Before the Arbiter for Financial Services

Case ASF 105/2023

AF ('the Complainant')

vs

Sovereign Pension Services Limited (C 56627) ('SPSL', 'Sovereign' or 'the Service Provider')

Sitting of 7 March 2024

The Arbiter,

Having seen the **Complaint** made against Sovereign Pension Services Limited ('Sovereign' or 'the Service Provider') relating to *The Centaurus Retirement Benefit Scheme* ('the Retirement Scheme' or 'Scheme'), this being a personal retirement scheme licensed by the Malta Financial Services Authority ('MFSA'), established in the form of a trust and administered by MPM as its Trustee and Retirement Scheme Administrator ('RSA').

The Complaint, in essence, relates to the Complainant's claims of significant losses suffered due to the alleged failures of the Service Provider as trustee and RSA of her Retirement Scheme, particularly given the alleged unsuitability of the investments permitted within her Scheme. It was claimed that the permitted investments did not match her low to medium risk profile and were not made in line with the Scheme's investment conditions.

The Complaint[1]

The Complainant explained that her Complaint, in brief, is that Sovereign has allowed investments to be made with her pension fund that were not in line with the Service Provider's Terms of Business and her Low to Medium risk profile. She claimed that this resulted in huge losses which reduced her original retirement pension scheme of approximately GBP 359,742 in 2013 to GBP 20,000.

The Complainant submitted that the Trustee was negligent and did not act in her best interests nor with integrity. She submitted that the high-risk investments which Sovereign allowed should have not been permitted in accordance with their terms of business and claimed that there were a number of other failings.

She explained that she has lost all of her pension fund which caused her a great deal of financial stress and worry.

As to the reasons why the Service Provider let her down, the Complainant further indicated the following:

a) That the Policy Transaction Statement received from Sovereign indicates investments in the name of *'single company organisations'*, which according to Sovereign's Terms of Business, were not permitted;[2]

b) That all the structured products invested into were without a guarantee against loss or had no maximum downside. She therefore believed that they were not cautious/medium-risk products and were not suitable for her risk profile;

c) That Sovereign's Terms of Business state that, as Trustees, Sovereign will check the investments to ensure that they match her risk profile. She claimed that Sovereign had not done this, as her risk profile was low to medium risk as stated on Sovereign's valuations. The Complainant claimed that therefore the investments recommended were unsuitable for her risk profile;

[1] Complaint Form on Page (P.) 1 - 6 with supporting documentation on P. 7 - 161
[2] P. 3

d) That Sovereign's Terms of Business further state that she could not have more than 30% of her investments in structured products. She noted that in December 2015, she had GBP 190,000 invested in these products which amounted to almost 54% of the total investment and therefore well above the allowed maximum 30%;

e) That she was not classed as an experienced or professional investor and accordingly her money should not have been invested into structured products. She submitted that, as a private individual, her money should have been invested in retail collective investment funds;

f) That the total expense rate was likely more than the maximum of 2.5% p.a. permitted under Sovereign's Terms of Business. She noted that Sovereign did not provide evidence of the total expense rate despite her requests.

Remedy requested

The Complainant noted that she is 66 years old and has no time now to build up the capital. She stated that she has suffered greatly from the said situation and believed she should be reinstated to the position she was in when she met Sovereign originally in order not to be disadvantaged by their failings.

The Complainant requested Sovereign to exercise a duty of care towards her. To achieve this, she requested to be reimbursed, as a minimum, with the full amount of her original investment of GBP 359,742.61.

She asked that the current valuation and payments over the years should be considered as compensation for the lack of growth and the interest she lost out on her investment. It was noted that this would go only some way to help alleviate her financial stress and worry and allow her to partially enjoy the retirement she had planned and had trusted Sovereign to provide.[3]

Having considered, in its entirety, the Service Provider's reply, including attachments,[4]

[3] P. 4
[4] P. 168 - 243

Where, the Service Provider, *inter alia*, raised the plea that the Complaint does not fall within the competence of the Arbiter pursuant to article 21(1)(b) and also article 21(1)(c) of Chapter 555 of the Laws of Malta ('the Act').

SPSL's preliminary submission - Article 21(1)(b)

The Service Provider submitted that the Complaint does not fall within the competence of the Arbiter in terms of article 21(1)(b) of the Act. It noted that according to the said provision, the Arbiter has the authority to hear complaints related to the conduct of a financial service provider under specific circumstances. SPSL stated that article 21(1)(b) stipulates that a complaint regarding the conduct of a financial service provider, which occurred before the enactment of the Act, must be made within two years from the date on which this provision came into force. It quoted the said article in its reply.

As to the timeline and applicability, Sovereign submitted that the Complainant became a member of the Scheme on 1 February 2013 and the disputed holdings were acquired following the advice of the Member's appointed investment adviser, Steve Jacobs of the *Imperius Group Ltd*, trading as *Advies Associates*, as per the Scheme's Application Form dated 1 February 2013.

The Service Provider further claimed that the investment instructions pertinent to the alleged misconduct were submitted on 24 March 2014. It submitted that the two-year limit set by the said article was thus exceeded.

With respect to transparency and communication, SPSL submitted that it has consistently maintained transparency by providing the Complainant with comprehensive annual statements which detailed her portfolio composition. It submitted that it was crucial to note that the losses were transparently indicated in the annual valuations dating back to 2015, a copy of which were presented to the Arbiter by the Complainant herself.

The Service Provider claimed that this clearly confirmed that the valuations were received and reviewed by the Complainant.

It was pointed out that the complaint was not brought to SPSL's attention until 2023.

SPSL's preliminary submission- Article 21(1)(c)

The Service Provider noted that article 21 (1)(c) of the Act (which it quoted in its reply), grants the Arbiter the authority to hear complaints regarding conduct occurring after the Act's enactment, provided that the complaint is registered in writing within two years from the date the Complainant became aware of the matters in question.

SPSL explained that, in this instance, the Complainant had a two-year window to register a complaint with it, commencing from the moment she became aware of the issues in 2015. It further submitted that this awareness is evidenced by valuations and email acknowledgements in 2015, 2017 and 2018.

SPSL underscored that the Complaint does not fall under the Arbiter's jurisdiction due to the specific timeline of the alleged misconduct. It submitted that the Complaint is time barred under article 21(1)(c) given the Complainant's awareness of the matters complained of since 2015.

The Service Provider also explained that, notwithstanding its preceding legal arguments, which it believed should lead to the dismissal of the Complaint, it remained committed to address the Complainant's concerns. A response was accordingly provided to the specific points raised by the Complainant as detailed below.

Reply in respect of the points raised

SPSL explained that the Scheme is a member directed scheme, meaning that members are required to appoint their own investment adviser to guide them in their investment decisions. Alternatively, an investment manager could be appointed to handle the investments on a discretionary basis.

Sovereign further explained that it is not licensed or authorised to provide investment advice, and members must rely on their appointed investment adviser for such advice. SPSL noted that the role of the investment adviser is to provide suitable advice to members regarding the investment decisions within their pension plan.

In accordance with the Complainant's instructions, the appointed investment adviser at the time that the holdings were purchased was Steve Jacobs of *The*

Imperius Group Ltd trading as *Advies Associates*, as noted in the Scheme's Application Form signed by the Complainant and dated 1 February 2013.

SPSL further pointed out that the authority granted by the Complainant when she signed the Scheme's Application Form, specifically, point 7 of the Declaration, explicitly states that:

> *'I hereby request that the funds transferred be invested in accordance with my preferences indicated above. I or my Financial Adviser may contact the trustee from time to time to indicate the preferred investment strategy for my pension fund … The trustess 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'*.[5]

Sovereign submitted that it was important to note that this provision granted permission to the RSA to accept instructions from the members' appointed adviser on their behalf.

It reiterated that, as the trustee and RSA of the Scheme, SPSL was not licensed or authorised to provide investment advice. SPSL noted that its role therefore was to manage and administer the pension scheme, set investment parameters, follow legal and regulatory requirements, process benefit payments and undertake regulatory reporting to the regulators and relevant authorities.

The Service Provider submitted that it had implemented a comprehensive process for reviewing investment instructions received from appointed investment advisers. Once a dealing instruction is reviewed, it is countersigned and then submitted to the investment provider. SPSL further noted that whilst every effort was made to ensure compliance with investment guidelines, it was important to recognise that the investment adviser operates independently from the RSA and holds responsibility for making investment decisions in accordance with those guidelines.

SPSL explained that, at the time of purchase of the *RBC Gazprom* note, it received a dealing instruction which was signed by the Complainant's apppointed adviser – Steve Jacobs. It submitted that as the purchase instruction

[5] P. 170

was received and signed by the investment adviser which the Complainant had indicated to it, the instruction was accepted on the understanding that it was aligned with the investment strategy put forth by the appointed adviser.

Sovereign further explained that the investment landscape and regulatory rules have undergone changes over time, including through the tightening of investment restrictions in 2019. It submitted that it was crucial to consider the context of the investment decisions made at the time such decisions were taken. The appointed investment adviser had a duty to provide the Complainant with complete and accurate information regarding the risks involved in the products that she invested in. It further submitted that the adviser was responsible for explaining these risks to the Complainant and for ensuring that she was well-informed before making any investment decisions.

The Service Provider explained that until the changes to the investment guidelines were made in 2019, there were no restrictions or prohibitions around investments into collectives. It noted that the 2013, 2014 and 2015 investment guidelines (which it attached to its reply) did not include any provisions limiting such investments. Whilst this explained the historical context, SPSL recognised that the suitability of investments should be assessed based on various factors, including the overall risk profile and investment objectives of the portfolio as a whole. It submitted that it was the investment adviser's responsibility to consider and align the investment strategy with the chosen investment risk score, taking into account the specific needs and circumstances of the investor.

It noted that the condition which specifies that only retail investments are accepted was included in the investment guidelines of 2019. SPSL pointed out that it was important to note that the investment guidelines dated 2013, 2014 and 2015 corresponding to the years when the structured notes in question were purchased, did not include this restriction.

The Service Provider submitted that, additionally, at the time the assets were purchased, the total expense ratio (TER) was not required to be assessed against the investment guidelines when trades were made. It noted that, as per the current investment guidelines, this was now mandated for funds but it was not applicable to structured notes. SPSL confirmed that, additionally, there were no

fund-based charges involved and that all charges incurred were related to the investment provider, investment adviser as well as dealing and custody charges.

SPSL explained that the maturity dates of the *EFG* and *Nomura* notes were 7 May 2019 and 9 April 2020 respectively. It noted that whilst it was possible for a structured note to be sold before it reaches maturity to align a portfolio with the updated investment guidelines, this fell, however, under the remit of the appointed investment adviser as SPSL was not authorised to provide investment advice and, therefore, was not in a position to make any recommendations.

It submitted that as trustee and RSA, SPSL has consistently maintained transparency by providing the Complainant with detailed information regarding the composition of her portfolio on an annual basis. These valuations provided detailed insights into the status and performance of the investments, and ensured that the Complainant was kept informed about their progress. SPSL further pointed out that it was important to note that the losses were clearly indicated in a valuation report dated 2015 and in the subsequent valuations thereafter, which the Complainant had acknowledged, confirmed receipt of and also included as an appendix to her Complaint to the Arbiter.

SPSL is confident that the information provided in the valuations allowed the Complainant to remain well-informed about the status of her investments and for her to raise any concerns or queries during that time.

Preliminary

Competence of the Arbiter

During the sitting of 31 October 2023, the Arbiter referred to the preliminary plea raised by the Service Provider in its reply dated 18 August 2023,[6] and granted the Complainant time to provide her formal detailed submissions to the such plea.

The submissions provided by the Complainant relating to the said plea were mainly in the sense that the Service Provider's claim of prescription was not

[6] P. 244 - 245 & 168 - 171

relevant to her Complaint.[7] She submitted that Sovereign was *'focusing on very old losses …'*,[8] and argued that her complaint was, however, *'not about any specific losses'* but was *'actually about the whole service'*, that is, *'about the Sovereign Trustees' role in managing my pension fund and the apparent lack of compliance with their terms offered in the Centaurus Pension Scheme'*. [9]

The Complainant further explained that her complaint came about following an email she received from Sovereign on 14 April 2023 involving a low balance, following which she *'decided to investigate to understand what has happened to [her] money …'*.[10]

As part of her investigations, she obtained various documents, including a Member Account Statement and *'a full Transaction statement dated 24th April 2013 to 5th April 2022'* which she claimed *'highlighted anomalies and losses over the whole term of the investment from 2013 to date and a lack of control and adherence to their own guidelines and investment parameters'*.[11]

The Complainant claimed that this was the first Transaction Statement she had ever received.

The Arbiter notes that in its reply, Sovereign submitted that the Complaint does not fall within the competence of the Arbiter pursuant to:

(a) article 21(1)(b) of the Act given that, in essence, *'the investment instructions pertinent to the alleged misconduct were submitted on 24th March 2014'* and the two-year limit set by the said article, that is, that a complaint had to be made with the Arbiter by not later than two years from the coming into force of the Act, was exceeded. The Complaint was only made in 2023; and

(b) article 21(1)(c) of the Act as it submitted that the Complainant failed to register a complaint with Sovereign within the prescribed two-year time window given that, it claimed, the Complainant became aware *'of the*

[7] P. 252
[8] P. 248
[9] *Ibid.*
[10] P. 249
[11] *Ibid.* – Emphasis added by the Complainant

> *matters complained on since 2015'*, as *'evidenced by valuations and email acknowledgements in 2015, 2017 and 2018 (Appendices 3-8)'*. [12]

The Service Provider further claimed in its reply that it had, *inter alia*, transparently indicated the losses to the Complainant through the valuations it sent *'on an annual basis dating back to 2015'*.[13]

Preliminary Plea in respect of Article 21(1)(b)

Article 21(1)(b) of the Act stipulates that:

> *'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) provides 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 does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

Consequently, the Arbiter has to determine whether the conduct complained of took place before the 18 April 2016 or after, in accordance with the facts and circumstances of each case.

In the case of a financial investment, the conduct of the service provider cannot be determined from the date when the transaction took place and, it is for this reason that the legislator departed from that date and laid the emphasis on the date when the conduct took place.

[12] P. 169
[13] *Ibid.*

As outlined in her Complaint to the Office of the Arbiter for Financial Services ('OAFS'), the alleged misconduct involves the actions of the Service Provider as the trustee and retirement scheme administrator of the Retirement Scheme.

In her Complaint to the OAFS, the Complainant claimed that her Complaint, in brief, is about Sovereign having *'allowed investments to be made with my pension fund that were not in line with their Terms of Business and my Low – Medium risk profile … This has resulted in huge losses which have reduced my original retirement pension fund of approx. GBP £359,742 in 2013 … to GBP £20,000 …'*.[14]

The Complainant particularly referred to her structured note investments which featured within her investment portfolio.[15]

The Arbiter notes that various material positions in structured note investments still featured and formed part of the Complainant's investment portfolio on, and after, 18 April 2016.[16] It is also noted that one structured note investment was even first purchased after the coming into force of the Act.[17]

The Service Provider also occupied its function and role as trustee and RSA of the Complainant's Retirement Scheme beyond 18 April 2016.

In the circumstances, the Arbiter considers that article 21(1)(b) is not applicable to the case in question 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, and the Complaint involves investment products which still featured and formed part of the Complainant's portfolio after 18 April 2016.

The Arbiter accordingly considers that the actions related to the Retirement Scheme complained of cannot be considered to have occurred before 18 April 2016. The conduct complained of is rather considered to have been continuing in nature as per article 21(1)(d) of the Act.

[14] P. 3
[15] P. 3, 12 & 13
[16] As per the summary of the purchase and sale of investment products summarised in Tables A to C produced later in this decision.
[17] An investment of GBP37,000 into the *'Commerzbank 5 Year Quanto Autocall Phoenix Note on BMW et al USD 30/09/2021'* purchased on 30 Sep 2016 – P. 72

The plea as based on Article 21(1)(b) cannot therefore be upheld and t**he Arbiter is accordingly dismissing the submissions made by the Service Provider concerning Article 21(1)(b). The Arbiter shall consider the other plea raised by the Service Provider next.**

Preliminary Plea in respect of Article 21(1)(c)

As outlined above, the Service Provider also raised the plea that the Arbiter does not have competence to hear this Complaint in terms of article 21(1)(c) of Chapter 555. Article 21(1)(c) stipulates that:

> *'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 services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'*

The Complainant accordingly had two years to complain to the Service Provider '*from the day on which the complainant first had knowledge of the matters complained of*'.

A formal complaint with the Service Provider was made by the Complainant on 19 May 2023.[18, 19]

In her Complaint Form to the OAFS, the Complainant indicated *'14/04/2023'* as the date when she claimed she first had knowledge of the matters complained of.[20] This reflects the date of an email[21] she received from Sovereign relating to the low balance of her Scheme which communication, she claimed, triggered her investigation.

As indicated in her submissions of 28 November 2023, the Complainant, *inter alia*, stated that:

[18] P. 11 - 14
[19] Further communications on her Complaint ensued following the Service Provider's response of 12 June 2023 – such as the Complainant's emails of 22 and 26 June 2023 (P. 19 -21 & P. 23 – 25).
[20] P. 2
[21] P. 262

> *'This complaint has come about due to an email from Sovereign about a low balance which I received on 14th April 2023 … which I decided to investigate to understand what has happened to my money and why Sovereign is not delivering on the product I signed up for.*
>
> *…*
>
> *The investigation into this low balance, which started with the mail received from Sovereign on 14th April 2023 has resulted in me receiving a Member Account Statement … and subsequently, on 5th May … a full Transaction Statement dated 24th April 2013 … in addition to various other documents which, when reviewed and studied, have highlighted anomalies and losses over the whole term of the investment from 2013 to date and a lack of control and adherence to their own guidelines and investment parameters. This is the first I knew of the losses. This is the first Transaction Statement I have ever received and the detail is all there …'.*[22]

As outlined above, the Service Provider, on its part, claimed that the Complainant became aware *'of the matters complained on since 2015'*, as *'evidenced by valuations and email acknowledgements in 2015, 2017 and 2018 …'*.[23]

In order to determine whether the Complainant was first aware of the matters complained of on 14 April 2023, as claimed by her, or earlier as claimed by Sovereign, it is useful to consider the timeline of key events as arising from the case file.

It is noted that the Complainant was accepted as a member of the Scheme on 3 April 2013.[24] On 24 April 2013, a single premium life assurance policy issued by *RL360* ('the Policy') was acquired by the Scheme.[25] A premium of slightly over GBP 353,000 was allocated to the said Policy.[26] The said premium was used to then purchase the underlying investments held within the policy - namely, the structured notes disputed by the Complainant as above mentioned.

[22] P. 249 – Emphasis made by the Complainant
[23] P. 169
[24] P. 133
[25] P. 52
[26] P. 44 & 53

Categorical details about the value of her underlying policy were provided by SPSL to the Complainant in respect of the actual surrender of her RL360 Policy in 2022.[27]

During the proceedings of this case, SPSL acknowledged the significant losses incurred on the Complainant's Scheme, where the Service Provider itself calculated the actual *'Net Loss'* (inclusive of interest and dividends received) arising on her investment portfolio as amounting to GBP 145,403.[28]

It is further particularly noted that over the period starting from April 2013 to 2022, a total of around GBP 130,000 was made in *'income payments'* to the Complainant out of the Scheme as emerging from the Member Account Statement attached to the Complainant's Complaint Form.[29] This was also confirmed by the Service Provider in its submissions.[30]

Taking the particular aspects of this case, one could have possibly given the benefit of the doubt to the Complainant on certain matters. This is particularly so when taking into consideration that:

- As outlined above, the Complainant had been, and kept receiving without difficulties and/or any apparent warnings, regular frequent withdrawals (every three months) from her pension over various years - for the amount of GBP 4,748 (since inception in 2013 to April 2017); and, then, of GBP 2,374 (or close to this amount) from April 2017 till October 2021; with other similar income payments occurring even throughout 2022.[31]

  Such frequent regular payments (even during times of material losses experienced within her Scheme as shall be considered in further detail below), could have possibly given her the wrong impression that there were no issues with her pension plan.

[27] In an email dated 18 January 2022, sent by SPSL to the Complainant , SPSL had already at the time indicated that the '*Total Value*' of the Policy was GBP 39,447.59 and the *'Surrender value: 33,035.39'* – P. 392. The underlying policy was eventually surrendered in April 2022 yielding just GBP 29,388.61 (P. 412).
[28] P. 417
[29] Over GBP 130,000 in income payments – constituting of 17 payments of GBP 4,748 for a total of GBP 80,716; 10 payments of GBP 2,374 for a total of GBP 23,740; 10 payments of GBP 2,371 for a total of GBP 23,710; and another income payment of GBP 2,353 (P. 44 - 47).
[30] P. 418
[31] P. 44 - 47

- The Complainant, a retail investor (with limited, if any, experience in investment instruments and whose occupation was as a *'Buildings Manager'* at the time of her membership),[32] may have, in the circumstances, not attributed much importance to the customary annual valuation statements in light of her frequent regular withdrawals she was receiving from her pension. This also **in the absence of any specific warnings provided to her from either the trustee and/or her adviser regarding material losses actually realised/crystallised on her investments during the respective valuation periods**.

  In fact, no evidence was presented that there was any two-way communication between the Complainant and the Trusteee during the course of the years when the substantial investment losses were being realised and accumulating in her portfolio.

- Despite that, *prima facie,* it may appear that the Complainant changed her investment adviser various times, as was pointed out by the Service Provider where SPSL also submitted on this point that, '… *it is a safe and certain presumption that once the advisor changed, then the investment portfolio would have been discussed',*[33] no evidence emerged that such discussions had occurred. This could possibly be explained by the fact that the change in advisers involved the same/connected parties so that in the eyes of the Complainant the people behind the changed advisers remained the same.

  Common elements indeed emerged in respect of the indicated investment advisers (which changed from *'The Imperius Group Ltd'* to *'Advies Wealth'* to *'Woodgrange Associates IFA Ltd'* and then to *'Adviser Platform LDA'*).[34]

  The common elements and involvements emerge from the use of the same trade name, *'Advies'*, by the said entities and also her indicated individual investment adviser (Steve Jacobs or Chris Redhead) featuring in more than one of the mentioned entities.[35]

[32] P. 178
[33] P. 341
[34] P. 350
[35] P. 178; P. 350 - 351; P. 353; P.355

This notwithstanding, all the pertinent factors of this case need to be taken into account in determining the date when the Complainant is deemed to have had first knowledge of the matters complained of, including consideration of the timing when losses have been crystallised and the particular context of certain annual valuation statements as shall be considered in detail below.

When it comes to the disputed investment portfolio, the Arbiter firstly notes that various transactions in investment products, comprising mainly of structured notes ('SN') clearly emerge from the *Policy Transaction Statement* issued by *RL360* covering the period from 2013 to 2022.[36]

Tables A to C below provide a summary of the purchase and sale/maturity of the investments as emerging from the policy accounts (held in GBP, Euro and USD) listed in the said *Policy Transaction Statement*: [37, 38]

Table A - Account in GBP

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold or Matured	Sale price	Realised Capital Loss/ Profit (exclusive of dividend /interest)
SN	RBC Phoenix Autocallable Notes Linked to Hang Seng CE Index et al GBP 19/04/2018	3 May 2013	GBP	75,000	7 Jan 2014	73,845	-GBP1,155
SN	EFG 6% pa Multi Barrier Reverse Convertible GBP 07/05/2019	8 May 2013	GBP	50,000	22 Jan 2014 (25,000 units) 8 May 2019 (25,000 units)	22,272.50 25,000	-GBP 2,727.50
SN	RBC Phoenix Autocallable Notes Linked to Molson Coors Brewing Co et al GBP 30/04/2018	15 May 2013	GBP	75,000	29 Jul 2013	75,000	0
SN	Commerzbank 18 Month Global Energy Income Note GBP 17/11/2014	20 May 2013	GBP	75,000	18 Jul 2014 (6,000 units) 17 Nov 2014	5,820.60 70,552.50	+GBP 1,373.10
SN	Nomura East to West Autocallable Notes 6 GBP 11/06/2018	11 June 2013	GBP	18,000	11 Dec 2013	19,080	+GBP 1,080

[36] P. 52 - 78
[37] *Ibid.*
[38] The said tables exclude various FX transactions and also various dividends/interest payments received from the investments.

SN	Commerzbank 1Y 6M Reverse Convertible Bond on the Worst of COP et al GBP 9/2/2015	9 Aug 2013	GBP	75,000	28 Mar 2014	75,000	0
SN	Commerzbank 1Y 6M Reverse Convertible Bond on the Worst of Cirrus Logic Inc et al GBP 18/6/2015	18 Dec 2013	GBP	50,000	18 Jun 2015	4,115	-GBP45,885
SN	RBC Reverse Convertible Notes linked to Sony Corp. et al GBP 13/01/2016	14 Jan 2014	GBP	70,000	13 Jan 2016	70,000	0
SN	Commerzbank 12 Month Reverse Convertible Bond on the Worst of CHK et al GBP 30/01/2015	31 Jan 2014	GBP	25,000	30 Jan 2015	2,695.50	-GBP 22,304.50
SN	Commerzbank 1 Year Reverse Convertible Bond on the Worst of GSK et al GBP 23/03/2015	21 Mar 2014	GBP	20,000	23 Mar 2015	20,000	0
SN	RBC Reverse Convertible Notes linked to Gazprom OAO et al GBP 18/04/2016	24 Apr 2014	GBP	75,000	18 Apr 2016	188.25	-GBP 74,811.75
SN	Nomura Quarterly Autocallable Notes Linked to Global Diversified Stocks GBP 11/12/2015	11 Dec 2014	GBP	69,000	11 Dec 2015	27,145.29	-GBP 41,854.71
SN	Nomura 5 Years GBP Autocallable Note on Worst of Coca-Cola CO et al. GBP 09/04/2020	10 Apr 2015	GBP	20,000	9 Apr 2020	9,584.82	-GBP 10,415.18
SN	EFG Express Certificate on Astrazeneca et al GBP 16/12/2020	25 Jan 2016	GBP	34,606.80	14 Sept 2016	36,000	+GBP 1,393.20
SN	Commerzbank 6 Year Quanto Autocall-Phoenix Note on AS51 et al GBP 01/02/2022	01 Feb 2016	GBP	26,000	1 Feb 2017	26,000	0
Fund	Athena Global Opportunities Fund A1	28 Feb 2017	GBP	40,000	21 Oct 2021 (22.397 units) 24 Mar 2022 (22.201 units) 29 Mar 2022 (355.402 units)	2,400 2,158 34,664.41	-GBP 777.59
Total realised Capital Loss (exclusive of dividends/interest) in GBP a/c						**-GBP 193,774.93**	

Table B - Account in Euro

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold or Matured	Sale price	Realised Capital Loss/ Profit (exclusive of dividend /interest)
Fund	JPMorgan Global Income Fund A EUR Acc	2 May 2013	EUR	58,881.18	18 Nov 2013	59,368.59	+EUR 487.41
Total realised Capital Profit (exclusive of dividends/interest) in EUR a/c						**+EUR 487.41**	

Table C - Account in USD

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold or Matured	Sale price	Realised Capital Loss/ Profit (exclusive of dividend /interest)
SN	EFG 12% p.a. Multi Barrier Reverse Convertible on Arena Pharmaceuticals et al USD 25/01/2018	25 Jan 2016	USD	50,000	25 Jan 2018	12,298.03	-USD 37,701.97
SN	Commerzbank 5 Year Quanto Autocall Phoenix Note on BMW et al USD 30/09/2021	30 Sep 2016	USD	37,000	13 Jan 2017	37,000	0
Total realised Capital Loss (exclusive of dividends/interest) in USD a/c						**-USD 37.701.97**	

From the above summary, it emerges amply clear that the Complainant suffered substantial capital losses (exclusive of dividends/interest received) on her investment portfolio overall due to the extensive realised capital losses emerging on the structured notes which featured within her investment portfolio.

It is also clear that the material losses on the investment portfolio emerging from the structured notes were realised and crystallised over the period 2015 to (April) 2020 by which time all the investment in structured products had been sold and/or matured. The disputed products accordingly no longer featured in the Complainant's investment portfolio by end 2020.

The last investment within her investment portfolio, comprising the investment (of GBP 40,000) into a collective investment scheme, the *Athena Global Opportunities Fund*, was redeemed in 2021 and 2022 as indicated in Table A above, yielding a relatively minor loss of over -GBP 700.

The above further indicates that one or more structured notes yielded significant realised (that is, crystallised) capital losses (exclusive of dividends/ interest), over the respective reporting years, in the amount of -GBP 110,044 in 2015,[39] -GBP 74,811 in 2016,[40] -USD 37,701 in 2018 [41] and -GBP 10,415 in 2020.[42]

The Arbiter also notes that the Policy Valuation Statement as at 31.12.2019, which the Complainant received on 24 April 2020, showed just two investment products remaining within the Complainant's investment portfolio held within the Policy. This statement showed the last remaining structured note investment - the *'Nomura 5 Years GBP Autocallable Note on Worst of Coca-Cola CO'* whose purchase amount involved a relatively lower figure of GBP 20,000 and another investment into a collective investment fund, the '*LF Partners Athena Global Opportunities Fund A1'* of GBP 40,000.[43]

In addition, the Arbiter notes that by 17 May 2021, the Complainant had ultimately received a copy of the Policy Valuation Statement for the period as at 31.12.2020. This valuation statement showed just one holding remaining within the Complainant's investment portfolio – i.e. the collective investment fund *'Athena Global Opportunities Fund A1'*. All of the disputed structured notes had clearly matured/or been redeemed by end 2020.[44]

[39] Composed of a capital loss (exclusive of div./int.) of : GBP 45,885 (on the *Commerzbank 1Y 6M Reverse Convertible Bond on the Worst of Cirrus Logic Inc et al GBP 18/6/2015*) + GBP 22,304.50 (on the *Commerzbank 12 Month Reverse Convertible Bond on the Worst of CHK et al GBP 30/01/2015*) + GBP 41,854.71 (on the *Nomura Quarterly Autocallable Notes Linked to Global Diversified Stocks GBP 11/12/2015*)

[40] i.e. a capital loss (exclusive of div./int.) of GBP 74,811.75 (on the *RBC Reverse Convertible Notes linked to Gazprom OAO et al GBP 18/04/2016*)

[41] i.e. a capital loss (exclusive of div./int.) of USD 37,701.97 (on the *EFG 12% p.a. Multi Barrier Reverse Convertible on Arena Pharmaceuticals et al USD 25/01/2018*)

[42] i.e. a capital loss (exclusive of div./int.) of GBP 10,415.18 (on the *Nomura 5 Years GBP Autocallable Note on Worst of Coca-Cola CO et al. GBP 09/04/2020*)

[43] P. 369

[44] P. 394 & P. 396

In the circumstances of this case, the Arbiter cannot reasonably and justifiably consider that the Complainant first had knowledge of the matters complained of in April 2023 as claimed by her.

The Complainant should have reasonably been aware of the material losses much earlier than the email of 14 April 2023 she indicated she received from Sovereign about her low balance in the Scheme.

It is noted that the Complainant claimed that she had received a Transaction Statement with full details only in 2023. This is however not an adequate basis to justify her claim that she only became aware of the losses in 2023.

Apart from the fact that she was categorically provided with details of the surrender value at the time of the surrender of her underlying policy in 2022, the material losses from the structured notes were, in the main, already crystallised and realised by 2019 and then all realised by 2020 as indicated above.

The Complainant was in receipt of both the Annual Member Statements as at end December 2019 and December 2020. In her submissions, the Complainant stated that:

> *'As Sovereign says, it is true that I did receive annual valuation reports but valuation reports are only snapshots of a fund at any given moment in time and, it is a well-known fact that fund values go up and down in the course of an investment'*.[45]

The said argument, however, cannot reasonably be applied in respect of the statements for the period ended 2019 and 2020 for the reasons mentioned.

It is noted that the valuations of 2019 and 2020, as attached by the Complainant to her Complaint Form,[46] and also presented by the Service Provider in its submissions,[47] indicated not just the policy value but also what was actually left of the investment portfolio. Furthermore given that losses had been realised from matured investments by end 2020, it is difficult to understand how

[45] P. 250
[46] P. 10, 142 - 143 & 144 - 147
[47] P. 367 - 369 & 388 - 391

Complainant expected investment recovery to claim that *'it is a well known fact that fund values go up and down in the course of an investment*'.

Furthermore, particular weighting is ultimately given to the fact that the Policy Valuation Statement *'Created on 17 May 2021'* was sent to the Complainant (by email on 17 May 2021), following the Complainant's own specific request for her to be provided with '*a Policy Valuation as at 31.12.2020'*, (as per her email of 15 May 2021).[48]

Even if one were to accept the view that the Complainant paid no attention to the normal annual statements based on her being duped to assume by the regular withdrawals that everything was fine with her pension portfolio, it is difficult to accept the same assumption with a statement for which she had specifically requested re-submission.

The Arbiter accordingly finds difficulty to accept that the Complainant did not realise, upon receipt of the said statement, the extent of actual realised losses she has suffered on her Scheme on the disputed investments after she had herself requested to receive a valuation as at end December 2020.[49]

The said valuation, which she received on 17 May 2021, listed *inter alia* her then '*Policy value'* as at end December 2020 as amounting to GBP 51,097.39, with the *'Premiums paid'* of GBP 353,301, the *'Withdrawals'* at GBP 118,167.91 and her only remaining investment holding (a collective investment fund) as detailed above.[50]

In the particular circumstances of this case and for the reasons amply mentioned, the Arbiter accordingly concludes that the Complainant's formal complaint was registered in writing with the financial services provider later than two years from the day on which the Complainant first had knowledge of the matters complained of.

The Arbiter is accordingly accepting the Service Provider's plea made in terms of Article 21(1)(c) of the Act that he has no competence to hear this Complaint.

[48] P. 394
[49] *Ibid*.
[50] P. 396

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.

The Arbiter makes reference to various previous decisions where the plea of prescription, as similarly applicable to the case of the Complainant, was indeed upheld as it was justified in terms of law.[51]

Decision

For the reasons explained, the Arbiter upholds the plea of prescription raised by the Service Provider in its first submissions on the basis of Article 21(1)(c) of Chapter 555 of the Laws of Malta and accordingly dismisses this Complaint.

In view of the above, **the Arbiter is not considering the merits of the case with respect to the alleged inadequate investments.**

This is without prejudice to any right the Complainant may have to seek justice before another court or tribunal competent to hear her case.

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

Recommendations

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[52] 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 (Inferior Jurisdiction).[53]

[51] Examples: Case ASF 010/2023; Case ASF 040/2022; Case ASF 065/2022; Case ASF 149/2022; Case 084/2022; Case ASF 110/2021 and Case ASF 091/2021 – https://www.financialarbiter.org.mt/oafs/decisions?page=1
[52] Such as the one of the Complainant
[53] E.g. civil court cases 15/2021 LM, 37/2021 LM and 38/2021 LM - https://ecourts.gov.mt/onlineservices/Judgements

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 across the sector, 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.[54]

The Arbiter further recommends that as a matter of good practice, Trustees should obtain regular confirmation, following submission of the annual statement, that such statement including any losses/profits realised over the period covered by such statement has been reviewed, explained and discussed by the client with their advisor.

The said recommendations are without prejudice to the applicable regulatory requirements and the decision as stipulated above.

Alfred Mifsud
Arbiter for Financial Services

<u>Information Note related to the Arbiter's decision</u>

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

[54] 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

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.