Before the Arbiter for Financial Services

Case ASF 065/2023

ZJ ('the Complainant')

vs

STM Malta Pension Services Limited

(C 51028) ('STM' or 'the Service Provider')

Sitting of 16 February 2024

The Arbiter,

Having seen the **Complaint** made against STM Malta Pension Services Limited ('STM' or 'the Service Provider') relating to the STM Malta Retirement Plan ('the Retirement Scheme' or '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 STM as its Trustee and Retirement Scheme Administrator ('RSA').

The Complaint, in essence, relates to the Complainant's claims of significant losses suffered on his Retirement Scheme due to the Service Provider's alleged failures to fulfil its fiduciary duties as trustee and administrator of his Scheme when it:

- allowed a bogus company which was not regulated by the FCA to act as his advisor and manage his pension plan;
- allowed investments within his Retirement Scheme which were not suitable.

The Complaint[1]

[1] Complaint Form on Page (P.) 1 - 5 with extensive supporting documentation on P. 6 - 140.

The Complainant explained that he allowed his advisor to manage his Retirement Scheme on the premise that such an advisor had terms of business with STM; that STM, as his trustee, had conducted due diligence on this firm; and that his advisor was a *de facto* firm.

The Complainant claimed that, in reality, however, the advisor was a bogus firm which was never regulated by the FCA[2] and never featured on the FCA's website.

He, therefore, submitted that STM failed in its duty of care by allowing a bogus firm to manage his account. The Complainant reiterated that he dealt with his advisor on the premise that the advisor was legitimate and was able to manage his pension plan in the first place. He stated that STM has a fiduciary duty to protect his interests.

The Complainant claimed that if STM had checked the FCA's website, STM would have discovered that the advisory firm did not exist and, accordingly, could not have been appointed.

He also explained that as a layperson, he was limited in the level of due diligence that he could conduct and that he relied on the fact that if STM had terms of business with the advisory firm, then, such a firm would be legitimate. The Complainant claimed that this was not the case, however, and that STM is, therefore, at fault.

The Complainant also claimed that all of the failed investments undertaken within his pension were ultimately not fit for purpose and not in keeping with a retail client, which he claimed he was. He pointed out that STM ultimately, countersigned all the investments.

In his complaint form to the Service Provider, which the Complainant attached to his Complaint Form to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant highlighted that the losses on his Scheme can be attributed to two facts:

> *'1. The holdings sold to me were unregulated investments and were professional in nature. I am a retail investor*

[2] Financial Conduct Authority, UK

2. *The company which sold me these investments were a bogus unregulated entity. I was of the belief that by virtue of being able to do business with STM, STM would have conducted some due diligence to ensure that they were a bona fide outfit who would conduct their business in a fair and compliant manner'*.[3]

Remedy requested

The Complainant sought to recoup the losses related to the management of his plan for the entire time he *'was being managed by Balquidder'*.[4] He approximated his losses to amount to GBP 100,000 but pointed out that he was still gathering the dealing instructions to get an idea of the exact figure.[5]

Having considered, in its entirety, the Service Provider's reply, which included no attachments,[6]

Where the Service Provider explained and submitted the following:

1. That the Complaint is unfounded and ought to be rejected because of the following reasons:

   (i) That preliminary the Complaint is time-barred based on Article 21 of Chapter 555 of the Laws of Malta. STM submitted that it was amply clear, from the documents submitted, that the Complainant first had been made aware of any alleged losses as early as 2015. It noted that, as it shall transpire from the evidence which it shall produce, the Complainant was made aware, had knowledge and was informed of the alleged losses in his portfolio at an early stage and, therefore, the time period for filing his action or seeking redress has lapsed according to law.

   STM also submitted that should the Arbiter take into consideration this action as directed towards it as trustee, then it considered that

[3] P. 7
[4] P. 3
[5] *Ibid.*
[6] P. 146 - 147

the filing of the Complaint is also time-barred by virtue of Article 41 of the Trust and Trustees Act, Chapter 331 of the Laws of Malta.

(ii) That without prejudice to the above, the quantification of loss was not yet determined when the Complainant filed the Complaint and, *ex admissis*, he in fact states that *'he is still gathering the dealing instructions to get an idea of the exact figure'*.[7] STM referred to Article 26(3)(c)(iv) of Chapter 555 and submitted that the Complainant must declare the quantum of loss and not base his claim on an approximate sum or guess.

(iii) That without prejudice to the above, and on the merits, the Service Provider contends that from the drafting of the Complaint, it is very difficult for it to adequately defend itself. It submitted that the Complainant failed to: identify which investment loss he is complaining about; identify the failed unregulated investments which were allegedly not fit for purpose; and, also, to identify which period of investment he is referring to, thus making it impossible for STM to submit an adequate defence.

(iv) That, on the merits, it asks the Arbiter to humbly take note of the fact that the allegations made by the Complainant are mainly addressed to his financial advisor and not to STM who is mainly custodian of the assets and not licensed to give financial advice.

(v) That, also, on the merits, STM contends that with regards to *Balquidder* being the appointed advisor - which it noted was only mentioned in the remedy sought and even though the Complainant had removed and appointed advisors on various occasions – such an advisor was chosen by the member himself and was not a *bogus firm*.

(vi) That, on the merits of the Complaint, STM asks that should the Arbiter decide that the Complainant ought to be compensated for any alleged

[7] P. 146

losses made, then, the withdrawals made by him should be taken into consideration. It noted that the said withdrawals amount to GBP 82,653.

(vii) STM further submitted that all allegations are unfounded in fact and at law and that, as it shall be evidenced, as custodian it has acted in the Complainant's best interest with prudence, diligence and utmost good faith and adhered to its statutory obligations according to law.

2. STM reserved the right to produce further oral and documentary proof and to make additional submissions to substantiate its position.

3. It submitted that, for the reasons mentioned, all of the Complainant's demands are to be rejected with costs to be borne by the Complainant.

Preliminary

Competence of the Arbiter

During the sitting of 21 November 2023, the Arbiter referred to the preliminary pleas raised by the Service Provider in its reply dated 5 June 2023 to the OAFS,[8] and granted the parties time to provide their respective submissions and defence on the said pleas.

STM Malta, on its part, highlighted that the Complainant himself stated that he first had knowledge of the matters complained of on 1 January 2011, as he indicated in his Complaint Form to the OAFS.[9] It submitted that *'Therefore, ex admissis, the Complaint is time barred by virtue of Article 21(1)(b) of chapter 555 of the Laws of Malta'*.[10]

In addition, the Service Provider also referred to the valuation statements sent to the Complainant for the end-of-year position as of 2014 and 2015, and claimed that despite the Complainant was aware of the substantial losses as emerging from the said statements, he did not file a complaint with the OAFS in 2018 as he ought to have done. STM accordingly submitted that, for the

[8] P. 146 - 147
[9] P. 2
[10] P. 153

indicated reasons, the Complaint was time barred on the basis of Article 21(1)(b) of Chapter 555 of the Laws of Malta ('the Act').

The Service Provider also referred to the annual valuation statements sent to the Complainant for 2016, 2017 and 2018. It claimed that it was also apparent from the said statements that the Complainant was making a loss on his investments. STM submitted that notwithstanding this, the Complainant did not register a written complaint with STM Malta in accordance with article 21(1)(c) of the Act and it accordingly considered the Complaint to be time-barred.

STM Malta also reiterated that the Complainant must indicate the quantum of the loss sustained and precisely indicate the failed investments he is complaining about. It also pointed out that the Complainant had changed his financial advisor in 2014, 2017, 2018 and 2022.

Furthermore, the Service Provider referred to article 41(2) of the Trust and Trustees Act, Chapter 331 of the Laws of Malta ('TTA'). It explained that the Complainant seems to indicate (in documents attached to his complaint)[11] that his Leonteq structured products were not suitable for his investment objectives.

STM submitted that the Complainant was, however, aware of the Leonteq structured notes *'as early as 2014 as it was listed as an asset in the valuation dated 2014'*.[12]

It further noted that the Complainant asked to remove his advisor *Parmafey/Balquidder* in 2017, claiming also that the Complainant *'became aware of the alleged breach of fiduciary duty complained of (the lack of FCA licence) in 2017 …'.*[13]

It submitted that *'… hence the action is time-barred by the statutory limitation of three years'* of the said article of the TTA.[14]

[11] P. 12
[12] P. 155 & 73
[13] P. 155
[14] *Ibid*.

In his subsequent submissions, the Complainant clarified *inter alia* that '*The losses can be attributed to the purchase of structured products which were professional in nature'*.[15]

As to the plea of prescription raised by STM, the Complainant stated the following:

> *'STM wish to indicate that I am somehow time-barred under Maltese law on the basis of being notified of my losses by virtue to being sent a yearly statement. I am going to opine why I believe this should not apply.*
>
> *1) There was no express notification of my losses. An express notification would be construed normally as a direct communication relating to a specific failure of a specific product. This did not occur.*
>
> *2) The idea that a yearly statement is tantamount to an express notification is nullified by the fact that a yearly statement can only specifically refer to a[n] 'unrealised' loss or gain. A statement which shows a negative is not necessarily a loss as the asset can climb in value. Therefore, no yearly statement provided to me could possibly have been an express declaration of a crystallised loss. Therefore, prescription should be void in this case.*
>
> *3) STM claim they are unable to compute the exact loss attributable to a specific product. I claim this on the basis that they are unwilling to declare the exact loss attributable to each structured product. It is therefore my submission that a declaration cannot be made in absence of an actual figure.*
>
> *4) The value of my current fund is down but is not fully attributable to unsuitable investments. It will take into account all associated fees ad would also take into account losses elsewhere. An express or even an implied notification would surely be related to a specific loss or failure. A member of a pension can logically be significantly down on their investments without any wrongdoing. They could for example be highly aggressive investors who are simply not succeeding.*

[15] P. 174

5) I was never made aware of any statutory right to redress in an express or implied manner by STM'.[16]

The Arbiter shall consider the said pleas and submissions next as indicated during the hearing of 21 November 2023.

Preliminary Plea in respect of Article 21(1)(b)

Article 21(1)(b) of Chapter 555 of the Laws of Malta ('the Act') stipulates that:

> *'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 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.'*

Article 21(1)(b) provides that a complaint related to the '*conduct*' of the financial service provider which occurred before the entry into force of this Act, **shall be made not later than two years** from the date when this paragraph comes into force. **This paragraph came into force on the 18 April 2016.**

The law does not refer to the date when a transaction takes place but refers to the date when the alleged misconduct took place.

Consequently, the Arbiter has to determine whether the conduct complained of took place before the 18 April 2016 or after, in accordance with the facts and circumstances of each case.

As outlined in his Complaint to the OAFS, the alleged misconduct involves the actions of the Service Provider as the trustee and retirement scheme administrator of the Retirement Scheme.

In his Complaint to the OAFS, the Complainant highlighted two main key aspects regarding the conduct of the Service Provider. As summarised earlier above, these relate to the claim that STM Malta allowed a bogus company which was

[16] P. 176

not regulated by the FCA to act as his advisor and, also, the claim that STM Malta allowed unsuitable investments.

With respect to the appointment of the financial advisor and the disputed financial investments, the conduct of the service provider cannot be determined from the date when the advisor was appointed nor when the transaction took place, and it is for this reason that the legislator laid emphasis on the date when the conduct took place.

As to the advisor, the Complainant specifically mentioned the *'entire time I was being managed by Balquidder'* in his Complaint.[17] The Arbiter notes that in its submissions, the Service Provider itself explained *inter alia* that:

> *'… In 2014, the Complainant sent a request to STM Malta to remove deVere and appoint Parmafey. In 2017, the same Complainant ask[ed] to remove Parmafey/Balquidder and ask[ed] to appoint GMW …'*.[18]

It is thus clear that the conduct of the Service Provider complained of in respect of his advisor *Balquidder* covered the period when *Balquidder* occupied its function as advisor, which period was between 2014 to 2017. The conduct complained of cannot accordingly be considered as *'conduct which occurred before the entry into force of this Act'*, that is, before 18 April 2016; and article 21(1)(b) is thus not applicable to such matter.

As to the failed investments, the Complainant eventually clarified that these were the structured products as he attributed the losses experienced on his Retirement Scheme to such products.[19]

The Arbiter notes that various material positions in structured note investments still featured and formed part of the Complainant's investment portfolio after 18 April 2016.[20]

[17] P. 2
[18] P. 155
[19] P. 174
[20] For example, the GBP85,000 investment in *Leonteq International Express Cert*, the USD50,000 investment in *Commerzbank 2Y Bearish RCB* and the USD50,000 investment in *Commerzbank 2Y Autocall Phoenix* - as per the summary of the purchase and sale of investment products summarised in Tables A to C produced later in this decision.

It is furthermore clear, that the Service Provider occupied its functions and roles as trustee and RSA of the Complainant's Retirement Scheme beyond 18 April 2016.

In the circumstances, the Arbiter considers that article 21(1)(b) is not applicable to the case in question given that the Complaint involves the conduct of the Service Provider during its tenure as trustee and administrator of the Scheme, which conduct goes beyond the period when the Act came into force; the disputed advisor *'Balquidder'* was still active as advisor after 18 April 2016; and the disputed investment products still featured and formed part of the Complainant's portfolio also after 18 April 2016. The Arbiter accordingly considers that the actions complained of cannot be considered to have occurred before 18 April 2016. The conduct complained of is rather considered to have been continuing in nature as per article 21(1)(d) of the Act.

The Arbiter is accordingly dismissing the submissions made by the Service Provider concerning article 21(1)(b).

Preliminary Plea in respect of Article 21(1)(c)

As outlined above, the Service Provider also raised the plea that article 21(1)(c) of the Act should apply. Article 21(1)(c) 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.'*

In that case, the Complainant had two years to complain to the Service Provider '*from the day on which the complainant first had knowledge of the matters complained of*'.

In his Complaint Form to the OAFS, the Complainant indicated '01/01/2011' as to the date when he claimed he first had knowledge of the matters complained about.[21]

[21] P. 2

Whilst it is unclear why the Complainant indicated such a date, it is useful to consider the timeline of key events as arising from the case file in order to consider this aspect in a just, fair and reasonable manner.

It is first noted that the Complainant's application for membership into the Retirement Scheme was dated 26 June 2012.[22]

The Scheme held an underlying insurance policy ('the Executive Redemption Bond') issued by *Skandia International* within which a portfolio of investment instruments was held as per the '*Historical Cash Account Transactions'* statement issued by *Utmost Wealth Solutions* as presented by the Complainant.[23, 24] The said underlying policy started on 4 September 2012.[25]

It is further noted that during the hearing of 21 November 2023, the Complainant's representative submitted that:

'they had asked the service provider several times for the full transaction history of all the investments of the complainant which the service provider did not provide',[26] and that

'The complainant has no access to his transaction history and for him to compute the loss attributed to specific products, he needs to have the full transaction history in order to acquaint each particular trade to its particular note'.[27]

During the said hearing, the Arbiter requested the Complainant to provide evidence of the information he requested from STM Malta, which he claimed was not provided.[28]

The evidence subsequently provided by the Complainant involved just general communications between his representative and Utmost.[29]

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[22] P. 8
[23] P. 43
[24] The business of *Skandia International* went through certain changes (acquisition and rebranding to Old Mutual and then to Quilter). *Quilter International* was in turn eventually rebranded to *Utmost International*
https://www.quilter.com/about-us/quilters-history/
https://utmostinternational.com/quilter-international/
[25] P. 70
[26] P. 148
[27] P. 149
[28] *Ibid.*
[29] P. 171 - 172

The Arbiter, however, notes that the Complainant himself had provided, as part of his attachments to the Complaint Form sent to the OAFS, a *'Historical Cash Account Transactions'* statement issued by *Utmost Wealth Solutions* in respect of the *Executive Redemption Bond* covering the period *'01/01/2012'* to *'06/03/2023'*.[30, 31]

Albeit, certain data/information could not be obtained from the said statement, the OAFS, however, sourced the various transactions undertaken within his investment portfolio, most particularly with respect to the disputed investments which, as outlined above, involve the structured note investments.

Tables A to C below provide a summary of the purchase and sale/maturity of the investments as emerging from the said Historical Cash Account Transactions statement (in respect of the a/c held in GBP, Euro and USD).[32, 33]

The structured notes are marked accordingly (SN) in the tables below for ease of reference.

[30] P. 43 & 44
[31] P. 42 - 68
[32] *Ibid*.
[33] The said tables exclude various FX transactions undertaken and, also, various dividends/ interest payments received from the investments.

Table A - Account in GBP

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold or matured	Sale price	Realised Capital Loss/ Profit (exclusive of dividend /interest)
	RS GBP First State GBL EMG M	*	GBP	*	15 May 2014	27,169.49	*
	RS STLG Baring Korea	*	GBP	*	15 May 2014	5,055.90	*
	RS GBP Threadneedle American	*	GBP	*	15 May 2014	6,344.96	*
	RS Sterling US Index Tracker	*	GBP	*	15 May 2014	32,179.34	*
	RS GBP Henderson Cautious Managed	*	GBP	*	15 May 2014	29,666.92	*
	RS STLG Artemis High Income	*	GBP	*	15 May 2014	31,129.65	*
	Morgan Stanley 5Y QU Inc	*	GBP	*	20 May 2014	134,736.00	*
	OMI IM GBP Aberdeen World Equity	*	GBP	*	10 June 2015	5,781.09	*
Fund	*GAM Star Fund Growth C ACC*	11 July 2013	GBP	10,000	22 May 2014	9,926.08	GBP -73.92
Fund	*LFP Europe 10 of 7 Equity Fund*	13 June 2014	GBP	30,000	19 June 2015	26,327.65	GBP -3,672.35
SN	*Leonteq Intnl Express Cert*	29 Aug 2014	GBP	85,000	29 Aug 2019	38,507.82	GBP -46,492.18
SN	*Leonteq 5Y M-Barrier Exp Cert*	23 Oct 2014	GBP	29,436	17 June 2015	21,789.90	GBP -7,646.10
Fund	*Vanguard Lifestrategy 20% Equity*	20 May 2020	GBP	9,000	**open position		
Fund	*Vanguard Lifestrategy 40% Equity*	20 May 2020	GBP	27,000	09 July 2021 **other open positions	2,700	
Fund	*Lindsell Train Ltd Global Equity*	21 May 2020	GBP	9,000	**open position		
Fund	*Polar Capital Fund GBL Tech*	21 May 2020	GBP	4,500	**open position		
Fund	*Fundsmith LLP Equity*	22 May 2020	GBP	9,000	**open position		
Fund	*Rathbone UT Mgt Mgt Multiast Strat Gth Pfolio*	22 May 2020	GBP	27,000	13 July 2021 **other open positions	2,700	

Table B - Account in Euro

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold or matured	Sale price	Realised Capital Loss/ Profit (exclusive of dividend /interest)
SN	*Commerzbank 6Y AC On AS51 SMI*	16 Jun 2014	EUR	37,000	07 May 2015	40,700	EUR +3,700
Fund	*Smartfund 80% Protected Growth Fund Class A EUR Shares*	09 Dec 2016	EUR	40,675	19 June 2019 22 May 2020	3,834.33 32,087.34	EUR -4,753

Table C - Account in USD

Type	Name of Investment	Date bought	CCY	Purchase amount	Date sold or matured	Sale price	Realised Capital Loss/ Profit (excl. of div. /int.)
SN	*Commerzbank 2 Y Bearish RCB*	22 May 2014	USD	50,000	09 May 2016	1,000	USD -49,000
SN	*Leonteq 2Y Ariad Pharma Glaxos*	04 June 2014	USD	50,000	12 June 2015	50,670	USD +670
SN	*Commerzbank 2Y Autocall Phoenix*	3 July 2014	USD	50,000	23 May 2016	13,318.50	USD -36,681.50
SN	*Commerzbank LG Cap Basket*	14 July 2014	USD	29,958	17 Dec 2015	329.70	USD -29,628
SN	*Leonteq 3Y Mlt Barr Exp Cert*	24 July 2014	USD	50,000	21 Oct 2014	50,000	-
Fund	*SmartFund 80% Protected Growth Fund Class A*	09 Dec 2016	USD	34,023.11	19 June 2019 22 May 2020	3,371.50 29,142.62	USD -1,508.99

* No Data available from the *Historical Cash Account Transactions* produced.

** Various open positions emerged as at 6 March 2023.

SN – Structured Note (as per the details included in P. 73 - 74)

From the above summary, it emerges amply clear that the Complainant suffered substantial capital losses (exclusive of dividends received) on his investments in the disputed structured notes featuring within his investment portfolio.

It is also clear that the material losses on the structured notes were realised and crystallised over the period 2015 to (August) 2019 by which time all the investments in structured products had been sold and/or matured. The last remaining structure note investment was indeed sold/matured in August 2019, by which time the disputed structured notes no longer featured in the Complainant's investment portfolio.

Most of the losses on the Structured Notes were in fact realised in the years 2015 – 2016 when 6 out of 8 Structured Notes investments matured/were redeemed, and only 1 out of 8 Structured Notes investments matured/was redeemed later, on 29 August 2019, following a 5 year invest term.[34]

Indeed, the Valuation Statement issued by *Utmost Wealth Solutions* as at 31 December 2019, produced by the Complainant during the proceedings of the case, only listed the remaining collective investment scheme (fund) investments which were left within his investment portfolio.[35]

The Arbiter takes into account that the cumulative realised capital losses on the Structured Notes investments exceeded considerably the GBP100,000 approximately claimed as compensation. The cumulative realised capital losses would however be lower when taking into consideration dividends/interest received on such products. Furthermore, it is noted the Complainant submitted that *'the value of my current fund is down but is not fully attributable to unsuitable investments. It will take into account all associated fees and would also take into account losses elsewhere …'.*[36]

In the circumstances of this case, the Arbiter cannot accordingly accept the Complainant's submissions that the yearly statement only referred to unrealised loss or gains,[37] when the material losses on the disputed investments had been actually realised and crystallised by the year 2019 as indicated above.

[34] Net capital losses (excl. dividends/interests received) on SN investments amounted to USD 114,639.50 and GBP 54,138 compensated by a gain in Euro 3,700. Converted at current exchange rates, this indicates an aggregate capital loss on SN investments of GBP 141,558, of which 67% were realised in the period 2015 – 2016 and 33% in 2019.
[35] Funds indicated as 'Collectives' in the said Valuation Statement - P. 111 & 112
[36] P. 176
[37] *Ibid*.

With respect to the disputed appointment of the advisor 'Balquidder', it is noted that STM Malta indicated in its submissions that the Complainant asked for the removal and replacement of such advisor in 2017.[38] This was not disputed by the Complainant. Nor did the Complainant provide any further information (in his defence of the plea of prescription), with respect to the conduct raised involving the said advisor.

The Complainant only made a formal complaint with the Service Provider on 21 July 2022,[39] meaning that to avoid prescription, Complainant had to have first knowledge of the matter complained of on 22 July 2020 or later.

Considering the particular circumstances of this case, the Arbiter accordingly decides that there is validity to the Service Provider's claim that the Complainant

> *'… had knowledge of the matter complained of more than two years from the date of his written complaint dated 21st July 2022'*.[40]

The Arbiter is thus accepting STM Malta's plea and determines that he has no competence to hear this Complaint in terms of Article 21(1)(c) of the Act and will not proceed to consider the other remaining plea raised nor the merits of the case.

Whilst understanding and sympathising with the Complainant's situation, the Arbiter points out that the law permits him to have competence to hear only those complaints pursued within the time allowed and prescribed by law, as outlined in terms of Articles 21 and 19(3)(e) of the Act.

The Arbiter makes reference to various previous decisions where the plea of prescription, as similarly applicable to the case of the Complainant, was indeed upheld as it was justified in terms of law.[41]

[38] P. 155
[39] P. 7
[40] P. 155
[41] Examples (involving other service providers but similar basis): Case ASF 010/2023; Case ASF 040/2022; Case ASF 065/2022; Case ASF 149/2022; Case 084/2022; Case ASF 110/2021 and Case ASF 091/2021 – https://www.financialarbiter.org.mt/oafs/decisions?page=1

Decision

For the reasons explained, the Arbiter upholds the plea of prescription raised by the Service Provider on the basis of Article 21(1)(c) of Chapter 555 of the Laws of Malta and is accordingly dismissing this Complaint.

In view of the above, the Arbiter is not considering the merits of the case with respect to the alleged inadequate investments and the contested appointment of the indicated investment advisor. This is without prejudice to any right the Complainant may have to seek justice before another court or tribunal competent to hear his case.

The Arbiter makes particular reference to the Complainant's contention that the signature of the dealing instruction was not his.[42]

As this implies fraud, the Arbiter declares that he has no competence to investigate fraud and such issues should be referred to the competent authorities for criminal activities. Furthermore, such fraud allegations were not raised either in the original complaint to the Service Provider[43] nor in the OAFS complaint and cannot be raised at this stage.

As the case is being decided on a preliminary plea, each party is to bear its own costs of these proceedings.

Recommendation

The Arbiter however wishes to recommend, (in a non-binding manner and without prejudice and obligation), that the Service Provider considers, on its own will, to act and give an appropriate redress in those cases[44] whose complaints cannot be heard by the Arbiter for reason of prescription, but which have similar features to those cases previously decided by the Arbiter which were confirmed by the Court of Appeal (Inferior Jurisdiction).[45]

It is commendable to note the trend in other countries, such as in the UK, where once an Arbiter/Ombudsman decides various cases in favour of consumers

[42] P. 174, 12 - 13
[43] P. 7 or in the OAFS complaint form.
[44] Such as the one of the Complainant
[45] Even if it involves other providers – such as civil court cases 15/2021 LM, 37/2021 LM and 38/2021 LM - https://ecourts.gov.mt/onlineservices/Judgements

which involve a recurring or systemic issue, then the industry is encouraged to take measures for appropriate redress even in the absence of a direct complaint from a consumer who has suffered detriment or was disadvantaged from such issues.[46]

Alfred Mifsud
Arbiter for Financial Services

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.

[46] The UK Financial Conduct Authority (FCA) Complaints Handling Rules DISP 1.3.6 requires the firm to consider whether, following the identification of such recurring or systemic problems, *'it ought to act with regard to the position of customers who may have suffered detriment from, or been potentially disadvantaged by, such problems but who have not complained and, if so, take appropriate and proportionate measures to ensure that those customers are given appropriate redress or a proper opportunity to obtain it.'* - https://www.handbook.fca.org.uk/handbook/DISP/1/3.html