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/ [Massun v \(1\) Mousi \(2\) Miut \(Appellant\) \(3\) Macki \(Appellant\) \(4\) Muvt \(Appellant\) \(5\) Meuna \(Appellant\) \(6\) Macken \(7\) Mycte \(8\) Mantu \(9\)](#)

[Miqe and Massun v \(1\) Mousi \(2\) Miut \(Appellant\) \(1\) Muvt \(2\) Macki \(Appellant\) \(3\) Musiac \[2022\] DIFC CA 003 and CA 004](#)

Massun v (1) Mousi (2) Miut (Appellant) (3) Macki (Appellant) (4) Muvt (Appellant) (5) Meuna (Appellant) (6) Macken (7) Mycte (8) Mantu (9) Miqe and Massun v (1) Mousi (2) Miut (Appellant) (1) Muvt (2) Macki (Appellant) (3) Musiac [2022] DIFC CA 003 and CA 004

AUGUST 25, 2022 COURT OF APPEAL - JUDGMENTS

Claim No: CA 003/2022

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the Name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

BEFORE CHIEF JUSTICE ZAKI AZMI, H.E. JUSTICE SHAMLAN AL SAWALEHI AND JUSTICE LORD ANGUS GLENNIE

BETWEEN

MASSUN

Claimant / Respondent

and

(1) MOUSI

(2) MIUT (Appellant)

(3) MACKI (Appellant)

(4) MUVT (Appellant)

(5) MEUNA (Appellant)

(6) MACKEN

(7) MYCTE

(8) MANTU

(9) MIQE

Defendants

JUDGMENT

Hearing :	18 and 19 July 2022
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Counsel :	Mr David Russell QC assisted by Mr Alastair Tomson instructed by BSA Ahmad Bin Hezeem & Associates LLP for the Second Defendant Mr Tom Montagu-Smith QC assisted by Mr Stephen Doherty instructed by Abdulla Al Awadi, Advocates & Legal Consultants for the Third Defendant Mr Stavros Pavlou instructed by Patrikios Pavlou & Associates LLC for the Fourth and Fifth Defendants The Claimant/Respondent was not present
Judgment :	22 July 2022

ORDER

UPON the Order with Reasons of H.E Justice Ali Al Madhani dated 22 December 2021 (the “Order”)

AND UPON reviewing the Claimant’s Application No. CFI-032-2020/13 for permission to amend her Particulars of Claim dated 27 May 2020 filed on 21 September 2020 (the “Amendment Application”)

AND UPON reviewing the Third Defendant’s Application No. CFI-032-2020/9 for Immediate Judgment dated 26 July 2020 (the “Immediate Judgment Application”)

AND UPON the Second Defendant’s Permission Application dated 12 January 2022 seeking permission to appeal against the Order

AND UPON the Third Defendant’s Permission Application dated 12 January 2022 seeking permission to appeal against the Order

AND UPON the Fourth and Fifth Defendants Permission Application dated 12 January 2022 seeking permission to appeal against the Order

AND UPON the Order of H.E Justice Ali Al Madhani dated 22 April 2022 granting permission to appeal for all Defendants

AND UPON the Claimant’s failure to file submissions in opposition to the appeals

AND UPON hearing Counsel for the Second, Third, Fourth and Fifth Defendants at the hearing of the appeals on 18 and 19 July 2022

IT IS HEREBY ORDERED THAT:

1. The appeals are allowed in part.
2. Paragraph 1 of the Order allowing the Amendment Application is set aside.
3. The Amendment Application is refused.
4. Paragraph 2 of the Order is varied. The Amendment Application having been refused, Immediate Judgment is granted against the Claimant on the whole of her claim.
5. The Freezing Order of H.E Justice Ali Al Madhani dated 22 April 2020 is set aside, including any costs orders made in relation thereto.
6. In consequence, the remaining paragraphs of the Order are set aside.
7. The Claimant must pay the Defendants and each of them their costs of the action, including the application both in this court and before the judge at first instance, to be assessed by the Registrar on the standard basis, if not otherwise agreed.

Issued by:

Nour Hineidi

Registrar

Date of Issue: 22 July 2022

Date of re-issue: 25 August 2022

Time: 2pm

Claim No: CA-004-2022

IN THE COURT OF APPEAL

BEFORE CHIEF JUSTICE ZAKI AZMI, H.E. JUSTICE SHAMLAN AL SAWALEHI AND JUSTICE LORD ANGUS GLENNIE

BETWEEN

MASSUN

Claimant/Respondent

and

(1) MOUSI
(2) MIUT (Appellant)

Defendants

(1) MUVT
(2) MACKI (Appellant)
(3) MUSIAC

Notice Parties

JUDGMENT

Hearing :	18 and 19 July 2022
Counsel:	Mr David Russell QC assisted by Mr Alastair Tomson instructed by BSA Ahmad Bin Hezeem & Associates LLP for the Second Defendant Mr Tom Montagu-Smith QC assisted by Mr Stephen Doherty instructed by Abdulla Al Awadi, Advocates & Legal Consultants for the Second Notice Party The Claimant/Respondent was not present
Judgment :	22 July 2022

ORDER

UPON reviewing the Order of H.E. Justice Omar Al Muhairi dated 4 February 2020 (the "Order")

AND UPON the Second Defendant's Permission Application dated 25 February 2020 filed against the Order

AND UPON the Fourth Defendant's Permission Application dated 25 February 2020 filed against the Order

AND UPON the Claimant's failure to file submissions in opposition to the appeals

AND UPON the Order of Justice Sir Jeremy Cooke dated 11 May 2022 granting permission to appeal for the Second Defendant and Second Notice Party

AND UPON hearing Counsel for the Second Defendant and Second Notice Party at the hearing of the appeals on 18 and 19 July 2022

IT IS HEREBY ORDERED THAT:

1. The appeals are allowed.
2. The Freezing Order H.E. Justice Omar Al Muhairi issued in CFI-074-19 is set aside, including any costs order made in relation thereto.
3. The Claimant's Claim is dismissed.

4. The Claimant must pay the Defendant's costs of the action both in this court and in the court below to be assessed by the Registrar on the standard basis if not otherwise agreed

Issued by:

Nour Hineidi

Registrar

Date of Issue: 22 July 2022

Date of Re-issue: 25 August 2022

Time: 2pm

SCHEDULE OF REASONS

Introduction

1. This is an Appeal in Action CA-003-2022 (on appeal from action CFI-032-2020). The Appeal is brought by the Second, Third, Fourth and Fifth Defendants (hereafter "D2, D3, D4 and D5" or, collectively, the "Appellants") against the Order of H.E. Justice Ali Al Madhani dated 22 December 2021.
2. We heard the Appeal in that action alongside an Appeal in action CA-004-2022 (on appeal from action CFI-074-2019). The connection between the two Appeals is apparent from our reasoning below.
3. These reasons are applicable to both Appeals.
4. The Appellants were represented at the hearing of the Appeals by counsel.
5. Despite having been served with the Notices of Appeal and having been made aware of the date fixed for the hearing of the Appeals, the Claimant in the action (the Respondent to the Appeals) did not appear at the hearing before us. Her lawyers had already taken the appropriate steps to cease acting for her and to come off the record.
6. In the circumstances we did not have the advantage in hearing the appeal of legal submissions by or on behalf of the Claimant. That is unfortunate. Nonetheless, we are satisfied that the arguments which the Claimant raised before the Judge and which she would have raised before us had she been represented on these Appeals have been fully explained by counsel for the Appellants by reference to the judgments appealed against and, where appropriate, to the transcript of the hearing in the court below.

The background to the claim – the Cyprus action

7. The background to the claim in this action is an assertion by the Claimant that the Defendants, or some of them, have engaged in a conspiracy fraudulently to deprive her of assets including a yacht (the "Yacht") and a property in Spain (the "Spanish Property") each valued at considerably in excess of EUR 30 million.
8. In October 2019, the Claimant began proceedings in Cyprus seeking various declarations as well as damages. Although the Yacht was mentioned in the final judgment of the Court in Cyprus, it was not the subject of the claim as made in that jurisdiction which was restricted to concerns about the Spanish Property. The Cypriot Court granted an ex parte Freezing Order, broadly equivalent to a Freezing Order in this jurisdiction. That ex parte Order was continued at a number of administrative hearings in Cyprus before a substantive hearing was fixed at which the Respondents (effectively the Defendants in this action) challenged the Order on a number of grounds, including (a) that the Cypriot Court had no jurisdiction to hear the case and (b) that the Claimant's action was tainted with illegality.
9. The substantive hearing in Cyprus took place in February 2020. Judgment was delivered on 30 March 2020. In that Judgment the Cypriot Court held, in short, that the court did not have jurisdiction over the claim; and that the claim would in any event have failed for illegality (there was "no prospect of success"). We were informed that the claim in Cyprus has now been withdrawn.

Action CFI-074-2019 and Appeal CA-004-2022

10. Action CFI-074-2019 was raised in this jurisdiction in November 2019 in support of the Cyprus proceedings. No separate substantive claim was made in the action. A Freezing Order was granted in that action on an ex parte application on 13 November 2019. A Continuation Hearing was held before H.E Justice Omar Al Muhairi on 10 December 2019 along with applications by various Defendants to vary it. We are only concerned here with an application by D2 and D3 as Second Notice Party challenging the jurisdiction of the Court to make an Order in support of the Cypriot Freezing Order. Judgment was given on 4 February 2020.

In that Judgment H.E Justice Omar Al Muhairi found that the DIFC Court did have jurisdiction to grant a Freezing Order in support of the Cyprus proceedings. It should be noticed that that decision was made before the Cypriot Court delivered its judgment on 30 March 2020.

11. That decision is challenged in the appeal brought by D2 and D3 as Second Notice Party in this Appeal CA-004-2022. They argue that the Judge did not approach the matter in the right way. He was wrong to hold that the Applicant for such an Order need only establish a good arguable case in respect of jurisdiction both in the DIFC Court and in the Cypriot Court. He should have reached a decision on those two jurisdiction hurdles. He should also have decided for himself whether, on the evidence before him, the Claimant had shown a good arguable case for injunctive relief. Had he decided those points for himself he would not, or should not, have granted or continued the Freezing Order.

12. These arguments are important and will almost certainly require to be decided by this Court. But in the circumstances in which we find ourselves we think that it would not be appropriate for us to decide them in this appeal. For reasons already explained, we have had no submissions from the Claimant. More importantly, there is a much more straightforward route to deciding this aspect of the appeal. The Freezing Order in Action CFI-074-2019 was granted in support of the Freezing Order made by the Court in Cyprus. But, as already observed, the Cypriot Court has now held that it has no jurisdiction over the claim and that, in any event, the Claimant had no prospects of success. The Cypriot proceedings have been withdrawn. There are no longer any Cypriot proceedings underpinning the DIFC action. The DIFC action is therefore without any basis; and it follows from the decision of the Cypriot Court that there was no arguable case that the Cyprus Courts had jurisdiction.

13. The Freezing Order made in that action must therefore be recalled and the action dismissed with costs both in this Court and in the Court below.

Action CFI-032-2020

14. Action CFI-032-2020 was raised in the DIFC in April 2020, soon after the dismissal of the Cypriot proceedings. It raises substantially the same claims. For present purposes any differences are unimportant. The Claimant claims to be the victim of fraud. In particular, she claims that one of her assets, the Yacht, has been misappropriated and that another of her assets, the Spanish Property, is at risk of misappropriation. We use the expression “her” assets in a deliberately loose sense, because at the heart of this appeal is a dispute about the extent to which these two assets can properly be called hers so as to justify in law a claim brought in her name.

15. The Claimant’s original claim in this action asserted that the Yacht and the Spanish Property were each held within a complex corporate structure. At the top of the chain of companies in each case was a company in which, so she averred, she was the owner or beneficial owner of 100% of the shares. Her claim against the Defendants in respect of the actual or threatened misappropriation proceeded upon the basis that, because of her indirect beneficial ownership of those assets arising from this shareholding, she was entitled to sue the alleged wrongdoers in her own name.

16. That analysis was immediately challenged by the Defendants, specifically D3 who made an application for Immediate Judgment under RDC Part 24. In short, the argument for the Defendants was that C had no right, as shareholder of the ultimate holding companies, to sue for the alleged wrongdoing. Such a claim fell foul of the rule against reflective loss as explained by the majority in *Marex Financial Ltd v Sevilleja* [2020] UKSC 31.

17. The Immediate Judgment application came on for a hearing before H.E. Justice Ali Al Madhani, along with other applications. Before that hearing however, the Claimant, no doubt aware of the risk that her claim as originally formulated might be dismissed, sought leave to amend her claim, and particularly to amend the basis on which she claimed to have a right to sue in her own name. We shall come back to look at her amended claim in due course, but it is sufficient for present purposes to note that the judge allowed the amendments and, on that basis only, did not grant Immediate Judgment against the Claimant.

18. It is important to note precisely what the Judge decided. In paragraph 1 of his Order, he granted the Claimant’s Amendment Application and gave directions as to service and filing of the Amended Particulars of Claim. In paragraph 2 he said this:

“2. The Immediate Judgment Application is granted. It is declared (for the reason explained in [183] and [184] of the Schedule of Reasons) that C is barred from claiming in respect of any losses which have been or might be suffered by her in her capacity as a shareholder of any of the companies in the corporate structures whose ultimate subsidiaries hold the assets the subject of this claim (as both defined in [1] of the Schedule of Reasons). For the avoidance of doubt, had the Amendment Application not been granted, immediate judgment would have been given against the Claimant on the whole of the claim. ...”

19. The Judge's reasons for making an Order in those terms is explained in paragraphs [183] and [184]. Having discussed the rule against reflective loss as applied to the Claimant's original (i.e., unamended) claim, he said this:

"182. For the reasons given above, the Immediate Judgment Application must be granted. Following my decision in the Amendment Application and having reviewed C's claims in the APoC, however, it seems to me that my decision in this application is, as things stand, of only very limited impact on C's right to pursue actions in respect of the losses that she claims have been or might be suffered by her. Most or nearly all of those claims, in my judgment, have been "transferred" to her primary case in the APoC in which she claims, not as a shareholder, but as the beneficial owner of the Assets.

183 In such circumstances, it seems appropriate to me to make a declaration rather than one of the orders which would usually conclude a successful immediate judgment application i.e., those set out in RDC r. 24.11: C is barred from claiming for any losses which were or might be suffered by her in her capacity as a shareholder of any of the companies in the corporate structures whose ultimate subsidiaries hold the Assets."

20. In summary, what the Judge did was to dismiss the Claimant's claim in its original form and allow it to proceed only on the basis of the Amended claim. He made it clear that the Claim as originally pleaded could not succeed and that had the amendment Application not been granted then the whole Claim would have been dismissed.

21. This part of the appeal is directed to the Judge's decision to allow the amendments to be made. If the appeal is successful on this aspect, then it follows from the Judge's decision in paragraph 2 of his Order – as to which there has been no cross-appeal – that the Immediate Judgment application would succeed on the whole of her claim. In other words, the whole of her claim would fall to be dismissed.

22. In her Amended Particulars of Claim the Claimant asserts a direct beneficial interest in the Yacht and the Spanish Property. Her Amended pleading was the subject of rigorous scrutiny before this Court. In summary, in addition to her original "indirect interest" claim (i.e. her claim based on her shareholding in the companies at the top of each chain), she alleges: (i) an "Express Trust" (using the terminology adopted by the Appellants on this Appeal) arising from the express intentions of those who set up the corporate structure; and (ii) a "Resulting Trust" arising from the fact, as she maintains, that she provided the entire valuable consideration for the acquisition of the Spanish Property and the Yacht and did not intend this to be a gratuitous transfer.

23. Unless an Amendment has the written consent of all parties, it requires the permission of the court: RDC Rule 18.2. Whether or not to grant permission to amend is within the discretion of the Court. But that discretion is inevitably circumscribed. In considering whether to allow the Amendment the Court will have regard to whether the Amendment is properly pleaded and has a real prospect of success. It will not allow an amendment which seeks to raise a case which is not sustainable in law, or which is inconsistent with the known facts.

24. The Appellants argue that neither the Express Trust nor the Resulting Trust arguments are maintainable either in fact or in law. Neither has any prospect of success. They are not even arguable. Having heard detailed argument on the points, we agree with those submissions. We give our reasons briefly in the following paragraphs.

25. We deal first with the case based upon an Express Trust. There are several difficulties with the Claimant's claim but the most obvious one is this - even taking the Claimant's case at its highest, none of the parties to the alleged contractual arrangements said to give rise to the Express Trust over the assets were the owners of the assets or otherwise competent to deal with the legal estate in the assets so as to settle the assets in trust for the Claimant. The claimant asserts in her Amended Particulars of Claim that the corporate holding structure for the Yacht and, separately, for the Spanish Property, was intended by her and D1 to D3 to give her a direct beneficial interest in those assets. But, on the Claimant's own case, the owner of the Yacht was a company called Lutri ("Lutri") and the owner of the Spanish Property was a company called Litul For the Claimant's Express Trust case to be even arguable there would have to be an averment, at the very least, that Lutri and Litul were party to any such contractual arrangements and settlors under the alleged trust. No such case is made out.

26. We deal next with the case based on a Resulting Trust arising from the fact, as the Claimant would have it, that she provided the entirety of the consideration for certain "Asset Swaps" under which, so it is said, the Yacht and the Spanish Property were acquired in exchange for certain properties in Moldova. We do not need to go into the details of this. Suffice it to say that there was no swap of assets in any legal sense – the same companies continued to own the Yacht (Lutri) and the Spanish Property

(Litul) and all that happened, on the Claimant's own case, was a transfer of shares in the two companies – and, more importantly, on her own pleaded case, the Claimant did not provide any consideration for the swap, her only interest in these matters being limited to her beneficial interest in the shares of companies higher up in the corporate holding structure.

27. We have attempted to summarise our conclusions in the briefest of terms. There were, inevitably, many more details focussed on in the arguments advanced before us. But we are satisfied that, on the Claimant's own pleaded case, her assertions of these alternative routes to success are without merit.

28. It follows that the appeal against the Judge's decision to permit the Amendments to be made is allowed. The proposed Amendments are bad in law and in fact. They do not give rise to any arguable case. The Appeal is allowed, the Freezing Order must be set aside and, in accordance with the Judge's ruling in paragraph 2 of his Order, Immediate Judgment must be entered against the Claimant on the whole of her claim. The Claimant must pay the costs of the action both in this Court and below.

29. We should add that other aspects of the Judge's decision were also brought under review in this Appeal. They included his refusal to make any Order for the provision of Further Information (RDC Part 19) and his refusal to order the production of documents referred to in pleadings and witness statements (RDC Part 28). In light of our decision to allow the Appeal and, in effect, to dismiss the Claimant's case we need not deal with these other aspects of the Appeal.

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