

House of Lords before Lord Bingham of Cornhill; Lord Hope of Craighead; Lord Scott of Foscote; Lord Rodger of Earlsferry; Lord Carswell. 24th January 2007.

LORD BINGHAM OF CORNHILL : My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote. For the reasons he gives I would dismiss the appeal and make the orders which he proposes.
2. Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign: see Steven Gee, *Commercial Injunctions*, 5th ed (2004), pp 77-83.
3. In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way. The procedure incorporates important safeguards for the defendant. One of those safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate. The claimant cannot of course guarantee that he will recover judgment, nor what the terms of the judgment will be. But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant.
4. On his application to Park J, Mr Fourie failed to do this. It follows that the judge was wrong to make the order he did. It also follows, in my opinion, that Mr Jarvis QC, the deputy judge, was right to discharge it. There had been a clear neglect of the correct procedure, and the court should not absolve the defaulting party from the consequences of its neglect by maintaining the order in force: *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428, 436. That, I think, is so whether or not the deputy judge foresaw that Mr Fourie might, in the immediate future, re-apply successfully in accordance with the recognised practice.

LORD HOPE OF CRAIGHEAD : My Lords,

5. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. I agree with him, for the reasons that he gives, that the appeal on the main issue should be dismissed. I would however set aside the order for indemnity costs.
6. On the main issue I also agree with the observations of my noble and learned friends Lord Bingham of Cornhill and Lord Rodger of Earlsferry. The importance of maintaining safeguards against misuse of such injunctions has recently been emphasised by the Court of Session in two cases dealing with the analogous procedure that is available in Scotland. It has pointed out that the maintenance of these safeguards is necessary if the use of the procedure is not to be held to be incompatible with article 1 of the First Protocol to the European Convention on Human Rights: *Karl Construction Ltd v Palisade Properties plc* 2002 SC 270; *Advocate General for Scotland v Taylor* 2003 SLT 1340.
7. Those cases were concerned primarily with issues of Scots procedure which do not arise in this case. But Lord Drummond Young said in para 54 of his opinion in *Karl Construction Ltd v Palisade Properties plc*, which was approved by the Inner House in *Advocate General for Scotland v Taylor*, that among the requirements that would have to be met if the order was to conform to that article was that the pursuer must establish that he has a prima facie case on the merits of the action in connection with which he is seeking the protective remedy. As he pointed out in para 55, nearly all of the other legal systems in which a protective security is available insist that a test which is broadly of this nature should be satisfied. I agree that the test will not be met if the claimant is unable to identify the claim which he is seeking to protect when he is seeking the remedy.
8. On the indemnity costs issue I share the concerns which have been expressed by Lord Rodger and by my noble and learned friend Lord Carswell as to whether an order for costs on the higher scale was appropriate. But I would, with respect, go further and hold that an order for indemnity costs was not justified in this case and that an order for costs on the standard basis should be substituted.
9. I recognise, of course, that there are limits on the extent which this House can properly interfere with orders of this kind. I accept too that the Civil Procedure Rules contain a new procedural code, the object of which is to enable the court to deal with cases justly, and that it is no longer necessary to show that there has to be some sort of moral lack of probity or conduct deserving moral condemnation on the part of the paying party: *Reid Minty v Taylor* [2001] EWCA Civ 1723; [2002] 1 WLR 2800, para 27, per May LJ.
10. But, as the judgments that were given in that case show, the award of costs on this basis will not be justified unless the conduct of the paying party can be said in some respect to have been unreasonable: see May LJ at para 32, Kay LJ at para 37. For example, as Kay LJ said in para 37, if one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis. I do not think that the appellant was guilty of conduct of that kind.
11. It is true that Park J was persuaded to make an order that he ought not to have made because, on the information that was laid before him, the making of a freezing order could not yet be justified. But litigants do from time to

time persuade judges to make orders in their favour ex parte which on more mature reflection have no sound basis in law and must be set aside. That in itself, without more, does not justify a departure from the ordinary rule that the costs that are awarded to the other party are assessed on the standard basis in such circumstances. I do not detect anything in the appellant's conduct that was unreasonable in the sense referred to in *Reid Minty v Taylor*. I bear in mind also that the making of a freezing order albeit for a lesser amount was within a matter of hours substituted for that made by Park J.

LORD SCOTT OF FOSCOTE : My Lords,

The Issues

12. On 9 July 2004 Park J, on a without notice application made by the appellant, Mr Fourie, made a freezing order (commonly called a Mareva injunction) against two individuals and a number of companies of whom only two are still actively involved in the proceedings. They are Mr Le Roux and Fintrade Investments Ltd. ("Fintrade"), the respondents to this appeal. The order froze the assets in England and Wales of each respondent up to a value of £3.4 million. Mr Fourie had made the application for the order in his capacity as liquidator of two South African companies, Herlan Edmunds Engineering (Pty) Ltd ("HEE") and its parent company, Herlan Edmunds Investment Holdings Ltd ("HEI"). Mr Le Roux was the majority shareholder of HEI and, until HEE and HEI went into liquidation in South Africa, had been in control of the two companies. Fintrade is an English company owned and controlled by Mr Le Roux.
13. HEI and HEE went into liquidation in South Africa in June 2004 on a creditor's petition and Mr Fourie was appointed liquidator of both companies. He formed the view that Mr Le Roux and Fintrade had by fraud and deception (some details of which I will refer to later) stripped HEE of its assets and removed those assets, or their proceeds, to England. Hence his application to Park J for the freezing order.
14. By an application dated 28 July 2004 Mr Le Roux, and others of those against whom the freezing order had been made (it is not clear which of them, but Fintrade must have been one) applied for the freezing order to be set aside. The main ground of the application was that "there was no jurisdiction to make the order" because, at the time the order was made, there had been no subsisting proceedings to which the freezing order could be ancillary and no undertaking to commence any such proceedings had been offered by Mr Fourie. The application came before Mr Jarvis QC, sitting as a deputy judge of the High Court, on 30 September 2004. On the jurisdiction point the deputy judge said that in order to support the grant of a freezing order the applicant needed proceedings to enforce an existing cause of action that had either already been instituted or that would, pursuant to an undertaking given to the court, be instituted within a short timeframe. He pointed out that, when the matter was before Park J, not only had no proceedings for substantive relief been commenced but no such proceedings had yet been formulated. In paragraph 60 of his judgment he said this:
"In my judgment, the court had no jurisdiction to grant a freezing order in circumstances where the applicant had no intention of issuing proceedings immediately or almost immediately. I do not regard this as a simple procedural irregularity which can be cured by issuing proceedings now. I do not regard it as akin to material non-disclosure which, in certain circumstances, the court may overlook and allow an injunction to be continued. In my judgment, this goes to the root of the jurisdiction."
So he discharged the freezing order, made an order for Mr Fourie to pay costs on an indemnity basis and gave directions for the immediate enforcement of the cross-undertaking in damages that Mr Fourie had given.
15. Mr Fourie appealed to the Court of Appeal. On 7 March 2005 the Vice-Chancellor (as he then was) gave a judgment, concurred in by Mance LJ and Jonathan Parker LJ, dismissing the appeal. He said he agreed with counsel for the respondents that "... jurisdiction to make an interim order depends on its activation by the commencement of substantive proceedings or an undertaking to do so" (paras 37 and 38) and went on, in paragraph 38, as follows: *"There was no suggestion of substantive claims being made in England before Park J ... There had been no activation of the jurisdiction whether by the issue of substantive proceedings in England or an undertaking to do so. Without either, the jurisdiction to grant any form of interim relief in support of the relevant cause of action under English law simply does not exist. ... In my view the deputy judge was right."*
The Vice-Chancellor also dismissed Mr Fourie's appeal against the indemnity costs order that the deputy judge had made. Mr Fourie has appealed to this House.
16. The background facts are much more complex than the previous paragraphs might suggest, and I shall have to refer to some of them later, but the main issue for your Lordships is, as expressed by the parties in their statement of Facts and Issues, whether Park J had had jurisdiction to make the freezing order. In my opinion, however, this issue cannot be confined to the issue of jurisdiction in its strict sense. Even if Park J did have power to make the freezing order, the question remains whether, in the absence of any proceedings for substantive relief or any undertaking to commence such proceedings, it was proper for him to have made the order.
17. There is also an issue about the propriety of the indemnity costs order and an issue as to whether the directions for the enforcement of the cross-undertaking were premature both of which your Lordships must deal with. Next, however, I must say rather more about the background facts and the litigation history than I have yet done.

The Background Facts

18. HEE had carried on business in South Africa but in July 2003 had ceased trading and the story really starts with an *ex parte* order obtained by Mr Le Roux and Fintrade in November 2003 from the Germiston Magistrate's Court in South Africa (the Germiston Order) for the seizure and handing over of HEE's plant and machinery pursuant to alleged debts owed to them by HEE. Pursuant to the Germiston Order Mr Le Roux took possession of HEE's assets. Some were sold. When Mr Fourie became, in June 2004, liquidator of HEE and began an investigation of its affairs he took the view that Mr Le Roux and Fintrade had obtained the Germiston Order by fraud and deception and, assisted by the Germiston Order, had stripped HEE of its assets and had exported some of these assets to England. He therefore commenced proceedings in the Transvaal Provincial Division of the High Court of South Africa and on 2 July 2004 Preller J made an order *nisi* requiring Mr Le Roux and other respondents to show cause why an order setting aside the Germiston Order should not be made. Fintrade was not one of the respondents to the proceedings. Your Lordships were told that South Africa does not have a procedure that would have enabled Fintrade, an English company with no presence in South Africa, to be served outside South Africa. At the same time Preller J made an order authorising Mr Fourie to institute in England such proceedings as might be necessary, including proceedings for injunctive relief, for the purpose of recovering HEE's assets. Preller J also ordered that
- "... letters of request be issued requesting the appropriate Division of the High Court of the United Kingdom to act in aid of the High Court of South Africa (Transvaal Provincial Division) for the purposes of recognising the appointment of [Mr Fourie], the applicant, as the duly appointed provisional liquidator of [HEE] and [HEI] ..."*
19. Preller J's order *nisi* came before Bosielo J who, in a judgment delivered on 8 September 2004, confirmed the order. Leave to appeal against Bosielo J's judgment was refused at first instance and again in the Supreme Court of Appeal of South Africa. A subsequent application for leave to appeal made by Mr Le Roux and others to the South African Constitutional Court was dismissed with costs. It is convenient to record some of the remarks made by Bosielo J in his judgment. He referred, at p15, to allegations made against Mr Le Roux as constituting *"... eloquent and irrefutable evidence of serious fraud which was used to deliberately mislead the magistrate in the Germiston proceedings to grant the order ..."* and expressed his agreement with Mr Fourie's counsel that *"... the proceedings in the Germiston Magistrate's Court were a shameless sham by the parties to hoodwink the Magistrate into granting an order, the sole purpose and effect whereof was to grant the parties, in particular [Mr Le Roux], the right to strip HEE of all its assets."*
- Bosielo J commented also that the respondents before him had based their resistance to confirmation of the order *nisi* on, in effect, technicalities. He said, at p18, *"What I find disturbing is that notwithstanding the fact that the replying affidavit contained damning and damaging allegations, the respondents elected to ignore it."*
- In the meantime, and before the order *nisi* had been confirmed, Mr Fourie had applied to Park J for the freezing order.
20. Another event in South Africa that deserves mention is that on 20 July 2004 an order was made in the Transvaal Provincial Division, on Mr Fourie's application, for an examination under section 417 of the South African Companies Act (No.61 of 1973 as amended). Section 417, similar to section 236(2) of the Insolvency Act 1986, enables directors and ex-directors, among others, of an insolvent company which is being wound-up to be brought before the court to answer questions about the company's assets and affairs. Your Lordships were not given any details about the institution or progress of any examination conducted under this order. Its relevance is that it constitutes a potential vehicle for the examination of Mr Le Roux.

The litigation history

21. At the hearing before Park J various references were made to the proceedings in aid of which the freezing order was being sought. Park J was told by Mr Selwyn Bloch QC, counsel for Mr Fourie, that *"The liquidator is intending to proceed in South Africa in terms of statutory enquiries and within the existence of that various claims would be formulated ..."* (Appendix page 12)

The reference to "statutory enquiries" was, presumably, a reference to proceedings under section 417 of the South African Companies Act. The transcript of the hearing records, also, Park J asking about the effect of the freezing order he was being asked to make. Both his question and Mr Bloch's answer (Appendix page 39) deserve attention:

Mr Justice Park: ... *What is going to happen in the end about any assets that are frozen in this way? Who is advancing a claim for those assets and in what proceedings? We are here today in an application which is ancillary to the insolvency jurisdiction of the South African court. What is before me is not a case in which Mr Fourie is seeking some sort of order from the English court that the money be paid over [to] him. The English court can freeze the money, but then, if some sort of order for the recovery of it is going to be sought, how is that going to be done?*

Mr Bloch: *My Lord has put his finger on a point that has exercised me to some extent. That is what is the formal proceeding leading up to some final form of final relief to which this attaches."*

Mr Bloch (pages 39-40) then answered the question he had posed by referring, first, to a possible claim in respect of torts committed in England and, secondly, to possible proceedings under section 426 of the Insolvency Act 1986 as a result of which, he appears to have thought, the court might give directions dealing with "pleadings and discovery and the usual procedural points" (Appendix page 40) and eventually "adjudicate on the merits of whether these assets are, for example, traceable." (Appendix pages 40-41). Later Mr Bloch again referred to the possibility of a proprietary claim being made. He said *"Using the English procedure [presumably a reference to*

section 236 of the 1986 Act], an enquiry would be sought at which the defendants would be interviewed or cross-examined ... Depending upon that, if the claimant or the applicant concluded that these assets were, in fact, owned by the companies in South Africa, it would invoke the South African solvency procedures as part of section 426 in order to recover those assets here." (Appendix pages 41,42)

These exchanges appear to me to demonstrate a muddle as to the purpose and nature of the freezing order that was being sought. The judge seems to have had in mind that the purpose, or perhaps one of the purposes, of the freezing order would be to preserve assets to which a proprietary claim would or might be brought by or on behalf of HEE (see his reference to an order for the "recovery" by Mr Fourie of the frozen money). Mr Bloch's references to assets being "traceable" or "owned by the South African companies" points in the same direction. But Mr Bloch's reference to the possibility of the eventual claim being a tort claim suggests that the purpose of the freezing order would be the "Mareva" purpose, namely, to prevent the proposed defendants from making themselves judgment-proof by disposing of their assets against which a damages judgment might be enforced. But whatever the judge and Mr Bloch had in mind the freezing order as granted was unquestionably of the "Mareva" type. Its terms were wholly inconsistent with an intention to preserve assets to which a proprietary claim by, or on behalf of, HEE might eventually be brought. The order being sought by Mr Bloch and granted by the judge was an order under CPR 25.1(f), not an order under CPR 25.1(c)(i). It is clear, however, that at the time of the hearing before Park J the nature of the proceedings in aid of which the freezing order was being sought was unformulated and inchoate. The judge knew that the proceedings, whatever they might turn out to be, would result from and be based upon the alleged fraud and breach of fiduciary duty of Mr Le Roux. Everything else about the proceedings was in the air.

22. Park J made the freezing order, subject to the usual cross-undertaking in damages, over 23 July 2004. When the matter came back before the court it was dealt with by Judge Norris QC, sitting as an additional judge of the Chancery Division. He renewed the freezing order for a further four months or thereabouts. Counsel for the respondents told him that an application to discharge the freezing order was in the pipeline. No additional elucidation of the details or nature of the eventual proceedings for substantive relief were proffered by counsel for Mr Fourie.
23. Mr Le Roux's and Fintrade's discharge application was dealt with by deputy judge Jarvis QC in the morning of 30 September 2004. The freezing order made by Park J was discharged. Mr Fourie and his lawyers immediately set about formulating a claim for substantive relief that could support a freezing order. They went back before the deputy judge in the afternoon of 30 September, armed with a proposed claim form, and renewed the application for a freezing order. The deputy judge, on their undertaking to issue and serve particulars of claim within 7 days, made a freezing order against Mr Le Roux and Fintrade in the same terms as the order he had discharged in the morning save that the protection was reduced to a sum of £1million for each respondent. Counsel for the respondents, who had succeeded in obtaining the discharge of the first freezing order, were present during the afternoon hearing but took no part. This second freezing order and, later, a third freezing order were the subject of several subsequent applications relating, mainly, to the amount of the protection. These applications culminated in a hearing before the Court of Appeal on the same occasion as that at which Mr Fourie's appeal against the discharge of the first freezing order was dealt with. The Court of Appeal upheld the third freezing order with a limit of £900,000. This freezing order remains in place and is not at the moment under challenge by either side.
24. In the appeal now before the House Mr Fourie does not seek the re-instatement of the first freezing order, or any increase in the amount of the protection above the £900,000 fixed by the Court of Appeal for the third and current freezing order. Instead he seeks a declaration that Park J did have power and jurisdiction to grant the first freezing order and an order setting aside the determination to the contrary by deputy judge Jarvis QC and the Court of Appeal. Since there is no challenge to the third freezing order and Mr Fourie does not ask for an increase of the £900,000, the question arises as to why he is seeking to invalidate the discharge of the first freezing order. The answer must be that, if he succeeds, the indemnity costs order must go and, too, the directions for the enforcement of the cross-undertaking in damages must be set aside. These last two *desiderata* (from Mr Fourie's point of view) are, presumably, the reason why this appeal is being prosecuted. The challenge to the discharge of the first freezing order is no more than a vehicle for their attainment.

The first issue

25. Both the deputy judge and the Vice-Chancellor referred to the issue as one of "jurisdiction". But jurisdiction is a word of some ambiguity. The ambiguity was referred to by Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 at 563. He said: "*The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that, although the Court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances.*"

The same point was made by Diplock LJ in *Garthwaite v Garthwaite* [1964] P.356 at 387, citing with approval Pickford LJ's remarks (see also *Edge v Pensions Ombudsman* [2000] Ch.602 at 642/3 and *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47; [2006] 3 WLR 699, 718-719, paras.66 to 68 to the same effect). The references to jurisdiction made both by the Vice-Chancellor and by the deputy judge (see paras.3 and 4 above) read as though they had in mind jurisdiction in the strict sense. If they did, then I think they were

wrong. It seems to me clear that Park J had jurisdiction, in the strict sense, to grant an injunction against Mr Le Roux and Fintrade. Both were within the territorial jurisdiction of the court at the time the freezing order was made. Both were, shortly after the freezing order had been made, served with an originating summons in which relief in the form of the freezing order was sought. There is no challenge to the propriety or the efficacy of the service on them. The power of a judge sitting in the High Court to grant an injunction against a party to proceedings properly served is confirmed by, but does not derive from, section 37 of the Supreme Court Act 1981 and its statutory predecessors. It derives from the pre Judicature Act 1873 powers of the Chancery courts, and other courts, to grant injunctions (see s.16 of the 1873 Act and s.19(2)(b) of the 1981 Act). The issue is, in my opinion, not whether Park J had jurisdiction, in the strict sense, to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it. This question does not in the least involve a review of the area of discretion available to any judge who is asked to grant injunctive relief. It involves an examination of the restrictions and limitations which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the injunctive relief in question can properly be granted. The various matters taken into account by the deputy judge and the Vice-Chancellor respectively in holding that Park J had no jurisdiction to make the freezing order were really, in my respectful opinion, their reasons for concluding that, in the circumstances as they stood when the matter was before him, it had not been proper for Park J to have made the order. That, in my opinion, is the real issue.

26. The line of authority on the power of the court to grant an injunction under section 37 of the 1981 Act, starting from *The Siskina* [1979] AC 210 and ending with *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, to which your Lordships have been referred by both sides on this appeal, needs, in my opinion, to be examined bearing in mind the ambiguity attendant upon references to the jurisdiction of the court to which Pickford LJ had referred. *The Siskina* is a very well known case and it is unnecessary for me to describe in any detail how the issue about the court's power to grant an injunction arose. Put briefly, a *Mareva* type injunction was sought against a Panamanian ship-owning company to restrain it from disposing of a fund, consisting of insurance proceeds, in England. The claimant for the injunction was suing the company in a Cyprus court for damages and believed the company to have no other assets from which to meet the hoped-for damages award than the fund in England. No proprietary claim was, or could have been, made by the claimant to the fund. The issue in the case was whether the "long-arm" jurisdiction of the court under R.S.C. Order 11 rule 1 could be invoked. If it could not be invoked, the proceedings claiming the injunction could not properly have been served on the Panamanian company. The claimant relied on sub-rule (i) which permitted the service of proceedings on a defendant out of the jurisdiction if a claim were made for "an injunction ordering the defendant to do or refrain from doing anything within the jurisdiction ...". The leading judgment, when the case came to this House, was given by Lord Diplock. He referred to section 45(1) of the Judicature Act 1925 (the predecessor of section 37(1) of the 1981 Act) and said at 254: "That sub-section, speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. This factor has been present in all previous cases in which *Mareva* injunctions have been granted it is not present in this."

Lord Diplock went on (at 256) to say of Order 11 rule 1(i) that the words used in the sub-rule were "terms of legal art" and that the reference to "an injunction" "presupposes the existence of a cause of action on which to found the 'action'". He continued

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction"

and concluded that "To come within the sub-rule the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment for an injunction."

The effect of this, concurred in by the other members of the Appellate Committee, was that the case could not be brought with Order 11 rule 1(i) and service of the writ on the Panamanian company had to be set aside. At which point there was, unarguably, an absence of any jurisdiction, in the strict sense, to grant any injunction against the company.

27. *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 and *British Airways Board v Laker Airways Ltd* [1985] AC 58 both involved claims for anti-suit injunctions. In *Castanho* Lord Scarman referred to what Lord Diplock had said in *The Siskina* at 256 and commented at 573: "No doubt, in practice, most cases fall within one or other of these two classes. But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the Court, where it is appropriate to avoid injustice."

His remarks were concurred in by the other members of the Appellate Committee, who included Lord Diplock. In *British Airways Board v Laker Airways Ltd*, where considerable reliance was placed by the unsuccessful respondents on Lord Scarman's dictum in *Castanho*, cited above, Lord Diplock, at 81, referred to what he had said in *The Siskina* at 256 but agreed that the "statement of principle in the stark terms in which [he] expressed it in *The Siskina*" needed to be qualified by what Lord Scarman had said in *Castanho*. And Lord Scarman, in the *British Airways* case at 95, emphasised that his remark in *Castanho* about an injunction being an available remedy "against a party properly before the court, where it is appropriate to avoid injustice" stated "an approach and a principle which are of general application". It is to be noted that in *The Siskina* the Panamanian company had not been "a party properly before the court".

28. In *South Carolina Insurance Co. v Assurantie NV* [1987] 1 AC 24, another anti-suit injunction case, Lord Brandon of Oakbrook referred to section 37 of the 1981 Act and to the three cases in this House to which I have just referred and continued at 40: "The effect of these authorities, so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable."

But Lord Goff of Chieveley, while agreeing with Lord Brandon's conclusion, expressed a reservation (with which Lord Mackay of Clashfern associated himself). Lord Goff said this, at 44: "I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available."

29. And, finally, in the *Channel Tunnel case* [1993] AC 334, the House rejected the proposition that an English court can never grant an interlocutory injunction where the cause of action is being litigated in arbitration proceedings abroad (see Lord Mustill at 361/362). Lord Browne-Wilkinson, at 342, said this: "Although the respondents have been validly served (i.e., there is jurisdiction in the court) and there is an alleged invasion of the appellants' contractual rights (i.e., there is a cause of action in English law), since the final relief (if any) will be granted by the arbitrators and not by the English court, the English court, it is said, has no power to grant the interlocutory injunction. In my judgment that submission is not well founded."

And, at 343, he concluded that "... the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body."

30. My Lords, these authorities show, in my opinion, that, provided the court has *in personam* jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it. The practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since *The Siskina* was decided and is unrecognisable from the practice to which Cotton LJ was referring in *North London Railway Co v The Great Northern Railway Co* (1883) 11 QBD 30 at 39-40 and to which Lord Diplock referred in *The Siskina* at 256. Mareva injunctions could not have been developed and become established if Cotton LJ's proposition still held good. In *The Siskina* the jurisdiction of the court over the defendant depended upon the ability of the plaintiff to obtain leave to serve the defendant out of the jurisdiction. Once the leave that had been granted had been set aside there was no jurisdictional basis on which the grant of the injunction could be sustained. On the other hand, if the leave had been upheld, or if the defendant had submitted to the jurisdiction, it would still have been open to the defendant to argue that the grant of a Mareva injunction in aid of the foreign proceedings in Cyprus was impermissible, not on strict jurisdictional grounds, but because such injunctions should not be granted otherwise than as ancillary to substantive proceedings in England. In 1977 Mareva injunctions were in their infancy and the House might well have agreed (c/f *Mercedes Benz AG v Leiduck* [1996] AC 284).
31. Whatever might have been the impact if that point had been raised in 1977 it would, today, fail. The effect of section 25 of the Civil Jurisdiction and Judgments Act 1982, as extended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, is to enable the High Court "to grant interim relief" in relation to "proceedings" that have been or are about to be commenced in a foreign state, for example, South Africa. The consequence of this, in relation to the present case, is in my opinion to settle the question of jurisdiction, in its strict sense. Whether the interlocutory freezing order made by Park J was to protect the ability of Mr Fourie, or HEE, to recover money awards they might succeed in obtaining in proceedings in England, or to recover money awards they might succeed in recovering in proceedings in South Africa, there was, in my opinion, jurisdiction, in the strict sense, for the order to be made.
32. In paragraph 38 of his judgment in the Court of Appeal the Vice-Chancellor referred to the need for there to be an "activation of the jurisdiction [to make the freezing order] whether by the issue of substantive proceedings in England or an undertaking to do so." I would agree that, without the issue of substantive proceedings or an undertaking to do so, the propriety of the grant of an interlocutory injunction would be difficult to defend. An interlocutory injunction, like any other interim order, is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief. But it is not in dispute that in suitable circumstances a freezing order may be, and often is, granted and served on the respondent before substantive

proceedings have been instituted. Such an order is not a nullity. It is of immediate effect. If proceedings for substantive relief are not instituted, the freezing order may lapse in accordance with its own terms or, on an application by the respondent, may be discharged. But none of this indicates that the court had no jurisdiction to make the order. No "activation" of the jurisdiction is needed.

33. Whenever an interlocutory injunction is applied for, the judge, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The interlocutory injunction in aid of the substantive relief should not place a greater burden on the respondent than is necessary. The yardstick in section 37(1) of the 1981 Act, "just and convenient", must be applied having regard to the interests not only of the claimant but also of the defendant. This is particularly so in the case of freezing orders applied for without notice. Assets of the defendant to which the claimant has no proprietary claim whatever are to be frozen so as to constitute a source from which the claimant can hope to satisfy the money judgment that, in the substantive proceedings, he hopes to obtain. The frozen assets are removed for the time being from any beneficial use by their owner, the defendant. This is a draconian remedy and the strict rules relating to full disclosure by the claimant are a recognition of the nature of the remedy and its potential for causing injustice to the defendant.
34. In *Memory Corporation Plc v Sidhu (No.2)* [2000] 1 WLR 1443 Mummery LJ referred at 1460 to the "... high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case."
- He went on to say this: "It is the particular duty of the advocate to see that the correct legal procedures and forms are used; ...; and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed."
35. In the present case no claim for substantive relief was formulated and shown to Park J, nor for that matter to Judge Norris QC, nor to deputy judge Jarvis QC until the afternoon of 30 September 2004. I find it very difficult to visualise a case where the grant of a freezing order, made without notice, could be said to be properly made in the absence of any formulation of the case for substantive relief that the applicant for the order intended to institute. It has to be inferred that, at the time of the application to Park J, Mr Fourie's counsel were unclear whether the substantive proceedings would be proceedings in South Africa or in England and, in either case, unclear what the cause or causes of action would be. But at the least a draft claim form could have been prepared claiming an inquiry as to what Mr Le Roux and Fintrade had done with the assets they had seized under the Germiston order and for the return of those assets or damages for their conversion. It seems to me significant that, when the freezing order was discharged in the morning of 30 September 2004, an adequate claim form was produced by that afternoon.
36. In my opinion, in the circumstances as they stood before Park J, the protection for the defendant that ought to be associated with the grant of a without notice freezing order was absent. The protection ought to include directions about the institution of proceedings for substantive relief. Here there were none. In the circumstances a challenge to the propriety of the making of the order was entitled to succeed, and to succeed for much the same reasons as were relied on by the deputy judge and the Vice-Chancellor for their conclusion that Park J had lacked jurisdiction to make the order. I disagree with that conclusion but am in respectful agreement with them about the deficiencies in the case for the freezing order that had been laid before Park J.
37. I am, nonetheless, uneasy about the discharge by the deputy judge of the freezing order. It may be that he did not know when he announced his decision on the discharge application that he would, an hour or so later, be dealing with an application for a renewed freezing order fortified by a draft claim form. If he did know that, I think it would have been sensible to postpone his conclusion on the discharge application until he had heard the renewed application. It is often said that nature does nothing in vain and I think that courts of equity should follow suit. But, since the deputy judge, when he discharged the freezing order, may not have realised that he was likely in a short time to grant another, I will quell my doubts and concur in the dismissal of Mr Fourie's appeal against the discharge.

Indemnity costs

38. There is, in the Record, a very short Note of the deputy judge's decision to award indemnity costs against Mr Fourie. Mr Isaacs QC is recorded as having relied on three matters:

- "1. the English claims were not thought out;
2. non-compliance with the practice direction [concerning issue of a claim form];
3. failure to comply with warning of Mummery LJ in the Memory case"

The Note then records the judge as saying "... It seems to me that when [a freezing] order is granted on a wrong basis which could have been avoided ... indemnity costs"

The Vice-Chancellor, dismissing Mr Fourie's appeal, explained his decision by saying this: "The question is not whether I would have made the same order as Mr Jarvis did, but whether he erred in principle in the exercise of his discretion. I see no error in principle. The judge plainly had all material facts in mind and those facts justified the conclusions he reached."

39. My Lords, I think it needs to be understood that the difference between costs at the standard rate and costs on an indemnity basis is, according to the language of the relevant rules, not very great. According to CPR 44.5(1), where costs are assessed on the standard basis the payee can expect to recover costs "proportionately and reasonably incurred" or "proportionate and reasonable in amount"; and where costs are assessed on the indemnity basis the payee can expect to recover all his costs except those that were "unreasonably incurred" or were "unreasonable in amount". It is difficult to see much difference between the two sets of criteria, save that where an indemnity basis has been ordered the onus must lie on the payer to show any unreasonableness. The criterion of proportionality, which applies only to standard basis costs, seems to me to add very little to the reasonableness criterion. The concept of costs that were unreasonably but proportionately incurred or are unreasonable but proportionate in amount, or vice versa, is one that I find difficult to comprehend.
40. For my part I find it difficult to identify why the procedural deficiencies of the application for the freezing order before Park J should have warranted an indemnity costs order against the applicant. However CPR 43 and 44 are a product of Lord Woolf's civil justice reforms, one object of which was to produce greater flexibility in awards of costs. It was, I believe, contemplated that greater use would be made of the discretion to award costs on an indemnity basis than had previously been the practice. Costs awards, as with most matters of practice and procedure, are primarily the responsibility of first instance judges with the Court of Appeal available to correct obvious errors. In the present case the Court of Appeal has affirmed the deputy judge's award on the ground that no error of principle could be discerned. I do not think your Lordships should interfere. I would dismiss the appeal on this point too.

The directions regarding the cross-undertaking

41. There was no appeal directed to the deputy judge's directions for the immediate enforcement of Mr Fourie's cross-undertaking in damages but they seem to me so plainly wrong in principle that I do not think your Lordships should let them stand.
42. The cross-undertaking was expressed in these terms: "If the court later finds that this order has caused loss to [a] Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make."

The gravamen of Mr Fourie's complaint against Mr Le Roux and Fintrade, namely, that each had taken part in fraudulently stripping HEE of its assets, had been made clear to Park J and, later, to the deputy judge. The deputy judge knew, therefore, that there were substantial claims that Mr Fourie, or HEE, had against Mr Le Roux and Fintrade, and that the claims were at least reasonably arguable. To the extent that the Park J freezing order did no more than prevent them from disposing of or dealing with assets, or the proceeds of assets, that they had fraudulently obtained from HEE, or from dealing with a sum of money representing the amount of damages payable by them on account of the fraud, it seems to me very highly questionable whether it can be right that they should be enabled to obtain compensation for loss caused to them by being so prevented. In a case of this sort it seems to me that a decision as to what, if anything, should be paid to Mr Le Roux and Fintrade for loss caused to them by the freezing order over the period 12 July 2004 to 30 September 2004 should not be taken until the result of the litigation is known. To take the decision at the stage the deputy judge took it was, in my opinion, in the circumstances of this case, wrong in principle. I think the directions for the immediate enforcement of the cross-undertaking should be set aside.

Conclusion

43. In summary, I would dismiss Mr Fourie's appeal so far as the discharge of the Park J freezing order and the award of indemnity costs are concerned, but I would set aside the deputy judge's directions, in paragraphs 4 to 9 (inclusive) of his order of 30 September 2004, for the enforcement of the cross-undertaking.

LORD RODGER OF EARLSFERRY : My Lords,

44. I have had the advantage of considering the speech of my noble and learned friend, Lord Scott of Foscote, in draft. For the reasons which he gives I too would dismiss the appeal and make the order which he proposes.
45. I should wish to associate myself, in particular, with the remarks of my noble and learned friend, Lord Bingham of Cornhill, about the desirability of not weakening the safeguards which have been developed to protect defendants against possible misuse of *Mareva* injunctions or freezing orders. Here, as Lord Scott shows, it is all too clear that, at the time when he made the application to Park J, the claimant had neither brought proceedings nor worked out what proceedings he was going to bring to which the freezing order would be relevant. That being so, one of the important safeguards was missing and so, even if he had the power to do so, the judge ought not to have granted the order at that stage. It was accordingly right for the deputy judge to discharge it - even though, shortly afterwards, when a claim form was produced and the claimant undertook to issue and serve particulars of claim within 7 days, he himself made a freezing order which differed only in the amount of the protection.
46. Whatever the exact scale of the difference may be in any particular case, an order for indemnity costs does, and is intended to, weigh more heavily on the party against which it is made than an order for costs on the standard basis. I share the doubts expressed by others as to whether the order for costs on this higher scale was appropriate in the present case, but I too have reluctantly come to the view that it is not a matter with which the House can properly interfere.

LORD CARSWELL : My Lords,

47. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Scott of Foscote, with which I agree, and for the reasons he has given I would make the order which he proposes.
48. I share his unease about the strangeness of the position, where the deputy judge discharged the freezing injunction made by Park J and continued by Judge Norris, then within a matter of hours made another order of like nature substituting a different sum as the limit of protection. There is a considerable air of artificiality about an appeal which centres round the correctness of the deputy judge's action in discharging the earlier order. That unreality is not decreased by the fact, as Lord Scott has clearly demonstrated, that the decision of the deputy judge and that of the Court of Appeal which upheld it were based on a flawed approach to the issue of the propriety of the injunction granted by Park J. I was during the hearing before the House attracted to the view that it would be desirable, in order to avoid injustice, to decline to apply the rule in *The Siskina* rigidly and to allow the appeal. I am persuaded by your Lordships, however, of the importance of maintaining the safeguards to defendants provided by the network of rules which the courts have developed in granting *Mareva* injunctions. I therefore must agree that, notwithstanding my reservations, the freezing order was wrongly made by Park J on 9 July 2004 and that it was proper to discharge it.
49. I also have reservations about the propriety of making an award of indemnity costs against the appellant. I find it hard to see any sustainable ground on which such an order should be made, which traditionally was restricted to marking the court's serious displeasure at the way in which the losing party has behaved or his case has been conducted : see Cook on Costs 2006, para 11.48. As Lord Scott indicates in paragraph 40 of his opinion, however, indemnity costs now tend to be awarded in a broader range of cases : see, e.g., *Reid Minty v Taylor* [2001] EWCA Civ 1723; [2002] 1 WLR 2800. That said, I still find it difficult to discern any clearly defensible reason in the present case for making the order: if a party commences proceedings on a mistaken basis, an award of standard costs is ordinarily sufficient sanction. I agree with Lord Scott, however, that this is peculiarly an area in which the principles should be developed and applied by the judges at first instance, with the oversight of the Court of Appeal, and that the House should not reverse a costs order without a strong reason in principle.

Appellants: Leon Kuschke; Sam Neaman; (Instructed by CMS Cameron McKenna LLP)

Respondents: Stuart Isaacs QC; Tom Smith; (Instructed by Rawlinson Butler LLP)