Before the Arbiter for Financial Services

Case ASF 044/2024

A

(Complainant)

Vs

CSB International Limited

(C 38923)

(Service Provider)

Sitting of 12 April 2024

The Arbiter,

Complaint

Having seen the Complaint[1] presented on 27 February 2024 whereby the Complainant maintains that on 10 August 2023 he contacted Dr Franklin Cachia, Director Tax & Regulated Industries with the Service Provider, to seek tax advice on behalf of a friend who was considering reporting to tax authorities a case VAT evasion. After explaining the background of the case, the Complainant asked these specific questions on which he needed advice:

1. '***The chances of the authorities treating 'A' sympathetically if he is a whistle-blower and not actively involved in tax evasion.***
2. ***The chances of the authorities expecting 'A' to repay all unpaid taxes, and possible penalties, or whether they will be sympathetic and only insist on part payment, or even none at all.***

[1] Pages (p.) 1 – 7 and attachments p. 8 - 69

3. ***Whether the authorities would prefer to allow 'A' to acquire ownership of the bar in return for the likelihood of past unpaid taxes being repaid in future years.***

4. ***Whether the authorities are likely to pursue 'A' in Ireland if he decides not to return to Malta.***

5. ***Whether 'A' should get out of the partnership as soon as possible and hope that the Maltese authorities do not pursue him.'***[2]

After some chasing, Complainant received an e-mail on 5 September 2023[3] giving information that he considered

> "*of no value … (which) … I did not ask for and did not need, and it completely failed to address my five questions."*[4]

For this service, Complainant was presented with an invoice claim of €2,046.25 plus VAT.[5] Following a complaint that this invoice was for services he had not asked for and at rates he did not approve, the claim of Service Provider was reduced in stages initially by 20%, then to €1,000 and finally to €500 (plus VAT).

Furthermore, the Service Provider on 6 September 2023,[6] gave brief replies to the specific questions Complainant had asked.

Complainant lamented that:

1. '***Dr Cachia misled me by not telling me that he had little or no practical experience of dealing with VAT investigations. Had Dr Cachia the required expertise, he would have been able to provide the advice in around 15 minutes of his time, and without the need to involve his colleague, Dorita D'Souza.***

2. ***Dr Cachia provided advice that was of little, if any, value.***

[2] P. 14
[3] P. 46 - 47
[4] P. 3
[5] P. 28
[6] P. 49

3. ***Dr Cachia was highly unprofessional in bullying me into paying this reduced invoice and before I had any opportunity to go through a formal complaints process.***

4. ***Dorita D'Souza was, I believe, highly unprofessional in recording 13.25 hours in assisting in the preparation of a straightforward e-mail that ran to one and a half pages, much of which was a simple copy and paste exercise setting out sections from the Value Added Tax Act. If my suspicion is correct, Dorita D'Souza committed fraud.***

5. ***Michael J Zammit, by failing to find that Franklin Cachia and Dorita D'Souza had behaved unprofessionally, was complicit in such behaviour.'***[7]

He said that, finally, he paid the reduced bill of €500 and €90 VAT to avoid court action, claiming that this payment was made under duress, and, by way of remedy, he expects refund of €590.

Reply of Service Provider

Having seen the reply[8] of the Service Provider stating:

'*With reference to the attached complaint submitted to the Office of Financial Services Tribunal, kindly consider this as our official reply.*

Kindly note that we have proceeded to file a Police Report against Mr A with Police Report Ref. No. XXXXX/1/2024 for harassment and for frivolously and vexatiously filing complaints with the Chamber of Advocates and the Office of the Financial Services Tribunal which is causing us unjustified prejudice.

As evidenced hereunder, we have provided Mr A with tax advice (attached) and discounted the attached invoice by 75% to which he paid. The time spent on the tax advice is clearly recorded on page 2 of the invoice. In this respect, all complaints being filed by himself are being done to extort unjustified gain and without any justified cause. Kindly note that we have presented the attached Letter of Engagement which terms and conditions are clearly transparent. Moreover, Mr A is a retired professional (a lawyer), therefore there is no excuse

[7] P. 4
[8] P. 74 - 75 and attachments 76 - 115

that he is a retail client and never read our Letter of Engagement to which he signed.

With reference to the attached invoice and our advice attached, once again, in order to clarify certain statements sent by Mr A, please note that the time spent on your matter may be found on page 2 of the attached invoice. You may note that I have limited my time to 15 mins and I did not charge for additional time spent on your matter, which include time to liaise with the authorities on a no-names basis, time to review our replies, time to hold virtual meetings (internal and external).

Kindly note that these are legal and tax opinions which usually, a law and/or audit firm would charge triple the amount we charged. We provided Mr A with legal advice and no accountancy advice. Moreover, whilst his questions were complex and difficult to answer, we have answered them in the best possible and professional manner and in the most legal way. Whether or not the answers are what he wanted to hear, it is altogether a different story. The law is what it is and there is very limited scope to bend the law or the powers conferred to the CfR. Respectfully, his disappointment should be directed towards the lacunas in the law rather than our professional replies.

Moreover, my colleagues and I have gone through all the relevant provisions of the VAT Act and the Income Tax Act in order to answer your queries in the best possible manner. Kindly note that the law contains over 300 pages, therefore, our time is certainly justified.

Furthermore, we have offered him a 20% reduction in our professional fees and thereafter another +50% discount for a final bill of EUR 1,000. Finally, out of good will we have discounted the invoice further to EUR 500 (excl. VAT) and waived a considerable amount of time.

May we remind you that he has signed and accepted our Letter of Engagement together with our Terms of Business, therefore, we were completely transparent with him. We also believe that, as he stated repeatedly, a lawyer of his seniority would have objected to any of our terms and conditions rather than accepting and signing our Letter of Engagement. This fact only quashes the false arguments he is trying to make.

Finally, we categorically deny that we have misled him as outlined and evidenced above. Moreover, we informed him that if he does not settle our invoice, we will proceed to take legal action against him which is the natural course of action when someone decides not to pay for your services.

We trust the above is clear.'[9]

Hearing

A hearing was held on 25 March 2024. Complainant confirmed that he had offered to pay €250 in full settlement by means of an email on 4 or 5 October 2023.[10]

After confirming on oath his submissions, the Complainant was cross-examined and stated:

'***Asked whether a Letter of Engagement was given to me by the service provider, I say, yes. Asked whether I signed it, I say, yes.***

Asked whether that means that I read it as well, I say, of course, I'm a lawyer.

Asked whether I also read the hourly fees which I signed and accepted, I say, no, because they were not in the Letter of Engagement.

It is being said that they are in the Letter of Engagement. I say that I'm looking at my signed copy here. It is the original. I can't see a second schedule. I see a first schedule that says Tax Advisory Services. The next page is Page 7, the Terms of Business.

The Arbiter states that he does not have it on record, and what he has is an email dated 4th October 2023 from Dr A on page 32, where I say:

"When I engaged you, I was told Dr Cachia's hourly rate was €250 plus VAT".

The Arbiter does not have the document referred to as Appendix 2 or Schedule 2 which gives the service rates.

The service provider is going to present a copy of the second schedule which was signed by Mr A.

[9] P. 74 - 75
[10] P. 53

Asked whether I was aware that Dr Cachia's rate was €250 an hour, I say, yes, because he told me on our first phone call, on 10th August.

It is being said that I received an invoice showing the time spent by Dr Cachia and his colleagues with respect to the queries that I raised. Asked whether this is correct, I say that it had figures down but whether that was a genuine record of the time spent, I do not know.

It is being said that after they issued the invoice, they offered me a 50% discount. Asked to confirm this, I say that they started with a 20% discount and then, yes, they offered a 50% discount and then a 75% discount, but I say that, in my view, a discount on a gross overcharge is not a discount.

Asked whether I accepted to pay €500 as the final offer, I say, under duress. I paid €500 plus €80[11] because my friend and colleague, XXXX, on whose behalf I am working, told me to settle it. I would have gone to court.

Asked to what duress I am referring to, I say, duress from the service provider, because they threatened a judicial letter against me, a 116A letter, plus garnisheeing my bank accounts. That is duress in the context of a charge of €1,000 or €500. It is disproportionate.

Asked what I would do should someone tell me that he is not going to pay me for my services, I say that perhaps I would sue, but I wouldn't necessarily freeze bank accounts.

It is being said that that is what the service provider is doing; that they told me that they were going to take legal action against me if I am not willing to pay them and, therefore, I was under duress.

I say, I think I was under duress. I'll leave it to the Honorable Arbiter to decide whether or not that is the case.'[12]

For the Service Provider, evidence was given by Timothy Hampton – Senior Manager, who stated:

'***Regarding the nature of the queries by Mr A, I say that to get into them in some detail, I need to review as some time has passed, but the general gist of it was that there was, I think, a colleague whom he was working on behalf of, who was in business with an individual and he thought that this individual was***

[11] Should have read €90
[12] P. 116 - 118

somehow taking advantage of the business relationship and wanted to see what possibilities he had, what the VAT Act specifically said about any reporting, any liability at law that could arise from this business relationship between the two individuals.

There was some information that made the client of Mr A question the business relationship and whether they were reporting everything correctly from the VAT and the tax point of view and, essentially, we needed to look into what the law states about potential liability that the partnership and the client of Mr A had.

That's it in a nutshell.

As regard to the work carried out to give advice to Mr A, I say that the time spent would be us basically looking into the specifics of the request again. We would need to go into the specifics because some time has passed since then. But we would need to see what the law and what the VAT Act states vis-à-vis the potential liability in different situations which were discussed.

So, that was what the work entailed - seeing the queries, looking into the VAT Act from our experience servicing clients and knowing what the penalties were and what matters could arise, seeing the potential exposure that this person had vis-à-vis the whole VAT Act. So, this is why it took all this time.

As to whether the time spent was genuine or whether we were trying to inflate our prices, as Mr A is alleging, I say that we do the opposite. When we have engagements like this, we try to keep it concise to the work actually done. I say that we have provided advice to other clients with this sort of work. The number of hours put in are in line with what we usually expect. We put a fair representation on the time we spent answering the queries. It was quite simple in that respect.

As regards to payment, I say that our invoices are generally payable upon issue; generally, and in most cases, according to the company's position.

When we think that non-payment is due to a client forgetting or a client to be included in a subsequent payroll, we have monthly exercises which we perform as CBS company-wise, where we reach out to these clients and ask them when we can expect payment. This is our first contact, asking when we can expect payment. And, if we have problematic clients – I am not saying this is the case over here – who are telling us that they are not paying for XYZ reasons (and

there could be many reasons), we slowly start to escalate. We start to put pressure and tell them that there are unpaid invoices. We tell them that it might impact future services, and that we will look at legal options that we have available to recover the funds. Obviously, always after having looked at those invoices raised which are for valid work done.

In this case, there was a dispute whether the work was valid from the client's side, which we justified from our end. Then, that would go to the respective senior managers of the departments to verify the challenges being made by the client in this case. So, from a procedure point of view, if we are not getting anywhere and we believe that the debt is rightfully due to CSB, then there is a legal letter and there is a 166A that we can go to. And, generally, if there is a bank account – I am not a lawyer by trade – but I think there are some other applications that can be made in order to recover the funds.

So, if a client is not willing to pay, it is a standard procedure that we will take legal action against said client.

Every month there is an exercise, we see the clients who are not paying in our portfolio, and we see the clients for whom we are going to escalate legal action. There are certain cases in which somebody can get involved to avoid escalating to that stage, but if we are being told that someone is definitely not paying, then we have to take legal action in this way.'[13]

Under cross-examination, he submitted:

'***Asked which senior manager looked at Dr Cachia's case, at the complainant's case, I say that Dr Cachia is a senior manager. I say that I am also a senior manager. I am a senior manager of the corporate team. Franklin is the senior manager of the taxation team, and we also escalated the matter to the Director of Operations and Finance, Jean Claude Cardona, for discussions.***

Asked whether I saw the complainant's initial email of instruction to Dr Cachia, I say that I can't recall at this point in time because it's been a while.

Asked by the Arbiter what role do I occupy, I say that I am the Head of the Corporate Services team, and we perform for corporate accounting, daily tax compliance service.

[13] P. 118 - 119

Asked by the Arbiter if I am in the advice section, I say yes, but that is the department of Franklin which is why I said that Franklin is the senior manager of the tax team.

Asked whether the advice I gave had any relevance to the client's questions, I say that we are going back in time but, from what I can remember, yes, 100%. If we're talking about potential exposure and relationship between the client and the authorities – and this is a VAT matter - how can we not talk about what the VAT Act states, the potential exposure and the potential fines?

We can also counter-argue that the questions made were sort of vague and that the overarching element here is that we wanted to understand the exposure that this client had.

To answer the client's questions, we had to look into the law first which is a 200-page document.'[14]

Final submissions

In his final submissions, the Complainant reaffirmed his Complaint and added:

'*Dr Cachia says in paragraph 7 of his response that I should not have signed the Letter of Engagement if I was going to object to CSB's terms and conditions. The argument is facile and fallacious. It presupposes that I should have known that Dr Cachia did not have the relevant expertise, that I should have known that work that I neither requested nor needed would be carried out, that I would be billed for basic research and that his junior colleague would spend the equivalent of two working days producing an e-mail containing, in the main, cut-and-paste paragraphs on elementary VAT law.'*[15]

In their final submissions, the Service Provider reiterated their claim that this Complaint should be dismissed on the basis that it is frivolous and vexatious in terms of Article 21(2)(c) of Chapter 555 of the Laws of Malta. It was claimed that:

1. *'The Complainant accepted our hourly rate via email;*
2. *The Complainant read, accepted and signed our Letter of Engagement and Terms of Business;*

[14] P. 119 - 120
[15] P. 122

3. *The Respondent discounted the initial invoice by over 75%, simply out of good will and to avoid dispute, which the Complainant paid in full and final settlement;*

4. *Nevertheless, the Complainant still submitted this complaint frivolously and vexatiously.'*[16]

It was further claimed that the Service Provider always acted professionally and with utmost good faith in the provision of its services and denies all allegations put forward by the Complainant. They also claimed that the discounted amount paid was in full and final settlement.

Analysis and consideration

The Arbiter,

Having read the Complaint and the Reply of the Service Provider, having heard the evidence, and read the final submissions, the Arbiter shall now proceed to consider and adjudge the case in terms of Article 19(3)(b) by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances of the case.

The Arbiter feels that irrespective of the issue whether the original invoice claim presented was justified by the actual value delivered in relation to the service asked for, it is undisputed that the settlement of €500 plus VAT, following the Complainant's offer of €250 plus VAT, was a full and final settlement and should not be reopened.

The argument that this was accepted under duress is refuted, especially given the legal background of the Complainant. Anybody exercising their legal rights should not be considered as undue duress. Furthermore, the Complainant admits he was aware of the hourly fee related to Dr Cachia's service of €250. Dr Cachia's involvement until the issue escalated into full blown dispute over the fees, justifies a fee as that finally settled upon.

[16] P. 127

Decision

For reasons explained above, the Complaint is hereby dismissed. 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.