After *Sandra*: Ancillary freezing orders and other interim measures in the DIFC Court

FEBRUARY 2024

In this article, **James Partridge** discusses the DIFC Court of Appeal decision in *Sandra Holding Ltd & Ors v Al Saleh & Ors* [2023] DIFC CA 003 and its potential effect on the availability of ancillary freezing orders and other interim relief in the DIFC Court.

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I. Introduction

1. The purpose of this article is to examine the impact of the DIFC Court of Appeal judgment in *Sandra Holding Ltd & Ors v Al Saleh & Ors*[1] on the DIFC Court's power and jurisdiction to make freezing orders in support of foreign proceedings ("**ancillary freezing orders**") as well as discuss the potential wider effect of this judgment on the issue of jurisdiction, particularly in relation to orders for interim relief.

II. Ancillary freezing orders: The position prior to *Sandra*

2. Prior to *Sandra*, while not without controversy,[2] the DIFC Court of First Instance ("**CFI**") appeared to have settled positively the question of whether it had an effectively free-standing jurisdiction to grant ancillary freezing orders even prior to judgment in the relevant foreign court (referred to in this article as "**anticipatory ancillary freezing orders**"). An anticipatory ancillary freezing order was granted by Shaman al Sawalehi J in *USEC v Wintercap SA & Ors*[3] (where the applicant sought a freezing order in aid of a worldwide freezing order made by the US District Court, District of Massachusetts), a judgment which was later followed by Wayne Martin J in *Lateef & Anor v Liela & Ors*.[4] After *Lateef*, three other first instance decisions proceeded on the basis that a free-standing jurisdiction to grant anticipatory ancillary freezing orders existed, namely: *Jones & Ors v Jones*;[5] *Globe Investments Holdings Limited v Commercial Bank of Dubai & Ors*;[6] and *Carmon Reestrutura v Cuenda*.[7]

3. As set out in these first instance decisions, it was considered that jurisdiction to grant freezing injunctions in support of foreign proceedings (both subsequent to *and* in advance of judgment in the foreign court) was founded under Article 5(A)(1)(e) of Law No. 12 of 2004 (the Judicial Authority Law (the "**JAL**")) which confers exclusive jurisdiction to the CFI for any claim or action over which such jurisdiction is *"in accordance with DIFC Laws and DIFC Regulations."* The DIFC Laws and Regulations generally relied upon in these decisions were as follows:

3.1. Article 7 of the JAL, which provides for, amongst other things, the execution within the DIFC of judgments, decisions, orders and ratified arbitral awards rendered outside the DIFC (Articles 7(5) – (6)).

3.2. The Rules of the DIFC Court (the "**RDC**"), primarily the following:

3.2.1. RDC 25.1,which provides that the CFI may grant certain interim remedies including freezing orders (both domestic and worldwide) and information orders in support of freezing orders (RDC 25.1(6) and 25.1(7) respectively); and

3.2.2. RDC 25.24 which expressly envisages an interim remedy being sought in support of foreign proceedings in the following terms:

> *"25.24 Where a party wishes to apply for an interim remedy but:*
>
> *(1) the remedy is sought in relation to proceedings which are taking place, or will take place, outside the DIFC; or*
>
> *(2) the application is made for an order for production of documents or inspection of property before a claim is made;*
>
> *any application must be made in accordance with Part 8."*

1 [2023] DIFC CA 003 (6 September 2023).

2 See for example the Judgment of Deputy Chief Justice Omar Al Muhairi in *Childescu v Gheorghiu & Ors* [2019] CFI 074 (4 February 2020) where the Judge noted a "*divergence of positions*" taken on the issue (at [8]) and considered (obiter) that the provisions of DIFC law which give the power to grant freezing injunctions "*do not themselves give rise to jurisdiction for the purposes of Article 5(A)(1)(e)*" (at [9]). This position, as described in this article, was effectively in the minority prior to *Sandra*.

3 [2019] DIFC CFI 003 (4 March 2019). While a written judgment was not handed down, the bases of the Court's conclusions were summarily recorded within the order itself.

4 [2020] ARB 017 (13 December 2021), in which Justice Wayne Martin continued a worldwide freezing order sought in support of proceedings brought in the US District Court, Southern District of New York.

5 [2022] CFI 043 (14 September 2022), in which Justice Sir Jeremy Cooke ordered the continuation of a freezing order sought in support of proceedings being brought in the Dubai Courts.

6 [2023] CFI 028 (4 July 2023), in which Justice Michael Black ordered the continuation of a freezing order sought in support of both a judgment of the Sharjah Court and enforcement proceedings in the BVI Court.

7 [2023] CFI 051 (7 September 2023), in which Justice Wayne Martin continued a freezing injunction in support of a worldwide freezing order granted by the Hong Kong Court. This decision was in fact handed down the day after the Court of Appeal's decision in *Sandra*. Unsurprisingly, the freezing injunction was then discharged (by the Order of Justice Wayne Martin, dated 27 December 2023) upon a further application by the defendant.

3.3. Certain provisions of Law No. 10 of 2004 (the "**DIFC Court Law**"), namely:

3.3.1. Those which describe the Court's power to make orders, including injunctions as it *"considers appropriate"* (principally, Articles 22 and 32); and

3.3.2. Article 24, which confirms the Court's jurisdiction to ratify any judgment, order or award of any recognised foreign court (amongst other things), pursuant to Article 7 of the JAL.

4. The above approach (it had been considered) found support in two sources:

4.1. *Nest Investments v Deloitte & Touche*,[8] by which the Court of Appeal (in the context of establishing the existence of a "*necessary or proper party*" gateway in DIFC Law) explained that the question of whether a DIFC Law or Regulation confers jurisdiction for the purposes of Article 5(A)(1)(e) of the JAL was a question of construction to be determined with reference to the context and purpose of the particular provision.[9] In this decision, RDC 20.7 (which permitted a party to be added to proceedings) was considered to confer jurisdiction.[10]

4.2. *Broad Idea International Ltd v Convoy Collateral Ltd*,[11] by which the Privy Council explained that the underlying purpose of a freezing order is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing the dissipation of assets against which such a judgment could potentially be enforced (the "**Enforcement Principle**").[12] It followed (the Privy Council found) that it was not necessary for the substantive claim to be brought in the Court granting the freezing order. Rather, what mattered was whether the applicant had a good arguable case for obtaining substantive relief in the form of a judgment enforceable by that Court.[13]

III. The Court of Appeal decision in *Sandra*

5. In *Sandra*, the Court of Appeal was asked, for the first time, to consider head-on the question of jurisdiction with respect to ancillary freezing orders (and, specifically, anticipatory ancillary freezing orders). What follows is a brief summary of the material facts of the case before the decision and its ramifications are addressed in a little more detail.

A. The facts

6. The claimants (the "**Respondents**" in the appeal) were a Cayman Island company ("**Sandra Holdings**") and its sole director and shareholder, Mr Nuri. Sandra Holdings owned shares, on Mr Nuri's behalf, in another Cayman Island company ("**UEL**") in which Mr Nuri's brother, Mr Fawzi, also held shares. Mr Nuri, Mr Fawzi and UEL were parties to a shareholder's agreement (the "**SHA**"), governed by the laws of the Cayman Islands and subject to the exclusive jurisdictions of the Cayman Islands and the Commonwealth of Massachusetts.[14]

7. The dispute arose out of the share sale of two wholly owned subsidiaries of UEL to a third party. The Respondents alleged that Mr Fawzi committed various breaches of the SHA and UEL's Articles of Association in connection with this sale. Mr Fawzi denied any wrongdoing.[15] Following the sale, the Respondents brought various proceedings against Mr Fawzi and other members of his family (collectively referred to as the "**Appellants**") in Kuwait and France and sought a worldwide freezing order in the DIFC Court (the "**WFO**") in support of the first set of Kuwaiti proceedings which was granted by Justice Sir Jeremy Cooke and subsequently continued at the return date. After the DIFC Court granted the Respondents' subsequent application for a contempt Order, the Appellants belatedly applied to discharge the WFO on the ground of lack of jurisdiction.[16] This application was dismissed at first instance and the contempt of court Order was upheld.

8. The Appellants filed a second appeal notice in respect of the WFO on 16 December 2022, again contesting jurisdiction. Chief Justice Zaki Azmi subsequently gave permission to appeal. By the time permission had been granted, the Respondents' French proceedings had been dismissed and shortly after the grant of permission, the set of proceedings remaining in the Kuwaiti Court had also been dismissed.[17]

B. The decision

9. The Court of Appeal set aside the WFO (and contempt of court Order) due to lack of jurisdiction. In so doing, the Court of Appeal clarified that the approach taken by the line of first instance decisions (referred to above) was incorrect and that Article 5(A)(1)(e) of the JAL did not provide jurisdiction to the CFI to make ancillary freezing orders prior to judgment in the relevant foreign Court. The Court of Appeal determined

8 [2018] DIFC CA 011 (13 March 2019)

9 As described by Justice Sir Jeremy Cooke at [39], it *"must always be a question of construction in light of the particular provision of the Law or Regulation in question, when seen in the context of the statute or regulation as a whole and the purpose which lies behind the provision and the statute."*

10 A decision made primarily on the basis that to construe RDC 20.7 otherwise would: (i) severely limit its utility (at [48]); and (ii) leave the DIFC Court unable to try a claim with multiple defendants from different jurisdictions, thereby giving rise to the prospect of unnecessary duplication of litigation in different jurisdictions and the risk of inconsistent decisions by different courts (at [53 – 54). With this in mind (as discussed further below), it can be seen why RDC 25.24 (in particular) could be considered to have a similar effect for ancillary freezing orders (where, if it were otherwise, the provision is arguably of limited utility (see the observation of Justice Sir Jeremy Cooke in *Jones*, at [9]) and the ability of the DIFC Court (and potentially the relevant foreign court) effectively to enforce a future judgment could be undermined(see the discussion of Justice Wayne Martin, in *Lateef*, at [122])).

11 [2022] 2 WLR 703.

12 Per Lord Leggatt, at [85].

13 Per Lord Leggatt, at [92] and [99]. The significance of *Broad Idea* (and the approach taken in the previous decisions of *Lateef* and *Jones*) was discussed by Justice Michael Black in *Globe Investments Holdings Limited* (at [55] – [72]). In so doing, Justice Michael Black rowed back from a suggestion that the Enforcement Principle gave rise to a freestanding power to make a freezing order (irrespective of any of the jurisdiction gateways in the JAL being satisfied) but rather approved the approach of Justice Sir Jeremy Cooke in *Jones*, namely that the Enforcement Principle supported their construction of the relevant DIFC Laws and Regulations as conferring jurisdiction pursuant to Article 5(A)(1)(e) JAL (see *Globe Investments Holdings Limited*, at [72] and *Jones* at [18]).

14 *Sandra*, at [5 – 6].

15 *Sandra*, at [7 – 8].

16 *Sandra*, at [22].

17 *Sandra*, at [26].

that anticipatory ancillary freezing orders could only be made where one (or more) of the other jurisdictional gateways under the JAL (namely, Articles 5(A)(1)(a) – (d) or Article 5(A)(2)) were satisfied.

10. As for the reasons, Chief Justice Zaki Azmi, citing *Nest Investment* with approval, confirmed that whether a DIFC Law or Regulation conferred jurisdiction was a matter of construction[18] but emphasised that *"clear expressive words"* were required for this to occur.[19] With this in mind, the Court of Appeal determined that none of the DIFC Laws and Regulations relied on by the Respondents conferred jurisdiction as contended:

    10.1. As for the material provisions of the RDC, the Chief Justice held that the words used in RDC 25.24 were not *"forceful enough"* to confer jurisdiction and that they described only a general power of the Court. He also held that RDC 25.24 was only intended to be procedural, merely indicating the manner of application required where a party *"wishes to apply"* for certain interim remedies.[20] RDC 25.24 was contrasted with RDC 20.7 (the RDC provision found in *Nest Investments* to confer jurisdiction), the latter expressly providing that the Court *"may order"* a joinder.[21] As for RDC 25.1(6) – (7), the Chief Justice similarly considered that these provisions merely described general powers.[22]

    10.2. It was also considered that the provisions of the DIFC Court Law relied upon by the Respondents (Articles 22, 24 and 32) conferred general powers only. In this respect, it was noted that the DIFC Court Law, generally, was worded in a way *"merely"* to *"express why the DIFC Courts are created"* and provide generally for the set-up of the Courts and its general jurisdictions and powers.[23] As for Article 24 specifically, while the Chief Justice noted that it likely provided jurisdiction to ratify a foreign judgment, order or award, he held that it was *"not a source of jurisdiction where there is no judgment or award to ratify."*[24]

    10.3. As for Article 7 of the JAL, Chief Justice Zaki Azmi considered the position to be the same as with Article 24 of the DIFC Court Law. While he accepted that Article 7 could provide a source of jurisdiction (in combination with Article 5(A)(1)(e), JAL) for the enforcement of foreign judgments, he held that *"this does not provide jurisdiction for an interim relief order in respect of a future or prospective judgement of a foreign court"*[25] (emphasis added).

11. As for the Enforcement Principle, while the Chief Justice observed that it was important to recognise the underlying purpose of a freezing order, he emphasised that the necessary question is always whether the Court has jurisdiction under its statute to grant the relief sought, not whether the Court should have jurisdiction *"merely in order to avoid a less corrupt and "perverse" outcome."*[26] He also noted that in *Broad Idea*, it was not disputed that the BVI Court had personal jurisdiction in respect of the relevant defendant[27] and that in the BVI Court (as with many common law courts) such jurisdiction arose from service of proceedings. As such, it was considered that the decision in *Broad Idea* was of limited relevance (at least to the question of threshold jurisdiction under the JAL) in the DIFC Court where personal jurisdiction is not established by way of service.[28] Similarly, the Chief Justice observed that while the English Court may be more ready to intervene where fraud was involved, the mere fact that a claimant had alleged fraud would not trigger the DIFC Court's jurisdiction, being of a *"qualified statutory nature."*[29]

12. The Court of Appeal also dismissed the Respondents' argument that the Appellants had submitted to the jurisdiction pursuant to RDC 12.5[30] by failing to challenge jurisdiction in time.[31] In so doing, the Court of Appeal drew a distinction between the threshold jurisdiction question of whether a particular matter falls within one of the jurisdictional gateways of the JAL (which the Chief Justice described as *"prima facie jurisdiction"*) and what he described as the question of *"ordinary jurisdiction"*,[32] with Part 12 of the RDC only relating to the latter.[33]

13. On the basis of the above, it was found that the Court had no jurisdiction to make the WFO and accordingly it was bound to be set aside. However, the judgment also addressed (obiter) a number of further arguments made in respect of issues which would have fallen to be determined had jurisdiction been established. Of these, potentially the most significant was on the issue of the Court's discretion (after *prima facie* jurisdiction had been established). In this regard, two main observations were made:

18 *Sandra*, at [57].
19 *Sandra*, at [58] (in respect of the RDC). See also at [64] where Chief Justice Zaki Azmi considered that no individual provision of the DIFC Court Law was intended to confer any special power or jurisdiction *"unless clearly worded"*.
20 *Sandra*, at [59].
21 *Sandra*, at [56].
22 *Sandra*, at [61].
23 *Sandra*, at [64].
24 *Sandra*, at [65].
25 *Sandra*, at [67].
26 *Sandra*, at [70].
27 Indeed, it should be noted that the entire discussion of the Enforcement Principle in *Broad Idea* expressly took place in the context of *"undoubted personal jurisdiction over the defendant"* (per Lord Leggatt, at [71]) such that it was never suggested that this principle acted so as to confer personal jurisdiction (effected, in any event, in the BVI Court, by service).
28 *Sandra*, at [73 – 74], citing with approval the DIFC Court of Appeal decision in *Akhmedova v Akhmedova* [2018] CA 003.
29 *Sandra*, at [80]. As to the statutory nature of the DIFC Court's powers, see the discussion in *The Industrial Group v El Fadil Hamid* [2022] CA 005/006 (20 September 2022).
30 RDC 12.5 provides that where a defendant files an acknowledgement of service and does not make an application disputing the Court's jurisdiction within 14 days, *"he is to be treated as having accepted that the Court has jurisdiction to try the claim."*
31 *Sandra*, at [76].
32 The example given of such a question was whether the parties had opted out of the Court's jurisdiction. Presumably a challenge on the basis of *forum non conveniens* also falls within this category.
33 As noted in the judgment (at [76]), this position is consistent with the previous first instance decision of *Hardt & Anor v DAMAC (DIFC) Company Ltd & Ors* [2009] CFI 036 and indeed not dissimilar to the position in English Law where *"submission cannot give the court jurisdiction to entertain proceedings which in themselves lie beyond the competence or authority of the court."* (*Dicey, Morris & Collins on the Conflicts of Laws*, 16th Ed., at [11-071]).

13.1. First, the Court of Appeal endorsed the five factors to consider, first set out by Potter LJ in *Motorola Credit Corp v Uzan*,[34] when determining whether to exercise the Court's discretion to grant an ancillary worldwide freezing order.[35]

13.2. Second, at paragraph 99 of the desicion, it was noted (in a passage considered further below), that where the defendant is neither a resident within the jurisdiction nor someone over whom there is personal jurisdiction, the Court should only grant an injunction extending to foreign assets in *"exceptional circumstances"* such as where there is a real connecting link between the subject matter of the order and the territorial jurisdiction of the Court and only where enforcement would be practical.

IV. The effect of *Sandra*

14. Discussion in this article is addressed at two issues: first, the effect of *Sandra* on the availability of ancillary freezing orders; and second, other potential consequences of the decision.

A. Ancillary freezing orders post *Sandra*

15. Following *Sandra*, it appears relatively clear that unless new legislation is passed, the Court does not have jurisdiction to grant an anticipatory ancillary freezing order where the only jurisdictional gateway potentially available is Article 5(A)(1)(e) of the JAL.

16. Novel arguments may be put forward to test *Sandra's* scope, but the issue of whether there is jurisdiction to grant ancillary freezing orders prior to judgment in the relevant foreign Court under Article 5(A)(e) should realistically be considered as all but settled. By way of example:

16.1. It could conceivably be argued that where the foreign court has made a worldwide freezing order (at least subsequent to a contested hearing), that this order itself may be enforced in the DIFC Court.[36] However, this would be a difficult argument to make where the DIFC Court has seemingly adopted the common law principles of enforceability, which require the foreign judgment to be final and conclusive on the merits.[37]

16.2. Justice Wayne Martin notably gave permission to appeal his decision to discharge the ancillary freezing order in *Carmon Reestrutura*.[38] The first permitted ground of appeal concerns the meaning and effect of paragraph 99 of *Sandra*. The arguments made in support of this ground are not publicly available, but it is difficult to see how paragraph 99 of *Sandra* could be said to give rise to an alternative means to jurisdiction for anticipatory ancillary freezing orders. As explained in *Sandra* itself, the DIFC Court, being a creation of statute, can only have jurisdiction in accordance with the gateways under the JAL. There therefore cannot be scope for an *"exceptional circumstances"* basis of jurisdiction outside those gateways and without statutory grounding.[39]

16.3. Justice Wayne Martin also gave permission to appeal on the issue of whether the Court of Appeal's rulings in *Sandra* with respect to jurisdiction were *"obiter dicta and therefore not binding on judges at first instance"*.[40] It is likewise very difficult to see how this ground could succeed. While it is correct that the Court of Appeal considered that the merits threshold of a *"good arguable case"* was not met in any event[41] and that, had it been called upon to do so, it would not have exercised its discretion in favour of the Respondents,[42] this most likely should not render the decision on jurisdiction *obiter*.[43]

17. That said, it should be emphasised that this does not mean that there will be no more ancillary freezing orders granted in the DIFC Court. First, the Court of Appeal in *Sandra* appeared to recognise that where judgment has been granted in the relevant foreign Court, there is jurisdiction in the DIFC Court to grant an ancillary freezing order in support of the enforcement of that judgment pursuant to Article 5(A)(1)(e), combined with Article 7 of the JAL. In other words, the judgment in *Sandra* implicitly recognised that Article 7 of the JAL was a DIFC Law which conferred jurisdiction for ancillary freezing orders after the relevant judgment has been made.

18. Further, *Sandra* does not even mean the end of anticipatory ancillary freezing orders in the DIFC Court. While the circumstances in which they may be granted have been restricted, there will no doubt be foreign proceedings concerning claims (such as against a DIFC Establishment, or where the claim concerns a contract made in the DIFC) for which a jurisdictional gateway under the JAL other than Article 5(A)(1)(e) is satisfied. Indeed, this was the case in *Childescu* where Deputy Chief Justice Omar Al Muhairi registered

34 [2004] 1 WLR 113 (while the case of *Arcelormittal USA LLC v Essar Steel Limited & Ors* [2019] EWCH 724 is cited in *Sandra*, the passage relied upon in *Arcelormittal USA LLC* cites *Motorola Credit*). The discretionary factors (per Potter LJ, at [115]) are as follows: *"First, whether the making of the order will interfere with the management of the case in the primary court e.g. where the order is inconsistent with an order in the primary court or overlaps with it… Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located… Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce."*

35 *Sandra*, at [98].

36 Which was in fact the position in England, prior to its withdrawal from the EU, in respect of judgments made in the court of another Member State, under the "2001 Brussels Regulation" (Council Regulation (EC) No 44/2001) later supplanted by the "Recast Brussels Regulation" (Regulation (EU) 1215/2012)) where the definition of *"judgment"* within that regulation was considered wide enough to encompass a worldwide freezing order made at an *inter partes* hearing and registration of a foreign judgment under the regulation rendered it of the same *"force and effect"* as if it had originally been made by the enforcing court (see *Cyprus Popular Bank Public Co Ltd v Vgenopoulos* [2018] QB 886, per Flaux LJ, at [7] and [50]).

37 Which are duplicated in part within Article 7 of the JAL itself. See also *Barclays Bank Plc & Ors v Essar Global Fund Ltd* [2016] CFI 036 (cited with approval by the Court of Appeal in *Akhmedova* (at [21])) where Justice Sir Richard Field applied the "*common law requirements for the enforcement of a foreign judgment*" (at [45]).

38 By an Order, dated 27 December 2023.

39 The reference to *"personal jurisdiction"* likely refers to jurisdiction based on physical/legal presence within the jurisdiction. In any event, the Court of Appeal's consideration of discretionary principles must be considered obiter given that the Appellants succeeded on the threshold jurisdiction question (at [97]).

40 At [7(b)] of the Order.

41 *Sandra*, at [86].

42 *Sandra*, at [106].

43 The Court of Appeal appeared to consider the jurisdiction issue first on the basis that if the Appellants were correct, the other grounds would fall away (at [2 – 3]) and in any event, a reason given for a decision is not rendered *obiter dicta* by virtue of a further reason being given (*Unger & Anor v Ul-Hasan & Anor* [2023] UKSC 22, per Lord Stephens, at [50 – 52], citing the speech of Lord Simonds in *Jacobs v London County Council* [1950] AC 361, with approval).

scepticism as to the availability of Article 5(A)(1)(e) to found jurisdiction but granted an anticipatory ancillary freezing order on the basis that Articles 5(A)(1)(a) and (b) of the JAL were satisfied.[44] On this point, the Court of Appeal in *Sandra* was clear. Where one of these other gateways is satisfied, the DIFC Court will have power to grant anticipatory ancillary freezing orders.

B. Other consequences

19. In some respects, the decision in *Sandra* could be considered relatively confined in scope. By the decision, the Court of Appeal applied the process of construction previously set out in *Nest Investments* to the DIFC Laws and Regulations relied on by the Respondents and determined that those specific Laws and Regulations, properly construed, did not confer jurisdiction. Further, while *Sandra* provides an important reminder that the DIFC Court's statutory nature means that jurisdiction principles applied in other common law courts should be regarded with caution, there is arguably no real inconsistency between *Sandra* and *Broad Idea*. As noted above (and in the judgment of *Sandra* itself), the Privy Council's decision in *Broad Idea* was expressly predicated on there being personal jurisdiction over the respondent such that threshold jurisdiction was not in issue.[45] In *Sandra* the primary point in issue *was* threshold jurisdiction.

20. That said, where *Sandra* is now the most recent Court of Appeal authority considering the vital issue (given the statutory nature of the DIFC Court) of jurisdiction under the Article 5(A)(1)(e) gateway, it is important to reflect on the extent to which it may influence future arguments concerning threshold jurisdiction, particularly in the context of interim relief absent underlying causes of action. The sub-sections below therefore first consider the general effect of *Sandra* on Article 5(A)(1)(e) issues before specifically discussing potential jurisdiction issues relating to interim relief.

(i) Article 5(A)(1)(e) post *Sandra*

21. While *Sandra* endorsed the decision in *Nest Investments*, given comments in the former, the latter may come to be seen as a "high-water mark" insofar as jurisdiction under Article 5(A)(1)(e) of the JAL is concerned.

22. First, it is notable that in *Sandra*, the Chief Justice added his own emphasis to the process of construction envisaged in *Nest Investments*, holding that *"clear expressive words"* were required for a provision to be considered to confer jurisdiction.[46] Precisely what this phrase means may well be the subject of argument in the future. Where RDC 20.7, considered in *Nest Investments*, does not expressly confer jurisdiction[47] it cannot mean that express words are required but it seems clear that it does set a relatively high threshold and likely one where ambiguity would be construed against a finding of jurisdiction being conferred. Moreoever, with the Articles of the DIFC Court Law (setting out various powers of the Court, including the power to grant interim relief) and the provisions of RDC 25.1 (setting out the Court's power to make freezing orders) relied upon by the Respondents both being described by the Court of Appeal as merely *"general powers"* not capable of conferring jurisdiction,[48] it appears that the degree of specificity in the relevant provision is an important consideration.

23. Indeed, the outcome of *Sandra* itself arguably indicates a more restrictive approach to the question of jurisdiction under Article 5(A)(1)(e) than that taken in *Nest Investments*. It is correct that there is a significant material difference between RDC 20.7 and 25.24, in that the former commences with the phrase *"The Court may order…"*, indicating a description of a discretionary power of the Court, while the latter mandates that the Part 8 procedure is to be used *"Where the party wishes to apply…"* for the relevant relief, indicating a provision merely dealing with how applications are made.[49] However, particularly given that there was at least some ambiguity (evidenced, not least, by the line of prior first instance decisions construing RDC 25.1 or in any event Article 7 of the JAL so as to confer jurisdiction) it is notable that the Court of Appeal in *Sandra* gave the policy arguments[50] in favour of jurisdiction such short shrift.[51] Further, in potential contrast to *Nest Investments*, the reduced utility of RDC 25.24 in the absence of a finding that Article 5(A)(1)(e) was engaged was not considered persuasive[52] and its procedural nature, as an indication that it did not confer jurisdiction, emphasised.[53]

24. In these circumstances, *Sandra* is likely to be considered of continuing significance and impact wherever the issue of whether the Article 5(A)(1)(e) gateway is engaged. The approach taken in this decision may well embolden defendants or respondents seeking to contest the threshold jurisdiction of the DIFC Court. As discussed below, this may particularly be the case for certain interim relief applications.

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44 At [9].

45 See for example at [71], per Lord Leggatt.

46 *Sandra*, at [58].

47 In *Nest Investments*, Justice Sir Jeremy Cooke noted that RDC 20.7 *"provides that the "court may order a person to be added as a party" in the circumstances there set out… The Rule does not expressly confer jurisdiction, by using that term, but it clearly sets out a criterion for the joinder of a party…"* (emphasis added) (at [47]).

48 *Sandra*, at [64] and [61] respectively.

49 See the discussion of Chief Justice Zaki Azmi in *Sandra*, at [56 – 59].

50 In *Lateef*, Justice Wayne Martin observed that a finding against jurisdiction would *"undermine the efficacy and integrity of the Court process…* [and] *undermine the arrangements between courts in different jurisdictions for the reciprocal enforcement of judgments"* (at [122]) and considered that such a *"perverse outcome could only follow from clear and unequivocal requirements or constraints in the statutory provisions"* (at [123]). See also *DIFC Courts Practice*, Rupert Reed KC and Tom Montagu-Smith KC, where the authors note that *"the policy case in favour of such a jurisdiction is overwhelming and in line with the approach of other major international dispute resolution centres"* (Chapter 1, page 66).

51 In contrast to *Nest Investments*, where policy considerations appeared highly material to the decision (see in particular at [54] where Justice Sir Jeremy Cooke observed that *"Public policy weighs heavily in favour of the Court having such a power because it aids in the administration of justice."*).

52 It should be noted that RDC 20.7 (as with RDC 25.24) would not be rendered of no utility if it did not confer jurisdiction, it would simply mean that the Court's jurisdiction over the party being joined to proceedings would have to be established by other means. In this respect, the "utility arguments" in relation to RDC 20.7 and RDC 25.24 could be said to hold roughly equivalent weight.

53 See *Sandra*, at [59], where Chief Justice Zaki Azmi emphasises that RDC 25.24 was *"merely intended to be procedural"*. This could be contrasted with the observations of Justice Sir Jeremy Cooke in *Nest Investments* that while the RDC is *"procedural in nature"* it *"sets out the boundaries of jurisdiction and is effective by reason of enabling statutory instruments"* (at [49]).

(ii) Interim relief post *Sandra*

25. A full analysis of how (if at all) *Sandra* may impact jurisdiction arguments in respect of each and every potential interim order with the DIFC Court's powers is beyond the scope of this article. Rather, the focus of the discussion below is the scenario where interim relief measures are sought, absent an underlying claim against the respondent(s) in the DIFC Court. The Court's jurisdiction to grant such measures, given their relatively exorbitant nature, will likely be the subject of much closer scrutiny following the decision in *Sandra*.

26. There are, generally speaking, two main categories (in addition to ancillary freezing orders) where interim relief is sought absent an underlying claim already having been commenced against the respondent(s) in the DIFC Court: (i) where relief is sought in advance of a claim being commenced against the respondent(s); and (ii) where relief is sought against a non-party to the claim.

27. As for the first category, given the variety of RDC provisions and other Laws[54] envisaging interim relief being granted prior to issue of a claim form, it appears beyond doubt that jurisdiction to grant such interim relief must exist. Having said that, where Articles 5(A)(1)(a) – (c) refer only to *"claims and actions"* (and Article 5(A)(1)(d) concerns appeals) and those RDC provisions and other Laws generally do not *expressly* confer jurisdiction, the author of this article considers that the jurisdiction to make pre-action interim relief applications will likely become an issue more closely scrutinised by respondents to such applications in light of *Sandra*.

28. As for interim relief of the second category, this is an area where, in the right case, the impact of *Sandra* may more likely be felt. While the DIFC Court plainly has jurisdiction to order disclosure against a non-party where the RDC expressly sets out this power,[55] *Sandra* serves as a reminder that applicants should not presume, without cross-referencing the relevant provisions, that the borders of this jurisdiction will directly match the common law jurisprudence developed in respect of *Norwich Pharmacal* or *Bankers Trust* orders. In this regard, it is notable that Justice Sir John Chadwick, in *Taleem PJSC v National Bonds Corporation PJSC & Anor*,[56] left open the question of whether an order for production of documents by a non-party can be made in circumstances where the non-party itself is not subject to the jurisdiction of the DIFC Court.[57] Post *Sandra*, this question may well be answered in the negative.

29. Finally, it is worth noting that the approach taken in *Sandra* may, at some future point, be tested in respect of novel interim relief developed in a foreign common law court. As Lord Leggatt observed in *Broad Idea*, courts with equitable powers have been able to *"modify existing practice where to do so accords with principle and is necessary to provide an effective remedy"*.[58] *Norwich Pharmacal* and *Bankers Trust* orders (as well as the freezing order itself) are products of this ability to modify existing practice but do not represent the end of the process. By way of example, website blocking orders represent a relatively recent extension of the equitable relief which the English Court has been prepared to grant.[59] In these circumstances and given the need for clear and (seemingly) specific wording for jurisdiction to be conferred on the DIFC Court, applicants may face difficulties applying for such novel relief if jurisdiction relies solely on Article 5(A)(1)(e) of the JAL. In this regard (and generally), it will be interesting to see whether the decision in *Sandra* precipitates any changes to the DIFC Laws and Regulations relevant to this jurisdictional gateway.

V. Conclusion

30. The decision in *Sandra* has clarified that there is no jurisdiction to grant anticipatory ancillary freezing orders where the only jurisdictional gateway relied upon is Article 5(A)(1)(e) of the JAL. In so doing, the Court of Appeal has provided an important reminder that the DIFC Court's jurisdiction cannot go beyond the confines of the relevant statutory provisions. Further, *Sandra* arguably applies a stricter approach to statutory interpretation than was applied in the previous Court of Appeal decision of *Nest Investments*. As such, practitioners should pay close attention to the potential for new jurisdiction challenges, particularly in the context of interim relief applications, where the only gateway relied upon is Article 5(A)(1)(e) of the JAL.

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54 See for example RDC 25.11, which provides that one of the categories of urgent applications is *"applications where a claim form has not yet been issued"*; RDC 25.14, which sets out certain requirements for applications and orders made before the issue of a claim form; RDC 28.47 and 28.48, which address the Court's power to order production of documents prior to commencement of proceedings; and Article 36 of DIFC Law No. 7 of 2005 (the Law of Damages and Remedies), which lists various remedies which the Court may make including an order for disclosure before a claim has been made (Article 36(h)).

55 See RDC 25.1(10), 25.71 and 28.51 – 28.52 (amongst other provisions).

56 [2010] CFI 014 (15 January 2013)

57 *Taleem*, at [5 – 6]. While *Norwich Pharmacal* orders and/or *Bankers Trust* orders were considered available in principle in *Emirates Reit (CEIC) Plc & Anor v Nasdaq Dubai Limited* [2020] CFI 054 (4 November 2020) and *Trustee in Bankruptcy and Liquidator of Cash Plus Limited and Receiver of Cash Plus' Subsidiaries and Affiliates v Carlos Hill & Ors* [2009] CFI 024 (11 November 2009) by Justice Roger Giles and Justice Sir Anthony Colman respectively, in both cases the relevant respondent was a DIFC Establishment.

58 At [59].

59 Discussed by Lord Leggatt in *Broad Idea*, at [58].

About the Author

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James is a commercial barrister with particular expertise in DIFC and cross-border disputes. Highlights of his DIFC work include being instructed as part of the counsel team (led by Timothy Killen and Patrick Dillon-Malone SC) in *Childescu v Gheorghiu & Ors* [2020] CFI 032, a US$40m fraud dispute involving (for the first time in the DIFC Court) the principle of reflective loss; acting (as sole counsel) for an energy commodities trading platform in its multi-million dollar financial mis-selling claim against a private Swiss bank; and advising on the first ever whistleblowing claim brought in the DIFC Court.

Other recent commercial cases of note include:

- *Amazon Europe Core SarL & Ors v Xia Qingquan* [2023] – acting as sole counsel for a multi-national company group in its claims for procurement of breach of contract and unlawful means conspiracy in relation to an alleged Chinese based scheme for the provision of fake product reviews.
- *HDI Global Specialty SE v Legal Protection Group & Ors* [2023] – acting (led by Rebecca Sabben-Clare KC (of 7KBW) and Timothy Killen) for a German insurance company in its claims for breach of an agency agreement against its UK based underwriting agents (and affiliated companies).
- *Rowe & Ors v Angermann Goddard & Lloyd* [2023] – acted (led by Timothy Killen) for a defendant surveying company in a multi-million-pound professional negligence and breach of trust claim concerning the valuation and sale of land held by a family trust.
- *Davies v Caddick & Anor* [2022] – acted for both Directors of a Gibraltar based hedge fund in defending claims of fraud and unlawful means conspiracy in relation to a £1m loan.

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