Before the Arbiter for Financial Services

Case ASF 008/2023

OL (the 'Complainant')

Vs

Momentum Pensions Malta Ltd.

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

Sitting of the 10 August 2023

The Arbiter,

Having considered in its entirety the Complaint (filed on 18 January 2023) including the attachments filed by the Complainant,[1]

<u>The Complaint</u>

The Complainant claims having invested private pension funds amounting to about GBP £278,000 and having transferred such funds to Momentum in August 2014. The funds were invested on the advice of his appointed Investment Advisors known as Offshore Investment in various funds operated by Generali late in 2014/(early) 2015.

He claims that some months later he found out that there was a problem with these investments and was informed that four out of six assets in his portfolio had been suspended.

He declared that in 2017 he changed his investment advisor to Stein International Investment Management with the assistance of Momentum. Two live investments were cashed out and resulting funds were reinvested in

[1] P. 1 -107

an investment platform MOVENTUM (nothing to do with Momentum), and later in 2019, they cashed out the residual value of the suspended investments on the basis that it was unlikely to increase and would no longer have to pay fees to Generali. This involved a loss of approximately GBP £113,000.

Complainant contended that his

"Trustees did not properly review the assets prior to approval and as such unsuitable assets were purchased and as such have a high level of culpability regarding the losses."[2]

"I believe that Momentum pensions as trustees were negligent in their initial oversight of the investments made. After the suspension of assets they were helpful but at that point it was too late and therefore they must accept responsibility."[3]

He quotes, as an example, the proximity of some of the investments to their failure and gave this timeline:

QROPS value transferred to Momentum 28 August 2014

Assets in Lancelot Global purchased in September 2014

Assets in Four Elements purchased 06 October 2014

Business licence of Lancelot Global and Four Elements revoked 20 March 2015.

He added:

"I will firmly state that my claim is not based on poor performance of the assets, as I am fully aware that investments can go down as well as up. However, in this case, the majority have ended up suspended and with a liquidator that is something totally different, even sinister, which I believe should have been spotted by the Trustee."[4]

As a remedy, he claims compensation for GBP £113,00 being the difference between his original investment of GBP £278,000 and the value of GBP £165,000 realised from liquidation of his original Generali investments.

[2] P. 3
[3] P. 4
[4] P. 5

The Complainant quoted 10 January 2022 as the date when Complainant had first knowledge of the matters he was complaining of and added that his Complaint is:

"based on the Malta Court Ruling against STM and Momentum regarding CWM. That both entities had a greater responsibility on the best interests of their client. I believe that my case is very similar to this.

The parties involved were:

Financial Advisor Offshore Investor based in the UAE

Portfolio holder Generali

Trustee Momentum Pensions."[5]

No reason has been given for saying that first knowledge about the Complaint was on 10 January 2022, but it is quite possible that this is the date that the Complainant became aware of Arbiter's decision in Case 077/2020 decided on 14 December 2021 where the Service Provider was MPM and the Investment Advisor was CWM.

The Reply of the Service Provider

In their reply of 8 February 2023, the Service Provider raised in their defence a preliminary issue on the competence of the Arbiter to hear this case as, according to them, the Complaint was prescribed by virtue of Article 21(1)(b) and Article 21(1)(c) of CAP 555 of the Laws of Malta.

They also claimed prescription pursuant to Article 2156(f) of CAP 16 of the Laws of Malta.

The Service Provider also made extensive defence on the merits of the case in their reply.

Hearing of 19 June 2023

In the hearing, the Arbiter made it clear that he was obliged to deal with the matter of his competence to hear the case before entering into the merits of the case, and this for the following reasons:

[5] P. 3

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.

The Arbiter gave the Service Provider up to 12 July 2023 to make written submission with arguments for prescription on the basis of the provision of CAP 555 and gave until end of July to the Complainant to submit his reply to the Service Provider's submission, to be strictly confined to the matter of Arbiter's competence due to prescription provisions of CAP 555.

Submission by Service Provider related to the issue of prescription under the provisions of CAP 555

1. Plea for prescription related to Article 21(1)(b) of CAP 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 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 18 Jan 2023, 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 effected 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 has to consider whether the Complainant

had full knowledge of the matters giving rise to the Complaint before 18 April 2018.

By the Service Provider's own assessment:

"without prejudice, even if the 2015/2016 is not considered to be the date the Complainant first had knowledge of the matters complained of, Momentum submits that <u>as early as November 2016, as certainly by February 2019</u>, *the Complainant had full knowledge of the matters he complains about****".***[6]

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 until at least 29 May 2018 when Momentum sent to the Complainant the statement for the year ended 2017 which clearly showed the investment withdrawal from Generali on 22 September 2017 and the first investment into Capital Platforms Moventum.

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

2. 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 when it could be argued that the Complainant had full knowledge of the matters subject of this Complaint was 29 May 2018, when he was sent the statement of investments as at 31 December 2017.

Following this date, the Service Provider quotes two subsequent dates which could remove any doubt that the Complainant had full knowledge of the issues complained of, namely:

[6] P. 274

"17 January 2019 – The Complainant wrote to his new advisor and asked: 'There was talk that there may be monies redeemable on some of the toxic funds but at the same time we had to pay the Generali fees, was it worth keeping them. Where did we go with that'. Complianant's advisor subsequently emailed Momentum and requested a valuation, which was provided".[7]

And,

"5th February 2019 – the Complainant's advisor informed him as follows: "… it seems that there is little or no chance of any significant return therefore I am recommending that we give up the funds, transfer the cash to your Trading Platform and close the bond. A bitter pill I know! If you could confirm I will arrange the paperwork for you".[8]

To this, the Complainant replied in agreement on 6 February 2019 and on same date a Generali valuation was provided to Complainant's advisor with updated valuation.

The Service Provider maintains that:

"The Complainant filed a complaint in writing to Momentum on the 15 February 2022".[9]

Therein the Complainant stated that he had first knowledge of the matters complained of on 10 January 2022. Momentum submit that such statement by the Complainant is not credible:

"as early as November 2016 and at the very latest by the 6 February 2019, the Complainant had knowledge of the matters being complained of. The Complainant himself in fact, on 6 February 2019, instructed the closure of the Generali Bond, after having received advice from his advisor".[10]

Consequently, the Service Provider maintains that the Complaint was made with them more than two years after the Complainant had knowledge of the

[7] P. 276, ref xi.
[8] P. 276, ref xii.
[9] P. 277, ref 9
[10] P. 277, ref 10

matters complained of 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

Complainant sent an email on 31 July 2023 replying to the submission of the Service Provider[11] in which reply he dealt with two issues:[12]

1. ***"Should the complaint be time-barred as Momentum suggests, taking away my only practical means of redress?***
2. ***Is the complaint justified?"***

At the hearing of 19 June 2023, the Arbiter had requested the parties to make submissions on the preliminary plea about the competence of the Arbiter to hear the case and, consequently, at least for the time being, the Arbiter will only take into consideration the part of the reply of the Complainant which deals with 1. above and will not take into consideration arguments made regarding 2. as these would deal with the merits of the case which can only be considered after the preliminary plea issue is settled.

On the question of the preliminary plea regarding the Arbiter's competence to hear this Complaint as raised by the Service Provider, the Complainant has replied:

*'**Time Barred***

Momentum suggest that by 2016 the full number of suspensions were known and as such the clock for the time to complain started then. They strongly push forward my initial strong criticisms of the Financial Advisor. I did in a response to a correspondence from the advisor state: That I am not aware how the responsibilities interrelate but I credit Offshore Investor with the bulk of the responsibility. (not verbatim)

The reason for my anger and frustration was after the first suspensions in March 2015, I made a number of communications directly with the advisor's representative Andy Berks. At first his responses were that the suspensions

[11] P. 279 - 306
[12] P. 281

were a technicality but that slowly changed as time went by. When the second lot of suspensions happened I was pretty well frustrated and angry, hence my communications with the General Manager of Offshore Investor. I am a road construction specialist not an investment specialist, therefore in my opinion my ignorance of where specific responsibilities start and end should not be considered pertinent to the case.

Late 2016 Momentum recommended that I change my advisor, which I agreed to. When they suggested I use Stein Investment I agreed to that and was grateful as I was somewhat concerned with how I would find a financial advisor which was both capable and willing to take over a portfolio where the majority of assets were in suspension or with the liquidator.

When speaking to my new advisor in early 2017, I was led to believe that the relevant financial regulations in Malta had greatly improved from the time of the investment but as they were at that time it was very unlikely that going legal with Momentum would be successful. It must be understood that at this time there as a potential that 2/3 of my pension could be wiped out. I had no appetite to go through a potentially expensive and fruitless court case.

Was this reasonable advice that I accepted? I would say yes because from the correspondence from Momentum both in the Adjudication ASF 072/2019 and responses to my complaint that this was their belief and quite probably many others in the industry at the time.

In early 2022, the same advisor sent me an email with an attachment of the front page from International Advisor with the story of Momentum's failed appeal regarding CWM. From this I found adjudication case no OAF 073/2019, reading through this I noticed many similarities with my own situation and I sent an email to Momentum in February 2022 stating my intent to claim.

In Momentum's response to my initial email informing them of my intent to claim, they stated: In accordance with the ***Standard Operational Conditions B2.6.2 of the Special Funds Act which applied to Momentum at the time. They met all their obligations.***

Part of Momentum's response to OAFS 073/2019 the latter part of item 5 states. The Service Provider submitted that this complaint relates to conduct

which occurred before the entry into force of Chapter 555, Article 21(1)(b) which came into force on the 18 April 2016. This intimates that Momentum didn't consider they were liable for failures prior to this date.

I would also refer to the email from Momentum to Offshore Investor dated November 15 2016 where Momentum rebuked Offshore Investor for their poor level of investment. Detailed as A07.

The Generali PB contains 4 illiquid assets, a stock based structured product, two further assets we would under current guidelines restrict as esoteric. The ultimate beneficiary of this policy is risk rated medium.

I would suggest that this wouldn't have been written if they believed they had the responsibilities of an RSA and Trustees as detailed in the ruling OAF 073/2019 some of which is recorded in B1 to B10 below.

I feel the main game changer is the following part of ruling 073/2019. Which I detail in B08.

Although the consultation document was published in 2017, MFSA was basically outlining principles established both in the TTA and Civil Code which had already been in force prior to 2017.

There are numerous other indications where they refer to the investments were made by the claimant and his advisor and that they are not licensed to give advice. This is not only regarding their responses in OAF 073/2019 but also responses to my claim. Of course, Momentum are not financial advisors but they have specific obligations to the investors to safeguard their interest as stated in the ruling on 073/2019 some of which are shown in B1 to B10 that even now they don't seem to acknowledge.

I believe prior to the aforementioned ruling Momentum and probably others believed they had conformed to the requirements prevalent at the time of the initial investment as stated in Momentum's response to my initial complaint. They stated: In accordance with the ***Standard Operational Conditions B2.6.2 of the Special Funds Act which applied to Momentum at the time. They met all their obligations.***

The Arbitration ruling was made in April 2021 followed by an appeal. Although 2016 may have been the date where the no of suspended assets were asserted, it was 2021 where the Momentum's level of responsibility was determined. Which based on those dates I would not be time barred. I believe it would be unreasonable, no unjust to Time Barr me for not being aware of provisions within Maltese Law which even Momentum and no doubt others were either oblivious to or unaware of.'[13]

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 registered 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 what was the date when without doubt 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.

[13] P. 282 - 283

The date when the Complaint was registered in writing with the Service Provider has been quoted by the Service Provider as 15 February 2022.[14] In his official complaint filed with the OAFS the Complainant also refers to

"email informing momentum of claim.pdf"[15]

and in support attached email dated 15 February 2022.[16] The thread of this email also has an email reply from Service Provider dated 17 February 2022 which says:

"I refer to your complaint dated 16 February 2021 in connection with your Retirement Scheme with Momentum Pensions Malta Limited".[17]

Given that the official Complaint filed with OAFS also has a formal reply from the Service Provider by means of letter dated 29 April 2022 which refers to the email of 15 February 2022 (the "Complaint"), the Arbiter concludes that the reference to "*complaint dated 16 February 2021*" as above quoted is an error as there is no evidence that any complaint was registered on such date, and both Complainant and Service Provider refer to the email of 15 February 2022 as the date when the official complaint was lodged with the Service Provider.

Consequently, in terms of Article 21(1)(c), for the Arbiter to have competence to continue hearing the merits of this case it must be established whether the Complainant had knowledge of the matters complained of only after 15 February 2020, being two years before the complaint was registered with the Service Provider.

The Service Provider has argued that Complainant had knowledge of the matters complained of

"as early as November 2016, and at the very least by the 6 February 2019, the Complainant had knowledge of the matters complained of".[18]

[14] P. 277, item 9
[15] P. 8
[16] P. 10
[17] P. 11
[18] P. 277

The 6 February 2019 is the date when the Complainant, on the advice of his new investment advisor, decided to liquidate completely the Generali portfolio and therefore had full view of the losses incurred.

Even if the Arbiter extends the date to 2 August 2019, being the date when the liquidation funds of the Generali investments were actually sitting in the account of the new Moventum platform, this would still be out of the two-year period stipulated by Article 21(1)(c). There is no question that at the very latest by 2 August 2019, the Complainant had an absolute total view of the matters complained of.

The Complainant makes reference to cases ASF 072/2019 and 073/2019 decided by the Arbiter on 28 July 2020 and 6 April 2021 against the same Service Providers with merits very similar to this Complaint. These decisions were later confirmed on appeal by the Court of Appeal of Malta.

The Complainant makes the case that the date of 10 January 2022, which he mentions in his official Complaint with the OAFS, as the date when he had first knowledge of the matters he complains of as it was after this date that

"Momentum level of responsibility was determined. Which based on those dates I would not be time-barred".[19]

And continues that

"I believe it would be unreasonable, no unjust to Time Barr me for not being aware of the provisions within the Maltese Law which even Momentum and no doubt others were either oblivious to or unaware of".[20]

Decision

While the Arbiter sympathises with the Complainant for the losses he suffered, the Arbiter is bound to determine his competence, in this case particularly, by what is provided for in Chapter 555, Article 21(1)(c).

[19] P. 283
[20] *Ibid*.

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.

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

This is without prejudice to right of the Complainant to takes his case to another Court or Tribunal[21] that is not bound by the competence issue as the Arbiter is in this case. For this purpose, the Arbiter is not expressing any opinion on whether the Complaint is time barred also by the provisions of Chapter 16 or on the merits of this Complaint.

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

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