Before the Arbiter for Financial Services

Case ASF 149/2022

ZJ ('the Complainant')

vs

Momentum Pensions Malta Limited

(C 52627) ('MPM' or 'Service Provider')

Sitting of the 17 November 2023

The Arbiter,

The Complaint

Having seen the Complaint[1] presented by the Complainant on 19 December 2022, whereby he claims that following the transfer of his pension to MPM on the advice of Continental Wealth Management ('CWM') between November 2013[2] and March 2014[3], he suffered extensive losses on the value of his pension.

He blames his loss on MPM for failing to perform their duties towards him as Trustees and Retirement Scheme Administrators of the Momentum Malta Retirement Trust ('the Retirement Scheme') and expects them to make good for his losses which he quantified at GBP 25,000, being approximately the difference between his original investment of GBP 34,317.84 and the value at the time of his complaint to the Service Provider at GBP 9,000.[4]

He stated in his complaint to the Service Provider that:

"*Please accept this as my formal complaint against the severe losses that my pension fund has suffered due to your firm accepting business from an unlicensed advisory firm – Continental Wealth Management – using unqualified advisers, and Trafalgar International who are only*

[1] Pages (P.) 1 - 50
[2] P. 232
[3] P. 243
[4] P. 373

licensed for Insurance Mediation. I have only recently become aware of your failings as my Trustee to act in my Best Interests and have a Duty of Care.

All of the investments made within my retail pension portfolio were passed by yourselves, Momentum, into inappropriate high risk structured notes, putting all of my pension fund at a very high and unacceptable risk of being destroyed. As my Trustee, Momentum should have acted in my best interests and disallowed the inappropriate and non diverse investments to have been made.

Given that you have been aware of these issues since early 2015, and have already been ruled against by the Maltese Arbiter's Office and lost your appeals against the Arbiter ruling at the Maltese Appeal Court, therefore lost your cases against numerous Member's whose situation was identical to mine, I await proposals for restoring my pension back to its original value and refunding all fees, commissions, exit penalties and lack of growth.

You have failed in your duties as the Trustee of my pension fund/investment and have failed to follow your own guidelines.

Please note – I do not give you permission to share this letter or its contents with Trafalgar International. Do not ask me for evidence of my claim as you already hold all my Dealing Instructions, etc. DO NOT ask for email conversations to be sent to you, or any other parties, as these are private to me and may be required as evidence later on. You are already in possession of all the relevant documents that you need. You have also already been instructed to pay out compensation for the EXACT same situation and therefore you know the relevant issues.

Kindly acknowledge receipt of this complaint – a copy of which is being sent to your regulator the MFSA and the Maltese Arbiter.

I expect a full written response within 15 days."[5]

Whilst the copy of this complaint to the Service Provider filed with the complaint to the Office of the Arbiter for Financial Service (OAFS) was unsigned and undated,[6] the Arbiter procured evidence from the Service Provider that this complaint letter they received was formally signed and dated 09 February 2022.[7]

Reply of the Service Provider to Complainant

The Service Provider replied to the Complainant on 13 April 2022[8] where in essence, the Service Provider refuted the Complainant's claims that it was responsible for the Complainant's losses as MPM claimed that it had, at all times, fulfilled its obligations with

[5] *Ibid*.
[6] P. 18
[7] P. 372 - 373
[8] P. 255 - 259

respect to the Complainant for the reasons *inter alia*: that MPM did not provide investment advice; that it observed all laws, rules and guidelines, including investment guidelines and terms and conditions; that the Complainant's allegations that his investments were not properly diversified were high-risk and for professional investors and not in line with regulatory requirements were unfounded; and that it cannot be held responsible for statements made and actions of other parties.

They further stated:

"***Your alleged Losses***

We note in the Complaint that you outlined that £34,317.84 was your original transfer value and your current fund value is £9,000 and you are alleging a loss of £25,000. This calculation fails to include any other costs associated with the running of your Scheme, for example, you do not take into account fees paid in relation to policy management and administration fees, custody and dealing charges, etc. It also does not include any withdrawals.

On reviewing our portfolio and analysing each investment you made we believe your actual loss on the investment themselves is much lower than you suggest. Our assessment shows a net realised loss on your actual investments of circa £14,000, and not at the level you allege.

We would like to finally point out that the years of 2017, 2018 and 2019, as a gesture of goodwill only, while we were working together on your issues with CWM, we agreed to reimburse or waive our annual fees that were paid or due from you.

Summary of our findings

In summary, after our investigation, we believe that we undertook, and acted appropriately on, all due diligence that was required of us at the time. We treated you fairly, reasonably and acted in your best interests at all times.

We consider your complaint properly lies with either CWM, as your adviser. The fact that you may not be able to bring a claim directly against this company does not mean you have a claim against us. Whilst we sympathise with your position, it is not correct to extend so significantly our obligations, purely as a means to seek recourse from us."[9]

Service Provider's reply to the OAFS

In its first reply to OAFS about the Complaint,[10] the Service Provider raised preliminary pleas of prescription stating:

"*B. Defence*

[9] P. 258
[10] P. 56 - 61 and attachments

7. *Momentum replies that the complaint is prescribed pursuant to article 21(1)(b) and article 21(1)(c) of Cap. 555 of the Laws of Malta; and also pursuant to article 2156(f) of Cap. 16 of the Laws of Malta*.

8. *Without prejudice, the complaint submitted by the Complainant to Momentum in writing (see fol. 18) differs to that made before the Hon. Arbiter, as shall be proved.*

9. *Momentum is not responsible for the payment of any amount to the Complainant.*

10. *Momentum submits that the complaint should therefore be rejected by the Hon. Arbiter."*[11] [12]

Preliminary

To avoid unnecessary details and arrive at an expeditious decision, as the Arbiter is bound to do by means of Article 19(3)(d)[13] of Chapter 555 of the Laws of Malta ('the Act'), the Arbiter makes reference to his decision of 28 July 2020[14] which grouped together a substantial number of complaints which had very similar features in their complaints against MPM.

For avoidance of repetition, the Arbiter declares that the circumstances of this particular complaint are very similar to the complaints decided upon on 28 July 2020, which decision was eventually confirmed by the Court of Appeal (Inferior Jurisdiction) on 19 January 2022 (Appeal Ref. no. 39/2020 LM).[15]

The basic difference between that group of complaints and this particular Complaint is however that whilst those complaints were filed in the years 2018 and 2019, this Complaint was filed in December 2022.

This is a very important difference as whereas in the decision of 2020, the Arbiter had dismissed preliminary pleas of prescription raised by the Service Provider (which decision to dismiss preliminary pleas of prescription was not contested by the Service Provider in their appeal), in this case, the passage of time might give different evaluation on the same pleas of prescription raised by the Service Provider in their reply.

Given that the Service Provider has raised certain pleas of prescription in its reply, the Arbiter shall proceed to consider these important aspects first.

[11] P. 56 - 57

[12] Same claims of prescription are repeated in same Reply of Service Provider in para. numbered 18, 20 (ii), 20 (iii), 20 (vi), 22.

[13] Article 19(3)(d) of the Act states that the Arbiter shall *"deal with a complaint in a procedurally fair, informal, economical and expeditious manner"*

[14] https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf

[15] https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=130091

Pleas of Prescription

The Arbiter is obliged to deal with the preliminary pleas of prescription before considering the merits of the Complaint.

Article 22(2) of the Act which deals with the procedure relating to complaints, stipulates that:

> ***"Upon receipt of a complaint, the Arbiter shall determine whether the complaint falls within his competence".***

One of the issues which may limit the Arbiter's competence to hear and adjudge a complaint is indeed the matter of prescription. Article 19(3)(e) of the Act states that:

> ***"(3) In carrying out his functions … the Arbiter shall:***
>
> ***…***
>
> ***(e) deal with any question of prescription in terms of law:***
>
> ***Provided that the financial services provider may only raise the plea of prescription in the first written submissions provided for by article 22(3)(c) unless otherwise authorised by the Arbiter giving reasons for that authorisation:***
>
> ***Provided further that the Arbiter shall not be entitled to raise the question of prescription of his own motion:***
>
> ***Provided further that nothing in this Act shall be interpreted as entitling the Arbiter to give a decision on any claim which is barred by prescription when the investigated party shall have raised the defence of prescription".***

The Arbiter notes that in the first written submissions of 09 January 2023[16] to the complaint filed by the Complainant with the OAFS, the Service Provider raised the plea of prescription as aforesaid.

The Arbiter is therefore obliged by legislation to consider whether his competence is restricted by the pleas of prescription raised by the Service Provider as above explained, before dealing with the merits of the case.

With respect to the first plea raised in terms of Article 21(1)(b) of the Act, the Arbiter has already decreed[17] his competence and dismissed the claim of the Service Provider that the complaint is time-barred by virtue of this Article.

[16] P. 56 – 61 and attachments
[17] P. 365 decree of 23 October 2023

There is indeed ample evidence that the conduct complained of meets the requirements of Article 21(1)(d) of the Act in that it is considered as continuing in nature and thus continued after 18 April 2016.

This decision is consistent with the Arbiter's decision above referred to of 28 July 2020.

The Arbiter issued a decree on 23 October 2023[18] whereby it was noted that the Complainant had not raised any defence explaining why the preliminary pleas of prescription should be rejected.

It was further noted that the Complainant in his official complaint to the OAFS had quoted the 01 January 2017 as the date when he had first knowledge of the matters being complained of.

Accordingly, the Arbiter requested additional information[19] in order to enable further consideration of the preliminary pleas of prescription related to Articles 21(1)(c) of Chapter 555, and Articles 2156(f) of Chapter 16 of the Laws of Malta:

- "*The Complainant to submit proofs that he raised the complaint with the Service Provider by 01 January 2019. The copy of the complaint letter to the Service Provider attached to the Complaint is unsigned and undated.*[20]

- *The Service provider to submit proofs when they received the official complaint from the Complainant and their official reply thereto."*[21]

The reply to this request received from the Complainant consisted of a three-liner with irreproducible foul language.

The Arbiter has a right under Article 22(4) of Chapter 555 to dismiss this complaint for reason of such inappropriate behaviour by the Complainant but, in the interest of equity and fairness, the Arbiter will not make use of such right.

The Service Provider submitted as follows:

"*Pursuant to a decree of the 23 October 2023, Momentum was directed to submit evidence of when Momentum received the official complaint from the Complainant, and the official reply thereto.*

The complaint was received by Momentum by means of an email of the 9 February 2022. This is attached hereto and marked 'Doc. PL21'. The reply to the complaint was sent by Momentum

[18] *Ibid*.
[19] As authorised by Articles 22(4) and 25(5) of Chapter 555
[20] P. 18
[21] P. 367 - 368

by letter dated 13 April 2022 – a copy was attached to the affidavit of Susan Brooks and marked 'Doc. PL9'.

For the purpose of article 2156(f) and article 2160 of Cap. 16 of the Laws of Malta, Momentum confirmed in paragraph 27 of its reply that it is not a debtor. This was also confirmed by the solemn declaration of Susan Brooks, who confirmed all statements in the reply filed by Momentum (paragraph 2 of the solemn declaration)".[22]

Consideration of residual pleas for prescription

To come to a decision on the other pleas of prescription raised by the Service Provider which have not been already dismissed, the Arbiter needs to consider which is the date that the Complainant actually registered his complaint with the Service Provider, as well as on which date the Complainant had first knowledge of the conduct being complained of.

Article 21(1)(c) of Chapter 555 of the Laws of Malta states:

> *"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 service provider not later than two years from the day on which the complainant first had knowledge of the matters complained of."*

Article 2156(f) of Chapter 16 of the Laws of Malta states:

> *"The following actions are barred by the lapse of five years:*
>
> *…*
>
> *(f) actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;"*

The Complainant registered in writing his first complaint with the Service Provider on 09 February 2022.[23] In this complaint, he quantified his losses at that date at £25,000.

This means that for the complaint not to be time-barred by virtue of article 21(1)(c), the Complainant needs to prove that he did not have first knowledge of the matter complained of before 09 February 2020.

In his official complaint to the OAFS, the Complainant has stated such date of his first knowledge as 01 January 2017 which, if accepted, would mean that the Complainant had first

[22] P. 371
[23] P. 372 - 373

knowledge more than five years before he filed his official complaint with the Service Provider and nearly six years before he filed his complaint with OAFS.

The Arbiter through his decree of 23 October 2023, gave opportunity to the Complainant to reconsider the date when he claims he had first knowledge but, as explained above, the Complainant failed to do so.

In addition, the Arbiter finds that the declared date of first knowledge of 01 January 2017 is quite probable given the following statement made by the Complaint in his complaint to the OAFS:

"*In May 2016, one of the victims made a complaint to CWM that her fund was drastically losing value and that the high charges were eroding what was left of her fund after repeated heavy trading losses. She was no longer prepared to accept the excuse of 'only paper losses' and had discovered that CWM was not licensed to provide either insurance or investment advice. She had also become exasperated that neither the QROPS provider nor the life office had picked up on the inexorable destruction of her fund and that if she herself did nothing, her fund would eventually be extinguished entirely.*

CWM accepted liability and in 2017 a compensation agreement was drawn up between CWM, Trafalgar International and Momentum Trustees to repay her the losses she had suffered and restore her fund to its original value. CWM admitted that a large number of clients had, indeed, suffered terrible losses already. However, they assured this client that they had already paid out at least £1 million in compensation.

This complainant did, indeed, receive most of her money back. However, by the summer of 2017 the state of CWM's client book was becoming untenable, and Momentum Trustees withdrew terms of business. CWM collapsed on 27th September 2017 and most of its advisors fled, leaving hundreds of distraught victims – including me.

At this point, I was informed that Trafalgar would be my financial advisor and now my pension pot was around 12000gbp still incurring annual charges of 500gbp but still no sign of the pot growing plus now too small to move as the charges involved would decimate what little was left. You are my last chance to try to recoup some of my investment and try to get my life and my family's at least a little bit better for the future. My wife can't work as she's battling cancer so it is very difficult and we're almost at breaking point."[24]

It is evident that the losses complained of were already known to the Complainant well before two years from filing of his complaint with the Service Provider.

[24] P. 10 - 11

Furthermore, it is noted that more than half of the loss claimed was already realised on 23 June 2016.[25]

By email sent to Service Provider on 01 February 2018,[26] Complainant demonstrates clear knowledge of failure of MPM contributing to his losses when stating:

> *"I reiterate that as the ceo of the company looking after my trust fund I again ask you for the information I requested earlier today, you are the one in charge of this not Trafalgar. Don't play games and at least be honest about the situation."*

As to the date when the Complainant first had knowledge of the conduct complained of, which is declared by the Complainant himself in the official complaint with the OAFS as 01 January 2017, the Arbiter is satisfied that the indicated date, or some other date between this date and February 2018, is indeed the applicable one when taking into consideration the particular circumstances of this case.

The fact that the loss seems to have continued to grow from about GBP 22,000 at the time of the declared first knowledge[27] to GBP 25,000 at the time of submission of the complaint to the Service Provider in 2022, does not change or move the benchmarks for establishing the date on which the Complainant first had knowledge of the matters complained of. Indeed, the conduct complained of was, in essence, the same in 2017 as that in 2022.

The Complainant was very scant with challenging the defence put up by the Service Provider during the two hearings held on 06 March 2023 and 27 March 2023. He made no attempt to challenge either the pleas of prescription raised by the Service Provider or their defence on the merits of the case.

He seemed to be relying completely on the fact that the afore referred to Arbiter's decision of 28 July 2020[28], which grouped together a substantial number of complaints which had very similar features in their complaints against MPM, would automatically apply to his case. This notwithstanding that the Complainant did not even attempt to argue that he had fresh knowledge of the matters complained of once he became aware of the 2020 decision of the Arbiter and the Court of Appeal decision of 2022 referred to above.

The Complainant based his expectation for a successful claim purely on the argument that the Arbiter had "*already ruled against and (you) lost your appeals against the Arbiter ruling at the Maltese Appeal Court, therefore lost your cases against numerous Member's whose situation was identical to mine*."[29]

[25] P. 323 sale of RBC Homebuilder Income Note SN resulting in net capital loss of GBP 13,549
[26] P. 265
[27] P. 11 original investment 34k less declared value 12k in 2017
[28] https://financialarbiter.org.mt/sites/default/files/oafs-decisions/ASF%20028-2018%20et.pdf
[29] P. 373

The Arbiter and the Court of Appeal decision referred to did not add fresh knowledge to the matters complained of, this being the extensive losses suffered, but decided that the conduct of the Service Provider was indeed a contributing factor to the losses incurred by the **complainants who had made and brought their case in a timely manner.**

Whilst understanding and sympathising with the Complainant's situation, the Arbiter points out that the law permits him to have competence to hear only those complaints pursued within the time allowed and prescribed by law, as outlined in terms of Articles 21 and 19(3)(e) of the Act explained above.

The Arbiter makes reference to various previous decisions where the plea of prescription, as similarly applicable to the case of the Complainant, was indeed upheld as it was justified in terms of law.[30]

Consequently, the Arbiter hereby upholds the plea of prescription claimed by the Service Provider under Article 21(1)(c) as he considers that the complaint registered in writing with the Service Provider was filed more than two years after the Complainant first had knowledge of the matters complained of – which could be 01 January 2017 as claimed by the Complainant himself, or possibly extended to September 2017[31] when he acknowledged the bulk of his claimed losses or possibly to 01 February 2018[32] when he directly held MPM responsible.

All these dates are well before two years from the date of the complaint registered with the Service Provider on 09 February 2022.

Decision

For reasons explained, the Arbiter upholds the plea of prescription raised by the Service Provider in their first submissions on the basis of Article 21(1)(c) of Chapter 555 of the Laws of Malta and accordingly dismisses this Complaint.

In view of the above, the Arbiter is not considering further the preliminary plea of prescription based on Article 2156(f) of Chapter 16 of the Laws of Malta and will not be deciding on the merits of the case. This is without prejudice to any right the Complainant may have to seek justice before another court or tribunal competent to hear his case.

As the case is being decided on a preliminary plea each party is to bear its own costs of these proceedings.

[30] Examples: Case ASF 010/2023; Case ASF 040/2022; Case ASF 065/2022; Case ASF 110/2021 and Case ASF 091/2021 – https://www.financialarbiter.org.mt/oafs/decisions?page=1
[31] P. 11
[32] P. 265

Recommendation

The Arbiter however wishes to recommend, (in a non-binding manner and without prejudice and obligation), that the Service Provider considers, on its own will, to act and give an appropriate redress in those cases[33] whose complaints cannot be heard by the Arbiter for reason of prescription, but which have similar features to those cases previously decided by the Arbiter and confirmed by the Court of Appeal.

It is commendable to note the trend in other countries, such as in the UK, where once an Arbiter/Ombudsman decides various cases in favour of consumers which involve a recurring or systemic issue, then the industry is encouraged to take measures for appropriate redress even in the absence of a direct complaint from a consumer who has suffered detriment or was disadvantaged from such issues.[34]

Alfred Mifsud
Arbiter for Financial Services

[33] Such as the one of the Complainant

[34] The UK Financial Conduct Authority (FCA) Complaints Handling Rules DISP 1.3.6 requires the firm to consider whether, following the identification of such recurring or systemic problems, *"it ought to act with regard to the position of customers who may have suffered detriment from, or been potentially disadvantaged by, such problems but who have not complained and, if so, take appropriate and proportionate measures to ensure that those customers are given appropriate redress or a proper opportunity to obtain it."* - https://www.handbook.fca.org.uk/handbook/DISP/1/3.html