MALTA

# COURT OF APPEAL
**(Inferior Jurisdiction)**

## HON. JUDGE
## LAWRENCE MINTOFF

Sitting of the 15th September, 2021

Inferior Appeal Number 38/2020 LM

**Henman Matthew (Holder of ID/Passport No. 463222945)**
**and Henman Sally (Holder of ID/Passport No. 504182272)**
*('appellants')*

***vs*.**

**Momentum Pensions Malta Limited (C 52627)**
*('appellee')*

**The Court,**

**<u>Preliminary</u>**

1. The present appeal was filed by applicants **Matthew** and **Sally spouses Henman (Pass. Numbers 463222945 and 504182272 respectively)** [hereinafter 'appellants'] from the decision delivered on the 28th July, 2020, [hereinafter 'the appealed decision'] by the Arbiter for Financial Services [hereinafter

"Arbiter"], Case No. 033/2018, whereby the said Arbiter dismissed their complaint brought before him against the company **Momentum Pensions Malta Limited (C 52627)** [hereinafter 'appellee company'].

## Facts

2. The facts of the case are as follows. Appellant Matthew Henman and appellant Sally Henman applied respectively on the 31th May, 2014[1] and 4th September, 2014[2] for membership with the *Momentum Malta Retirement Trust* [henceforth 'the Scheme'], a personal retirement scheme set up as a trust licensed by the Malta Financial Services Authority with appellee company as its trustee. Appellants presented their application following the advice of Continental Wealth Management [hereinafter 'CWM'] as to the choice of investments, but after a while the said investments suffered substantial losses.[3]

## Mertu

3. Appellants instituted the present proceedings by filing a complaint before the Arbiter on the 23rd February, 2018, where they declared that they were seeking compensation from appellee company to bring the value of the balance of their investment to the original amount invested.

[1] Copy *a fol.* 279 in the acts held by the Arbiter.
[2] Copy *a fol.* 247.
[3] *Vide fol.* 473 and 474.

4. Appellee company filed its reply on the 16th March, 2018. Prior to making its submissions on the merits of the complaint presented by appellants, it raised the issue that the proper respondent was Continental Wealth Management, a company registered in Spain, and that the said appellee company was not licensed to provide investment advice nor did it provide investment advice to appellants. As to the merits, it submitted that it had not committed fraud and it had not acted negligently and the losses suffered by appellants were wholly attributable to their adviser appointed by themselves.

## The Appealed Decision

5. The following are the Arbiter's considerations on which his decision was founded:

> ***"Considers:***
>
> ***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.*** *(fn. 2 Cap. 555, Art. 19(3)(b))*
>
> ***The Complainants***
>
> *The Complainants respectively born on 4 January 1966 and 29 October 1968 are both of British nationality and were resident in Portugal at the time of the Application Form for Membership.*
>
> *Mr GF's occupation was indicated as 'Financial Adviser' in the Application Form for Membership into the Retirement Scheme dated May 2014 ('the Application Form for Membership') which application bore his signature.*

*Mrs GF's occupation was indicated as 'Housewife' in the Application Form for Membership into the Retirement Scheme dated September 2014 ('the Application Form for Membership') which application bore her signature.*

*The Complainants were accepted by MPM as members of the Retirement Scheme on 17 June 2014 and 21 October 2014 respectively.*

***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 (fn. 3 https://www.mfsa.mt/financial-services-register/result/?id=3453) and acts as the Retirement Scheme Administrator and Trustee of the Scheme. (fn. 4 Role of the Trustee, pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit).*

***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. (fn. 5* 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/)*

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

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

*As confirmed by the Service Provider, registration under the RPA was granted to the Retirement Scheme and the Service Provider on 1 January 2016 and hence the framework under the RPA became applicable as from such date (fn. 6 As per pg. 1 of*

*the affidavit of Stewart Davies and the Cover Page of MPM's Registration Certificate issued by MFSA dated 1 January 2016 attached to his affidavit).*

*The Trusts and Trustees Act (Chapter 331 of the Laws of Malta), ('TTA') is also relevant and applicable to the Service Provider, as per Article 1(2) and Article 43(6)(c) of the TTA, given MPM's role as the Retirement Scheme Administrator and Trustee of the Retirement Scheme.*

***Particularities of the Case***

***The Product 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 (fn. 7 https://www.mfsa.com.mt/financial-services-register/result/?id=3454) as a Retirement Scheme under the Special Funds (Regulation) Act in April 2011 (fn. 8 Registration Certificate dated 28 April 2011 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit)) and under the Retirement Pensions Act in January 2016. (fn. 9 Registration Certificate dated 1 Jan 2016 issued by MFSA to the Scheme (attached to Stewart Davies's affidavit)).*

*As detailed in the Scheme Particulars dated May 2018 presented by MPM during the proceedings of this case, the Scheme* 'was established as a perpetual trust by trust deed under the terms of the Trusts and Trustees Act (Cap.331) on the 23 March 2011' *(fn. 10 Important Information section, Pg. 2 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit)) and is* 'an approved Personal Retirement Scheme under the Retirement Pensions Act 2011'. *(fn. 11 Regulatory Status, Pg. 4 of MPM's Scheme Particulars (attached to Stewart Davies's affidavit))*

*The Scheme Particulars specify that:*

'The purpose of the Scheme is to provide retirement benefits in the form of a pension income or other benefits that are payable to persons who are resident both within and outside Malta. These benefits are payable after or upon retirement, permanent invalidity or death'. *(fn. 12 Ibid.)*

*The case in question involves a member-directed personal retirement scheme where the Members were respectively allowed to appoint an investment adviser to respectively advise them on the choice of investments.*

*The assets held in the Complainants respective account with the Retirement Scheme were used to respectively acquire the European Executive Investment Bond, this being a life assurance policy issued by Skandia International. (fn. 13 Skandia International*

*eventually rebranded to Old Mutual International - https://www.oldmutualwealth.co.uk/Media-Centre/2014-press-releases/december-20141/skandiainternational-rebrands-to-old-mutual-international/)*

*The total premium paid into the respective Executive Investment Bond, was in turn invested in investment instruments such as those indicated in the table of investments forming part of the 'Investor Profile' presented for each Complainant by the Service Provider during the proceedings of the case. (fn. 14* The '*Investor Profile' in respect of the Complainants is attached to the Additional Submissions document presented by the Service Provider)*

***Investment Adviser***

*Continental Wealth Management ('CWM') was the investment adviser appointed by the Complainants. The role of CWM was to advise the respective Member regarding the assets held within the Retirement Scheme.*

***Underlying Investments***

*The Service Provider indicated that the underlying policy, the European Executive Investment Bond issued by Skandia International, and held within the Retirement Scheme commenced in July 2014 in respect of Mr GF and in March 2015 in respect of Mrs FF. The respective policies had a total premium for investment (after fees/charges) of GBP172,777 in respect of Mr GF and GBP26,636 in respect of Mrs FF. (fn. 15 Ibid.)*

*The investments undertaken within the said policy were summarised in the table of investment transactions as provided by the Service Provider. (fn. 16 Ibid.)*

*The said table indicates that the respective portfolio of investments in respect of the Complainants comprised substantial investments into structured notes. (fn. 17 Ibid.)*

*The Service Provider indicated a loss (excluding fees) of GBP101,123 on the Retirement Scheme of Mr GF and a loss (excluding fees) of GBP9,940 on the Scheme of Mrs FF as at 26 January 2018. (fn. 18 Ibid.)*

***Final Observations and Conclusions***

*There is a particular key aspect which distinguishes this Complaint from the other complaints filed with the Office of the Arbiter for Financial Services ('OAFS') with regards to the Scheme. This particular aspect, which the Arbiter considers has a material bearing on this Complaint, relates to one of the Complainants, Mr GF, having worked for CWM, the indicated investment adviser.*

*Further to MPM's claim, in its reply to the OAFS, that Mr GF's occupation was as a financial adviser and that* he 'was in fact a financial adviser, working for CWM', *the Complainant made certain clarifications on this point in his additional submissions filed in June 2019.*

*The Complainant noted inter alia that he wanted to* 'make it clear that I worked for CWM in the capacity of selling QROPS to people following training provided by Head Office'.

*The Complainant also stated inter alia that he had* 'worked in pensions for Guardian Royal Exchange and Aegon and had good background knowledge of UK pensions for Final Salary and Money Purchase but had not previously heard of QROPS'.

*The Complainant further claimed that he had* 'no investment experience other than holding investments in blue chip shares from a trust fund' *and that he* 'was not involved in the investments in CWM', *where he also alleged that* 'although I asked about being given training on this as I felt it would assist in the selling of the product, this never occurred'.

*As to his duties with CWM, the Complainant explained that* 'Generally, I provided phone numbers of expats to head office, who in turn would cold call and give general details of the product. I would then visit to explain in more detail but mostly, the closing of the business was carried out by Dawn Kirby or Anthony Bishop from head office'.

*On its part, in its additional submissions, the Service Provider submitted that Mr GF was attempting to downplay his involvement in CWM as it was claimed that Mr GF was a* 'Senior Partner at CWM at least until 2017'.

*As evidence, the Service Provider provided an email communication sent by Mr GF dated 19 June 2017 in such capacity. Furthermore, the Service Provider also attached an Application For Membership in respect of the Retirement Scheme which was signed in June 2017 where, in the section titled* 'Financial Adviser Details' *of the said form, Mr GF was mentioned as the Adviser of CWM and where the '*Financial Adviser Declaration' *section in the same form was completed and signed by Mr GF himself.*

*Having considered the particular circumstances in hand and the explanations provided by both parties with respect to the role and involvement of Mr GF with CWM, the Arbiter attributes more weight to what has been stated by the Service Provider on this specific point.*

*On the basis that, ultimately, Mr GF:*

- *was a 'Financial Adviser' as indicated in his own Application Form for Membership of the Scheme dated May 2014;*
- *occupied a role with CWM where such role transpired to be a senior position;*
- *was involved in the selling of pension products with CWM as confirmed by Mr GF himself;*
- *was signing in the capacity of Financial Adviser of CWM as transpired in the form dated June 2017 submitted by MPM.*

*Through his background and actual involvement with CWM itself, Mr GF was, or should have been, in a position to be aware of and understand the implications of the investments made within his and his wife's portfolio.*

*Considering Mr GF's occupation as 'Financial Adviser' and his employment with CWM, it is unclear how the Complainants can claim in their Complaint that investments were placed without their knowledge or that the risk profile of one of the Complainant was changed without consent, or now challenge the suitability of the investments made claiming in the process that:*

'I am not an investment expert so most of this goes over my head in terms of what we were invested into, but the massive losses on just a few of these investments shows they must have been high risk', *as claimed in the Complaint Form.*

*It is considered that there are no sufficient and justifiable grounds on which the Arbiter can uphold Mr GF's and his wife's Complaint.*

***For the above-stated reasons, the Arbiter cannot uphold the complaint.***

***Because of the novelty of this case each party is to bear its own costs."***

## The Appeal

6. Appellants appealed from this decision on the 17th August, 2020 and they are requesting this Court to:

*"1. Cancel and Revoke the decision of the Office of the Arbiter for Financial Services of the 28.07.2020 in the names Matthew Henman and Sally Henman vs Momentum Pensions Malta Limited (033/2018) on the basis of the First and/or the Second ground of appeal; and consequently*

2. *Uphold and grant the complaint of the appellants filed with the Office declare that Momentum Pensions Malta Limited;*
3. *Liquidate the amount of compensation due to the appellants on the basis of the Second demand;*
4. *Order Momentum Pensions Malta Limited to pay the appellants the compensation liquidated in accordance with the third demand together with legal interest and all legal and judicial costs to Respondents charge."*

Appellants declare that the following are their grounds of appeal: (a) the Arbiter committed an error of fact when deciding that appellant Matthew Henman was not an ordinary investor; and (b) the Arbiter misapplied the law or applied the incorrect law to the merits of the case.

**The Reply**

7. Appellee company replied on the 14 ta' September, 2020 whereby it is requesting this Court to revoke the appeal filed by appellants, whilst confirming the appealed decision, with costs of the first instance proceedings and those of the current appeal against said appellants.

**Considerations**

8. The Court will now consider appellants' grievances in the light of the Arbiter's findings, whilst also considering the submissions made by appellee company.

9. Appellants contend that reference to appellant Matthew Henman as 'Senior Partner' in an email sent by him during his time at CWM, was only a reference to his title as employee of the said company as a sales employee. Whilst referring to his work agreement which he submitted before this Court, he quotes a clause of that agreement and contends that the limitations of his position as 'Partner' are thereby made abundantly clear. Appellants contend that it had not been disproved or contested by appellee company that appellant's field was QROPS and not investments and that there was no correlation between the two. They declare that they had appointed Dawn Kirby as their financial advisor in the same manner and to the same extent as the other investors had done and that she had identical duties and responsibilites towards appellants. Appellants argue that one cannot establish facts on the mere balance of probabilities, and the Arbiter had reached his conclusion on scanty and insufficient evidence. In any case, appellants continue to argue, if appellant Matthew Henman was in some way an expert, his wife certainly was not. They declare that their second grievance with regards to the appealed decision is that the Arbiter misapplied the law or applied the incorrect law with respect to the merits. Appellants agree that the investment relationship, as correctly pointed out by appellee company in its reply to their complaint, was one between them and CWM and not with said appellee company. However they also insist that this does not imply that there is no juridical relationship between appellants and appellee company, and explain that the present action was for breach of fiduciary obligations which the appellee company owed to their members including appellants. To sustain their argument, appellants refer to the decision delivered by the Arbiter on the 28th July, 2020 in the names **NE**

**& Others *vs*. Momentum Pensions Malta Limited** ASF 028/2018. Appellants conclude that if appellee company was found to have defaulted from its fiduciary obligations towards its members indiscriminately, then it cannot also be held that appellee company at the same time respected those obligations towards those members because one of them was *dato ma non concesso* an experienced investor.

10. On its part appellee company maintains that if appellant Matthew Henman did not occupy the said postion with CWM, this would not change the Arbiter's other considerations. It contends that after all the facts upon which the Arbiter based such considerations were not being contested by appellants, and they had not brought forward any pleas as regards such considerations. It concludes its arguments against appellants' first grievance by referring to para. 14 of the appeal application, which refers to Dawn Kirby, and strongly declares that it is not after all the proper respondent. With regard to the second grievance, appellee company submits that the appellants do not explain which law was wrongly applied or which was the incorrect law they were referring to. It contends that whilst the appellants are insisting that their complaint was based on the alleged breach of fiduciary obligations, this is not mentioned in the said complaint and therefore appellants are precluded from presenting a fresh complaint before this Court.

11. The Court acknowledges that the Arbiter from the outset recognised a substantial difference in the present proceedings from those instituted by other complainants with regards to the Scheme, and this was the position held by appellant Matthew Henman with CWM, which was the investment adviser. The

Arbiter considered the fact as having a material bearing upon appellants' complaint. He noted that in his additional submissions filed in June 2019, the said appellant had made a number of clarifications on the issue wherein he stated that he wanted to *"make it clear that I worked for CWM in the capacity of selling QROPS to people following training provided by Head Office".* The Arbiter also quoted appellant saying that he had *"worked in pensions for Guardian Royal Exchange and Aegon and had good background knowledge of UK pensions for final Salary and Money Purchase but had not previously heard of QROPS'.* The Arbiter also noted that appellant had declared that he had *"no investment experience other than holding investments in blue chip shares from a trust fund",* and that he *"was not involved in the investments in CWM",* and that *"although I asked about being given training on this as I felt it would assist in the selling of the product, this never occurred".* The Arbiter also referred to the description of duties offered by appellant in his position with CWM. The Arbiter then noted that the appellee company had submitted that appellant Matthew Henman was attempting to mitigate his involvement in CWM, and it had raised the issue that he was actually a *"Senior Partner at CWM at least until 2017".* The Arbiter noted that to prove this, the appellee company presented an email communication[4] sent by appellant and dated 19th June, 2017 in his such capacity, and it also attached an Application For Membership with the Retirement Scheme[5] signed in June 2017 where said appellant was referred to as the adviser of CWM, and where the *'Financial Adviser Declaration'* completed and signed by appellant himself. Having considered the facts before him and

[4] Copy *a fol.* 466.
[5] Copy a *fol.* 467.

the submissions made by either party as to the role and involvement of appellant with CWM, the Arbiter decided to attach greater weight to what appellee company had stated, and concluded that considering his background and actual involvement within CWM, appellant was or should have been in a position to know and understand the consequences of the investments in both his and his wife's portfolio. The Arbiter was sceptical as to whether appellants could claim that investments were made without their knowledge, and that the risk profile of one of them was changed without consent or even further challenge the suitability of those investments. The Arbiter therefore considered that there were no sufficient and justifiable grounds on which he could uphold their complaint.

12. This Court does not find any fault with the appealed decision and hereby makes the Arbiter's considerations its very own. As to appellants' argument that the Arbiter should not have applied the same criteria to appellant Sally Henman if it were somehow true that appellant Matthew Henman was some expert, this Court cannot but disagree. It notes that most documents exhibited by appellants carry both their names and signatures on each respective document. The Court can only but consider that they were together throughout most and probably all of the transactions necessary for the investment of their money, and it cannot but note that even where they were not joint signatories, appellants were signing separate documents within a short period of time from each other. The Court has much doubt that they separately considered those transactions, and that appellant Sally Henman did not rely on the experience and knowledge of her husband appellant Matthew Henman. Their joint

complaint only strengthens this Court's view. After all, it cannot but also note that they did not bring any evidence forward to refute this probability.

13. As to the appellants second grievance, the Court deems it fit that prior to any other consideration, it should examine appellants complaint as brought forward before the Arbiter. Whilst in the application before this Court they contend that their action was based on the alleged breach of fiduciary obligations which appellee company had towards appellants, their complaint confirms otherwise. Appellants were very clear in their submissions when they accused appellee company of failing to consider whether the types of investments that were being placed were suitable for them. The Court considers that appellants complaint therefore concerns the actual time sale of the investments, at which time the only relationship that was being established was between said appellants and CWM, which it transpires was their professional adviser acting through Dawn Kirby, and instructing appellee company on their behalf.[6] In their complaint, appellants themselves acknowledge that they were misdirected by Dawn Kirby. It is therefore evident that appellants' arguments are not correct.

14. They also contend that the Arbiter misapplied the law or applied the incorrect law with respect to the merits. However they do not follow this allegation further, and in the absence of any clarification the Court cannot consider this grievance.

[6] Vide letter 21.10.14 to appellant Sally Henman from appellee company.

15. For the above reasons, the Court does not find that the grounds of appeal brought forward by appellants are justified, and hereby rejects their grievances.

**Decide**

**For the above reasons, the Court disallows the appeal filed by appellants, and whilst confirming the appealed decision in its entirety, it also rejects their complaint as presented to the Arbiter.**

**The costs of the proceedings before the Arbiter shall be settled as decided by the said Arbiter, whilst the costs related to the present proceedings shall be settled entirely by appellants.**

Moqrija.

**Onor. Dr Lawrence Mintoff LL.D.**
**Imħallef**

**Rosemarie Calleja**
**Deputat Reġistratur**