

4 STONE BUILDINGS



Alastair Tomson successful in the DIFC Court of Appeal

[Massun v Mousi & Others](#) [2022] DIFC CA 003

4 Stone Buildings' [Alastair Tomson](#) has been successful in the DIFC Court of Appeal, with the dismissal of a long-running action against his client in [Massun v Mousi & Others](#) [2022] DIFC CA 003.

The claim in the DIFC originally took the form of a freezing order ancillary upon substantive proceedings brought in Cyprus in relation to an alleged fraudulent conspiracy by the respondents concerning substantial assets – property in Spain, and a yacht – respectively held through two complex offshore holding structures. The Cyprus court ultimately dismissed the underlying proceedings on the basis it had no jurisdiction, and the Claimant then brought substantive proceedings in the DIFC against defendants including a DIFC company which was alleged to be a party to the alleged fraudulent conspiracy (hence giving the DIFC jurisdiction), in relation to which she obtained a further *ex parte* freezing order from the DIFC court.

The Defendants denied all the claims made by the Claimant. Further, the Claimant's pleaded case was challenged by the Defendants as being unsustainable on the basis that the alleged loss upon which the Claimant's case was based was not her loss, but was in fact loss suffered by companies in the holding structure. Hence her claim as formulated fell foul of the principle of reflective loss.

In a judgment handed down in December 2021 ([Kaamil v Kaawa & Others](#) [2020] CFI 032, in which Alastair also appeared for the Second Defendant) the DIFC Court of First Instance applied the reasoning of the UK Supreme Court in [Marex Financial Limited v Sevilleja](#) [2020] UKSC 31 and found that the case as originally pleaded had no realistic prospect of success. This was significant, as the DIFC courts had not previously applied the approach taken in [Marex](#).

However, rather than striking out the claim and giving immediate judgment, the court permitted an amendment to the Claimant's particulars of claim, which the judge found was reasonably arguable, to the effect that the Claimant had obtained a direct beneficial interest in the assets at the bottom of the holding structure as a result of the asset swap by which they had been acquired. She therefore claimed *ex hypothesi* to have suffered a direct loss which could be claimed in the proceedings.

The Second to Fifth Defendants appealed on the basis that the Claimant's case as to how she had obtained the alleged beneficial interests in the assets was flawed on the facts as pleaded and legally, and that the judge had accordingly been wrong to find it was reasonably arguable.

The DIFC Court of Appeal allowed the appeals, agreeing with the Appellants that neither express nor resulting trusts could have arisen based on the facts relied on by the Claimant.

Accordingly, the DIFC Court of Appeal set aside the freezing orders and gave judgment (with costs) against the Claimant on the claims.

Representation:

[Alastair Tomson](#) of 4 Stone Buildings, led by David Russell QC, appeared for the Second Defendant instructed by Tyne Hugo of BSA Ahmad Bin Hezeem & Associates LLP.

Tom Montagu-Smith QC and Stephen Doherty appeared for the Third Defendant instructed by Abdulla Al Awadi, Advocates.

Stavros Pavlou of Patrikios Pavlou & Associates appeared for the Fourth and Fifth Defendants.

