Neutral Citation Number: [2023] EWHC 3231 (Comm)

Case No: CL-2020-000701

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 20 December 2023

Before :

MR JUSTICE BRIGHT

- -

Between :

Unitel S.A.

Claimant

- and -

(1) Unitel International Holdings B.V.
(2) Isabel dos Santos

Defendants

- -
- -

Paul Sinclair KC and Christopher Knowles (instructed by Addleshaw Goddard LLP) for the Claimants
Richard Hill KC and Guy Olliff-Cooper (instructed by Joseph Hage Aaronson LLP) for the Defendants

Hearing dates: 29, 30 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10:00am on 20/12/23 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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Mr Justice Bright:

1. This judgment deals with the application of the Claimant ("Unitel") for a freezing order against the Second Defendant ("Ms dos Santos").

The parties

2. Unitel is incorporated in Angola and provides mobile telephone services in that country.

3. The First Defendant ("UIH") is incorporated in the Netherlands and is owned and controlled by Ms dos Santos. Its last financial reports were filed on 18 December 2018, for the period ending 31 December 2017. It currently has no directors. I have been told that the Dutch authorities have recently issued a direction that UIH will be dissolved unless directors are appointed within a few weeks.

4. Ms dos Santos was a director of Unitel from its incorporation until November 2020. It is equally significant that she is the daughter of the late José Eduardo dos Santos, who was President of Angola for nearly 40 years until 2017. She has been involved in various businesses in Angola and elsewhere, notably having served for some years as the chair of Sociedade Nacional de Combustíveis de Angola E.P. ("Sonangol"), the Angolan state oil company.

5. Until late 2020, she was also the beneficial owner of 25% of Unitel, via Vidatel Limited ("Vidatel"), a BVI company.

6. Throughout most of the period with which this judgment is concerned, Unitel was owned by four shareholders, each with an equal 25% stake. One was Vidatel, beneficially owned by Ms dos Santos. The others were Mercury-MSTelecom-Serviços de Telecomunicações S.A. ("Mercury", an Angolan company owned by Sonangol); Geni SARL ("Geni", an Angolan company owned by a retired Angolan General, Leopoldino Fragoso do Nascimento); and PT Ventures SGPS S.A. ("PT Ventures", a Portuguese company).

7. The ownership and control of Unitel began to change, from January 2020:

   (1) In January 2020, Sonangol purchased PT Ventures, and so acquired its 25% shareholding.

   (2) A BVI court appointed receivers over Vidatel's assets, including its shares in Unitel, by an order dated 29 October 2020.

   (3) By two Presidential Decrees of 28 October 2022 (no. 256/22 and no. 257/22), the Unitel shares owned by Vidatel and Geni were appropriated by the Angolan State.

8. Accordingly, Unitel is now ultimately in the effective control of the Angolan State, whether directly or indirectly.

Unitel's claim against Ms dos Santos

9. In 2012 and 2013, Unitel made a series of loans to UIH under seven facility agreements, in amounts totalling €322,979,711 and US$43,000,000. Unitel's case is

that the terms of these loans were uncommercial, in that they were given at unjustifiably low rates of interest and without any significant security. Unitel further says that these loans were procured by Ms dos Santos, for the benefit of UIH and, ultimately, for her own personal benefit. Finally, Unitel says that Ms dos Santos owed Unitel duties of diligence, care and loyalty to Unitel in her role as a director, and that she acted in breach of those duties.

10. UIH stopped paying any interest on various facility agreements from late 2019/early 2020. On the basis of these and other alleged defaults, Unitel gave notice of acceleration on 1 September 2020 and demanded repayment by UIH of €325,305,539 and US$43,937,301.

11. Unitel's claim against Ms dos Santos is in damages, including for any sum due that Unitel does not recover from UIH. The total quantum of the claim against her is said to justify a freezing order in the sum of £580 million.

Ms Dos Santos's defence

12. Ms dos Santos denies that the loans were uncommercial and that she acted in breach of duty, and says that Unitel's board and shareholders approved the transactions.

13. She also says that these proceedings are a political campaign against her, brought at the instigation of the current government of Angola. She says that, during her time as chair of Sonangol, she made determined efforts to root out corruption. This embarrassed and angered some elements within Angola, including her father's successor. She says that these proceedings, and the freezing order application before me, must be viewed in the light of political feuding in Angola.

Procedural history

14. This action was commenced by Unitel in 2020, with UIH as the sole Defendant.

15. Some time later, Unitel's shareholders passed a resolution to make a claim against Ms dos Santos. The precise date of the resolution is contentious, but it is accepted that, for the purposes of this application, I should proceed on the basis that its date was 6 April 2022.

16. On 3 October 2022, Unitel issued and filed its application for permission to amend so as to bring its claim against Ms dos Santos in this action. It also issued and filed the application before me, i.e., for a freezing order. Both applications were served on Ms dos Santos under cover of a solicitors' letter of 3 October 2022, to which her solicitors responded on 10 October 2022. In other words, Unitel gave notice to Ms dos Santos that it would apply for a freezing order. The application was supported by the First Affidavit of Mark Chesher, a partner at Addleshaw Goddard LLP, Unitel's solicitors. His Affidavit was made on 29 September 2022.

17. Addleshaw Goddard LLP agreed with Ms dos Santos's solicitors, Joseph Hage Aaronson LLP, that the joinder application should be decided first, and that they would seek to have the freezing order application listed at least 3 months after the hearing of the joinder application. Ultimately, the joinder application was heard on 23-24 May 2023. On 25 May 2023, HHJ Pelling KC allowed the amendment and

joinder, on terms that Ms dos Santos was to be added as Second Defendant from the date of service on her of the Amended Claim Form and Amended Particulars of Claim. I understand that service was effected on 1 June 2023.

18. Ms dos Santos sought to appeal the decision of HHJ Pelling KC, but her application for permission was refused by Males LJ on 4 October 2023.

19. Ms dos Santos ultimately responded to the freezing order application by her Third Witness Statement, dated 27 October 2023.

20. Mr Chesher made his Second Affidavit on 10 November 2023.

Other freezing orders

21. It is relevant that Ms dos Santos's assets are already affected by several other freezing orders.

22. First, various freezing orders have been obtained against Ms dos Santos by the Angolan State:

(1) On 23 December 2019, a freezing order was made in Angola in respect of various shareholdings and bank accounts in Angola.

(2) On 19 December 2022, a further freezing order was made in Angola, which provides for the seizure of further assets, notably shareholdings including Ms dos Santos's shareholdings in UIH.

(3) On 11 February 2020, a freezing order was made in respect of Ms Dos Santos's bank accounts in Portugal.

(4) On 5 March 2020, a further freezing order was made in Portugal, seizing shareholdings in Portugal and other Portuguese assets.

(5) On 27 November 2020, a freezing order was made in the Isle of Man. The effect of this is not wholly clear, but it is common ground that it affects Wilkson Properties Limited ("Wilkson"), an Isle of Man company through which Ms dos Santos owns some real property in London.

23. Second, PT Ventures obtained a worldwide freezing order in the BVI against Vidatel on 12 October 2015. This is now probably only of historic relevance, given that Vidatel's main asset – its 25% shareholding in Unitel – was appropriated by the Angolan State by Presidential Decree no. 256/22 of 28 October 2022.

24. Third, Unitel has obtained the following freezing orders:

(1) On 7 September 2020, Unitel obtained an order in the Netherlands attaching any funds in any accounts of UIH with four Dutch banks. However, UIH was later found to hold no accounts with those banks.

(2) On 28 September 2020, Unitel obtained a freezing order in Portugal against UIH, freezing UIH's shareholdings in ZOPT SGPS S.A. ("ZOPT"), and any shares

received or receivable by UIH in Zonoptimus SGPS S.A. ("NOS"), both Portuguese companies.

The legal principles

25. It was common ground that an applicant for a freezing order must show the following:

(1) A good arguable case on the merits.

(2) A real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets.

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

26. Much of the legal dispute on the application related to the first limb – good arguable case. There was a significant difference between the parties as to what "good arguable case" means, in the context of an application for a freezing order.

27. Unitel's case, very ably presented on this point by Mr Christopher Knowles, was that the meaning of "good arguable case" in this context remains as explained by Mustill J in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The 'Niedersachsen')* [1983] 2 Lloyd's Rep 600, at 605, 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." Mr Knowles acknowledged that some recent authorities suggest that the effect of the decision of the Court of Appeal in *Lakatamia Shipping Co. Ltd. v Morimoto* [2019] EWCA Civ 2203, at [38] per Haddon-Cave LJ, was to equiparate the "good arguable case" test as applied in the freezing order context to that applied in the context of jurisdiction – where its meaning has been explored in a series of cases culminating in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10. Mr Knowles said that I should conclude that this was not, in fact, the intention of the Court of Appeal in *Lakatamia Shipping Co. Ltd. v Morimoto*., and that Mustill J's well-known formulation in *The 'Niedersachsen'* remains good law. He relied on the decision of the Court of Appeal in *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381, where Longmore LJ at [25] specifically said that the test in the freezing order context was different from that in the context of jurisdiction; see also at [67] per Elias LJ.

28. Ms dos Santos's case was that *Lakatamia Shipping Co. Ltd. v Morimoto* has indeed changed the law as regards the "good arguable case" test in the freezing order context, and that the *'Niedersachsen'* approach is no longer appropriate. In advancing that case on Ms dos Santos's behalf, Mr Richard Hill KC drew attention to the fact that Haddon-Cave LJ's judgment in *Lakatamia Shipping Co. Ltd. v Morimoto* at [38] is based entirely on *Kaefer*. He said that I therefore should follow the three-limb approach first propounded by Lord Sumption JSC in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 and repeated in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34. This was the approach considered by the Court of Appeal in *Kaefer*, where Green LJ gave guidance about how to apply the test at [72] to [80] and made it clear that it is, essentially, a relative test. The court must try to form a view as to which party has the better of the argument. Only if the court "finds itself simply unable to form a decided conclusion on the evidence before it" does limb

(iii) arise, in which event the court can fall back on considering whether there is "a plausible (albeit contested) evidential basis" for the applicant's case.

29. Mr Hill KC particularly relied on the decisions of Edwin Johnson J in *Harrington & Charles Trading Co. Ltd. v Mehta* [2022] EWHC 2960 (Ch) and the decision of Dias J in *Chowgule & Co Pte. Ltd. v Shire* [2023] EWHC 2815 (Comm). In both cases, the Court considered that "good arguable case" in the context of freezing orders is now the same as in the context of jurisdiction, i.e., the three-limb text set out in *Brownlie* and *Goldman Sachs* and explained in *Kaefer*. In *Harrington & Charles Trading*, Edwin Johnson J gave detailed consideration to the effect of the judgment of Haddon-Cave LJ in *Lakatamia Shipping Co. Ltd. v Morimoto* and concluded that what was said at [38] has changed the test to be applied, in the context of freezing orders.

30. A few days after the hearing before me concluded, Butcher J handed down his judgment in *Magomedov v TGP Group Holdings* (SBS) LP [2023] EWHC 3134 (Comm). He reviewed the authorities, including both *Harrington & Charles Trading* and *Chowgule*, and came to the opposite conclusion: i.e., that the test in the freezing order context remains as set out by Mustill J in *The 'Niedersachsen'*.

31. Since the decision of the Court of Appeal in *Lakatamia Shipping Co. Ltd. v Morimoto*, most of the authorities where the Court has had to apply the "good arguable case" test in the freezing order context have been occasions where the effect of Haddon-Cave LJ's judgment was not considered. The instances cited by Butcher in *Magomedov* at [37] are all examples. It is significant that many judges continue to follow the Mustill J approach, but these decisions might be said to have been arrived at per incuriam, i.e. without the benefit of the most recent binding authority.

32. There is also the decision of the Chancellor in *PJSC Bank Finance and Credit v Zhevago* [2021] EWHC 2522 (Ch), but in that case there does not seem to have been any argument on the point: see at [171], noting that it was conceded that the applicant had a "good arguable case" on the basis of the test per *Lakatamia Shipping Co. Ltd. v Morimoto*.

33. The cases where the point has been considered head-on are, so far as I am aware, limited to, on one side, *Harrington & Charles Trading* and (more briefly) *Chowgule*, which are in Ms dos Santos's favour; and, on the other side, *Magomedov*, which is in Unitel's favour.

34. I find it striking that Haddon-Cave LJ's judgment in *Lakatamia Shipping Co. Ltd. v Morimoto* makes no reference to *Kazakhstan Kagazy plc v Arip* (making it unclear whether the views of Longmore and Elias LJJ were cited); and that Haddon-Cave LJ said at [35] that the "good arguable case" test was "not a particularly onerous one" and referred to Gee on Commercial Injunctions (6th ed., 2016) at §12-026, which endorsed the Mustill J approach.

35. It therefore seems to me not at all clear that Haddon-Cave LJ intended to have the transformative effect for which Ms dos Santos contends. Notwithstanding *Harrington & Charles Trading*, I am not aware that many observers have come to this conclusion. Subsequent editions of the White Book and of Gee on Commercial Injunctions (7th ed., 2020, inc. 1st supp. 2022) both still endorse the formulation in *The 'Niedersachsen'*. Indeed, in its current edition, not only does Gee on Commercial

Injunctions §12-033 state at some length that the jurisdictional approach of *Brownlie*, *Goldman Sachs* and *Kaefer* is not applicable in the freezing order context, it positively cites *Lakatamia Shipping Co. Ltd. v Morimoto* as supporting this conclusion.

36. My own view is aligned with that of Butcher J; essentially for the reasons that he gives, but especially because of Haddon-Cave LJ's reference to Gee on Commercial Injunctions in his judgment at [35] – which cannot easily be reconciled with an intention to approve a test different from the one espoused in that text.

37. However, I cannot help but note that the law is in a confused state, which cries out for a definitive answer from the Court of Appeal. The reality is that Haddon-Cave LJ's judgment deals with this point briefly, elliptically and ambiguously. This is not at all surprising: the Court of Appeal in that case was not being asked to decide a live point on "good arguable case" on the merits (this was not one of the grounds of appeal – see at [39]). The real focus of the case was all on risk of dissipation. When first instance judges are asked to work out the significance of Haddon-Cave LJ's judgment in relation to "good arguable case", we are inevitably drawn into opining as to what Haddon-Cave LJ 'really meant' at [35] and [38]. This leads to much effort being spent on whatever minute linguistic indicia can be found within those two paragraphs. In my view, it is not productive to keep trying to squeeze more meaning from the few words uttered by Haddon-Cave LJ on the subject. It would be much better to consider the point afresh and from first principles. But only the Court of Appeal can have the luxury of doing this.

38. This all means that, in practical terms, my views on this question of law are of no real significance. Indeed, I told the parties at the hearing that, if the issue between the parties as to the meaning of "good arguable case" in the freezing order context were determinative of the outcome of this application, I would feel bound to grant permission to appeal. I therefore must consider whether Unitel satisfies the "good arguable case" test on both the possible approaches to that test. It will then be apparent whether the difference between Unitel's case and Ms dos Santos's case on this point of law is significant to the outcome, or not.

39. However, before I proceed to that task, I must first highlight one aspect of the three-limb test, per *Brownlie*, *Goldman Sachs* and *Kaefer*, which is highly pertinent in this case and in similar freezing order applications.

40. The formulation of Lord Sumption JSC in *Brownlie* at [7] was 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 ."

41. In *Kaefer*, the explanation of Green LJ as to when limb (iii) may come into play was as follows:

(1) He made it clear, by a number of references, that the three-limb test is essentially a relative test: see for example, [71], [73] and [79]. The Court must try to form a view as to which party has the better of the argument.

(2) At [78], he summarised limb (ii) "… an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it reliably can." Green LJ then made some practical comments about the use of judicial common sense and pragmatism.

(3) Green LJ then turned to limb (iii) at [79] and [80], stating that it only arises "where the court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument". In such a case, the court can fall back on whether there is "a plausible (albeit contested) evidential basis" for the applicant's case. He noted that, where limb (iii) arises, it moves away from a relative test.

42. Lord Sumption JSC's formulation of limb (ii) and Green LJ's explanation of it in his judgment at [78] require the court to conduct a relative assessment and try to decide who has the better of the argument, "if it reliably can." In his explanation of limb (iii) at [79] and [80], Green LJ did not repeat the reference to the reliability of the relative assessment, but I have no doubt that this must be taken as read.

43. It follows that, under the three-limb *Brownlie* test, the court must not merely try to decide who has the better of the argument. If it can decide who has the better of the argument, it must also try to gauge the reliability of its conclusion on that point. This is a feature of the three-limb test that (in my view) makes it difficult to apply satisfactorily to any question going to the merits of the claim, as opposed to a question that will not arise at trial. This has been my experience in this case, hence the observations at the end of this judgment.

Angolan Commercial Companies Law, Art. 80(1)

44. In her Defence, Ms dos Santos takes issue with nearly every aspect of Unitel's case against her. This includes Unitel's case as to the duties that she owed as a director. No doubt anticipating that this part of the case would be hotly contested in this application, Unitel adduced written expert evidence on this area of Angolan law from Prof. Dr. Dário Moura Vicente. Ms dos Santos also adduced expert evidence on Angolan law, from Prof. Dr. Maria de Fátima Ribeiro.

45. In the event, despite the many points taken in the Defence, and even on the basis of the understanding championed by Mr Hill KC as to the meaning of "good arguable case", it was not contended on behalf of Ms dos Santos that Unitel could not satisfy that test on her duties as a director. Nor did Ms dos Santos rely on most of the other merits issues. I should make it clear that Ms dos Santos of course reserved her right to develop her case on all these points later, if necessary – in particular, at trial.

46. Before me, the primary point taken by Ms dos Santos on the merits was that the claim against her has been brought too late, under the law of Angola as provided in the Angolan Commercial Companies Law ("ACCL"). Ms dos Santos relied, in particular, on Article 80(1) of the ACCL.

47. The ACCL is the general source of law for Angolan commercial companies. Accordingly, among other things, it provides the framework for the duties owed by directors to such companies, as well as for the claims that companies can make against their directors for breach of those duties and the circumstances in which such claims can be brought.

48. To understand the point on Article 80(1) in context, it is first necessary to consider Chapter XVI of the ACCL, entitled "Statute of Limitations". This Chapter contains a single Article (Article 175). The translation provided by Ms dos Santos is as follows:

> "**CHAPTER XVI**
> **Statute of Limitations**
> **ARTICLE 175**
> **(Statute of limitations)**
>
> 1. The rights of the company against the founders, shareholders, managers or directors, members of auditing bodies, accountants or auditors and liquidators, as well as the rights of these persons against the company, expire within a period of five years, counting from
> verification of the following facts:
>
> a) commencement of arrears, relating to the subscription obligation respecting capital or supplementary loans;
> b) finding of fraudulent or negligent conduct against founder, manager, director, member of the auditing body, accountant or auditor or liquidator or its revelation, if that has been hidden;
> c) damage arising, in relation to obligation to indemnify the company, even if this has not been fully verified;
> d) date on which transfer of stakes or shares becomes effective in relation to the company as to the liability of the transferors;
> e) any other obligation becomes outstanding;
> f) practice of act on behalf of an irregular company due to irregularity in the form of articles of incorporation or lack of registration.
>
> 2. The rights of shareholders and third parties arising out of the liability undertaken toward them by founders, managers or directors, members of the company's auditing bodies, liquidators, accountants or auditors, as well as the rights of shareholders in those cases provided for in articles 87 and 88, expire within 5 years, counting from the time referred to in paragraph b) of Nº 1.
>
> 3. The rights of third parties against the company, which can be exercised against former shareholders and those exigible by the latter against third parties, expire within 5 years, counting from the extinction of the company's registration, under the terms of articles 163 and 164, if, owing to other precepts, such rights do not expire before the end of that period.
>
> 4. The indemnity rights referred to in article 116, expire within 5 years counting from the effective date of the registration of a merger.
>
> 5. If the indemnity obligation is caused by an unlawful fact constituting a crime, for which the law establishes a longer limitation period, this shall be the period applicable."

49. Even disregarding the titles given to Chapter XVI and to Article 175, this is immediately recognisable as a limitation provision. It provides a limited period within which the prospective claimants' legal rights expire – normally, five years. The commencement date from which this period runs may vary according to the circumstances (depending, for example, on whether fraud is involved). However, it is referable to the underlying cause of action.

50. Unitel's case is that the limitation period applicable to its claims against Ms dos Santos will not expire until November 2025. This may be in issue at trial, but Ms dos Santos does not contend that Unitel does not have a good arguable case on this point. Accordingly, no point arises before me on limitation under Article 175.

51. Article 80(1) has a very different focus from that of Article 175. The translated text of the ACCL provided by Ms dos Santos is an extract which does not include the full Chapter within which Article 80(1) is situated, so I do not know its number or title. However, the content of Articles 78, 79, 81 and 82 (all of which I have in Ms dos Santos's translation, in addition to Article 80) suggests that this part of the ACCL is concerned with the obligations owed by directors, including liability for breach of those obligations (Articles 78 and 79), and claims on the part of the company (Article 80) or the shareholders (Articles 81 and 82) for breach of those obligations.

52. Article 80 provides as follows:

> "**ARTICLE 80**
> **(Indemnity action)**
>
> 1. The company can only file an indemnity action after a shareholder resolution is passed on it and it must be filed within a period of six months counting from the date of the approval of the said resolution, with the shareholders being permitted to nominate special representatives for that purpose.
>
> 2. During the meeting at which the yearend accounts are appraised, resolutions can be approved on an indemnity action and the dismissal of managers or directors whom the meeting considers responsible, even though these matters do not appear on the convening notice, with the managers or directors whom the meeting considers responsible being prevented from voting on those resolutions.
>
> 3. The approval of the resolution referred to in the previous number prevents those managers or directors from being elected again while the indemnity action is pending."

53. Article 80 as a whole is concerned with the circumstances in which the company can file an action for an indemnity claim against a manager or directors, and the effect of this on the manager or directors affected and their capacity to act for the company.

54. The company can only file such a claim after a shareholder resolution is passed, and must do so within six months of the shareholder resolution. The company would normally act by its directors (or persons to whom they have delegated), but in this situation must be enabled to act through persons other than the defendants to the indemnity claim. The last two lines of Article 80(1) therefore empower the shareholders to nominate special representatives for the purpose of filing the claim.

55. Article 80(1) does not look like a limitation provision. It does not seem likely that it is intended to cut across or otherwise affect the limitation period provided in Article 175. It is concerned, rather, with the company's capacity to file a claim against the manager and/or directors. The company only has such capacity if it is created by a shareholder resolution; and it then has a shelf-life of six months from the date of the shareholder resolution.

56. On the facts that I have been asked to proceed on for the purposes of the application, Unitel issued and filed its application to join Ms dos Santos on 3 October 2022, i.e., within six months of the shareholder resolution (assuming, for present purposes, that this was passed on 6 April 2022). However, the joinder application was not decided until 25 May 2022; and Ms dos Santos was only formally joined as Second Defendant when service of the Amended Claim Form and Amended Particulars of Claim was effected, on 1 June 2023. This was more than six months after the shareholder resolution.

57. Ms dos Santos's case is that the requirement in Article 80(1) that the indemnity action be "filed" within six months of the shareholder resolution was not satisfied by Unitel merely issuing and filing its application to join Ms dos Santos; it required her actually to be joined to the proceedings, as Second Defendant, which did not happen until 1 June 2023. Unitel's case is the opposite. This is the principal point on which I have to decide whether Unitel has a "good arguable case".

58. Unitel's Angolan law expert, Prof. Vicente, stated that proceedings are "filed" under Angolan law/procedure, including for the purposes of Article 80(1), when the claimant's initial application is received at the court registry. He said that the purpose of Article 80(1) is to ensure that it is certain, within six months, whether the company wishes to assert its rights per the shareholder's resolution; such certainty being necessary both for the company and for the manager/directors affected. He said that Unitel's act of issuing and filing the joinder application of 3 October 2022 achieved this certainty and thus fulfilled the purposive requirement of Article 80(1).

59. He said that the fact that a decision of the Court was necessary, before the joinder could be made effective, does not derogate from this; and that, in some circumstances, even in Angola, the filing of legal proceedings does not mean that the defendant is party to them or that they will proceed against the defendant; they may be rejected by the court.

60. Ms dos Santos's Angolan law expert, Prof. Dr. Ribeiro, stated Article 80(1) could only be satisfied by issuing a joinder application in England if this were procedurally equivalent to filing an action in Angola. She addressed this by considering whether a judge would have to authorise it, and whether the company would then have to take any further steps for the action to be considered as filed. She said that, because the joinder of Ms dos Santos required both the decision of the Court (i.e., the Order of HHJ Pelling KC of 25 May 2023), and then the service of the Amended Claim Form and Amended Particulars of Claim on 1 June 2023, it was not procedurally equivalent to the filing of an action in Angola.

61. Both the experts then served further reports. Prof. Vicente accepted that it was legitimate to consider whether the joinder application was equivalent to filing an

action in Angola, and opined that it was. Prof. Ribeiro repeated her view that it was not.

62. If the test to be applied is as explained by Mustill J in *The 'Niedersachsen'*, i.e., a case more than barely capable of serious argument, but not necessarily one with more than a 50% chance of success, I have no doubt that Unitel has satisfied this test.

63. If the test is the three-limb test from *Brownlie*, I must first try to decide who has the better of the argument. In my view, Unitel does. I agree with Prof. Vicente's view that the joinder application of 3 October 2022 was equivalent to filing an action in Angola, for the purposes of Article 80(1). In reaching that view, I note Prof. Vicente's evidence that when an action is filed in Angola, the Court does not have to accept it, and further acts may be required of the company.

64. It also strikes me that, in considering the question of procedural equivalence, it is necessary to have in mind the purpose of Article 80(1), because this must shed light on how such equivalence is to be measured. On the basis that Article 80(1) is concerned with the capacity of the company to act on the shareholder's resolution, issuing and filing a joinder application in England seems to me precisely the decisive exercise of this capacity that Article 80(1) requires. Furthermore, because foreign companies effectively have to litigate in England via solicitors, who have to be instructed to go onto the record and act for the company, issuing and filing the joinder application meant that Unitel's solicitors, Addleshaw Goddard LLP, then had actual and/or ostensible authority to conduct the litigation thereafter – even after the expiry of the six-month period under Article 80(1), their appointment having been made before this. Looking at the question in this way supports the view of Prof. Vicente.

65. I therefore have a clear view as to which party has the better of the argument: Unitel does.

66. What I find much more difficult is gauging the reliability of this decision. It is essentially a question of foreign law, on which I am largely but not wholly dependent on information from the two experts. I need the experts to say what the relevant foreign law provisions are, and to explain their meaning and effect, but am able to use my own critical faculties as well. However, I have not had the benefit of seeing and hearing the experts give oral evidence. At trial, they will have to deal with the cut-and-thrust of cross-examination; and they will develop their respective positions, in the way that invariably happens during the trial process.

67. I know that I have been deprived of the benefit of seeing this dynamic process unwind, but I cannot say what if any difference it would have made. I am aware of some important questions that Counsel and I would have wished them to address, if the experts had been giving evidence before me, and have in mind that I do not know what their answers might have been. I am also conscious that the trial process invariably throws up further evidence and fresh points, which cannot be predicted in advance but which may turn out to be significant.

68. I therefore feel uncomfortable saying whether this is a limb (ii) case or a limb (iii) case, because there is no metric by which to measure the reliability of my conclusion on Article 80(1). I know that it is not as reliable as the conclusion that the trial judge will in due course reach on the same point, but I cannot say by how much. I would

feel less inhibited in assessing the reliability of my conclusion if I knew that it concerned a point that will not fall to be determined finally at trial, when there is bound to be more information.

69. What I can say is that, if this is a limb (iii) case, Unitel has a plausible (albeit contested) evidential basis for its case.

70. It follows that, on either approach to the meaning of "good arguable case" in this context, Unitel's case on Article 80(1) of the ACCL is a "good arguable case".

Ms dos Santos's other arguments on the merits

71. In addition to the argument on Article 80(1) of the ACCL, Ms dos Santos had two further points on the merits, which were said to mean that Unitel does not have a "good arguable case". Despite the admirable élan with which they were advanced by Mr Hill KC, they were both makeweights.

72. The first was that Unitel's claim against Ms dos Santos only arises if it cannot recover from UIH. It was said that UIH's assets are sufficiently substantial that there is no real chance of this. In circumstances where UIH has not filed financial reports since 18 December 2018 (for the period ending 31 December 2017), this is a proposition I cannot possibly accept.

73. The second was that one of the elements of Unitel's claim is for the additional interest that would have been due to Unitel, if the facility agreements had been on commercial terms. Unitel says that they would have been at 10%; Ms dos Santos says that that rate would have been much lower, pointing to evidence that some of UIH's borrowing was at only about 3%. Mr Hill KC said this would reduce the quantum of Unitel's claim by about £40 million, i.e. to £510 million.

74. For this, he relied on the financial reports for the period ending 2013, which did indeed refer to UIH borrowing at about that rate. However, the notes to the reports also referred to various other loans at higher rates, including one at 10% and several others at between 8% and 8.5%. All these loans were for much smaller sums than under UIH's facility agreements with Unitel.

75. While presented as a point on the merits, this is really a point about the amount that should be frozen, if a freezing order is granted. Given the evidence that some of UIH's borrowing was at 10%, I consider I should proceed on the basis that it is credible to suppose that advances of the magnitude of the facility agreements would have attracted that kind of rate.

Risk of dissipation

76. The law on risk of dissipation is not in doubt and was not disputed between the parties. It is as set out by Popplewell J in *Fundo Soberano De Angola v Santos* [2018] EWHC 2199 (Comm), at [86], as approved (with one adjustment) by the Court of Appeal in *Lakatamia Shipping Co. Ltd. v Morimoto* at [34], and also at [51].

77. Unitel's primary argument on risk of dissipation was that the subject-matter of the claim is the deliberate, wrongful alienation of a huge amount of money. The Amended Particulars of Claim do not use the words "dishonest" or "fraud", but they

expressly allege not only that the facility agreements were on uncommercial terms, and that the loans were effectively unsecured, but that Ms dos Santos knew or ought to have known this. Mr Paul Sinclair KC, on behalf of Unitel, made it clear that he regarded the substance of the allegations against Ms dos Santos as amounting to fraud and dishonesty. I accept this.

78. Furthermore, as I have already noted, Ms dos Santos essentially accepts that there is a good arguable case in respect of the claim against her. Her major objection, in respect of "good arguable case", is that time has expired under Article 80(1) of the ACCL – which has no bearing on the central allegations of knowing breach of duty.

79. The mere fact that an applicant for a freezing order has a good arguable case in respect of wrongdoing is not always by itself enough to establish a risk of dissipation, but it can be where the wrongdoing is relevant to the issue of dissipation: *Lakatamia Shipping Co. Ltd. v Morimoto* at [51(1)]. Here, the wrongdoing is unquestionably relevant. I accept Unitel's submission that this is sufficient to establish risk of dissipation.

80. Unitel also relied on a number of further points, in particular that Ms dos Santos and/or her companies had not complied with court orders in the BVI (including a freezing order), and that adverse findings about her honesty have been made by two tribunals in the Netherlands. Ms dos Santos said that the breaches of the BVI orders were not intentional, and that she was not party to the proceedings that gave rise to the Dutch findings and did not give evidence. The matters relied on by Unitel are troubling, but Ms dos Santos's explanations have some merit or possible merit, so that overall I did not find that these points added much to Unitel's case – subject to one exception.

81. The exception is a judgment of 15 June 2023 of the Enterprise Chamber of the Amsterdam Court of Appeal. It is anonymized, but it is readily apparent that it relates to the Enterprise Chamber's investigation into the policy and affairs of Esperaza Holding B.V. ("Esperaza"), a Dutch company in which Ms dos Santos and/or her late husband were involved. The Enterprise Chamber investigation was highly critical of Ms dos Santos (among others), resulting in proceedings before the Court of Appeal. It is apparent from the judgment that, contrary to Ms dos Santos's written submissions to me, she was represented before the Court of Appeal and took part in the proceedings via her lawyers. She did not give evidence to the Court of Appeal, but this appears to be because she chose not to. The Court of Appeal essentially upheld the findings of the Enterprise Chamber-ordered investigation, including its conclusion that Ms dos Santos knowingly and deliberately used forged documents to extract very substantial amounts of money from Esperaza as dividend payments.

82. The process by which the Enterprise Chamber and the Court of Appeal arrived at these conclusions, and the evidential basis that underpins them, are both set out in some detail in the judgment. This judgment therefore adds substantially to Unitel's case on risk of dissipation.

83. Ms dos Santos's main response on risk of dissipation arose from the fact that this application was made on notice, following which 14 months have passed without Ms dos Santos taking any steps at all to dissipate her assets.

84. Mr Hill KC developed this point in two ways. First, he relied on the fact that notice had been given at all: he said that this, and the fact that Unitel was then prepared to wait for this application to be heard, showed that Unitel had a "relaxed" attitude and could not really be worried that Ms dos Santos would dissipate her assets.

85. While it is relatively uncommon for an applicant for a freezing order to make the application on notice, it is hardly unheard of. I would never regard it as, by itself, a signal that there is something wrong with the application, although it is no doubt salutary for the applicant to explain matters. In this instance, Mr Chesher's evidence on behalf of Unitel eexplained that many of Ms dos Santos's significant assets consist of very high value real property, which could not be dissipated immediately. That being so, Unitel was right to give notice. I would be loath for this judgment to make freezing order applicants reluctant to give notice, where that would be the right thing to do.

86. As to Unitel's willingness to wait for the application to be heard, this adds nothing to the fact that Unitel gave notice. This is not a case where Unitel can be said to have delayed making the application. It was issued promptly. The delay in getting it heard has not been of Unitel's making.

87. Second, Mr Hill KC relied on the fact that Ms dos Santos has not used the time since October 2022 to dissipate her assets. He referred to *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [50], where Carr J said that this can be a powerful factor militating against a risk of dissipation, and *Holyoake v Candy* [2018] EWCA Civ 297 at [62]-[63] per Gloster LJ, where it was said that, had there been a real risk of dissipation, it would have materialised by the time of the application.

88. I respectfully agree with Carr J's approach in *Tugushev* at [61] that, in a case such as this, there must be "careful consideration of the nature and circumstances surrounding the assets in question."

89. The assets identified by Mr Chesher in support of the application include real property in the UK said to be worth up to £33.5 million, real property in Monaco worth US$55 million and real property in Dubai worth US$40 million.

90. Ms dos Santos's assets also include various corporate assets. These naturally include the assets of UIH as well as those of another holding company, Kento Holding Limited (a Maltese company owned by Ms dos Santos). The most valuable of these corporate assets – at any rate, the most valuable of the corporate assets identified by Unitel – are shares in ZOPT, which in turn owns shares in NOS. NOS is said to be a valuable and profitable Portuguese telecoms company.

91. Unitel has also identified various bank accounts held by Ms dos Santos, her late husband or one of their companies, in this country and in Angola, Portugal, the BVI, South Africa and elsewhere. Mr Chesher was unable to say what funds were in those bank accounts.

92. In the November 2023 Third Witness Statement that she made in response to the application, Ms dos Santos said that she had not taken any steps to dissipate her assets. However, she did not provide any substantiation for this assertion, beyond noting that many of the assets identified by Mr Chesher were already frozen. She did

not provide a statement of her assets, either confirming the assets that Mr Chesher had identified, or identifying any additional assets. Nor did she (for example) provide evidence showing the state of her bank accounts (i) in October 2022 and (ii) in November 2023, or state what her current outgoings are or from what sources she funds them.

93. In his Second Affidavit, which Mr Chesher made in reply to Ms dos Santos's Third Witness Statement, all Mr Chesher could say on this topic was as follows:

> "I set out at paragraphs 173 to 192 of MC1, Unitel's knowledge as to Ms dos Santos' assets inside and outside of the jurisdiction at the time of writing that statement (29 September 2022). To the extent it has been possible to determine this, the assets identified last year have been retained by Ms dos Santos and her companies are as set out in that affidavit."

94. My understanding of this, as explained by Mr Sinclair KC, is as follows:

(1) Unitel is reasonably confident that nothing has happened to the real property assets in the UK, Monaco and Dubai that were identified in Mr Chesher's First Affidavit and they have not been dissipated. These are the relatively illiquid assets that probably cannot be dissipated immediately and which (I assume) it is relatively easy to monitor. Furthermore, one of the UK properties (15 St Mary's Place) has since 27 November 2020 been frozen by the Isle of Man freezing order over Wilkson, so Ms Dos Santos could not have disposed of it in any event.

(2) The shares in NOS (held via ZOPT, and then by UIH and Kento) have been retained: but this is no surprise as they have been frozen by various other freezing orders, notably the Portuguese order of 5 March 2020.

(3) Unitel knows that Ms dos Santos has interests in other foreign corporations, but does not know what their ultimate net assets may be, or were in October 2022.

(4) Unitel knows that Ms dos Santos has at least one UK bank account and various foreign bank accounts, but does not know what is in those bank accounts, or was in them in October 2022. In so far as they are affected by other freezing orders, it is reasonable to assume that the funds in those bank accounts have not altered.

(5) Unitel naturally has no information regarding whatever assets Ms dos Santos may have that were not identified by Mr Chesher in his First Affidavit. It does not know what, if any, other assets she may have had in October 2022, or what has happened to them since then.

95. This is a long way from the facts of *Tugushev*, where Mr Orlov's main asset was "a huge physical undertaking which makes its money by using large, expensive machinery manned by numerous operatives to haul, process, package, sell and ship 400,000 metric tonnes of fish a year" , i.e. "a vast, public-facing and international business", which could not readily be sold: see the judgment of Carr J at [63], [68] and [69].

96. There is also no real comparison with *Holyoake v Candy*, where there was no doubt that the Defendants' main assets were various specific UK real properties, and that

none of them had been dissipated. Furthermore, in that case, the facts summarised by Gloster LJ at [62] show that the first intimation of proceedings against the Defendants was in May 2014, followed by draft particulars of claim in December 2014 and a revised claim issued in August 2015. The application for relief akin to a freezing order was issued in February 2016, resulting in a hearing in April 2016. Thus, in that case, the period from the first intimation to the hearing was nearly two years, and most of that time elapsed before the application was issued.

97. Here, Ms dos Santos had no notice that a freezing order would be sought until 3 October 2022. From that point onwards, however, it will have been apparent to her that her assets were being monitored, at least in so far as Unitel had already identified those assets, as set out in Mr Chesher's First Affidavit. It therefore will have been apparent to her that her conduct in relation to those assets would influence the outcome of the freezing order application.

98. This applies in particular to those real property assets that were not already frozen – in particular, a significant UK property (2 St Mary's Gate) and the properties in Monaco and Dubai. It can fairly be said on her behalf that she made no effort to dissipate those real property assets. However, this could have been deliberate restraint for tactical reasons, namely to maximise the prospect of defeating Unitel's application.

99. All the other major assets that Unitel knows about and can monitor have been frozen by other freezing orders, so the fact they have not been dissipated does not really redound to Ms dos Santos's credit.

100. Beyond that, nothing is certain. There is no information either way (i) as to what if any additional assets there may be, beyond those identified in Mr Chesher's First Affidavit, or (ii) as to what if anything has happened to them.

101. In these circumstances, the fact that Ms dos Santos does not appear to have dissipated her assets since October 2022 is not sufficient to negate Unitel's evidence that there is a real risk that she will dissipate her assets, unless restrained from doing so.

Just and convenient

102. Ms dos Santos said that, even if the Court were satisfied that Unitel has a good arguable case on the merits and that there is a real risk that Ms dos Santos might dissipate her assets, the fact that her assets are already restrained by other freezing orders means that any additional freezing order imposed by this Court will not serve any useful purpose.

103. I was referred to *AA v BB* [2019] EWCA Civ 2203, where the Court of Appeal held that there was no principle that the existence of a prior freezing order (in fact, in that case, a restraint order made under section 41of the Proceeds of Crime Act 2002) precludes the making of a freezing order, although it would be a material fact and consideration must be given to the additional burden placed on a defendant by a fresh freezing order.

104. Here, most of the other freezing orders already in existence have been obtained by the Angolan State – in Angola, in Portugal and in the Isle of Man. My understanding is that they were granted in support of prospective criminal proceedings, albeit no

criminal or civil proceedings have yet been brought against Ms dos Santos in Angola and Mr Hill KC has stated that she does not know what the basis is of the allegations against her. Unitel is no better informed.

105. In these circumstances, it is far from clear that the freezing orders obtained by Angola will remain in force. If they were to be discharged, I have been given no reason to suppose that Unitel would be given advance notice of this (notwithstanding its effective ownership by the Angolan State). I would add that the fact that Ms dos Santos says that they are the result of a political campaign against her by the current government of Angola must, if true, increase the uncertainty surrounding the durability of these freezing orders. I pretend to no expertise in Angolan politics, but I assume that they are as changeable as the politics of other countries. Accordingly, the fact that many of the assets identified by Unitel are currently subject to freezing orders obtained by Angola does not provide adequate reassurance to Unitel.

106. As to the additional burden that would be placed by granting the order sought by Unitel, I have not received any evidence or submissions elaborating on this. I take it for granted that some costs would be incurred in ensuring compliance, not least because the draft order includes a provision requiring the disclosure of assets. However, without information from Ms dos Santos as to how it would affect her to have to make this disclosure, I cannot assume in her favour that the burden on her would be so disproportionate to the benefit to Unitel that I should refuse to make the order on this ground.

107. On the contrary, it seems to me highly desirable that Ms dos Santos should now be ordered to disclose her assets, in circumstances where Unitel does not know what if any assets she has that are not covered by the other freezing orders already in existence.

108. Accordingly, I do not accept that the other freezing orders mean that it is not just and convenient for this court to grant a further order. The order sought is, in principle, both just and convenient.

Conclusion

109. For the reasons given above, I will grant a freezing order in Unitel's favour.

110. In her written submissions, Ms dos Santos has made various points as to the wording of the order. I did not receive oral submissions on these points from Mr Hill KC or from Mr Sinclair KC, so the terms of the order will be finalised at a further hearing. It may help the parties if I say now that, in the light of the conclusions set out above, I see no obvious basis on which it should be restricted to Ms Dos Santos's assets in this jurisdiction; this seems an obvious case for a worldwide freezing order.

Final observations

111. I noted above that I would feel less inhibited in assessing the reliability of my conclusion on Article 80(1) if I knew that it concerned a point that will not fall to be determined finally at trial, when there is bound to be more information. The fact that it concerns a merits point, which will undoubtedly need to be determined at trial, has troubled me. This prompts the following observations.

112. First, if I were to express a settled view as to the reliability of the evidence I have received, and particularly if I were to say that it is so reliable that the strength of Unitel's case on the point is above 50%, I would be trampling over turf that should be left pristine for the trial judge.

113. Second, if applicants for freezing orders are told that they must provide evidence that reliably demonstrates that their prospects are above 50%, they will feel obliged to give the court as much evidence as they can muster. In a case like the present, which turns on a point of foreign law, they will say (with some justification) that the court should hear oral evidence from the rival experts, and decide the point – in effect, as a preliminary issue. I suspect that Mr Sinclair KC might well have asked me to allow oral evidence from the Angolan law experts, if he had known in advance what Mr Hill KC would say about the meaning of "good arguable case". On the basis that the three-limb test requires Unitel to provide me with the most reliable evidence available to it, I might have found this difficult to refuse. Yet, applications like this are not supposed to become mini-trials.

114. Third, the overall effect will be to lengthen hearings of this kind. As it was, this hearing took two days. If there had been more evidence of Angolan law, especially oral evidence, it would have taken at least three days and possibly four. If a pattern were to develop of hearings like this encompassing more evidence, and so taking longer, that would have a real effect on listing. This would be detrimental to other court users.

115. Fourth, one answer would be to say that the court does not have to assess reliability in all cases, it can simply fall back on limb (iii). But this risks making limb (iii) the court's route home in every case, rather than the exceptional safety-net which, it seems to me, Lord Sumption JSC had in mind. I regret having had to fall back on limb (iii) in this case, rather than dealing properly with limb (ii). That is why, if the three-limb test represents the law, I would probably have permitted oral evidence, if I had been asked to do so. If the law raises a question for the parties to address, they should be permitted to answer it with the best evidence then available to them.

116. Fifth, another way of addressing this might be to say that the three-limb test applies only where the relevant point will not arise at trial. However, this is not straightforward. At first sight, it might seem tempting to distinguish between the context of jurisdiction and the context of freezing orders. But it is not uncommon for disputes on jurisdiction to depend on points that will arise at trial; and some points that arise in relation to freezing orders will not arise at trial.

    (1) *Brownlie* itself illustrates this. In the next phase of the litigation it became apparent that jurisdiction depended on a question of Egyptian law going to the ultimate liability of the Defendant, which ordinarily would have been pleaded out, explored in expert evidence and tested at trial: *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45.

    (2) The converse is illustrated in the context of freezing orders by *Lakatamia Shipping Co. Ltd. v Morimoto*. Haddon-Cave LJ considered the meaning of "good arguable case" not in so far as it applied to the merits, but in so far as it applied to risk of dissipation: see at [33], referring to the judgment of Peer Gibson LJ in *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272 at [21]. Risk of

dissipation will not arise again at trial, which perhaps makes it appropriate to treat it more stringently than points on the merits.

117. Finally, fragmenting the phrase "good arguable case" so as to give it two different meanings, depending on the context, seems tortuous. If that is going to be the ultimate outcome, it would seem preferable for different tests to be expressed by different words, not the same words.