IN THE CAYMAN ISLANDS COURT OF APPEAL

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 5 of 2022
(FSD CAUSE NO. 186 of 2020 (MRHJ))

BETWEEN:

GIBSON CONSULTANTS LIMITED

PLAINTIFF/RESPONDENT

AND

THE EMIRATES CAPITAL LTD

DEFENDANT/APPELLANT

BEFORE:

The Rt. Hon. Sir John Goldring, President
The Rt. Hon. Sir Bernard Rix, Justice of Appeal
The Rt. Hon. Sir Jack Beatson, Justice of Appeal

Heard: **1 September 2022**

Draft circulated: **7 September 2022**

Judgment Delivered: **9 September 2022**

JUDGMENT

The Rt. Hon Sir Jack Beatson, JA

1 The question in this appeal is whether The Emirates Capital Ltd. ("Emirates"), a company incorporated under the laws of the Dubai International Financial Centre ("DIFC"), is contractually obliged to pay Gibson Consultants Ltd ("Gibson"), a Cayman Islands exempted company, advisory fees pursuant to an Investment Advisory Agreement ("IAA"). Justice Ramsay-Hale tried this as a preliminary issue on the basis of a Statement of Agreed Facts (the "SAF"). She determined the preliminary issue in

Gibson's favour and granted Emirates leave to appeal against her order dated 15 March 2022.

2 Notwithstanding the attractive way Mr Durston advanced his submissions on behalf of Emirates, at the end of the hearing the Court dismissed the appeal. In the remainder of this judgment, I summarise the background, the material contractual provisions, the material paragraphs of the SAF, and the positions of the parties before the judge and her decision. I then give my reasons for joining in the decision to dismiss the appeal.

1. The Background:

3 The context of the dispute is the failure of a Cayman Islands fund, Fulcrum Diversified Income Note Fund ("Fulcrum"). Emirates was Fulcrum's investment manager under an Investment Management Agreement ("IMA"). Gibson was Fulcrum's investment adviser under the IAA entered into by it, Fulcrum and Emirates. The IMA and the IAA were both originally entered into on 6 September 2017 and amended and restated on 1 July and 11 October 2018. Both agreements contain choice of law and jurisdiction clauses in favour of the Cayman Islands.

4 On 9 April 2019 Emirates served termination notices on Fulcrum and Gibson, giving the contractually required nine months' notice of termination under clause 10.2(a) of the IMA and clause 8.3 of the IAA. On 25 May 2019 Fulcrum was placed into voluntary liquidation by its sole management shareholder. On 7 August 2019, on the application of the joint voluntary liquidators, the Court appointed joint official liquidators ("JOLs"). Under clause 6.1 of the IMA, Emirates, as the Investment Manager, was entitled to be paid a management fee. On 20 August 2019 it submitted a proof of debt in Fulcrum's official liquidation for its fees from 1 May 2019 to 9 January 2020, the termination date under the IMA: SAF §8. On 23 September 2019, the JOLs rejected Emirates' claim for fees between 9 December 2019 and 9 January 2020 but admitted the balance of the claim. Emirates was the sole creditor. The way the proof was made and the JOLs responded are set out in section 3 below. The assets realised by the JOLs were insufficient to pay its claim and on 28 January 2020 the JOLs paid Emirates a total

dividend of US$ 735,041.19: see the judgment below at [14]. On 29 May 2020 Fulcrum was dissolved. Gibson instituted these proceedings against Emirates on 19 August 2020.

5 Whether Emirates is under an obligation to pay advisory fees to Gibson is governed by clause 5.1 of the IAA. That provides that "*...the Investment Manager* [Emirates] *shall pay to the Investment Adviser,* [Gibson] *an advisory fee of US$50,000 per month (the "**Advisory Fee**") which will be payable monthly in arrears, provided that the Investment Manager has received an aggregate minimum Management Fee in each month of US$150,000…*". It will be seen ([8a] below) that in relation to Emirates' Management Fee, clause 5.1 of the IAA reflects and in substance "tracks" clause 6.2 of the IMA. In the period between August 2018 and April 2019 Emirates had paid the advisory fees to Gibson. The preliminary issue, ordered on 3 May 2021, was whether thereafter Emirates had received sufficient management fees from the official liquidation of Fulcrum to trigger its obligation under the IAA to pay Gibson the advisory fees claimed.

6 In the light of Fulcrum's failure, in substance the following issues were canvassed in the written and oral submissions before us. The first is whether the fact that the JOLs made chronological and monthly allocations in respect of each admitted claim, and stated that the distribution payment was made on that basis, qualified under the IMA and IAA as Emirates having "*received*" an aggregate management fee of US$ 150,000 in respect of each of the four months between May and August 2019. The second is whether the JOLs had power to allocate the claims admitted as they did by allocating the available dividend chronologically and monthly for the period from May 2019 as Fulcrum's obligation to pay Emirates' management fee under the IMA accrued and making the distribution payment on that basis: see the judge's statement at [19]. The third is the effect, if any, of Emirates' failure to challenge the JOLs' allocations before Fulcrum was dissolved.

7 At the time of the hearing before the judge there were two other matters in dispute between the parties which were to be resolved at trial: see judgment, [20]. The first was whether Gibson had in fact provided any advisory services to Emirates. The

second matter arose only if it had provided such services. It was whether Gibson could claim damages for the loss of the opportunity to invest the advisory fees that should have been paid to it. Emirates now accepts that "*both those issues have fallen away*": §6 of its skeleton argument for this appeal. It accepts that Gibson did provide services, in particular in assisting Emirates in formulating its claim in the liquidation. It also accepts that, irrespective of which party succeeds, the outcome of the appeal should bring a substantive end to the Grand Court proceedings.

2. The material contractual provisions

8 The material provisions of the IMA and IAA are set out in SAF §§ 2-5. I have summarised clause 5.1 of the IAA and clause 6.1 of the IMA above. The other material contractual provisions are:

a. Clause 6.2 of the IMA provides that the management fee is to be 1% 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"*. It also provides that "*the Management Fee will be allocated rateably for partial periods*".

b. Clause 10.5 of the IMA provides that "*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…".*

c. Clause 8.5 of the IAA provides that "*On termination of this Agreement the Investment Advisor 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…"*

3. The Statement of Agreed Facts ("SAF")

9 The fee Emirates claimed for the 8 months and 9 days between 1 May 2019 and 9 January 2020 in its proof of debt submitted on 20 August 2019 was US$ 150,000 for each month until the end of December 2019, and a prorated sum of US$ 44,383,56 for 1-9 January 2020. The total amount claimed in respect of its fees was US$ 1,244,383.56: see SAF, § 8.

10 The Notice of Rejection of Proof of Debt, Companies Winding Up Rules 2018 (hereafter "CWR") Form No 26, which the JOLs sent Emirates on 23 September 2019 referred to at [4] above only rejected the claim for fees between 10 December 2019 and 9 January 2020: SAF §9.

11 SAF §10 records that the JOLs rejected the claim for fees after 9 December 2019 because the dissolution of Fulcrum would immediately terminate the IMA and they estimated that the fund would be dissolved on or around 9 December 2019. In the event, that estimate was wrong. As stated at [4] above, the fund was dissolved on 29 May 2020.

12 SAF §9 states that the Notice sent to Emirates on 23 September 2019 admitted the fees totalling US$ 1,094,383.56 as seven monthly fees of US$ 150,000 between May and November 2019, a prorated sum of US$ 44,383,56 for 1-9 December 2019, and US$ 0 for 10 December 2019 to 9 January 2020. The claims were thus admitted on a monthly basis, in the same way as in Emirates' claim.

13 The assets realised by the JOLs were insufficient to pay Emirates' claim. SAF §12 records that on 24 January 2020 the JOLs sent Emirates a Notice of Final Dividend, CWR Form No 34. This gave notice that they had declared a final and only dividend of 67.16 cents in the dollar in respect of the US$ 1,094,383.56 total amount of fee claims admitted to proof. It also records that the total assets realised were US$ 1,013,450.49, the expenses of the liquidation were US$ 278,409.49, and that the amount of final distribution would be US$ 735,041.19.

14 The JOLs' covering letter enclosing CWR Form No 34 stated that the distribution payment of US$ 735,041.19 would be made in accordance with the table in SAF §13. That table allocated the fees that were admitted on a monthly basis, in the same way as in Emirates' claim and in CWR Form No 26. Accordingly, US$ 150,000 were allocated to each of the four months between May and August 2019, and US$ 135,041.19 to September 2019. As noted at [4] above, the judge stated that the JOLs paid Emirates US$ 735,041.19 on 28 January 2020. SAF §14 records that payment to Emirates, but not its date.

15 SAF §15 refers to §9.10 of the JOLs' First and Final Report dated 21 April 2020. It stated that the final dividend to Emirates was allocated in accordance with the table set out in SAF §13, that is on a monthly basis.

4. The positions of the parties and the judge's decision

16 In its written submissions to the judge, Gibson submitted that Emirates was obliged to pay advisory fees for the four months for the following reasons. First, clause 6 of the IMA provides that the Management Fee is to be calculated each month and is payable monthly in arrears, and clause 5.1 of the IAA "tracked" this. Clause 5.1 did so by providing that the advisory fee "*shall be payable monthly in arrears"* provided that the Investment Manager has received the specified minimum Management Fee of US$ 150,000 in each month. Secondly, in the exercise of their quasi-judicial capacity under Order 16 rule 1(4) of the CWR "*to adjudicate the creditors' claims"*, the JOLs were entitled to allocate the debt due to Emirates on a monthly basis until the assets realised ran out as they had done. Thirdly, their express monthly allocations equated to Emirates "*receiving"* an aggregate of US$ 150,000 for each of the four months from May 2019.

17 Emirates' position below and before this court is based on the fact that the JOLs gave notice declaring a final dividend of US$ 735,041.19 representing 67.16 cents in the dollar in respect of its claim. It submitted that because 67.16% of a monthly

Management Fee of US$ 150,000 is US$ 100,740, it only received a monthly management fee of US$ 100,740. Accordingly, it maintained that it has no obligation to pay advisory fees to Gibson.

18 Emirates submitted that what it described as the JOLs' *"notional allocation"* in their letter and final report is "*legally irrelevant and therefore of no consequence*" because liquidators pay a dividend to a creditor in respect of the whole of its admitted claim and they have no power to allocate the dividend to a part or parts of the admitted claim: see skeleton below, §§8-9. It also relied on sections 110(1)(a) and 110(2) of the Companies Act (2021 Revision) as showing that liquidators have no power to allocate a dividend to part of a creditor's admitted claim or to pay it otherwise than by reference to the admitted amount of the claim. It also submitted that that such an allocation would breach section 140(1) which provides that the property of the company shall be applied in satisfaction of its liabilities *pari passu* and CWR Order 18 rule 2 that a JOL who has sufficient funds "*shall … declare and distribute dividends among the creditors <u>in respect of the debts which they have proved</u>"* (emphasis added).

19 Mr Manning, who appeared on behalf of Emirates below, submitted that it was "*Insolvency 101"* that the JOLs had no power to allocate dividends in the way in which they purported to do in this case. If they wanted to expunge a proof which had been admitted or to reduce the amount admitted, they should have made an application under CWR Order 16 rules 20 and 21. In this case the JOLs neither made such an application nor indicated that they took issue with any part of Emirates' admitted claim.

20 The judge summarised the submissions of Gibson at [21] and [27] and those of Emirates at [22] – [26]. Her decision, contained in [28] – [29] of her judgment, essentially accepted Gibson's submissions without explaining why or what problems there were with Emirates' submissions. At [28] she stated that the JOLs "*are well versed in Insolvency 101"* and that she was "*not persuaded*" that they "*got it wrong or acted outwith their powers in recording that the first four of Emirates' invoices – for claims – were settled in full"* and that Gibson's case "*is doomed to fail as a matter of*

law". At [29] she stated that Gibson had, in her 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*".

5. The Appeal

21 Emirates' written submissions criticised the judge's references to whether Gibson had "*an arguable case*" and whether its case was "*doomed to failure*" rather than deciding the preliminary issue on the basis of the parties' SAF. I agree with that criticism, but it does not in itself get Emirates home, and was not relied on in Mr Durston's oral submissions on Emirates' behalf.

22 There are two real issues. The first is whether Gibson's submission that, in view of the fact that the obligations under the IMA and IAA accrued on a monthly basis, the JOLs were entitled to allocate the debt due to Emirates on a monthly basis until the assets ran out. §10.2 of Emirates' written submissions to this court state that Emirates "*submitted a single proof of debt in the official liquidation in respect of past and future Management Fees of US$150,000 per month, covering the period from 1 May 2019 to 9 January 2020*". It stated that the claim was "*in respect of [its] contractual right to be paid Management Fees throughout the nine-month termination period under the terms of the IMA*". The written submissions thus characterised the claim as a single claim with a single total for accrued entitlements and ones that would accrue before expiry of the termination.

23 At the hearing, Mr Durston accepted that the contents of the contract were relevant to the JOL's adjudication of whether Emirates' claims were valid. This was realistic in view of CWR Order 16 rule 2(3)(d) in relation to the required form and content of a proof and r. 6 in relation to its admission and rejection. It also follows from the quasi-judicial capacity in which JOLs adjudicate claims: CWR Order 16 rule 1(4). Mr Durston, however, submitted that once claims are admitted, the contract is irrelevant. They become a claim admitted for a global amount and all that is relevant is the total amount of the admitted claims. He argued that allocating the admitted claims in the

way that the JOLs did as set out in the table in SAF §13 would have the effect of rejecting the monthly claims after August 2019 although they had been previously admitted. It was also, he maintained, contradictory to declare a final and only dividend of 67.16 cents in the dollar in CWR Form No. 34 calculated on the basis of Emirates' full admitted claim of US$ 1,094,383.96 and the US$ 735,0412.19 available for distribution from the insolvent estate but to state that Emirates received 100% of their claims for the first four months of the period.

24 Mr Durston did not point to any authority supporting his proposition. It does not sit comfortably with the fact that the CWR does not prohibit the allocation of payments of Final Dividends or with the recognition by Henderson J in *Re Parmalat Capital Finance Ltd.* [2011] (1) CILR 112 at 113-114 that JOLs have the same flexibility as any other "*judicial, quasi-judicial or administrative decision maker*". I consider that Emirates' submission that the JOLs allocation was inconsistent with the *pari passu* principle concerning the distribution of assets was misconceived. That principle concerns the position between multiple creditors or between creditors and contributories. Here Emirates was the sole creditor.

25 CWR Order 18 rule 3(1), which provides that where the assets are insufficient for meeting the admitted debts, the debts "*shall abate in equal proportions between themselves*", might point in favour of Emirates' position. It might suggest that an application by Emirates under CWR Order 16 rule 20 to expunge an admitted claim or to reduce the amount which has been admitted would have succeeded. But Emirates did not rely on Order 18 rule 3(1). However, whether or not an application by Emirates would have succeeded, in this case Emirates neither made such an application nor indicated to the JOLs that it took issue with any part of their allocation of its admitted claims or the basis upon which the distribution payment was made until after the conclusion of the liquidation and the dissolution of Fulcrum.

26 The second issue in this appeal is whether, even if the JOLs had no power to make the allocation and distribution in the way that they did, it was open to Emirates to challenge the allocation for the first time only after the conclusion of the liquidation

when the JOLs were *functus officio.* I have concluded that it was not open to Emirates to do this for the reasons in the remainder of this judgment.

27 Emirates accepted and received a distribution payment by the JOLs made on the basis that it was receiving 100% of its admitted claims for the first four months, a partial payment for the fifth month and nothing in respect of the remaining months of the period of notice. I accept the submission on behalf of Gibson that Emirates should have objected to the JOLs' allocation during the liquidation: see skeleton §21(d) relying on *Re UCF Fund Limited* [2011] (1) CILR 305. Emirates had been on notice of Gibson's claim from 25 March 2020 more than two months before the conclusion of the liquidation on 29 May 2020 when Fulcrum was dissolved. By 25 March Emirates had received the letter dated 24 January 2020 enclosing CWR Form No. 34. It received the JOLs' First and Final Report on 21 April 2020. It thus received these documents respectively over five months and one month before the conclusion of the liquidation on 29 May 2020. Those documents showed the way the JOLs had exercised their power of allocation. Despite this, Emirates did not object to the allocation of the dividend on a monthly basis, let alone apply to the court under section 110 of the Companies Act to challenge the way the JOLs had exercised their power.

28 The Court had no evidence as to why Emirates did not contest the statement that the distribution would be made in accordance with the table in SAF §13 despite the correspondence with Gibson about its claim. Mr Durston stated he had no personal knowledge of the reason but, in the course of his submissions, gave a possible reason. He stated that the reason might have been that challenging the allocation would involve further expenses in the form of court and lawyers' fees which would reduce the amount of money available to it as the only creditor in the liquidation. Whether or not that was the reason, Emirates did not challenge the JOLs' allocation. Emirates thus made a choice for whatever reason not to challenge the allocation. As Rix JA stated during the hearing, it accepted the money on the basis that it was paid whether or not the JOLs had power to make the allocations they did.

29 I consider that Emirates, as the sole creditor, must be taken to have accepted the JOLs' conduct of the liquidation including their allocation and the basis upon which the distribution payment was made. The allocation and basis of distribution cannot in any event now be challenged because the JOLs became *functus officio* on their discharge.

30 I also observe that there is considerable force in Gibson's submission that Emirates has been seeking to hide behind "*the vicissitudes of insolvency law to avoid its obligations*" to Gibson. This was unattractive. Emirates took the benefit of the services Gibson provided in assisting it prepare its claim in the liquidation. Despite knowing of a probable claim by Gibson for advisory fees which it had paid until April, Emirates did not challenge the allocation by the JOLs which triggered Emirates' entitlement to management fees for the months between May and August 2019. As the President observed, in substance Emirates' argument sought to take the benefit of clause 6.2 of the IMA *vis a vis* the JOLs, but not the obligation under the substantially identically worded term in clause 5.1 of the IAA.

The Rt. Hon Sir Bernard Rix, JA A

31 I agree.

The Rt. Hon Sir John Goldring, President

32 I also agree.