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IN *Dos Santos v Unitel S.A.* [2024] EWCA Civ 1109, the Court of Appeal analysed the content of the "merits threshold" for a freezing (*Mareva*) injunction. The "merits threshold" is what an applicant must show as regards the strength of his case to justify injunctive relief, the standard for freezing injunctions being that of a "good arguable case".

The appellant was a beneficial owner and director of the respondent, Angola's largest mobile telecoms company, until the Angolan state took control of the respondent in 2020. In 2012 and 2013, the respondent made various loans to a wholly-owned company of the appellant. The respondent alleged that the loans were uncommercial and procured by the appellant in breach of her fiduciary duties. The respondent thereafter applied for an ancillary worldwide freezing injunction against the appellant in England. The central issue was whether the respondent possessed a "good arguable case" as to its capacity to bring a claim under Angolan law.

The meaning of a "good arguable case" was hotly contested. The respondent argued that the standard has always been whether the case "is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50% chance of success" (*Ninemia Maritime Corp. v Trave Schiahrtsgesellschaft mbH und Co. KG ("The Niedersachsen")* [1983] 2 Lloyd's Rep 600, 605 (Mustill J.)). In contrast, the appellant contended that "good arguable case" is associated with the threefold test applicable in the jurisdictional gateway context (*Brownlie v Four Seasons Holdings* [2017] UKSC 80, [2018] 1 W.L.R. 192), following *Lakatamia Shipping Co. v Morimoto* [2019] EWCA Civ 2203, at [38]. Crucially, the *Brownlie* test is partly relative: the judge must first consider whether he can decide who has the better of the argument and, if so, test that conclusion's reliability. Bright J. ([2023] EWHC 3231 (Comm)) applied the two standards in the alternative, holding that the respondent had a good arguable case by either standard.

The appellant appealed, arguing that, inter alia, Bright J. misapplied "good arguable case" pursuant to *Brownlie*. Sir Julian Flaux C. (Popplewell and Falk L.JJ. agreeing) upheld Bright J.'s decision and confirmed that the *Niedersachsen* test continues to be good law. He reasoned that the freezing injunction and jurisdictional gateway contexts were very different, notwithstanding that the "good arguable case" standard was first transposed from the latter (at [97]). The "relatively low threshold" for freezing injunctions was explained by the fact that the merits would be revisited at trial (at [99]) and it was not the court's role to conduct a mini-trial to evaluate which side has the better of the argument (at [100]). This conclusion was buttressed by a wealth of local

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and foreign authorities which consistently applied the *Niedersachsen* test (at [101], [107]–[112]).

Had the Court of Appeal stopped there, *Dos Santos* would have been uncontroversial. However, the Court of Appeal, particularly Popplewell L.J., curiously ventured beyond simply affirming the *Niedersachsen* test. Popplewell L.J. observed, *obiter*, that it was time "to recognise that the gateway merits test for a freezing order is and should be the same as that for interim injunctions generally, namely whether there is a serious issue to be tried" (at [122]; see also Sir Julian Flaux C. at [106]), and that "serious issue to be tried" should be the preferred label hereafter (at [131]).

Taking "serious issue to be tried" to require a "real prospect of success" (i.e. more than merely arguable and carrying a degree of conviction), as in the summary judgment context, Popplewell L.J. saw no perceivable distinction between that standard and what was said in *Niedersachsen* (at [125]–[126]). While acknowledging the differences between freezing and other interim injunctions, with the former safeguarding "a legally protected interest in a judgment being enforceable" and the latter protecting "a substantive right which will be vindicated at trial by a judgment" (at [128], invoking the language in *Broad Idea International v Convoy Collateral* [2021] UKPC 24, [2023] A.C. 389, at [89]), Popplewell L.J. maintained that there was "no justification for a different merits test in the nature of the interests being protected" (at [128]). Nor was there any reason to continue regarding freezing injunctions as the more invasive, considering the frequency at which they are granted and the fact that other interim injunctions "can operate just as invasively" (at [129]).

Popplewell L.J. added that the grant of freezing injunctions should be regulated not through a stricter merits threshold, but by exceptions built in the order itself, the cross-undertaking in damages and other aspects of the test, particularly in considering whether it is just and convenient to make the order (at [130]).

The suggestion that freezing injunctions are, like interim injunctions to which *American Cyanamid Co. v Ethicon Ltd.* [1975] A.C. 396 applies, effectively subject to a "serious issue to be tried" test is puzzling. It discards a sizeable body of authority, from England and overseas, expressly declaring that "good arguable case" and "serious issue to be tried" represent substantively different tests, the former being a higher standard to overcome (*Holyoake v Candy* [2016] EWHC 970 (Ch), [2016] 3 W.L.R. 357, at [10]; *Natural Dairy (NZ) Holdings Limited (in Provisional Liquidation) v Chen Keen (alias Jack Chen)* [2020] HKCFI 2678, at [80]; *Sang Cheol Woo v Charles Choi Spackman* [2021] SGHC 42, at [50]). It also undercuts *Niedersachsen* itself, where Mustill J. unequivocally rejected the analogy to "ordinary interim injunctions" and *Cyanamid*'s relevance (*Niedersachsen*, 604). It seems odd to go so

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far as to elide the two expressions, when the analysis sits uncomfortably with not just the orthodoxy but also its endorsement of Mustill J.'s test.

Ironically, where Popplewell L.J. took a wrong turn was in drawing on summary judgment jurisprudence and assuming that "serious issue to be tried" straightforwardly stood for a "real prospect of success" (at [124]–[126]). The problem is that Lord Diplock in *Cyanamid* was ambiguous on what "serious issue to be tried" means, having associated it with two expressions that are not naturally compatible – "frivolous or vexatious" and "real prospect of succeeding" (*Cyanamid*, 407–08; *Mothercare Limited v Robson Books Limited* [1979] F.S.R. 466, 473). While Popplewell L.J.'s preference to emphasise "real prospect of success" has support (e.g. *Mothercare*, 471–74), he did not adequately confront a competing reading of *Cyanamid* which leans towards "frivolous or vexatious" being key (*Smith v Inner London Education Authority* [1978] 1 All E.R. 411, 419; *Eng Mee Yong v Letchumanan s/o Velayutham* [1980] A.C. 331, 337 (P.C.); *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46, (2006) 227 C.L.R. 57, at [71] (Gummow and Hayne JJ.)). The latter not only appears to be Mustill J.'s understanding, as evidenced by his use of the word "derisory" (*Niedersachsen*, 604), but also easily explains why "good arguable case" is a higher standard.

Moreover, the Court of Appeal failed to appreciate the significance of the distinction between freezing and other interim injunctions, and why it accounts for the dissimilar thresholds. Its conclusion that the same threshold should apply is a consequence of its adoption of the rights-based formulation of the "enforcement principle", namely that the freezing injunction serves "to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced" (*Convoy*, at [84]–[89]). Although couching the rationale for freezing injunctions in rights-based terms reveals a resemblance to other interim injunctions, Lord Leggatt in *Convoy* reminded us that such language should be used only if the interest "is understood to be different, and different in character, from the [substantive] right" (*Convoy*, at [89]). This difference in character cannot merely be that the right is a legally protected interest in enforcement. As freezing injunctions envelop assets in which the applicant had no interest in the first place, the underlying right is one which is "create[d] ... where none existed before" (*Miller Brewing v Mersey Docks and Harbour* [2004] F.S.R. 5, at [43]). A heightened bar is therefore justified: it reflects not only the fact that the right is naturally radical, but also the reality that "[a]n order lightly or wrongly granted may have a capacity to impair or restrict commerce" in a serious way (*Cardile v LED Builders Pty Limited* [1999] HCA 18, (1999) 198

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C.L.R. 380, at [50], [51]). That freezing injunctions are now proliferating in the courts does not detract from their distinctively invasive nature.

Finally, the suggestion that a watered-down threshold could somehow be made up by the court when considering whether it is "just and convenient" to grant the injunction is confusing, as the judge will be given the impossible task of weighing merits with convenience. It is also unclear how insufficient merits could be cured by bespoke terms. Conflating the merits analysis with the court's residual discretion only exacerbates unpredictability and unfairness.

In short, *Dos Santos* should be commended for closing the door on the *Brownlie* test in the freezing injunctions context, but the attempt to bring such injunctions in line with ordinary interim injunctions was probably one step too far.

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