

Before the Arbiter for Financial Services

Case ASF 070/2023

ZD (the 'Complainant')

Vs

Finance Incorporated Limited

(C 55838)

('FIL' or 'Service Provider')

Sitting of 7 February 2024

The Arbiter,

Having considered in its entirety, the Complaint (filed on 25 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 *Migotrade*, 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 €1,000 transferred by the Complainant through his bank NovaKBM on 19 February 2021.²

The Complainant argued that:

"It turned out that the investment scheme (proposed by Migotrade) was a scam, and I lost all the money I had invested. I trusted that my funds would be safe with their institution and that they take appropriate measures to prevent such fraudulent activity. I believe Finance

¹Pages (p). 1 – 6 and attachments p. 7 - 37

² P. 37

Incorporated Limited has let me down by failing to exercise due diligence in conducting business with the scam company. Their actions have allowed the scam company to defraud me and other people, have caused significant financial and emotional distress.”³

Complainant further 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 plausible”.*⁴**

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*, that⁵:

1. FIL had failed to make proper due diligence on Bit2Bit OU which would have exposed that it was a scam entity.
2. That 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. That 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. That 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.”*⁶**

³ P. 2

⁴ P. 8

⁵ P. 8 - 17

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.⁷

In fact, the Complainant insisted that:

“... it became 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 at all.”⁸

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.⁹

The Complainant further stated that as a regulated and licensed financial institution, FIL 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 losses together with fees was sought as compensation together with full disclosure of details of the holders of the account where the Complainant transferred the lost funds subject to the Complaint.

Reply of the Service Provider

FIL filed a reply on 18 June 2023¹⁰ whereby, primarily, the Service Provider declared that it is not the legitimate respondent vis-à-vis the Complainant and his actions. It declared that the Complainant is not an eligible customer of FIL given that:

⁶ P. 8

⁷ P. 12

⁸ *Ibid.*

⁹ P. 13

¹⁰ P. 43 – 48 and attachments p. 49 - 70

- (1) He is not a customer who is a consumer of Finance Incorporated,
- (2) Nor has Finance Incorporated offered to provide the Complainant with a financial service,
- (3) Nor has the Complainant sought the provision of a financial service from Finance Incorporated.¹¹

FIL explained that the Complainant was not their customer but a customer of their customer, Bit2Bit OU, and gave the following timeline:

- Bit2Bit was onboarded and opened their account with FIL on 25 January 2021.
- Bit2Bit had a licence issued by Estonian Police and Border Guard and offered service related to the conversion of virtual currency to/from fiat currency.
- FIL had followed all rules and regulations provided through the Money Laundering Act (Chapter 373 of the Laws of Malta) when onboarding Bit2Bit.
- Transaction monitoring on the account of Bit2Bit was conducted according to rules and regulations.
- Complainant's funds (€ 1,000) were transferred to the account of Bit2Bit on 19 February 2021.
- FIL had no connection or knowledge of Migotrade who were not a customer. No funds were ever received or remitted by FIL from/to Migotrade.
- The account of Bit2Bit was closed on 06 July 2021.
- Complainant's first communication on the matter with FIL was on 18 January 2022.
- Through the monitoring of the account of Bit2Bit, it resulted that there was no evidence of connection between Bit2Bit and Migotrade, and

¹¹ P. 44

debit transactions on account of Bit2Bit were channelled towards account held by Bit2Bit with other banks.

In conclusion, FIL refuted allegations of unjustified enrichment and of wilful and deliberate misconduct for purposes of making fraudulent gains to the detriment of the Complainant. It also refuted the compensation sought by the Complainant.

The hearings

Having read and considered the arguments made by both sides, the Arbiter held several hearings to hear the merits of the Complaint.

The first hearing of 27 June 2023 had to be postponed as the Complainant failed to appear or connect.

The second hearing of 18 September 2023 had also to be postponed after the Complainant informed that he had language problems to communicate verbally in English. He accordingly was seeking a person who could assist him with translation during the hearing. The Arbiter offered Complainant to make written rather than oral submission.

At the third meeting of 24 October 2023, the translator helping the Complainant explained that the Complaint was in respect of total payments of € 120,000 made to Migotrade.

The Arbiter explained that the Complaint was about a small sum of €1,000 paid to Bit2Bit through their account with FIL. Consequently, if the Complainant suffered any losses through payments made through intermediaries other than FIL, these had to be treated by filing separate complaints, always if such intermediaries were licensed in Malta. Accordingly, the Arbiter gave the Complainant time to reconsider and amend his Complaint as necessary.

On 27 November 2023, Complainant sent evidence of five payments for a total of € 45,500 made to Bit2Bit. Of these five payments, only the payment in the original Complaint for €1,000 was made through FIL. The other four payments

for a total of €44,500 were made through intermediaries not licensed in Malta.¹²

Decree

On 28 November 2023, the Arbiter issued a decree ordering the Complaint to proceed as originally presented, i.e., only in respect of the payment of €1,000 made through FIL to Bit2Bit.

The Arbiter called a further hearing for the 08 January 2024 but, on 02 January 2024, the Complainant informed that he preferred written submissions.

The Arbiter requested written submissions by the Service Provider by 08 January 2024 and by the Complainant by 31 January 2024.

No written submissions were received and, accordingly, the Arbiter is proceeding to consider and adjudge the Complaint.

Decision re Preliminary Plea

Having heard the parties and seen all the documents and submissions made, the Arbiter proceeds to decide on the preliminary pleas raised by the Service Provider that Complainant is not an eligible customer in terms of Chapter 555 and, consequently, the Arbiter has no competence to adjudge this Complaint.¹³

The relationship between the beneficiary of the transfer complained of, “Bit2Bit OU” and the alleged fraudsters, does not emerge in the case but the Service Provider makes 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.¹⁴

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. Furthermore, it is very unlikely that a sole payment for one thousand euro could give rise to money laundering suspicions.

¹² P. 82 - 85

¹³ P. 44

¹⁴ P. 47

The Complainant accordingly failed to provide any evidence to challenge the plea raised by the Service Provider that he is not even 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 ‘Migotrade’.”¹⁵

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**:

*“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**.”¹⁶*

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:

¹⁵ p. 7

¹⁶ Article 11(1)(a)

“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 FIL. In spite of his suspicions and allegations, no evidence was provided that FIL were in some way directly or indirectly involved in the scam.

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 FIL and the Complainant.

In view of the above, it results that the Complainant was not *“a customer who is a consumer”* of FIL, neither that FIL *“has offered to provide a financial service”* to the Complainant, nor that the Complainant *“has sought the provision of a financial service from FIL 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**

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.
