Before the Arbiter for Financial Services

Case ASF 091/2021

SI & II

('the Complainants')

vs

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

Sitting of the 14 November 2022

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 duties to look after the Complainants' respective Scheme given the alleged failure by DFSM to undertake: (a) adequate due diligence in respect of the Complainants investment advisor, *St James International* (b) adequate due diligence, assessment and monitoring of the *Privilege Wealth One Limited Partnership*, this being an underlying investment of their respective Scheme.

The Complaint as described by the Complainants

The Complainants explained that DFSM invested GBP100,000 into the *Privilege Wealth One Limited Partnership* ('PWL') for each of their respective trusts, after

performing an initial due diligence check on the investment to accept it as a *bona fide* properly run investment.

They claimed that DFSM however failed to properly check the lack of regulation of the investment advisers, *St James International*, whom the Complainants learned had no PI (professional indemnity) cover and was based in Moscow. It was noted that DFSM now blames *St James International* for the failed investment despite that it refused to deal with other advisers based on a lack of their satisfactory regulation.

The Complainants further submitted that DFSM failed to perform their due diligence duties as trustees to monitor the disputed investment on an ongoing basis for which they charged fees of over treble the average Malta QROPS trustee.

They noted that the PWL investment was not properly assessed both initially and on an ongoing basis and that it subsequently failed.

The Complainants claimed that other than the sophisticated investor declarations for their UK resident status which was only generic to the broad type of investment, DFSM as trustees did not require any member indemnity declarations and was happy to allow the investment to proceed. The Complainants further claimed that had indemnities been sought by the trustees, neither investment would have proceeded.

It was also claimed that DFSM had previously sought members to sign indemnities on other investments and trusts but not for the Complainants.

The Complainants claimed that DFSM:

a) Failed to discover that high-risk staff administering the PWL investment, had previous links to failed investments and was wanted by the police.

b) Failed to make sure the underlying investments listed to be made were actually made by the managers of the investment.

c) Failed to ensure that the insurance premium covering 95% of the PWL investment in the event of failure, was kept up to date.

d) Catastrophically failed to perform both initial due diligence and ongoing due diligence such that had either one been completed properly/ successfully would have saved them from massive losses.

In their formal complaint to the Service Provider dated 26 February 2021, the Complainants explained and highlighted the following:

- That *St James International* had advised them that as trustees DFSM would, in return for a significantly higher than average cost (about £3k p.a. compared to £1k for their then-current trustee fees), invest some of their pension funds into PWL. The £100,000 investment for each trust would cover the additional trustee cost and still provide an 8% p.a. return.

- That they were of the understanding that DFSM agreed on terms of business with *St James International* as an advising firm to introduce UK resident clients and investment schemes, such as PWL.

- That the investments were made by DFSM as trustees in 2015 after their understanding that the trustees thoroughly investigated everything about the PWL investments. It was noted that this was for the purposes of due diligence prior to the trustees actioning their requests, which took a number of weeks and was meant to ensure the security of the investment.

- That they were of the understanding that the investments were insured for 90% of the capital value plus interest due, which was one of the deciding factors for requesting DFSM to investigate the investment together with the promised 10% pa return being offered.

- That they are now of the understanding that the insurance premiums for the said cover were discontinued soon after, or possibly even before, the investments were made.

- That some of the directors of the investment might have been associated with previously failed schemes, and one senior employee was even operating under an *alias* and wanted by the police internationally.

- That in addition, the assets into which their monies were supposed to have been invested did not happen.

- That this was surely something that the trustees had a duty to have been aware of and brought to their attention.

- That they believed that had the trustees investigated more thoroughly they would have not agreed to the investments being made in the first place.

- That as a result of this and other matters, they believed that there was a significant failure in the due diligence processes performed by the trustees both initially and during the course of the investments being held. The Complainants further stated that competent ongoing due diligence, for example, may have discovered, potentially soon enough to rectify it, the failure to maintain insurance premiums.

- That in addition there has been minimal communication to them both while the investments were being dealt with, as well as once they failed.

Remedy requested

The Complainants requested DFSM to compensate them each of their respective GBP100,000 investment monies together with a reasonable level of interest to reflect the returns lost over the last five years.[1]

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

The Service Provider noted that by way of background, the investment into the PWL loan notes was initially made by DFSM on 24 March 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 the Complainants were both informed of the said events at that time by both the Service Provider and *St. James International* who had stated in an email communication to the Complainants dated 5 April 2018, that the consequence of the administration *'is very likely to result in the liquidation of PWL*

[1] Page (P.) 4
[2] P. 20-23

putting capital invested at serious risk' and that *'if any capital is returned it will be significantly lower than that invested if any at all*.'[3]

DFSM submitted that it, therefore, follows that 5 April 2018 is the latest date on which the Complainants first had knowledge of the matters of which they formally complained to DFMS, on 27 February 2021 through their letter dated 26 February 2021.

It was further submitted that, as the Complaint was made more than 2 years after the key dates of 26 February 2018 and 5 April 2018, the Complaint 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).

DFMS remarked that it should be also noted that the individual named in Section B to the Complaint Form, (Mr. D Brownlee-Jones), being the person designated by the Complainants to assist them in relation to their Complaint to the Arbiter, is the person who introduced the Complainants to the PWL loan notes and to *St James International* in the first instance and who allegedly *'received 9.6% introductory commission'* from *St James International* as stated in the email to the Complainants dated 5 April 2018.[4]

DFMS noted that before dealing with the subject matter of the Complaint, it considers it may be helpful to summarise the background in relation to the PWL investment as the facts were complicated. It further 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.

DFMS provided the following background in its reply:

- That *Privilege Wealth plc* was incorporated and operated as a holding company. Its principal purpose was to assist in the raising of finance for its 4 overseas subsidiaries, as well as the day-to-day management of its subsidiaries.

[3] P. 20
[4] *Ibid*.

- That 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 payday 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.

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

- That 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.

- That as a result, 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 payday loans were not being paid to group companies, after operating costs in order to settle intercompany loans.

- That by now, 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 judgment was obtained against him in the High Court in London on 9 March 2017.

- That 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.

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

With respect to the essence of the Complaint, DFSM replied as follows:

a) That the Standard Operational Conditions issued under the terms of the Special Funds (Regulation) Act, the predecessor to the Retirement Pensions Act (Chapter 514 of the Laws of Malta) and the Pension Rules issued by the MFSA which apply to personal retirement plans licensed thereunder, did not require an investment adviser to be regulated whereas new rules do.

b) That the appointment of *St James International*, as investment adviser to the Complainants, was instigated on the express request of the Complainants in accordance with the regulations which prevailed under the Standard Operational Conditions in force at that time.

c) That DFSM stopped dealing with unregulated advisors in accordance with the Pension Rules, and hence the change in its policy.

d) That DFSM cannot comment on whether *St James International* had PI cover in place or not. In its view, this point is, however, irrelevant because there is no evidence to support whether *St James International* would have accepted liability in the first instance in relation to any claim made against it by the Complainants.

e) That the claim made by the Complainants relating to the failure to undertake due diligence on the PWL investment and that it did not properly assess this investment was factually incorrect. DFSM submitted that due diligence was

undertaken by it in relation to the PWL loan note offering in late 2014 and early 2015.

The initial investment was made by DFSM in respect of the Complainants on 24 March 2015 for a fixed term of three years. The investment was 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 in respect of the investments.

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 following nonreceipt of the January 2018 interest payment), it is 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 Complainants cannot be attributed to any failure by DFSM to conduct due diligence.

The Service Provider further noted that from the email dated 5 April 2018 attached to its reply,[5] from Brownlee-Jones[6] to the Complainants, he advised them to seek redress in respect of their failed investments from *St James International*, this being the party who provided advice to the Complainants in respect of PWL at the time.

DFSM also noted that as no further communication was received by it, it is reasonable to assume that attempts to obtain compensation from *St James International* failed and, as a result of this, the Complainants have turned to seek address from DFSM over 3 years after the reported failure of their respective investment in PWL.

The Service Provider pointed out that 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

[5] P. 24

[6] Indicated in the Complaint Form as the person assisting the Complainants (P. 2).

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 that was deployed by DFSM in monitoring the investment.

f) That in order to deal with the allegation relating to indemnities, it is necessary to understand the context in which the investments were made in 2015, as the pension rules under the Standard Operational Conditions prevailing at that time required, *inter alia*, for an investment portfolio to be diversified so as to avoid risk to the portfolio overall.

DFSM noted that when it acted on the investment directions made by the Complainants following advice they had obtained from *St James International*, DFSM considered the value of the investment to be made into PWL not in isolation but from a holistic perspective, taking into account the value of each of the Complainants overall pension plans and the assets invested therein.

The Service Provider submitted that, in particular, it should be noted that the PWL investment respectively constituted 28% and 23% of the value of the Complainants' separate pension fund. The balance of their respective funds was invested in a number of retail collective investment schemes at the time. Consequently, the investment direction to DFSM made by the Complainants to diversify under 30% of their respective pension funds into a non-correlating asset class (i.e., PWL) seemed a reasonable position for the Complainants to take. This is also given that the Complainants had obtained specific investment advice beforehand from *St James International* in respect of PWL and also given the fact that the Complainants (being UK residents) were high net worth individuals who were *'sophisticated investors'* in accordance with Section 50A of and Part II, Schedule 5 to the UK Financial Services and Markets Act 2000 (Financial Promotions) Order 2005, and therefore entitled to receive promotional material and invest in the PWL.

DFSM further submitted that it did not obtain an indemnity from the Complainants because this is not required under its standard policies and procedures in cases where investment directions are submitted by

'Sophisticated Investors', who are making their investment directions under the advice of their investment advisers, as is the case in question.

The Service Provider further noted that whilst it did not request an indemnity to be signed by the Complainants, there is no evidence to prove how the Complainants would or would not have reacted to signing an indemnity in 2015.

DFSM refuted the comments that had it done so, then the Complainants would have not proceeded with the investment. It considered this to be conjecture on the part of the Complainants, predicated wholly with the benefit of hindsight and, as such, should be disregarded.

g) With respect to the claim about the failure to discover about high-ranking staff having had previous links to failed investments and wanted by police, the Service Provider submitted that this claim lacks provenance. It suspected that such a claim is based on information reported on social media.

It noted that, as mentioned in its reply, the author of *Offshore Alert* published a series of articles over the internet suggesting that the operation was an investor scam. This resulted in *Privilege Wealth* suing the author (successfully) for defamation before the High Court in London in 2017.

DFSM submitted that there is no evidence to support any contention that high-ranking staff have been convicted of any criminal or civil wrong brought against them.

h) The Service Provider submitted that it made the investments in the loan notes on behalf of the Complainants on their direction, as Sophisticated Investors acting on investment advice procured from their investment adviser.

The investment objective in respect of PWL was to use the money invested by the Complainants and all other loan note holders, in the sub-prime consumer lending market in the United States. It submitted that there is no evidence to support the contention made by the Complainants that monies invested in PWL were not used for that purpose.

i) As to the claim relating to the failure to ensure the insurance premium was kept up to date, DFSM noted that Grant Thornton UK LLP, as joint liquidators of PWL, confirmed, in a communication to the creditors of the partnership dated 14 August 2019, that the insurance policy referred to by the Complainants was originally incepted from December 2014 to December 2015 and renewed in 2016 and 2017.

   DFSM further noted that it still remains unclear, at present, as to whether insurance monies under the policy will be recovered, whether in part or in whole, from the insurers.

In conclusion, the Directors of DFSM previously dismissed claims for compensation made by the Complainants for the reasons mentioned. DFSM further noted that no further new evidence has since been adduced by the Complainants to support their contentions. It submitted that consequently, the Directors' position remains (un)altered for the reasons stated.

The Directors of DFSM further concluded that in this case, Brownlee-Jones (of *Holborn Assets*) referred the Complainants to *St James International* to provide investment advice to the High-Net-Worth Investors so that they in turn could direct the Trustees to make the investments.

It submitted that *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 Complainants by *St James International*. It noted that following the failure of the PWL investment recommended by *St James International*, Brownlee-Jones has now persuaded the Complainants 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 Complainants were first advised in respect of the failure of their investments in PWL and the time they initially chose to write to DFSM seeking compensation (that is, over 3 years), it is also reasonable for the Directors to conclude that attempts made by the Complainants to seek redress from *St James International* failed and it is for this reasons that they have directed their attention towards DFSM.

The Service Provider further noted that whilst the position in which the Complainants find themselves in is unfortunate, DFSM considers the Complaint made by the Complainants against it as being unjustified and also as time barred by statute and, therefore, submitted that the Complaint 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(c) of the Arbiter for Financial Services Act (Cap. 555) ('the Act').

DFSM submitted that this is so given that the Complainants filed a formal complaint, through their letter dated 26 February 2021, and this is more than two years after the date it considered the Complainants first had knowledge of the matters complained of.

DFSM referred to the *'key date'* of 26 February 2018, this being the date it indicated when PWL was placed into administration. It also highlighted the other *'key date'* of 5 April 2018, this being the date of an email sent by the Complainants' advisors, *St James International*, in which the Complainants were *inter alia* informed that it was very likely that the events occurring would result in a liquidation of PWL, putting their invested capital *'at serious risk'* and that *'If any capital is returned it will be significantly lower than that invested if any at all*.[7]

DFSM accordingly submitted that it considered the date of 5 April 2018, as *'the latest date on which the Complainants first had knowledge of the matters of which they formally complained …'*.[8]

[7] P. 20 & 24
[8] P. 20

Statements made by the Complainants relevant to the plea raised

Certain statements made by the Complainants during the hearing of 12 October 2021, and in their final submissions, are particularly relevant to the plea under consideration.

During the hearing of 12 October 2021, it was testified that:

'The first issue is that we invested on the basis that an insurance policy was in place to cover 90% of the capital and the first year's interest in the event of fraud or failure of the investment, and we invested in March 2015. Simply eight months later, in December 2015, the insurance policy for this investment lapsed and was not renewed. So, the potential from then onwards did not exist. ***We were not aware of this until the Administrative Meeting in August 2019. We then submitted our claim within the two years' spin stated by Dominion, in March 2021****. No previous claims have been submitted against St James International or anybody else in contradiction of Dominion's assumption.*

A second point is that a member of PWL's Management Team was an internationally known criminal. This was discovered in March 2017*'.*[9]

During the same sitting, the Complainant further testified that:

'It is being said that this issue I am complaining about in relation to a potential criminal involved in the fund concerned, happened after the investment took place, I say that yes, it was after the investment was made, that's true; but I believe that it was March 2017 when we became aware that Interpol was after this chap. I cannot say exactly but we discovered a lot of information when the Administrative Meeting met and I believe that Mr Brownlee-Jones has been carrying out some investigations. And a lot of the information came from Mr Brownlee-Jones and also when we started to receive documents from the Administrators meeting*. I personally did not make personal investigations to find out this information'.*[10]

[9] P. 27 – Emphasis added by the Arbiter
[10] P. 29 – Emphasis added by the Arbiter

It is further noted that, in their final submissions, the Complainants noted *inter alia* the following which is also relevant to the matter under consideration:[11]

'Dominion want to suggest the insurance was valid at the outset as they had confirmed but couldn't monitor it going forward as their excuse for not even trying to do so. Indeed, the first they knew of the unpaid premium and change to conditions to remove the capital protection insurance was over 4 years after their initial due diligence in August 2019.

It was only well after this in late 2019/2020, that we were informed of this failure in due diligence, which prompted our complaint a year or so later'.

In order to adequately consider the plea raised relating to the period of decadence, raised in terms of Article 21(1)(c) of the Act, the Arbiter shall analyse 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:

- March 2015 – The rationale for the PWL investments was communicated by the Complainants adviser, *St James International*,[12] to DFSM in a letter dated 12 March 2015.[13]

- March 2015 – The investments into the PWL were undertaken on 24 March 2015.[14]

- April 2017 - Article published on 22 April 2017 in the Daily Mail UK regarding the alleged British fraudster involved in the call centre of *Privilege Wealth* in Panama.[15]

- February 2018 - Communication dated 6 February 2018 from the Managing Director of the General Partner (*Privilege Wealth Management Ltd*) of PWL. This communication, which was issued to all note holders, related to

[11] P. 174 – Emphasis added by the Arbiter
[12] P. 134
[13] P. 102
[14] P. 7, 12-13 & 20
[15] P. 58-59

the placing of *Privilege Wealth Plc* in UK, (a major debtor to the PWL), into administration in 23 January 2018.[16]

The communication of 6 February 2018 further indicated that on 23 March 2018, *'there will be no funds remitted to [PWL] by [Privilege Wealth Plc in UK] in order to pay redemption, capital and interest payments to Loan Note Holders'*.[17]

The said communication further described various facts emerging on *Privilege Wealth plc* in UK and how this affected the PWL investment. The notice also outlined: the facts pertaining to the developments in question; details relating to the alleged fraudster acting as *'the call centre manager … of Privilege Call Centres Inc'*; issues surrounding ventures introduced by the alleged fraudster and ensuing problems; the outcome of investigations relating to the said problematic ventures and related lawsuits; rescue attempts; the financial position of the partnership;[18] and details of a restructuring proposal whose *'primary benefit … [was] to give investors the chance to recoup all of their capital over a 3, 4 or 5-year time horizon'*.[19]

- February 2018 – A further communication dated 19 February 2018 was issued from the Managing Director of the General Partner of the PWL 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.[20]

- February 2018 – DFSM sent a letter to the Complainants dated 23 February 2018,[21] and email dated 26 February 2018,[22] relating to the communications sent by the Managing Director of the General Partner of the PWL investment. DFSM's letter highlighted *inter alia* the deadline of 9 March 2018 and asked the Complainants to liaise with their advisor and communicate (to DFSM), their chosen course of action in advance of the deadline.

[16] P. 112 - 117
[17] P. 112
[18] P. 114
[19] P. 117
[20] P. 122 - 123
[21] P. 124
[22] P. 126

- February 2018 – Complainant confirmed his voting preference on the form provided by *Privilege Wealth Management Ltd*, signing and dating it 26 February 2018.[23]

- March 2018 – Email sent by the Complainants to *St James International* where they highlighted *inter alia*, *'the serious concern and worry we both have regarding our total investment of £200,000 …'*.[24]

  The Complainants further noted that *'… apart from initially hearing that there is a possibility our initial investment may be returned to us in 3 to 5 years, and that we have now voted for St James International to sit on the oversight committee, neither my wife nor I have received any further information or advice regarding this matter'*.[25]

  It was further noted by the Complainants in the said email that: [26]

  'One of our major concerns is that although Privilege Wealth were originally required to take out an insurance policy against just such a failure they apparently failed to do so and we therefore need to know how this was allowed to happen and what actions are to be taken to compensate us in this regard'.

  The Complainants further posed the following question in their email:

  'Was the due diligence exercise that we would expect Dominion to undertake on our behalf robust enough?'

- April 2018 - Email from *St James International* dated 5 April 2018 in which the Complainants were made aware that the consequences of commencement of legal action taken by an investor against *Privilege Wealth* in Gibraltar, will very likely result in the liquidation of PWL and this will put the invested capital at serious risk and that the returned capital could be significantly lower, if any, at all.[27]

[23] P. 128
[24] P. 152
[25] *Ibid*.
[26] *Ibid*.
[27] P. 24-25

- June 2018 – Email dated 29 June 2018 from DFSM to the Complainant relating to a notification of 20 June 2018 sent by Grant Thornton, as the appointed liquidators of the PWL, relating to a possible creditors meeting.[28]

- July 2018 – Email dated 2 July 2018 from DFSM asking *inter alia* the Complainant whether it is his intention to pursue the First Creditors Meeting or wait until Grant Thornton have further information to provide.[29]

- July 2018 – Email dated 2 July 2018 from the Complainant notifying DFSM that he does not wish to pursue the First Creditors meeting at that stage.[30]

- July 2018 – Email dated 9 July 2018 from DFSM notifying the Complainants that they have been informed by a former adviser of *St James International*, that a number of his clients *'sought to submit a complaint to Action Fraud, based in the UK, in an endeavour for the UK Police Force to commence an enquiry into the loss of the funds through Privilege Wealth One LP and Privilege Wealth plc'*.[31]

  Dominion further stated in the said email that *'By way of an update, we are still awaiting to receive feedback from Grant Thornton with regards to the initial phase of the liquidation of PWL plc and PWL One LP'*.[32]

  Dominion further asked the Complainants to confirm whether they liked to proceed with the submission of a claim through Action Fraud.

- December 2018 – Email from DFSM dated 12 December 2018 notifying the Complainant of a letter received from Grant Thornton (dated 11 December 2018),[33] which provided *'an update in relation the liquidation of Privilege Wealth'*, the purpose of a liquidation committee[34] to be formed and investigations of the partnership. The said email noted that *'a meeting of*

[28] P. 131-132
[29] P. 131
[30] P. 130
[31] *Ibid*.
[32] *Ibid*.
[33] P. 136
[34] *'The primary purpose of a liquidation committee is to assist the liquidators in fulfilling their duties, which may include being involved in helping to make key decisions in relation to investigations, legal action or other steps required in the interests of the liquidation estate'* - P. 142

creditors will be convened in order to form a liquidation committee' and also provided a proxy form for votes.[35]

- August 2019 – Letter dated 14 August 2019 issued by *Grant Thornton*, the liquidators of the PWL investment, where reference was *inter alia* made to their previous report to creditors dated 11 December 2018, and which provided an update and progress report on the investigations undertaken by the liquidator, including on the insurance policy relating to the said investment.[36]

- September 2019 – Email dated 12 September 2019 sent by DFSM notifying the Complainant *inter alia* of a status update report from Grant Thornton and that DFSM attended a liquidation committee meeting on 27 August 2019 but was the only committee member present. Details of a resolution for the consideration by the Liquidation Committee was also provided.[37]

- March 2020 – Email dated 6 March 2020 sent by DFSM notifying the Complainants of the outcome of the liquidation committee meeting held on 20 February 2020, as well as a summary provided by Grant Thornton of their investigations.[38]

- February 2021 – The Complainants sent a formal letter of complaint to DFSM through their letter dated 26 February 2021.[39]

- March 2021 – DFSM replied to the formal complaint filed by the Complainants by way of its letter dated 19 March 2021.[40]

Other considerations, observations and conclusion

In essence, the Complaint relates to the *'massive losses"*[41] claimed by the Complainants on the PWL investment, with the Complainant's request for compensation based on the following two key alleged failures:

[35] P. 134
[36] P. 34-35
[37] P. 148
[38] P. 150
[39] P. 7
[40] P. 9
[41] P. 4

a) The principal claim that DFSM failed to undertake adequate due diligence, assessment and monitoring of the *Privilege Wealth One Limited Partnership* ('the PWL investment') given that DFSM allegedly failed to discover the problematic history of high-ranking staff involved in the administration of said investment; failed to ensure the actual execution of underlying investments within the PWL investment; and failed to ensure that the PWL investment kept its insurance cover up to date.

b) The claim that DFSM failed to undertake adequate due diligence in respect of the Complainants investment advisor, *St James International*, given it was claimed that *St James International* was subject to *'lack of regulation'* and had *'no PI [professional indemnity] cover'*.[42]

With reference to Article 21(1)(c) of the Act invoked by the Service Provider, 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. *Awareness about material loss* – On the basis of the email dated 5 April 2018, sent by *St James International* in reply to the concerns raised by the

[42] *Ibid*.

Complainant, it appears that the PWL investment was at the time not yet under liquidation.

The said email of *St James International* clearly however highlighted the consequences of certain actions developing at the time, which *were 'very likely to result in the liquidation of PWL'* and which liquidation accordingly would put the *'capital invested at serious risk'*, where *'If any capital is returned it will be significantly lower than that Invested if any at all'*.[43]

There is no doubt that this warning was clear, categorical and did not downplay or created doubts about the seriousness of the matter in hand and resulting implications, that is, of significant or complete loss of the investment. Neither did such email raise hopes about the proceeds from the investment and rather indicated that the capital could be completely lost or, if returned, would be significantly lower than the amount invested.

The email notification by DFSM dated 29 June 2018 to the Complainant, wherein reference was made to Grant Thornton *'as the appointed liquidators of PWL'*, further indicates that the liquidation of the PWL investment had indeed commenced shortly thereafter, by June 2018, at the latest.[44]

It is furthermore noted that, in the 11 December 2018 report issued by Grant Thornton, a bleak outcome was indicated. In the said report it was *inter alia* stated under the title of *'Investigations'* that as *'previously reported … the asset position of the Partnership was uncertain and the liabilities are estimated to be in excess of £28 million, split between the Partnership and Privilege Wealth'*.[45]

Hence, in the circumstances, it is difficult for the Arbiter to reasonably consider the Complainants, as first having knowledge of the massive losses during or after August 2019, as alleged by them, given that during the year 2018 they have been already aware of the *'massive losses'* that such investment would yield.

[43] P. 24
[44] P. 131
[45] P. 136

ii. *Awareness of key allegations about the due diligence, assessment, and monitoring of the PWL investment*

As to the Complainants' awareness regarding the inadequate due diligence, assessment, and monitoring of the PWL investment, it is noted that as outlined above, the Complainants referred to three main aspects, namely (i) DFSM's alleged failure to discover the problematic history of high-ranking staff involved in the administration of said investment; (ii) DFSM's alleged failure to ensure the actual execution of underlying investments within the PWL investment; and (iii) DFSM's alleged failure to ensure that the PWL investment kept its insurance cover up to date.

Even on these aspects, the Complainants are however considered to have had details of such matters prior to 2019.

The Complainants referred to August 2019 as the date when they became aware of the matters.[46] **Whilst the report issued by Grant Thornton, dated 14 August 2019, provided an update including on various investigations; possible recoveries (such as on the *'Oliphant and Rosebud loan'*);**[47] **and also about the cover on the insurance policy; it is noted that this was however not the first time such aspects were mentioned**.

- *Failure to discover the problematic history of high-ranking staff* - It is noted that the Complainants mentioned Christopher Burton, as being the *'British fraudster … gunned down in assassination attempt',* [48] as the high-ranking staff which they alleged should have been discovered in the due diligence undertaken by DFSM. An article dated 22 April 2017[49] produced by the Complainants themselves was also attached in the Complainant's email to the OAFS of 14 October 2021.

  It emerges that the Complainants were clearly aware of the issues involving Christopher Burton prior to 2019. The matters surrounding

[46] As testified during the hearing of 12 October 2021 – P. 27
[47] P. 35
[48] P. 31
[49] P. 58

Christopher Burton indeed emerge even in the communication of 6 February 2018 issued by the General Partner of PWL.[50]

- *Failure to ensure the actual execution of PWL underlying investments* – Whilst the Complainants have not mentioned any specific investments on this point, it is noted that in the notice of 6 February 2018 issued by the General Partner of PWL,[51] mention had already been made of the problems with certain investments. Indeed, the said notice had mentioned the issues with *'Oliphant'* and *'Rosebud'*[52] which both also featured in the notice of 14 August 2019.[53]

  Hence, no evidence has emerged during the case to suggest that the Complainants first came aware of this aspect in 2019 either.

- *Failure to ensure the PWL investment kept insurance cover up to date* – Similarly, in the original notice sent by the Managing Director of the General Partner of PWL, dated 6 February 2018, in the section titled '*Financial Position of the Partnership*', there were already indications of certain difficulties 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'.[54]

  Hence, the Complainants are deemed to first had knowledge about failures in keeping the insurance cover up to date way back in 2018.

iii. *Awareness of allegation about the investment advisor* -

No clear details have emerged by when the Complainants first had knowledge about the alleged *'lack of regulation'* of *St James International* and the failure by a such advisor to have *'no PI cover'*.

[50] P. 114
[51] P. 112-116
[52] P. 114-115
[53] P. 35
[54] P. 116

The issues arising in the year 2018 as also outlined above, and also in light of the emails both dated 5 April 2018 sent to the Complainants respectively by *St James International* and Darin Brownlee-Jones,[55] indicate that such matters should have emerged in 2018 at the time when the Complainants are considered to have become aware of the losses on the investment.

For the reasons amply mentioned above in this decision, the Arbiter accordingly considers that there is no sufficient basis on which he can reasonably and justifiably consider *'the Administrative Meeting of August 2019'*,[56] or *'late 2019/2020'*[57] as the time when the Complainants first had knowledge of the matters complained of, as argued by the Complainants.

The Complainants only filed a formal complaint with the Service Provider on 26 February 2021, which is more than two years from the day on which the Complainants are considered by the Arbiter they 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

[55] P. 24-25
[56] Hearing of 12 October 2021 – P. 27
[57] Complainants' Note of final submissions – P. 174