Neutral Citation Number: [2024] EWHC 2747 (Ch)

Case No: CR-2023-001718

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY & COMPANIES LIST

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 29 October 2024

Before :

MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

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RE SP COMMODITIES LIMITED (IN LIQUIDATION)

Between :
MARK REYNOLDS AND ADAM HARRIS (as joint liquidators of SP Commodities Ltd)

Applicants

- and –

PRIYESH PAREKH

Defendants

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- -

Mr Christopher Snell (instructed by SA Law LLP)) for the **Applicants**
Mr Michael Phillis (instructed by BBS Law Ltd) for the **Respondent**

Hearing date: 29 October 2024

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

Mr David Halpern KC :

1. This morning I heard an application dated 26 September 2024 by the Applicants ("**A**") as liquidator SP Commodities Ltd that the Respondent ("**R**") do pay the costs of:

   (1) The initial application for a freezing order which was heard by Richard Smith J on 28 August 2024;

   (2) The application for substituted service of the freezing order, which was heard by Zacaroli J on 4 September 2024; and

   (3) The costs of the second hearing of the freezing application , which took place before Miles J on 18 September 2024.

2. These costs were adjourned by Miles J to today because of the uncertain state of the law prior to *Dos Santos v Unitel SA* [2024] EWCA Civ 110, decided on 30 September 2024. My task has been considerably simplified by that decision.

3. Mr Michael Phillis, instructed by BBS Law, appeared for R. There was no skeleton argument from him, but I do not criticise him for that, because he told me that he and his solicitors were not instructed until yesterday. He realistically accepted:

   (1) That R should pay the costs of the application for substituted service;

   (2) That the need for an order for substituted service was brought about by R's conduct, that the decision was made on the merits, and hence that his client should pay the costs (Accordingly I need say nothing more about that those costs); and

   (3) That the law has been clarified by *Dos Santos*. Nevertheless he maintained that there was no general rule that a successful application for a freezing order should have his costs and that in the present case R had not opposed the application "*tooth and nail*".

4. In *Dos Santos* Flaux C said:

> "*116. In so far as there is a general rule as to the costs of contested interlocutory or procedural applications, it is that a party who contests an application and fights it tooth and nail on every point, 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. This is clear from CPR 44.2(2) and is the general rule applied in the Business and Property Courts in relation to contested interlocutory applications. The Court will not usually reserve costs to the trial judge of, for example, a contested jurisdiction or disclosure application which the defendant has lost, merely because the defendant points out that it might succeed in defeating a claim at trial. Were it otherwise trial judges and, in turn costs judges, would be inundated with*

having to make rulings on costs of interlocutory applications which had been reserved by the judges who heard the applications.

117. Of course the Court has a discretion to make a different order on a contested interlocutory application, including reserving the costs to the trial judge, as CPR 44.2(b) provides. One situation in which the Court will usually make an order that the costs be reserved is in the case of an American Cyanamid interim injunction as the authorities from Desquenne onwards establish. However, that is because, on the balance of convenience, the Court is prepared to grant an interim injunction which allows a party to rely upon 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. However if the claimant's case fails at trial, then it can generally be said that the interim injunction should not have been granted, since the right or obligation did not exist or was not established. Hence it is generally more appropriate for the costs of the application for the interim injunction to be reserved to the trial judge.

118. However, the position is different in the case of a freezing injunction. If the claimant establishes the three criteria referred to in [6] above: (1) a good arguable case on the merits; (2) a real risk 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 injunction, then the Court will grant the injunction. When granted it is not "interim" or dependent on the balance of convenience like an American Cyanamid injunction, nor will the Court make the injunction final at trial, as in the case of an interim American Cyanamid injunction. As Edwin Johnson J pointed out at [29] of his costs judgment in Harrington there is no such thing as a final freezing order. Subject to any subsequent application to vary or discharge it, the freezing injunction remains in place until trial. If the claim succeeds the Court may continue the injunction post judgment but that is not the making of a final injunction. The purpose of the freezing injunction remains as set out at [85] of Convoy Collateral : "to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment."

119. Another important distinction between a freezing injunction and an American Cyanamid injunction is that whereas, in the case of the latter, if the relevant right or obligation is not established at trial it can generally be said that the interim injunction should not have been granted, in the case of the former even if the claim fails at trial, it does not follow that the freezing order was not correctly granted on the basis

that the claimant satisfied the three criteria for the grant of the freezing injunction. …"

5. *Dos Santos* draws a clear distinction between an application for an interim injunction, to which the *American Cyanamid* principle applies, and a contested application which is interlocutory, in the sense that it occurs before trial, but which results in a decision based on the merits of the application in question. An application for substituted service clearly falls on the latter side of the line, and so does an application for a freezing order.

6. Mr Phillis's submission focuses on the words "*tooth and nail*" but in my judgment it gives them a weight which they will not bear. The decision whether costs should follow the event is fact-sensitive and will vary from case to case. I do not consider that *Dos Santos* lays down a hard-and-fast rule which requires an application to be fought tooth and nail before costs can be ordered. If, contrary to this conclusion, there is any such rule, I am satisfied that the application for a freezing order was sufficiently opposed to justify an order for costs.

7. The relevant facts are as follows:

   (1) A brought these proceedings for misfeasance against R, a former director of the Company. The trial was listed for July 2024 but was adjourned at the last minute because R had changed solicitors and claimed to be ill. R was ordered to pay the wasted costs but has failed to do so.

   (2) In the course of investigating what assets R might have, A discovered activity at the Land Registry which led them to apply for a freezing order on 28 August. They gave prior notice to R on 23 August, but R did not respond until 29 August, after the order had been made. He then failed to respond to further correspondence.

   (3) He gave an address in Dubai but it became apparent that he was not living there, which is why it was necessary to obtain an order for substituted service.

   (4) He was served with notice of the intended return date but again failed to respond, leaving A with no option but to prepare for a contested hearing.

   (5) He attended the hearing on the return date by video-link and instructed the CLIPS representative to act for him. Mr Christopher Snell, who appears for A, also appeared on that occasion. He informed me that the CLIPS representative applied in the alternative either to discharge the freezing order, on the ground that there was no risk of dissipation, or to adjourn the return date so that R could put in evidence in opposition.

   (6) In the event Miles J continued the order until trial but added: "*The Respondent shall have liberty to apply to discharge or vary the Freezing Injunction on notice to the Applicants. For the purposes of any such application, the Respondent shall not need to show a material change in*

circumstances between the date of this order and the date of his application to vary or discharge the Freezing Injunction."

8. In *Cancrie Investments Ltd v Haider* [2024] EWHC 2302 (Comm), Nigel Cooper KC drew a distinction between the costs of the initial application for a freezing order and the costs of the return date. I am not convinced that there should be any such distinction. In principle it appears to me that the costs of the initial application should usually be dealt with on the return date, and that appears to have been accepted in *Dos Santos*. But in any event the present case is unusual because the initial application was made on notice. Mr Phillis has realistically accepted that the costs of the first hearing should be dealt with in the same way as the costs of the return date.

9. Mr Phillis relied on three particular points.

   (1) He says that A could have sought an undertaking from R but failed to do so. I am satisfied that R has behaved evasively throughout and has failed to communicate with A. A had no reason to think that R would agree to give an undertaking, nor did R offer to do so.

   (2) He says that the injunction is unusual in that A's undertaking in damages is limited to the assets in their hands as liquidators. Mr Snell accepts that the principal asset is the benefit of the claim against R and hence in practice the undertaking is unlikely to be of much value if R is ultimately successful. In my judgment the fact that this makes the order particularly Draconian does not make any difference to the application of the analysis in *Dos Santos*. It remains the case that A have satisfied the test for a freezing order.

   (3) He says that there was no full-blown opposition at the hearing before Miles J. However in my judgment it is clear that (i) R did not consent to the order before it was made and (ii) he did seek to oppose it at the hearing, but realised that he did not have sufficient evidence. Miles J's order, no doubt made at R's request, preserved R's right to keep alive his opposition to the order.

10. For these reasons I am satisfied that R should pay all three sets of costs. I am told that the substantive hearing will not now take place until May 2025, and I see no reason why A should be kept out of their costs for a further six months. They are entitled to an immediate assessment.

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