

DIFC Court of Appeal clarifies the sources of DIFC law

In [The Industrial Group v El Fadil Hamid \[2022\] CA 005/006 \(20 September 2022\)](#), the DIFC Court of Appeal has found that the English torts of malicious prosecution and abuse of process do not exist in DIFC law. In doing so, the Court has clarified the sources of DIFC law. Legal principles from other jurisdictions cannot be imported into DIFC law where there is no equivalent provision in statute. While decisions from other jurisdictions can be relied on to interpret the DIFC's laws, judges cannot make new law simply because the DIFC was established on common law lines. The judgment also gives important guidance on the effect of change to the penalty regime in the DIFC Employment Law.

The Defendant was employed by the Claimant in a senior position until 2018. The Claimant dismissed him summarily, accusing him of, amongst other breaches, misappropriating company money. The Claimant made a criminal complaint to the Dubai Public Prosecutor and commenced civil proceedings in the DIFC Courts to recover the sums said to have been taken. By the time of trial, the Claimant's claim had been withdrawn or dismissed and new solicitors and counsel were instructed. The Defendant brought a counterclaim for various employment entitlements, including a penalty for failure to pay sums due on termination. He also brought a claim for malicious prosecution and abuse of process, claiming AED 52m (US\$14m).

Following trial, HH Justice Sir Richard Field awarded a penalty of AED 7.5m. Under the DIFC Employment Law 2005, a daily penalty accrued at the employee's rate of pay until payment of all sums due to the employee. The law was changed in August 2019, after which a penalty does not accrue during the course of a relevant dispute. Proceedings had started before the new law was introduced but were completed afterwards. The Judge found that the right to a penalty had accrued and continued unchanged during the proceedings. The Judge dismissed the tort counterclaim, finding that the torts of malicious prosecution and abuse of process were not part of DIFC law. Both parties appealed.

The Court of Appeal reduced the penalty to AED 2.4m, finding that the penalty ceased accruing when the new law was introduced. The right to a penalty which had accrued up to that point was however preserved.

The Defendant raised three arguments in support of his case that the torts existed in DIFC law. Two are of significance.

First, he argued that the DIFC was a common law jurisdiction, such that it was open to the Courts to develop judge-made law in the same way as in England. Second, he relied on the "waterfall" provisions in the Law on the Application of Civil and Commercial Laws in the DIFC.

The Court of Appeal rejected these arguments.

Law in the DIFC is statutory. There is no room for purely judge made law and no coherent way to identify a gap which requires filling. DIFC law is not exclusively based on English law and so features of English law which are not present in DIFC statute cannot simply be imported.

The waterfall provisions are choice of law provisions. They do not inform the content of DIFC law. They cannot be used to fill "gaps" in DIFC law.

This conclusion is significant and, to some extent, runs contrary to received views. The last jurisdiction identified in the waterfall is England and Wales. On the basis of this, it is often said that DIFC law "defaults" to English law or relies on English law as a "backstop". The effect of the Court of

Appeal's decision is that this is wrong. DIFC law is its own code. Decisions from other jurisdictions, including England and Wales, can legitimately be used to interpret DIFC legislation, where appropriate. However, suggestions in cases such as *Dutch Equity Partners v Daman*, *Re Forsyth Partners* and, more recently, *Lural v Listral* that English law can supplement DIFC law are wrong.

This is an important decision which is likely to have a significant effect on the relationship between DIFC law and English law in a wide spectrum of cases.

[Tom Montagu-Smith KC](#) of 3 Verulam Buildings appeared for the Claimant, instructed by [Ben Brown](#) and [David True](#) of Addleshaw Goddard, Dubai.