Before the Arbiter for Financial Services

Case No. 083/2019

RO

('the Complainant' or 'the Member')

vs

Momentum Pensions Malta Limited

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

or 'the Retirement Scheme Administrator'

or 'the Trustee')

Sitting of the 3 May 2021

The Arbiter,

PRELIMINARY

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

The Case in question

The Complainant claimed that she has lost the majority of her pension fund claiming *inter alia* that the Service Provider as trustee failed to act in her best interests, failed to have a duty of care and failed to follow its own guidelines

when her portfolio was invested in high-risk professional investor only structured notes and continued to lose money.[1]

The Complainant explained that despite being a low to medium risk retail investor, her pension fund was invested into high-risk professional investor only structured notes that caused severe losses against her pension fund, leaving her with little, and quite possibly, no income for her retirement.

It was also claimed that she was placed into the Executive Investment Bond, purchased by MPM, which she claimed was expensive and had a lock-in period which meant she could not exit from it without incurring huge penalties.

It was further submitted that MPM accepted business from Continental Wealth Management ('CWM') using unqualified advisors and Trafalgar International, which were only licensed for insurance mediation, and this was why she found herself in this situation.

The Complainant stated that she had only recently become aware of the extent of the problem and was devastated to find that money she was reliant on in her retirement had been abused in that way.

It was noted that her pension fund now stood at GBP22,545.37 according to a statement of 2019, with a loss of GBP39,383.20, not including her GBP13,000 that she had withdrawn. The Complainant submitted that her statement of 2018 indicated a value of GBP25,817.17 and, accordingly, this meant that a loss of GBP3,271.80 was incurred over the year.

The Complainant submitted that MPM has been aware of this since 2015 and had settled claims for exactly the same reason. It was further submitted that MPM are continuing to lose her money and are failing in their duty of care.

The Complainant requested her pension fund to be restored to its original value less the money she withdrew of GBP13,000. All the fees, commissions and exit penalties were also requested to be refunded. The Complainant also requested the payment of a return of 4% *per annum* for the number of years she was invested in order to reflect the lack of growth. It was noted that the initial investment before costs amounted to GBP74,926.24 and less the

[1] *A fol.* 4

withdrawals she made of GBP13,000 would leave a total figure of GBP61,926.24 which when adding the 4% p.a. requested return would amount to GBP78,356.45 up to, and including, 2019.[2]

In its reply, MPM essentially submitted the following: [3]

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 advisor 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

[2] *Ibid.*
[3] *A fol.* 61-64

21(1)(b) came into force on the 18 April 2016. The complaint was filed on the 26 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.

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 submits 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 her advisor. (Reference was made to the copy of MPM's application form attached to its reply, marked as 'Appendix 1', and the Royal Skandia application form attached to its reply, and marked 'Appendix 2'.)[4]

   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

[4] *A fol.* 62, 65 & 74

it neither receives commissions, nor pays commissions to any third parties. MPM explained that it charges a fixed fee for the services it provides - this fee does not change, regardless of the underlying investment (which the Complainant was advised to invest in by CWM). It was noted that MPM accordingly did not stand to make any gain or benefit as a result of the Complainant investing in any particular underlying investments.

8. MPM noted that the Complainant alleges that *'despite being a low to medium risk retail investor'* her fund was invested in *'high risk professional investor only structured notes'* which caused her *'severe losses'* to her pension fund.[5] MPM replied that the Complainant has not brought any evidence to substantiate her generic allegation. In any event, MPM replied that, as will be proved, all investment guidelines were observed.

   It was further noted that the Complainant further complains that she was *'placed in to a Bond …which is expensive and has a lock in period which I cannot exit without incurring huge penalties'*.[6] MPM submitted that the Complainant was informed of the bond and all associated fees and charges since 2013 and had never complained. MPM further submitted that it was unacceptable that she should raise this complaint six years after having received all the information and also after she agreed to the investment. (MPM referred to a letter dated 1 April 2013 marked as 'Appendix 3' to its reply as well as the fee schedule dated 27/7/2012 marked as 'Appendix 4' in this regard.)[7]

9. MPM noted that the Complainant also alleges that she has '*only recently become aware of the extent of this problem ...*'.[8] MPM refuted this allegation and noted that it has sent annual member statements to the Complainant since 2013. (Reference was made to the copies of the annual member statements attached to its reply and marked as 'Appendix 5'.)[9]

[5] *A fol.* 62
[6] *Ibid.*
[7] *A fol.* 62, 96 & 114
[8] *A fol.* 62
[9] *A fol.* 62 & 115

10. MPM remarked that the Complainant then generically makes the following allegations against MPM, without substantiating them in any manner: *'Failing as Trustee to Act in my Best Interests; Failing to have a Duty of Care; Failing to follow their own guidelines; Continuing to lose money'*.[10] MPM submitted that it cannot be expected to reply in a reasoned manner to the allegations of this nature. The Service Provider also noted that the Complainant makes a series of generic allegations against MPM without providing any explanation or basis. MPM noted that it reserves the right to reply further if and when clarification is provided (without Complainant being allowed to widen the scope of her complaint).

11. MPM noted that MPM further replied that a welcome letter was also sent to the Complainant on the 15/08/2012 (a copy of which was attached and marked as 'Appendix 6' to its reply).[11]

12. MPM noted that the Complainant has also attached a large number of documents to her complaint which she has not marked and neither does she make any reference to them in her complaint.

Momentum does not provide investment advice

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

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

15. MPM noted that this is clear from the application forms (attached to Appendix 1 and 2 to its reply) which specifically request the details of the Complainant's professional advisor. It was pointed out that the Complainant also declared on the application form that she acknowledged that the services provided by MPM did not extend to

[10] *A fol.* 62
[11] *A fol.* 63 & 130

financial, legal, tax or investment advice (and referred to declaration 9 on page 6 of the application form).

16. 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

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

18. 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.

19. 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.'

The said article stipulates that a complaint related to the '*conduct*' of a 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 in respect of the Scheme. It is noted that MPM's role with the Scheme is that of a **trustee *and* retirement scheme administrator**, with such roles having been occupied by MPM in respect of the Complainant since the time the Complainant became a member of the Scheme and **continued to be occupied beyond the coming into force of Chapter 555 of the Laws of Malta**.

With respect to the investment portfolio, 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.[12]

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 advisor 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.**[13] CWM was therefore still accepted by the Service Provider and acting as the investment advisor to the Complainant after the coming into force of Chapter 555 of the Laws of Malta. 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.'

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*'.

[12] The table of investments presented by the Service Provider indicated Structured Notes ('SN') existing after the coming into force of the Act - *A fol.* 221

[13] Para. 44, Section E, of the affidavit of Stewart Davies, Director of MPM – *A fol.* 152

In its Reply before the Arbiter , 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 her investment (Appendix 5 attached to the reply filed by Momentum), and yet she only filed a complaint with Momentum on 5 August 2019 ...*'.[14]

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 mentioned the underlying life assurance policy, the Executive Investment Bond issued by Old Mutual International IOM Limited. The Annual Member Statement issued to the Complainant by MPM included no details of the specific underlying investments held within the said policy.

Hence, the Complainant was not in a position to know, from the Annual Member Statements she received, what investment transactions were actually being carried out within her 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.*

[14] *A fol.* 218

Every effort has been made to ensure that this statement is correct but please accept this statement on this understanding.

Certain underlying assets within 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.'[15]

Such a disclaimer did not reveal much to the Complainant about the actual state of the investments and the statements in question could not have reasonably enabled the Complainant to have knowledge about the matters being complained of. As indicated above, it is further noted that CWM remained the investment advisor of the Complainant up until September 2017 and there were even structured notes in the Complainant's investment portfolio at the time which still had to mature.

The Complainant in this case submitted her formal complaint with the Service Provider on the 5 August 2019 and, thus, within the two-year period established by Art. 21(1)(c) of Chapter 555.[16]

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

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

Clarity and Substance of alleged claims

In its reply, MPM *inter alia* argued that the Complainant made generic allegations against it without providing any explanation, basis or substantiation. Particular reference was made by MPM in this regard to the Complainant's statements where she claimed the following in respect of MPM:

'Failing as Trustee to Act in my Best Interests; Failing to have a Duty of Care; Failing to follow their own guidelines; Continuing to lose money'.[17]

[15] *A fol.* 119
[16] *A fol.* 11
[17] *A fol.* 62 & 4

MPM submitted in this regard that it *'cannot be expected to reply in a reasoned manner to the allegations of this nature'*.[18]

At the outset, the Arbiter would like to highlight that this is a Complaint filed by a retail consumer of financial services within the structure of Chapter 555 of the Laws of Malta. The Service Provider should accordingly consider the complaint made by the Complainant (a *'Housewife'*, as indicated in MPM's own Application Form for membership),[19] into such context and not expect the client, who chose to file the Complaint herself, as allowed within the parameters of the law, to reply in a legalistic manner or with the knowledge and expertise of a professional in the field.

Having reviewed the Complaint, it is considered that whilst the Complainant could have structured and explained her Complaint in a more articulate manner, it is sufficiently clear that the substance of the Complaint can be considered to, in essence, relate to the alleged shortcomings of MPM in the carrying out of its duties as Trustee and Retirement Scheme Administrator of the Retirement Scheme. She made a key allegation relating to the claim that MPM failed to act in her best interests and with the duty of care where it was highlighted that despite being a low to medium risk retail investor, her pension fund was invested in high-risk professional investor only structured notes, with MPM, allegedly, not following its own guidelines.[20]

MPM filed a detailed reply indicating that it understood very well the allegations being lodged by the Complainant.

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.[21]

[18] *A fol.* 62-63
[19] *A fol.* 84
[20] *A fol.* 4
[21] Cap. 555, Art 19(3)(b)

The Complainant

The Complainant, born in 1957, 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').[22]

In the said application form, the Complainant's occupation was indicated as '*Housewife*'.

It was not indicated, nor has it emerged, during the case that the Complainant was by any means, a professional investor. It has emerged that she had no prior experience and knowledge in investments in structured notes, with her previous investments being only limited to the *'Investment Bond - SEB'* which she jointly held with her husband as indicated in the CWM's Client Fact Find.[23] The Complainant can thus be treated as being a retail client.

The Complainant was indicated in CWM's Client Fact Find, to have a *'Low to Medium'* attitude to risk with her *'Financial Planning Priorities'* being *'1. Capital Growth 2. Protection 3. Tax Efficiency 4. Lump Sum Investment from QROPS'*.[24]

MPM's Application Form for Membership indicates that the Complainant had selected the description of her attitude to investment risk as being *'Uncomfortable with risk but prepared to take some risk to provide opportunity for growth over the longer term'*.[25]

From the five risk categories available ranging from *'1 No Risk'* to *'5 High Risk'*, her risk profile, in the same form, was somehow marked for all three categories, as being:

- *'1 No risk'* defined as *'Your capital is safe but any growth is likely to be moderate'*,
- *'2 Low Risk' defined* as *'There is a small degree of risk to your capital which may go down as well as up - any growth is likely to be fairly moderate'*, and

[22] *A fol.* 65
[23] *A fol.* 36
[24] *A fol.* 35
[25] *A fol.* 68

- *'3 Medium Risk'* defined *as 'There is some risk to your capital which may go down as well as up - there is potential for growth over the longer term'*.[26]

The Complainant was accepted by MPM as a member of the Retirement Scheme on 15 August 2012.[27]

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[28] and acts as the Retirement Scheme Administrator **and Trustee** of the Scheme.[29]

The Legal Framework

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

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta) ('RPA'). The RPA was published in August 2011 and came into force on the 1 January 2015.[30]

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.

[26] *Ibid.*
[27] *A fol.* 125
[28] *https://www.mfsa.mt/financial-services-register/result/?id=3453*
[29] *A fol.* 175 - Role of the Trustee, pg.4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).
[30] *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/*

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.[31]

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

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

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

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

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

Particularities of the Case

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

The Momentum Malta Retirement Trust ('the Retirement Scheme' or 'the Scheme') is a trust domiciled in Malta. It was granted a registration by the MFSA[32] as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011[33] and under the Retirement Pensions Act in January 2016.[34]

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*

[31] As per pg.1 of the Affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1st January 2016 attached to his affidavit.
[32] *https://www.mfsa.com.mt/financial-services-register/result/?id=3454*
[33] Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's Affidavit).
[34] Registration Certificate dated 1 Jan 2016 issued by MFSA to the Scheme (attached to Stewart Davies's Affidavit).

(Cap. 331) on the 23 March 2011'[35] and is '*an approved Personal Retirement Scheme under the Retirement Pensions Act 2011*'.[36]

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*'.[37]

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

The assets held in the Complainant's account with the Retirement Scheme were used to acquire a whole of life insurance policy for the Complainant.

The life assurance policy acquired for the Complainant was called the Executive Investment Bond issued by Skandia International[38]/Old Mutual International ('OMI').[39]

The premium in the said policy, of GBP74,926.24[40] was in turn invested in a portfolio of investment instruments under the direction of the Investment Advisor 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.[41]

The '*Investor Profile*' presented by the Service Provider for the Complainant also included a table with the '*current valuation'* as at 14/08/2019. The said table indicated a loss (excluding fees) of GBP25,692 (equivalent to 34.29% of

[35] Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit).
[36] Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's Affidavit).
[37] *Ibid.*
[38] Skandia International eventually rebranded to Old Mutual International - *https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandia-international-rebrands-to-old-mutual-international/*
[39] *A fol.* 75
[40] *A fol.* 98
[41] The '*Investor Profile'* is part of the Additional Submissions presented by the Service Provider in respect of the Complainant - *A fol.* 221

the initial premium) as at that date, arising from the investment instruments. The loss experienced by the Complainant is higher when taking into account the fees incurred and paid within the Scheme's structure which were not reflected in the above figure. It is to be also noted that the Service Provider does not explain whether the loss indicated in the '*current valuation*' for the Complainant relates to realised or paper losses or both.

Investment Advisor

Continental Wealth Management ('CWM') was the investment advisor appointed by the Complainant.[42] The role of CWM was to advise the Complainant regarding the assets held within her Retirement Scheme.

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 advisor and provided financial advice to investors. CWM was authorised to trade in Spain and in France by Trafalgar International GmbH*'.[43]

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*',[44] 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'*.[45]

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.[46]

[42] *A fol.* 66
[43] Pg. 1 of MPM's reply to the OAFS - A fol. 61
[44] Para. 39, Section E titled, *'CWM and Trafalgar International GmbH*' of the affidavit of Stewart Davies - *A fol.* 150
[45] *Ibid.*
[46] Attachment to the '*Additional submissions*' made by MPM in respect of the Complainant - *A fol.* 221

During the tenure of CWM, whose term was terminated by MPM in September 2017,[47] the portfolio was, at times, solely or predominantly invested into structured notes. The table indicates a relatively minor investment into just one investment fund during the tenure of CWM - an investment undertaken in November 2015, into the VAM Managed Funds Lux Close Brothers Balanced Fund for GBP6,000. The other investments within the portfolio all constituted of structured notes throughout the term of CWM, from 2013 till September 2017.

The table indicates two other investments into collective investments schemes, the Marlborough schemes of GBP7,000 and GBP6,000 respectively, but these two investments were done in November 2017, and so after the tenure of CWM.

Further Considerations

Responsibilities of the Service Provider

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

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

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

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

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

[47] *A fol.* 152

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:[48]

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*** *…*'.

[48] Emphasis added by the Arbiter.

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.*';

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

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

The same principle continued to apply under the rules issued under the RPA. Standard Condition 4.1.7, Part B.4.1 titled '*Conduct of Business Rules*'

of the Pension Rules for Service Providers dated 1 January 2015 issued in terms of the RPA, provided that:

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

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

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

Trustee and Fiduciary obligations

As highlighted in the section titled '*The Legal Framework*' 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 or reference, 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'.*

Then, 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*'.[49]

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'***.[50]

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****'.*[51]

[49] Ganado Max (Editor) ,'*An Introduction to Maltese Financial Services Law*',) Allied Publications 2009) p. 174.
[50] *Op. cit.*, p. 178
[51] Consultation Document on Amendments to the Pension Rules issued under the Retirement Pensions Act [MFSA Ref: 09-2017], (6 December 2017) p. 9.

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***'.[52]

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

'The RSA will then ensure that the proposed trade on the dealing instruction, when considered in the context of the entire portfolio, ensures a suitable level of diversification, is in line with the member's attitude to risk and in line with the investment guidelines (applicable at the time the trade is placed)…'.[53]

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***'.[54]

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

'*I accept that I or my chosen professional advisor may suggest investment preferences to be considered, however, **the Retirement Scheme administrator***

[52] Para. 17, Pg. 5 of the affidavit of Stewart Davies - *A fol.* 145
[53] Para. 31, Pg. 8 of the affidavit of Stewart Davies - *A fol.* 148
[54] Para. 33, Pg. 9 of the affidavit of Stewart Davies. Para. 17 of Page 5 of the said affidavit also refers - *A fol.* 149

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.[55]

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 investment restrictions and the risk profile of the member in relation to his individual member account within the Scheme'.[56]

The MFSA has also highlighted the need for the retirement scheme administrator to query and probe the actions of a regulated investment advisor 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'. [57]

[55] *A fol.* 89 - Emphasis added by the Arbiter

[56] 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/.

[57] 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).*

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

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

'***The Trustee need to ensure that the member's funds are invested in a prudent manner and in the best interests of the beneficiaries. The key principle is to ensure that there is a suitable level of diversification*** *…*',[58]

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*** *…*'.[59]

Other Observations and Conclusions

<u>Allegation relating to fees</u>

The Complainant complained about the underlying policy, the Executive Investment Bond, being expensive and having a lock in period which she could not exit from without incurring huge penalties.

Apart that such allegation has not been substantiated it has not emerged either that the Complainant was not fully aware of such fees applicable on the said policy. As indicated by the Service Provider, details of the specific fees applicable on the Executive Investment Bond, were clearly disclosed to the Complainant way back in March 2013 with the submission of the policy documents.[60]

The Arbiter is accordingly accepting the Service Provider's submissions on the matter relating to the fees and rejecting the Complainant's claim in this regard.

[58] Emphasis added by the Arbiter - *A fol.* 188 - 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) - *A fol.* 180.
[59] Emphasis added by the Arbiter - *A fol.* 90
[60] *A fol.* 98

Key considerations relating to the principal alleged failures

The Arbiter will now consider the principal alleged failures raised by the Complainant.

As indicated above, the Complainant, in essence, alleged that MPM failed to act in her best interests and with the duty of care highlighting that despite being a low to medium risk retail investor her pension fund was invested in high-risk professional investor only structured notes with MPM not following its own guidelines.

The Complainant also claimed that MPM accepted business from CWM using unqualified advisors.

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 advisor was the duty of other parties, such as CWM.

This would reflect on the extent of responsibility that the financial advisor 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. <u>The appointment of the Investment Advisor</u>

It is noted that the Complainant chose the appointment of CWM to provide her 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. **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 advisor as further detailed below.**

<u>Inappropriate and inadequate material issues involving the Investment Advisor</u>

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

It is considered that **MPM accepted and allowed inaccurate and incomplete material information relating to the Advisor 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 of 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 advisor and also decide with whom to enter into terms of business**.

The section titled '*Professional Advisor'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 advisor.

In the same section of the Application Form, CWM was indicated as having a registered address in Spain and that it was regulated, where '*Interalliance*

Worldnet' ('Inter-Alliance') was mentioned as being the regulator of the professional advisor.

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

With respect to the reference to '*Inter-Alliance*' such reference was not defined or explained in the Application Form. Neither was such reference ever explained or referred to during the comprehensive submissions made by the Service Provider during the proceedings of the case. It has not emerged either that Inter-Alliance are, or were, a regulatory authority for investment advisors in Spain or in any other jurisdiction. It appears that 'InterAlliance Worldnet', an abbreviation apparently for '*Inter Alliance WorldNet Insurance Agents & Advisors Ltd'* was a service provider itself in Cyprus, but clearly it was not a regulatory authority.[61]

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

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

ii. Lack of clarity/convoluted information relating to the advisor in the Application Form of the Underlying Policy

It is noted that the lack of clarity and convolution relating to the investment advisor has also prevailed in the Application Form submitted in respect of the acquisition of the underlying policy, that is, the one issued by Skandia International.

[61] https://international-advisor.com/iaw-fined-cypriot-regulator/

MPM, as Trustee of the Scheme had clear sight of the said application and had indeed signed the application for the acquisition of the policy for the Complainant in its role as trustee.[62]

It is noted that the Application Form of the policy provider refers to, and includes, the stamp of another party as financial advisor. The first page of the said application form includes a section titled '*Financial advisor details*' and a field for '*Name of financial advisor*', with such section including a stamp bearing the name of 'GlobalNet Ltd' with a P.O. Box address in Cyprus.[63]

The two entities, both CWM and Global Net Ltd are then featured in the section titled '*Financial advisor declaration*' of the said form with the same stamp of GlobalNet Ltd, again featuring here in the part titled *'Financial advisor stamp*' in the same section.[64] It is also noted that the same section includes a field titled 'Regulator name' with this filed featuring the words *'Interalliance Worldnet*' which were crossed and on top of it was included reference to *'GlobalNet Ltd*'.[65]

There is accordingly a lack of clarity on the exact entity ultimately taking responsibility for the investment advice provided to the Complainant.

For the reasons explained, the information on the financial advisor is also somewhat inconsistent between that included in MPM's application form and the application form of the issuer of the underlying policy.

iii. Lack of clarity and no proper distinctions between CWM and GlobalNet Ltd

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 Advisor*' whilst at the same time indicated another party, '*Globalnet Limited*' as the '*Investment Advisor'*.[66]

[62] *A fol.* 82
[63] *A fol.* 75
[64] *A fol.* 83
[65] *Ibid.*
[66] Attachments to the Reply submitted by MPM before the Arbiter for Financial Services.

No indication or explanation of the distinction and differences between the two terms of '*Professional Advisor*' and '*Investment Advisor*' 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 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 any other party.

iv. 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.

With respect to GlobalNet Limited, the Service Provider actually noted that this was actually an unregulated company involved in administrative services, explaining, in its reply, that

'Global Net Limited ('Global Net'), an unregulated company, is an associate company of Trafalgar and offers administrative services to entities outside the European Union'.

This contradicts and does not reflect the role of GlobalNet Ltd which was indicated in the Application form of Skandia International and the Annual Member Statements issued by MPM as indicated above.

Furthermore, with respect to Trafalgar, it is noted that, 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 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*'.[67]

MPM's statement that CWM '*was operating under Trafalgar International GmbH licenses*'[68] has not been backed up by any evidence during the proceedings of this case. No comfort can be thus taken either 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*',[69] 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, InterAlliance and/or GlobalNet were themselves no regulatory authority;

(ii) the inconsistency and lack of clarity as to the regulatory status of the investment advisor in the Application Forms as well as the confusing and unclear references in the statements relating to the advisor as indicated above;

[67] para. 39, Section E, titled '*CWM and Trafalgar International GmbH*' in the affidavit of Stewart Davies - *A fol.* 150/151.
[68] *A fol.* 150
[69] Pg. 1, Section A titled 'Introduction', of the Reply of MPM submitted before the Arbiter for Financial Services.

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

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

Article 23(3) of the MiFID I Directive, which applied at the time, indeed provided specific requirements on the registration of tied agents.[70]

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*'.[71]

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.

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

Other observations & synopsis

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

The responsibility of MPM in accepting and allowing CWM to act in the role of investment advisor takes even more significance when one takes into consideration the scenario in which CWM was accepted by MPM. As indicated above, MPM accepted CWM when, as verified in the Complainant's Application Form for Membership, it was being stated in MPM's own application form that CWM was a regulated entity.

However, no evidence has transpired that this was so, as amply explained above.

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

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 advisor 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 advisor to be regulated.[72]

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'. [73]

[72] *A fol.* 151
[73] *Ibid.*

However, the Arbiter strongly believes that the aspect of scrutinising an investment advisor 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 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 advisor meant, in practice, that there was a layer of safeguard in less for the Complainant as compared to a structure where an adequately regulated advisor is appointed.

An adequately regulated financial advisor 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 advisor.

Besides the issue of the regulatory status of the advisor, MPM also allowed and left uncontested important information, which was convoluted, misleading, unclear and lacking as explained above, with respect to the investment advisor, 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, Inter-Alliance, GlobalNet 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 advisor 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 advisor), **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 advisor 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 or predominantly invested into such instruments as detailed in the section 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*'.[74]

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'*.[75]

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

Although no fact sheets in respect of the Complainant's underlying investments were produced, as part of the investigatory powers granted under Cap. 555, the Arbiter managed to source, from a general search over the internet, fact sheets in respect of various structured note investments featuring in the Complainant's portfolio,[76] namely, in respect of the:

- *RBC Smartphone 8.5% PA Inc NT*, with ISIN XS0962806377;[77]
- *RBC 2 Y Retail Income*, with ISIN XS0964845266;[78]
- *RBC GBP Phoenix AC April*, with ISIN XS1027521639;[79]
- *Nomura 9% US Tech Income Notes*, with ISIN XS1048446188;[80]
- *Commerzbank 9% Future Pioneers*, with ISIN XS1057776392;[81]
- *RBC Online Large Caps Inc Note*, with ISIN XS1092556452;[82]
- *Commerzbank 7% P.A. US Diversified AC Income Note*, with ISIN XS1240919933.[83]

Apart from *inter alia* the credit risk of the issuer and the liquidity risk, other risks that were highlighted in the fact sheets, include the risk that the investor could possibly receive less than the original amount invested, or potentially even losing all of the investment.

The fact sheets sourced indicate that the underlying assets, to which the structured notes were linked to, comprised stocks or financial indices. A particular feature, described in all the fact sheets sourced, involved the

[76] *A fol.* 221
[77] https://www.portman-associates.com/wp-content/uploads/2013/09/RBC-Smartphone-Fixed-Income-Fact-Sheet.pdf
[78] https://www.portman-associates.com/wp-content/uploads/2013/10/RBC-Retail-Fixed-Income-Notes-Fact-Sheet1.pdf
[79] https://www.portman-associates.com/wp-content/uploads/2014/04/RBC-Select-Index-Autocall-Notes-FactSheet.pdf
[80] https://www.portman-associates.com/wp-content/uploads/2014/03/Nomura-9-1Y-US-Technology-Income-FACTSHEET.pdf
[81] https://www.portman-associates.com/wp-content/uploads/2014/05/Commerzbank-9-Fixed-Future-Pioneers-FACT-SHEET.pdf
[82] https://www.portman-associates.com/wp-content/uploads/2014/07/RBC-10pa-Online-Large-Caps-Income-FACTSHEET.pdf
[83] https://www.portman-associates.com/wp-content/uploads/2015/06/7-p.a.-US-Diversified-Autocallable-Income-Note-Factsheet.pdf

application of capital buffers and barriers where the invested capital was however 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 respective 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, in case 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 to, 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 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, at times, comprised 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.[84]

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 (such as RBC, Commerzbank, Nomura and Leonteq) emerged in the Complainant's portfolio.

[84] *A fol.* 221

Even in case where the issuer of the structured product was a large institution, the Arbiter does not consider this to justify or make the high exposure to single issuers acceptable, even more, in the Scheme's context. The maximum limits relating to exposures to single issuers outlined in the MFSA rules and MPM's own Investment Guidelines did not make any distinctions according to the standing of the issuer.

Hence, the maximum exposure limits 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.

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,[85] 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 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.[86] 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 in turn 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

[85] Affidavit of Steward Davies - *A fol.* 148
[86] *A fol.* 221

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 in turn the aim of such requirements.

The application of investment restrictions at a general, 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 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*[87] and *umbrella schemes*.[88]

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'*.[89] 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

[87] i.e. a collective investment scheme without sub-funds.
[88] 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.
[89] *A fol.* 149

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 of the Retirement Scheme.[90]

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,[91] 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 own Investment Guidelines but, on multiple occasions, there were material departures from such guidelines where the maximum limits were materially exceeded as outlined further below.

[90] For example, as clearly outlined in the Investment Guidelines marked 'January 2013' and 'Mid-2014' - *A fol.* 188/189.
[91] *A fol.* 149 - Para. 32 of the affidavit of Stewart Davies.

Portfolio not reflective of the MFSA rules

The high exposure to structured products (as well as high exposure to single issuers), 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.[92]

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

SOC 2.7.2 in turn required the Scheme to ensure *inter alia* that, the assets of a scheme are '*invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole'*[93] and that such assets are '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[94]

SOC 2.7.2 of the Directives also provided other benchmarks including for the portfolio to be '*predominantly invested in regulated markets*';[95] to be '*properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings'*[96] 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

[92] Para. 21 & 23 of the Note of Submissions filed by MPM - *A fol.* 205.
[93] SOC 2.7.2 (a)
[94] SOC 2.7.2 (b)
[95] SOC 2.7.2 (c)
[96] SOC 2.7.2 (e)

be predominantly invested in regulated markets, limited to 20% of the scheme's assets for any one collective investment scheme.[97]

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

In addition, individual exposure to structured notes were, on multiple occasions, excessively high. Notwithstanding that certain information (such as the *'SN*Percentage of Policy Value'*) was left out, by the Service Provider, for a number of structured note investments in its table of *'investor profile'* attached to its additional submissions,[98] it has however clearly emerged that there were a number of instances where individual exposures to single issuers[99] were at times even higher than 30%, this being the maximum limit applied in the Rules to relatively safer investments such as deposits as outlined above.

The said table also indicates various multiple occasions where individual exposure to single structured note investments constituted more than 20% of the policy value at the time of purchase (with the 20% limit applicable to diversified investments like collective investment schemes whose performance was spread over a number of underlying assets).[100] 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 in respect of those structured products which featured barrier events and provided risk of loss similar to an investment in the worst performing underlying, rather than having the indicated high individual exposures.

The portfolio also included material positions into high-risk investments where the high risk is reflected in the high rate of returns (of 7% to 9.83% reflected in the name of a number of structured notes featuring in the portfolio) and in the extent of the losses experienced.

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

[98] *A fol.* 221

[99] Such as to the *'Nomura 9% US Tech Income Notes'* and the *'Commerzbank 9% Future Pioneers'* which respectively comprised 33.98% of the policy value as indicated in the table provided by the Service Provider - *A fol.* 221.

[100] Such as for example the investment into the *'Leonteq 3 Years Multi Barrier Express Cert'* which constituted 28.14% at the time of purchase.

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.

*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 solely or predominantly invested in structured notes for a long period of time. It is unclear how a portfolio, solely or predominantly invested into 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.[101]

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).

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

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.[102]

Hence, the interpretation of '*regulated market*s' has to be seen in such context.

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

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

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 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*[103] *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*

[102] 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'.

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

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.

It is noted that structured notes invested into typically do not have a maturity of a few months but a longer-term view commonly between one or more years. Indeed, the fact sheets sourced all had a maturity ranging from 1 to 5 years.

The bulk of the assets within the policy was, at times, invested into just a few structured notes with material positions taken in few products.[104] 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.

[104] The portfolio commenced with just two structured note investments which together comprised GBP63,000, (an investment of GBP50,000 into *'RBC 1Y GBL Financials Income NT'* and GBP13,000 into the *'Nomura 5Y AC HK Europe Taiwan'*) constituting a staggering 84.08% of the total investible premium of GBP74,926.24 (*A fol.* 15 & 221). Other instances of material exposures to a few structured products emerged in subsequent years as per the information included in the table presented by the Service Provider (*A fol.* 221).

There are indeed various risks applicable in relation to the secondary market and 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 where the lower values of the structured notes on the secondary market would have affected the value of the Scheme as can be deduced from the respective Annual Member Statements that MPM itself produced.

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

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

It is nevertheless 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 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*
66.7%	RBC	Mar 2013	1 SN issued by RBC constituted 31.40% of the policy value (GBP50,000 of GBP74,926.24) at the time of purchase in March 2013.
33.98%	Commerzbank	April 2014	1 SN issued by Commerzbank constituted 33.98% of the policy value at the time of purchase in April 2014.
33.98%	Nomura	April 2014	1 SN issued by Nomura constituted 33.98% of the policy value at the time of purchase in April 2014.
28.14%	Leonteq/ Notenstein	May 2015	2 SNs issued by Leonteq/Notenstein constituted 11.51% and 16.63% of the policy value at the time of purchase in May 2015.

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 [105] was reduced to 40% of the portfolio's value in the '*Investment Guidelines*' marked December 2017 [106] and, subsequently, reduced further to 25% in the '*Investment Guidelines*' for 2018. [107]

Similarly, the maximum exposure to single issuers for '*products with underlying guarantees*', that is structured products as referred to by MPM itself, in the '*Investment Guidelines*' marked Mid-2014 and 2015 specifically limited maximum exposure to the same issuer default risk to no more than (33.33%), one third of the portfolio. The maximum limit to such products was subsequently reduced to 25%, one quarter of the portfolio, in the '*Investment Guidelines'* marked 2016 [108] and mid-2017,[109] 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 this case under examination by the Arbiter, 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 also 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:[110]

[105] MPM's Investment Guidelines '2015' as attached to the affidavit of Stewart Davies
[106] MPM's Investment Guidelines 'Dec-2017' as attached to the affidavit of Stewart Davies
[107] MPM's Investment Guidelines '2018' as attached to the affidavit of Stewart Davies
[108] MPM's Investment Guidelines '2016' as attached to the affidavit of Stewart Davies
[109] MPM's Investment Guidelines 'Mid-2017' as attached to the affidavit of Stewart Davies
[110] Emphasis in the mentioned guidelines added by the Arbiter.

Investment Guidelines marked 'January 2013':
○ ***Properly diversified*** *in such a way as to* ***avoid excessive exposure****:*
▪ *If* ***individual investments*** *or equities are considered then* ***not more than 20% in any singular asset****, aside from collective investments.*
▪ *…*
▪ ***Singular structured products should be avoided due to the counterparty risk*** *but are acceptable as part of an overall portfolio.*
Investment Guidelines marked 'Mid-2014':
• *Where products with underlying guarantees are chosen,* ***no more than one third of the overall portfolio to be subject to the same issuer default risk****.*
In addition, ***further consideration needs to be given to*** *the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to* ***avoid excessive exposure****:* • *...* • ***To any single credit risk***
Investment Guidelines marked '2015':
• *Where products with underlying guarantees are chosen, i.e.* ***Structured Notes****, these will be* ***permitted up to a maximum of 66% of the portfolio's values****,*
with ***no more than one third*** *of the portfolio to be* ***subject to*** *the* ***same issuer default risk****.*
In addition, ***further consideration needs to be given to*** *the following factors:* • *…* • ***Credit risk of underlying investment*** • *…* *…*
• *In addition to the above, the portfolio must be constructed in such a way as to* ***avoid exposure****:* • *...* • ***To any single credit risk****.*
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 also noted that additional investments into structured notes were observed[111] 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 this case, the Service Provider still continued to allow further investments into structured products at one or more instances (through additional purchases in structured notes in 2015 and 2016), 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.

For the reasons amply explained, the Arbiter is convinced 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 not been truly achieved in respect of the Complainant's investment portfolio.

Service Provider's comments on adherence with Investment Guidelines

Despite the Service Provider's claim that it *'observed all guidelines, including investment guidelines'* and its claim that *'as will be proved, all investment guidelines were observed'* it did not submit any tangible and reasonable

[111] '*Table of Investments'* in the '*Investor Profile*' provided by MPM refers - *A fol.* 221.

proof in this regard during the proceedings of the case. The evidence emerging during the case, actually indicates various instances of non-adherence to the investment guidelines as amply considered above.

An aspect that the Service Provider raised in its defence on the adherence with the investment guidelines, was the statement it made in its *'Investment Guidelines Commentary'* that it submitted as part of its submissions, where MPM stated as follows:

'All instructions in line with Investment Guidelines. Instructions invested across structured notes which were very widely diversified with underlyings quoted on major stock exchanges including the NASDAQ, NYSE diversified across Sector, Industry and Region. Underlying companies included companies which included US Sears Holding Corporation, Oasis Petroleum, Groupon Inc, Nike, Ralph Lauren, Wal Mart, Facebook, Apple, Sony Corp, Expedia, Pandora Medi Inc. The Member also invested in a number of well diversified funds'.[112]

Apart that this includes generic statements which were not substantiated nor supported by adequate evidence, these comments by the Service Provider are actually considered misleading and incorrect and rather demonstrate the lack of attention exercised by the Service Provider with respect to the investment portfolio composition and the features of the products which the Complainant's portfolio was predominantly exposed to.

In addition to the various aspects raised above with respect to the adherence with the MFSA requirements on investments and MPM's own Investment Guidelines, it is to be noted that:

i) In light of the specific features of the structured note investments invested into, as described in the preceding sections above, no comfort can truly be taken from MPM's submissions.

The analysis and comments made by the Service Provider superficially mention and focus on the underlyings of the structured notes. The statements made by MPM however completely ignore the particular mechanisms of the structured notes invested into, in particular, the

[112] *A fol.* 221

material implication that an investment into such structured notes was, in reality, resulting just in the exposure to one stock, the worst underlying stock, from the list of underlyings as explained in the preceding sections.

Hence, the claim that *'they were widely diversified'* by reference to *'underlyings quoted on major stock exchanges'*[113] is factually incorrect and misleading and fails to properly consider, and take into account, the features and mechanisms of the structured notes invested into. Indeed, these same features ultimately contributed to the material losses experienced on such products.

ii) It is also not true that the Member was *'invested in a number of well diversified funds',* as misleadingly and incorrectly stated by the Service Provider.

Such submissions and inferences by the Service Provider are however factually incorrect and misleading given that, over the four-year period during which CWM acted as advisors up until September 2017, the only investment into funds, was just a single (relatively minor) investment of GBP6,000 as explained in the section titled *'Underlying Investments'* above.

Hence, the Service Provider's claims relating to the adherence with the investment guidelines, cannot reasonably be accepted and be deemed credible for the ample reasons explained above.

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.

As indicated above in the section titled *'Preliminary Observations'* under *'Permitted Portfolio Composition'*, the OAFS traced Fact Sheets in respect of various structured products which featured in the Complainant's portfolio.

[113] *Ibid.*

The fact sheets in question all 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.

References to '*Professional Investors only*' in the Fact Sheets could have not referred to the type of marketing documentation, and 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 were only aimed for professional investors, which the Complainant was not. The Service Provider presented no fact sheet of structured notes invested into forming part of the Complainant's portfolio, 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 her 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 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 that they reflected her risk profile of *'No to Low to Medium Risk'* indicated in the Application Form accepted by the Service Provider, which profile, in itself, is somewhat ambiguous and contradictory.

Even if one had to consider a risk profile of just *'Medium Risk'*, which was not the case, a *'medium risk'* profile (let alone one having *'low'* or even *'no risk'*) cannot even be construed as some sort of justification for the creation of a pension investment portfolio, where the risks taken, individually and within the whole portfolio, were to such an extent as to put into prejudice the achievement of the scope for which the Retirement Scheme was created, as has happened in this case.

This is particularly so in the context of a pension scheme which, by its nature, is not a speculative investment account/vehicle. Moreover, the Arbiter is of the view that not only was the investment portfolio not of 'no risk', 'low risk' or even 'medium risk', but ultimately, the investment portfolio went against and was not reflective of the applicable investment principles and parameters as amply considered in detail in the preceding sections.

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*'[114] and '*properly diversified in such a way as to avoid accumulations of risk in the portfolio as a whole*'.[115]

Apart from the fact that the Arbiter does not have comfort that the portfolio was reflective of the conditions and investment limits outlined in the MFSA's Rules and MPM's own Investment Guidelines, **it is also being pointed out that, over and above, the duty to observe specific maximum limits relating to diversification as may have been specified by rules, directives or guidelines applicable at the time, the behaviour and judgement of the Retirement Scheme Administrator and Trustee of the Scheme is expected to, and should have gone beyond compliance with maximum percentages and was to, in practice, reflect the spirit and principles behind the regulatory framework and in practice promote the scope for which the Scheme was established.**

[114] SOC2.7.2(a) of Part B.2.7 of the Directives.
[115] SOC2.7.2(b) of Part B.2.7 of the Directives.

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

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. [116]

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

It is also evidently clear that such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced. The actions and inactions that occurred, as explained in this decision, enabled such losses to result within the Scheme, leading to the Scheme's failure to achieve its key objective.

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

[116] For example, in the reference to litigation filed against Leonteq - *A fol.* 153.

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

Final remarks

As indicated earlier, the role of a retirement scheme administrator and trustee does not end, or is just strictly and solely limited, to the compliance of the specified rules. The wider aspects of its key role and responsibilities as a trustee and scheme administrator must also be kept into context.

Whilst the Retirement Scheme Administrator was not responsible to provide investment advice to the Complainant, the Retirement Scheme Administrator had clear duties to check and ensure that the portfolio composition recommended by the investment advisor 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 her pension.

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

For the reasons amply explained, it is accordingly considered that there was, at the very least, a clear lack of diligence by the Service Provider in the general administration of the Scheme in respect of the Complainant and in carrying out its duties as Trustee, particularly, when it came to the oversight functions with respect to the Scheme and portfolio structure and the acceptance of the advisor. 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*'[117] of the Complainant who had placed her 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.

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

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 advisor to the Member of the Scheme.

Hence, having carefully considered the case in question, the Arbiter considers that the Service Provider is to be only partially held responsible for the losses incurred.

Compensation

Being mindful of the key role of Momentum Pensions Malta Limited as Trustee and Retirement Scheme Administrator of the Momentum Malta Retirement Trust and in view of the deficiencies identified in the obligations emanating from such roles as amply explained above, which deficiencies are considered to have prevented the losses from being minimised and in a way contributed in part to the losses experienced on the Retirement Scheme, the Arbiter concludes that the Complainant should be compensated by Momentum Pensions Malta Limited for part of the realised losses on her 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 her 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 and there were still open investment positions within the portfolio constituted by CWM.

The Arbiter shall accordingly formulate how compensation is to be calculated by the Service Provider for the Complainant for the purpose of this decision.

Given that the Complaint made by the Complainant principally relates to the losses suffered on the Scheme at the time of Continental Wealth

Management acting as advisor, compensation shall be provided solely on the investment portfolio constituted under Continental Wealth Management.

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 within the said portfolio which, at the date of this decision, no longer forms part of the Member's investment portfolio (given that such investment has matured, been terminated or redeemed and duly settled), it shall be calculated any realised loss or profit resulting from the difference in the purchase value and the sale/maturity value (amount realised). 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), such realised profit shall be accumulated from all such investments and netted off against the total of all the realised losses from the respective investments calculated as per (i) above to reach the figure of the Net Realised Loss within the indicated portfolio.

The computation of the Net Realised Loss shall accordingly take into consideration any realised gains or realised losses arising within the portfolio, as at the date of this decision.

(iii) Investments which were constituted under Continental Wealth Management and are still held 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.

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

Dr Reno Borg
Arbiter for Financial Services