

TESTING THE LIMITS OF THE DIFC COURTS' JURISDICTION

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The DIFC Court of Appeal's recent decision in *Sandra Holding Ltd (2) Nuri Musaed Al Saleh v (1) Fawzi Musaed Al Saleh (2) Ahmed Fawzi Al Saleh (3) Yasmine Fawzi Al Saleh (4) Farah El Merabi [2023] DIFC CA 003* ("*Sandra Holding*") clarifies the scope of the DIFC Courts' jurisdiction for providing interim relief, including worldwide freezing orders, in support of foreign proceedings. The Court of Appeal has held that the previous authority in *Jones v Jones CFI 043/2022* is incorrect and injunctive relief can only be granted in support of foreign proceedings if the DIFC Courts have jurisdiction over the Respondent(s) under one of the statutory gateways.

"The RDC cannot add or extend the Courts' jurisdictional powers without clear words to that effect."

The simplified background to the matter is that a dispute arose between two Kuwaiti brothers under a shareholders' agreement of a Cayman Islands registered entity with one brother claiming that the other had defrauded him of approximately US\$45m. As well as commencing proceedings in Kuwait, France and the United States, the Claimant brother applied to the DIFC Courts for a worldwide freezing order which was granted by Justice Sir Jeremy Cooke in November 2021 (the "WFO").

This appeal was filed by the Appellants to overturn the WFO on six grounds:

- the DIFC Court does not have jurisdiction to issue a freezing order in support of foreign proceedings outside of the gateways in Article 5A(1) of the judicial authority law (law 12 of 2004 as amended) (the "JAL"). According to the Appellants, the DIFC Courts' jurisdiction is primarily derived from Article 5 of the JAL, and since the Appellants do not fall within the scope of Article 5A(1)(a)-(d) the DIFC Courts do not have the power to grant the WFO;
- the WFO was granted primarily on the basis that there were ongoing proceedings in Kuwait, but the Kuwaiti proceedings have now been dismissed based on the findings of the court appointed expert;
- unlike English Courts, DIFC Courts do not have an inherent sovereign jurisdiction;
- there is no clear evidence linking the Appellants to the DIFC;
- The judge did not find jurisdiction on the basis that the Appellants were deemed to have submitted to DIFC jurisdiction, in fact he made his decision on the basis of actual jurisdiction; and
- Rule 25.24 of the Rules of the DIFC Courts (the "RDC") is procedural and not substantive, meaning that it does not purport to give rise on its own to a free-standing jurisdiction beyond the JAL.

"The decision reinforces the qualified statutory nature of the jurisdiction of the DIFC Courts."

The Court of Appeal agreed with the Appellants and held that the RDC cannot add or extend the Courts' jurisdictional powers without clear words to that effect. As the Respondents relied on the wording in RDC 25.24 to found jurisdiction, and because the Court of Appeal confirmed that that wording was not meant to confer jurisdiction, the Respondents failed to establish that the DIFC Courts' had jurisdiction over the Appellants and the WFO was dismissed.

The Court of Appeal considered the decision in *Nest Investments Holding Lebanon S.A.L. & ors v Deloitte & Touche (M.E.)* CA-011-2018 where a different RDC provision (RDC 20.7) was deemed to be wide enough to confer jurisdiction and give the court discretionary power to grant the relevant order to join a second defendant. However, the Court of Appeal in *Sandra Holding* made it clear that the decision in *Nest* "should not be taken as an indicator that the Court had conclusively determined that all rules in the RDC confer jurisdiction on the DIFC Courts. Instead, one needs to make an assessment on a case-by-case basis to determine their true effects and ascertain if the relevant rule in fact confers jurisdiction".

Although the Court of Appeal in *Sandra Holding* recognised the underlying purpose of a freezing order and its support to the prospective enforcement of a judgment, it found that it must always be established that the DIFC Court has the jurisdiction under its statute to grant the requested relief. The question is not whether it should have jurisdiction just to avoid a less corrupt and perverse outcome.

The Court of Appeal also recognised that although the DIFC Courts have granted injunctions as a conduit jurisdiction in support of foreign judgments or arbitral awards, the DIFC Courts do not have any statutory basis to assume jurisdiction over matters that are not within its scope.

The *Sandra Holding* decision reinforces the qualified statutory nature of the jurisdiction of the DIFC Courts and it is now clear that if the DIFC Courts are to have wider jurisdiction akin to the English common law courts, the limitations set out in the JAL will have to be reconsidered and that statute amended.

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