Before the Arbiter for Financial Services

Case ASF 115/2022

NF (the 'Complainant')

vs

Momentum Pensions Malta Ltd Reg. C 52627 ('Momentum' or 'MPM' or the 'Service Provider')

Sitting of the 26 October 2023

The Arbiter,

Having considered in its entirety, the Complaint (filed on 22 September 2022) including the attachments filed by the Complainant,[1]

<u>The Complaint</u>

The Complainant claims having invested private pension funds amounting to about GBP£ 31,000 in The Momentum Malta Retirement Trust, for which the Service Provider was Trustee and Retirement Scheme Administrator (RSA). The membership application form was completed on 13 March 2013 and the funds were invested on the advice of his designated advisor (CWM/Trafalgar) in a bond with Skandia Life Ireland Limited.

He explained that:

"I ended up with approx. GBP£ 4,500 which I withdrew 2 years ago while there was something left a lot of blame was aimed at Leonteq etc. I was kept receiving misinformation as to who was to blame for the sudden decrease in the value of my portfolio. Momentum continually blamed CWM and as the Trustee of my fund I can't believe they didn't query some of the very poor dealing transactions on my fund eventually CWM closed down so then lots of

[1] P. 1 - 59

the blame was put on Leonteq I was continually told a case was been put to file for compensation this has never happened."[2]

The Complainant blamed the Service Provider for the loss he incurred which he quantified at original amount of £31,000 less withdrawal of £4,500 and seeking compensation for £25,000.[3]

In his official complaint, the date of 01 January 2018 was indicated as the date when Complainant had first knowledge of the matters being complained of.

Attached to his official complaint, there is the complaint filed with the Service Provider by means of letter dated 25 January 2022.[4] In essence, in said letter, he complains of:

- Severe losses that his pension fund suffered due to accepting business from an unlicensed advisory firm – CWM, using unqualified advisors and Trafalgar International who are only licensed for Insurance Mediation.
- That MPM failed in their duties as the Trustee of the pension fund/investment and failed to follow their own guidelines.

He also says that:

"I have only recently become aware of your failings as my Trustee to act in my Best Interests and have a Duty of Care … I do not give you permission to share this letter or its contents with Trafalgar International".[5]

Reply of the Service Provider

In their reply of 13 October 2022, the Service Provider repeat most of what they had stated in their direct reply to the Complainant in a letter dated 07 April 2022.[6]

[2] P.2
[3] *Ibid*.
[4] P. 6
[5] *ibid*
[6] P 7 - 10

The Service Provider raises these preliminary pleas about the Arbiter's competence to hear this case:

1. The Matter complained of has already been the subject of a settlement agreement between *inter alia* the Complainant and Momentum.
2. The Complaint is prescribed pursuant to article 21(1)(b) and article 21(1)(c) of Cap. 555 of the Laws of Malta.

The Service Provider also made extensive defence on the merits of the case in their reply and these merits were treated in the hearings held on 16 January 2023 and 27 February 2023, and various related written submissions emanating from such hearings.

Preliminary Pleas

It is the Arbiter's firm opinion that, before considering the merits of the case, it is necessary to deal and adjudicate on the preliminary pleas raised and this for two main 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 have to be presented to a different court or tribunal.

In fact, 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.

Accordingly, the Arbiter shall first proceed to rule on the preliminary pleas raised.

The Matter complained of has already been the subject of a settlement agreement between *inter alia* the Complainant and Momentum

Article 21(2)(a) of Cap. 555 of the Laws of Malta prohibits the Arbiter from hearing a case which *"is or has been the subject of a lawsuit before a court or a tribunal or is or has been the subject of a complaint lodged with an ADR entity in any other jurisdiction, initiated by the same complainant on the same subject matter".*

It does not specifically prohibit the Arbiter from hearing and adjudicating complaints if the parties had reached any prior agreement the validity of which is being challenged by the Complainant.

The agreement that the Service Provider refers to is found in page 122 of the proceedings which is an undated[7] document signed solely by the Complainant which accepts a small sum as '*ex gratia*'. This document is addressed to the Service Provider and to Investment advisor Trafalgar International and commits the Complainant to irrevocably waive all his present and future rights, claims, argument and/or other demands against them.

'*Date:*

To: Trafalgar International GmbH and Momentum Pensions Malta Limited

I, Mr NF of ……., hereby acknowledge and accept your offer "ex gratia" of a special refund of GBP 2,755.74, the payment of which will not be taken as a precedent and/or admission of any wrong doing of, or on behalf of, Trafalgar International GmbH and Momentum Pensions Malta Limited (the 'Companies').

I hereby irrevocably waive any right, claim, argument and/or other demand I have or may have in the future, towards and/or against the Companies. Moreover, I hereby declare that I have no further claim regarding any additional funds, except any funds or compensation due to me from the claim current being pursued by Old Mutual International against Leonteq Securities A.G., referenced in the attached link:
https://www.judgments.im/content/J2022.htm

I further commit to keep the existence of anything related to this matter in absolute confidence and shall not disclose to any third party the existence or

[7] In their final submission p. 261 Service provider state this was signed on 18 February 2020 but effectively the document is undated.

contents of this arrangement or the circumstances related to this matter, without the prior explicit written consent of the Company, which shall be exercised at its sole discretion. I hereby acknowledge and declare that any disclosure on my part, at any point in time, of any of the circumstances of, and/or other pecuniary compensation by the Companies, the Companies will be entitled to a full payment of the compensation.

I declare that the present statement was signed out of my own volition and complete free will without any pressure, influence or force exerted by the Companies towards my part.

This waiver of claims shall become irrevocable upon signing.

Yours sincerely,

Mr NF'.[8]

In his final submission, the Complainant challenges the validity of this agreement, stating:

"On a final note with the regards of the settlement I agreed to take for approx. £4,000 and a letter stating I would not take any action, as I pointed out this was mad under extremely stressful time for me as my wife was terminally ill at the time with cancer and sadly passed away in November 2021. The letter is not legally binding it has not been notarised and witnessed by a legal representative therefore it has no value and besides why would my case be any different to the other members who have received recompense?"[9]

What needs to be considered is whether there was or there was not a binding full and final settlement agreement whereby the Complainant validly waived his rights to make further claims as he is doing through this Complaint.

Whilst as an ADR mechanism, the Arbiter does not have the final say on whether this is a case of *res judicata*, the Arbiter feels that rather than an agreement this seems to be a unilateral declaration. In fact, it is not signed by the parties to whom it seems to be addressed, it is undated and not witnessed. It can hardly

[8] P. 122
[9] P. 257

be referred to as an agreement which is normally signed by both parties making the agreement.

Consequently, one needs to consider whether this unilateral declaration was obtained abusively or under duress, and whether a unilateral declaration is binding or can be walked back through another unilateral declaration which restores the *status quo ante* by returning the payment received.[10]

Whatever, the Arbiter feels that the document referred to as an agreement, but is in fact a unilateral declaration, does not render the issue between the parties as *res judicata*. The document is not strong enough to merit the status of *res judicata* and therefore dismisses the preliminary plea that such 'agreement' is an impediment to proceeding with hearing the merits of the Complaint.

Plea for prescription related to Article 21(1)(b) of CAP. 555

This article 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 CAP. 555 came into force on 18 April 2016 and so, in terms of the above for complaints occurring before this date, the complaint had to be submitted to the OAFS by 18 April 2018.

As the Complaint was submitted on 22 September 2022, more than 4 years after the set expiry date, then, according to the Service Provider, the Arbiter has no competence to continue hearing this Complaint.

The Arbiter has consistently maintained in past such decisions that the date of transactions being affected should not be considered as the date giving rise to the complaint. Such date may happen later, often much later, than the date of the original transaction giving rise to the complaint, and, in this case, the Arbiter

[10] In fact, the Complainant does not include the payment received through this 'agreement' in the calculation of his loss. Is this an error or an intention to refund?

has to consider whether the Complainant had full knowledge of the matters giving rise to the complaint before 18 April 2018, and if the matters complained of had exclusively happened before the coming into force of the Act on 18 April 2016.

By the Service Provider's own assessment:

"The Complainant was therefore informed in January 2018 that Trafalgar would have a very difficult task in assisting with the recovery of the policy. In fact the Complainant himself in the complaint confirms that on the 1st January 2018 he first had knowledge of the matters complained of".[11]

The Arbiter agrees that the Complainant had a fair view of the matters being complained of well before 18 April 2018, but he did not have the full view of the matter before the coming into force of the Act on 18 April 2016. In fact, the Service Provider seems to agree with the Complainant that it was only in January 2018 that the Complainant had first knowledge of the extent of his losses.

For this reason, the Arbiter denies the first claim for prescription under Article 21(1)(b).

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".

As stated above, the first date the Complainant admits having full knowledge of the matters subject of this Complaint was 01 January 2018. One could argue that the Complainant had knowledge of the situation before this date as he was receiving annual statements. Furthermore, in 2017, matters came clearly to the surface with the suspension of the Service Provider's business with CWM and submission of detailed asset valuation of the portfolio indicating such losses.[12]

[11] P. 66
[12] P. 260, para v. to viii.

A case could have been made by the Complainant that his full view of the loss was only evident upon encashment in January 2020, but this would have been difficult to sustain given that on 09 January 2018 he was already complaining about having lost £27,000 since transferring £31,000.[13]

Consequently, the Service Provider maintains that the Complaint was made with them on 25 January 2022, more than two years after the Complainant had knowledge of the matters complained of by his own admittance on 01 January 2020 and, therefore, in terms of Article 21(1)(c), the Arbiter has no competence to continue hearing this case.

Submission by Complainant related to the issue of prescription under the provisions of CAP. 555

The Complainant at no point in the proceedings raised any challenges to the claim of prescription under article 21 of the Act Chapter 555 of the Laws of Malta. He only raised an indirect point in his final submission stating:

"Why would my case be different to the other members who have received recompense?"[14]

Decision

While the Arbiter sympathises with the Complainant's arguments, the Arbiter is bound to determine his competence by what is provided for in CAP. 555, in this case particularly, in 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 full and ample knowledge of the matters complained of.

The decisions of the Arbiter in cases with similar issues to those made in this Complaint did not add any new knowledge on the issues underlying this Complaint, and the Complainant had ample time to lodge his Complaint in a timely manner as many other complainants have done.

This, as of itself, answers the Complainant's question why he is not being awarded compensation as was awarded in similar cases the merits of which

[13] P. 133
[14] P. 257

were similar to this Complaint but where no issues of prescription were applicable.

For these reasons, the Arbiter determines that in terms of Article 21(1)(c) of CAP. 555, he has no competence to continue hearing the merits of this case and hereby dismisses it.

This is without prejudice to the right of the Complainant to take his case to another Court or Tribunal[15] that is not bound by the competence issue as the Arbiter is in this case.

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

Alfred Mifsud
Arbiter for Financial Services

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