December 2024

Commodities in Focus Weekly – issue 108

The correct test for freezing injunctions – Dos Santos v Unitel SA [2024] EWCA Civ 1109

Overview

In the case of Dos Santos v Unitel SA, the Court of Appeal confirmed that the appropriate test for establishing the "good arguable case" element of the threshold test for freezing injunctions remains that set out in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH* ("**The Niedersachsen**") *[1983] 2 Lloyd's Rep 600*. This case also touched on whether the threshold test of a "good arguable case" in the context of freezing injunctions should be aligned with "serious issue to be tried" as part of the American Cyanimid test in the context of interlocutory applications generally.

Factual background

Ms dos Santos, the daughter of the former President of Angola, founded Unitel in 1998 and was a director of, and beneficial owner in, Unitel until 2020. Ms dos Santos also owned and controlled Unitel International Holdings BV ("**UIH**"), a company incorporated in the Netherlands.

Between May 2012 and August 2013, Unitel made a series of loans to UIH amounting to €322,979,711 and US$43 million secured by promissory security. UIH defaulted on the loans, and in October 2020, Unitel issued proceedings against UIH.

In October 2022, Unitel applied to join Ms dos Santos to their claim against UIH and applied for a Worldwide Freezing Order ("**WFO**") to be made against her.

On 29 December 2023, the court granted the WFO and ordered the costs of the same to be paid by Ms dos Santos with a payment on account.

Permission to appeal was granted to Ms dos Santos on 12 March 2024 on the grounds that the appeal raised important issues of law on which there has been much divergence among High Court judges.

Freezing orders

For a freezing order application to be successful, the applicant must show:

(i) A good arguable case on the merits;

(ii) The existence of assets;

(iii) A real risk that a future judgment will go unsatisfied because of an unjustified dissipation of assets; and

(iv) That it would be just and convenient in all circumstances to grant the freezing order.

The key issue in this case focused on the interpretation of the "good arguable case" test for granting freezing injunctions, and in particular:

(1) Whether the test should follow the test in *The Niedersachsen* or whether the three-limb test applied to determine whether a claim falls within one or more of the jurisdictional gateways as established by the Supreme Court in *Brownlie v Four Seasons Holdings*;[1] and

(2) Whether there is a distinction between freezing orders and other interim injunctions.

[1] Brownlie v Four Seasons Holdings Inc [2017] UKSC 80

The Niedersachsen

The "good arguable case" test originated from *The Niedersachsen*[2] where the meaning of "good arguable case" was set out by Mustill J as:

"one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."

The three-limb test *(Brownlie v Four Seasons Holdings)*

The three-limb test as explained by Lord Sumption in *Brownlie* is as follows:

> *"… (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;*
>
> *(ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but*
>
> *(iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."*

The appeal

Ms dos Santos pursued two grounds for appeal:

1. That the judge was wrong to find that Unitel had a "good arguable case" as set out in *The Niedersachsen* and the judge should have considered the three-limb test as set out in *Brownlie* (and more recently in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV*[3]) as the appropriate "good arguable case" merits test; and
2. That the judge was wrong to award Unitel its costs of the WFO application. The ordinary costs order for an interim injunction is for costs reserved and there is no reason to adopt a different approach for a contested application for freezing relief, and to make a different order on the facts of this case.

The parties' positions

Ms dos Santos argued that the "good arguable case" test was intended to be the same test as in jurisdiction cases and nothing in *The Niedersachsen* changed that. Reliance was placed on two recent cases (*Harrington & Charles Trading Co. Ltd v Mehta*[4] *and Chowgule & Co Pte. Ltd v Shire*[5]) where the High Court found that in the context of freezing orders the test was now the same as in the context of determining whether a claim falls within one or more of the jurisdictional gateways.

Counsel for Ms dos Santos also drew on recent cases such as *Lakatamia Shipping Co. Ltd v Morimoto* which suggested that a higher threshold should be applied and aligned the "good arguable case" test with the "serious issue to be tried" standard that is applied in the context of other interlocutory injunctions.

At first instance, the Court acknowledged that although it wasn't necessarily intended, the effect of the Court of Appeal decision in *Morimoto* was to treat the "good arguable case" test in the freezing injunction context as the same as that applied in the context of jurisdictional gateways (*Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV*).

Unitel argued that the "good arguable case" test is that which is set out in *The Niedersachsen*, which in itself drew a distinction between freezing orders and orders made in the context of jurisdiction.

Decision

The Court held that the appeal should be dismissed on both grounds.

"Good arguable case" test and "serious issue to be tried"

The Court held that the correct test is that set out in *The Niedersachsen*. A "good arguable case" in the context of freezing injunctions is not to be assessed by reference to the three-limb test derived from *Brownlie* or from recent decisions in *Harrington and Chowgule.*

[2] Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH [1983] 2 Lloyd's Rep 600 at 605

[3] Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV [2019] EWCA Civ 2203

[4] *Harrington & Charles Trading Co. Ltd v Mehta [2022] EWHC 2960 (Ch)*

[5] Chowgule & Co Pte. Ltd v Shire [2023] EWHC 2815 (Comm)

There are obvious differences between whether the threshold of a jurisdictional gateway has been reached for the purposes of serving out of the jurisdiction (where the issue of whether the case falls within the gateway will not be revisited at trial), and whether the merits threshold for the granting of freezing relief has been reached (and where the Court will determine the merits of the case at trial).

The Court concluded that there is not, and should not, be any distinction between the "good arguable case" test in respect of freezing orders and the test of "serious issue to be tried" applied to other forms of interim injunctions. The latter is no different in substance from the "good arguable case" test in the sense defined in *The Niedersachsen*, and in the context of interlocutory applications, the two tests can be equated.

The Court held that Unitel satisfied *The Niedersachsen* test.

Costs

The Court of Appeal took a firm view that it should not interfere with the High Court judge's order that Ms dos Santos should pay the costs of the freezing injunction.

The decision was based on the general rule as set out in CPR 44.4(2), and the fact that a party who contests an application, thereby causing the successful party to incur costs which would not otherwise be incurred, should be ordered to pay the successful party's costs at the conclusion of the application.

Whilst the Court's discretion to make a different order as to costs on a contested interlocutory application remains, the Court stated that this would be appropriate in the case of an interim injunction as the Court is prepared to grant an interim injunction to a party relying on a right or obligation, the existence of which has yet to be established, effectively holding the ring pending the trial. If at trial the right or obligation is established, then the injunction can be made final and permanent or other relief granted.

It is therefore generally more appropriate for the costs of applications for interim injunctions to be reserved to the trial judge. The position is different in the case of freezing injunctions which will not be made final at a trial.

Commentary

This case contains important new guidance on the test to be applied when hearing applications for freezing injunctions.

The judgment clarifies an area of law where there has been a divergence of views. It ensures that freezing injunctions as a remedy remain accessible to claimants without imposing a disproportionately high merits threshold. By affirming the interpretation of a "good arguable case" in *The Niedersachsen*, the Court of Appeal has ensured that applicants can secure the necessary protections against asset dissipation without the requirement to prove the merits of their case to a higher standard prematurely.

Lastly, the ruling on costs acts as a reminder of the financial implications of contesting freezing orders and the significant costs that may be incurred in doing so.

The full judgment can be found here.

Authors

Kelly Hubble

Associate, London

T: +44 20 7809 2214
E: kelly.hubble@shlegal.com

Pammy Verde

Solicitor apprentice, London

T: +44 20 7809 2500
E: pammy.verde@shlegal.com

Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking here.