THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BETWEEN

MAHPEE

Claimant / Appellant

and

MAIJA

Defendant / Respondent

JUDGMENT OF H.E. JUSTICE ALI Al MADHANI

UPON the Order of H.E Justice Maha Al Mheiri dated 26 August 2021 made in SCT-191-2021 granting permission to appeal against the Judgment of H.E Justice Nassir Al Nasser dated 5 August 2021

AND UPON reviewing all the documents filed on the Courts' file

AND UPON hearing the Claimant and the Defendant at a hearing on 19 September 2021

IT IS HEREBY ORDERED THAT:

1. The Judgment is set side.

2. The Defendant shall pay the Claimant the sum of USD 15,000 immediately as well as the Claimant's court fees in the sum of USD 750.

Issued by:
Nour Hineidi
Registrar
Date of issue: 17 February 2022
Time: 4pm

JUDGMENT

Introduction

1. This is the Claimant's appeal against the judgment of H.E. Justice Nassir Al Nasser issued on 5 August 2021 (the **"Judge"** and the **"Judgment"**) by which he ordered the Defendant, at paragraph [1] of the order, to pay the Claimant the sum of USD 15,000 for certain work done (the **"Payment"**), but only on condition that the Claimant completed further work, unless the Defendant wished to keep the work on hold rather than progress it, in which case the Payment was due immediately. The Claimant says that it is entitled to the Payment without condition. For the reasons which follow, I agree with the Claimant.

Background

2. In 2019, the Defendant wished to establish a company in the Abu Dhabi Global Market (the **"ADGM"**), licensed to provide certain financial services. He approached the Claimant, a compliance and regulatory services provider, to help him form and register the company.

3. Upon accepting the Claimant's offer as set out in a Letter of Engagement and a Schedule of Services and Terms and Conditions attached to the letter on 2 July 2019, a contract was formed between the parties (the **"Contract"**). Key provisions of the Contract in this appeal are as follows:

(a) Pursuant to clause 3.2 of the Letter of Engagement, the net fee for the services, USD 52,500, was payable in "three" instalments as follows (in fact, five instalments are set out):

i. a "Commitment Fee" of USD 15,000, upon payment of which the contractual period is commenced;

ii. USD 15,000 on submission of the "application package" to the ADGM's Financial Services Regulatory Authority (the **"FSRA"**);

iii. USD 5,000 upon submission of the "retail endorsement" application;

iv. USD 10,000 upon receipt of the FSRA "in-principle approval"; and

v. USD 7,500 following registration with the ADGM Registration Authority.

4. What each service was comprised of is not significant in this appeal.

(a) Pursuant to clause 3.4 of the Letter of Engagement, the fixed fee was subject to the following "assumptions and provisos" amongst others:

i. "the application requires no waiver or modification of any FSRA rule;"

ii "there is no change of business model necessitating any change of permission or endorsement"; and

iii. "the FSRA Licence is obtained within 9 months of signing our engagement letter".

(b) Pursuant to clause 3.6 of the Letter of Engagement, "in the event of the termination of this Contract, [the Claimant] shall be entitled to recover all of its fees accrued to the time of termination and calculated in accordance with the . hourly rates [of the relevant staff], up to an amount not exceeding the sum of the next instalment stage shown in the estimate of costs and timelines set out in 3.2 above".

(c) Clause 1.1 to 1.5 of the Schedule of Services outlines the work that the Claimant was required to complete up until the application to the FSRA was made, including advising on and reviewing the Defendant's prospective company's regulatory business plan and preparing the essential compliance documents, and clause 1.6 of the Schedule of Services concerns the Claimant's submission of the application to the FSRA. (Clause 1.7 onwards concern the post-application period and the Defendant's responsibilities which are insignificant in this appeal).

(d) Pursuant to clause 3.4 of the Terms and Conditions, if the Contract is terminated, "any work completed and finalised in accordance with the Contract will be invoiced in accordance with this Contract".

(e) Clause 4 of the Claimant's Terms and Conditions concerned "Fees and payment":

i. "Unless otherwise agreed in writing our fees shall be determined by reference to the nature and value of the work undertaken, the basis of time spent, and the experience level of the staff involved" (4.1).

ii. "Unless expressly stipulated otherwise in the Letter of Engagement, any amount of fees indicated to you in the Letter of Engagement shall be considered as an estimate only which is not contractually binding and whilst given in good faith, will be subject to the stated caveats and assumptions and to any factors outside our control. We will notify you if it becomes reasonably apparent that any fee estimate is likely to be exceeded" (4.2).

5. The Defendant paid the Commitment Fee. The Claimant commenced work in preparation for the application to be made to the FSRA i.e. the work set out at clause 1.1 to 1.6 of the Schedule of Services, upon completion of which the second instalment at clause 3.2 of the Letter of Engagement in the amount of USD 15,000 becomes due. It is not disputed that work was completed, but nor is it disputed that no application was ever made to the FSRA. The reasons for this are not important in this appeal, but suffice it to say that work was paused when new FSRA rules were announced but not yet issued and therefore known on the one hand, while on the other hand the Defendant's company was subsequently licensed in the DIFC, undermining the need to be licensed in the ADGM, as licensure in one allows operation in the other.

6. The Claimant invoiced the Defendant for USD 15,000 i.e. for the second instalment. In an email sent to the Defendant on 22 April 2021, it was stated "While I understand that the application wasn't submitted to the regulator due to circumstances outside of our control, the work was done and delivered to you . In all fairness, we should be paid for the services that we have provided so far" and in an email sent around three weeks later, the Defendant was asked to "refer to the attached timesheet report extracted from our time recording system showing the work done by Mahpee on your application". The Defendant refused to pay on the basis that the obligation to pay had not arisen as no application to the FSRA had been made.

7. The Claimant subsequently issued these proceedings claiming the amount. The Defendant argued that, while the Claimant had completed some of the pre-application work, it had not completed all of it, and was therefore not entitled to the USD 15,000 stipulated at clause 3.2 of the Letter of Engagement, which required the application to the FSRA to be made. If the Claimant wanted USD 15,000, it should finish the work including submission of the application. Otherwise, the Defendant intimated that he was content to pay half the amount.

8. The Judge handed down his Judgment. At paragraph [26], he stated: ". the Claimant has fulfilled its obligation as per the Agreement and has worked on the Application . The Claimant is therefore entitled to payment [for] its efforts, but I find it appropriate that it must amend the Application in light of the FSRA's requirements and proceed to submit the Application".

9. The Defendant did not challenge the Judgment. The Claimant did. In its Appeal Notice in respect of the decision, the Claimant stated:

> The Court's decision to condition the Claimant's entitlement to the USD 15,000 upon the submission of an amended application is considered unjust for the following reasons. (i) The Claimant fulfilled its obligation as per the Agreement and prepared an application that was ready to be submitted in January 2020 in accordance with the current FSRA framework at that time. No extra work should be required by the Claimant [sic] to obtain the fee it is entitled to (agreed by the Court on point 26 of the Decision) due to a material change by the regulator, which we specify exemption from in multiple points in clause 3.4. (ii) Amending the application to meet the new framework requirements, which were not in existence in January 2020, is an entirely separate mandate that will require substantial additional work from the Claimant, beyond the scope of the original agreement. This is not taken into consideration by the Court in its ruling.

10. In submissions in the appeal, the Claimant further emphasised the "assumptions and provisos" at clause 3.4 of the Letter of Engagement. Referring to them, especially those cited at [3.b.i-iii], the Claimant argued that: "The objective behind Section 3.4 is not to unilaterally modify our fees, but to recognize and be fairly remunerated for extra work done, that could not have been foreseen, and ultimately benefits the client"; "It is evident from the scope of work set forth in the contract that Mahpee was not required pursuant to Clause 3.4 to modify an entire application due to the "waiver or modification of any FSRA rule," no less the implementation of an entire framework across the application and corresponding documents. We fulfilled our obligation under the current contract and were ready to submit"; and "Under the new framework, a current submission will require substantial extra work - outside of the scope of the original contact - that as per Clause 3.4, we have anticipated and protected ourselves against being obligated to complete".

11. In response to the appeal, the Defendant maintained its position as advanced at first instance, and also filed an assortment of screenshots of communications between him and the Claimant, including one of an email from a senior consultant of the Claimant, sent on 19 February 2020, stating, amongst other things:

> Once the new FSRA framework is issued, we will review it and make any necessary amendments (just to make sure that what we have included on GIRA is not in contradiction with the new framework) and submit the application within three business days of FSRA accepting applications again. In order for us to proceed with the submission, you will proceed with the payment for both FSRA application fees and the second instalment for Mahpee fee.

There was no mention of additional fees, in accordance with clause 3.4 of the Letter of Engagement or otherwise.

Discussion

12. The Defendant has placed significant reliance on clause 3.2 of the Letter of Engagement which sets out when each instalment would be due to the Claimant. In my judgment, this reliance is misconceived. Clause 3.1 of the Letter of Engagement provides that the Claimant "will provide the Services at a fixed net fee of US$52,500". The "Services" are, clause 1.2 explains, set out in the Schedule of Services. In my view, the Defendant is liable to pay for the "Services" provided by the Claimant; clause 3.2 of the Letter of Engagement only sets out when payments should ordinarily be made, not when liability comes into existence.

13. I do not think that the Contract contemplates that the Claimant might not be paid for work done, on the mere basis that a particular milestone was not reached. Clause 4.2 of the Claimant's Terms and Conditions provides, it will be recalled, that "Unless expressly stipulated otherwise in the Letter of Engagement, any amount of fees indicated to you in the Letter of Engagement shall be considered as an estimate only which is not contractually binding and whilst given in good faith, will be subject to the stated caveats and assumptions and to any factors outside our control. We will notify you if it becomes reasonably apparent that any fee estimate is likely to be exceeded". Was it expressly stipulated in the Letter of Engagement that the net fee was not an estimate? In my judgment, it was not. There are no words to that effect. Were there any factors outside of the Claimant's control which were likely to cause the net fee or any part thereof to be exceeded? In my view, there was: the DFSA introducing new rules. Was the Defendant notified of this? He was, at the latest when invoiced for the pre-application work, and in detail following the hearing of this appeal by means of post-hearing submissions filed by the Claimant.

14. The Defendant has not disputed that work has been done nor, so far as I am aware, has he challenged the Claimant's valuation of that work. He has not said that, having regard to the nature and value of the work, the time spent on it and the staff involved, the Claimant has overcharged. His position is confined to the proposition that nothing is payable as no application to the FSRA has been made. In my judgment, that proposition is wrong.

15. Pursuant to clause 3.6 of the Letter of Engagement, for example, if the Contract is terminated the Claimant is entitled to be paid all fees accrued until the time of termination. And pursuant to clause 3.2 of the Letter of Engagement, payment of instalments two and three are - confusingly - stated to be payable before the relevant applications are made, not "on" and "upon" their submission as described in the table immediately above. Indeed, on a strict reading of the Contract, it may be that the Claimant could submit flawed applications to the FSRA - ones that have not taken into account the new rules and that are liable for rejection - in order to trigger the Defendant's liability, on his own case, to pay the amounts identified as instalments two and three in the Letter of Engagement.

16. Had I been deciding this case at first instance, I might have required the Claimant to terminate the Contract or to follow any other procedure in or consistent with the Contract as a pre-condition for ordering the Defendant to make the Payment. But I am deciding the appeal, and a different question is before me. That question is whether the Claimant should be obligated to do further work in order to qualify for the Payment i.e. USD 15,000. In my judgment, there is no evidence that the answer to that question should be yes. Properly construed, I think the Contract guarantees the Claimant payment for work done and fees properly accrued. The Claimant submits that the work it completed to date is valued at USD 15,000. This has not been disputed. The appeal is therefore granted.