Court of Magistrates (Malta)

APPLICATION NO. 272/2022: L-AVUKAT DR. ANDREW SCIBERRAS (KI. 244687M) BĦALA MANDATARJU SPEĊJALI TAL-ASSENTI JOSHUA LEONARD SNELLING (KI. 272195A) V. MAPFRE MIDDLESEA P.L.C. (C5553)

(COMPETENCE RATIONE MATERIAE OF THE COURTS TO HEAR COMPLAINTS AGAINST FINANCIAL SERVICES PROVIDERS THAT CAN OTHERWISE BE ALSO REFERRED TO THE ARBITER FOR FINANCIAL SERVICES UNDER CH. 555 OF THE LAWS OF MALTA)

MAGISTRATE: DR. VICTOR G. AXIAK

14 July 2023

THE COURT,

having see the application filed by Dr. Andrew Sciberras as a special mandatary of Joshua Leonard Snelling, absent from Malta[1] ("the claimant") on 7 December 2022 wherein he requested Mapfre Middlesea p.l.c ("the respondent company" or "the respondent") to appear before the Court on the appointed date:

> and to state why, saving any necessary declarations and provisions, you should not be condemened to pay the applicant *nomine* the sum of **five thousand one hundred and seventy one Euros and thirty seven cents (€5,171.13)** which sum represents the expenses incurred by the same Joshua Leonard Snelling for a medical procedure, being an emergency operation, consisting in *Laprascopic Appendectomy* as a result of accute appendicitis and for which the above-mentioned Joshua Leonard Snelling was duly insured by means of an insurance policy ("Health Policy Cover: MAPFRE International Scheme") issued by you in his favour and which policy had and should consequently be honored. With costs, including the costs of judicial letter number 2476/2022 of the 6th October 2022 (see "**Dok. AS1**") and with **legal interest** accruing from the date of the same judicial letter up to the date of effective payment

[1] Fol 1-9

having seen the reply filed by the respondent[2] on 23 January 2023 whereby *inter alia* it stated that:

> In the first place and preliminarily, the lack of competence *rationae materiae* of this Honourable Court to hear this case and this in view of the fact that the merits of this case perfectly fit the parameters of a relationship between an "eligible customer" and a "financial services provider" as defined in Chapter 555 of the Laws of Malta and therefore the plaintiff's claim should have been referred to the Arbiter for Financial Services established by the same Act and not to the Ordinary Courts;

having seen the *order in camera* given by the Court on 30 January 2023 whereby the application was appointed for hearing and the Court *inter alia* ordered the respondent and the applicant, in that order, to submit evidence with regard to the said preliminary plea,

having heard the oral observations on this preliminary plea of

- the respondent, represented by Dr. Nadia Vella, and
- the claimant, represented by Dr. Andrew Sciberras,

gives the following

Partial Judgment

1. The claimant filed this application to request the respondent company to pay him the amount of € 5,171.13 incurred by way of medical expenses for a surgical intervention, The claimant is insured by the respondent under a Health Policy ("MAPFRE International Scheme") and therefore the amount claimed is allegedly due by the respondent, as the insurer, by way of indemnity.

2. The respondent company in its reply filed a preliminary plea stating that this Court is not competent *ratione materiae* to hear this case as the claim should have been referred to the Arbiter for Financial Services established under Chapter 555 of the Laws of Malta.

3. That under Art. 19(1) of the Arbiter for Financial Services Act (Ch. 555 of the Laws of Malta):

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[2] Fol 13-41

'19.(1) It shall be the primary function of the Arbiter to deal with complaints filed by eligible customers through the means of mediation in accordance with article 24, and where necessary, by investigation and adjudication.'

4. That under Art. 2 of the said Act, "eligible customer" is defined as meaning:

'... a customer who is a consumer of a financial services provider, or to whom the financial services provider has offered to provide a financial service, or who has sought the provision of a financial service from a financial services provider. It includes the lawful successor in title to the financial product which is the subject of the relevant complaint'

5. Moreover under Art. 2 of the said Act, "financial services provider" is defined as meaning:

'... a provider of financial services which is or has been licensed or otherwise authorized by the Malta Financial Services Authority in terms of the Malta Financial Services Authority Act or any other financial services law, and is related to investment services, banking, financial institutions, credit cards, pensions, insurance, and any other Service which in the opinion of the Arbiter constitutes a financial service,which is or has been resident in Malta or is or has been resident in another EU/EEA Member State and which offers or has offered its financial services in and, or from Malta...'

6. Counsel for the respondent company argued in her oral observations that the claimaint, as an eligible customer, should have instituted this lawsuit as a complaint to the Arbiter for Financial Services given that the respondent is a financial services provider in terms of law. Counsel for the claimant rebutted that the Arbiter does not have exclusive competence to hear complaints brought forward to his Office and indeed the Act itself provides as such in Art. 21(1)(a).

7. The Court makes reference to the parliamentary debates in the Plenary that preceded the enactment of Act XVI of 2016:

"ONOR. EDWARD SCICLUNA: ... Matul is-snin kien hemm każijiet ta' individwi li kienu offruti prodotti mingħajr ma ġie spjegat lilhom ir-riskju li kien hemm wara dak l-investiment. Kellna wisq każijiet matul is-snin. Il-konsegwenzi kienu li l-investituri tilfu parti sostanzjali, jekk mhux kollu, mit-tifdil li kienu għamlu! Kellna u għad għandna l-Awtorità għas-servizzi Finanzjarji (MFSA), imma rridu nifhmu li din hija regolatur li jara, permezz tar-regoli u superviżjoni, li l-

istituzzjonijiet finanzjarji li jkunu liċenzjati minnha jkunu qed jimxu sew. Ilkoll nafu kemm ir-regolamenti qegħdin jiżdiedu, u hawnhekk qed ngħaddu ħafna regolamenti u nwaqqfu istituzzjonijiet li jkomplu jsaħħu din l-istituzzjoni biex ikollna settur ta' servizzi finanzjarji b'saħħtu... Però, filwaqt li l-ilmenti li jingħataw l-MFSA jagħtuha d-dritt li twaħħal multi jew anke li tirrevoka l-liċenzja ta' dak il-provditur, kif ġieli ġara, il-liġi ma tagħtix dritt lill-MFSA li timponi xi forma ta' kumpens finanzjarju lill-investitur li jkun sofra d-danni. F'din l-istituzzjoni l-ġdida se naraw li dan isir...

Il-konsumatur irid jifhem ukoll li l-arbitru mhux se jkun xi forma ta' garanzija ta' kumpens finanzjaru awtomatiku. Il-kumpens jingħata biss fejn ikun hemm prattiċi ħżiena u mhux għax wieħed ikun tilef il-flus... Dan l-arbitru se jkun qiegħed hemm biex jiddeċiedi fuq problemi li jkunu nqalgħu fejn hemm prattiċi ħżiena u informazzjoni ħażina mogħtija mill-provditur finanzjarju. Hawnhekk m'aħniex qed nitkellmu dwar telf li joħroġ mis-swieq'.[3]

8. It is clear that the legislative intent in enacting the Arbiter for Financial Services Act was for consumers to have an alternative means of redress (other than through the Courts) in the case of misconduct of a financial services provider. In this case, the claimant is in no way complaining about the conduct of the respondent company but is requesting it to pay him the amount claimed by way of indemnity under the contract of insurance. This distinction is not made in the law but is ironically referred to in the Health Insurance Proposal Form itself (fol 36) where the Complaints Procedure is outlined in detail. The customer is indeed informed that:

> "We recognise that a client may not be satisfied with the service provided. To deal with this we have a complaints procedure. For the sake of clarification a complaint is broadly defined as being a written expression of dissatisfaction with services that we provide or actions we have taken that require a response. We distinguish complaints from queries. Queries are challenges to specific decisions in specific circumstances"

9. Moreover, it is also clear that the consumer is not compelled to bring forward a complaint to the Arbiter, but may, if s/he so chooses, institute a lawsuit in Court. Art. 21(1)(a) of the Act states that:

> ***'21.(1)(a) Nothing in this Act shall imply that a complaint relating to the conduct of a financial service provider is to be exclusively regulated by the provisions of this Act...'***

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[3] Transcript of the Plenary Session, session number 295 of the Twelfth Parliament, 20 July 2015 as published by the Office of the Clerk of the House of Representatives, p. 727-728

10. In this regard reference is made once again to the parliamentary debates in the Plenary as well as in the Permanent Committee for the Consideration of Bills that preceded the enactment of Act XVI of 2016:

"Irrid nagħmilha ċara wkoll li l-konsumatur se jibqagħlu d-dritt li jirrikorri għall-qrati tal-ġustizzja. Aħna m'aħniex qed nagħlqu l-bibien li wieħed ikun jista' jmur il-qorti jekk ikollu każ ġenwin, però se jkollu l-għażla li jew imur il-qorti jew imur għand l-arbitru finanzjarju *(emphasis by the Court). Imbagħad jekk l-individwu jmur għand l-arbitru ma jistax imur il-qorti u viċiversa"*[4]

...

"ONOR. CHRIS SAID: Ħalli nkompli fuq subklawsola 21(1), fejn qed ngħidu li f'dawn il-każijiet il-klijent jista' jagħżel hu jmurx qorti jew imurx quddiem l-Arbitru. X'inhi r-raġuni, Ministru, li m'aħniex qegħdin nagħmluha compulsory li tmur quddiem l-Arbitru? Hemm xi raġuni?

IS-SUR PAUL BONELLO: Ma tistax, dak huwa human right.

DR PETER GRECH: Ir-raġuni ta' din hija biex ma tirrestringix. Qed tipprovdi dan il-mezz ta' arbitraġġ, però mhux qed tirrestringi l-aċċess għall-Qorti.

ONOR. CHRIS SAID: All right, biex ma tirrestringix. Imma ħalli nieħu eżempju ieħor. Fil-qrati tagħna għandna li, jekk it-talba tkun taħt €5,000, ma tistax tmur quddiem il-Qorti Ċivili, bilfors trid tmur quddiem it-Tribunal. Qed ngħid sew? Ma tistax tmur quddiem il-Qorti Ċivili għax taqa' taħt il-kompetenza tat-Tribunal. M'għandix problema li tmur naħa jew oħra, imma biex ikollna ċ-ċarezza u ma jkunx hemm problemi fejn wieħed għandu jmur jew ma jmurx.

ONOR. EDWARD SCICLUNA: Ir-risposta hija biex inħallu l-option, il-freedom lill-individwu li jagħżel.

DR PETER GRECH: Ħalli ma jiġix xi ħadd jgħid li bgħatnieh bilfors hemmhekk; jekk irid, jista' jmur il-Qorti, bħalma jista' ...

IS-SUR PAUL BONELLO: Qisha mandatory arbitration.

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[4] ibid.

ONOR. CHRIS SAID: M'għandix problema li jkun hemm l-għażla."[5]

11. In light of the above deliberations, it is the considered opinion of this Court that it has jurisdiction to take cognisance of the application filed by the claimant.

Decision

12. **For these reasons the Court rejects the preliminary plea of the respondent company, finds that it is competent *ratione materiae* to determine the claims brought forward by the claimant and orders the continuation of the proceedings.**

    Costs are reserved for final judgement.

V.G. Axiak — Y.M. Pace

Magistrate — Dep. Registrar

[5] Transcript of the Permanent Committee for the Consideration of Bills, meeting number 90 of the Twelfth Parliament, 2 March 2016 as published by the Office of the Clerk of the House of Representatives, p. 8