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Insights

COLD COMFORT: COURT OF APPEAL TAKES A CHILL APPROACH TO FREEZING INJUNCTIONS

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SUMMARY

The Court of Appeal has clarified the requirements to be satisfied before obtaining a freezing injunction, affirming an attainable merits threshold is to be preferred over a more stringent alternative. Any perceived tilt in favour of prospective applicants, however, is tempered by a heightened emphasis on the requirement for any potential order to be "*just and convenient*". In this insight, Rachel Ziegler and Sanjay Lohano examine the Court of Appeal decision in *Dos Santos v Unitel S.A.*, providing practical insights for prospective applicants looking to utilise one of the law's so-called "*nuclear weapons*".

WHAT IS A FREEZING INJUNCTION?

A freezing injunction is a court order which restrains the respondent from dealing with or disposing of their assets. The underlying purpose is to ensure that, if and when a judgment is obtained, the respondent still has assets to satisfy that judgment.

The Court will consider the following key issues:

1. Does the applicant have a "*good arguable case*" (the "**Merits Threshold**");
2. Is there a "*real risk of dissipation*" such that a judgment will go unsatisfied if the injunction is refused; and
3. Is it "*just and convenient*" in all the circumstances to grant the injunction.

WHAT DOES "*GOOD ARGUABLE CASE*" MEAN?

In recent years, there has been a degree of confusion regarding the standard set by the first limb - how good must an applicant's argument be before the Court even starts to think about granting the order.

The standard position for the last 35 years was that an applicant's case must be *"…one which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than a 50% chance of success*", namely the test from *The Niedersachsen*. More recent authority, however, contested this understanding.

One analysis of the Court of Appeal's decision in *Morimoto* [2019], at [38] per Haddon-Cave LJ, was that it may have aligned the Merits Threshold for freezing injunctions with the relative approach taken when the Court considers whether it should allow service out of the jurisdiction ("**Jurisdictional Gateway Applications**"). In that context, the Court must also assess whether there is a "*good arguable case"*. However, there the phrase is interpreted as asking the Court to decide which party has the *"better of the argument*". If the Court is unable to conclude this on the basis of the evidence before it, the Court should then consider whether there is "*a plausible (albeit contested) evidential basis*" for the applicant's case. Recent High Court judgments - *Mehta* [2022] and *Shirke* [2023] - also followed this new approach, further entrenching the confusion around the standard set by the Merits Threshold.

Dos Santos touched precisely on this debate.

DOS SANTOS

The underlying claim related to a series of loans and interest payments which the defendants in those proceedings had allegedly stopped repaying. Unitel S.A. sought a freezing injunction against Miss Dos Santos, but both sought to assert a different interpretation of the Merits Threshold.

The Court unanimously confirmed *The Niedersachsen* approach to interpreting the Merits Threshold for freezing injunctions on the following basis:

Good Arguable Case

- The meaning of "*good arguable case*" is inherently flexible. Although this phrase is used as a test in both freezing injunction and Jurisdictional Gateway Applications, there is no reason why it must retain the same meaning in both.
- Freezing injunctions are an interim order and the test is applied in circumstances where the substantive merits of a claim will be considered at trial. This is in contrast to Jurisdictional Gateway Applications, where the merits of each parties' arguments are only considered at the stage of the application for permission to serve out and where the Court will not revisit the merits at trial. The Court held that this justifies a lower bar for freezing injunctions.
- It would be invidious for the Court, at the nascent stage at which freezing injunctions tend to be sought - generally being pre-disclosure - to determine which party has "*the better of the argument"*. A comparative investigation at an early stage would also impose an extra burden on already stretched courts.

- Recent High Court judgments had not intended to change the law or assimilate the two tests. To the extent they did so, they were wrong.

Serious issue to be tried

- More fundamentally, the Merits Threshold for freezing injunctions should be recognised as being the same as that for interim injunctions generally. The Court concluded that the nature of freezing order relief did not justify any distinction. Other forms of injunctive relief can operate just as intrusively as a freezing injunction.
- The test for interim injunctions is whether there is a serious issue to be tried, meaning whether the claim has a "*real prospect of success*" (i.e. is not frivolous).
- As there was no distinction between the tests for freezing injunctions and other interim injunctions, the Court preferred to use the phrase "*serious issue to be tried*" in the context of freezing injunctions (as well as other interim injunctions) and to restrict the use of the expression "*good arguable case*" to the context of Jurisdictional Gateways Applications.
- The intrusive nature of freezing injunction relief and the fact that such relief should not be granted too readily should be addressed in the following ways:
  1. considering the other requirements to be fulfilled, specifically the just and convenient test;
  2. the exceptions in freezing injunction orders which act as safeguards; and
  3. in the application of the cross- undertaking in damages.

SIGNIFICANCE

Though the Court confirmed the lower threshold test to be the appropriate one, it is unlikely to be easier to obtain a freezing injunction. The Court's reasoning for assimilating the Merits Thresholds for interim injunctions was not to condone a more lenient approach to freezing injunctions but to confirm that the test is not an unduly heightened one.

Further, in clarifying one limb of the test, the Court has thrown the other requirements into sharp focus. In the Court's words, it is always necessary to give "*anxious scrutiny*", not only to the second limb of the test, real risk of dissipation, but also to the third, whether it is just and convenient to make the order. The latter lacks precision and confers a broad discretion on the particular judge sitting on the case. An increased focus on these limbs of the test inevitably risks increased unpredictability as to the likely outcome of any application for a freezing injunction.

The first instance judge rightly commented the law was "*in a confused state*" and "*crying out for a definitive answer from the Court of Appeal*". Clarification has been provided but it is questionable whether this is definitive. By inviting increased focus on the other limbs of the test and opening the door to a more subjective analysis, there is a risk that confusion has been created elsewhere.

Moving forward, applicants would be wise to give increased attention to the risk of dissipation of assets and the just and convenient test when seeking a worldwide freezing injunction.

This article was written with trainee solicitor Sanjay Lohano.

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