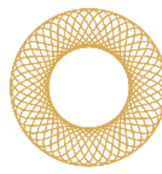

Outer Temple

Massun v Mousi and ors [2022] DIFC CA 004

Stephen Doherty, *Outer Temple Chambers*

After a long running dispute, the DIFC Court of Appeal has dismissed the claim in Massun v Mousi & Ors. Outer Temple members, David Russell QC and Stephen Doherty, acted for the Second and Third Defendants.

In *Massun v Mousi and ors [2022] DIFC CA 004* the DIFC Court considered appeals arising from an alleged multi-million dollar fraud concerning a yacht and a number of properties in Spain ("the Property"). The Claimant was an individual, and the alleged "ultimate beneficial owner" of the Property which she said had been misappropriated by the first to third defendants.

On 22 December 2021, the Court of First Instance entered immediate judgment dismissing the Claimant's claim based on an application of the principles of reflective loss, in the DIFC Court's first application of the principle, and following the decision of the UK Supreme Court in *Marex Financial Ltd v Sevilleja [2020] UKSC 31*. The CFI judgment was recently published in redacted form: *Kaamil v Kaawa and ors [2020] CFI 032 (21 December 2021*.

Whilst it dismissed the Claimant's claim, the Court of First Instance also permitted an amendment to the Claimant's case to allow her to assert a direct beneficial interest in the Property. However, her claim was subsequently dismissed in its entirety on 22 July 2022 by the DIFC Court of Appeal.

The litigation raises interesting points of law relevant to individuals or families holding their wealth through complex corporate structures and

trusts, and the potential risks of utilising those structures due to the limitations placed on the ability of the "ultimate beneficial owner" to directly pursue claims before the Court.

The Rule Against Reflective Loss

The Supreme Court in *Marex* confirmed that shareholders could not bring a claim for the diminution in the value of their shareholding arising as a consequence of some loss sustained by the company, for which the company has a cause of action against a wrongdoer. The rule arises from the principle established in *Foss v Harbottle* (1843) which states that the only party that can claim relief for harm caused to a company, is the company itself, and a shareholder cannot suffer any loss which is separate and distinct from the loss of the company.

Following *Marex* there were a number of cases before the English High Court which sought to test whether or not Marex had narrowed the scope of the rule against reflective loss, such that it could only be applied in precise circumstances. That led to arguments being raised before the English Courts as to whether the rule extended to claims involving

chains of companies (i.e. where the claimant was not a direct shareholder of the company, but had an interest in the shareholding of a parent company - *Broadcasting Investment Group Ltd v Smith* [2020] EWHC 2501), or whether the rule would also apply to individuals who had a beneficial interest in the shareholding of a company.

The Holding Structures of the Property

In *Massun / Kaamil*, the Property was held in complex structures that may be familiar to practitioners advising ultra-high net worth individuals. The Property itself was owned by Company A, whose shareholding was owned in turn by Company B, whose 100% shareholder was Company C, whose shareholding in turn was held on trust for the Claimant by another individual / nominee shareholder. In that context, the Claimant as "ultimate beneficial owner" of the Property, in fact only had a direct beneficial interest in the shares of Company C.

At the point in time that the Property was acquired by the Claimant as "ultimate beneficial owner", it was also significant that the Property itself never changed hands, and was owned at all times by Company B. The assets exchanged by the Claimant, in acquiring the Property, were in fact the shares in Company B.

The DIFC Court's Application of the Rule Against Reflective Loss

In the Court of First Instance, the Third Defendant argued that the Claimant's claim was barred by the rule against reflective loss, since the only direct interest held by the Claimant was in the shareholding at the top of the corporate structure. The rule applied because the only conceivable loss suffered by the Claimant was the diminution of her shareholding, and she had no direct claim in relation to the Property. That claim, if it existed, would need to be pursued by Company A, the owner of the Property.

In addressing the issue, the Court asked two main questions: (i) whether the rule as stated in *Marex* should be applied in the DIFC Court; and (ii) what was the scope of the rule, as defined in *Marex*.

On the first issue, the DIFC Court decided to follow the approach of the UK Court rather than the approach adopted in other common law jurisdictions, most notably the New Zealand Court of Appeal, which held in *Christensen v Scott* (cited by the minority in *Marex*) that shareholders have personal rights which, if invaded, were actionable regardless of the rule in *Foss v Harbottle*. The Judge accepted the Third Defendant's argument that the DIFC Court enjoys a close nexus with English Law, which is persuasive authority in the DIFC Court in line with Article 8(2) of DIFC Law No. 3 of 2004, and that no such nexus existed with New Zealand law.

On the Second issue:

- The Third Defendant argued that whether the rule applies falls to be determined by reference to the loss being claimed, rather than the party claiming the loss. That was significant, because provided that the loss could not be seen as separate and distinct from the loss of Company A, it did not matter whether the Claimant was the direct shareholder of Company A, or the shareholder of a company higher up in the corporate holding structure, or for that matter the beneficiary under a trust holding the shares elsewhere in the holding structure.
- As regards shareholders, the Court held that the application of the rule could not be circumvented solely because the claimant was a shareholder of Company B rather than Company A, because the loss remains one which is not separate and distinct from B's loss. In other words, Company B's loss is suffered as a consequence of the loss in value of the shareholding in Company A, and so the diminution in the shareholding of Company B is not recoverable by shareholders, for precisely the same reason that the shareholders of Company A could not claim for loss of diminution in their shareholdings as a consequence of the alleged misappropriation of Company A's Property. The DIFC Court therefore declined to follow the English High Court's approach in Broadcast Investment Group.
- As regards beneficial owners, the Court accepted the Third Defendant's submission that the scope of the rule restated in Marex applied to beneficial owners of shares in the same way that it applied to direct shareholders (following Shaker v Al-Bedrawi & Ors [2003] EWCA Civ 1452), otherwise the rule would be easily circumvented in ways which would fail to uphold the principle in Foss v Harbottle. There was no reason in principle why a

"beneficiary-shareholder" should be in a better position than a direct shareholder.

The Claimant's Alleged Direct Beneficial Interest

The Claimant was granted permission to amend her case by the Court of First Instance, to plead a direct beneficial interest in the Property. At first instance, it was held that the Claimant was therefore permitted to advance her claim that she had a direct interest in the Property, acquired by either an express trust created by those who agreed to establish the corporate structure, or alternatively by way of resulting trust at the time the property was acquired, on the basis that she had advanced the consideration for its acquisition.

That point was appealed to the Court of Appeal on the basis that the Claimant's amended case was not properly arguable since:

- On the creation of an express trust, on the Claimant's pleaded case the corporate structure was created by the agreement of the Claimant and her advisors, and Company A (i.e. the owner of the Property) was not a party to any contract. Since Company A was the only party competent to deal with the legal estate in the Property, so as to settle the assets in trust for the Claimant, the express trust claim failed because there was no settlor.
- On the claim that there was a resulting trust, the Property at all times remained in Company A's hands. To the extent that any consideration was advanced for the acquisition of assets, it was for the acquisition of shares higher up in the corporate structure (and therefore subject to the findings on reflective loss at first instance).

Following the Court of Appeal's judgment, the claim was dismissed in its entirety.

Find out more

This article was written by Stephen Doherty. In Massun v Mousi & Ors, David Russell QC and Stephen Doherty acted for the Second and Third Defendants.

Stephen Doherty practises commercial litigation, with a focus on international dispute resolution and arbitration, pensions, and financial services law. He is ranked as a Tier 1 Junior by the Legal 500 (The English Bar: Commercial in the Middle East) and as an "Up and Coming" Junior Chambers & Partners Global 2022.

His international practice is predominantly based in the United Arab Emirates (UAE), and the wider GCC region. In the past twelve months Stephen has been instructed as sole counsel in a number of multi-million dollar arbitrations, including in the fields of construction, property and shareholder disputes. He has appeared in arbitrations conducted under a number of institutional rules, including the ICC, DIAC, DIFC-LCIA and ADCCAC. Stephen also regularly appears in the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM) Courts across a number of areas, including applications for interim injunctive and Mareva relief, financial services disputes, employment disputes, and jurisdictional challenges. Stephen is also currently instructed in relation to a Dubai Financial Services Authority (DFSA) regulatory investigation.

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