

Before the Arbiter for Financial Services

Case ASF 055/2022

RI (the 'Complainant')

vs

**Momentum Pensions Malta Ltd.
Reg. C 52627 ('Momentum' or 'MPM'
or the 'Service Provider')**

Sitting of the 10 August 2023

The Arbiter,

Having considered in its entirety, the Complaint (filed on 25 April 2023) including the attachments filed by the Complainant,¹

The Complaint

The Complainant claims having invested private pension funds amounting to about GBP £100,866.69 and having transferred such funds to Momentum for investment in Old Mutual in 2013/2014.² As at the date of the Complaint, the approximate market value was GBP £44,800.67 showing a loss of GBP £56,065.82. A more recent valuation as at 8 February 2023 showed that the value had continued to fall to GBP £29,140.40 and therefore the loss continued to increase accordingly.

The Complainant faults the Service Provider for this loss, and he believes that they failed him as follows:

1. They accepted business from an unlicensed advisory firm: Continental Wealth Management ("CWM") using unqualified advisers and used

¹ P. 1 -230

² P. 25 - GBP £44,900.18 were invested on 31 July 2013 and GBP £55,966.51 were invested on 4 July 2014.

Trafalgar International GmbH (“Trafalgar”) who is only regulated to provide insurance mediation;

2. They allowed his investments to be put into inappropriate high-risk structured notes and put his pension fund at very high and unacceptable risk;
3. They allowed the pension to be invested into an expensive bond which had high penalties for leaving early; and
4. They failed in their duties as trustees of his pension fund.

Failure of Service Provider to act properly as Trustees includes that they have:

- ***“Failed to act in my best interests.***
- ***Failed to act within their investment guidelines.***
- ***Failed to ensure investments were within my risk profile and investment status***
- ***Failed to fully disclose fees and provide all pre-contractual information.***
- ***Failed to ensure that the companies that they issued terms of business to were qualified, had the correct legal licenses and necessary regulations, etc. to operate.***
- ***Failed to communicate to me any concerns at any time over huge losses or inappropriate investments being made within my portfolio.***
- ***Failed to act to mitigate losses to my pension fund.***
- ***Failed to obtain or act upon related investment term sheets and failed to investigate the risks associated.***
- ***Momentum failed to fulfil its fiduciary duties under section 1124(A) of the Civil Code Chapter 16 of the Laws of Malta and the Trust and Trustees Act. A1.”³***

As a remedy, he expects the Service Provider to make good for all losses incurred.

³ P. 3

The Complainant claims having filed his Complaint with the Service Provider on 20 September 2019.⁴ As no reply or acknowledgement was received, he resubmitted his complaint to the Service Provider on 29 January 2022, this time under registered mail with evidence of delivery.⁵

The Reply of the Service Provider

In their reply of 8 April 2022⁶ to the Complainant's letter of 29 January 2022, the Service Provider denies having received the complaint which the Complainant alleges having sent on 20 September 2019, and they only refer to the complaint of 29 January 2022.

In their reply, the Service Provider rejects the complaint and argues that the alleged loss of GBP £56,065.82 does not match their assessment which shows much lower net realised losses. They make various defence arguments on the merits of the complaint which will be referred to later in this decision.

The Complaint was filed with the OAFS on 25 April 2023. It gives the 20 September 2019 as the date when the Complainant had first knowledge of the matters subject of the Complaint.

The Service Provider filed their reply with the OAFS on 15 May 2023, and in it they raise preliminary pleas on the competence of the Arbiter to hear this Complaint stating that:

“Momentum replies that the complaint is time-barred pursuant to article 21(1)(b) and article 21(1)(c) of Cap. 555 of the Laws of Malta; and, without prejudice, also prescribed pursuant to article 2156(f) of Cap. 16 of the Laws of Malta.

Without prejudice, the complaint submitted by the Complainant to Momentum in writing on 29 January 2022 differs to that made before the Hon Arbiter, as shall be proved.

Furthermore, and also without prejudice, the Complainant has 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

⁴ P. 15; 17

⁵ P. 19

⁶ P. 9 -12

a claim for compensation for the same losses before a different forum. Momentum submits that Complainant cannot be compensated twice for the same losses.”⁷

The Service Provider also made extensive defence on the merits of the case in their reply.

Hearing of 20 June 2023

In the hearing, the Arbiter made it clear that he was obliged to deal with the matter of his competence to hear the case before entering into the merits of the case and this for the following reasons:

1. If the Arbiter decides that he has no competence to hear the case, it is in the parties’ interest to have such a decision as quickly as possible so that they can consider seeking justice in a court or tribunal that may have such competence.
2. Not to prejudice the parties’ position by arguing the merits of the case if these have to be presented to a different court or tribunal.

The Arbiter gave the Service Provider two weeks to make written submissions with arguments for prescription on the basis of the provision of CAP 555 and to be more specific about the additional complaints made to OAFS that were not included in the complaint to the Service Provider.

The Arbiter also gave a further two weeks to the Complainant to file his reply to the submissions of the Service Provider.

Submission by Service Provider related to the issue of prescription under the provisions of CAP 555

1. Plea for prescription related to Article 21(1)(b) of CAP 555 which states:

“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:

⁷ P. 140

Provided that a complaint about the 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 Act CAP 555 came into force on 18 April 2016 and so, in terms of the above for complaints occurring before this date, the Complaint had to be submitted to the OAFS by 18 April 2018.

The Service Provider claims that the Complaint was filed with Momentum on 29 January 2022. They also stated:

“The Complainant has suggested, however, that he originally sent his complaint on the 20 September 2019.⁸ I hereby confirm that Momentum’s records show that Momentum did not receive any complaint from Complainant prior to his January 2022 complaint. This had already been confirmed to the Complainant in the reply provided to him by Momentum to his January 2022 complaint.”⁹

For the purpose of deciding whether the Complaint is prescribed in terms of Article 21(1)(b), it is quite irrelevant whether the Complaint was filed in 2019, as claimed by the Complainant, or in 2022 as claimed by the Service Provider, as both dates go beyond the two-year period following the entry into force of the said article of CAP 555.

The Arbiter has consistently maintained in past such decisions that the date when transactions were effected should not be considered as the date giving rise to the complaint. Such date may happen later, often much later, than the date of the original transaction giving rise to the complaint and, in this case, the Arbiter has to consider whether the Complainant had full knowledge of the matters giving rise to the Complaint before 18 April 2018.

The Complainant maintains that he had first knowledge of the matters complained of on 20 September 2019.¹⁰ The Service Provider maintains that Complainant had received statements showing valuation as at end 2016 and 2017 with substantial unrealised losses on his original investment, so they maintain that the Complainant had knowledge of the matters being

⁸ P. 17

⁹ P. 236

¹⁰ P. 2

complained of before 18 April 2018. However, they also concede that the losses were realised in July 2019.¹¹

The Arbiter agrees that the Complainant had a fair view of the matters being complained of well before 18 April 2018, but he did not have the full view of the matter until the losses were realised in July 2019.¹²

For this reason, the Arbiter denies the first claim for prescription under Article 21(1)(b).

2. Plea for prescription related to Article 21(1)(c) of CAP 555 which 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”.

As stated above, the first date when it could be argued that the Complainant had full knowledge of the matters subject of this Complaint was 24 July 2019, when losses on the portfolio were realised and proceeds reinvested in TC NEW HORIZON GLOBAL BALANCED FUND L GBP ACC which is still held unrealised in the pension portfolio.

In his Complaint to the OAFS, the Complainant puts the date of first knowledge as 20 September 2019. However, the Arbiter has conviction that the correct date should be not later than 24 July 2019 when the losses were realised.

For the case to be prescribed under Article 21(1)(c), therefore, the Complaint had to be *“registered in writing with the Service Provider”* by 24 July 2021.

Here we have two versions for the date when the Complaint was so registered.

The Service Provider maintains that the Complaint was registered with them only on 29 January 2022, and they never received any earlier complaints from the Complainant. This is supported by the registration certificate¹³ and is

¹¹ P. 236

¹² P. 263

¹³ P. 19

officially declared as such in the official reply to the complaint dated 8 April 2022.¹⁴

The Complainant declares on this point in his reply to the submissions dated 16 July 2023 of the Service Provider, that:

“I did file a complaint on 20th September 2019 (copy attached)”.¹⁵

The decision on whether this Complaint is prescribed in terms of Article 21(1)(c) depends on the date when the complaint was filed with the Service Provider. If it was filed on 20 September 2019, as the Complainant maintains, then it is not prescribed, and the case can proceed to be heard on its merits.

If it was filed on 29 January 2022, as the Service Provider maintains, then it is prescribed as it is after the two-year period when the Complainant had first knowledge of the case on 24 July 2019.

As is evident in page 15 and page 17, the Complaint was originally sent by email on 20 September 2019 which was purportedly addressed to:

s.davies@momentumpensions.com

complaint.info@financialarbiter.org.mt

communciations@mfsa.com.mt

Consequently, the OAFS has a first-hand view of the Complaint of 2019 as a copy has actually been received at this Office on 20 September 2019 at 13:47. In fact, the OAFS system generated an automatic acknowledgement at 15:47.¹⁶

However, it is noted that the email to the Service Provider was incorrectly addressed:

s.davies@momentumpensions

and not

s.davies@momentumpensions.com as written in the complaint document.¹⁷

¹⁴ P. 10

¹⁵ P. 271 - 278

¹⁶ P. 275

¹⁷ P. 280

This gives credibility to the Service Provider's contention that they had never received the original complaint of 2019.

There is no evidence that, between the date to the so-called original complaint of 20 September 2019 and the date of the official complaint filed with the Service Provider on 29 January 2022, there was any follow-up on part of the Complainant on his original complaint.

In fact, the OAFS only received such follow-up from the Complainant on 25 January 2022 and he was immediately informed that the OAFS can only proceed with a complaint after an official complaint is filed with the OAFS which had to include evidence of submission of complaint to the Service Provider and their reply.¹⁸

Analysis and further considerations

Article 22(2) of CAP. 555 obliges the Arbiter upon receipt of a complaint to determine whether the complaint falls within his competence and, in terms of Article 22(5)(a), to inform the complainant in writing of the decision and reasons for it if the Arbiter determines that the complaint does not fall within his competence.

In this case, the Arbiter will deal with the preliminary plea raised by the Service Provider that the Arbiter has no competence to hear this Complaint as in terms of Article 21(1)(c), this Complaint has been registered with the Service Provider more than two years after the day on which the Complainant first had knowledge of the matters complained of.

It is to be noted that the two years relate to the date of the complaint being registered in writing with the Service Provider not the date on which the complaint was registered with the OAFS.

Consequently, for the Arbiter to have competence to proceed with hearing the merits of this case, it must firstly be determined what was the date when without doubt the Complainant had full knowledge of the matters being the subject of this Complaint, and whether the Complaint was registered with the Service Provider within two years from such date. Other issues, no matter how

¹⁸ In terms of Art. 21(2)(b) of CAP. 555

relevant to the merits of the case, will not be relevant to the issue of determining the Arbiter's competence.

The date when the Complainant had first knowledge of the matter complained of has been set as the 24 July 2019.

The Arbiter hereby decides that the date when the complaint was registered in writing with the Service Provider is 29 January 2022, notwithstanding the expectations of the Complainant that the first complaint was so registered with the Service Provider on 20 September 2019. The Arbiter bases his decision on these facts:

1. Arbiter has first-hand view that the email of 20 September 2019 sending the complaint to the Service Provider was incorrectly addressed and could never have reached the Service Provider.
2. Article 21(1)(c) speaks clearly of the date when *"the complaint is registered in writing with the financial services provider"*. One cannot in any way accept that an incorrectly addressed email which never reached its addressee can be equivalent to the quoted provision of the cited Article.
3. The Complainant had ample time to check back with the Service Provider to see, firstly, that they did receive his complaint, and why they had not even acknowledged it, let alone sent him a reply.

There is no evidence that the Complainant did anything of this sort before January 2022. In fact, he only followed up with the OAFS on 25 January 2022 when he was informed that he has no case or file open with the OAFS.

Decision

While the Arbiter sympathises with the Complainant given the loss he has incurred on his pension investments, the Arbiter is bound to determine his competence by what is provided for in Chapter 555, in this case particularly, the provisions of Article 21(1)(c).

It has been established without any doubt that the Complaint was filed with the Service Provider more than two years after the Complainant had full and

ample knowledge of the matters complained of. The decisions taken by the Arbiter in cases with similar issues to those made in this Complaint in 2020¹⁹ and subsequently did not add any new knowledge on the issues underlying this Complaint, and the Complainant had ample time to lodge his Complaint in a timely manner as many other complainants have done.

For these reasons, the Arbiter determines that in terms of Article 21(1)(c) of CAP. 555, he has no competence to continue hearing the merits of this case and hereby dismisses it. Consequently, the Arbiter will not be dealing with the claim by the Service Provider that the Complainant introduced new matters in his Complaint with the OAFS that were not included in the complaint registered with the Service Provider, nor that he is seeking justice on the matters complained of by joining a class action before an Isle of Man court.

This is without prejudice to the right of the Complainant to take his case to another Court or Tribunal²⁰ that is not bound by the competence issue as the Arbiter is in this case. For this purpose, the Arbiter is not expressing any opinion on whether the Complaint is time barred also by the provisions of CAP. 16 or on the merits of this Complaint.

As the case was decided on a preliminary plea, the Arbiter decides that the parties carry their own costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services

¹⁹ Refer in particular to decision of 28.07.2020 covering 39 such cases

²⁰ As provided for in Art. 21(1)(a)