Before the Arbiter for Financial Services

Case No. 032/2021

SP

('the Complainant')

vs

Sovereign Pension Services Limited

(C56627)

('SPSL' or 'the Service Provider' or 'the Retirement Scheme Administrator')

Sitting of the 25 April 2022

The Arbiter,

Having seen **the Complaint** relating to The Centaurus Retirement Benefit Scheme ('the Retirement Scheme' or 'Scheme'), this being a personal retirement scheme established in the form of a trust and administered by Sovereign Pension Services Limited ('SPSL' or 'the Service Provider'), as the Trustee and Retirement Scheme Administrator of the Scheme.

The Complaint, in essence, relates to the alleged lack of protection provided by the Service Provider to the Complainant in respect of his Retirement Scheme given that it was claimed that SPSL permitted an inappropriately licensed entity to act as the Complainant's financial adviser; that his pension fund was invested in a dubious litigation fund which was already in difficulty; and that investments were of high risk and not in line with his medium to low risk appetite.

A further claim that was made involved the allegation that any chances of recovery on the litigation fund (one of the underlying investments of the

Scheme) were prejudiced given that SPSL was the investor of this fund and the Complainant heard nothing on this investment for a number of years.

The Complaint

The Complainant submitted that the Service Provider did little to nothing to protect him in the handling and investment of his pension. He noted that the situation concerned the *Centaur Litigation Ltd* fund.

The Complainant explained that Mr Baker of *Orion International* had advised him to remove his two pension funds from the UK and place these into a QROPS scheme offered by *Sovereign Group* with *Cornhill* as investment managers.

He explained that he knew and trusted Mr Baker who had prepared the Sovereign forms for him which he willingly and trustingly signed. The Complainant noted that Mr Baker did not advise him that the investments (with a guaranteed 10% return) were of high risk and were not reflective of his medium to low risk appetite stated in Sovereign's form.

The Complainant submitted that he assumed that SPSL would at least provide some check and protect him in general on the investments.

He claimed that SPSL seem to state that their role is, in effect, as organisers and were understandably hiding behind the forms he signed.

The Complainant further submitted that he believed that Mr Baker was not properly licensed in the Labuan Offshore Financial Centre and that Mr Baker was certainly only a life broker and not an investment adviser. It was noted that the Complainant did not consider it unreasonable to ask SPSL to produce evidence of this, given that this was one of the minimal requirements of the Labuan Offshore Financial Centre which *Orion* clearly did not have.

The Complainant claimed that the comfort and protection he expected from SPSL was a factor in his agreement to the whole deal.

He noted that when he was provided with literature on the *Centaur Litigation* fund there was an absence of Report and Accounts which should have raised flags.

The Complainant explained that Mr Baker wanted to put the whole pension into this investment and he gave credit to SPSL that it only allowed 25%. He questioned however whether this was prudence or concern. He further pointed out that the investment managers, *Cornhill*, declined to handle such investment and that Mr Baker had advised him that SPSL could do this investment directly if so instructed by the Complainant, to which he unwittingly consented.

The Complainant claimed that one part of the evidence he presented to SPSL was a letter from a crook running the *Centaur Litigation* fund which fund welcomed SPSL to the investment and not himself. It was noted that the said letter stated that there was no funding to put his investment in. The Complainant further stated that, as indicated by the liquidators, this resulted in his money never being invested and his not being a straightforward claim. He added that whilst other money which was invested had a chance of a return, he had no such chance because the whole structure was already failing.

It was claimed that SPSL's agreement to accede to Mr Baker's request to handle this investment has affected the Complainant's position and his fund.

The Complainant submitted that although legally SPSL may feel secure there was however clear evidence of negligence.

The Complainant noted that the real culprit was Mr Baker who was clever and devious and made more money from his misfortune. It was submitted that by approving Mr Baker, SPSL has however conveyed a respectability that the adviser would have otherwise not have had. He further noted that SPSL made money out of this too and in the end he was the only loser.

In short, the Complainant submitted that SPSL permitted an inappropriately licensed financial adviser, *Orion International*, to make an investment from the pension scheme SPSL was responsible for administering, into a dubious litigation fund which according to the liquidators was already in trouble and collapsed shortly after. This was furthermore in clear breach of his low to medium risk appetite. The Complainant also submitted that had SPSL made any proper enquiries, which was expected in their role, it would have been evident that there were problems. It was further claimed that Mr Baker had a

clear financial interest because of his commission. The Complainant submitted that SPSL should surely have done more to protect him.

The Complainant further claimed that because SPSL are the investors and not himself (which he questioned whether this was unusual), any chance of recovery has been prejudiced with nothing heard for four years.

Remedy requested

The Complainant stated that he was not seeking full compensation of his overall loss of GBP140,000, including on the *Kiwanis Fund,* which was a fraud for which *Cornhill*, as investment managers, should be held responsible, nor even the GBP80,000 loss on the *Centaur Litigation fund*.

He finally stated that he was rather seeking some form of compensation such as a 50% on an *ex-gratia* basis.[1]

Having considered SPSL's reply where it was basically submitted:[2]

1. That the Centaurus Retirement Benefit Scheme ('the Scheme') is a member directed scheme where such direction requires members to appoint their own investment adviser to advise on any investment decisions, or alternatively an investment manager to manage the investments on a discretionary basis.

2. That SPSL is not authorised to provide investment advice and any advice must be provided to the members by their appointed investment advisers. As Retirement Scheme Administrator ('RSA'), SPSL has a process in place to review any investment instructions received. When considering how to exercise the Scheme's investment powers, SPSL must take several factors into consideration, including the requirement for diversification, any restrictions on investments, the suitability of investments and underlying assets and the requirement to obtain investment advice, where necessary.

3. That at the time of establishment of the Complainant's ('the Member') plan, the Member appointed Orion International Limited as his

[1] Page (P.) 4
[2] P. 119-122

Investment Adviser ('Investment Adviser') as per page 2 of the Scheme's Application Form.[3] Orion International Limited was responsible for providing the member with ongoing investment advice.

4. That when joining the Scheme, the Member also agreed to the Terms and Conditions defined by the RSA - reference was made to the Declaration on page 12 of the Scheme's Application Form.[4] Point 7 of this Declaration stated that *'the Trustee may have regard to my financial adviser's indications without reference to me until such time as his nomination is cancelled by me in writing. I understand that my financial adviser may be remunerated by commission and/or trail fees payable by the bond issuer or investment house from charges to be deducted from my pension funds and I confirm that my financial adviser has fully explained to me the extent and nature of his fees'*.[5]

5. That by virtue of the said declaration, any instructions received were accepted in good faith. Additionally, the investment instructions, Centaur Litigation SPC application form and the Cornhill FlexMax application form included the Member's signature, which serves as additional confirmation that the Member was aware of and agreed with the trades being placed.[6]

   Therefore, it was deemed that the Investment Adviser had explained the details of the funds to the Member and that the Member agreed to proceed based on his Investment Adviser's suggestions. SPSL pointed out that, furthermore, the investment guidelines are noted on page 11 of the Scheme's Application Form, which was signed by the Member before joining the Scheme.[7]

6. That whilst the application form notes that *'... the trustee must retain ultimate discretion on investment decision'*, the same application form refers the applicant to the Scheme Particulars document, which notes that *'The Trustee may consider any such preference, however the Trustee shall retain ultimate discretion on investments <u>taking into account</u> the*

[3] P. 126
[4] P. 135
[5] P. *Ibid*.
[6] P. 120, 147 & 163
[7] P. 134 & 135

investment objective and purpose of the Scheme along with any applicable investment restrictions'.[8] SPSL submitted that consequently, such ultimate discretion is required purely to ensure that the relevant investment restrictions laid out to protect the Member are not breached.

7. That it was in recognition of its duties that the RSA, pursuant to the power granted to it in the scheme deed by a deed/agreement dated 3rd December 2012, appointed Sovereign Asset Management Limited ('SAM') as its investment adviser.

8. That in recognition of the fact that members of the Scheme administered by the RSA have different financial requirements, investment preferences, risk profiles, tolerance to risk and so on, the RSA has sought the necessary advice from SAM with regards to the Member's plan.

9. That when SPSL received the application form and other documents in 2013, both the *Kijani Commodity Fund* and the *Centaur Litigation Fund* were assessed by SAM against the Member's risk profile (low to medium) and the Scheme's investment guidelines which were in force at the time - these were approved accordingly in line with SPSL's processes as per pages 10 and 11 of the Scheme's Application Form.[9] The portfolio was reviewed and assessed as a whole, and the *Centaur Litigation Fund* was approved on the condition that no more than 25% of the portfolio would be invested in that fund, in line, with the applicable investment guidelines.

   SPSL further submitted that as the Member mentioned in the Arbiter's form, it was because of its restrictions that the pension was not fully invested into the *Centaur Litigation Fund*, thereby attesting to the efficacy of such restrictions in protecting the Member. It also noted that as a result of this, GBP80,000, which equates to 25% of the whole portfolio, was converted to AUD and the amount of AUD130,000 was invested in the *Centaur Litigation Fund* as instructed by the Member and appointed Investment Adviser.

[8] P. 120
[9] P. 133 & 134

The investment was made by SPSL as trustees of the Scheme on behalf of the Member and it is for this reason that the Member is not listed as the investor. SPSL confirmed that the RSA has however received no proceeds from the *Centaur Litigation Fund* to date.

10. That the *Centaur Fund* was not considered in isolation (as being of lower to medium risk), but was considered in the context of the overall portfolio, precisely for the purpose of providing a balanced portfolio which satisfied the selected risk profile. The *Centaur Fund* was intended to be uncorrelated to financial markets and appeared to be in line with the overall investment strategy and objectives applicable at the time. The remaining 75% of the Member's funds were invested with *Cornhill FlexMax*. The funds sent to *Cornhill* were invested in 5 different funds as instructed on the Cornhill Application Form.[10]

11. That on the submitted complaint form, the Member confirmed that he was provided with literature on the *Centaur Litigation Fund*[11] and that there was no reason for him to suspect that this was not a sound investment. In agreement with this, when the RSA reviewed the *Centaur Litigation Fund*, together with the advice from SAM, and after the proposed investment was reviewed and assessed against the Member's selected risk profile, there was no reason for this request to be rejected.

12. That with regards to the Member's comments about the regulation of the appointed Investment Adviser, it was to be noted that in 2013 the regulations in Malta did not impose an obligation on the RSA to check and conduct reviews on the licences held by investment advisers, nor on the regulator of the jurisdiction where they are regulated.

    This notwithstanding, the RSA did carry out due diligence checks on the Member's appointed investment adviser - both on the entity and on the individual representing the entity.[12] The checks included searches on *World Check* - a reputable risk intelligence database widely used by financial services providers to obtain reliable information on companies and individuals - and by other internet searches using Google's search

[10] P. 152
[11] P. 176-177
[12] P. 179-183

engine. These checks also indicated that the individual representing the Investment Adviser entity on the Application Form, Steve Baker, was a regulated independent financial adviser in the United Kingdom before moving to Malaysia. Furthermore, despite it not being a requirement, the RSA obtained a certified copy of the licence of the Investment Adviser.[13] Consequently, the RSA had no reason to reject business from this entity. SPSL further noted that a review on the Investment Adviser in 2017 once again yielded no adverse media.[14]

13. That with regards to the Member's comment that the Investment Adviser was regulated as an insurance broker and not a financial adviser, the RSA would like to comment that the statutory requirement of ensuring that the appointed adviser has the necessary insurance or investment licence, depending on the products chosen, was enforced by the MFSA when the new Pension Rules were implemented in 2019. Consequently, the RSA went beyond what was expected of it at the time by conducting the relevant checks on both the entity and the individual adviser, both at the time that the member joined the Scheme as well as after during its ongoing monitoring process.

14. That the Member decided to transfer his pension scheme to *The Calpe Retirement Benefit Scheme* in Gibraltar on the 4 May 2015. The Member was aware of the fund's liquidation at the time, and as a result the *Centaur Litigation Fund* was not transferred along with the rest of the Member's pension fund. On the 6 December 2014, the Member acknowledged in an email that *'There clearly is a problem with this litigation fund which seems to have been a scam and the South China Morning Post article is totally damming ...'*.[15]

    Subsequently, on the 9 December 2014, the Member also acknowledged in another email that *'... it is very clear there is little hope of recovery, obviously I am not happy in particular because when the money was transferred there were already questions in the public domain'*.[16]

[13] P. 185
[14] P. 187-189
[15] P. 121
[16] P. 191-194

SPSL submitted that therefore, whilst it has acknowledged the Member's complaint and has replied to his queries, it makes reference to Article 21(1)(b) of Chapter 555 of the Laws of Malta ('Article 21') which notes that the Arbiter shall have competence to hear complaints in relation to the conduct of a financial service provider which occurred on or after 1st May 2004. The proviso then notes that *'Provided that a complaint about conduct which occurred before the entry into force of this Act, [which date is 18th April 2016], shall be made by not later than two years from the date when this paragraph comes into force'*. The conduct which was being complained of has occurred after 1st May 2004.

SPSL further noted that the Member's aforementioned emails sent in December 2014 acknowledge the fact that the investment in question was not performing well and that his chances of making a return out of such investments were very minimal.

SPSL also noted that the Member submitted the complaint directly to the RSA on the 9th January 2021 and made the following comment on the Arbiter's complaint form:

'I assumed Sovereign would at least provide some check and protect me in general on the investments'.[17]

The Member's main complaint in the Arbiter's form is that:

'Sovereign permitted a not properly licensed financial adviser Orion International to make an investment of my pension fund which they were responsible for administering in a dubious litigation funding scheme which according to the liquidators was already in trouble and collapsed shortly after ...'.[18]

SPSL submitted that these are facts that were known to the Member back in 2014, that is, before the coming into force of the above-mentioned paragraph and, therefore, the Arbiter does not have competence to hear the complaint which the Member has put forward on the RSA's conduct since such complaint was to be made by not later than two years from the

[17] P. 122
[18] *Ibid.*

date of the above-mentioned paragraph coming into force, that being the 18th April 2016.

15. That should the Arbiter interpret Article 21 differently, then after taking into consideration the basis of this complaint, the RSA maintains the stance that the company should not be held accountable for the investment decisions made and consequently the losses suffered following the decision to invest in the *Kijani Commodity Fund* and the *Centaur Litigation Fund*.

    SPSL submitted that as an RSA, it acted in line with the designated purposes expected out of a retirement scheme administrator and in line with the rules as were applicable at the time of the facts arising.

    It further submitted that processes were in place and checks were conducted accordingly, some of which were over and above what was expected of an RSA at the time.

    Therefore, SPSL refutes the Member's accusation of having been negligent. It submitted that whilst the RSA has no control over the performance of the funds, it has acted on the instructions received by the Member's appointed Investment Adviser, which were also agreed to by the Member by way of his signature on all instructions received.

    SPSL submitted that the Member's main complaint revolves around investments which were recommended to him by his appointed Investment Adviser and the Member acknowledges in the Arbiter's form that *'... the real culprit is this Baker who is clever and devious and made more money from my misfortune ...'*.[19]

    SPSL therefore suggested that the Member directs his grievances and request for compensation to the Investment Adviser via the appropriate channels.

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

Considers:

[19] *Ibid.*

Preliminary Plea regarding the Competence of the Arbiter

The Service Provider raised the plea that the Arbiter does not have the competence to consider this case because it is time-barred under Article 21(1)(b) of Chapter 555 of the Laws of Malta ('the Act'), 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:

Provided that a complaint about 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.'

Article 21(1)(b) stipulates that a complaint related to the '*conduct*' of the financial service provider which occurred before the entry into force of this Act shall be made not later than two years from the date when this paragraph comes into force. This paragraph came into force on the 18 April 2016.

The law refers to the date when the alleged misconduct took place. The Complaint in question relates to the conduct of SPSL as trustee of the Complainant's Scheme. The conduct complained about involves SPSL, in its capacity as trustee of the Scheme, allowing Mr Baker to act as the Complainant's investment advisor and also permitting disputed underlying investments of his Retirement Scheme as indicated above.

Another conduct complained about relates to the claim of the recovery of the *Centaur Litigation Fund* being prejudiced through the actions/inactions of the Service Provider.

With respect to Mr Baker being permitted and acting as investment adviser, the Arbiter notes that **the Complainant had already indicated, way back in December 2014, his intention to no longer have Mr Baker involved in his pension fund due to failed investments**.

The Service Provider was notified of such instructions at the time, as evidenced by the copy of the email dated 9 December 2014 produced by the Service Provider during the proceedings of the case.[20]

With respect to the underlying investments of the Retirement Scheme, the Arbiter notes that, as indicated by the Service Provider in its reply, **the Complainant *'decided to transfer his pension scheme to The Calpe Retirement Benefit Scheme in Gibraltar on the 4th May 2015'* and that *'... the Centaur Litigation Fund was not transferred along with the rest of the Member's pension fund'***.[21]

This indicates that the Service Provider accordingly no longer acted as the trustee in respect of the Complainant's investments (other than for the *Centaur Litigation Fund*) after the said transfer in 2015.

During the hearing of 27 April 2021, the Complainant did not dispute the transfer to the Gibraltar Scheme and indeed confirmed *inter alia* that:

'The rest of my funds are in Gibraltar; and they [SPSL] were, unfortunately, left with this one because it was in liquidation when the rest of the fund was moved'.[22]

As to the *Centaur Litigation Fund*, the Service Provider confirmed, in its final submissions during the hearing of 11 May 2021, that:

***'We are the policy holders of the fund and we have been in contact with Grant Thornton, the liquidators'*.[23]**

Despite that this investment seems to have remained under the control of SPSL, it is also clear that the Complainant first had knowledge of the matters complained of on this fund way back in December 2014, as emerging from the emails dated 6 and 9 December 2014 sent by the Complainant.[24]

In the email of 6 December 2014, the Complainant himself noted that:

[20] P. 191
[21] P. 121
[22] P. 196
[23] P. 201
[24] P. 191 & 192

'*There clearly is a problem with this litigation fund which seems to have been a scam and the South China Morning Post article is totally damming, as you will see I now know to go after Cornhill Management who should at least advise what is happening*'.[25]

In the email of 9 December 2014, the Complainant stated *inter alia* that

'… I have received and reviewed the Grant Thornton Report, it is very clear there is little hope of any recovery, obviously I am not happy in particular because when the money was transferred there were already questions in the public domain'.[26]

The Arbiter determines that, in the particular circumstances of this case, the conduct complained of with respect to the permitted investment advisor and investments occurred before the 18 April 2016, and the Complainant accordingly had until 18 April 2018 to lodge his complaint on these matters with the Office of the Arbiter for Financial Services ('OAFS'). The Complaint Form filed by the Complainant was registered with the OAFS only on 15 March 2021.[27]

It is noted that during the hearing of 27 April 2021, the Complainant himself remarked *inter alia* that

'… I have a moral case rather than a legal case. If I had a legal case, I would have been doing it differently. But this is more of a moral situation'.[28]

Whilst the Arbiter understands the Complainant's situation and appreciates his sincerity, the Arbiter is bound by the provisions of the Act and his decision needs to reflect and be in line with the parameters established by law.

In the particular circumstances of this case, and for the reasons explained, the Arbiter considers that the plea made by the Service Provider as based on Article 21(1)(b) of Chapter 555 of the Laws of Malta is justified and is upholding it and declares that he has no competence to deal with this

[25] P. 192
[26] P. 191
[27] P. 1 - The complaint to the OAFS follows the submission of a formal complaint dated 9 January 2021, sent by the Complainant to the Service Provider (P. 105) which was replied to by SPSL through a letter dated 26 January 2021 (P. 7).
[28] P. 196

Complaint in relation to the claim that the SPSL allowed the permitted investment adviser and the disputed underlying investments allowed within the Scheme.

Whilst the Arbiter is not in a position to consider the merits of this case with respect to such aspects, the Arbiter however notes that another matter was also raised by the Complainant which is not considered to be time-barred under Article 21(1)(b). This relates to the Complainant's claim that his chances of recovery on the *Centaur Litigation Fund* have been prejudiced given that SPSL were the investors of this fund, rather than himself, and given that he had heard nothing from SPSL for four years (since 2016) on this fund. The Arbiter shall consider this aspect next, given that the conduct complained of in this regard did not occur before the 18 April 2016, and hence Article 21(1)(b) does not apply in respect of this claim.

Claim of recovery on the Centaur Litigation Fund being prejudiced

The Arbiter would like to first refer to the question raised by the Complainant as to whether it was unusual for SPSL to be indicated as the investor, instead of himself, of the underlying investment fund.

However, throughout his experience in dealing with various cases involving personal pension schemes, the Arbiter has indeed seen such a structure, where the retirement scheme administrator holds the underlying investments in its name as trustee of the scheme. Hence, the Arbiter does not consider it unusual for the Service Provider to hold such underlying investments under its name, in the capacity of trustee of the Scheme.

The Arbiter further notes that the Complainant has not substantiated nor provided much information or basis for his claim that his chance of recovery on the Centaur Litigation Fund *'have been prejudiced, nothing heard for 4 years!'*.[29]

It is noted that in his letter dated 17 February 2021 to the Service Provider, the Complainant referred to a letter sent in 2016 by the liquidators of the *Centaur Litigation Fund* to SPSL.[30]

[29] P. 3
[30] P. 89

Whilst noting that this was not addressed to him, but to SPSL, he stated *inter alia* that:

'As far as I am aware I have heard nothing since, have you heard nothing or simply not passed it on, it is strange and unusual to have my pension fund as the nominal investors and I have to question if you have prejudiced my chances however slim of my recovery by not passing on info from the liquidators'.[31]

It is also noted that during the hearing of 11 May 2021, during which the Complainant made his final submissions, the Complainant stated *inter alia* that:

'My complaint is more towards what has happened since with the problems of the liquidation and I have eventually received a reply from the liquidators of the Centaur Litigation Fund dated 28 April 2021 …'.[32]

The Complainant further testified, during the same sitting, that *'we had a problem which I could not get any information about what has happened in litigation from the liquidators'*, and reiterated that *'We have heard nothing, and I am not sure if Sovereign had or hadn't, but I certainly haven't. For a number of years, we have absolutely no idea what is happening with this liquidation'*.[33]

The Arbiter notes the Service Provider's explanation, during the hearing of 11 May 2021, that it has *'been in contact with Grant Thornton, the liquidators'* of the *Centaur Litigation Fund* and SPSL had *'… been trying to call them, (they are based in Australia), and email them but we've had limited response from them'*.[34]

During the same sitting, the Service Provider further explained that:

'It is our responsibility to communicate this to Mr SP. So, we are very much willing to help out the matter and try to get what we can from Grant Thornton.

[31] P. 90
[32] P. 200
[33] P. 201
[34] *Ibid*.

We will keep in contact with Mr SP on any updates we receive from Grant Thornton. We are chasing them regularly'.[35]

The Arbiter is of the opinion that one would reasonably expect regular, prompt and full updates to be provided, as appropriate, by the trustee to the member of the personal pension scheme regarding the status and developments of the investments. The trustee should ensure that the Complainant is adequately updated on his investment and the matter should also be adequately followed with the liquidators to safeguard the best interests of the member. Any communications received by the trustee from the liquidators need to be duly notified to the member accordingly.

However, in the particular circumstances of this case, it has not been demonstrated, nor transpired, that any notifications sent by the liquidators of the *Centaur Litigation Fund* to SPSL, which may have not been forwarded to the Complainant,[36] resulted in the recovery of this fund being prejudiced nor that any such lack of updates were the consequence of the losses experienced by the Complainant on this fund.

The Arbiter considers that no sufficient evidence nor adequate basis furthermore emerged which could support the indicated claim of prejudice on the recovery of the *Centaur Litigation Fund,* and which could justify the payment of any compensation in terms of Article 26(3)(c)(iv) of the Act, *'for any loss of capital or income or damages suffered by the complainant as a result of the conduct complained of'*.

For the reasons explained, the Arbiter cannot uphold the complaint.

Given that the preliminary plea was only partially accepted, each party is to bear its own costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services

[35] *Ibid*.
[36] In view of the Complainant's claim that he *'heard nothing'* on this fund and *'for a number of years, [he had] absolutely no idea what is happening with this liquidation'* (P. 201).