MALTA

CIVIL COURT

FIRST HALL

THE HON. MR. JUSTICE

JOSEPH R. MICALLEF

Sitting of the 8 th May, 2014

Citation Number. 694/2013

Maurine Anne **FABRI** u Martes Ann Galea, din tal-aħħar bħala eredi ta' Paul Fabri

vs

GLOBALCAPITAL FINANCIAL MANAGEMENT LIMITED (C – 30053)

The Court:

Having taken cognizance of the Sworn Application filed by plaintiffs Fabri and Galea on the 17th of July, 2013, by virtue of which and for the reasons therein mentioned, they requested that this Court (a) declare defendant company liable towards them for damages, including diminution of their patrimony, loss of profits and loss of interests, in view of the mis-selling of investments on its recommendation; (b) orders defendant company to reimburse them the sum of fifty-nine thousand five-hundred and thirty-two Pounds Sterling and ninety-eight pence (£ 59,532.98) representing the value of the afore-said investment; (c) to liquidate the damages sustained by them as a result of the said investment, including the liquidation of the effective patrimonial loss, the loss of profits and of interests; and (d) to condemn defendant company to reimburse them such liquidated damages, patrimonial loss, loss of profits and/or loss of interests. Plaintiffs requested also payment of legal interests on the said sum of £59,532.98 to run from the 12th September 2008 to date of effective payment as well as judicial costs;

Having seen its interlocutory decree of the 29th of July, 2013, whereby it ordered service of the Application on the defendant company and gave orders to the plaintiffs as to the production of evidence on their part;

Having taken cognizance of the Sworn Reply filed by defendant Company on September 5th, 2013, whereby it rebutted plaintiffs' allegations levelled in its regard with respect to wrongful behaviour in discharging its obligations and in rendering the services they requested and, consequently, rejected all their claims. By way of preliminary pleas, the defendant company pleaded (i) the nullity of the plaintiffs' suit arising

from the inherent incompatibility of the second claim (that relating to the refund of the sum invested) with the other claims (those regarding liability for damages and the consequent liquidation thereof) which cannot be raised in one and the same action; and (ii) the plaintiffs' suit cannot stand since the basis of their action is a recommendation by the Consumer Complaints Manager within the Malta Financial Services Authority, which recommendation does not in any way bind it as an investment company. It also raised pleas on the merits;

Having ruled by decree made during the hearing of November 20th 2013, on a request to that effect by counsel to plaintiffs, that all proceedings of this case would henceforth be conducted in English;

Having also directed by another decree during that same hearing that, before proceeding any further, the Court would consider the defendant company's first preliminary plea, after counsel to plaintiffs declared that plaintiffs stood by their claims and that the action as filed was not null[1]. Under the said decree, the Court granted parties leave to file written submissions relating to the said plea;

Having seen the Note of Submissions filed by the defendant company on January 21st 2014[2], relative to its first preliminary plea;

Having seen the Note of Submissions filed by plaintiffs on February 28th 2014[3], in reply to those made by the defendant company;

Having heard additional submissions by counsel during the hearing of March 6th, 2014, when the case was adjourned for judgement on the preliminary plea;

[1] Pg. 197 of the records
[2] Pp. 199 to 207 of the records
[3] Pp. 210 to 221 of the records

Having examined all the relevant documents in the records of the case;

Having Considered:

This is an action for damages arising out of an investment which failed. Plaintiffs allege that the defendant company (hereinafter referred to as "Global") enticed them to shift funds from another investment into a particular fund (hereinafter referred to as "Lifemark") which, after a while, collapsed and yielded them no further dividend. They insist that Global mis-sold them the investment when they were not in a position to form an informed consent to consider its recommendation. They claim damages from Global consisting of loss of patrimonial worth as well as loss of profits or interests. They also claim a refund of a liquidated sum representing the monies which were employed in their investment in Lifemark;

Global rejects plaintiffs' allegations in their entirety. It also raised two preliminary pleas. By virtue of the first of these pleas, Global (i) raises the issue of the nullity of the plaintiffs' suit arising from the inherent incompatibility of the second claim (that relating to the refund of the sum invested) with the other claims (those regarding liability for damages and the consequent liquidation thereof) which cannot be raised in one and the same action. Through the second preliminary plea, Global (ii) argues that the plaintiffs' suit cannot stand since the basis of their action is a recommendation by the Consumer Complaints Manager within the Malta Financial Services Authority, which recommendation does not in any way bind it as an investment company;

This judgment is concerned with the first preliminary plea only;

The Court refers to the following relevant facts which emerge from the records of the case. Around the middle of the month of September of 2008, plaintiff Maurine Anne Fabri and her late husband Paul acquired fifty-nine thousand five-hundred and thirty-two point ninety-eight units of an investment fund in *Lifemark S.A. Secure Income Bond 3 GBP - QI*[4] for the consideration of one Pound Sterling (£1) per unit, through the advice and intervention of Global. Spouses Fabri had been Global's clients for some five years prior to that date and had made other financial investments through Global[5]. As a matter of fact, it results that the purchase of the Lifemark investment was effected through the proceeds from the sale of the said investments;

Global is a licensed intermediary under the Investment Services Act[6];

As a result of the Lifemark investment, Fabri received dividends in December 2008, June 2009, September 2009, and February 2010[7];

At some point during 2010, Global advised spouses Fabri that payment of dividends from the Lifemark investment was temporarily suspended[8], after Lifemark had been placed under provisional administration[9];

Paul Fabri passed away on October 6th 2010. Following his demise, plaintiffs lodged a complaint against Global with the Consumer Affairs Unit of the Malta Financial Services Authority (M.F.S.A.) in March 2011 regarding their plight[10]. By letter dated October 16th 2012[11], the

[4] Doc "A", at p. 6 of the records
[5] Docs "B" and "C" and "GC1" to "GC6", at pp. 7 – 8 and 60 – 4 of the records
[6] Act XIV of 1994 (Chap 370)
[7] Docs "N1" to "N7" at pp. 125 – 133 of the records
[8] Docs "N9" and "N10", at pp. 135 – 6 of the records
[9] Doc "N8", at p. 134 of the records
[10] Affidavit of Carmelo Galea, at p. 191 of the records
[11] Doc "D", at pp. 9 – 12 of the records

Consumer Complaints Manager of M.F.S.A.'s Consumer Affairs Unit advised spouses Fabri that, after having made its enquiries, including having Global's version of events, the Lifemark investment should not have been offered to them and that they may have been "mis-sold" an investment product with which they were not familiar;

Before they had as yet received the Consumer Complaints Manager's advice, plaintiffs had written to Global in February of 2011[12], requesting it to pay them "compensation for losses for bad advice". A meeting held with representatives of Global did not yield a favourable outcome to plaintiffs. Further requests were made through a legal letter in December of 2012[13] and a judicial intimation in January of 2013[14]. Both missives requested the refund of the amount invested in Lifemark as well as the liquidation and payment of damages. Global stood its ground and refuted any allegation made by plaintiffs;

Plaintiffs filed this action on July 17th 2013;

The legal considerations concerning the preliminary plea under examination revolve around its pre-eminently procedural nature. In weighing its validity, the Court must necessarily limit its enquiry into the formal aspects of the plaintiffs' action without delving into the merits. This is so because the said plea is peremptory of the proceedings and not of the merit, and its success or otherwise determines the eventual outcome of this suit, irrespective of whether the plaintiffs' request is otherwise justified. Furthermore, the plea raises an issue of law rather than of fact, and therefore the principal drift of the Court's considerations has to rely on the formal validity of the judicial act and not on its substantive merits;

[12] Doc "E", at pp. 35 – 6 of the record
[13] Doc "F" at p. 37 of the records
[14] Doc "G" at p. 38 of the records

In terms of law, such a plea requires a pronouncement under a separate head[15] and the Court felt that it should not delay this consideration together with a judgment on the merits for the simple reason that it can rule on the plea's validity on the basis of what results from the records at this initial stage of the proceedings;

As stated, Global raises the issue of the formal validity of plaintiffs' Sworn Application. It founds its plea on the basic argument that in reality plaintiffs' action is two distinct actions rolled into one when those actions are not compatible the one with the other. Indeed, at one stage of the proceedings, learned counsel to Global suggested that plaintiffs be granted time to consider whether they would wish to opt for one of their claims rather than the other. However, learned counsel to plaintiffs submitted that the action as filed stands and that it constitutes no cause for nullity as pleaded by Global[16];

Global submits that plaintiffs promoted an action for restitution together with an action for damages. The former is contained in plaintiffs' second claim, whereas the latter features in the other three claims. The Court is thus given to understand that the plea refers to both that part of the Sworn Application which contains the claims (the "*petitum*"), as well as to that part which contains the recitals or premises (the "*causa petendi*"). Global insists that an action for restitution and an action for damages are not compatible, cannot be promoted cumulatively and deny it the right to defend itself properly if faced by two fundamentally different requests. Furthermore, it avers that were the two actions to be upheld, plaintiffs would end up unjustifiably enriching themselves with the full refund of their original outlay and the payment of damages for a loss which would have been made up for in the reimbursement requested in the restitution claim. This eventuality is compounded by the fact that plaintiffs' claims are made simultaneously and not alternatively;

[15] Art. 730 of Chap 12
[16] Vide p. 197 of the records

Global bases its plea on the provisions of articles 156(1)(a) and (b) of the Code of Organization and Civil Procedure, as well as articles 789(1)(c) and (d) of the same Code. It also recalls the maxim "*electa una via non datur recursus ad alteram*" and that it is not right that a plaintiff bring forward more than one action and leaving it up to the Court to determine which of the remedies sought should prevail. Effectively, Global argues that whereas an action for restitution presupposes that the contract in question is impugned, an action for contractual damages does not and is, on the contrary, based on the existence of the same contract;

On their part, plaintiffs rebut these submissions claiming that their action is, essentially, legally based on contractual damages arising out of Global's non-performance. They envisage such non-performance in its failure to acquit itself of its duty of diligence towards them as its clients. In their submissions they go to great lengths to explain the underlying contractual nature of the relationship between them and Global and the distinction between damages arising from a contractual relationship and damages arising in tort. They rely on jurisprudence which holds that one and the same action can lie on both tortuous liability and contractual liability. They argue that their second claim (that calling for the restitution of the sum invested by them as funds for the Lifemark investment) represents but one facet of their claim for damages in that it refers to the head of "actual loss" ("*damnum emergens*") which is one of the recognized heads under which one can lawfully claim in an action for damages under article 1045 of the Civil Code;

The Court believes that plaintiffs miss the point made by Global and seem to overlook the true basis of Global's plea. The question here is not whether damages in contract and damages in tort can be the basis of a claim in one and the same action. As a matter of fact, Global concedes that the relationship between it and plaintiffs is a contractual one. The real thrust of the present plea of nullity lies on whether one can proceed with an action for damages at the same time as one proceeds with an action for restitution. Global insists that the two

actions are irreconcilable and mutually exclusive. Nor, it seems, do the plaintiffs realize that even the legal basis of their action (being one based on contractual non-performance) does not lie within the provisions of articles 1045 and 1047 of the Civil Code and the other provisions relating to tort, but on other provisions of the Code relating to the effects of obligations, particularly contractual ones;

It is the Court's considered opinion that the operative provisions of law which regulate the relationship between plaintiffs and Global, and more specifically plaintiffs' allegations against Global, are those contained in articles 1125 and 1135 of the Civil Code rather than those mentioned by plaintiffs in their submissions. Both those provisions provide the remedy which a person who alleges another's non-performance of a contract may seek: those provisions speak only of damages and not of specific performance or restitution;

In such circumstances, one would be well advised to keep in mind that once the damages claimed in this action emanate from a contractual context, their sole purpose should be that of redressing the loss which the injured party shows to have suffered, and should not be an occasion of punishing or penalizing the non-performing party nor of providing the said injured party with an opportunity of unduly enriching itself at the other party's expense[17]. Particularly, a party to a contract which fails to perform what it had undertaken to do, becomes liable to the other party for damages by making good for any damage which is reasonably deemed to be a direct consequence of the failure to properly perform one's undertakings[18], while at the same time, the injured party has to adopt all reasonable means of mitigating such losses[19];

[17] App. Comm **15.12.1952** in ***Calleja noe vs Mamo pro et noe*** (Kollez. Vol: **XXXIV.i.367**)
[18] P.A. PS **23.4.2010** in ***Joseph Dalli et vs Mediterranean Film Studios Ltd.*** (not appealed)
[19] Inf Civ App **3.11.1956** in ***Xuereb vs Livick*** (Kollez. Vol: **XL.i.63**)

It does not seem that our law allows for the aggregation of an action for restitution or specific performance and a claim for damages in one and the same action, as other legal systems expressly provide for[20];

The Court emphasises, first and foremost, that plaintiffs' claims are cumulative, in the sense that once what is alleged by them is proved, they expect all of their claims to be upheld in the final judgement. This is where Global's plea aims to focus upon. Global claims that by the manner in which plaintiffs' action is drafted, it falls foul of the provisions of article 156(1)(a) of Chapter 12 of the Laws of Malta and has put it in an awkward position of not being able to level a proper defence to those claims. This brings into effect the provisions of articles 789(1)(ċ) and (d) of the same Code, and which violation brings about its inherent nullity;

The Court can never emphasize enough that, in matters relating to the validity of judicial acts, the distinction has to be drawn between absolute and relative nullity. In the latter case, the Court is duty bound to draw the parties' attention or to make *ex officio* orders, whereas this is not at all possible in the case of absolute nullity prescribed by law under the former[21]. Furthermore, it is settled law that for a judicial act to be struck down as being null "*jeħtieġ li jkunu jikkonkorru raġunijiet gravi, fosthom nuqqasijiet ta' evidenti preġudizzju għad-difiża tal-konvenut; u huwa risaput li l-leġislazzjoni u l-ġurisprudenza patrija ilhom progressivament jirrifuġġu mill-formliżmu eċċessiv, fonti ta' litiġji żejda u prokrastinazzjonijiet inutili, purke' ovvjament ma tirriżultax l-effettiva vjolazzjoni tal-liġi*"[22];

When the law prescribes that the Sworn Application should consist of a "statement which gives in a clear and explicit manner the subject of the cause in separate numbered paragraphs", this is to be taken to mean that the recitals should guide the person who peruses of the Application to the reason behind the claim or claims made by the plaintiff. Coupled to this is

[20] *Vide*, for example, art. 1453 of the Italian Civil Code
[21] Vide P.A. SM **1.10.1910** in ***Ludovico Magro vs Pio Żammit*** (mhix pubblikata), which contains a clear exposition of the effects of nullity of judicial acts
[22] Comm. App. **15.4.1977** in ***John Mallia vs Maria Assunta Borġ e****t* (not published)

the need for the defendant to be in a position to contest the claim[23]. Where there is no inherent contradiction between what is premised and what is claimed, then a plea of nullity of a judicial act should not be lightly entertained. For a Sworn Application (or Counter-Claim) to pass the rigours of the law, it is enough that the party sued can discern what the party suing is claiming against him[24] and that the judicial act is such as to allow the defendant to set up a proper defence to the plaintiff's claim[25];

It is pertinent to point out that the success or otherwise of the plea of nullity of judicial acts depends on whether it can validly rely on at least one of the four instances under the provisions of article 789(1) of the Code of Organisation and Civil Procedure. As stated, Global relies on the provisions of article 789(1)(ċ) and (d) of the said Code. It has been authoritatively explained that the distinction to be drawn between a nullity under paragraph (ċ) and one under paragraph (d) of the said sub-section, consists in the fact that, under the latter, the judicial act lacks an essential requisite and not a simple violation of the prescribed form[26]. One must underline the fact that the law reefers to "essential particulars" and not to any particular, which means that certain defects which are not "essential" fall beyond the ambit of the sanction of nullity. For a particular to be considered "essential" in a judicial act, it is necessary that its violation seriously and irremediably hampers one or more of the basic procedural rules by virtue of which a cause may proceed swiftly, efficiently, diligently and in full and proper observance of the parties' rights and of the tenets of natural justice[27];

To cite but one judgment which addresses cogently this question, the Court states that: "*... ma hemmx kwestjoni li dottrinarjament huwa importanti li jiġu, għall-finijiet ta' l-oġġett tat-talba u tad-dritt li jiddeterminaha, eżaminati attentament il-fattijiet li jkunu taw lok għall-ġudizzju, u dawn il-fattijiet ma jistgħux ma jkunux a konjizzjoni tal-kontendenti; jekk minn dawn il-fattijiet jitnissel aktar minn dritt wieħed sabiex id-domanda tkun imressqa 'l quddiem f'ġudizzju, ma hemm xejn fil-liġi li l-attur li jippromwoviha ma jkunx jista' jiddeduċihom jekk jittendi li huma ntiżi għall-otteniment ta' l-oġġett propost, salv li l-istess ma humiex inkonċiljabbli. Dina r-redazzjoni ta' l-att taċ-ċitazzjoni ma tirrendix dak l-istess att għall-kawżalijiet tiegħu mhux ċar, iżda se mai turi in forza ta'*

[23] Cfr., for example, P.A. **5.6.1959** in ***Sciortino et vs Micallef*** (Kollez. Vol: **XLIII.ii.748)**
[24] P.A. **14.2.1967** in ***J.G. Coleiro vs Dr. J. Ellul*** (Kollez. Vol: **LI.ii.779**);
[25] Comm. App. **20.1.1986** in ***Carmelo Bonniċi vs Eucharistico Żammit noe et***
[26] Cfr, for example, P.A. C.S.:**4.11.1988** in ***Carmelo Galea vs Pawlu Cuschieri*** (unpublished)
[27] P.A. GCD **31.10.2008** in ***Diane Vella et vs Medserv Operations Limited***

liema drittijiet ("jus petendi") l-attur ikun qiegħed jippromwovi l-azzjoni. Apparti dana, ebda preġudizzju ma jitnissel lill-konvenut minn dana l-aġir ġuridiku, ilgħaliex huwa jkun jista' jirripudja l-azzjoni attriċi għad-drittijiet kollha radikati fl-att promotorju tal-kawża. . . "[28];

The law lays down, amongst other requisites, the need for a Sworn Application to contain a statement which gives in a clear and explicit manner the subject of the cause and the cause of the claim[29]. This implies that the statement ought to link what is alleged with what is eventually claimed. Closely tied to this rule is principle that the party sued is able to raise a defence against the plaintiff's suit[30];

The issue of the incompatibility or outright contradiction between claims has for a number of years taxed these Courts[31]. There were instances where the Court explained the limits within which a Sworn Application could be spared the extreme sanction of nullity, in spite of some procedural flaws[32]. Such plea was invariably considered under the perspective of the requisites laid down in article 156(1) of the Code;

In the light of the aforesaid considerations, the Court finds that the plea is well founded and cannot be set aside, as plaintiffs suggest. The Court is persuaded that plaintiffs' action is actually an amalgam of two actions which do not stand together. It does not subscribe to the plaintiffs' view that, in the manner it is presented, theirs is truly "one judicial action" claiming "responsibility and payment of contractual damages". Furthermore, the action requests remedies which exclude one another. For if indeed, as plaintiffs suggest, their second claim is nothing but a way of claiming actual damages, the question automatically arises as to what purpose was there to make such a claim when there is another claim (the third one) which specifically asks the Court to liquidate damages. The truth seem to be that plaintiffs' second claim is a remedy altogether different from the claim for damages, and, thus, incompatible

[28] Ċiv. App.**14.11.1949** in ***Borġ noe vs Vincenti*** (Kollez.Vol: **XXXIII.i.535,** at p. 538)
[29] Artt. 156(1)(a)(b) of Chap 12
[30] *Vide* P.A. **5.6.1959** in ***Sciortino et vs Micallef*** (Kollez. Vol: **XLIII.ii.748)**
[31] *Vide* Comm. **9.1.1995** in ***Aquilina et vs Ruġġier noe*** (Kollez. Vol: **LXXIX.iv.1334**)
[32] Civ. App **6.3.1996** in ***Żammit et vs Żammit Tabona noe et*** (Kollez. Vol: **LXXX.i.454**)

with such claim. Plaintiffs were offered the opportunity to choose and opted not to make a choice but to steadfastly cling to the form of action they initiated. At this juncture the Court deems it pertinent to adopt the wise dictum which suggests that "*eligere igitur actor bene debet qua actione velit agere, aut malae electae actionis periculum et damnum ultro subire*"[33]. The Court believes that this is one case where the choice has validated the plea of nullity on the basis of article 156(1)(a) of the Code of Organization and Civil Procedure;

For these reasons, the Court upholds the defendant company's first preliminary plea and declares that the plaintiffs' action is affected by formal nullity on the basis of incompatible claims;

The Court therefore decides and rules that:

It **upholds the first preliminary plea** of the defendant company and discharges the said company from complying with the proceedings, thus declaring it non-suited, with **costs** against the plaintiffs.

< Final Judgement >

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[33] Cfr. Civ. App. **19.1.1959** in ***Scicluna vs Camilleri et*** (Kollez. Vol: **XLIII.i.55** at p. 61)