Before the Arbiter for Financial Services

Case ASF 039/2022

EP (the 'Complainant')

vs

TMF International Pensions Ltd. Reg. C 76483 ('TMF' or the 'Service Provider')

Sitting of 18 August 2023

The Arbiter,

Having considered in its entirety, the Complaint (filed on 28 March 2022) including the attachments filed by the Complainant,[1]

The Complaint

The Complainant claims having transferred on 21 August 2014 GBP £250,985.82, previously invested in her Barclays Pension Plan, to the Service Provider to be invested into the Melita International Retirement Scheme QROPS for whom the Service Provider was the Trustee and Retirement Scheme Administrator.

This investment was made on the advice of her FCA licensed Investment Advisor, Serenus Consulting. The investment has now been practically fully lost and the Complainant has already received compensation of GBP £85,000 (maximum possible) from the UK's Financial Services Compensations Scheme (FSCS) on the basis that the FCA licensed investment advisor gave her bad advice and caused her an estimated loss of GBP £581,524.20.[2] Notwithstanding this compensation, FSCS gave Complainant permission to pursue her rights against Service Provider

[1] P. 1 - 505
[2] P. 381

on the condition that first recoveries (net of expenses) up to GBP £85,000 are to be refunded to FSCS.[3]

The Complainant's representative explained that:

"***At the time of transferring her defined benefit Barclays pension, our client was 49 years old and was employed as an Insurance Consultant. She is now 56 years old and retains the same employment today.***

Serenus Consulting Ltd was the financial adviser who recommended that she transfer out of her previous Barclays pension plan and invest a large percentage of her funds into the investment with Hockney Court with Capital Bridging Finance Solutions Ltd, which has been recently valued at zero by the FSCS. The advisor transferred her to TMF Group to arrange the QROPS. Although TMF Group did not provide any financial advice, they had a duty of care to ensure that the recommended product met the client's needs, and that the underlying asset was a suitable investment for their QROPS.

It is both our, and our client's view that TMF Group should have raised concerns about the investment and the structure of the QROPS (invested in un-regulated, high-risk funds), as well as [Complainant's] personal unsuitability for a QROPS, and therefore not accepted the recommendation of the advisor.

That said, TMF Group accepted a payment of £250,985.82 on 21 August 2014, and an investment was made into Melita International Retirement Scheme QROPS.

Our client raised her concerns to Return My Money following receipt of numerous 'valuations' from TMF Group showing that the investment had now been valued at £0, effectively meaning her entire pension fund had been lost. The FSCS is now valuing the Hockney Court investment at zero, however, [Complainant] is still being charged administration fees by TMF Group.

In support of our client's complaint, we would like to raise the following points for consideration:

- *TMF Group have failed to conduct adequate due diligence on the underlying asset, which they deemed suitable for a QROPS. The client was*

[3] P. 587 -591

allowed to invest a large amount of her portfolio into an 'un-regulated' investment which was not balanced. This shows clearly that no care was given.

- *TMF Group have failed however to investigate our client's capacity to understand exactly what she was investing in, and whether she could be considered to be a sophisticated investor. A QROPS, therefore, should neither have been recommended to our client by the adviser, nor should TMF Group have allowed this to proceed.*

- *Although TMF Group were not permitted to give our client advice on the investments within the QROPS, they are duty bound to ensure that the products contained within the wrapper are suitable, and that the client itself has the capacity to accept the risks associated with a QROPS. TMF Group failed to ensure certified high net worth individuals and self-certified sophisticated investors certifications, or evidence of any kind that that the investment was not suitable for [Complainant] and could only have been so had she been either a high net worth individual or a sophisticated investor and been certified as such. Again, we understand that TMF Group did not provide advice, however, as they clearly had no requirement for this documentation this shows their due diligence was both incomplete and flawed.*

- *TMF Group did not take sufficient steps to ensure that the client fully understood both the terms of the QROPS itself, and the underlying investments and how they would affect her pension.*

- *When considering the multitude of additional fees charged by both TMF Group, the client's QROPS has cost over ~£2,000 in fees alone. Our client was completely unaware of the ongoing cost of the QROPS, and this was not made clear to her by either the advisor or TMF Group."*[4]

As a remedy, the Complainant argued that had she kept her Barclays defined benefit pension, its notional value would currently be just short of GBP

[4] P. 12 - 13

£600,000, so that net of the FSCS and other recoveries, she claims GBP £496,746.19 in compensation.[5]

It is to be noted that the first complaint about the Service Provider was made on behalf of the Complainant by 'Return My Money' on 18 February 2022.[6]

In her Complaint Form to the Office of the Arbiter for Financial Services (OAFS), the Complainant states that she had first knowledge of the matters complained of on 16 March 2021.[7]

Reply of the Service Provider

The reply to the direct complaint letter of 18 February 2022 was made on the same day by TMF where, apart from refuting any liability, they point out that:

- TMF is based in Malta not in UK
- TMF is not regulated by the UK FCA
- TMF is not a party to the UK COBS (Conduct of Business Sourcebook)
- TMF does not come under the jurisdiction of the UK Financial Ombudsman Service.[8]

In their official reply[9] to the OAFS, the Service Provider raised several preliminary pleas, namely:

1. As the case was raised with the UK FSCS and the Complainant's rights were subrogated to such entity, it is only such entity that can raise the Complaint with the OAFS.
2. In terms of Article 21(2)(a) of Chapter 555 of the Laws of Malta, the Arbiter should decline to hear this case once it has been referred on the same matter to the FSCS.

[5] P. 6
[6] P. 12 - 17
[7] P. 2
[8] P. 17
[9] P. 515 - 558

3. As the Arbiter is bound by the provisions of Article 21(3)(a) to award maximum compensation of €250,000 plus interest and costs, whereas the Complaint is for a much bigger sum, the Arbiter should declare his incompetence to hear the case.

4. That the Complaint was prescribed as the investment was made on 21 August 2014 and the Complainant had full awareness of the matters complained of on 9 December 2019.

The Service Provider also raised in its defence several issues of the merits of the case, *inter alia*:

a. That Complainant had illegally colluded with third parties (who have since been convicted of Pension Liberator[10] charges) who introduced her to the licensed Investment Advisor and that she gained illegally by partial liberation from her pension fund as part of the deal to make the risky investments complained of.

b. That the Complainant had not disclosed the first successful investment in another risky scheme on which she made 10% gain in a short time span.

c. That the Trustees had made proper due diligence on the investment recommended by the Investment Advisor and agreed to by the Complainant. Claims were made that it was the Complainant that prodded the Investment Advisor to make such risky investment.

d. That the Complainant had a strong financial background working many years for Barclays, then setting up her own insurance business and she was a knowledgeable person who knew what she was doing when she signed off her understanding.

e. That in the Risk Questionnaire filled and signed by the Complainant, it resulted she was a *'very aggressive'* investor.

f. That fees were full disclosed.

[10] Illegal and hidden withdrawal from the pension fund

Considerations

The Arbiter held several hearings to gain a thorough understanding of this Complaint.

The first hearing was held on 3 May 2022 where the Arbiter requested a copy of the complaint filed with FSCS and the written agreement regarding compensation resulting therefrom.[11]

After examining the requested documentation, the Arbiter issued a decree on 10 May 2022, insisting that, from the documentation provided, it was clear that the Complainant had assigned the rights to make this complaint to the FSCS, then the Complaint can only proceed if Complainant procures waiver of such right from the FSCS.[12]

Once the Complainant procured such reassignment of rights and evidence thereof,[13] the Complaint proceeded with a second hearing on the 21 November 2022[14] for the evidence and cross-examination of the Complainant, and a third hearing on the 10 January 2023[15] for the evidence and cross-examination of the Service Provider.

Both parties then submitted final considerations from which the main issues not already covered were:

1. Complainant did not submit, despite several commitments to do so,[16] any evidence about the source and the reason why she received a payment of GBP £50,000 as part of her switch from Barclays to QROPS and the underlying investment complained of.

2. The Service Provider raised this £50,000 payment from the argument on the merits in the official reply to a preliminary plea on the basis of *'ex turpi causa non oritur actio'* (the Complainant cannot claim damages from the

[11] P. 559
[12] P. 584 - 585
[13] P. 586 - 591
[14] P. 594
[15] P. 626
[16] E.g., p. 596

Service Provider if the Complainant is involved or has committed an illegal act).[17]

The Arbiter regrets the failure of the Complainant regarding 1. above and will consider as applicable when analysing the merits of the case if it survives the preliminary pleas raised by the Service Provider.

Regarding 2., the Arbiter rejects new preliminary pleas in the final submissions stage and will only consider the issue as part of the analysis of the merits, again, if the case survives the preliminary pleas.

Consequently, the Arbiter, before entering into any analysis of the merits of the Complaint, feels obliged to deal with the matter of his competence to hear the case raised as preliminary pleas by the Service Provider, and this for the following reasons:

1. If the Arbiter decides that he has no competence to hear the case, it is in the parties' interest to have such a decision as quickly as possible so that they can consider seeking justice in a court or tribunal that may have such competence.
2. Not to prejudice the parties' position by arguing the merits of the case if these need to be presented to a different court or tribunal.

Preliminary pleas

1. **As the case was raised with the UK FSCS and the Complainant's rights were subrogated to such entity, it is only such entity that can raise the Complaint with the OAFS.**

   This preliminary plea is rejected as the Complainant has provided evidence that her rights to make this Complaint have been reassigned to her by the FSCS.

[17] P. 650

2. **In terms of Article 21(2)(a) of Chapter 555 of the Laws of Malta, the Arbiter should decline to hear this case once it has been referred on the same matter to the FSCS.**

   This preliminary plea is rejected as the FSCS is not a court, tribunal or ADR as defined in the cited Article of Chapter 555. It is merely a compensation scheme for any failings of UK licensed institutions and, in fact, the FSCS has been assigned the rights to raise this Complaint with the OAFS.

   These rights were reassigned to the Complainant on condition that any recoveries from any award under this Complaint will first go to refund the FSCS. Furthermore, this complaint was fully declared in the Complaint application with the OAFS.

3. **As the Arbiter is bound by the provisions of Article 21(3)(a) to award maximum compensation of €250,000 plus interest and costs whereas the Complaint is for a much bigger sum, the Arbiter should declare his incompetence to hear the case.**

   This preliminary plea is also rejected as Article 21(3)(a) does not oblige the Arbiter to lose his competence to hear claims for amounts exceeding €250,000 plus interest and costs, but only limits the Arbiter's ability to award a compensation higher than this amount. In fact, by virtue of Article 21(3)(b), the Arbiter can make recommendations (non-binding) for higher compensation.

4. **That the Complaint was prescribed as the investment was made on 21 August 2014, and the Complainant had full awareness of the matters complained of on 9 December 2019**.

   Here we are dealing with two distinct provisions of Chapter 555 in relation to prescription limitation to the Arbiter's competence to hear complaints.

   Prescription related to Article 21(1)(b) of Chapter 555 which states:

   "An Arbiter shall have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider which occurred on or after the first of May 2004: Provided that a complaint about the conduct which occurred before the entry into

force of this Act shall be made by not later than two years from the date when this paragraph comes into force."

The Act Chapter 555 came into force on 18 April 2016 and so, in terms of the above, for valid complaints regarding events occurring before this date, the complaint had to be submitted to the OAFS by 18 April 2018.

In various previous decisions, the Arbiter has ruled that the date when the transaction was executed is not the date when the complaint has actually occurred as the complaint could be of a continuing nature which extended its happening beyond the 18 April 2016 when the Act Chapter 555 became executive.

The Service Provider themselves mention the 9 December 2019 as the date when the Complainant was aware of the potential loss subject of this Complaint.

Consequently, the Arbiter dismisses the preliminary plea on the basis of Article 21(1)(b) as there is ample evidence that the matter complained of continued after 18 April 2016.

Plea for prescription related to Article 21(1)(c) of CAP. 555 which states:

"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 service provider not later than two years from the day on which the complainant first had knowledge of the matters complained of."

In her Complaint with the OAFS, the Complainant states that she had first knowledge on 16 March 2021 which corresponds to the same statement on the claim on FSCS.[18]

In their reply of 19 April 2022, the Service Provider puts this date as 9 December 2019. At no stage did the Complainant raise any queries or

[18] P. 2; 577

issues with the date of first knowledge as claimed by the Service Provider.[19]

It is crucially important for determining the Arbiter's competence to continue hearing this case whether the Complainant had first knowledge on 9 December 2019, as claimed by the Service Provider, or on 16 March 2021 as claimed by the Complainant. Given that the Complaint was registered with the Service Provider on 18 February 2022 (which date is not contested), the Arbiter will not have competence to hear this Complaint if it results that the Complainant had first knowledge of the Complaint issues before 18 February 2020.

The date of 16 March 2021 (as claimed by the Complainant) does not result from any event happening on such date. It precedes the application claim for compensation on FSCS by four and a half months as the latter was dated on 31 July 2021.

The date of 9 December 2019 (as claimed by the Service Provider) is referred to in their first reply to the OAFS as:

"The Complainant was provided with valuations on a yearly basis and was aware of the potential loss she allegedly made on 09/12/2019."[20]

This was further explained in the final submissions:

"At that point, we communicated with [Complainant] and informed her that there was a problem with her investment and that we engaged lawyers to seek redress and reclaim any of the investment that we possibly could. The Complainant was informed of this fact on 9th of December 2019.

The Complainant as stated in her Complaint received 'numerous valuations from TMF Group showing that the investment had now been valued at £0, effectively meaning her entire pension fund had been lost'.[21] ***Since the Service Provider wrote to the Complainant on the 9th December 2019, then the Complainant should have filed her action within two years (9 December 2021 being the last day in which the Complaint ought to have been filed). However,***

[19] P. 516
[20] *Ibid*.
[21] P. 3

the Complaint was filed on the 29th of March 2022 thus it is time barred by virtue of Article 21(1)(c) of Chapter 555 of the Laws of Malta."[22]

It has to be made clear that the date relevant to the Purpose of Article 21(1)(c) is the date when the complaint was filed with the Service Provider, i.e., 18 February 2022 and not the date when it was filed with the OAFS, i.e., 28 March 2022.

So what matters is whether the Complainant had first knowledge of the matters complained of before or after 18 February 2020.

Analysis and further considerations

Article 22(2) of CAP. 555 obliges the Arbiter upon receipt of a complaint to determine whether the complaint falls within his competence and, in terms of Article 22(5)(a), to inform the complainant in writing of the decision and reasons for it if the Arbiter determines that the complaint does not fall within his competence.

In this case, the Arbiter will deal with the preliminary plea raised by the Service Provider that the Arbiter has no competence to hear this Complaint as in terms of Article 21(1)(c), this Complaint has been filed with the Service Provider more than two years after the day on which the Complainant first had knowledge of the matters complained of.

It is to be noted that the two years relate to the date of the Complaint being registered in writing with the Service Provider not the date on which the Complaint was registered with the OAFS.

Consequently, for the Arbiter to have competence to proceed with hearing the merits of this case, it must firstly be determined, without doubt, the date when the Complainant had full knowledge of the matters being the subject of this Complaint, and whether the Complaint was registered with the Service Provider within two years from such date. Other issues, no matter how relevant to the merits of the case, will not be relevant to the issue of determining the Arbiter's competence.

[22] P. 652

The date when the Complaint was filed with the Service Provider is uncontested as 18 February 2022.

The date when the Complainant had first knowledge of the matters complained of is contested as explained above.

The Arbiter finds no evidence that could give credibility to the date of 16 March 2021 as claimed by the Complainant. There is no evidence that on such date there was any trigger of new knowledge about the investment complained of.

The date of 9 December 2019, as claimed by the Service Provider, has a clear trigger being the date when the Service Provider reported to the Complainant that there was a problem with her investment and that lawyers had to be brought in to recover whatever was possible. This was more than indicative that the investment has lost substantial value and, in fact, future statements showed the value of the investment as zero.

The date of 9 December 2019 was at no stage contested by the Complainant during the proceedings.

Decision

While the Arbiter sympathises with the Complainant given the loss she has incurred on her pension investments, the Arbiter is bound to determine his competence by what is provided for in Chapter 555, in this case particularly, the provisions of Article 21(1)(c).

It has been established without any doubt that the Complaint was filed with the Service Provider more than two years after the Complainant had first knowledge of the matters complained of.

For these reasons, the Arbiter determines that in terms of Article 21(1)(c) of Chapter 555 of the Laws of Malta, he has no competence to continue hearing the merits of this case and hereby dismisses it. Consequently, the Arbiter will not be dealing with the merits of the case.

This is without prejudice to the right of the Complainant to take her case to another Court or Tribunal[23] that is not bound by the issue of competence as the Arbiter is in this case.

As the case was decided on a preliminary plea, the Arbiter decides that the parties carry their own costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services

[23] As provided for in Art. 21(1)(a)