Before the Arbiter for Financial Services

Case ASF 010/2023

HJ ('the Complainant')

vs

Momentum Pensions Malta Limited

(C 52627)

('MPM' or 'Service Provider')

Sitting of 3 November 2023

The Arbiter,

The Complaint

Having seen the Complaint[1] presented by the Complainant on 24 January 2023 whereby he claims that following the transfer of his pension (Local Government Pensions) to MPM on the advice of Continental Wealth Management ('CWM') on 13 March 2014, 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 £95,188.18.[2]

[1] Pages (P.) 1 - 113
[2] P. 4

Having considered, in its entirety, the Service Provider's reply, including attachments,[3]

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 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 by other parties that his losses were just paper losses.

In its defence, the Service Provider further submitted that the Complaint is prescribed pursuant to Article 21(1)(b) and Article 21(1)(c) of the Act and also pursuant to Article 2156(f) of Cap. 16 of the Laws of Malta.

In addition, it also claimed that the formal complaint submitted by the Complainant to MPM on 24 January 2022 differs from that made before the Arbiter.

The Service Provider furthermore noted that the Complainant had joined a class action against a number of life companies which has been initiated before the court of the Isle of Man and has therefore initiated a claim for compensation for the same losses before a different forum. MPM accordingly submitted that the Complainant cannot be compensated twice for the same loss.

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)[4] of Chapter 555 of the Laws of Malta ('the Act'), the Arbiter makes reference to his decision of 28 July 2020[5] which grouped together a substantial number of complaints which had very similar features in their complaints against MPM.

[3] P. 119 - 122 & 123 - 165

[4] 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"*

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

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).[6]

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 2023.

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.

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:***

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

> ***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 defense of prescription".***

The Arbiter notes that in the first written submissions of 14 February 2023[7] to the Complaint filed by the Complainant with the Office of the Arbiter for Financial Services ('OAFS'), the Service Provider raised the plea of prescription in paragraph 8 of their reply stating:

> *"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."*

This preliminary plea related to prescription is repeated in paragraph 21 of their reply but only as related to Article 21(1)(b). The preliminary pleas are also reiterated by the Service Provider in its final submissions.[8]

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 hereby decrees that his competence in the case in question is <u>not prescribed</u> by this article which limits his competence if the conduct complained of happened before the entry into force of the Act on 18 April 2016, and the complaint is not filed with the OAFS within two years from such date.

The Retirement Scheme and various disputed investments were still in operation after the date of the coming into force of the Act.

[7] P. 119 – 122 and attachments
[8] P. 375 – 383 paragraphs 1, 2, 3, 7, 8

Given that the Complaint involves the conduct of the Service Provider during its tenure as trustee and administrator of the Scheme, which conduct goes beyond the period when the Act came into force, the Arbiter considers that Article 21(1)(b) is not applicable to the case in question.

In particular, the Arbiter refers to the fact that the Service Provider only terminated their relationship with CWM in 2017 and this triggered a sort of first complaint by the Complainant to the Service Provider on 28 November 2017 in evidence that the conduct complained of continued well after the coming into force of the Act on 18 April 2016.

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.

Other pleas for prescription

To come to a decision on the other pleas of prescription raised by the Service Provider, 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 on the Service Provider on 28 November 2017.[9] In this complaint, he already quantified his losses at that date at £85,690.11. It is claimed by the Service Provider that the Complainant eventually withdrew this complaint as consequently they never issued a formal reply to it.

It is noted that James Lephew, Senior Compliance Associate of the Service Provider, replied on 19 December 2017, acknowledging the complaint of 28 November 2017 and promising a review of the complaint and a reply within 4 weeks.[10]

In an email exchange of 20 December 2017[11] with Lephew, the Complainant says that:

> *"At this present moment I am not in a position to proceed with the official complaint as I am dealing with a personal family matter.*
>
> *However, on 11th November 2017 I requested the following from Momentum … to cancel all advisor and annual fees with immediate effect.*
>
> *… I would however, like to proceed with this request, as I have not yet received a reply."*

On 11 January 2018, the Complainant sent another email[12] to MPM complaining about the loss which he now quantified at £83,793.50. Here, the Complainant reiterated that:

> *"As my Trustee I hold Momentum responsible for allowing these losses to initially happen and then allow them to continue for almost 4 years".*[13]

Then, a strange turn of events is marked by an email dated 01 February 2018,[14] addressed to Stewart Davis, Group CEO of MPM, this time signed by HJ and AN.

[9] P. 41
[10] P. 42
[11] *Ibid.*
[12] P. 44
[13] *Ibid.*
[14] P. 45

This complaint belongs exclusively to EN who never filed a complaint with the OAFS before 2023. On the other hand, the Complainant's wife, AN, filed a complaint with the OAFS in 2019 and her case (with reference number 072/2019), was in fact one of the cases included in the 28 July 2020 collective decision referred to earlier above.

The reason why AN filed her complaint with the OAFS whereas the Complainant never did so is not understood. But, by the email above referred to signed by both, they seem to admit the withdrawal of the Complainant's 2017 complaint:

> *"… One of our major concerns has been that we feel (as Trustees) Momentum should have noticed the extent/scale and speed at which these losses occurred and responded swiftly to limit any further financial damage. I am not blaming you personally but stating our views.*
>
> *The complaint that I withdrew was due to the bereavement of a close family member and we are not prepared to go forward with the complaint as we have had enough stress in 2017 and don't need more in 2018. However, I would appreciate the chance for you to review our cases and if there is anything Momentum can do (financially) then we would appreciate it."*

Following this there were several e-mail exchanges which indicated that the Complainant was in correspondence with *Trafalgar International GmBH* ('Trafalgar'), who became Investment Advisers after CWM was kicked out and went out of business in 2017 and, apparently, building expectations that Trafalgar can contribute to resolve their losses, whilst occasionally seeking help from MPM to push Trafalgar in this direction.

There was also a suggestion that the Complainant could join a distress group seeking compensation from Old Mutual International ('OMI'), (the policy issuer where the failed investments were held), and that OMI was in turn suing Leonteq, an issuer of one of the major failed investments which contributed substantially to the accumulated loss.

It is still a matter of question why the Complainant seems to have withdrawn his complaint of 2017, whilst continuing to blame MPM for failing their duty as Trustees and RSA of his Scheme to protect him from such losses, whilst never filing an official complaint with the OAFS before 2023.

This seems odd when up to 2018 both the Complainant and his wife were jointly communicating with MPM on their respective losses but then seem to have adopted different approaches as his wife filed an official complaint in 2019[15] and was awarded partial compensation by the above referred to collective decision of 2020.

Along the way, the Complainant seems to have developed a change of heart and he submitted a fresh formal complaint to the Service Provider on 24 January 2022, where he quantifies his loss at £95,188.18. He then filed his Complaint with the OAFS one year later, on 24 January 2023, claiming the same loss but still indicating in his Complaint Form, the date of 28 November 2017 as the date when he had first knowledge of the matters subject of his Complaint.[16]

The Arbiter traces two reasons to explain the change of heart:

1. In the explanation for reasons why his financial services provider has let him down, the Complainant states:

   "The reason for re instigating my complaint is as mentioned earlier about my wife winning her case but pointing out the similarities.

   The group of over 50 individuals who all had MPM as their trustees complained to Malta Arbiter with the same situations as myself. I should be awarded the same compensation as they did from the courts in January 2022 which were actually processed end of 2019, but due to the win in January 2022 I did not have legal proof that MPM were partially responsible for my losses".[17]

2. The complaint letter to the Service Provider of 24 January 2022[18] is written in a similar style to other complaints seen by the Arbiter which indicates that following the collective decision of 2020 above referred to and confirmed on appeal in 2022, scheme members who had not yet complained seem to have sought the assistance of a common source who lodged their fresh complaint.

[15] Case ASF 72/2019
[16] P. 3
[17] P. 51
[18] P. 7 & 9

Having given this background, the Arbiter now proceeds to decide on two important issues which will determine the validity or otherwise of the preliminary pleas raised by the Service Provider related to prescription.

a) One key aspect to take into consideration in deciding on prescription is whether the Arbiter can accept that the complaint originally raised with the Service Provider by the Complainant of 28 November 2017 has been withdrawn, and his complaint filed in 2022 is the only valid complaint that the Arbiter can adjudicate on, or whether the Arbiter can consider that the complaint of 2017 was, in practice, never actually withdrawn.

b) The other key aspect is whether the date of first knowledge of the conduct complained of, that was admitted to by the Complainant as being the 28 November 2017, is valid or whether there are indications that a later date could be considered given that losses continued to grow after such date.

On the first issue, the Arbiter notes that even if he had to consider the first complaint of 28 November 2017 as never actually having been withdrawn, then the matter complained of likely fails the prescription barrier of 5 years - with reference to Chapter 16 of the Laws of Malta, Article 2156(f) - as the Complaint with the Arbiter was filed only on 24 January 2023, well over 5 years from the date of the first complaint with the Service Provider.

However, the Arbiter does not consider that the complaint registered with the Service Provider of November 2017 can be revived as there is ample written evidence, as quoted above, that the Complainant was actually withdrawing his complaint and never sought proper replies from the Service Provider for what he believed where their failures in protecting him.

The fact that the Complainant registered a further fresh complaint with the Service Provider on 24 January 2022, which was officially replied to by MPM on 05 April 2022,[19] is further proof that the Complainant actually was not reviving his original complaint of 2017, but actually filing a new one and that he did not consider either his complaint of November 2017 as being valid/or still in progress.

In the circumstances, the Arbiter decides that the date of filing the Complaint with the Service Provider, for the purposes of Article 21(1)(c), is that of 24 January 2022.

[19] P. 13 - 16

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 28 November 2017, the Arbiter is satisfied that the indicated date 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 £85,000 at the time of the first complaint to £95,000 at the time of the second complaint does not change or move the benchmarks for establishing the date on which the Complainant first had knowledge of the matters complained of. Indeed, it is noted that no new investments were made in the meantime and the conduct complained of was, in essence, the same in 2017 as that in 2022.

The Complainant seems to be arguing when stating:

> *"… I should be awarded the same compensation as they did from the courts in January 2022 which were actually processed end of 2019, but due to the win in January 2022 I did not have legal proof that MPM were partially responsible for my losses",* [20]

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 Arbiter however cannot reasonably accept this argument. The Arbiter and the Court of Appeal 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 matter. The wife of the Complainant was amongst the successful complainants.

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.

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 – that

[20] P. 51

is, from 28 November 2017 (date of first knowledge) to 24 January 2022 (the date of filing of the actual complaint with the Service Provider).

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.

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

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[21] 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.[22]

[21] Such as the one of the Complainant.

[22] 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

A copy of these recommendations and this decision is being sent to the Malta Financial Services Authority for their information.

Alfred Mifsud
Arbiter for Financial Services