

# Reconsidering the Freezing Order after *Dos Santos v Unitel* [2024] EWCA Civ 1109

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serle court



# The 3 requirements for a freezing injunction

- (1) a good arguable case on the merits;
- (2) a real risk that a judgment will not be met because of an unjustified dissipation of assets; and
- (3) it is just and convenient in all the circumstances to make the order sought.

# A “good arguable case”?

“more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50% chance of success.”

□ **The Niedersachsen** [1983] 2 Lloyds Rep 600 at 605



# American Cyanamid guidelines for other interim injunctions

- (1) A serious issue to be tried on the merits
- (2) Would damages would be an adequate remedy?
- (3) Does the balance of convenience favour the grant or refusal of relief?

The merits test for imposing a *proprietary* injunction is the same: a serious issue to be tried: see **Madoff Securities Ltd v Raven** [2011] EWHC 3102 (Comm) at [127]



# **Dos Santos v Unitel [2024] EWCA Civ 1109**

What is the meaning of “good arguable case”?

Is the test to be equated with the “good arguable case” that a cause of action falls within a CPR Part 6B gateway permitting service out of the jurisdiction?



# The “gateway” test

To show a “good arguable case” that a claim falls within a service gateway:

- (i) the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;
- (ii) 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.

**Four Seasons Holdings Inc v Brownlie** [2017] UKSC 80, at [7]; **Goldman Sachs v Novo Banco** [2018] UKSC 34 [9]



# The conclusion in Dos Santos

“Good arguable case” in context of freezing injunctions is not to be equated with the gateway test: see [96]

The merits test for both freezing injunctions and **American Cyanamid injunctions** is the summary judgment test: ie whether there is a serious issue to be tried: see [106], [122]. This is now the correct terminology: see [131]

This means that the claim must be more than merely arguable, it must carry some degree of conviction: [125]



# The role of the third limb:

“It is always necessary to give anxious scrutiny not only to the second limb of the test but also to the third, whether it is just and convenient to make the order.”

Popplewell LJ at [130]



# Costs of the interim relief

**American Cyanamid** injunctions: often appropriate to reserve costs of the interim application till the substantive right is adjudicated upon at trial: see [117]

Freezing orders: court may make an immediate order for costs at the return date because the relief is not “interim” or dependent on the balance of convenience: see [118]



# Other recent decisions of interest

- ❑ **LAX SA v JBC SA** [2024] EWHC 2042 (Comm): court's power to order the *applicant* to give asset disclosure in relation to the cross-undertaking in damages.
- ❑ **Ucoinvest v Jysan Holding** [2024] EWHC 1532 (Ch): more limited order granted on return date following material non-disclosure by the applicant.
- ❑ **GFI Capital v Haigh** [2024] EWCA CIV 65: a freezing order expires in accordance with its terms upon the handing down of judgment



# In the Dubai International Financial Centre Court

Carmon v Cuenda [2024] DIFC CA 003 (26 November 2024)

The DIFC Court has jurisdiction to make a freezing order in support of pending foreign proceedings-but is only likely to do so where there are assets in Dubai