

CASE FOCUS

Case No Murkan v Mishti, DIFC 089/2023 issued on 3 July 2023

Jurisdiction DIFC

Court DIFC Court of First Instance

Recommended by Ayesha Karim, Advocate, India, Independent Practitioner

WHAT IS IT ABOUT?

An employee resigned but continued working during his notice. He claimed 2,723,094 AED for outstanding holiday, public holiday and sick pay, and cancellation of the visa. The Employer counter claimed 17,500 AED for among other things breach of the conditions of employment on the notice period and a non-compete clause, and losses caused by the employee's sudden resignation. The Small Claims Tribunal found in the Employee's favour, ordered him to return a uniform and dismissed the Employer's counter-claims. The Employer appealed to the Court of First Instance. Under Article 28(1) of DIFC Law No. 10/2004 the DIFC Court of First Instance could hear Small Claims Tribunal decision appeals on a question of law; an alleged miscarriage of justice; a procedural fairness issue; or a matter provided for in or under DIFC Law. The former RDC 44.118 was held to exclude appeals from the Small Claims Tribunal on questions of fact but this part of the RDC had been replaced by Part 53. RDC 53.87 stated an appeal would be allowed if the decision was: wrong; unjust because of a serious procedural or other irregularity in the proceedings; or wrong in relation to any other matter provided for or under any law. RDC 53.91 stated 'Permission to appeal may be given only where: (1) the court considers that the appeal would have a real prospect of success; or (2) there is some other compelling reason why the appeal should be heard'. The word 'wrong' in RDC 53.87 seemed to allow appeals which included simple questions of factual error, but Article 28(1) of DIFC Law No. 10/2004 which did not allow these.

WHAT WAS DECIDED?

The Court decided no appeal lay from the SCT on a question of fact. If the word 'wrong' in RDC 53.87

– covered questions of fact an appeal to the Court of First Instance would open up for review all or any of the SCT Judge's findings of fact said to affect the outcome. SCT proceedings which were intended to be fast, cost effective and final so application for permission to appeal because of factual errors was not available. The calculations of amounts owed to the employee had been based on a 2500 AED monthly salary but the salary was 2000 AED with a 500 AED bonus which could not be used to calculate dues on termination. This miscalculation was arguably an error of law not fact. It was a very small issue and there was a risk it might lead to the reopening of factual matters. Permission to appeal on this was granted and the appeal was disposed of on the spot.

WHY IS THIS IMPORTANT?

This case confirms despite the apparent contradiction between Article 28 of DIFC Law No. 10/2004 and Part 53 of the RDC, it is not possible to appeal a Small Claims Tribunal case as a result of a factual error and a strict approach will be taken on this.

Case No (1) 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 DIFC Case No. 003/2023, issued on 6 September 2023

Jurisdiction ...DIFC

Court DIFC Court of Appeal

Recommended by Outer Temple Chambers

WHAT IS IT ABOUT?

The original dispute in this case involved a share holder agreement in the Cayman Islands which led to litigation on breach and fraud in Kuwait and France. An ex-parte Worldwide Freezing Order (WFO) was granted and a return date was fixed. The Appellants failed to appear on the return date, and did not challenge or comply with the Court Order. They applied to vacate the WFO nine months after it was granted which the court refused. Key questions were the Court's jurisdiction to issue the WFO in these circumstances and if the judge had been wrong to refuse to hear the vacation application.

WHAT WAS DECIDED?

The Court of Appeal ruled the DIFC Courts did not have jurisdiction to grant the WFO against the appellants. Article 5(A)(1)(e) of Dubai Law No. 12/2004 did not extend to all the procedural provisions of the Court Law (DIFC Law No. 10/2004) or the Rules of Court. The wider enforcement principle which had been adopted by the Privy Council in *Broad Idea International v Convoy Collateral Ltd* did not apply in the absence of a specific statutory conferral of jurisdiction. The Contempt of Court Order was set aside. The first time an ancillary freezing order was issued by the DIFC Courts was in *United States Securities and Exchange Commission and others v Wintercap S.A*, DIFC Case No. 003/2019. There the judge did not provide a schedule of reasons when he granted the Order, but did detail the legal basis of the Court's jurisdiction as he found it. He stated the order was made in line with Article 5(A)(1)(e) of the Dubai Law No. 12/2004, Article 32(b) of DIFC Law No. 10/2004 and Rules 25.1.6(a) and (b), Rule 25.1.7 and Rule 25.24 of the Rules of the DIFC Courts. Subsequent DIFC first instance decisions in which these Orders were made included *Childescu v Burcea* (DIFC Case No. 074/2019) where the judge observed the provisions in DIFC law and in the RDC which give the DIFC Courts power to grant freezing orders do not themselves give rise to jurisdiction for the purposes of Article 5(A)(1)(e) of Dubai Law No. 12/2004. Later decisions in which challenges to jurisdiction were rejected included *Lateef v Liela* DIFC ARB Case No. 020/2020, *Jones v Jones* DIFC Case No. 043/2022 and this case at first instance. A long-running issue on the DIFC Courts' jurisdiction to make freezing orders in support of ongoing foreign proceedings which have not proceeded to judgment has finally been resolved here. In doing so, it has cast new light on how Dubai Law No. 12/2004 applies to the jurisdiction of the DIFC Courts, and, in particular, the circumstances in which jurisdiction may arise under the laws of the DIFC itself, as opposed to the laws of Dubai.

The long running debate at first instance on the availability of freezing orders in the absence of a foreign judgment has now been settled in favour of the more restrictive view that they are not.

Article 5(A)(1)(e) of Dubai Law No. 12/2004 can only be relied on in limited circumstances such as those in *Nest Investments v Deloitte & Touche*, DIFC Case No. 11/2018 and in the context of DIFC Law No. 10/2004 and Rules of Court only as an adjunct to a matter which is otherwise within jurisdiction.

Although in the circumstances technically obiter dicta, observations by the Court on what is necessary to establish a good arguable case in relation to foreign proceedings and the principles to be applied in the exercise of discretion are useful guidance for those applications which are within jurisdiction in the future. The first test involves assessing the likely prospect of there being an enforceable judgment in the foreign court in due course – a proposition foreshadowed

but not determined in *Burcea v Childescu* (DIFC Case No. 044/2022). The exercise of discretion requires consideration of the location of any assets which are the subject of the injunction and the connection between the subject matter and the Court's territorial jurisdiction.

Case No Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC, DIFC Case No. 016/2022 issued on 12 May 2023

Jurisdiction DIFC

Court DIFC Court of Appeal

Recommended by Covington & Burling

WHAT IS IT ABOUT?

Under the terms of a 1999 FIDIC contract, a developer contracted with a construction company to build a tower in Dubai.

The contractor made four applications for a time extension which were rejected. They maintained that they were entitled to a time extension but the employer argued they had failed to comply with a 28-day notice period in Sub-Clause 20.1 for raising their claim with the engineer and the 42-day notice period for making a detailed claim. The DIFC Court of First Instance ruled the project had been delayed by 325 days, of which 19 days were down to the contractor and 306 to the employer. However, the judge dismissed the contractor's claims because of a failure to comply with the notice requirements. The contractor appealed.

WHAT WAS DECIDED?

The appeal was dismissed. The court found the 28-day notice requirement was a condition precedent to the contractor's entitlement to obtain the time extension however strong their extension claim might be. A failure to serve that notice in time meant the time extension claim would fail.

The 42-day detailed claim requirement was not a condition precedent. For the purpose of the 28-day notice requirement, time ran from the date the contractor became aware or ought to have been aware of an event or circumstance giving rise to a time claim extension.

The Court distinguished *Obrascon Huarte Lain SA v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) which held time could start to run from the moment delay to completion occurred or started to occur. This interpretation would render Sub-Clause 20.1 ineffective in ensuring claims were notified and dealt with swiftly. Enforceability of time bar clauses are a recurring theme in Middle East construction disputes, as under regional civil codes and Sharia law, these clauses may not be enforceable in certain circumstances.

The DIFC Court's strict interpretation of notice periods is a reminder contractors must comply with notice requirements regardless of the strength of their claims.

Failing to do this may lead to a contractor bearing extension costs and being liable for liquidated damages, even if the employer caused the delays.