

caseBrief



DIFC Court of Appeal overrules Sandra Holding in part and reaffirms itself as an international commercial court

By Haider Afridi, Chatura Randeniya, Mevan Bandara, Sulakshana Senanayake and Lee Schama | 4 December 2024

“When you make a wrong turn you must make two right turns: one to correct the wrong turn and one just for growth.”

This ancient, Native American proverb still holds true today – at least, it seems, according to the eagerly-awaited decision in *Carmon Reestrutura-Engenharia E Serviços Técnicos Especiais, (SU) LDA v Antonio Joao Catete Lopes Cuenda* [2024] DIFC CA 003 (*Carmon v Cuenda*).

The DIFC Court of Appeal in *Carmon v Cuenda* has overturned, in part, its own decision in *Sandra Holding Ltd and others v Fawzi MUSAED Al Saleh and others* [2023] DIFC CA 003 (*Sandra Holding*), holding that the Court does have the jurisdiction to make freezing orders in support of foreign court proceedings. This landmark decision, issued by Justices Robert French, Sir Peter Gross and Rene Le Miere, is also the first time that the DIFC Court of Appeal has considered the circumstances under which it may depart from its own previous decisions.

Background

On 24 July 2023, Afridi & Angell, acting on behalf of the Claimant (an Angolan construction company), sought and obtained from Justice Wayne Martin (as he then was), sitting as the DIFC Court of First Instance, an *ex parte* freezing order together with an order for specific disclosure in support of proceedings in Hong Kong in which it was alleged that the Defendant had misappropriated in excess of USD 23 million of Carmon’s money.

The High Court of Hong Kong had already issued both a proprietary injunction over the funds, and their traceable proceeds, and a worldwide freezing order. A banker’s book order revealed that the Defendant had transferred the funds to other jurisdictions including Switzerland and the UAE. Justice Martin’s Order accordingly restrained the Defendant’s bank

The Authors

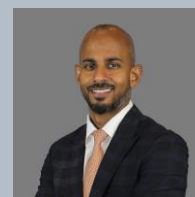


Haider Afridi

Partner

hafridi@afridi-angell.com

With over 30 years’ of experience in dispute resolution in the UAE, Haider represents clients in both institutional and ad hoc arbitration proceedings, as well as works with local counsel on matters before the UAE Courts. He has been involved in substantial claims in the construction, real estate, and financial services sectors. Haider also sits as an arbitrator and has experience in adjudicating disputes in a variety of sectors.



Chatura Randeniya

Partner

crandeniya@afridi-angell.com

Chatura advises and represents clients in arbitration, and has represented clients in DIAC, ADCCAC, ICC and ad hoc arbitrations. He also works with local advocates on matters before the UAE Federal courts. Chatura regularly advises clients in high value construction, and maritime and shipping disputes. He is

accounts in onshore Dubai to prevent any further dissipation and required the disclosure of balances in those accounts.

Following a heavily-contested return date hearing, Justice Martin reserved judgment pending the Defendant's compliance with his previous order for disclosure and, on the morning of 7 September 2023, ruled that the freezing order should continue – not least because new evidence revealed that the Defendant had, in apparent breach of the Hong Kong High Court orders, dissipated and/or transferred-on most of the funds in the UAE bank accounts.

The Wrong Turn: the CA decision in *Sandra Holding*

On the afternoon of 6 September 2023, the Court of Appeal handed down judgment in *Sandra Holding* which held that the DIFC Court of First Instance had no jurisdiction to make a freezing order in support of the prospective enforcement of a judgment in proceedings pending in a foreign court unless the Court had such jurisdiction established through one of the pathways specified in Article 5(A) of the JAL.

The Defendant then, relying on *Sandra Holding*, applied to set aside Justice Martin's order for want of jurisdiction. Justice Martin, accepting that he was bound to follow the decision of the Court of Appeal, discharged his own orders while staying the operation of the discharge (i.e., maintaining the freeze over the Defendant's accounts) pending the decision of the Court of Appeal. Justice Martin also gave permission to appeal his order on limited grounds. Carmon then sought further permission to appeal from the Court of Appeal as to whether the recent decision in *Sandra Holding* was wrong in law and should, to that extent, be overruled.

The First Right Turn: Correcting the Law

In a legal first for the DIFC Courts, on 4 April 2024, Justice Sir Peter Gross sitting as a single judge of the Court of Appeal, also gave leave to appeal in respect of Carmon's further grounds, holding that there was “*an arguable case that Sandra Holding was wrongly decided*” and identifying a number of important policy issues which arose:

“(1) The power of the DIFC Courts, established (inter alia) to assist international trade, to grant freezing orders in circumstances where such relief could be crucial to avoid the dissipation of assets.

(2) The need to guard against the assertion by the DIFC Courts of an exorbitant jurisdiction.

(3) The proper limits of judicial (as distinct from legislative) development of the law by the DIFC Courts, whose jurisdiction is based on statute.”

admitted as Attorney-at-Law of the Supreme Court of Sri Lanka. He is a ranked practitioner by Chambers and Partners and Legal 500.

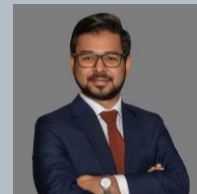


Mevan Bandara

Partner

mbandara@afриди-angell.com

Mevan advises and represents clients in arbitration, DIFC Court litigation and onshore litigation. He has represented clients in DIFC-LCIA, DIAC, ICC and ad hoc arbitrations seated in London, Dubai, Singapore and Sri Lanka. He specialises in cross-border disputes, tax, construction, banking, real estate, maritime and employment disputes.



Sulakshana Senanayake

Senior Associate

ssenanayake@afриди-angell.com

Sulakshana specialises in litigation before the DIFC Courts. He is a Part II Practitioner of the DIFC Courts with full rights of audience and has represented clients in a number of notable cases before the DIFC Courts. He has particular experience in the areas of commercial disputes, employment, construction, negligence and injunctions as well as regulatory disputes involving the DFSA and the Financial Markets Tribunal.

In last week's landmark judgment, the Court expressly held in summary: ¹

"It is the respectful opinion of this Court that the Court in Sandra Holding took a wrong turning in an unduly restrictive view of the powers of this Court which may be deployed in aid of its express jurisdiction it is clear with the benefit of full and further consideration, that the past decision was legally incorrect Further, it can be said to have generated inconvenience in the sense that the absence of the power to issue a freezing order in respect of a prospective foreign judgment may result in the jurisdiction of this Court to recognise the foreign judgment ultimately issued being thwarted. The correct analysis, in our respectful view, is whether the Court had power (and if it be necessary to say so, ancillary jurisdiction) to do so in order to avoid the thwarting of its undisputed express jurisdiction to recognise and enforce a foreign judgment. We are clear that the answer is Yes. We would add that considerations of policy for this Court are overwhelmingly in favour of granting the injunction. So too, are all discretionary considerations. The appeal should be allowed." ²

The Second Right Turn: For Growth - the DIFC as an international court

The significance of the decision of the Court of Appeal in *Carmon v Cuenda* cannot be overstated.

First, it lays a strong foundation for the continued economic growth of the region and the promotion of the Emirate as an international centre for dispute resolution and settlement: ³

"The ability of a potential judgment debtor in a commercial dispute to make a pre-emptive strike against enforcement of any judgment against it would be inimical to the rule of law in trade and commerce, domestically and transnationally. The DIFC Courts are part of a growing network of international commercial courts in a number of jurisdictions around the world. Where their jurisdiction and powers are amenable to constructions supporting the rule of law in transnational trade and commerce, such constructions should be preferred. In our opinion, Article 24 of the Court Law properly construed confers jurisdiction to entertain proceedings by way of an application for such



Lee Schama

Barrister

lschama@afridi-angell.com

Lee handles a broad range of litigation and specialises in complex and high value disputes. He has significant experience across a wide range of commercial law including international and multi-jurisdictional banking, corporate and personal insolvency, money laundering and asset tracing, commercial and white-collar crime, and residential and commercial property law. Lee's practice also encompasses several niche areas including defamation, aviation, competition, intellectual property and trademark infringement, and taxation.

¹ Extracted from [204] and [205]

² The *Carmon* Court also found that the case for a WFO was not established on the merits in *Sandra Holding Ltd* and the result would therefore likely have been the same even had the court found there to be jurisdiction and power to make the order sought in that case

³ Extracted from [154] - [155]

relief as may be necessary to prevent its pre-emption by a dissipation of the assets of a prospective judgment debtor in proceedings in a foreign court whose judgment can be recognised and enforced in the DIFC Courts.....”

Second, the Court of Appeal provided carefully-considered guidance as to how in the future the question of whether the DIFC Court Rules confer jurisdiction on the DIFC courts in a particular case should be resolved. Adopting what it termed an “expansive” approach “informed by public policy”, the Court ruled that “regard must be had to the function and purpose of the DIFC Courts, which are statutory courts integral to the operation of the DIFC as a Financial Free Zone”.

Third, an important conceptual distinction was made between the existence of a jurisdiction and the powers that may be exercised in aid of it. Critically, it was said that jurisdiction may be implied from the grant of a power.⁴

Accordingly, the Court of Appeal held in *Carmon v Cuenda* that the grant of a jurisdiction to recognise and enforce a foreign judgment must encompass, if only by implication, the grant of power necessary to prevent that jurisdiction from being thwarted. The DIFC Court has express jurisdiction to recognise and enforce foreign judgments, and that jurisdiction would be thwarted if a defendant to a foreign proceeding which may yield such a judgment could dissipate its assets, whether within the DIFC or otherwise.

Finally, having been asked for the first time to overrule one of its own previous decisions, the Court of Appeal concluded that if one of its earlier decisions embodied an error of law that impeded the effective administration of justice then it would review the case having regard to the four considerations set out by the High Court of Australia in *John v Federal Commissioner of Taxation*⁵, namely:

- (a) whether or not the precedent decision rested upon a principle carefully worked out in a significant succession of cases;
- (b) whether there were differences in the reasoning that led to the precedent decision;
- (c) whether a precedent decision had achieved no useful result but considerable inconvenience; and
- (d) whether or not a precedent decision had been independently acted on in a manner which militated against reconsideration.

⁴ See [31], [38] and [58].

⁵ (1989) 166 CLR 417

The decision is also growing evidence of the progress of the DIFC Courts' longer term mission to develop its own distinctive body of jurisprudence by broadening the base beyond its traditional roots in English common law. ■

Afridi & Angell successfully represented Carmon throughout the proceedings and instructed Zoe O'Sullivan KC of Serle Court Chambers for the set aside application and the appeal.

Afridi & Angell

Founded in 1975, Afridi & Angell is a full-service UAE law firm in its fifth decade at the forefront of the legal community. From the beginning, our hallmarks have been a commitment to quality, unsurpassed knowledge of the law and the legal environment, and crafting of innovative business solutions. Licensed in the three largest Emirates of Abu Dhabi, Dubai and Sharjah as well as the Dubai International Financial Centre, our practice areas include banking and finance; corporate and commercial law; arbitration and litigation; construction; real estate; infrastructure projects; energy; project finance; maritime (wet and dry); and employment. We advise local, regional and global clients ranging in size and sophistication from start-ups, sole proprietorships, family-owned businesses, entrepreneurs and investors to some of the world's largest public and private companies, governments and quasi-government institutions. We attract and retain clients with our dedication to practical guidance focused on their business needs supported by decades of experience here in our home jurisdiction, the UAE.

Afridi & Angell is the exclusive member firm in the UAE of top legal networks and associations, most notably Lex Mundi, the world's leading network of independent law firms, and World Services Group.

www.afridi-angell.com