



27 February 2013

PRESS SUMMARY

The Financial Services Authority (a company limited by guarantee) (Respondent) v Sinaloa Gold plc and others (Respondents) and Barclays Bank plc (Appellant)[2013] UKSC 11
On appeal from [2011] EWCA Civ 954

JUSTICES: Lord Neuberger (President), Lady Hale, Lord Mance, Lord Clarke, and Lord Sumption

BACKGROUND TO THE APPEALS

On 20 December 2010, the Financial Services Agency (“FSA”), acting in pursuance of its public duties under sections 3 to 6 of the Financial Services and Markets Act 2000 (“FSMA”), made a without notice application for a freezing injunction against Sinaloa Gold and PH Capital Invest under section 380(3) of FSMA. The FSA alleged that both companies were involved in promoting the sale of shares in Sinaloa without proper authorisation and an approved prospectus and that PH Capital Invest had breached FSMA in various other respects.

Schedule B to the injunction stated that the FSA gave no cross-undertaking in damages. However, under Schedule B, the FSA undertook to cover both costs and losses incurred by third parties as a result of the injunction. The undertaking in respect of third party losses was inadvertent and the FSA applied to have it removed. Barclays - with whom Sinaloa Gold plc had six bank accounts - intervened to oppose this application. The application to have the undertaking removed was refused in the High Court. However, this decision was reversed in the Court of Appeal. The effect of the Court of Appeal’s decision was to preserve the undertaking in respect of third party costs but eliminate the undertaking in respect of third party losses. Barclays appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. There is no general rule that an authority such as the FSA, acting pursuant to a public law duty, should be required to give a cross-undertaking in respect of losses incurred by third parties. Further, there are no particular circumstances which mean that the FSA should be required to give such a cross-undertaking on the facts of this case. The judgment of the Court is given by Lord Mance.

REASONS FOR THE JUDGMENT

- Whilst there is no continuing justification for the former blanket practice whereby the Crown was not required to give a cross-undertaking in any circumstances, a general distinction still exists between private claims and law enforcement actions [33].

- In a private claim, a claimant seeking an injunction will ordinarily be expected to give a cross-undertaking in damages to the defendant(s) and to third parties. This can be justified on the basis that such a claimant should be prepared to back its own interest with its own assets against the event that it obtains the injunction unjustifiably with the result that harm is caused to the interest of another [30]. However, different considerations arise in relation to law enforcement actions, where a public authority is seeking to enforce the law in the interests of the public generally, often in pursuance of a public duty to do so, and enjoys only the resources which have been assigned to it for its functions [31]. In these circumstances public authorities cannot generally be expected to back their legal actions with the public funds with which they are entrusted for the purpose of undertaking their functions [33]. Such a requirement may inhibit public officials from fulfilling their public duties for fear of exposing public funds to claims for compensation.
- The position regarding the giving of any cross-undertaking cannot differ according to whether it is intended to protect a defendant or a third party [14, 34]. In both instances the cross-undertaking covers the loss caused by the grant of an injunction in circumstances where the person incurring the loss is essentially innocent [34].
- A pragmatic distinction can be drawn between an undertaking in respect of costs and an undertaking in damages. Public authorities should be able to enforce the law without being inhibited by the fear of cross-claims and the exposure of their resources, and this applies with particular force to any open-ended undertaking in respect of third party loss. It does not apply with the same force to a more limited cross-undertaking in respect of third party costs [35].
- There are no special circumstances why the FSA should be required to give a cross-undertaking in respect of losses suffered by third parties on the particular facts of this case. In a case such as the instant one, where the FSA takes positive action to shut down allegedly unlawful activity, it does not in the course of so doing assume any responsibility towards or liability for breach of a duty of care enforceable at the instance of third parties [37-38].
- The FSA enjoys a further power to freeze the assets of a permitted person, without making any application to a court, under Part IV of the FSMA. In the exercise of its powers under Part IV the FSA is excluded from any risk of liability by virtue of paragraph 19 of Schedule 1 to FSMA. There would therefore be an apparent imbalance were the FSA required to accept potential liability in cases such as the instant one concerned with the activities of unauthorised persons [37-38].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html