Before the Arbiter for Financial Services

Case ASF 110/2021

UN

('the Complainant')

vs

Dominion Fiduciary Services (Malta) Limited (C 47259) ('DFSM' or 'the Service Provider')

Sitting of the 10 January 2023

The Arbiter,

Having seen **the Complaint** relating to The Dominion Malta Retirement Plan 2010 ('the 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 Dominion Fiduciary Services (Malta) Limited ('DFSM' or 'the Service Provider'), as its Trustee and Retirement Scheme Administrator ('RSA').

The Complaint, in essence, involves the claim that DFSM failed in its fiduciary duty as trustee given that it allegedly failed to undertake adequate due diligence and monitoring in respect of the *Privilege Wealth One LP Loan Note*, this being an underlying investment of the Scheme.

The Complaint

The Complainant explained that she became a member of the Scheme for retirement planning purposes in March 2015. Her introducer to the Scheme was Darin Brownlee-Jones (of *Holborn Assets* in London) and her financial adviser was David Sime of *St James International*.

On 22 March 2015, the Service Provider purchased the *Privilege Wealth One LP Loan Note* ('the PWL Loan Note' or 'the investment') for a capital value of GBP250,000 using the money held in her Member Account with the Scheme.

The Complainant explained that on 23 February 2018, DFSM informed the Complainant that the PWL Loan Note had been placed into administration. A period of complete uncertainty then followed with no concrete information emerging from DFSM.

The Complainant further explained that, at the time, she believed that the process of administration would reimburse her investment. She noted that *Grant Thornton* was appointed by the court as formal administrators with DFSM retaining custody of the investment. This gave her confidence about the recovery of the PWL Loan Note.

It was noted that the Complainant was previously prepared to allow DFSM as trustee and Grant Thornton as administrator to retain a form of joint control with a view to receive eventual compensation on the investment. However, she has now lost faith that either party will facilitate any form of reimbursement. She considered that her loss has been now irretrievably crystallised.

The Complainant claimed that no explanation was received from the trustee or the administrator as to what actually happened to her investment, and she no longer had any confidence that any such explanation or reimbursement will be forthcoming at this stage.

A formal complaint was made by the Complainant to DFSM through a letter dated 1 July 2021 which was replied to by the Service Provider by way of its letter dated 21 July 2021.

The Complainant noted that her claim, in essence, is based on DFSM's failure, as trustee of the Scheme, to conduct sufficient due diligence on the PWL Loan Note prior to the purchase of the said investment.

She submitted that whilst it was true that the PWL Loan Note was purchased on her instruction, which instruction was based on the advice of her then financial adviser David Sime of *St James International*, she considered that this however cannot, and does not, relieve DFSM of its direct fiduciary duty owed to her as an investor.

The Complainant submitted that had proper due diligence been conducted and appropriate cautionary advice been offered, she would not have allowed the purchase of the PWL Loan Note to proceed.

She noted that DFSM hold themselves out as a market leader in this field and as a benchmark of integrity. She further noted that their fees certainly reflect that. The Complainant submitted that she accordingly felt that she could rely on DFSM's reputation, and that effective and proper due diligence would be undertaken concerning her money and any proposed investment.

It was further submitted that the nature of the fiduciary services provided by DFSM cannot be diluted or sidestepped.

The Complainant noted that the capital value invested into the PWL Loan Note amounted to GBP250,000. Interest on this investment should have been at the rate of 10% *per annum.*

The Complainant accordingly sought compensation for her loss in such amount as the Arbiter considered it to be just and equitable.[1]

In its reply, DFSM essentially submitted the following:[2]

The Service Provider noted that the investment into the PWL Loan Note was initially made by DFSM in 2015 and that the investment failed as a result of PWL no longer being able to meet its contractual obligations to its loan note holders. PWL was subsequently placed into administration on 26 February 2018.

DFSM noted that it informed the Complainant of this event on 23 February 2018, as acknowledged by the Complainant in the formal complaint letter to the Service Provider.[3]

As the act of putting a company into administration primarily arises because the company in question has become insolvent and is unable to carry on trading, DFSM submitted it was thus reasonable to conclude that the Complainant became aware of the fact her investment was at risk at that time and that, as a

[1] Page (P.) 4
[2] P. 19-22
[3] P. 8

result of the administration, she may receive little or no money in return by way of final dividend.

It further submitted that nonetheless, the Complainant chose to delay making her complaint to DFSM until after she had terminated her relationship with the firm. Her complaint was made on 1 July 2021, this being the date of her formal complaint to DFSM.

DFSM submitted that in light of the fact that the written complaint to it was made by the Complainant more than two years after the date she first had knowledge of the matters complained of, it follows that her subsequent complaint to the Arbiter falls outside the competence of the Arbiter in terms of Article 21(c) of the Arbiter for Financial Services Act (Chapter 555 of the Laws of Malta), being time barred by statute.

DFSM further noted that the individual named in Section B to the Complaint Form, who was designated by the Complainant to assist her in relation to her Complaint to the Arbiter, is the person who introduced her to the PWL Loan Note and to *St James International* in the first instance.

Before dealing with the subject matter of the Complaint, DFSM considers it may be helpful to summarise the background in relation to the PWL investment as the facts were complicated. It noted that the information in its reply is reproduced, in part, from the Joint Administrator's Report dated 15 March 2018 which was presented to the High Court of Justice in the UK (ref. CR-2018-000569) in respect of *Privilege Wealth Plc*, in administration.

DFSM provided the following background in its reply:

- *Privilege Wealth plc* was incorporated and operated as a holding company. Its principal purpose was to assist in the raising of finance for its four overseas subsidiaries, as well as day-to-day management of its subsidiaries.

- The business model of the group was to make a profit from borrowing money and in turn investing these funds in the form of high yielding pay day loans to individuals with low or no credit, primarily located in the United States or by buying portfolios of distressed debt.

The interest differential, less operating costs, would represent the profit available for the group whilst the wide spread of risk, by way of low exposure to any one defaulting consumer, would mitigate risks for investors.

- One of the principal investors into *Privilege Wealth Plc* was PWL. PWL raised funds for this purpose from individual investors (such as the Complainant) who acquired loan notes issued by PWL.

- The main operations of the group were conducted by *Privilege Call Centres Inc*, a subsidiary of *Privilege Wealth Plc*, located in Panama City, in the Republic of Panama. The subsidiary operated as a call centre which, at its peak in around October 2016, employed in excess of 150 Panamanian nationals.

- As a result of insufficient financial control within the group, cash flow issues were experienced by *Privilege Wealth Plc* and upon the directors' investigations into the financial stability of the subsidiaries located in Panama it became evident that the subsidiaries' liabilities were significantly higher than those detailed on the accounting records available.

  Moreover, it was also established that profits generated on the payday loans were not being paid to group companies, after operating costs in order to settle intercompany loans.

- Both subsidiaries in Panama had ceased trading and commenced insolvency proceedings with significant inter-company balances due to *Privilege Wealth Plc* and, ultimately, PWL.

  Cash flow issues were compounded further during the autumn of 2016 when articles published by *Offshore Alert* suggested that the whole operation was an investor scam. These reports resulted in *Privilege Wealth Plc* pursuing the author of *Offshore Alert* for defamation and a judgement was obtained against him in the High Court in London on 9 March 2017.

- The financial irregularities within the group, the insolvency of the subsidiaries in Panama and the adverse publicity by *Offshore Alert* had a high impact on *Privilege Wealth Plc's* ability to trade, ultimately resulting in *Privilege Wealth Plc* being put into administration.

- This obviously had severe ramifications for PWL (resulting in PWL being put into administration) and also for the loan note holders in PWL who, as a result, have most likely lost all of their investment.

DFSM further replied as follows with respect to the Complaint:

a) That the Complainant instructed DFSM to make the investment into the PWL Loan Note following receipt by her of investment advice provided by David Sime of *St James International*.

To summarise the essence of the Complaint, the Complainant appears to be however of the view that due diligence, conducted by DFMS prior to the time the investment was made on her instructions, should have been sufficient to enable DFSM to predict the investment was to fail several years after the event as a result of facts and circumstances which could not reasonably have been known to DFSM at the time.

DFSM submitted that it undertook due diligence in relation to the PWL Loan Note offering in late 2014 and early 2015. Due diligence included, *inter alia*, the examination of all offering and contractual documentation pertaining to the investment together with gaining an understanding of the business model conducted by PWL in order to generate the investment returns promised.

DFSM further submitted that any investment whose performance depends on matters associated with the granting of loans in the retail marketplace to individuals with low or no credit, together with collection of interest and principal, carries with it a degree of credit risk.

The Service Provider permitted the investment instruction to proceed because: (1) the investment direction submitted by the Complainant resulted from investment advice which the Complainant freely admits she received beforehand from her appointed professional investment advisor and (2) the Complainant confirmed that she was to be treated as a sophisticated investor in respect of the investment, in which case it is reasonable to conclude that she had sufficient expertise to understand the risks associated with it.

The initial investment was made by DFSM in March 2015, for a fixed term of three years. The investment performed in accordance with its contractual conditions, with all interest payments paid in a timely manner until January 2018, when the last annual interest payment was not received.

DFSM submitted that given the effluxion of time between the initial due diligence and investment (i.e. March 2015 and the subsequent failure of the investment, of which DFSM first became aware of following the non-receipt of the January 2018 interest payment), it was reasonable to conclude that events leading to the failure of the investment (as summarised in its reply), and to the subsequent insolvency of PWL could not reasonably have been known to, or otherwise foreseen, by DFSM at the time the investment was made.

In the circumstances, DFSM considers that the proximate cause of the loss suffered by the Complainant cannot be attributed to any failing by DFSM to conduct due diligence prior to the investment in PWL being made.

The Service Provider pointed out that, moreover, it should be noted that the PWL investment was a fixed term loan note (i.e., for a three-year period), which in light of its static nature could not be monitored in respect of its performance on an ongoing basis other than through the late receipt or non-receipt of contractual interest payments. DFSM submitted that this is an objective test which was deployed by DFSM in monitoring the investment.

In conclusion, the Directors of DFSM previously dismissed claims for compensation made by the Complainant for the reasons mentioned. DFSM noted that no further evidence has since been adduced by the Complainant to support her contention. Consequently, the Directors' position remains (un)altered for the reasons stated.

The Directors of DFSM are also of the view that in this case, Brownlee-Jones (of *Holborn Assets*) who classifies himself as 'Professional Adviser', in respect of his relationship to the Complainant, himself referred the Complainant to *St James International* in the first instance to provide independent advice to the High-Net-Worth Investor and to direct the Trustees to make the investment.

DFSM submitted that Brownlee-Jones (and/or *Holborn Assets*) motivation for this transaction was possibly the large amounts of commissions paid by way of introducers fees in respect of the investment advice provided to the Complainant by *St James International*.

Following the failure of the PWL investment recommended by *St James International*, Brownlee-Jones has now persuaded the Complainant to seek redress against DFSM as trustee and administrator of the pension plan.

DFSM reiterated that given the effluxion of time between the date on which the Complainant was first advised in respect of the failure of her investment in PWL and the time she initially chose to write to DFSM seeking compensation (that is, over 3 years), it is also reasonable for the Directors to assume that attempts made by the Complainant to seek redress from *St James International* failed and it is for this reason that she has now directed her attention towards DFSM.

The Service Provider noted that whilst the position in which the Complainant finds herself is unfortunate, it considers the Complaint made by the Complainant as being unjustified as it required knowledge of events which can only be determined with the benefit of hindsight. Moreover, the Complaint is also time barred by statute and, therefore, falls outside the jurisdiction of the Arbiter.

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

Further Considers:

Preliminary Plea raised in respect of the competence of the Arbiter

The Arbiter shall first consider the plea raised regarding his competence.

The Submissions made by the Service Provider

The Service Provider submitted that the Complaint is time-barred and falls outside the competence of the Arbiter in terms of Article 21(1)(c) of the Arbiter for Financial Services Act (Cap. 555) ('the Act').

DFSM submitted that the Complainant filed a formal complaint more than two years after the date it considered the Complainant first had knowledge of the matters complained of.

The Service Provider referred to its notification to the Complainant sent in February 2018 regarding Privilege Wealth plc being put into administration. It argued that this notification made the Complainant aware that her investment was at risk. DFSM accordingly claimed that over three years had passed from when she first had knowledge of the matters complained of till the formal complaint made by the Complainant with the Service Provider of 1 July 2021.

Statements made by the Complainant relevant to the plea raised

In her Complaint Form to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant indicated *'01/07/2021'* as the date when she first had knowledge of the matters complained of.

It is further noted that in her formal complaint to the Service Provider of 1 July 2021, the Complainant stated *inter alia* the following:[4]

'Whilst I have to date been prepared to allow Dominion as Trustee and Grant Thornton as Administrator to retain a form of joint control of the matter, with a view to eventual compensation, this allowance has now been exhausted. ***This is partly because I have now managed to disinvest entirely from any involvement with the Trustee and partly because I have recently (26 May 2021) become aware that I am not the only investor to have lost a substantial investment with PWL via a Member Account with Dominion****'.*

The Arbiter also notes that, in the *'Summary of Complaint'* filed by the Complainant with the OAFS, through her email dated 17 November 2021, the Complainant also submitted that:

'I do not think it fair or reasonable for Dominion to seek to have my complaint declared out of time. The facts of the situation following the liquidation in February 2018 were unclear and the various positive outcomes being canvassed by the liquidators, then and subsequently, made any clear view of events or outcomes impossible to predict. ***In any event my knowledge of the insurance***

[4] P. 8

failure did not form until August 2019, and even then, the body of uncertainty was considerable. I made my claim when it became clear to me that Dominion had failed in their ongoing duty of due diligence' [5]

The Complainant also stated the following in her final submissions:

*'… **my complaint centres exclusively on the adequacy of the due diligence undertaken by Dominion into PWL**, prior to the investment being made and/or subsequently, **such that a failure of the featured capital risk insurance resulted in no insurance claim being available to me**. (**It follows that any limitation period should only start when I first became aware of such insurance failure**)'*.[6]

As part of the consideration of the plea relating to the period of decadence, raised in terms of Article 21(1)(c) of the Act, the Arbiter shall also consider next the timeline of events as emerging during the case.

Timeline of events

The Arbiter notes the following timeline of events according to the documents and information emerging during the proceedings:

- January 2015 – Investment rationale in respect of the PWL Loan Note investment issued to the Complainant by David Sime of *St James International*.[7]

- May 2015 – According to the details provided by the Complainant in her Complaint Form, the investment into the PWL Loan Note for GBP250,000 was undertaken in May 2015.[8] This was not contested by DFSM.

- February 2018 - A communication dated 6 February 2018 was issued by the Managing Director of the General Partner (*Privilege Wealth Management Ltd*) of the Privilege Wealth One Limited Partnership. This communication, which was issued to all note holders, related to the placing of *Privilege Wealth Plc* in UK (a major debtor to the Privilege Wealth One Limited Partnership), into administration on 23 January 2018.[9]

[5] P. 25 - Emphasis added by the Arbiter
[6] P. 139 - Emphasis added by the Arbiter
[7] P. 55
[8] P. 3
[9] P. 35 - 43

The communication of 6 February 2018 further indicated that on 23 March 2018, *'there will be no funds remitted to [the Privilege Wealth One Limited Partnership] by [Privilege Wealth Plc in UK] in order to pay redemption, capital and interest payments to Loan Note Holders'*.[10]

The said communication further described various facts emerging on *Privilege Wealth plc* in UK and how this affected the PWL Loan Note investment. The notice also outlined *inter alia* the financial position of the partnership,[11] and also covered certain aspects involving the insurance policy amongst other failures involving the Privilege Wealth structure.

- February 2018 – A further communication dated 19 February 2018 was issued from the Managing Director of the General Partner of the PWL Loan Note investment. This communication related to the possibility of the dissolution of the partnership and asked investors to vote on the way forward by 9 March 2018.[12]

- February 2018 – DFSM sent a letter to the Complainant dated 23 February 2018,[13] as well as an email dated 26 February 2018,[14] relating to the February communications sent by the Managing Director of the General Partner of the PWL Loan Note investment. DFSM's communications highlighted *inter alia* the deadline of 9 March 2018 and asked the Complainant to liaise with her advisor and communicate (to DFSM), her chosen course of action in advance of the deadline.

- 1 July 2021 – The Complainant sent a formal letter of complaint to DFSM through her letter dated 1 July 2021.[15]

- 21 July 2021 – DFSM replied to the formal complaint filed by the Complainant by way of its letter dated 21 July 2021.[16]

[10] P. 35
[11] P. 39
[12] P. 45 - 46
[13] P. 47
[14] P. 49
[15] P. 8
[16] P. 10

Other considerations, observations and conclusion

In essence, the Complaint relates to the loss claimed by the Complainant on the PWL Loan Note,[17] with her request for compensation based on the claim that DFSM failed in its fiduciary duty to undertake adequate due diligence on the PWL Loan Note and in respect of the insurance policy that was meant to be in place in respect of such product.

With reference to Article 21(1)(c) of the Act, the said article 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 Act came into force on 18 April 2016. With regards to the '*conduct of a financial service provider*' the law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

Having carefully considered the pertinent matters, the Arbiter concludes that the Service Provider's preliminary plea, where it was claimed that he has no competence to hear this Complaint in terms of Article 21(1)(c) of the Act, is justified in the particular circumstances of this case and is accepting it for the reasons further outlined below:

i. *Date of awareness about the loss on investment* – As outlined above, the Complainant indicated the date *'01/07/2021'* as to the date when she first had knowledge of the matters complained of.

   However, this date cannot be accepted by the Arbiter given that this date is actually the date when the Complainant made a formal complaint to the Service Provider. The Complainant would obviously have been aware of the matters complained of prior to filing her formal complaint with DFSM.

[17] P. 4

It is noted that as described in her formal complaint letter of 1 July 2021, her formal complaint was rather triggered *'partly because [she] has now managed to disinvest entirely from any involvement with the Trustee'* and also '*partly because I have recently (26 May 2021) become aware that [she] is not the only investor to have lost a substantial investment with PWL via a Member Account with Dominion'*.[18]

The Arbiter however cannot reasonably and justifiably take the 1 July 2021 or 26 May 2021 as *'the day on which the complainant first had knowledge of the matters complained of'* for the purposes of Article 21(1)(c) of the Act.

The Complainant was not prohibited, and neither was she in some way prejudiced from filing a formal complaint with DFSM prior to terminating or divesting her relationship with the trustee. She was freely in a position and able to submit a formal complaint with the Service Provider during the time DFSM acted as trustee.

The date when the Complainant became aware that there were other investors who lost money on the PWL Loan Note cannot either be taken to justify any delay in submitting a formal complaint. Nor can such a date prevail on any other prior period when the Complainant can reasonably be considered as first having knowledge of losses on the investment.

As part of the justifications provided by the Complainant in respect of the reasons why she filed her formal complaint to DFSM in July 2021, the Complainant also submitted that she had no clear view of events and that the outcome of the administration/liquidation process was impossible to predict.

The Arbiter however considers that the notification of 6 February 2018 relating to the placing of *Privilege Wealth Plc* in UK, a major debtor to the PWL Loan Note investment as outlined above, provided clear indications of material issues which adversely and significantly affected the value of the investment.

[18] P. 8

Apart from the matters raised earlier on in this decision, the said notice of 6 February 2018 also *inter alia* specified that:

'[Privilege Wealth Plc] and its subsidiaries are the major debtors to [Privilege Wealth One Limited Partnership], owing in excess of $38m, and therefore the impending liquidation of [Privilege Wealth Plc] immediately brings into question the 'carrying value' of the primary asset on the [Privilege Wealth One Limited Partnership] balance sheet; namely, promissory notes receivable and accrued interest thereon issued by [Privilege Wealth Plc]'.[19]

The said notification further outlined that:

'… If we currently assume Zero value to the [Privilege Wealth Plc], the [Privilege Wealth One Limited Partnership] deficit is $28.5m …' [20]

The Arbiter also notes that whilst the process of the insolvency procedures initially involved administration, which could have possibly provided more hope of some recoupment, such procedures eventually turned into a liquidation procedure shortly thereafter (in June 2018) in the same year.[21]

There were accordingly clear indications at the time of material problems involving the investment and ability to return the capital.

ii. *Date of awareness about the issues with the insurance policy related to the disputed investment* – As to DFSM's alleged failure to ensure adequate due diligence and in verifying that the PWL Loan Note kept its insurance cover up to date, the Complainant is considered to have had relevant knowledge on these aspects also in 2018.

The Arbiter notes the Complainant's submissions that her *'… knowledge of the insurance failure did not form until August 2019, and even then the body of uncertainty was considerable'*.[22]

[19] P. 35
[20] P. 39
[21] https://www.offshorealert.com/investigations/privilege-wealth/
[22] P. 25

It is also further noted that to substantiate her claim the Complainant referred to a letter dated 14 August 2019, which she indicated was sent by the liquidators, Grant Thornton, which she quoted as stating the following:

'the Companies insurance policy was originally incepted from 1 December 2014 to December 2015. Thereafter the date was extended to November 2016 and then to 3 January 2018 … However, the Companies most recent policy does not cover protection of the Investors' capital as the premiums were not paid'.[23]

The Arbiter notes however that in the original notice sent by the Managing Director of the General Partner of the PWL Loan Note, dated 6 February 2018, in the section titled 'Financial Position of the Partnership', there were already indications of shortfalls with the insurance cover.

In the said notice, the Managing Director had *inter alia* indicated the following:

'*My understanding is that despite paying over $2m … no claims are possible under the capital shortfall insurance policy because not all premiums due for the year Dec 2016 to Nov 2017 were paid*'.[24]

Knowledge about the insurance failure had thus already emerged in early 2018.

As outlined in her final submissions, the Complainant herself stated that '*any limitation period should only start when I first became aware of such insurance failure'.* [25]

Hence, in the particular circumstances, it is difficult for the Arbiter to reasonably consider the Complainant as first having knowledge of the matters complained of at a date later than in the year 2018.

For the reasons mentioned, the Arbiter considers that there is no sufficient basis on which he can reasonably and justifiably consider May or July 2021 (or any

[23] P. 24
[24] P. 39
[25] P. 139 – Emphasis added by the Arbiter

other date after 1 July 2019) as the time when the Complainant first had knowledge of the matters complained of, as held by the Complainant.

A formal complaint with DFSM was only filed on 1 July 2021, which is more than two years from the day on which the Complainant is considered by the Arbiter to first had knowledge of the matters complained of.

Conclusion

For the above-stated reasons, the Arbiter is accepting the submission made by the Service Provider that he has no competence to hear this Complaint in terms of Article 21(1)(c) of the Act and is accordingly dismissing the case.

Given that the Complaint is being refused on the basis of a preliminary plea, each party is to bear its own legal costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services