

Before the Arbiter for Financial Services

Case ASF 006/2024

ZS & NS

(the 'Complainants')

vs

Papaya Ltd

Reg. No. C 55146

('Papaya' or 'Service Provider')

Sitting of 21 March 2024

The Arbiter,

Having considered in its entirety, the Complaint filed on 08 January 2024, including the attachments filed by the Complainants,¹

The Complaint

Where, in summary, the Complainants claimed to having fallen victims, on or about 28 July 2023, to two multi-layered scams operated by CYsec's Clone which involved making deposits at the instruction of the scammers from the Complainants' account with HSBC Malta to scammers accounts at Papaya for a sum total of €4,938.68.

Complainants request that Papaya take responsibility for their loss *"for allowing money-laundering activity to happen by providing service to a client of theirs who has stolen our hard-earned funds"*. They also expected financial

¹ Page (P.) 1 – 14 and attachments p. 15 - 123

compensation for the emotional and financial distress that the situation caused them.²

Two complaints were filed directly on the Service Provider both dated 28 July 2023. One complaint filed by Mrs (Complainant) relating to a payment of €1,200 effected on 20 June 2023 from her account with HSBC to a beneficiary 'janis sirmonts' who had an account with Papaya ending with 64613.³ The other was filed in identical terms by Mr (Complainant) referring to a payment of €2.738.68 to a beneficiary 'Rumen Sharkov' who had an account with Papaya ending 37222,⁴ and another payment of €1,000 to a beneficiary 'Denis Yosifov Kadrinov' who had an account with Papaya ending 64980.⁵

The date when these last two payments were effected is not evident, though Complainants mention they happened on or about 28 July 2023 (which oddly is the same date of their direct letter of complaint to the Service Provider).

The Complainants declared they were holding the Service Provider responsible for their loss claiming that Papaya

- Failed its obligations under the Anti-Money Laundering (AML) regulations for proper due diligence on its clients who had received the proceeds of the scam in their account with Papaya
- Participated in unjust enrichment, violations of international law, aiding abetting criminal fraud activities by failure to adopt proper fraud detection services.

They also demanded disclosure of full details of the beneficiaries of the accounts where their funds were transferred.

Papaya replied on 08 August 2023 explaining that according to their GDPR⁶ obligations, they were unable to disclose the information requested without proper authority. They recommended that Complainants refer the case to the authorities in charge with whom Papaya will fully co-operate if they are properly

² P. 4

³ P. 42

⁴ P. 58

⁵ P. 59

⁶ General Data Protection Regulation (679/2016)

authorised. No direct reference to accusations or remedy requested was made in Papaya's reply.

Complainants wrote back to Papaya on 15 August 2023 repeating their claims that Papaya had failed them as they failed to adopt proper Anti-Money Laundering (AML) procedures which would have detected the fraud and stopped Complainants' transfers being made available to fraudsters.

Reply of the Service Provider

Having considered Papaya's reply⁷ dated 23 January 2024, whereby it raised a preliminary plea of incompetence of the Arbiter to hear this Complaint on the basis of Article 11(1)(a) of Chapter 555 of the Laws of Malta which obliges the Arbiter to deal with complaints filed by eligible customers. They maintained that Complainants were not eligible customers of the Service Provider.

Preliminary Plea

The Act Chapter 555 provides in Article 11(1)(a) and again in Article 19(1) that the primary function of the Arbiter is to deal with complaints filed by eligible customers.

The Arbiter therefore feels it is obligatory to decide the preliminary plea raised by the Service Provider before entering into the merits of the case. If it results that the Complainants do not qualify as eligible customers of the Service Provider, then the Arbiter would have no competence to adjudge this Complaint.

The preliminary plea has to be decided before entering into the merits of the case for two particular reasons:

1. If the Arbiter has no competence to adjudge this case, then the Complainants should know it in order to consider taking their case before a competent court or tribunal.

⁷ P. 129

2. If the Arbiter has no competence to adjudge this case, it is prudent not to express an opinion on the merits of the case so as not to prejudice the opinion of another competent court or tribunal.

The hearing

A hearing was held on 12 March 2024⁸ where Mr (Complainant) confirmed that:

- Papaya never offered Complainants to provide a financial service
- Complainants never sought the provision of a financial service from the Service Provider

Consideration and Analysis

The Arbiter, having heard the parties and seen all the documents and submissions made,

Considers:

The Complainants have failed to provide any evidence to challenge the plea raised by the Service Provider that they are not *'eligible customers'*. In fact, Mr Complainant has explicitly accepted that they do not qualify as eligible customers and their relationship with Papaya was simply to try to recover the money they were scammed to transfer to customers of Papaya.

The Arbiter notes that the Complaint mainly revolves around the allegation made by the Complainant that the Service Provider did not observe its legal obligations relating to KYC and AML procedures and failed to investigate its clients' accounts which were related to fraud and financial crime.

Considering that the Complaint mainly revolves around money-laundering and financing of terrorism issues, the Arbiter would like to draw the attention of the Complainants that questions and issues in this regard should be addressed to the Competent Authorities in Malta that specifically deal with such issues.

The Arbiter does not have the competence and expertise to deal with these issues.

⁸ P. 130 -131

The Service Provider declared that it is not the legitimate respondent in this case, as it had no contractual obligations towards the Complainants.

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**.'*⁹

Thus, the Arbiter has to primarily decide whether the Complainants are, in fact, **eligible customers** 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 Complainants make it clear in their Complaint that they were victims of *fraudsters*, and no evidence was provided that Papaya were in some way directly involved in the scam. The fact that Papaya had an account relationship with the beneficiaries of the funds transferred (it is not clear what relationship such beneficiaries had with the alleged fraudsters) does not constitute sufficient

⁹ Article 11(1)(a)

evidence that Papaya had failed their KYC obligation or was aiding and abetting the fraudsters in their devious schemes. Three separate transfer payments not exceeding €5,000 in total should not be expected to give rise to concerns leading to non-execution of Complainants' own instruction to credit such funds to the indicated client accounts.

Decision on 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 the Service Provider and the Complainants.

In view of the above, it results that the Complainants were not *'a customer who is a consumer'* of Papaya neither that Papaya *'has offered to provide a financial service'* to the Complainants, nor that the Complainants *'have sought the provision of a financial service from Papaya for the purposes of the Act.'*

Decision

For reasons explained above, the Complainants cannot be deemed as *'eligible customers'* in terms of Article 2 of the Act.

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

This without prejudice to the right of the Complainants to take their 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.
