

## **Before the ARBITER FOR FINANCIAL SERVICES**

**Case ASF 011/2022**

**LG (the 'Complainant')**

**Vs**

**TMF International Pensions Limited**

**Reg C 76483**

**(the 'Service Provider' or 'TMF')**

### **Sitting of 18 August 2023**

The Arbiter,

Having seen the Complaint filed with the Office of the Arbiter for Financial Services (OAFS) on 27 January 2022<sup>1</sup> where the Complainant claimed total loss of funds amounting to GBP £289,686.16 in his pension known as the QROPS Melita International Retirement Scheme Trust (the 'Scheme') for which the Service Provider acted as Trustees and Administrator of the Retirement Scheme Trust.

### **The Complaint**

Complainant explained that between 30 January 2015 and 07 May 2015, he invested a total sum as above indicated which was invested in what he claims were risky investments that did not match his risk profile.

He accuses the Service Provider of insufficient due diligence to ensure that the funds were safe, secure and protected in accordance with his risk profile.

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<sup>1</sup> Page (P.) 1 - 41

As a remedy, he requested:<sup>2</sup>

1. Refund of GBP £289,686.16 less any amount that may be recovered from the UK's FSCS (Financial Services Compensation Scheme) where he was claiming, with the assistance of the Service Provider, compensation based on bad advice given to him by an FCA licenced investment advisor;
2. Interest at 8% since 30 January 2015 or the amount that the GBP £289,686.16 would have been worth had it not been sent to the Service Provider, whichever is the greater;
3. Compensation for the stress and aggravation for GBP £1,000;
4. Professional fees incurred with bringing this Complaint.

The Complaint to the OAFS was preceded by direct complaints raised on behalf of Complainant by Mendelsons Solicitors of Manchester UK, first dated 26 March 2021<sup>3</sup> and, second, dated 12 May 2021.<sup>4</sup>

In these complaints, the Complainant seeks the same remedies as explained above and accuses the Service Provider of:

- Failure to meet regulatory obligations
- Breaking principles 2 and 6 of the FCA (Financial Conduct Authority) Principles of Business
- Failure to undertake due diligence on investments
- Allowing Complainant to make investments that were unsuitable for his risk profile, which did not match his risk profile and failing to properly assess his personal circumstances and pursue his best interests.

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<sup>2</sup> P. 4

<sup>3</sup> P. 8

<sup>4</sup> P. 9 - 11

## **Reply of the Service Provider**

TMF replied summarily to the direct complaints by means of a letter dated 13 May 2021,<sup>5</sup> wherein they stated:

*“TMF International Pensions is a regulated Retirement Scheme Practitioner in Malta and is not a SIPP provider in UK and not regulated by FCA. Basic due diligence on the FCA website would have confirmed this.*

*Both Mr & Mrs LG were not solicited nor canvassed by TMF International Pensions. Mr & Mrs LG were advised by Serenus Consulting, an FCA regulated firm. The application forms signed by both Mr & Mrs LG clearly state the advice was given by Serenus Consulting.*

*TMF International Pensions does not give advice and is not regulated so to do, and will only accept business introduced to it through such regulated advisers.*

*The Trustees therefore fully refute your assertions and claims. They respectfully suggest you direct your attentions to the UK FCA regulated adviser, with whom Mr & Mrs LG solicited their advice and proceeded with knowledge aforethought”.<sup>6</sup>*

The Service Provider replied to the OAFS Complaint on 9 Feb 2022<sup>7</sup> stating:

- Complainant was introduced by Serenus Consultants, an FCA regulated adviser, who were acting as his investment advisers.
- Complainant was a Chartered Accountant, Company Director, and in his attitude to risk questionnaire defined himself as a ‘Professional Investor’ rather than a retail investor.
- The original funds were invested in an investment portfolio managed by Brooks Macdonald for an amount of GBP 120,000. This investment performed well and generated about GBP £50,000 overall profit.
- The balance of GBP £ 164,860 was invested in a high interest loan note in a German property Company, Dolphin Capital GmbH – German Listed

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<sup>5</sup> P. 12

<sup>6</sup> *Ibid.*

<sup>7</sup> P. 47 - 78

Building. The Investment Advisor recommended this investment as suitable for the Complainant given that he had a strong financial background and was a qualified Accountant and, according to the Investment Advisor, fitted the Balanced approach to risk resulting from the attitude to risk questionnaire as it meets the Complainant's long term capital growth objective in the loan note version that rolls up the high coupon and pays compound interest during the 5-year term which had a nominal coupon of 12% - 15% stepping up each year.

They further stated that:

*"The Trustees are not Investment Advisers and in accordance with the Personal Retirement Schemes Regulations B.1.3.10, the Trustees accepted the appointment of Serenus Consulting as a suitable Investment Adviser, as they not only complied with the Regulations in 2014 but also the most recent version. They were, as stated, regulated by the FCA to give this advice. The Trustees were satisfied from the documents provided, that not only was Mr LG aware of the investment in Dolphin Capital and he understood and accepted the risks attached to it. As a professional investor and a chartered accountant, the Trustees accepted that Mr LG understood what was presented to him by Serenus Consulting.*

*The Trustees are aware that Mr LG has made formal complaints to the FCA regarding the advice he received from Serenus Consulting and approached the UK Financial Services Compensation Scheme (FSCS) for compensation. Please see attached. According to the FSCS letter dated 15/12/21 (attached), paragraph 1 states that the FSCS has paid compensation to Mr LG for his loss. In fact, TMF International Pensions assisted the FSCS in this claim in June 2021.*

*The Trustees are concerned that the compensation already paid by FSCS prior to the application being submitted to the Arbiter by Mr LG has not been disclosed. One might wish to question why?*

*In conclusion, the Trustees fully refute this claim for the following reasons:*

- 1) Mr LG is claiming a full refund of the total amount invested (less any compensation awarded by the FSCS). However, the Brooks Macdonald investment was not "lost" as claimed. To claim a loss for capital already*

*distributed and a remaining fund in profit, is grossly misleading at best, if not fraudulent. The Trustees are therefore led to question the honesty of this claim.*

- 2) *The Trustees did carry out sufficient due diligence on the remaining asset by not only insisting on a suitably qualified Investment Adviser in line with the Regulations, but also have on file copies of the advice given and accepted by Mr LG, his attitude to risk and Professional Investor status.*
- 3) *Mr LG is already pursuing the right course of action, and receiving compensation from FCA and FSCS who are responsible for overseeing the advice provided to him by Serenus Consulting in UK.”<sup>8</sup>*

## **Preliminary – Revisions to the Complaint and ensuing matters**

### **The hearing sessions**

The first hearing session was held on 14 March 2022.<sup>9</sup> The Complainant requested permission to change his Complaint in the light of the reply submitted by the Service Provider.

### **The revised Complaint**

An amended Complaint dated 16 March 2022<sup>10</sup> addressed to the Service Provider was filed with the OAFS whereby the investment of GBP £120,000 was excluded from the Complaint as there was no loss suffered on this investment so the Complaint

***“will focus on the investment of GBP £160,000 into Dolphin Capital, less the FSCS award”.***<sup>11</sup>

In the revised Complaint, it was clarified that Complainant had contacted (Investment Advisor) Serenus and several options were discussed *“including the unregulated German property investment vehicle known as Dolphin which*

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<sup>8</sup> P. 48

<sup>9</sup> P. 79

<sup>10</sup> P. 82 -101

<sup>11</sup> P. 85

*guaranteed 13.8% growth per annum over 5 years. This was held in a QROPS scheme in Malta with TMF Group the trustees”.*<sup>12</sup>

The Complainant further explained:

*“At this point (Complainant) was aware that Dolphin Capital’s investment into German property was unregulated, however, the marketing literature of the Dolphin Capital addressed this by offering attractive security in the event of a default on the loan note.*

*The marketing documents state unambiguously in several places that the investment funds would be secured by a first legal charge on the underlying assets, and the charge would only be released once all investors were repaid. The marketing documents specify that the lender’s funds would be transferred by the trustees to a law firm named Botterman Khorrami Law (“B K Law”), where they would be held until security over the assets was in place. Only once that was in place would B K Law transfer the funds to the Dolphin Trust for investment.*

*It was on this basis alone that (Complainant) felt secure enough with potential risks and agreed to go ahead with the investment.*

*In recent weeks (Complainant) has examined the matter and it has come to light that Complainant is not registered as a first creditor over Dolphin Capital/German Property Group assets. On further investigation, (Complainant) have discovered that Complainant’s funds were transferred by TMF Trustees to a bank account that does not appear to be owned by B K Law. In a letter provided by B K Law to a claimant in a similar position to Complainant, B K Law state that the last date they received monies in an account for UK loan notes intended for Dolphin Capital/German Property Group was on 3<sup>rd</sup> September 2014. Claimants in a similar position to the Complainant have stated that many of the transfers went to a company called Whites Group and have identified the bank account numbers used in their transfer. The Complainant’s funds were transferred to “Beneficiary account number: GB03LOYD30961846564960”; the last 8 digits ‘46564960’ appear to relate to a Lloyds bank account owned by WTUK Ltd – Whites Group – 46564960.*

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<sup>12</sup> P. 82 - 83

*Further, the letter from B K Law specifies the account name for receiving such funds as 'DC80PKG', whereas the beneficiary's name on the Complainant's transfer is stated as 'BK LawDC80 5 Years Loan Notes'.*

*It is apparent that TMF Trustees did not adhere to their express undertaking to secure first legal charge for the Complainant, and that this is due to the transfer of the funds not having taken place as advertised. The Complainant is now unable to recover any of his assets through the liquidator.*

*New basis of claim:*

*We hold TMF International Limited responsible for our client's loss through German Property Group. At this stage, we do not allege that the loss itself is due to TMF International, but we allege that had TMF carried out its commitments to our client, he would have been able to recover at least a portion of his losses from the liquidator. He now has no recourse against the assets themselves.*

*TMF in their capacity as trustees did not fulfil their express commitments to secure first legal charge on the assets. This amounts to a serious breach of trust and negligence in a matter that was critical to the decision of the Complainant to invest in the Dolphin Group.*

*Further, the actions of TMF in the incorrect transfer of the funds to Dolphin Capital were in breach of the various Maltese regulations that require businesses to act in the best interests of their scheme's beneficiaries, to act honestly, to carry out their obligations with good faith, and to carry out its fiduciary duties to protect the interests of its members and beneficiaries."<sup>13</sup>*

In the revised Complaint, it was also clarified/confirmed that:

- Complainant had received a compensation of GBP £85,000 from UK FSCS, being the maximum amount possible.
- Complainant upholds that investment of more than 50% of the total QROPS in a single unregulated investment does not adhere to the balanced approach to risk resulting from the approach to risk questionnaire.

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<sup>13</sup> P. 83 -84

- Notwithstanding the advice of the Investment Advisor, the Trustee had responsibility to make their own due diligence that the investment was in line with the risk profile of the Complainant as was decided by the Arbiter in the decision of case ASF 078/2019 pages 26 – 27.

In summary, the revised Complaint maintained that the Service Provider was at the very least partially responsible for the decision to invest into Dolphin Capital and fully responsible for the manner in which the investment was carried out, which left the Complainant with no charge as collateral over the assets.

As a result, the remedy was redefined:

1. GBP £75,000 as the balance of the original investments in Dolphin not yet recovered (following the UK FSCS award);
2. Interest at 8% since 30 January 2015 or the amount that the GBP £75,000 would have been worth had it not been transferred to the Service provider, whichever is the greater;
3. Compensation for stress and aggravation in the sum of GBP £1,000;
4. Professional fees incurred in bringing this Complaint.

Among the attachments with the revised submissions, with particular relevance to this Complaint, there were:

- Information Sheet<sup>14</sup> of Dolphin Trust meant to attract investors' interest in subscribing to the Fixed Term Loan Notes in which the Complainant highlighted several references to lenders having a registered first legal charge on the underlying asset.<sup>15</sup>
- Letter dated 27 July 2020<sup>16</sup> issued by a German legal firm BOTTERMANN KHORRAMI stating that no monies were received in UK loan notes DC80PKG after 3 September 2014, so, once the investment in Dolphin was made, after such date it could not have been invested in such loan notes.

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<sup>14</sup> P. 88 - 91

<sup>15</sup> P. 89; 91

<sup>16</sup> P. 92



### **Service Provider's reply to revised Complaint**

In reply to the revised Complaint, the Service Provider, apart from questioning the credibility and good faith of the first Complaint which claimed for losses not incurred and did not mention the compensation from FSCS, stressed that:

- Complainant was a financially sophisticated professional whose LinkedIn profile shows he held high finance related professional positions and holds a Master's Degree in Economics
- The Trustee subscribed to the Security as indicated in the Loan Note Instrument of Dolphin Capital
- Decision for such investments was made by Complainant on the advice of Serenus Consulting
- Arbitrator's decision in case ASF 078/2019 does not apply to this Complaint as in the quoted case investors were unsophisticated and the Investment Advisor was not FCA licensed.
- Dolphin Capital was not considered high risk and unsuitable for Complainant's risk profile as, according to the Investment Advisor, Dolphin Capital was rated as '1' by Credit Rating Agency HoppenstedtKreditinformationen GmbH and Complainant had a strong financial background and was a qualified Chartered Accountant.

### **The second hearing**

The second hearing was held on 3 May 2022, during which the Complainant testified that:

***"The basis of my complaint is that I accept that TMF are not responsible for the investment, the sensibility of making that investment. However, it did have a responsibility to ensure that the investment was made in the appropriate way.***

***I accept that this was a risky investment. However, in learning about the company, Dolphin, in reading the marketing literature, I was assured that the risk was minimum in that I would be treated as a creditor of the organisation. And, in order to do that, I would receive a kind of attractive security in that my investment would be given a term Secure First Legal Charge on the underlying***

***assets which to me sounded that I was a creditor. So that reassured me that it was not as risky as I thought; and, if anything went wrong with the investment, I would have a bigger chance to have my funds returned.***

***The marketing literature explained that to secure that was via the Trustee transferring my funds to a law firm called BK Law who would then hold those funds and ensure that security was made before transferring into the investment fund. What I have subsequently learnt is that it did not take place. I have tried to make a claim as a creditor through the liquidation process and that claim is being declined because my funds are not recognised as having that First Legal Charge. And what I have learnt through the credit association is that many investors are having the same problem that their funds are not transferred via the legal firm but via a transfer company called Whites. And that meant that the funds have gone directly to the firm to use in any way they see fit rather than being invested in property which is the whole purpose of the investment.***

***As a result, I am now making the claim that TMF did not transfer the funds correctly and have been negligent in securing my funds appropriately.***

***Questions by Mr K<sup>17</sup> to the complainant:***

***Asked if this investment was made absolutely on the basis of it being of securing a specific status as a creditor, I say, yes. At the time, it sounded like a really attractive investment and much better than I thought was available in the market, which represents risk but I was assured that if I were to be treated as a creditor, and the fact that this business is investing in property, it would be a safe investment and, therefore, be able to get something back.***

***Asked how did I get this advice on this investment, I say that the independent financial advisor told me two things. He told me how much the return on the investment would be - 13.8% p.a. - which is a really good, guaranteed return. But then he shared the marketing material with me that demonstrated why I would have this security and, therefore, ensured that the risk was not great.***

***It is being said that I received independent, financial advice and the complaint here is not about the investments as such, I say that, no. I accept that it was about a decision and I received some compensation for that but it is not the amount I invested.***

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<sup>17</sup> Mr K was assisting Complainant

***What I am complaining here is that the way the investment was done has left me without any further recourse. I cannot now be treated as a creditor; I am not included in the liquidation process.***<sup>18</sup>

Under cross-examination the Complainant said:

***“It is being said that in my original complaint to the Arbiter I said that TMF has lost all my money, over £250,000; and that my lawyers said that it was a speculative complaint the first time round knowing very well that TMF had not lost all of my money and asked why I made a false declaration, I say that I do not know why that form of words were used because not all of the funds have been lost but part of the fund was regulated in a safe investment.***

***Asked why did I make a false declaration, I ask would that change the situation?***

***Asked where did I hear about Dolphin investments, I say that Serenus introduced me to Dolphin. Asked if I ever heard of Dolphin before I met Serenus Consulting, I say, I do not think so.***

***Asked if I remember a meeting in my house in which I asked Serenus Consulting to attend when there was another person present - Mr Warren Dunn, I say, yes. It is being said that Mr Warren Dunn introduced me to Dolphin, I say that I thought it was Serenus.***

***Since I said that Serenus produced the marketing material, and I thought that it was quite a good return, asked if I had seen that material before and if it was given to me by Mr Warren Dunn, I say I don't know. I do not know who gave me that. Well, I think it was Serenus.***

***I believe that Serenus told me about Dolphin. Asked if I ever heard of it before, I say that I cannot remember. I think Warren Dunn introduced me to Jim Bell. Asked why would Warren Dunn introduce me to Jim Bell, I say that Warren Dunn was not an independent financial advisor whereas Jim Bell was.***

***Asked what I was asking Warren Dunn to do for me, I say I asked Warren Dunn to help me find a better way for investing, so he knew of Jim Bell's company and introduced me to them.***

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<sup>18</sup> P. 112 - 113

***It is being said that Mr Dunn's name appears on the Dolphin Capital's application form for him to be paid commission for this product and asked if I know anything about that, I say that I do not know. Asked how well do I know Mr Dunn, I say that he is an old friend.***

***It is being said that he introduced me to Jim Bell with no knowledge or forethought of Dolphin Capital which is my stated affidavit to this hearing, I say that he sounds that he would have known about Dolphin but I thought it was Jim Bell who told me about Dolphin and recommended making the investment. It is being said that Warren Dunn was not at my house when I met Jim Bell, I say that he may have been.***

***It is being said that it sounds rather strange that my friend, Warren Dunn, who introduced me to Dolphin and who introduced me to Serenus so that I could invest in Dolphin and Mr Dunn was paid for that, I say, I cannot remember which order the discussions went. I think Warren introduced me to Jim and Jim discussed a range of investments and we opted to go with Dolphin.***

***Asked when did I make an application to the FSCS for compensation, I say that I started the process just after the investment defaulted which was March 2020, so, probably the process started in April 2020; it probably took a few months to get the claim together.***

***Asked if my Trustees, TMF, helped me in that, I say that I do not think so.***

***Asked if TMF did not fill any forms and send data to my lawyers or assist me with my that claim with the FSCS, I say not that I was involved with.***

***It is said that part of my claim to the FSCS is that I assigned my rights under the investment in Dolphin to the FSCS. Asked if I assigned my rights on this as part of my contractual agreement with the FSCS, I say I do not know. How would I know? I submitted a claim using a lengthy legal process. Asked if this was done under advice from my lawyers, I say, yes."***<sup>19</sup>

Given these developments, the Arbiter requested that a copy of the claim and the agreement reached with FSCS be provided to the OAFS and notified to the Service Provider.

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<sup>19</sup> P. 114 - 115

The Arbiter was to then give a preliminary decision on whether he can continue to hear the case in the light of the claim filed with the FCSC, in view of the provisions of Article 21(2)(a) of CAP. 555.

In a decree issued on 10 May 2022, the Arbiter concluded that:

*“In the first eventuality (that the Complainant has transferred his rights to the FSCS), the Arbiter cannot continue to hear this case because it is amply clear that the Complainant’s rights have been transferred to the FSCS.*

*In the second eventuality, that is, if the FSCS waives its acquired rights and authorises the Complainant to pursue his rights to make up for the shortfall in losses, the Arbiter would continue to take cognisance of this case.*

*For the above-stated reasons, the Arbiter is adjourning the case sine die and would re-appoint it only if the OAFS receives a communication from the Complainant together with a specific authorisation from the FSCS, that the Complainant may continue with these proceedings.”<sup>20</sup>*

On the 23 June 2022, the Complainant informed the OAFS that FSCS have reassigned all rights to the Complainant and that the Complainant *“must repay the FSCS the full amount of his award from any compensation resulting from claims relating to the reassigned rights”*.<sup>21</sup>

It was stated that, therefore, the complaint amount should be reinstated to GBP £160,000 from the reduced GBP £75,000 which had taken into consideration the compensation of GBP £85,000 by FSCS. A copy of the reassignment agreement dated 20 June 2022 was submitted.<sup>22</sup>

On 25 July 2022, the Arbiter decreed that the case may be reappointed for continuation and rejected the Service Provider’s plea that the Arbiter was still not competent to hear the case by virtue of Article 21(2)(a) of CAP. 555, as such plea was not justified at law.<sup>23</sup>

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<sup>20</sup> P. 132- 133

<sup>21</sup> P. 134

<sup>22</sup> P. 134; 143 - 147

<sup>23</sup> P. 152

## **Analysis and considerations**

Having heard the parties and seen all the documents and submissions made, the Arbitrator further considers:

### **The third hearing**

At the third hearing of 4 October 2022, it was agreed that written questions were to be made by the Service Provider to the Complainant who would reply in time to the next sitting of 14 November 2022.

The Service Provider sent questions and several tabbed documents attached in confirmation which can be accessed on file pages 211 – 348. The Complainant's answer can be accessed on file pages 356 – 357.

What is of relevance is the query that the investment in Dolphin Capital was first pushed by a 'friend' of the Complainant who had an interest in marketing the loan issue and that such contact may have influenced the Investment Advisor to recommend positively on such investment given that they were introduced to the Complainant by such a 'friend'. The Complainant denied having any knowledge of the matter.

Also, of particular relevance are the questions and answers provided as follows:

**28. "Did you receive written advice from Serenus consulting and understand it?"**

**Yes.**

**29. Were the risks of investing in Dolphin Capital explained to you?**

**Yes.**

**30. The Loan Note instrument was drafted by Pitmans, a well-respected UK Law Firm. Is there anything in the Instrument which is untoward?**

***I don't know. I relied on Serenus Consulting and TMF to consider this.***

**31. Is the Loan Note Certificate No: 14333 issued 26/3/15 compatible with what Warren Dunn negotiated with Dolphin Capital?**

***I was not aware that Warren Dunn was negotiating anything with Dolphin capital. Once I was introduced to Serenus Consulting, I dealt with them alone.***<sup>24</sup>

### **The fourth hearing**

The fourth hearing was held on 14 November 2022.

TMF representative made his case of follows:

***“Mr LG was introduced to us by Serenus Consulting, a FCA regulated firm, in particular by a gentleman by the name of Jim Bell. We were approached by Mr Bell to take on Mr LG as a client, to transfer his pensions to a Maltese pension scheme and to make various investments on his behalf. This was in 2014.***

***As regards to due diligence, we have always checked on Serenus and all their intermediaries whether they are duly regulated in the country in which they operate and in which the client is resident.***

***Serenus Consulting was a FCA regulated firm with the relevant permissions to advise Mr LG on pension transfers and investments. With regards to Mr LG himself, we carried the usual due diligence, and the usual KYC due diligence on him to confirm that he is who he says he is. And to confirm, in this case, that Mr LG was a professional investor. We checked his LinkedIn profile and other sources to confirm that, as well as the signed declarations that he signed to Serenus.***

***Regarding the investments chosen, I say that we have a copy on file of the investment recommendation made by Serenus Consulting to Mr LG together with his acknowledgement and sign-off as to the suitability of those investments.***

***I say that there were two different portfolios. There was a portfolio with Brooks Macdonald and investments into what was then called Dolphin Capital, and now known as the German Property Group.***

***As regards to checks we did on the investment themselves, I say that Brooks Macdonald is a regulated discretionary manager in the UK. I have checked them up on the FCA website to ensure that they are suitable together with a portfolio matching the investment risk submitted by Mr LG on Dolphin which***

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<sup>24</sup> P. 357

*is a more esoteric investment. We checked out the lawyers, the bankers, and the proposal being put forward, in this case, the law firm operating; it is called Pitmans, a very well-known law firm in the UK. Lloyds Bank were the bankers. We take that as being a reasonable due diligence on the ... business.*

*When I say, 'A portfolio with Brooks Macdonalds', it is not an investment in one vehicle, it is a portfolio.*

*There were press comments that Dolphin were in trouble. We made Mr LG aware of our concerns over the investments and suggested that he contact his investment advisor to take further advice on what was going on with Dolphin. I do not recall if there was any reaction from Mr LG at that point.*

*We communicated with Serenus as well and suggested that they look into the Dolphin investment. It became clear reasonably quickly that there was a major issue with Dolphin because of the lack of communication from their offices.*

*I wrote to Mr LG informing him of the loss issue here and, ultimately, he said that he wished to make a complaint and a claim against the FSCS and we assisted him and his advisor in formulating a complaint against Serenus Consulting and the Financial Services Compensation Scheme.*

*We have not got the evidence that the FSCS compensated him the £85,000. The evidence we have is the paperwork saying they will pay him the £85,000.*

*Once we received the complaint from Mr LG and the letter from Mendelsons, we were somewhat surprised. We followed the complaints procedure, went through the file and we responded to Mr LG's original complaint which was factually inaccurate, which resulted in an amended complaint to the Arbiter.*

*As in our past, under the Act, we are not regulated investment advisors. We cannot give advice on investments. We rely solely on regulated intermediaries to provide investment recommendations. Our duty is obviously to ensure that they are commensurate with the investment policy statement submitted by the client together with ... professional investors.*

*We rely, as is required by the Pensions Act, on independent, suitably regulated investment advisors to provide investment advice to the client. We also check that and carry out our due diligence which we did in this case and suggested that any complaint is made to Serenus Consulting and PI Insurance.*



***Cross-examination:***

***As I said earlier, yes, TMF do have the responsibility to perform due diligence on investments.***

***Yes, we carried out due diligence on the Dolphin/German Property Group investment.***

***Asked whether I checked the literature that the client was being presented with in the lead up to this, and ensured that it matched what was in fact happening on the ground, I say that the literature that was given to the client was not provided to us so we were unaware of what the client received.***

***Asked whether we asked Mr Bell for the literature he was providing Mr LG so that we could do due diligence accordingly, I say, no. We asked for the literature on Dolphin Group on the investment and the proposal and the submissions that were made to Dolphin, the application process.***

***Asked whether the Dolphin literature that we have make any mention of there being a secured line of first creditor status for investors like Mr LG, I say, no, there was no such mention of it.***<sup>25</sup>

**Final submissions**

The Complainant did not make any final submissions and the Service Provider's final submission added no new information other than already available.

**The Merits of the Case**

**Observations, analysis and conclusion**

This is quite an unusual Complaint that has had three lives.

The first life is the original Complaint, where the Complainant claimed full recovery of the investment of GBP £289,686.16 less any amount awarded by the FSCS. This Complaint was signed on 10 January 2022 but registered with OAFS on 27 January 2022.

A second life happened when the Complaint was revised by means of a letter of 16 March 2022 following the first hearing of 14 March 2022 where the remedy sought was reduced to GBP £75,000 by exclusion of (1) the amount of GBP

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<sup>25</sup> P. 358 - 360

£120,000 invested in the portfolio under discretionary management of Brooks MacDonald and (2) the compensation of GBP £85,000 received from FSCS.

A third life was morphed into following a request by the Arbiter for deposition of the full claim on and award by the FSCS. The Complainant informed on 23 June 2022 that with respect to the compensation of GBP £85,000 from FSCS the Complainant was restored with full rights over his claim on the Service Provider which had previously been assigned to the FSCS under the compensation deal.<sup>26</sup> Consequently, the claim amount was restored to GBP £160,000 being the amount invested in the Dolphin Loan Note.

In all three lives, apart from the amounts claimed, there was also included a claim for interest, costs and a small measure of moral compensation.

The Arbiter notes that in all three lives, the Complainant showed uncomfortable economy with proper disclosure of important facts. This brings into question whether the claim is motivated by genuine or opportunistic reasons.

In the original claim, the Complainant claimed compensation also for the amount invested with Brooks Macdonald on which no losses were incurred. On the contrary, the last valuation statement presented dated 19 April 2021,<sup>27</sup> shows a value of GBP £166,731.65 compared to an original investment of GBP £120,000 in 2015.

Furthermore, in the first Complaint, the Complainant whilst seeking full compensation of the amount invested *“less any amount awarded by FSCS”*, he fails to inform that on 29 July 2021, the FSCS had already awarded compensation of GBP £85,000 which, according to the Service Provider,<sup>28</sup> was received in July 2021, i.e., six months before filing the Complaint with OAFS.

Furthermore, the Complainant failed to disclose that by accepting the compensation from FSCS, he had transferred to FSCS his rights to *“claim (or receive and keep any payments) from anyone else involved in your loss (except*

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<sup>26</sup> P. 134

<sup>27</sup> P. 254 - 256

<sup>28</sup> P. 355

*from the Investment Advisor*).<sup>29</sup> This clearly involved any awards that may have been given by the Arbiter under this Complaint.

In the second life, where the Complaint remedy was reduced to GBP £75,000, as explained above, the Complainant again fails to disclose that he had transferred his rights to such claims to the FSCS.

In the process leading to the Complaint's third life, when the claim value was restored to GBP £160,000 following recovery of the rights assigned to FSCS against (eventual) full refund of compensation received, it emerged (from submission of the application for compensation made to the FSCS on 8 June 2020<sup>30</sup>) that there again the Complainant had included in his loss the amount invested with Brooks Macdonald, and it seems that the compensation of GBP £85,000 (the maximum possible) was arrived at on the basis of such total loss.<sup>31</sup>

The Complainant bases the case for compensation from the Service Provider on the fact that the latter has not performed their duties as Trustees and Administrators of the retirement scheme when they did not challenge the advice given by the Investment Advisor to invest GBP £160,000 out of GBP £280,000 (57%) in a single unregulated and illiquid investment carrying very high double digit coupon rates at a time when the risk-free rate was very low or negative.

Complainant maintains that this investment was outside his risk appetite as a balanced investor willing to take some risks to make a higher return. The investment in Dolphin loan notes was much riskier than the balanced risk profile resulting from the risk appetite questionnaire, so, the Complainant maintains that the Service Provider failed him when he accepted the advice of the Investment Advisor.

In reply, the Service Provider maintains that the investment in the Dolphin loan notes was accepted by the Complainant on the advice of his Client Advisor who was FCA licensed and paid to give such advice. They maintain that in the risk questionnaire,<sup>32</sup> the client declared that he was a Chartered Accountant and that he was a professional and not a retail investor.

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<sup>29</sup> P. 140

<sup>30</sup> P. 118 - 130

<sup>31</sup> P. 94 - 101

<sup>32</sup> P. 78

Furthermore, in his LinkedIn profile he described himself as holding a degree in Economics and as being a

*“Career Interim Finance (ACMA) professional specialising in significant Operations and Commercial business change projects particularly in the FMCG – Food sector. My skills and specialisms lie mainly in Financial Planning and Analysis, commercial business support and manufacturing/supply chain operations support”*.<sup>33</sup>

The Arbiter is of the view that whilst the Trustee should have been more challenging in accepting the investment in Dolphin loan notes as not being in line with the risk profile of the Complainant, any failings in this regard are substantially mitigated by the fact that the Complainant was financially quite sophisticated and fully capable of understanding the risks and rewards of the investment as indeed explained in the Investment Advisor recommendations.<sup>34</sup>

Not only the Complainant, given his professional status, never raised concerns about the audacity of excessive risk in the advice given to invest such a significant exposure in high coupon single investment loan note, but in the evidence that he gave at the hearing of 3 May 2022, there was a sharp refocusing of his Complaint as follows:

***“The basis of my complaint is that I accept that TMF are not responsible for the investment, the sensibility of making that investment. However, it did have a responsibility to ensure that the investment was made in the appropriate way.***

***I accept that this was a risky investment. However, in learning about the company, Dolphin, in reading the marketing literature, I was assured that the risk was minimum in that I would be treated as a creditor of the organisation. And, in order to do that, I would receive a kind of attractive security in that my investment would be given a term Secure First Legal Charge on the underlying assets which to me sounded that I was a creditor. So that reassured me that it was not as risky as I thought; and, if anything went wrong with the investment, I would have a bigger chance to have my funds returned.***

***The marketing literature explained that to secure that was via the Trustee transferring my funds to a law firm called BK Law who would then hold those***

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<sup>33</sup> P. 291

<sup>34</sup> P. 65 - 70

***funds and ensure that security was made before transferring into the investment fund. What I have subsequently learnt is that it did not take place. I have tried to make a claim as a creditor through the liquidation process and that claim is being declined because my funds are not recognised as having that First Legal Charge. And what I have learnt through the credit association is that many investors are having the same problem that their funds are not transferred via the legal firm but via a transfer company called Whites. And that meant that the funds have gone directly to the firm to use in any way they see fit rather than being invested in property which is the whole purpose of the investment.***

***As a result, I am now making the claim that TMF did not transfer the funds correctly and have been negligent in securing my funds appropriately.***

***Questions by Mr K to the complainant:***

***Asked if this investment was made absolutely on the basis of it being of securing a specific status as a creditor, I say, yes. At the time, it sounded like a really attractive investment and much better than I thought was available in the market, which represents risk but I was assured that if I were to be treated as a creditor, and the fact that this business is investing in property, it would be a safe investment and, therefore, be able to get something back.***

***Asked how did I get this advice on this investment, I say that the independent financial advisor told me two things. He told me how much the return on the investment would be - 13.8% p.a. - which is a really good, guaranteed return. But then he shared the marketing material with me that demonstrated why I would have this security and, therefore, ensured that the risk was not great.***

***It is being said that I received independent, financial advice and the complaint here is not about the investments as such, I say that, no. I accept that it was about a decision and I received some compensation for that but it is not the amount I invested.***

***What I am complaining here is that the way the investment was done has left me without any further recourse. I cannot now be treated as a creditor; I am not included in the liquidation process.”<sup>35</sup>***

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<sup>35</sup> P. 112 -113

Given this evidence, the Arbitrator concludes that the basis of the Complaint changed from the Trustees failing their duties of due diligence on the investment to match the risk profile, to an accusation that the Trustee invested in a product which in a sense was different from the one he was advised upon as it did not have the same collateral security features.

This brings into question whether the investment DOLPHIN CAPITAL 80. PROJEKT GmbH & CO. KG., as explained in the LOAN NOTE INSTRUMENT dated 7 January 2015 in the Pitman document<sup>36</sup> and the Certificate No. 14333 confirming the investment<sup>37</sup> following the application signed by the Trustee,<sup>38</sup> was the same investment with the exact features as covered by the recommendations made by Serenus Consulting in their advice to the Service Provider of 1 March 2015.

In the revised Complaint of 16 March 2022, the Complainant indeed raised the point<sup>39</sup> that TMF invested in a different product from the one the client had chosen. He attached a Dolphin Trust Information Sheet<sup>40</sup> showing that investors in such Loan Note would have been covered by a first charge on the property underlying the investment.

A letter was further presented issued by lawyers BOTTERMANN KHORRAMI<sup>41</sup> explaining that after 3 September 2014 no investment monies were received in loan notes DC80PKG UK. It was argued that this proves that the Service Provider invested in a different product from that chosen by Complainant and such product had weaker security features which thus compromised the security of the investment as intended by the Complainant and advised upon by the Investment Advisor.

The Arbitrator however notes that the Information Sheet refers to the company's information memorandum dated January 2015, so it could not have been promoting an investment the subscription for which seems to have closed on 3 September 2014. Furthermore, the Information Sheet makes no reference to

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<sup>36</sup> P. 316 -343

<sup>37</sup> P. 344

<sup>38</sup> P. 346 - 347

<sup>39</sup> P. 83

<sup>40</sup> P. 88 - 91

<sup>41</sup> P. 92

loan notes DC80PKG UK as explained in the German lawyer's letter above referred to, so there seems to be no linkage between the two documents.

This notwithstanding, the Pitmans Loan Note Instrument, unquestionably refers to the investment subscribed by the Trustees which in Article 11 that:

*“the Notes will be secured by the Security which shall be registered by the Security Trustee and which shall be held by the Security Trustee as security for the Noteholders”.*<sup>42</sup>

It is further noted that the ‘Security’ is defined in the Loan Note Agreement as:

*“a first ranking land charge over the Property registered on the land charges register in favour of the Security Trustee”.*<sup>43</sup>

No evidence has been provided whether in fact such charge has been executed and, rather than provide evidence about non-subscription to a Loan Note which had closed in 2014, it would have been more appropriate for the parties to provide evidence whether the Security of a first charge on the property was executed in favour of the Security Trustee as provided in the Loan Note Agreement.

In this respect, the Arbiter notes that according to Schedule 5 – Security Trustee Agreement<sup>44</sup> of the Pitmans' documents, the Service Provider accepted the role of first representative of the Noteholders and, therefore, have an obligation to pursue the matter with the Security Trustee.

It is further to be noted that the Security Trustee, according to the said agreement, is actually “Laden Intertrust Treuhandgesellschaft mbH” based in Berlin, Germany, and thus a distinct and unrelated entity to the Trustee and RSA of the Scheme.<sup>45</sup>

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<sup>42</sup> P. 324

<sup>43</sup> P. 318

<sup>44</sup> P. 338 - 343

<sup>45</sup> P. 338

## **Decision**

**The Arbiter has to decide the case on the basis of what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.<sup>46</sup>**

**In the circumstances of this particular case, the Arbiter is deciding against the Complainant and dismissing his claims for compensation on the following basis:**

- a. No evidence has been presented that the investment had been made in a loan note product that does not have the security features of a first charge on the underlying property and/or that the Service Provider was itself responsible to ensure the proper execution of the first legal charge on the property underlying the investment as mentioned in the product's documentation.**
- b. No evidence has been provided that even with the first charge over the underlying property there is a better chance of recovery than without such first charge.**
- c. The Complainant has accepted that he was fully aware of the risks of the product complained of, and throughout the complaint process, shifted his Complaint from lack of due diligence to making the investment in a different product from the one he had accepted.**
- d. The Complainant is financially sophisticated, self-defined as a professional investor, and was accordingly, or should have been, adequately aware of the risks he seemingly chose to take with his eyes wide open.**
- e. Any failures by the Service Provider in not refusing the recommendations and Complainant's willingness to invest 57% of his portfolio in a single risky product, are mitigated by the fact that the Complainant is financially sophisticated and professional; the limitations of the alleged failures as he himself changed in the nature of his Complaint (as explained above) in the evidence given at the hearing**

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<sup>46</sup> Art. 19(3)(b) of CAP. 555



**of 3 May 2022; and the developments involving/extent of the award of compensation of FSCS as outlined above.**

- f. In the course of the Complaint, the Complainant has been quite economic with proper relevant disclosures (which forced him to make two material revisions of his Complaint).**

Finally, the Arbiter recommends that the Service Provider follows up on their duties as the beneficiary's representative, with the Security Trustee regarding the security indicated in the Loan Notes Agreement and to keep the Complainant fully informed on such matter.

Given the circumstances of this case, the Arbiter orders the parties to bear their own respective costs of these proceedings.

**Alfred Mifsud**  
**Arbiter for Financial Services**