

Before the Arbiter for Financial Services

Case ASF 066/2023

DC (the 'Complainant')

Vs

Lazarus Long Limited (formerly Phoenix Payments Limited) (C 77764) ('Phoenix' or 'Service Provider')

Sitting of 13 October 2023

The Arbiter,

Having considered in its entirety, the Complaint (filed on 22 May 2023), including the attachments filed by the Complainant,¹

The Complaint

Where, in summary, the Complainant claimed to have been a victim of a scam orchestrated by *Universal Markets*, whom he considers as fraudsters, that were somehow linked to a client of the Service Provider known as 'Bit2Bit OU'. The total amount in question is that of €17,100 transferred by the Complainant through his bank account affected in two separate payments of €8,600 and €8,500 respectively on 06 and 24 November 2020.²

The Complainant accused the Service Provider of having:

'facilitated the fraud to begin with, you are undeniably an involved player in the scam's ecosystem, by providing infrastructure which fraudsters exploit to make their scams more operable'.³

¹ P. 1 - 50

² P. 6; 18; 22

³ P. 7

The Complainant stated that despite his attempt to resolve the matter directly with Service Provider, the latter failed to co-operate and acknowledge their responsibility.

The Complaint further accused, *inter alia*, that⁴:

1. Phoenix had failed to make proper due diligence on Bit2Bit OU which would have exposed that it was a scam entity.
2. The Service Provider had a duty of care in relation to transactions being made on its platform which would have made it obvious that the Complainant was being defrauded.
3. The Service Provider breached its fiduciary duties to the Complainant by failing to exercise the diligence required in the performance of its obligations, resulting in a significant loss to the Complainant.
4. The Service Provider had possibly neglected legal provisions for measures against money laundering. Further, he accused the Service Provider of participation in fraud, unjust enrichment and violations of international law.

He submitted that had the Service Provider ***'looked at the wider circumstances surrounding the above-referenced transaction(s), this illicit transfer of wealth could have been prevented'***.⁵

He also submitted that a financial institution should seek further information and/or documentation from the client in order to help create a proper KYC profile; and when the movement of large sums of money is concerned, the service provider should verify the legality and legitimacy of its sources.⁶

In fact, the Complainant insisted that:

'... it has become glaringly obvious to me that no adequate information or/and documentation were sought by your organization, at best, and at worst – no appropriate safeguards were implemented.'⁷

⁴ P. 8 -16

⁵ P. 7

⁶ P. 11

⁷ P. 11

He insisted that the Service Provider knew, or should have known, that the funds being liquidated did not rightfully belong to the fraudsters, and that the assets being liquidated through its services were not profits earned in a legitimate and lawful way.⁸

The Complainant further stated that as a regulated and licensed financial institution, Phoenix should have analysed their client's activities to be able to distinguish between what is a normal activity, and other illegal activity.

He stated further that the Service Provider has strict statutory and regulatory obligations to monitor client's transactions and report suspicious activities to the law enforcement authorities accordingly.

In view of the above, a full refund of losses⁹ was sought as compensation together with full disclosure of details of the holders of the account where complainant transferred the lost funds subject to the complaint.

The reply of the Service Provider

Having considered Phoenix's reply¹⁰ whereby, primarily, the Service Provider declared that it is not the legitimate respondent vis-à-vis the Complainant and his actions. It declared that it has no relationship with the Complainant, whether contractual or otherwise, and was not involved or in contact with the same Complainant when the alleged claim arose.

Phoenix stated that as submitted by the Complainant himself, the alleged dispute and claim is against Universal Markets, a third party incorporated in a separate jurisdiction and, thus, if the Complainant has any claim, this should have been instituted against third-party companies and directors as applicable, and not against Phoenix. It stated further that, as also admitted by the Complainant himself, he never engaged Phoenix to provide any service to him and, consequently, the Service Provider has no contractual or any other obligation towards him.

⁸ P. 12

⁹ In the official Complaint, the refund amount was stated as €17,000 while in the complaint letter it is stated as €17,100

¹⁰ P. 55 - 56

Phoenix also stated that in spite of the fact that it had no legal relationship with the Complainant, when he contacted it, Phoenix referred the Complainant to the rightful respondent.

The Service Provider reiterated that there is no relationship between the Complainant and, therefore, has no obligation to answer the Complaint as submitted or to disclose any privileged information. It insisted that it always acted in good faith in the provision of its services and any fraudulent actions on the part of third parties cannot be in any manner attributed to it.

Phoenix emphasised that it has no obligation to reimburse the Complainant for acts or omissions carried out by himself and/or third parties. It denies all allegations put forward by the Complainant, whilst insists that it accepts no responsibility for the negligence and/or acts or omissions carried out by third parties.

In conclusion, Phoenix explained how, in terms of Chapter 373 of the Laws of Malta, the Prevention of Money Laundering Act and Subsidiary Legislation 373.01 entitled Prevention of Money Laundering and Funding of Terrorism Regulations, it is obliged to carry out due diligence on all customers and has thus carried out full customer due diligence on its customers and the Ultimate Beneficial Owners.

In summary, the Service Provider raised two preliminary pleas in their first reply:

1. That as Phoenix has voluntarily surrendered its licence, which surrender became effective as from 07 February 2023 when it was accepted by MFSA (Malta Financial Services Authority – the Regulator). Accordingly, it no longer qualifies as a ‘financial services provider’ in terms of Act Chapter 555 which rules the procedures for such complaints. They argued that as the Complaint was filed after 07 February 2023, it falls outside the competence of the Arbiter in terms of Article 21 of the Act.
2. That the Complainant was never their client and that they never had any contractual relationship with the Complainant; therefore, the Complainant is not a customer in terms of the Act who can lodge such complaint against them.

The hearing of 01 September 2023

During the hearing Complainant explained:

'I am the one who put my money on Universal Markets and been scammed by Universal Markets. I had made contact with Facebook, with the scammer, Universal Markets. Their proposal was very attractive; so, from Facebook, I went to their website.

I made contact with them because they offered me, for my money, a lot of profit. I came in contact with one of their managers. He called me several times, and I started to deal with them.

Eventually, I made a lot of profits on their 'scheme' but it was all fake. I know this now but at the time I did not know it. So, I put money in it several times. When I wanted to withdraw my profits, it did not work. There were a lot of reasons why I could not have the possibility to withdraw profits from my account with them, so I knew at that time that I was scammed by Universal Markets.

I looked up where I sent the payment to for this case - as there are other cases also; there are other banks involved – where I made two bank wire transfers from Belgium KBC to Phoenix Payments: one on 6 November 2020 for €8,600 directly to an account of Universal Markets through Phoenix Payments; and another one on 24 November 2020 for €8,500. It was a wire transfer in Euros from my bank KBC to the bank, Phoenix Payments, on an account of Universal Markets.

***My point is that Phoenix Payments gave the opportunity to scammers to use their bank account. I made contact with Phoenix Payments, but they did not work together with us to recover the money. So, we think that Phoenix Payments were responsible for the transactions; and they were responsible for giving an account to scammers. Since they wouldn't work together with us to recover the money, I came to OAFS, Malta, to have the opportunity to try to recover my money from the scammers.'*¹¹**

During cross-examination, the Complainant admitted that the beneficiary on the bank transfer was Bit2Bit OU not Universal Markets. He also confirmed having filed complaints with Universal Markets, Bit2Bit and, also, against KBC who was

¹¹ P. 57 - 58

the remitter of his funds from his account in Belgium. He also filed a complaint with the Belgian Ombudsman against KBC but **'they could not see any fault'**.¹²

At the hearing, the Arbiter explained that he is obliged by law to deal with the preliminary pleas raised by the Service Provider before proceeding with evidence related to the merits of the case. This is to ensure that he has the necessary competence to adjudge this complaint.

Establishing the Arbiter's competence was in the interest of both parties to ensure that if it is established that the Arbiter has no competence, the Complainant can consider other competent channels to address his complaint to.

Consequently, the Arbiter requested the Complainant to address the issue raised by the Service Provider that he does not qualify as an Eligible Customer in terms of Act Chapter 555.

The Arbiter expressed that, following submissions, he will issue a decision on both preliminary pleas raised by the Service Provider.

The submissions re preliminary pleas

In his submission of 15 September 2023, the Complainant stated:

*'Please be informed that I am not a customer of Phoenix Payments Ltd. I am victim of the fraud. The scammers used Phoenix Payments Ltd to receive the funds I sent from my bank account. Please find the statements attached.'*¹³

The statement attached reveal that apart from the two payments covered by this Complaint, the Complainant had been scammed a further 2 payments totalling €75,000 sent to the same Bit2Bit OU to an IBAN account in Lithuania.

The Service Provider submitted on 20 September 2023 that as Complainant admitted that he is not a customer of Phoenix, which confirms the plea they raised, they had nothing to add.¹⁴

¹² P. 58

¹³ P. 60 - 61

¹⁴ P. 62

Decision re Preliminary Pleas

Having heard the parties and seen all the documents and submissions made,

Considers:

Preliminary plea re:

Phoenix has voluntarily surrendered its licence, which surrender became effective as from 07 February 2023 when it was accepted by MFSA (Malta Financial Services Authority – the Regulator) that it no longer qualifies as a ‘financial services provider’ in terms of Act Chapter 555 which rules the procedures for such complaints.

Consequently, they argued that as the Complaint was filed after 07 February 2023, it falls outside the competence of the Arbiter in terms of Article 21 of the Act.

The Arbiter outrightly rejects this preliminary plea on the basis that the Service Provider was licensed during the period in relation to which the Complaint relates to.

It is true that the definition of ‘financial service provider’ in the Act specifically relates only to cases where the licence is suspended or withdrawn by the competent authority¹⁵ and does not make reference to a case where the licence is voluntarily surrendered.

However, the Arbiter considers acceptance by the competent authority of the voluntary surrender of a licence as being equivalent to the licence being withdrawn.

Preliminary plea re:

Complainant was never their client and that they never had any contractual relationship with the Complainant; therefore, the Complainant is not a customer in terms of the Act who can lodge such complaint against them.

As explained above, the Complainant categorically admits that he is not a customer of the Service Provider. In fact, he simply sent two payments to a client

¹⁵ Article 2 of CAP 555 – definition of ‘financial services provider’

of the Service Provider who incidentally is different from the Universal Markets which he termed as the fraudsters.

The relationship between the beneficiary of the transfers 'Bit2Bit OU' and the alleged fraudsters does not emerge in the case but the Service Provider make strong assertions about their compliance to Act Chapter 373 of the Laws of Malta, the Prevention of Money Laundering Act, and affirmed that they carry out full due diligence on its customers and Ultimate Beneficial Owners.¹⁶

In any event, the OAFS is not the right medium through which any allegations regarding possible infringements of Anti-Money Laundering obligations should be made.

The Complainant accordingly failed to provide any evidence to challenge the plea raised by the Service Provider that he is not a 'customer' much less an eligible customer.

Based on the content of the Complaint Form and the enclosed documentation, it is clear that despite the fact that the Complainant points out to the Service Provider's alleged failures, he declared that he '*... fell victim to a multi-layered scam operation orchestrated by 'Universal Markets'.*¹⁷

The Service Provider declared that it is not the legitimate respondent in this case as it had no contractual obligations towards the Complainant, and he has never been their client.

The Arbiter's competence

Article 22(2) of Chapter 555 of the Laws of Malta ('the Act') stipulates that:

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

Moreover, in virtue of Article 19(1) of the Act, the Arbiter can only deal with complaints filed by **eligible customers**:

¹⁶ P. 56

¹⁷ P. 2

*'It shall be the primary function of the Arbiter to deal with complaints filed by **eligible customers** through the means of mediation in accordance with Article 24 and where necessary, by investigation and adjudication.'*

The Act stipulates further that:

'Without prejudice to the functions of the Arbiter under this Act, it shall be the function of the Office:

*(a) To deal with complaints filed by **eligible customer**.'*¹⁸

Thus, the Arbiter has to primarily decide whether the Complainant is in fact an **eligible customer** in terms of the Act.

Eligible customer

Article 2 of the Act defines an '*eligible customer*' as follows:

'a customer who is a consumer of a financial services provider, or to whom the financial services provider has offered to provide a financial service, or who has sought the provision of a financial service from a financial services provider.'

The Complainant makes it clear in his Complaint that he was a victim of *Fraudsters* and not of Phoenix. In spite of his suspicions and allegations, no evidence was provided that Phoenix were in some way directly involved in the scam.

Above all, the Complainant categorically admitted he was never a customer of the Service Provider.

Decision

Determination of eligibility

Considering the above and having reviewed the circumstances of the case in question, it is evident that there was no contractual relationship between Phoenix and the Complainant.

¹⁸ Article 11(1)(a)

In view of the above, it results that the Complainant was not *‘a customer who is a consumer’* of Phoenix, neither that Phoenix *‘has offered to provide a financial service’* to the Complainant, nor that the Complainant *‘has sought the provision of a financial service from Phoenix for the purposes of the Act.’*

Accordingly, the Complainant cannot be deemed an *‘eligible customer’* in terms of Article 2 of the Act.

Therefore, the Arbiter does not have the competence to deal with the merits of this Complaint.

This without prejudice to the right of the Complainant to take his case to a competent court or tribunal.

Considering that the case was decided on a procedural issue, each party is to bear its own costs of these proceedings.

**Alfred Mifsud
Arbiter for Financial Services**