

CASE AND COMMENT

The address for the submission of material for this section is given at the beginning of this issue

CAUSE OF ACTION FIRST; FREEZING INJUNCTION AFTER

Fourie and others v le Roux and others
[2007] UKHL 1

(House of Lords)

(Lord Bingham of Cornhill; Lord Hope of Craighead; Lord Scott of Foscote;
Lord Rodger of Earlsferry; Lord Carswell)

In *Fourie v le Roux*, the House of Lords has given the freezing injunction one of its infrequent dustings, before firmly placing it back on the shelf marked “interim remedy: for use in contentious cases only”. This reinforces, as we will see, the place of the freezing injunction within the combined ambit of two potential conceptual approaches: as necessarily tied to a conventional cause of action in tort, contract or under statute (“the substantive approach”) and as a procedural technique (“the procedural approach”) rather than as aligned to the recovery and securing of assets (“the purposive approach”). The additional issue as to the award of indemnity costs on discharge of the injunction is not within the scope of the present piece.

FACTS

Before reaching the doors of the House of Lords, *Fourie* travelled a tortuous path, not all of which has been reported, and involving some excursions to the Court of Appeal still listed by Casetrack as part heard or awaiting reserved judgments. I seek here to unravel and simplify to some extent, so as to extract the points that are actually of precedent value to those involved in the complex world of the freezing injunction.

The starting point, then, is a South African manufacturer of car wheels: Herlan Edmunds Engineering Pty Ltd (“HEE”), which, together with its parent company (Herlan Edmunds Investment Holdings Limited (“HEI”)), went into liquidation in South Africa in 2004. Mr *Fourie*, and, later, Mr Muthanyl and Ms Appel were appointed as provisional liquidators¹ of both companies with, of course, the objective of gathering in as much of the assets of both companies as possible on behalf of their creditors.

¹ The South African Companies Act 1973, section 368 allows the master to appoint a provisional liquidator at the time of making a winding up order until a final liquidator is appointed. This provision is, except that in England and Wales a provisional liquidator may be appointed prior to the making of the winding up order, equivalent to Companies Act 1985, section 532 (not repealed by Companies Act 2006).

In this they were frustrated by the activities of Mr Le Roux and his associates. Mr Le Roux owned the majority of the shares in HEI and was a former director of both HEE and HEI. He was alleged to control a number of other companies which featured as respondents in the earlier stages of the English litigation, of which the most significant (and the only one surviving as respondent to the House of Lords) for current purposes was an English company, Fintrade Investments Ltd (“Fintrade”) of which he owned, directly or beneficially, the whole share capital.²

HEE purchased its car wheel business in 2001, appointing Fintrade as its distributor. HEE was clearly struggling at this point and was placed in provisional liquidation on the application of the company from which it had bought the business, being apparently rescued from that liquidation by a finance agreement, the benefit (including security over HEE’s equipment) of which was subsequently purchased by Mr Le Roux; Mr Le Roux and Fintrade contributing funds to discharge the liquidation. In 2002, Fintrade and HEE entered into a further financing agreement, (also involving security over HEE’s assets being given to a company related to Fintrade). Allegations were made that all these (and another deed of assignment between HEI, HEE and Fintrade), at least in the versions relied on by the respondents, were backdated forgeries. However, in November 2003, relying on the 2001 finance agreement of which Mr Le Roux now held the benefit and the finance agreement in favour of Fintrade, Mr le Roux and Fintrade obtained an order from the South African Magistrates’ Court enforcing the security and attaching the equipment of HEE (“the magistrates’ court order”). In June 2004, however, Mr Fourie was appointed provisional liquidator of HEE and HEI on the application of another creditor of the companies and he then issued an application in the High Court of South Africa naming Mr le Roux and others. That application required the respondents to show cause why the equipment should not be attached, instead, in favour of the liquidator and sought the setting aside of the magistrates’ court order.³ The High Court of South Africa at this point also issued a letter of request to the English courts (“the first letter of request”) asking the English courts to recognise the liquidation proceedings and the position of Mr Fourie as liquidator and to permit him to bring “such legal proceedings in the High Court [in England and Wales] as may be necessary”.⁴ On 12 July 2004, Mr Fourie then obtained a freezing injunction, without notice, from Park J against Mr le Roux and other respondents⁵ (“the first freezing injunction”) in response to the first letter of request. No substantive claim having been issued in South Africa (other than the liquidation proceedings and the magistrates’ court claim) or in this jurisdiction, the first freezing injunction was contingent on the usual undertaking to issue a suitable originating application. An originating application was duly issued in this jurisdiction, but only repeated the claim for a freezing injunction without seeking any substantive relief based on a more conventional cause of action. In July 2004 the South African High Court issued a second letter of request (“the second letter of request”). It appears to have been understood that the South African court had no mechanism to assert jurisdiction over Fintrade or Mr le Roux by, for example, granting permission to serve them out of the jurisdiction.

The originating application was heard by Norris J in late July and continued the first freezing injunction until December, without prejudice to the respondents’ intention,

² Another individual respondent, Mr Vermaak, was dropped from the proceedings at a comparatively early stage.

³ This application was successful on 8 September 2004 although then stayed pending appeal.

⁴ *Re Herlan Edmunds Engineering*, [2004] EWHC 2260 (Ch), *per* Mr J Jarvis QC at [15].

⁵ In July 2004 all but three of the respondents were dropped from the proceedings, leaving Mr le Roux and Fintrade as principal respondents.

expressed at that hearing, to apply for its discharge. This application for discharge came before Mr Jarvis QC as a deputy Chancery Division judge on 30 September 2004. He discharged the first freezing injunction,⁶ awarding indemnity costs against Mr Fourie,⁷ He did, however, grant a fresh freezing injunction (“the second freezing injunction”) against Mr le Roux and Fintrade on a without notice basis that afternoon, again on the understanding that substantive proceedings would be issued. The claim form subsequently issued sought relief under both South African company and insolvency statutes (jurisdiction to deal with which derived from the first letter of request and Insolvency Act 1986, section 426) as well as in respect of economic torts, originally phrased as being subject to English law, although this limitation was later dropped.

The return date for the second freezing injunction, granted in favour of Mr Fourie, his co-liquidators and HEE itself (unlike the first freezing injunction granted in favour of Mr Fourie alone), came before Blackburne J in October 2004.⁸ Rejecting the claims based on South African statute *via* the first letter of request and Insolvency Act 1986, section 426 as a result of the lack of specificity in the letter of request, the second freezing injunction was nevertheless continued on the basis of the non-statutory claims in respect of which a claim form had been issued in London, so vesting jurisdiction in the High Court. Whilst technically a continuation, the order as it emerged from Blackburne J’s court was in favour of HEE alone and in a smaller amount (“the third freezing injunction”) such that the second injunction as then in place was also terminated.

March 2005 saw the involvement of the Court of Appeal⁹ in (a) an appeal against the discharge of the first freezing injunction (since the third freezing injunction was now in place, this was an attempt to dislodge the costs order made on discharge rather than a serious attempt to reinstate the first freezing injunction)¹⁰ and (b) an appeal against the financial limit of the third freezing injunction. Both appeals were dismissed although an adjustment to the costs order was made in respect of the discharge of the first freezing injunction.

The second letter of request, confined to HEE and much more specific than the first, came before Blackburne J in May 2005,¹¹ and jurisdiction to act on the request was confirmed.

The next, and currently final, reported episode – aside from an appeal from the detailed assessment of costs in the Court of Appeal¹² – was the review by the House of Lords of the March 2005 Court of Appeal decision in respect of the first freezing injunction.¹³ On 24 January 2007, the House of Lords dismissed the appeal on the basis that, in the absence of a properly formulated substantive cause of action both (a) in existence at the time and (b) articulated before Park J, the first freezing injunction had not been properly made and (albeit by a four to one majority) that the award of indemnity costs on its discharge had been justifiable.

There, for the moment, the dispute rests.

⁶ [2004] EWHC 2260(Ch).

⁷ [2004] EWHC 3234 (Ch).

⁸ [2004] EWHC 2557 (Ch).

⁹ [2005] EWCA Civ 204.

¹⁰ *Per* Lord Scott in [2007] UKHL 1 at p 329.

¹¹ [2005] EWHC 922 (Ch).

¹² [2006] EWHC 1840 (Ch).

¹³ [2007] UKHL 1.

ISSUES ARISING

Whilst reading of the saga involves issues of insolvency law and procedure and of the availability of freezing injunctions in this jurisdiction in aid of foreign courts, as well as the principles underlying the award of indemnity costs; the underlying theme, and, of course, the main submission to survive to the House of Lords, was that seeking validation of what I have described as the substantive approach, which, it is only fair to say, has been the historical approach. A freezing injunction (previously a *Mareva*¹⁴ order), whose purpose is conventionally expressed as being to secure assets in the hands of the respondent or sometimes in the hands of third parties, in anticipation of a monetary award or in aid of enforcement of a judgment; is an interim procedural remedy listed in Civil Procedure Rules 1998¹⁵ (“CPR”) r 25.1 which describes the courts of England and Wales as being empowered to grant:¹⁶

- (f) an order (referred to as a “freezing injunction”) –
 - (i) restraining a party from removing from the jurisdiction assets located there; or
 - (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;
- (g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction;

Interim remedies are not, then, intended to be self-standing or an end in themselves but to exist only as an adjunct to and in aid of some substantive claim. The question for discussion by the House of Lords in *Fourie v le Roux* was, if that substantive approach remained the basis of the jurisdiction, to identify the nature of that substantive claim (which I will refer to as the “foundation” for the grant of the freezing injunction) as it might exist at the time of the application to Park J. However, during the course of its route to the House of Lords, a number of other possible foundations came, as we will see, under discussion. A further layer of complexity is added by the need to formulate an appropriate procedural approach: when and how should the foundation be identified and in what kind of proceedings?

The conventional foundation: a cause of action (justiciable in England and Wales)

The archetypal situation in which a freezing injunction is obtained is, of course, that in which the substantive claim is based in contract, tort or statute and the substantive relief sought is monetary: damages; debt or perhaps the taking of an account. The fact that substantive proceedings have not yet been issued on the basis of that cause of action and seeking that relief is not fatal to the application for the injunction and, indeed, CPR Part 25 and in particular PD 25a and its standard form order proceed on the basis that an injunction can be granted on the basis of an undertaking to issue such a claim. Both the first and second freezing injunctions in *Fourie v le Roux* were granted on the basis of such undertakings and resulted, in the former case, in the issue of an originating application which merely repeated the claim for a freezing injunction; but in the second case a claim form reciting a more detailed repertoire of claims. Equally clearly and at the opposite end of the spectrum, the freezing injunction can be granted in aid of execution: following the formal merger of the initial cause of action with the judgment debt.¹⁷

¹⁴ *Mareva Companiera Naviera SA v International Bulk Carriers SA*, [1980] 1 All ER 213, CA.

¹⁵ S I 1998/3132 as subsequently and substantially amended.

¹⁶ The power to grant injunctions specifically appears in Supreme Court Act 1981, s 37.

¹⁷ Even if the judgment is yet to be quantified. A freezing injunction may also be made in aid of the enforcement of an order for costs: *Jet West v Haddican*, [1992] 2 All ER 545, CA.

Nevertheless, there are a number of riders even to this principle which bear discussion. First, where a cause of action exists, if it is no more than speculative, it may not be appropriate to grant the injunction prior to formal establishment of liability;¹⁸ indeed, the strength of the underlying cause of action is a factor in the exercise of the equitable discretion to make the order in the first place. Second, where there is a cause of action against one co-defendant, a freezing injunction may sometimes be granted against other co-defendants against whom there is not, technically, a cause of action:¹⁹ a rare example of the freezing injunction as pure procedural technique detached from the substantive foundation.

A dictum of Lord Diplock in *The Siskina* is generally relied on in support of the principles governing the relationship between interim injunctions and their foundation in a cause of action:

A right to obtain an interlocutory injunction is not a cause of action. 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.²⁰

The reference here to a “threatened” invasion of the applicant’s rights permits the anticipatory or *quia timet* interim injunction designed actually to prevent the wrong being committed or completed (*ie* the cause of action actually arising) pending resolution of the issues in dispute between the parties (as, for example, an injunction prohibiting publication of allegedly libellous material or the commission of an alleged nuisance). In such cases there is, indeed, generally found to be a requirement in the *American Cyanamid*²¹ criteria for grant of such interim injunctions that monetary compensation should not be a sufficient remedy. The freezing injunction is, of course found in precisely the opposite case: where damages *will* be an adequate remedy provided assets from which to pay such damages can be secured. It is that conceptual difference that underlies the fact that it is established, despite indications to the contrary in the early stages of the development of the jurisdiction,²² that a freezing injunction will not be granted contingently on the coming into existence of a cause of action at soemsome point in the future.²³ The focus not only on a (substantive) cause of action but in addition, on the monetary nature of the (procedural) remedy sought is also significant: it has been held that a freezing injunction is not appropriate

¹⁸ *Polly Peck International plc v Nadir*, [1992] 4 All ER 769, CA.

¹⁹ See *TSB Private Bank International SA v Chabra*, [1992] 1 WLR 231, Ch D; *Yukong Line Ltd v Rendsberg Investments Corporation and others* [2001] 2 Ll Rep 113, CA.

²⁰ [1979] AC 210, at p 256.

²¹ *American Cyanamid Co v Ethicon Ltd*, [1975] AC 396, HL.

²² See *A v B* [1989] 2 Ll Rep 423, QBD in which a conditional order was made to take effect as soon as the cause of action arose.

²³ *Veracruz Transportation v VC Shipping Co Inc* [1992] 1 Ll Rep 353, CA; *The P*, [1992] 1 Ll Rep 470, QBD; *Zucker v Tyndall Holdings plc* [1992] 1 WLR 1127, CA; *Rowland v Gulfpac Ltd (No 1)* [1999] Lloyd’s Rep Bank 86, QBD.

In *re Q’s Estate*, [1999] 1 Ll Rep 931, QBD, however, whilst it was accepted that a freezing injunction could not be granted before a cause of action arose, Rix J was prepared to indicate at a preliminary hearing that as soon as the cause of action did arise, the injunction could be granted. He also reinforced a distinction he had been prepared to consider in *Gulfpac*, that: “[i]n my judgment none of the line of cases ending in *Zucker v Tyndall Holdings plc* was concerned with equitable rights. In law it is clear on present authority that there must be a pre-existing cause of action in law, although the position may be said not to be fully worked out, perhaps, where there is a repudiatory breach. In equity, however, the position is more fluid and it is also clear that there is a line of authority that equity will lend a hand, in advance of the appropriate time at law, to prevent injustice where the right is clear and the danger is clear, too”. Given the firmness of the line taken by the House of Lords in *Fourie v Le Roux*, it is unlikely that such a distinction would be successful, if now argued.

See also L Collins, “The Legacy of the *Siskina*” (1992) 108(APR) LQR 175–181; “FM”, “Mareva Injunctions – the Limits of Pre-emptive Strikes” (1993) 12(APR) CJQ 146–150.

where the substantive claim is not for a monetary remedy but only for a declaration;²⁴ *contra* a conventional, interim injunction.²⁵

The first freezing injunction in *Fourie v Le Roux* failed for the lack of clear identification before Park J of an extant (substantive) cause of action in respect of which monetary relief was being sought (procedural). Mr Jarvis QC had regarded this point as not a mere “procedural irregularity” which could be cured by the identification of causes of action and issue of proceedings some two and a half months later, but as “going to the root of the jurisdiction”²⁶ to grant the order in the first place. The substantive and procedural were, hence, intertwined.

Before the Court of Appeal, however, counsel for the applicants sought to distinguish between the existence of causes of action (substantive) and the existence of, or intention to issue, proceedings in respect of such a cause of action (procedural). Appropriate causes of action, it was argued, must have existed in order to allow Mr Jarvis QC to grant the *second* freezing injunction and there was no suggestion that these had only come into existence in the hiatus between 9 July 2004 and 30 September 2004. Counsel for the respondents countered that no causes of action under English law had been identified before Park J and suggested that “jurisdiction to make an interim order depends on its activation by the commencement of substantive proceedings or an undertaking so to do”.²⁷ The latter view was preferred; there having been no “activation of the jurisdiction whether by the issue of substantive proceedings in England or by an undertaking to do so”.²⁸ Consequently the matter was conceived of as both substantive (existence of a cause of action) and procedural (issue of proceedings or an undertaking to do so), with the procedural requirement of issue definitively determining the jurisdiction. The standard form of freezing injunction annexed to PD 25 does, of course, contain such an undertaking:

[a]s soon as practicable the Applicant will issue and serve a claim form [in the form of the draft produced to the court] [claiming the appropriate relief] .²⁹

Assuming the first freezing injunction was granted in this format or something close to it, there was, then, such an undertaking in procedural form. The procedural problem was in fact that the originating application issued in England and Wales following the grant of the first freezing injunction sought only a freezing injunction and no relief based on a substantive cause of action sufficient retrospectively to “activate”, in the words of the Court of Appeal, the jurisdiction to grant the interim order. This may have been because it was thought that, as a result of either or both the statutory provisions discussed further below, the substantive relief to which the first freezing injunction attached was to be adjudicated in South Africa rather than in England and Wales and that therefore the only relief in respect of which any form of domestic proceedings could be issued was the freezing injunction itself but that *something* had to be issued in this jurisdiction. There seems little reason to issue an originating application in, presumably, the same terms as the application for interim relief otherwise than to comply with what had been interpreted as a “merely” procedural requirement. Clearly, the cross border statutory provisions, such as Civil Jurisdiction and Judgments Act 1982, section 25, are predicated on the basis that the foundation

²⁴ *Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co.* [1986] 2 Ll Rep 439 (note), CA; *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Ll Rep 428, QBD.

²⁵ *Newport Association Football Club Ltd v Football Association of Wales Ltd* [1995] 2 All ER 87, Ch D.

²⁶ *Op cit* at [60].

²⁷ *Op cit* at [37].

²⁸ *Op cit per* Mance V-C at [38].

²⁹ in Schedule B at paragraph (3).

cause of action *is* being adjudicated elsewhere (in which case there would be no purpose in issuing a duplicate claim for substantive relief in this jurisdiction) but what can be inferred from the views both of Mr Jarvis QC and the Court of Appeal is that the real problem was that it was unclear, at least until the afternoon of 30 September, to what the freezing injunction was intended to be an adjunct; in whom such a claim might vest³⁰ against whom and in what jurisdiction it would be sought: a problem of the substantive approach. However, merely undertaking in the terms of the standard order to “issue and serve a claim form . . . claiming the appropriate relief” does not of itself require the *nature* of the substantive claim to be identified; recognition of this being, I suggest, inherent in the Court of Appeal’s insistence, as the definitive act, on the *subsequent* issue of proceedings. Frequently, of course, a draft claim form can be made available to the court at the initial hearing, but there is no absolute requirement in the CPR that it should be. A jurisdiction validated only retrospectively, is, of course, far from ideal.

What is odd about this latter-day emphasis on the identification of a cause of action is, of course, that the *strength* of the applicant’s case on the foundation cause of action has generally been stated to be one of the factors in the exercise of the discretion to grant a freezing injunction in the first place; irrespective of the presence or otherwise of a draft claim form and irrespective of any proceedings subsequently issued. So the cause of action should necessarily be discussed as part of the oral application in any event: an easier route to the same result. The threshold was placed by Mustill J (as he then was) in 1984, following discussion of the authorities, as

a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success.³¹

If that threshold is not made out in argument on the initial application then no formal undertaking to issue proceedings (proceedings perhaps doomed to failure or immediate strike out under CPR r 3.4) will cure the situation. Any application made without identifying a cause of action should therefore fail on the grounds that sufficient strength in the underlying cause of action has not been demonstrated, whether a claim form has been issued or not.³² What issuing proceedings should achieve is focus: *committing* the applicant to the cause or causes of action initially relied on; and that focus is equally desirable whether the freezing injunction is granted in aid of a claim that is justiciable in England and Wales or, by statute, in aid of foreign judicial activity. It is this question of focus, tending to give precedence to the procedural aspects, however, rather than the *strength* of the foundation cause of action that concerned the House of Lords in confirming that the failure to identify a cause of action before Park J was fatal to the first freezing injunction. So, Lord Bingham allowed the procedural in effect to define the substantive:

[t]he 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.³³

³⁰ The first freezing injunction being granted in the names of the liquidators only, HEE’s non-participation being regarded in the Court of Appeal as also being fatal to the first freezing injunction.

³¹ *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG*, [1984] 1 All ER 398 at p 404. This formulation was confirmed by the Court of Appeal.

³² See Capper, D, “Asset Freezing Orders – Failure to state the cause of action”, (2007) 26(APR) CJQ 181–184 at 183: “[e]vidence can be overlooked in the emergency situations that asset freezing orders are sought in, but an applicant that is not in a position to tell the court what cause of action it needs the asset freezing order to protect is guilty of egregious abuse of process”.

Lord Scott found it unhelpful to formulate the problem as one of “jurisdiction” – the court patently having some jurisdiction over Mr le Roux and Fintrade who were within the country at the time the order was made – but whether, having technical *in personam* jurisdiction over the respondents, Park J’s discretion had been properly exercised. In the complex circumstances surrounding the *Fourie v le Roux* litigation, some imagination could have, it was suggested, been applied to generate a substantive claim justiciable in England and Wales:

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 [magistrate’s court order] and to 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.³⁴

Both Lords Bingham and Rodger signalled the importance of the identification of a (substantive) cause of action as part of the safeguards for the respondent. This is clearly right, at least in the normal case, although the emphasis on the status of the (domestic) proceedings related to that cause of action contains the potential for confusion in cross-border cases where the cause of action will, necessarily, be litigated elsewhere. The House of Lords did, however, reject the notion adopted by the Court of Appeal of a retrospective “activation” of the jurisdiction to grant the order taking place on the subsequent issue of substantive proceedings. Without referring specifically to the conventional formulation of the criteria for the granting of the injunction (including reference to the strength of the underlying cause of action) the House of Lords related the question of substantive relief to the question of the discretion, rather than jurisdiction.

The House of Lords has, then, brought the question at least of the existence (although not necessarily the strength) of the underlying cause of action back into the foreground, albeit in terms that continue to place emphasis on the issue of formal proceedings. As the strength of the underlying cause of action has always been and remains one of the criteria for the grant of the injunction in the first place the decision of the House of Lords, in fact, once one strips away this emphasis on issue of a claim form, creates, I suggest, no new law, but reminds us of what has always in fact been the case. Best practice is, then, as it always has been, to attend the without notice hearing armed, in a domestic case, with a draft claim form rather than allowing oneself to be seduced by the breadth of the standard undertaking into thinking that this is something that need only occupy the mind after the event; the discipline of completing the claim form before making the application providing a necessary focus on the freezing injunction as an adjunct to something else. In a foreign case, identifying the foundation for the injunction should lead to discussion whether the undertaking should be phrased in terms of the issue of a domestic procedural claim at all.

Lord Bingham, it will be noted, suggested that the applicant must identify “on what basis he expects to recover judgment against *the defendant*” (my italics) and Lord Scott suggested a claim for an inquiry against both Mr Le Roux and against Fintrade. When

³³ *Op cit* at [3].

³⁴ *Op cit* at [35].

it was suggested to Mr Jarvis QC that the magistrates' court proceedings in South Africa could be sufficient foundation for the freezing injunction, he regarded it as "fatal" that one of the (then) respondents to the first freezing injunction had not been involved in those proceedings (a procedural point). There is, however, precedent for suggesting that, provided a cause of action could be identified against either Mr le Roux or against Fintrade, that would not necessarily preclude the making of an order against other respondents, at least where the additional respondent is or has been formally joined to the proceedings in which the foundation cause of action is asserted; the procedural utility of the ancillary order here outweighing the dictates of the substantive approach. In *TSB Private Bank International SA v Chabra*,³⁵ an order was made against a company joined under RSC Ord 15 r 6(2)(b)(ii) (now CPR r 19.2(2)): the principal respondent being the majority shareholder in that company – because the company might have received assets from the principal respondent; a situation which bears some comparison with that of Mr le Roux and Fintrade.³⁶ In *Mercantile Group (Europe) AG v Aiyela*, a freezing injunction in aid of execution was granted against the defendant's wife (all claims against her having previously been dropped) and confirmed by a Court of Appeal including Bingham MR (as he then was), who said:³⁷

I am very pleased to reach that conclusion, for if jurisdiction did not exist the armoury of powers available to the court to ensure the effective enforcement of its orders would in my view be seriously deficient. That is in itself a ground for inferring the likely existence of such powers, since it would be surprising if the court lacked power to control wilful evasion of its orders by a judgment debtor acting through even innocent third parties. The jurisdiction is of course one to be exercised with caution, restraint and appropriate respect for the legitimate interests of third parties. But that the jurisdiction exists, both in relation to the disclosure order and the *Mareva* injunction, I do not doubt.

Finally, in *Yukong Line Ltd v Rendsburg Investments Corporation*,³⁸ a differently constituted Court of Appeal (the point having been actually conceded by counsel) expressed the view that:

It is now settled law that, although the Court has no jurisdiction to grant an interlocutory *Mareva* injunction in favour of a plaintiff who has no good arguable cause of action against a sole defendant, it has power to grant such an injunction against a co-defendant against whom no direct cause of action lies, provided that the claim for the injunction is ancillary and incidental to the plaintiff's cause of action against that co-defendant.³⁹

Whilst the House of Lords in *Fourie v Le Roux* stressed the importance of a cause of action, and appears to have been contemplating a cause of action against both or all respondents to the freezing injunction, the question of an ancillary order was, of course, not canvassed. Consequently, there is nothing in their Lordships' speeches which necessarily precludes the exercise for the future, I suggest, of the ancillary jurisdiction.

Insofar as attention is centred on the proceedings in which causes of action are asserted, a difficulty appears when the underlying judicial activity in respect of which the freezing injunction is sought is an insolvency proceeding. There are no conventional

³⁵ [1992] 1 WLR 231, Ch D.

³⁶ In *Aiglon Ltd v Gau Shan Co Ltd*, [1993] 1 LI Rep 164, QBD (Comm), Insolvency Act 1986, s 423 was used as a foundation for an "ancillary" order against a company thought (as was Fintrade) to have been involved in an asset-stripping exercise.

³⁷ [1994] QB 366, CA. Applied in *Yukong Line Ltd v Rendsburg Investments Corporation and Others*, [2001] 2 LI Rep 113, CA.

³⁸ [2001] 2 LI Rep 113, CA.

³⁹ *Ibid*, per Potter LJ at [37].

“parties” to a winding up petition; there may be no dispute or contention about what is due,⁴⁰ there are no formal “claims” based on causes of action. Nevertheless, the activities of the liquidators involve the identification and securing of assets: precisely the kind of activity in which, taking a purposive approach, one can see a parallel with the freezing injunction. And in *Fourie v le Roux*, of course, the injunction was sought not only in aid of an insolvency, but a foreign insolvency, when jurisdiction to make the order at all had to be derived from statute.

The mainstream cross-border foundation: Civil Jurisdiction and Judgments Act 1982, section 25

The position in *Fourie v le Roux* is complicated, of course, by the fact that, except for the short period when economic torts under English law were relied on, the principal causes of action that might have been identified as a possible foundation for the first freezing injunction would have been justiciable in South Africa so that the issue of a domestic claim form would be inappropriate in any event (unless the exercise of imagination suggested by Lord Scott identified domestically justiciable claims).

Before Mr Jarvis QC, the applicants sought an entitlement to the first freezing injunction as being in aid of foreign proceedings by virtue of Civil Jurisdiction and Judgments Act 1982, section 25; a provision originally intended as an enactment of the relevant provisions of the Brussels Convention but subsequently extended by the Civil Jurisdiction and Judgments Act (Interim Relief) Order 1997⁴¹ to proceedings in some other jurisdictions. This argument had, however, not been made fully before Park J except by way of passing comment, and was, consequently bound to failure on introduction at this later stage. The argument is, however, worth considering as part of the wider picture of the interplay between the domestic jurisdiction to grant freezing injunctions in aid of domestic proceedings and both (a) cross-border and (b) insolvency jurisdictions.

A freezing injunction is patently susceptible of being granted by virtue of section 25.⁴² A series of criteria for doing so was given by Neuberger J (as he then was) in *Ryan v Friction Dynamics*, noting the need for care in exercise of the jurisdiction because the court would know less about the foreign proceedings than it would in a domestic case but also emphasising the substantive approach, including the relevance of the strength of the underlying cause of action:

Just as when exercising its primary jurisdiction to grant a freezing order, the court should not make such an order under section 25 unless the basic requirements are satisfied, namely that the claimant has a good arguable case and there is a real risk of dissipation.⁴³

Section 25, however, refers not to causes of action but only to “proceedings”, giving precedence to the procedural over or in addition to the substantive. An extant cause of action may yet to be asserted in “proceedings” (as in the domestic situation where the order is granted on the basis of an undertaking to issue proceedings). Judicial

⁴⁰ See, for an example, the Australian decision *re Independent Insurance Company Ltd*, [2005] NSWSC 587, NSW Supreme Court, in which one ground for objection to the making of an injunction in New South Wales in response to a letter of request from the English court in aid of an English liquidation, was the lack of any *lis inter partes*; discussed in Quinlan, M and Norton, E, “Say ‘please’: letters of request in cross-border insolvencies” at <http://www.aar.com.au/pubs/insol/foinsolsep05.htm>, accessed 2 April 2007.

⁴¹ SI 1997/302.

⁴² See *Republic of Haiti v Duvalier*, [1990] 1 QB 202, CA; *Crédit Suisse Fides Trust SA v Cuoghi*, [1998] QB 818, CA; *Ryan v Friction Dynamics Ltd* [2001] CP Rep 75, Ch D; *Motorola Credit Corp v Uzan (No 6)* [2003] EWCA Civ 752, CA; *Eliades v Lewis (No 9)*, [2005] EWHC 2966 (QBD); *Tasarruf Mevduatı Sigorta Fonu (A Firm) v Demirel (Application to Set Aside)*, [2006] EWHC 3354 (Ch).

⁴³ *Op cit* at p 84.

proceedings, of course, may, of course not involve a “cause of action” as conventionally defined, or, even if there is a cause of action, may not involve a dispute (as where, for example, liability is admitted but quantum remains at large). The claim in the foreign court may have been issued against only those defendants in respect of whom that court can assert jurisdiction.⁴⁴

The first case is catered for in the wording of section 25(1), allowing for relief to be granted here where “proceedings have been or are to be commenced . . .”. As to the second case, the use of the word “proceedings” appears to add an explicit filter to the jurisdiction: only causes of action asserted in “proceedings” attract the possibility of relief; or that the assertion of a cause of action is what defines the foreign judicial activity as “proceedings”. In *Haiti v Duvalier*, however, it was said in the Court of Appeal that “[s]ince the enactment of section 25, either a claim for interim relief is itself a cause of action, or there can be proceedings and a claim without a cause of action”.⁴⁵ The (foreign) claim in that case was, however, nevertheless couched in terms of tracing and money judgment claims; *ie* there was a clearly identifiable foreign cause of action even if there was none domestically and this statement is best understood as reading “a domestic cause of action” for “a cause of action”. Neuberger J would appear to have shut off the possibility of the most radical expression of the procedural approach: that provided there are foreign “proceedings”, there is the possibility of relief in the absence of a conventional cause of action, a result consistent with that in *Fourie v le Roux*. Whilst there were clearly allegations of asset stripping and the like against Mr le Roux, they had been raised in South Africa only in support of the application which resulted, *inter alia*, in the first letter of request. The argument raised on behalf of the respondents in *Fourie v le Roux* was, however, that the South African liquidation and judicial activity were not “proceedings” for the purposes of the rule; there being no trial or judgment involved.⁴⁶

Mr Jarvis QC, noting that as a statutory enactment of the Brussels Convention, section 25 was to be construed “in a European way”,⁴⁷ limited the jurisdiction of the English courts in granting a freezing injunction to circumstances in which the claim (*aka* the “proceedings”) would be sufficient to permit an English court to grant a freezing injunction, that is, by defining “proceedings” at least in the case of a freezing injunction, as “the kind of proceedings in which a domestic freezing injunction would be ordered”, where a conventional cause of action can be delineated. An alternative, apparently rather desperate, attempt to rely on the magistrates’ case as “proceedings” also failed as being too narrow to substantiate the much wider freezing injunction now being sought and as not involving Fintrade (which was a respondent to the freezing injunction application); although, as we have seen, provided there is a cause of action against one defendant, freezing injunctions have been made on an ancillary, procedural, basis against third parties.

Discussions about the legislative use of the word “proceedings” have arisen in other contexts. So, for example, in *re Unisoft Group Ltd (No 1)*,⁴⁸ the Court of Appeal was

⁴⁴ In *Crédit Suisse Fides Trust SA v Cuoghi*, [1998] QB 818, CA it was determined that the fact that the foreign court had no jurisdiction over the respondent to the freezing injunction sought did not preclude the making of the order by a court in England and Wales, provided that court had such jurisdiction. This is entirely proper: if the foreign court had jurisdiction over the respondent it could exercise it to grant a similar order and the courts of England and Wales would need to be involved only in its enforcement over assets within the jurisdiction.

⁴⁵ [1990] 1 QB 202, CA *per* Staughton LJ at p 211.

⁴⁶ In reliance on *re International Power Industries NV*, [1985] BCLC 128 where an application was made under Evidence (Proceedings in other Jurisdictions) Act 1975 in aid of a US investigation, the analogy being between the “fact finding” nature of the discovery application and the “asset finding” nature of a liquidation.

⁴⁷ [2004] EWHC 2260 at [39]. One might question, however, the relevance of a “European” interpretation when the section was being invoked in its extended, non-European aspect.

⁴⁸ [1993] BCLC 1292, CA.

invited to consider applications under Companies Act 1985, section 459 (now replaced in Companies Act 2006) – which, similarly, do not result in a trial or a judgment for damages – as being “other proceedings” for the purposes of the then statutory ground for the award of security for costs under Companies Act 1985, section 726,⁴⁹ and held that such an application fell within the ambit of the term. If section 459 is sufficient foundation for security for costs, it might be possible then to suggest by purposive analogy that a freezing injunction is no more than “security for damages”. A section 459 petition has been considered to be sufficient to support a freezing injunction on an apparently more purposive basis:

... a s 459 petition, which is no more in essence a monetary claim than a creditor’s winding up petition, was nonetheless based on a sufficient cause of action to give the court jurisdiction to grant interim relief, including a freezing order.⁵⁰

When the section 25 point was advanced in the Court of Appeal in *Fourie v le Roux*, it was held, and conceded, that the foreign insolvency proceedings were insufficient to raise a jurisdiction to grant a freezing injunction under section 25, less because the South African judicial activity was not “proceedings”⁵¹ but because there was no such jurisdiction in relation to the domestic equivalent, giving primacy to the substantive cause of action:

... the relief which is sought in England must correspond to the relief sought in the foreign proceedings ... interim relief is defined in section 25(7) as being the kind of relief which the English court has power to grant in proceedings related to matters within its jurisdiction. To my mind this serves to emphasise that the foreign proceedings must have a claim, the equivalent of which in England would be sufficient for the English court to accept jurisdiction for granting a freezing order.⁵²

Whilst, in the Court of Appeal, a slightly more generous approach was taken, the focus remained on the underlying cause of action: “... the foreign claim must be such that the relief sought in England can be identified as interim relief in relation to the final order sought abroad in the proceedings relied on”.⁵³

The English courts have, however, granted freezing injunctions by way of interim relief in aid of domestic insolvency proceedings. So, in the first instance decision *Revenue and Customs Commissioners v Egleton*, (judgment delivered on 19 September 2006), where a petitioning creditor who wished to avoid the delay inherent in waiting for liquidators to be appointed sought a freezing injunction, it was commented that:

The reason why freezing orders are not in practice sought or obtained in relation to the assets of companies the subject of creditors’ winding up petitions is probably that statutory provisions such as those invalidating transactions after the presentation and/or advertisement of the petition generally afford appropriate protection to the company’s creditors.⁵⁴

Here, counsel had argued that there was no jurisdiction to grant an injunction against respondents who were (like Mr le Roux) a director and controller of the company to be wound up and (like Fintrade) a company which had had dealings with

⁴⁹ To be repealed by Companies Act 2006.

⁵⁰ *HM Revenue and Customs v Egleton*, [2006] EWHC 2313, per Briggs J at [17] approving *re Premier Electronics GB Ltd* [2002] BCC 911.

⁵¹ Wallace suggests that, in an appropriate case, it may therefore still be open to foreign insolvency practitioners to use s 25 in aid of foreign insolvency in an appropriate case: Wallace, I, “Case Comment – *Fourie v le Roux*”, (2006) 19(1) *Insolv Int*, 12–13 at 13.

⁵² [2005] EWCA Civ 204, per Mance V-C at [42].

⁵³ *Ibid* at [32].

⁵⁴ Per Briggs J, in *Revenue and Customs Commissioners v Egleton*, [2006] EWHC 2313, (Ch) at [21].

the company to be wound up, because, *inter alia*, the petitioning creditor was “pursuing no cause of action for a money judgment for the effective enforcement of which a freezing injunction would preserve a fund”.⁵⁵ Briggs J pointed out that, as was apparently conceded by counsel, if this was right, a disputed debt would permit interim relief to be given because there was a cause of action, before or after judgment; but an undisputed debt, leading directly and only to a creditor’s winding up petition, would not attract the same relief. Not only was the order granted but also made on an ancillary basis against non-parties.

... in my judgment the particular nature of the relief sought by means of the presentation of a creditors’ winding up petition does not disable the petitioner from asserting that it is pursuing a cause of action for the purpose of conferring jurisdiction upon the court to grant appropriate interim relief, whether by way of freezing order or otherwise.⁵⁶

The approach taken by Briggs J is more purposive: the focus being on the nature of the (asset-retrieving) relief sought rather than on whether or not the claim is technically contentious or the precise nature of the linked judicial activity. Nevertheless, whilst Lord Scott in the House of Lords in *Fourie v le Roux* thought that it was clear that there was jurisdiction “in the strict sense” to grant an order under section 25, it was contingent on being “to recover money awards [the applicants] might succeed in recovering in proceedings in South Africa”⁵⁷ that is, contingent on formulation of a cause of action.

*The cross-border insolvency foundation: the letter of request and Insolvency Act 1986, section 426*⁵⁸

The application for the first freezing injunction to Park J had been, however, most explicitly based on Insolvency Act 1986, section 426, permitting “the courts having jurisdiction in relation to insolvency law” in the United Kingdom to assist other courts with similar jurisdiction and, apparently, a draft originating application based on this section had been taken to that hearing. Consequently the jurisdiction here is not terminologically constrained by an additional procedural filter: it is clearly available in aid of insolvency proceedings, albeit not as of right.⁵⁹ The jurisdiction to assist was defined by Morritt LJ in *Hughes and Hannover Ruckversicherungs AG*, an application by Bermudan provisional liquidators for an injunction, as combining

(a) [the English court’s] own general jurisdiction and powers and either (b) the insolvency law of England and Wales as provided for in the Insolvency Act 1986, the specified sections of the Company Director Disqualification Act 1986, and the subordinate legislation made under any of those provisions; or (c) so much of the law of the relevant country as corresponds to that comprised in (b).⁶⁰

⁵⁵ *Ibid.*, at [14].

⁵⁶ *Ibid.*, at [15].

⁵⁷ *Ibid.*, at [31].

⁵⁸ Had the UNCITRAL Model Law been in place, however, whilst art 21.1(g) “Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State” raises the same argument about whether in fact the order would be available in domestic law or in aid of domestic proceedings; art 21.1(c) provides a more explicit basis for a freezing of assets, at least of the insolvent company: “Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20” would have assisted, but only to the extent that the assets frozen in the hands of Mr Le Roux and Fintrade could be said to be the property of HEE.

⁵⁹ The fact that the power is discretionary is emphasised in, for example: *re Focus Insurance Co Ltd*, [1996] BCC 659, Ch D; *re Business City Express Ltd*, [1997] BCC 826, Ch D; *re JN Taylor Finance Pty Ltd*, [1999] BCC 197, Ch D; *re Television Trade Rentals Ltd*, [2002] EWHC 211 (Ch).

⁶⁰ [1997] BCC 921, CA at p 938.

Mr Jarvis QC concluded that only category (a) was relevant to this application, no claims at that stage being made under English statutes or under the South African equivalents. The English court was, therefore, being asked to exercise its own powers in aid of the South African proceedings. This formulation was also rejected, on the ground that, the first letter of request having been phrased in extremely wide terms, that, again,

[s]ection 426 does not enable a foreign insolvency practitioner to come to the English court to claim relief which the English court would not otherwise grant unless he falls within categories (b) and (c) of Morritt LJ's formulation.⁶¹

Nevertheless, Mr Jarvis QC felt it significant that, in his view, there were not (or perhaps were no longer) extant insolvency proceedings in South Africa to which a section 426 order could attach:

... if there are existing foreign insolvency proceedings and the assistance of the English court is required, for example to obtain documents in England, then an originating application based on section 426 will be appropriate. On the other hand, if there are foreign proceedings and a freezing order is sought in aid of those proceedings, then an originating application based on section 25 will be appropriate. I am totally unable to accept Mr Bloch's submission that in some way section 426 gave the court jurisdiction in the circumstances of this case.⁶²

As we have seen, the argument that the court would never grant a freezing injunction in aid of domestic insolvency *per se* seems doubtful.

However, the section 426 point then fell for further consideration by Blackburne J, dealing with the application to continue the second freezing injunction.⁶³ By this time an attempt had been made to identify statutory claims under South African insolvency law as well as non statutory claims for conspiracy and economic torts as a basis for the order, rather than relying on the South African insolvency alone. Here, however, the first letter of request caused a procedural impediment; its terms too generic expressly to confer jurisdiction in respect of the South African statutory claims under section 426.⁶⁴ As to the non-statutory substantive claims, vested more clearly in HEE than in its liquidators, and likely to be governed by South African law in any event, even if heard here (Fintrade at least being domiciled in this jurisdiction and there being potential to obtain permission to serve out of the jurisdiction on Mr le Roux under CPR rr 6.20 and 6.21), Blackburne J found there to be a jurisdiction to grant a conventional freezing injunction, making specific findings as to the risk of dissipation by the two respondents in an attempt to frustrate the purpose of the liquidation. This, based on different grounds, in the name of HEE as well as of its liquidators, and in a smaller amount was, then, the third freezing injunction.

The Court of Appeal, at the time of the unsuccessful attempt to revive the first freezing injunction was only invited to review the amount, rather than the basis of the third freezing injunction. The House of Lords, whilst commenting on Civil Jurisdiction and Judgments Act, section 25 in passing did not address section 426: the point being more firmly that, whatever the derivation of the foundation sought to be relied on, the person who had had needed to address it was Park J some two and a half years earlier.

⁶¹ [2004] EWHC 2260 (Ch) at [50]. See also *re Independent Insurance Company Ltd*, *op cit* and *re HIH Casualty & General Insurance Ltd*, [2006] EWCA Civ 732.

⁶² *Ibid* at 51.

⁶³ [2004] EWHC 2557, (Ch). See also Ho, L C, "Section 426 and personal jurisdiction: *Fourie v le Roux*", (2005) 21 IL and P 2.

⁶⁴ Factual errors at least in the letter of request do not necessarily invalidate it: *Duke Group Ltd v Carver* [2001] BPIR 459, Ch D.

CONCLUSION

Clearly, as we have seen, the decision in *Fourie v Le Roux* does not answer all questions, in particular that of the possible survival of the ancillary freezing injunction. As far as the conventional domestic freezing injunction is concerned, the House of Lords has simply reinforced the need to focus on the underlying cause of action at the point of the initial application, aside from the separate need to draft and issue suitable originating proceedings afterwards. However, at least insofar as insolvency proceedings are concerned, the question remains whether there is a need for an express power to freeze assets at the periphery of an insolvency, on a purposive basis, without the need for the liquidator or petitioning creditor to be in a position to assert a substantive cause of action, here or elsewhere, against at least one respondent in possession of assets. If there is such a need, legislation, it would seem, must supply it.

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*MA (Cantab), FHEA, solicitor, Nottingham Law School. I am grateful to my colleague Maureen Maksymiw for her helpful comments on this article in draft. Errors and omissions remaining are very much my own.