

DIFC Court of Appeal: Important New Jurisdiction Judgment

In September 2022 the DIFC Court held in *Jones v Jones* that it has an unfettered freestanding jurisdiction to grant injunctions, without any reference to jurisdictional gateways (see [Laurence Page's note](#)). On 6 September 2023, a year later, the DIFC Court of Appeal has found that *Jones v Jones* was wrong. Injunctive relief can be granted in support of foreign proceedings, but only if the DIFC Court has jurisdiction over the respondent under one of the statutory gateways. [James Leabeater KC](#) acted for the successful appellants. See below for his note summarising the decision.

Sandra Holdings v Saleh: DIFC Court of Appeal Clarifies Jurisdiction to Grant Injunctive Relief

Jones v Jones principle is wrong

In *Jones v Jones CFI 043/2022* Justice Sir Jeremy Cooke held that the DIFC Court had jurisdiction to grant injunctive freezing relief in support of foreign proceedings even where the respondent does not fall within the established jurisdictional gateways in Article 5 of the Judicial Authorities Law (JAL).[1]

The Court of Appeal has now held in *Sandra Holdings v Saleh CA 003/2023* that that is incorrect: in every case, the claimant must first establish that the DIFC Courts have jurisdiction under a statutory gateway; and, if that is established, injunctive relief should only be granted on established discretionary principles.

[James Leabeater KC](#) instructed by [Antonios Dimitracopoulos](#) and [Jonathan Brown](#) of [BSA Ahmad Bin Hezeem & Associates LLP](#) represented the successful appellants.

Background

In *Sandra Holdings* Justice Sir Jeremy Cooke [granted freezing relief](#) against the respondents in support of proceedings in Kuwait. The respondents had no connection with the DIFC and no assets within the DIFC. They did not comply with ancillary asset disclosure orders and, faced with an application for contempt, applied belatedly for the freezing injunction to be set aside.

The application to set aside came again before Justice Sir Jeremy Cooke, who [refused to set aside](#) the freezing injunction, finding that the Court had had jurisdiction to make the Order for the reasons he had given in *Jones v Jones* and refusing otherwise to hear the respondents on why the freezing order should not have been made because they had failed to comply with it. He then found the respondents in contempt and [imposed significant sanctions for contempt](#).

On 6 September 2023 the Court of Appeal (Chief Justice Zaki Azmi, H.E. Deputy Chief Justice Ali Al Madhani and Justice Lord Glennie) [allowed the appeal in full](#), setting aside both the freezing injunction and the findings of contempt.

The Judgment of the Chief Justice, with whom the other Justices of Appeal agreed, is the new starting point for all issues relating to the jurisdiction of the DIFC Courts, and it is required reading for all DIFC practitioners.

In this note I try to summarise the most important points. Numbers in square brackets refer to paragraphs of the Chief Justice's judgment.

Jurisdiction of the DIFC Courts

The jurisdiction of the DIFC Courts is founded in Article 5A of the JAL. This gives DIFC Courts territorial jurisdiction over entities based in or licensed in the DIFC, and over contracts performed or partly concluded within the DIFC (Article 5A(1)(a)–(d)). Article 5A (2) and (3) give the DIFC Courts jurisdiction where parties have agreed to confer jurisdiction on the Courts (opt-in jurisdiction) [53].

The Court's jurisdiction can be expanded by the RDC, by virtue of Article 5A(1)(e), as the DIFC Courts of Appeal found in *Nest Investments v Deloitte & Touche* [2018] CA 011 by reference to RDC 20.7. However, that requires clear and expressive words [58]. None of the provisions of the RDC give the DIFC Courts jurisdiction to act outside the established gateways and *Jones v Jones* was wrong to find they did. Whilst RDC 25.24 refers to applications for interim relief in relation to proceedings taking place or which will take place outside the DIFC, that does not expand the DIFC Courts' jurisdiction: it merely relates to procedure [59]. Nor do articles 22, 24 or 32 of the Court Law No.10 of 2004 assist [64].

If the decision at first instance were correct, the DIFC Courts would have jurisdiction over any foreign proceedings anywhere in the world. That is wrong: the Court's jurisdiction is constrained to the circumstances outlined in Article 5 of the JAL [62].

Whilst the DIFC Courts may act as a conduit enforcement jurisdiction in appropriate circumstances [71], that does not mean that they can grant interim relief in aid of anticipatory foreign judgments: it is key that the judgment or award has in fact been issued [65].

A failure to dispute jurisdiction in time does not confer jurisdiction

The respondents had failed to file an acknowledgment of service or applied to dispute jurisdiction within the 14 day time limit set out in RDC r.12.4. The claimant argued that that failure gave the Court jurisdiction under RDC r.12.5, which states that where an application disputing jurisdiction is not made, the respondent "*is to be treated as having accepted that the Court has jurisdiction to try the claim*". However, that provision only applies where the Court has *prima facie* jurisdiction. Where, as here, the Court has no jurisdiction at all, RDC r.12.5 cannot give it jurisdiction [76].

Other points in relation to freezing relief

Those points were sufficient to allow the appeal, but the Chief Justice went on to consider further points that had been argued. One of those was probably only of interest to the particular parties, being that the claimants had no good arguable case on the facts [83].

Of greater importance, however, the Court has held, when considering an application for a worldwide freezing order and assuming it has *prima facie* jurisdiction, that the discretionary factors established under English law should apply, as summarised in *Arcelormittal USA LLC v Essar Steel Limited & Others* [2019] EWCH 724 (Comm): see [98]-[99]. On the facts, and applying those principles, the freezing injunction should not have been made.

Contempt

The Court of Appeal held that the Judge should have permitted the respondents to argue all points on why the freezing injunction should not have been made [108].

The claimant had argued that the principle that an order made by a court of unlimited jurisdiction must be obeyed

unless and until it has been set aside by the court, set out for example in *PWC v Saad* [2014] UKPC 35 [25], should apply to DIFC proceedings. The Court of Appeal held that the DIFC Courts are not of unlimited jurisdiction and therefore that principle does not apply [111].

Since the freezing injunction should not have been made, the findings of contempt, and the sanctions, were set aside [112]-[113].

Discussion

The kernel of the decision in *Jones v Jones* lies in RDC r.25.24. That provision states:

“25.24 Where a party wishes to apply for an interim remedy but: (1) the remedy sought is in relation to proceedings which are taking place, or will take place, outside the DIFC...Any application must be made in accordance with Part 8”.

Justice Sir Jeremy Cooke found that that provision had to expand the DIFC Courts’ jurisdiction beyond the Article 5A(1)(a)-(d) gateways because otherwise it would have no point: any proceedings within Article 5A(1)(a)-(d) would be brought substantively in the DIFC Courts, not in a different Court of Tribunal. As he said in *Jones v Jones* [9], “it is hard to see that this Rule can have any application in the absence of a power to grant such a remedy in the circumstances envisaged by the Rule which refers to “proceedings which are taking place or will take place” and not simply to the situation where a judgement has already been issued by a foreign court or the Dubai Court.”

However, this proceeded on a mistaken assumption that where the jurisdictional gateways can be established the DIFC Courts decide the substantive claim. The DIFC Courts applies established *forum non conveniens* principles and it is perfectly possible for a claim falling within the Article 5A(1)(a)-(d) gateways to be heard elsewhere. An obvious example is a claim against a DIFC Licensed Establishment under a contract which has an exclusive jurisdiction clause in favour of a different Court. Such a claim would properly be brought in the Court in whose favour the parties had agreed the jurisdiction clause and a claim brought in the DIFC Courts on that contract would be stayed, notwithstanding the fact that the DIFC Courts had *prima facie* jurisdiction over the DIFC Licensed Establishment. However, the DIFC Courts could properly be asked for injunctive relief against the DIFC Licensed Establishment, and RDC 25.24 states (and only states) that such an application should be made by Part 8. Once that mistaken assumption in *Jones v Jones* has been corrected, the decision falls away.

As the Court of Appeal has now held, the DIFC Courts are a creature of statute, without inherent jurisdiction. It is therefore wrong to permit judge made expansions of its jurisdiction. If it is felt that it is desirable for the DIFC Courts to have wider jurisdiction, perhaps akin to that enjoyed by the English Courts under s.25 of the Civil Jurisdiction and Judgments Act 1982 – and that is a perfectly sensible proposal – the JAL should be amended appropriately.

[1] Dubai Law No. 12 of 2004 as amended by Law No. 16 of 2004