined above), somehow construe that these were *'just'* guidelines and not strict rules, as the Service Provider tried to argue,[96] one would in any case reasonably not expect any major departure from the limits and maximum exposures specified in the stipulated guidelines.

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

Portfolio not reflective of the MFSA rules

The high exposure to structured products (as well as high exposure to single issuers in respect of the Complainant), which was allowed to occur by the Service Provider in the Complainant's portfolio, jarred with the regulatory requirements that applied to the Retirement Scheme at the time, particularly Standard Operational Condition ('SOC') 2.7.1 and 2.7.2 of the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002'*, ('the Directives') which applied from the Scheme's inception in 2011 until the registration of the Scheme under the RPA on 1 January 2016. The applicability and relevance of these conditions to the case in question was highlighted by MPM itself.[97]

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

[95] For example, as clearly outlined in the Investment Guidelines marked 'January 2013' and 'Mid-2014' in the Scheme's Application Form.
[96] *A fol.* 161 - Para. 32 of the affidavit of Stewart Davies.
[97] Para. 21 & 23 of the Note of Submissions filed by MPM - *A fol.* 218

SOC 2.7.2 in turn required the Scheme to ensure *inter alia* that, the assets of a scheme are '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole*',[98] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[99]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[100] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings',*[101] where the exposure to single issuer was: in the case of investments in securities issued by the same body limited to no more than 10% of assets; in the case of deposits with any one licensed credit institution limited to 10%, which limit could be increased to 30% of the assets in case of EU/EEA regulated banks; and where in case of investments in properly diversified collective investment schemes, which themselves had to be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.[102]

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

In the case of the Complainant it has also clearly emerged that individual exposures to single issuers were at times close to 30%, this being the maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above. As also mentioned above, it would have been more sensible for the maximum limit of 10% applicable to single issuers in case of securities, to have been similarly applied for those structured products which featured barrier events and provided risk of loss similar to an investment in the worst performing underlying apart from not having the portfolio being solely/predominantly in such products.

[98] SOC 2.7.2 (a)
[99] SOC 2.7.2 (b)
[100] SOC 2.7.2 (c)
[101] SOC 2.7.2 (e)
[102] SOC 2.7.2 (h)(iii) & (v)

Instead, there were exposure as high as 29% of the policy value at the time of purchase in the case of a number of products such as for example in respect of the investment into the Commerzbank AG 1 yr Inc Nt Glbl Pharmaceutical GBP and the RBC Capital Markets 1yr US Financials Inc Nt GBP, respectively.[103]

The portfolio also constituted solely of structured products during the years 2013-till August 2015 and remained the predominant investments in subsequent years (where only relatively small investments into collective investment schemes were undertaken between Sept 2015 and May 2017 as emerging from the table provide by the Service Provider).[104]

The structured products invested into were also not indicated, during the proceedings of this case, as themselves being traded in or dealt on a regulated market. The portfolio also included material positions into high risk investments where the high risk is reflected in, for example, the high rate of returns ranging from 8%-13.6% p.a. which featured in the fact sheets sourced.

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

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

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

The investment portfolio in the case reviewed was ultimately at times solely or predominantly invested in structured notes for a long period of time.

It is also to be noted that over 97% of the underlying policy was invested into five structured notes at the time of the commencement of the policy.[105]

[103] *A fol.* 236
[104] *Ibid.*
[105] *A fol.* 236

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

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

This was a condition which prevailed in all of the presented MPM's Investment Guidelines since January 2013 till that of 2018.[106]

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

The term '*regulated markets*' is in fact commonly referred to, defined and applied in various EU Directives relating to financial services, including diversification rules applicable on other regulated financial products.[107] Hence, the interpretation of '*regulated markets*' has to be seen in such context.

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

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

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

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

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

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

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

The Investment Guidelines of MPM, marked January 2013, required no more than a '*maximum of 40% of the fund*[108] *in assets with liquidity of greater than 6 months*'. This requirement remained, in essence, also reflected in the Investment Guidelines marked 'Mid-2014' which read:

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

It is evident that the scope of such requirement was to ensure the liquidity of the portfolio as a whole by having the portfolio predominantly (that is, at least 60%) exposed to liquid assets which could be easily redeemed within a short period of time, that is, 3-6 months (as reflected in the respective conditions) whilst limiting exposure to those assets which take longer to liquidate to no more than 40% of the portfolio.

With reference to the fact sheets sourced in the Complainant's portfolio, it is noted that the structured notes invested into typically had a maturity or investment term of 1 to 5 years as evidenced in the product fact sheets.

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

The bulk of the assets within the policy was, at times, invested into a few structured notes as already mentioned. It is unclear how the 40% maximum limit referred to above could have been satisfied in such circumstances where the portfolio was predominantly invested into structured notes which themselves had long investment terms.

It is further noted that the possibility of a secondary market existing for structured notes meant that a buyer had to be first found in the secondary market in case one wanted to redeem a holding into the structured note prior to its maturity.

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

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

MPM should have been well aware about the risks associated with the secondary market. It has indeed itself seen the material lower value that could be sought on such market in respect of the structured notes invested into. The lower values of the structured notes on the secondary market was indeed affecting the value of the Scheme as can be deduced from the respective Annual Member Statements that MPM itself produced.

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

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

It is also to be noted that <u>even if one had to look at the composition of the Complainant's portfolio purely from other aspects, there is still undisputable</u>

<u>evidence of non-compliance with other requirements detailed in MPM's own Investment Guidelines</u>.

This is particularly so with respect to the requirements applicable regarding the proper diversification, avoidance of excessive exposure and permitted maximum exposure to single issuers.

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

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

Exposure to single issuer in % terms of the policy value at time of purchase	*Issuer*	*Date of purchase*	*Description*
55.60%	RBC	Jan/Feb 2013	3 SNs issued by RBC respectively constituted 13.32%, 13.32% and 28.96%, at the time of purchase in Jan/Feb 2013.
Over 32.52%	RBC	Feb/ Mar 2014	2 SNs issued by RBC respectively constituted 16.39% and 16.13% of the policy value at the time of purchase in Feb/March 2014. (This is over and above the previous already existing high exposure to RBC through other previous purchases).
28.96%	Commerzbank	Jan 2013	1 SNs issued by Commerzbank constituted 28.96% at the time of purchase in Jan 2013.

Exposure to single issuer in % terms of the policy value at time of purchase	*Issuer*	*Date of purchase*	*Description*
Over 33.33%	EFG	Sept 2014 to April 2015	Multiple purchases of Structured notes issued by EFG which at the time of their respective purchase (over a short period of time) constituted 15.44%, 8.27%, 9.77% and 10.06%.

The fact that such high exposures to a single counterparty was allowed in the first place indicates, in itself, the lack of prudence and excessive exposure and risks to single counterparties that were allowed to be taken on a general level.

The Arbiter notes that the Service Provider has along the years revised various times the investment restrictions specified in its own '*Investment Guidelines*' with respect to structured products, both in regard to maximum exposures to structured products and maximum exposure to single issuers of such products. The exposure to structured notes and their issuers was indeed progressively and substantially reduced over the years in the said Investment Guidelines.

The specified maximum limit of 66% of the portfolio value in structured notes having underlying guarantees which featured in the '*Investment Guidelines*' marked 2015[109] was reduced to 40% of the portfolio's value in the '*Investment Guidelines*' marked December 2017,[110] and, subsequently, reduced further to 25% in the '*Investment Guidelines*' for 2018.[111]

Similarly, the maximum exposure to single issuers for '*products with underlying guarantees*', that is, structured products as referred to by MPM itself, in the '*Investment Guidelines*' marked Mid-2014 and 2015 specifically limited maximum exposure to the same issuer default risk to no more than (33.33%),

[109] MPM's Investment Guidelines '2015' as attached to the affidavit of Stewart Davies
[110] MPM's Investment Guidelines 'Dec-2017' as attached to the affidavit of Stewart Davies
[111] MPM's Investment Guidelines '2018' as attached to the affidavit of Stewart Davies

one third of the portfolio. The maximum limit to such products was subsequently reduced to 25%, one quarter of the portfolio, in the '*Investment Guidelines'* marked 2016[112] and mid-2017[113], reduced further to 20% in the '*Investment Guidelines*' marked December 2017 and, subsequently, to 12.5% in the '*Investment Guidelines*' for 2018.

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

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

Indeed, the Arbiter considers that the high exposure to structured products as well as to single issuers in the Complainant's portfolio jarred, and did not reflect to varying degrees, with one or more of MPM's own investment guidelines applicable at the time when the investments were made, most particularly with respect to the following guidelines:[114]

Investment Guidelines marked 'January 2013':
○ ***Properly diversified*** *in such a way as to* ***avoid excessive exposure****:*
▪ *If* ***individual investments*** *or equities are considered then* ***not more than 20% in any singular asset****, aside from collective investments.*
▪ *…*
▪ ***Singular structured products should be avoided due to the counterparty risk*** *but are acceptable as part of an overall portfolio.*
Investment Guidelines marked 'Mid-2014':

[112] MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies
[113] MPM's Investment Guidelines 'Mid-2017' as attached to the affidavit of Stewart Davies
[114] Emphasis in the mentioned guidelines added by the Arbiter.

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

• ***To any single credit risk**.*
Investment Guidelines marked '2016' & 'Mid-2017':
• *Where **products with underlying Capital guarantees** are chosen, **i.e. Structured Notes**, these will be **permitted up to a maximum of 66% of the portfolio's values**,*
*with **no more than one quarter** of the portfolio to be **subject to** the **same issuer/ guarantor default risk**.*
• ***Where no such Capital guarantee exists**, investment will be **permitted up to a maximum of 50% of the portfolio's value**.* *…*

• *In addition, **further consideration needs to be given to** the following factors:*
  • *…*
  • ***Credit risk of underlying investment**;*
…

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

Besides the mentioned excessive exposure to single issuers it is noted that additional investments into structured notes were observed[115] to have been allowed to occur within the Complainant's portfolio, in excess of the limits allowed on the overall maximum exposure to such products.

MPM's Investment Guidelines of 2015, 2016 and mid-2017 specifically mentioned a maximum limit of 66% of the portfolio value to structured notes. In the case reviewed the Service Provider still continued to allow in 2015

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

further investments into structured products at one or more instances when the said limits should have applied.

The additional investments also occurred despite the portfolio being already exposed to structured notes more than the said percentage at the time when the additional purchase was being made. It is further observed that the portfolio of investments also remained heavily exposed to structured notes, above the 66% threshold, in 2016 and 2017.

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

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

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

The Service Provider has not claimed that the Complainant, whose occupation was indicated as translator/teacher, was a professional investor. No details have either emerged indicating the Complainant not being a retail investor.

With respect to the Complainant's portfolio, the OAFS traced Fact Sheets in respect of various structured product which featured in his portfolio as described in the section of this decision titled *'Invested into Structured Notes'* above.

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

With respect to the structured products issued by RBC for example, the fact sheet clearly indicates that the investment was '*For Professional Investors Only'*

with the '*Target Audience*' for such product being specified as '*Professional Investors Only*' as outlined in the '*Key Features*' section of the fact sheet.

The Service Provider claimed that the references to '*Professional Investors only*' in the Fact Sheets referred to the marketed documentation. This is, however, not really the case, as explained above, and it is clear that such fact sheets were issued purposely for those investors who were eligible to invest in the product.

It is also clear that such products were not aimed for retail investors but only for professional investors. Indeed, the Service Provider presented no fact sheet of structured notes invested into which were targeted for retail investors.

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

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

Other observations & synopsis

The Service Provider did not help its case by not providing detailed information on the underlying investments as already stated in this decision. Although the Service Provider filed a Table of Investments, it did not provide adequate information to explain the portfolio composition and justify its claim that the portfolio was diversified. It did not provide fact sheets in respect of the investments comprising the portfolio of the Complainant and it did not demonstrate the features and the risks attached to the investments.

Various aspects had to be taken into consideration by the Service Provider with respect to the portfolio composition.

Such aspects include, but are not limited to:

- the nature of the structured products being invested into and the effects any events or barriers that may form part of the key features of such products, would have on the investment if and when such events occur as already detailed above;

- the potential rate of returns as indicative of the level of risk being taken;

- the level of risks ultimately exposed to in the respective product and in the overall portfolio composition; and

- not the least, the issuer/counterparty risk being taken.

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

Apart from the fact that no sensible rationale has emerged for limiting the composition of the pension portfolio at times solely or predominantly to structured products, no adequate and sufficient comfort has either emerged that such composition reflected the prudence expected in the structuring and composition of a pension portfolio. Neither that the allocations were in the best interests of the Complainant and even more when his risk profile was of Low Risk as selected in his Application Form for Membership.[116]

In its reply, the Service Provider pointed out that, in his Application Form for Membership, the Complainant selected *'structured notes'* as a type of investment that he *'would be happy to see within [his] retirement fund',*[117] and submitted in this regard that the *'Complainant expects Momentum not to make reliance on that which Complainant himself declared, and signed for, in the application form'.*[118]

[116] *A fol.* 52
[117] *Ibid.*
[118] *A fol.* 45

Apart that the said form included not just reference to structured products but also to other investment products, such as *'Investment funds/bonds'*, (where bonds were never invested into and investment funds were only invested into after nearly three years of commencement of the investment portfolio and also to a relatively much smaller extent than investments in structured notes), the mere reference to *'structured products'* cannot reasonably be seen as overriding, in some way, the Complainant's selected *'Risk Category'*, and *'Risk Profile'* which reasonably prevail or justifying the extent of exposure to such products. Indeed, in the same section, the Complainant had selected a *'Risk Profile'* of *'Low Risk'* where this was described in the same form as *'... a small degree of risk to your capital ...'*.[119]

Any investment in structured products had to only be made within such parameter. Not only was the investment portfolio not reflective of a pension portfolio but it cannot be either reasonably construed as reflecting a small degree of risk to the capital.

In the circumstance where the portfolio of the Complainant was at times, solely or predominantly invested in structured products with a high level of exposure to single issuer/s, and for the reasons amply explained above, the Arbiter does not consider that there was proper diversification nor that the portfolio was at all times *'invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole'*[120] and *'properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole'*.[121]

Apart from the fact that the Arbiter does not have comfort that the portfolio was reflective of the conditions and investment limits outlined in the MFSA's Rules and MPM's own Investment Guidelines, **he is also convinced that over and above the duty to observe specific maximum limits relating to diversification as may have been specified by rules, directives or guidelines applicable at the time, the behaviour and judgement of the Retirement Scheme Administrator and Trustee of the Scheme is expected to, and should have gone beyond compliance with maximum percentages and was to, in**

[119] *Ibid.* (Emphasis added by Arbiter).
[120] SOC2.7.2(a) of Part B.2.7 of the Directives.
[121] SOC2.7.2(b) of Part B.2.7 of the Directives.

practice, reflect the spirit and principles behind the regulatory framework and in practice promote the scope for which the Scheme was established.

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

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

Causal link and Synopsis of main aspects

The actual cause of the losses experienced by the Complainant **cannot** just be attributed to the under-performance of the investments as a result of general market and investment risks and/or the issues alleged against one of the structured note providers, as MPM has *inter alia* suggested in these proceedings. [122]

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

It is also evidently clear that such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced. The actions and inactions that occurred, as explained in this decision, enabled such

[122] For example, in the reference to litigation filed against Leonteq - *A fol.* 165

losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.

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

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

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

Final remarks

As indicated earlier in this decision, the role of a retirement scheme administrator and trustee does not end, nor is just strictly and solely limited, to the compliance of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had however clear duties to check and ensure that the portfolio composition recommended by the investment adviser provided a suitable level of diversification and was *inter alia* in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the Retirement Scheme to be achieved with the necessary prudence required in respect of a pension scheme.

The oversight function is an essential aspect in the context of personal retirement schemes as part of the safeguards supporting the objective of retirement schemes.

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

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

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

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

The Arbiter also considers that the Service Provider did not meet the '*reasonable and legitimate expectations*'[123] of the Complainant who had

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

placed his trust in the Service Provider and others, believing in their professionalism and their duty of care and diligence.

Conclusion

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

However, cognisance 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 Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by Momentum Pensions Malta Limited for part of the realised losses on his pension portfolio.

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

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

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

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

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

(i) For every such investment it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised).

Any realised loss so calculated on such investment shall be reduced by the amount of any total interest or other total income received from the respective investment throughout the holding period to determine the actual amount of realised loss, if any;

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

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

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

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

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

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

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

Dr Reno Borg
Arbiter for Financial Services