

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION



FSD 186 of 2020 (MRHJ)

BETWEEN

GIBSON CONSULTANTS LTD

Plaintiff

-and-

THE EMIRATES CAPITAL LIMITED

Defendant

IN CHAMBERS AS OPEN COURT

Appearances: Mr. Brett Basdeo of Walkers for the Plaintiff
Mr. Guy Manning of Campbells for the Defendant

Before: Hon. Mrs. Justice Margaret Ramsay-Hale

Heard: 10 June 2021

Draft Ruling circulated: 3 March 2022

Ruling Delivered: 15 March 2022

HEADNOTE

Breach of Contract - Claim by investment adviser against investment manager of insolvent company for fees after proof of debt accepted by Joint Official Liquidators based on monthly allocation of dividend by JOLs

Preliminary issue - GCR O. 33 r.4 - Whether competent for JOLs to allocate dividend to monthly claims - Companies Act ss 110 and 140

RULING ON PRELIMINARY ISSUE

INTRODUCTION

1. These proceedings relate to a contractual dispute between the Plaintiff, Gibson Consultants Ltd., (“Gibson”) and the Respondent, The Emirates Capital Limited (“Emirates”). Gibson is a Cayman Islands exempted company incorporated on 29 May 2017. Emirates is a company incorporated under the laws of the Dubai International Financial Centre. The claim arises out of the Defendant’s failure to pay advisory fees which Gibson says are due under the terms of an Investment Advisory Agreement (“IAA”).



2. By Order made on 3 May 2021, the trial of a preliminary issue on a point of law was ordered by the Court. This is the decision of the Court on the preliminary issue.

AGREED FACTS

3. As required by GCR 33 rule 3, certain facts were agreed. Between 2017 and 2019, Emirates acted as the investment manager to a Cayman Islands fund, Fulcrum Diversified Income Note Fund (the "Fund"). The Fund was incorporated on 29 May 2017 and was an open ended investment vehicle registered with the Cayman Islands Monetary Authority. Pursuant to an Investment Management Agreement ("IMA"), entered into between the parties dated 6 September 2017 and amended and restated on 1 July 2018, Emirates acted as the investment manager to the Fund for a management fee of US \$150,000 per month.
4. The IAA entered into between the Fund, Gibson and Emirates, made on 6 September 2017 and amended and restated on 1 July 2018 and 11 October 2018, provided that, if Emirates received at least US \$150,000 in management fees from the Fund in a given month in which Gibson had provided investment advisory services to Emirates, then Emirates would be obliged to pay US \$50,000 in advisory fees to Gibson in respect of that month.
5. The relevant clauses in the IMA are as follows:

Clause 6.1:

"In consideration of the provision of discretionary investment management services in accordance with this Agreement, the Investment Manager shall be entitled to receive, and the Fund shall pay in US Dollars to the Investment Manager a management fee (the "Management Fee")."

Clause 6.2:

"The Management Fee is calculated as at the close of business on the last Business Day of each month and is payable monthly in arrears. The Management Fee in respect of each Series of the Class A Participating Shares, shall be equal to 1% per annum of the Total Subscription Proceeds in respect of that Series provided that the Investment Manager receives an aggregate minimum Management Fee in each month of US\$150,000 in respect of all Series. The Management Fee will be allocated rateably for partial periods".

6. Clause 10.2(a) of the IMA provides as follows:

“The Investment Manager may terminate this Agreement: (a) at any time by giving not less than nine months’ notice in writing (or such shorter period as the Fund may accept) to the Fund”.

7. Clause 10.5 of the IMA provides (in relevant part) as follows:

“On termination of this Agreement the Investment Manager shall be entitled to receive all fees and other moneys accrued but not yet paid on a pro rata basis up to the date of such termination as provided in this Agreement...”.

8. Clause 5.1 of the IAA provides as follows:

“In consideration of the provision of investment advisory services in accordance with this Agreement, the Investment Advisor shall be entitled to receive, and the Investment Manager shall pay to the Investment Advisor, an advisory fee of US\$50,000 per month (the “Advisory Fee”) which shall be payable monthly in arrears, provided that the Investment Manager has received an aggregate minimum Management Fee in each month of US\$150,000 in respect of all Series in accordance with the Investment Management Agreement”.

9. On 9 April 2019, Emirates served termination notices on the Fund and on Gibson, giving the contractually required nine months’ notice of termination under the terms of the IMA and IAA. The termination date under both was 9 January 2020.
10. The Fund proved unable to attract sufficient equity subscriptions to make it viable and on 25 May 2019 the sole management shareholder of the Fund passed a resolution to put the Fund into voluntary liquidation. On 7 August 2019, the Court made an order bringing the voluntary liquidation under the supervision of the Court and appointing joint official liquidators (“JOLs”). The Fund was dissolved on 29 May 2020.
11. Emirates submitted a proof of debt to the JOLs for its fees arising under the IMA from May 2019 to 9 January 2020 in the sum of US \$1,244,383.56. On 23 September 2019, the JOLs sent the Defendant a Notice of Rejection of Proof of Debt rejecting US \$150,000 of the Defendant’s claim and admitting the balance of US \$1,094,383.56, being management fees of US \$150,000 for seven (7) months for the period 1 May 2019 to 30 November 2019, plus prorated management fees for 1-9 December 2019.
12. The claim for fees for the period 9 December to 9 January 2020 was rejected on the basis that the dissolution of the Fund would immediately terminate the IMA and the JOLs estimated the Fund would be dissolved on or around 9 December 2019.

13. Emirates was the only admitted creditor in the liquidation of the Fund but, after paying the expenses of the liquidation, the assets realised by the JOLs were insufficient to pay Emirates' claim in full.
14. On 28 January 2020, the JOLs made payment to Emirates in the sum of US \$735,041.19. The JOLs' First and Final Report to the Court dated 21 April 2020 explains the payment of the Dividend and allocates the payment of the outstanding management Fees on a monthly basis as follows:

Management Fee	Per Claim	Distribution Payment
May 2019	US\$150,000	US\$150,000
June 2019	US\$150,000	US\$150,000
July 2019	US\$150,000	US\$150,000
August 2019	US\$150,000	US\$150,000
September 2019	US\$150,000	US\$135,041.19
October 2019	US\$150,000	US\$0
November 2019	US\$150,000	US\$0
December 2019	US\$150,000	US\$0
1 – 9 January 2020	US\$44,383.56	US\$0
Total	US\$1,244,383.56	US\$735,041.19

15. Paragraph 9.10 of the JOLs' First and Final Report dated 21 April 2020 stated that the final dividend to the Defendant was allocated in accordance with the table set out at paragraph 12 above. Emirates asserts that no such allocation had been included in the draft version of the JOLs' First and Final Report which was sent to them on 23 January 2020. Counsel for Emirates says further that at no point did the JOLs put Emirates on notice of, or seek approval from Emirates for, the notional allocation on which Gibson relies.
16. On the basis that Emirates was paid the sum of US \$150,000 per month from the Fund for the months May 2019 to August 2019, Gibson asserts that Emirates' obligation to pay the US \$50,000 advisory fee for each of those months was triggered and now claims the sum of US \$200,000 in respect of unpaid fees and damages.



THE PRELIMINARY ISSUE

17. The Court has the power pursuant to Order 33 r 3 to try a preliminary question of law at the outset.
18. The terms of the Order provide that the question to be resolved in this application is whether Emirates received sufficient management fees from the Official Liquidation of the Fund pursuant to the IMA to trigger the obligation to pay advisory fees to Gibson pursuant to the IAA.
19. Although framed as a question of fact for determination by the Court in Emirates' summons and in the Order made in terms, it was apparent from the submissions advanced by Emirates on its application for a trial of a preliminary issue, and in these proceedings, that the issue being raised was a question of law which was whether the JOLs had the power to allocate the dividends as they did.
20. The remainder of the issues which these proceedings raise, that is to say, whether Gibson in fact provided any advisory services in respect of the advisory fees for which it claims, and if so, whether it has a legally viable claim for damages in respect of lost opportunity to invest those advisory fees and the quantum of that claim, will be resolved at trial if the preliminary issue is resolved against Emirates.

THE SUBMISSIONS

21. Gibson's case is based on the allocation of the dividends by the JOLs, as set out in the table above, settling Emirates' claim for monthly management fees arising under the IMA between May and September 2019.
22. In his oral submissions, Mr. Manning who acts for Emirates, submitted that it was "*Insolvency 101*" that the JOLs had no power to allocate dividends in the manner in which the JOLs purported to allocate them in this case.
23. He submitted that this notional allocation of the dividends to the Fund's monthly obligations to Emirates under the IMA raised the question of whether Cayman Islands liquidators have the power to pay only part of an admitted claim which, he suggested, is what it would amount to if the dividends were allocated as set out.
24. Referring briefly to the statutory scheme, Mr. Manning pointed out that the JOLs' functions as set out in s.110 of the **Companies Act** are to collect, realise and distribute the company's assets and, pursuant to s. 140(1), to apply those assets *pari passu* among the creditors in settlement of the claims they have approved.



25. Mr. Manning contended that the JOLs had no power to allocate the dividend as they did. Emirate's claim was a single claim in respect of accrued and future fees - calculated on a monthly basis because that was how its contractual entitlement arose - in respect of which the JOLs made a single payment.
26. Counsel submitted that the only way Emirates could have been paid US \$150,000 a month is if its claim had been admitted for those 4 months only, which was not the case. The whole of Emirates' claim had been admitted: US \$150,000 per month for 8 months and a prorated sum for part of the 9th month and the claim was paid at 67 cents in the dollar, amounting to US \$100,740 a month. Emirates' obligation to pay Gibson pursuant to clause 5.1 of the IAA was only triggered if it received US \$150,000 per month from the Fund. As a matter of law, it did not and Gibson's claim was, for that reason, unarguable.
27. Mr. Basdeo submissions were, in sum, that Emirates' proof of debt was the monies which fell due during the 9 month notice period under the IMA. It was an obligation which arose monthly in arrears that the JOLs approached it in that way and adjudicated the debt due to Emirates on a monthly basis, as they were entitled to do, until the assets of the Fund ran out. As Emirates were paid the first four claims in full, he submitted that Gibson's claim did not fall to be dismissed.

DECISION

28. Accepting, as I do, that the JOLs are well versed in Insolvency 101, I am not persuaded that the JOLs got it wrong or acted outwith their powers in recording that the first four of Emirates' invoices - or claims - were settled in full and that Gibson's case is doomed to fail as a matter of law.
29. Gibson has, in my view, an arguable case that Emirates' invoices for May, June, July and August 2019 were paid in full, thus triggering Emirates' obligation to pay Gibson's fees under the IAA.
30. I will hear Counsel on the form of order including directions for trial of the remaining issues and on costs. It only remains for me to thank Counsel and the parties for their patience in awaiting the decision on the preliminary issue which was much delayed.

DATED THE 15th MARCH 2022

RAMSAY- HALE J