Hilary Term
[2013] UKSC 11
On appeal from: [2011] EWCA Civ 954

JUDGMENT

The Financial Services Authority (a company limited by guarantee) (Respondent) *v* Sinaloa Gold plc and others (Respondents) and Barclays Bank plc (Appellant)

before

Lord Neuberger, President
Lady Hale
Lord Mance
Lord Clarke
Lord Sumption

JUDGMENT GIVEN ON

27 February 2013

Heard on 12 and 13 December 2012

Appellant
Richard Handyside QC
Tamara Oppenheimer

(Instructed by Barclays Bank plc Legal Services)

Respondent
Nicholas Vineall QC
James Purchas
Adam Temple
(Instructed by the Financial Services Authority Legal Department)

LORD MANCE (with whom Lord Neuberger, Lady Hale, Lord Clarke and Lord Sumption agree)

Introduction

1. The issue on this appeal is whether and if so in what circumstances the Financial Services Authority ("FSA") should, as a condition of obtaining a freezing injunction under section 380(3) of the Financial Services and Markets Act 2000 ("FSMA") and/or section 37(1) of the Senior Courts Act 1981 ("SCA"), be required to give to the court a cross-undertaking in damages in favour of third parties affected by the injunction. The answer I would give is that there is no general rule that an authority like the FSA acting pursuant to a public duty should be required to give such an undertaking, and that there are no particular circumstances why it should be required to do so in the present case.

2. The issue has been argued as a matter of principle between the FSA and Barclays Bank plc ("Barclays"), a potentially affected third party. However, a brief statement of the background is appropriate.

3. On 20th December 2010 proceedings were commenced by the FSA against three defendants (Sinaloa Gold plc, a person or persons trading as PH Capital Invest and a Mr Glen Lawrence Hoover) on the basis that (a) Sinaloa was promoting the sales of shares without being authorised to do so and without an approved prospectus, contrary to FSMA sections 21 and 85, (b) PH Capital Invest and Mr Hoover were knowingly engaged in this activity, and (c) PH Capital Invest was as an unauthorised person carrying on regulated activities in breach of FSMA section 19 in various other respects.

4. Sinaloa Gold plc had six bank accounts at Barclays, in respect of all of which Mr Hoover was the sole authorised signatory.

5. Before issuing these proceedings, the FSA had on 17th December 2010 obtained without notice an injunction freezing the defendants' assets under sections 380(3) FSMA and/or 37(1) SCA. Barclays were notified of the order on 20th December 2010, and the injunction was continued by David Richards J at a hearing on notice on 31st December 2010.

6. As originally issued, Schedule B to the injunction, headed "Undertakings given to the Court by the Applicant", read:

> "(1) The Applicant does not offer a cross-undertaking in damages.
>
> ….
>
> (4) The Applicant will pay the reasonable costs of anyone other than the
>
> Respondents which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets *and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make*." (italics added)

By the time the injunction was continued, the possible inconsistency between paragraphs (1) and (4) was observed, and the FSA was required to agree to add at the end of paragraph (1) the phrase "save to the extent provided in paragraph (4) below", without prejudice to its right to apply to vary paragraph (4).

7. On 12th January 2011 the FSA applied to have the words which I have italicised in paragraph (4) removed. Barclays intervened to oppose the application, which was refused by HHJ David Hodge QC on 25th January 2011 [2011] EWHC 144(Ch). On 18th October 2011 the Court of Appeal reversed his decision and ordered a cross-undertaking in the terms of paragraph (4) without the italicised words [2012] Bus LR 753. The effect was to preserve the undertaking in respect of costs incurred by third parties (which the FSA did not dispute), but to eliminate any requirement that the FSA give an undertaking in respect of losses incurred by third parties. Barclays now appeals by permission of this Court.

The FSA and FSMA

8. The FSA is governed by FSMA. Schedule 1 to FSMA makes provision about its status, including an exemption from liability in damages (paragraph 12 below). The FSA was given general functions which in discharging it must, so far as is reasonably possible, act in a way which is compatible with defined regulatory objectives and which it considers most appropriate for the purpose of meeting those objectives: FSMA, section 2(1) and (4). Its general functions include making

rules, preparing and issuing codes, giving general guidance and determining general policy and principles by reference to which to perform particular functions. The regulatory objectives include maintaining market confidence in the UK financial system (section 3), protecting and enhancing the stability of the UK financial system (section 3A, as inserted by section 1(3) of the Financial Services Act 2010), securing the appropriate degree of protection for consumers (section 5) and reducing the extent to which it is possible for a business carried on by a regulated person or in contravention of the general prohibition to be used for a purpose connected with financial crime (section 6).

9. Section 19 in Part II of FSMA prohibits any person from carrying on, or purporting to carry on, a regulated activity in the UK unless authorised (under sections 40 to 43 in Part IV) or exempt. This is the "general prohibition", for contravention of which penalties are set by section 23. Section 21 contains specific restrictions on financial promotion, including communicating an invitation or inducement to engage in investment activity in the course of business, with penalties for contravention being set by section 25. Section 85 prohibits dealing in transferable securities without an approved prospectus.

10. Section 380(3) provides that, if, on the application of the FSA or the Secretary of State, the court is satisfied that any person may have contravened, or been knowingly concerned in the contravention of, a relevant requirement "it may make an order restraining … him from disposing of, or otherwise dealing with, any assets of his which it is satisfied he is reasonably likely to dispose of or otherwise deal with". A relevant requirement includes "a requirement which is imposed by or under this Act" (section 380(6)(a)) and so includes the requirement under section 19 to be authorised or exempt before carrying on a regulated activity.

11. Under Part IV of FSMA, permission may be given subject to such requirements as the FSA thinks appropriate (section 43), which may include an "assets requirement" prohibiting the disposal of, or other dealing with, any of the permitted person's ("A's") assets or their transfer to a trustee approved by the FSA (section 48(3)). Under section 45(4), the FSA may on its own initiative vary a previously included Part IV permission to include an assets requirement. Under section 48(4) and (5), if the FSA imposes an assets requirement and gives notice to any institution with which a person ("A") keeps an account, the notice has the effect that (a) the institution does not act in breach of any contract with A in refusing any instruction from A in the reasonably held belief that complying would be incompatible with the requirement and (b) if the institution complies with the instruction, it is liable to pay to the FSA an amount equal to that transferred from or paid out of A's account. In relation to authorised persons, the FSA thus enjoys a right to impose a freezing order without going to court and without any occasion arising on which a cross-undertaking could be required of it.

12. The FSA also enjoys an exemption from liability in damages, set out in paragraph 19 of Schedule 1 to FSMA:

> "(1) Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.
>
> (2) Neither the investigator appointed under paragraph 7 nor a person appointed to conduct an investigation on his behalf under paragraph 8(8) is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of his functions in relation to the investigation of a complaint.
>
> (3) Neither sub-paragraph (1) nor sub-paragraph (2) applies-
>
> > (a) if the act or omission is shown to have been in bad faith; or
> >
> > (b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998."

13. Paragraph 19(1) of Schedule 1 would protect the FSA, if it was, for example, the subject of a claim by A on whom it had imposed an assets requirement under section 45(4), by an institution to which it had notified the imposition of such a requirement under sections 48(4) and (5) or by any other third person. Paragraphs 7 and 8 of Schedule 1 require the FSA to establish a scheme for the independent investigation of complaints against it (other than complaints more appropriately dealt with in another way, e.g. by referral to the Upper Tribunal under the appeals procedure contained in Part IX of FSMA or by the institution of other legal proceedings), and the issue and, where appropriate, publication of reports on such complaints.

The present issue

14. The issue now before the Supreme Court raises for consideration: (a) whether and how far the position of the FSA, seeking an interim injunction pursuant to its public law function and duty, is to be equated with that of a person

seeking such an injunction in pursuance of private interests; (b) whether and how far the position regarding the giving of any cross-undertaking differs according to whether it is to protect a defendant or a third party; and (c) whether there is any coherent distinction between cross-undertakings in respect of third party losses and costs.

15. Taking the first point, I propose to start with the requirements which apply when a claimant is pursuing private interests. Since the first half of the 19th century such claimants have when seeking an interim injunction been required to give the "usual undertaking". That means an "undertaking to abide by any order this Court may make as to damages in case the Court shall hereafter be of opinion that the Defendants …. shall have sustained any by reason of this order which the [claimant] ought to pay": see e.g. *Tucker v New Brunswick Trading Company of London* (1890) 44 Ch D 249, 251. The practice regarding defendants is reflected in CPR 1998, Practice Direction ("PD") 25A 5.1(1), requiring, unless the court orders otherwise, an undertaking "to pay any damages which the respondent sustains which the court considers the applicant should pay". But modern practice, reflected in PD 25A 5.1A, also provides that, when the court orders an injunction "it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order".

16. Asset freezing (formerly *Mareva*) injunctions were developed by the courts in the late 1970s and 1980s. Because of their particular, potentially stringent effects, they are separately regulated in the rules. PD 25A 6 annexes a sample wording which may be modified in any particular case. In addition to an undertaking in the usual form in favour of the defendant, it includes an undertaking in favour of third persons in identical form to paragraph (4) of that originally required in this case (paragraph 6 above).

17. The history of the undertaking in favour of third persons can be traced back to a statement by Lord Denning MR in *Prince Abdul Rahman Bin Turki Al Sudairy v Abu-Taha* [1980] 1 WLR 1268, 1273 and to decisions by Robert Goff J in *Searose Ltd v Seatrain UK Ltd* [1981] 1 WLR 894 and *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport* [1981] 1 WLR 1262. In *Searose*, Robert Goff J, building on Lord Denning's statement, held that, where a bank had to incur costs in identifying whether a bank account existed within the terms of a Mareva injunction, it should be entitled to an undertaking to cover its reasonable costs, before it incurred them. In *Clipper Maritime* the freezing injunction obtained by the claimants covered cargo or bunkers belonging to the defendants Mineralimportexport on board a vessel which was on time charter to Mineralimportexport and which was in the port of Barry. Its effect might have been to inhibit the port authority in its use of the port and to cause it loss of

income. An undertaking was required to cover any actual income lost to the port authority. In the later case of *Galaxia Maritime SA v Mineralimportexport* [1982] 1 WLR 539, the defendants were again Mineralimportexport and a freezing injunction was initially granted to prevent them from removing from the jurisdiction (just before Christmas) a cargo on a third party's vessel which was only on voyage charter to Mineralimportexport. The Court of Appeal categorically refused to continue the interim injunction on any terms, since it could effectively block the third party's vessel indefinitely.

18. Under the standard forms of injunction currently in use for both ordinary interim injunctions and freezing injunctions, the enforcement of the undertaking is expressed to be in the court's discretion. There is little authority in this area. Neill LJ undertook a useful review of the general principles in *Cheltenham and Gloucester Building Society v Ricketts* [1993] 1 WLR 1545, 1551D-1552D. The position regarding undertakings in favour of defendants has been more recently reviewed in *Commercial Injunctions*, by Steven Gee QC, 5th ed (2004 and First Supplement), paragraphs 11.017-11.032, while the authorities on undertakings in favour of third parties are covered in paragraphs 11.008-11.012. An inquiry into damages will ordinarily be ordered where a freezing injunction is shown to have been wrongly granted, even though the claimant was not at fault: paragraph 11.023. But, depending on the circumstances, it may be appropriate for the court to await the final outcome of the trial before deciding whether to enforce: see the *Cheltenham and Gloucester* case, p.1552B. However, Professor Adrian Zuckerman has pointed out (*The Undertaking in Damages – Substantive and Procedural Dimensions* [1994] CLJ 546, 562) that it does not follow from a defendant's success on liability that he did not in fact remove (or seek to remove) assets from the reach of the claimant, justifying an interim freezing order. The court retains a discretion not to enforce the undertaking if the defendant's conduct makes it inequitable to enforce: *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 361E, per Lord Diplock. It seems likely that compensation is assessed on a similar basis to that upon which damages are awarded for breach of contract: *Cheltenham and Gloucester*, p.1552C-D, per Neill LJ.

19. The position regarding third persons is necessarily different in certain respects. The purpose of the cross-undertaking is to protect them - so long at least as they are "innocent" third persons not implicated in the alleged wrongdoing or conduct justifying the freezing order – whether or not the freezing order was justified as against the defendant. That purpose goes back to the orders first made in the *Searose* and *Clipper Maritime* cases.

20. I turn to the position of an authority acting in pursuit of public functions. The leading authority is the *Hoffmann-La Roche* case. Following a report by the Monopolies Commission the Department of Trade and Industry made an order

under the relevant monopolies legislation: the Regulation of Prices (Tranquilising Drugs) (No. 3) Order 1973 (SI 1973 No 720), setting maximum prices for certain drugs. Hoffmann-La Roche issued proceedings claiming that the Monopolies Commission report had been unfair and contrary to natural justice and was invalid, and that the Regulations based upon it were likewise ultra vires and invalid. The Department issued proceedings, and sought an injunction to restrain Hoffmann-La Roche from charging prices in excess of the Order prices under a provision in the primary legislation (section 11 of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948) which provided that "compliance with any such order shall be enforceable by civil proceedings by the Crown for an injunction or for any other appropriate relief".

21. The issue argued was whether the Department should be required to give a cross-undertaking in damages in order to obtain the order. The House recognised the general rule requiring a cross-undertaking as a condition of the grant of an interim injunction in ordinary litigation: see e.g. per Lord Reid at p 341B. It recognised that, since the Crown Proceedings Act 1947, there was no continuing justification for the former blanket practice whereby the Crown was not required to give any such undertaking in any circumstances (even in cases where it was asserting proprietary or contractual rights which a private person could have and enforce): per Lord Reid at p 341C and Lord Diplock at p 362B-H. But it considered, by a majority, that the Crown remains in a position different from that of any private individual when it brings what Lord Diplock described as a "law enforcement action": p 363B.

22. The majority did not express itself with one voice regarding the implications of this distinction. Lord Reid thought "special circumstances" or "special reason" to be required before the Crown should have to expose itself by cross-undertaking: p 341E and G. Lord Cross of Chelsea however accepted that it might be fair to require that the Crown give a cross-undertaking where the defendant's defence was that what he is doing or proposing to do was not prohibited by the order in question, but that, where as here the defence was that what was "on the face of it the law of the land" was not in fact the law, "exceptional circumstances" would be required before the court "should countenance the possibility" that the Crown might be deterred from applying for an interim injunction by the need to give a cross-undertaking: p 371D-G. Lord Morris of Borth-y-Gest also focused on the apparent unlawfulness of the sales in excess of the order prices which Hoffmann-La Roche was threatening. Lord Diplock saw no reason, since the Crown Proceedings Act, for "a rigid rule that the Crown itself should *never* be required to give the usual undertaking in damages" in a law enforcement action, but equally no basis for the converse proposition that "the court …. ought *always* to require an undertaking": p 364C-D: this was because (p 364E):

> "When …. a statute provides that compliance with its provisions shall be enforceable by civil proceedings by the Crown for an injunction, and particularly if this is the only method of enforcement for which it provides, the Crown does owe a duty to the public at large to initiate proceedings to secure that the law is not flouted …."

Lord Diplock continued (p 364F-G):

> "I agree therefore with all your Lordships that the practice of exacting an undertaking in damages from the Crown as a condition of the grant of an interlocutory injunction in this type of law enforcement action ought not to be applied as a matter of course, as it should be in actions between subject and subject, in relator actions, and in actions by the Crown to enforce or to protect its proprietary or contractual rights. On the contrary, the propriety of requiring such an undertaking from the Crown should be considered in the light of the particular circumstances of the case."

23. In concluding that no cross-undertaking should be required, Lord Diplock repeated that the Crown was seeking to enforce the law by the only means available under the governing statute, and he, like Lord Morris and Lord Cross, stressed that Hoffmann-La Roche was threatening to breach an apparently valid order approved by each House of Parliament: pp 364H-365B. On this basis, he also said (p 367A-C):

> "So in this type of law enforcement action if the only defence is an attack on the validity of the statutory instrument sought to be enforced the ordinary position of the parties as respects the grant of interim injunctions is reversed. The duty of the Crown to see that the law declared by the statutory instrument is obeyed is not suspended by the commencement of proceedings in which the validity of the instrument is challenged. Prima facie the Crown is entitled as of right to an interim injunction to enforce obedience to it. To displace this right or to fetter it by the imposition of conditions it is for the defendant to show a strong prima facie case that the statutory instrument is ultra vires."

24. However, he went on (p 367C-D):

> "Even where a strong prima facie case of invalidity has been shown upon the application for an interim injunction it may still be

> inappropriate for the court to impose as a condition of the grant of the injunction a requirement that the Crown should enter into the usual undertaking as to damages. For if the undertaking falls to be implemented, the cost of implementing it will be met from public funds raised by taxation and the interests of members of the public who are not parties to the action may be affected by it."

25. Lord Wilberforce, dissenting in *Hoffmann-La Roche*, was unenthusiastic about English law's "unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action" (p 359A), but rested his dissent ultimately on the fact that, without a cross-undertaking, the Crown in Hoffmann-La Roche would be put in a position where, if it ultimately lost the action, the injunction would have enabled it (through the National Health Service) to profit during the period while the injunction precluded Hoffmann-La Roche from selling to the National Health Service at market, rather than order prices.

26. *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227 was another case concerned with a claim to enforce apparently valid legislation, this time by a local authority and relating to Sunday trading. Lord Goff of Chieveley at p 274C-D read the speeches in *Hoffmann-La Roche*

> "as dismantling an old Crown privilege and substituting for it a principle upon which, in certain limited circumstances, the court has a discretion whether or not to require an undertaking in damages from the Crown as law enforcer."

In extending the principle to all public authorities, he said (p 274D-E):

> "The principle appears to be related not to the Crown as such but to the Crown when performing a particular function. …. [T]he considerations which persuaded this House to hold that there was a discretion whether or not to require an undertaking in damages from the Crown in a law enforcement action are equally applicable to cases in which some other public authority is charged with the enforcement of the law: see e.g. Lord Reid, at p. 341G, Lord Morris of Borth-y-Gest, at p. 352C, and Lord Cross of Chelsea, at p. 371B-G."

27. In *In re Highfield Commodities Ltd* [1985] 1 WLR 149 Sir Robert Megarry V-C interpreted *Hoffmann-La Roche* as deciding that no cross-undertaking should be required of the Crown unless the defendant showed special circumstances

justifying the requirement. In *Attorney-General v Wright* [1988] 1 WLR 164 Hoffmann J regarded as undeniable (even if, to some eyes, not "particularly attractive") the "potency" of the principle "that Crown officials should not be inhibited from performing their duty to take action to enforce the law by the fear that public funds may be exposed to claims for compensation by people who have thereby caused [sic] loss" (p 166C-D). On the facts, however, he required an undertaking to be given by the receiver of, and to be met out of the funds of, the charity for whose benefit the Attorney-General was suing to recover property. Although the Attorney-General was not suing to protect any proprietary or contractual right of the Crown, he was suing in the proprietary interests of the charity, which could be expected to give an undertaking. In *Director General of Fair Trading v Tobyward Ltd* [1989] 1 WLR 517, Hoffmann J said that, whatever one might say about the policy, it is well established that "the usual practice is that no cross undertaking is required" when the Crown is seeking an interim injunction to enforce the law (p 524E-H). In *Securities and Investments Board v Lloyd-Wright* [1993] 4 All ER 210, Morritt J addressed the issues on the basis of defence counsel's concession that "it would not be appropriate that there should be a cross-undertaking of damages" in a law enforcement action (p 213H-J), and in *Customs and Excise Commissioners v Anchor Foods Ltd* [1999] 1 WLR 1139 at p 1152C-D, Neuberger J said that "it would ordinarily not be right to require a cross-undertaking in damages from Customs", but ordered one because of the "unusual facts of this case", in which Customs was, to protect its right to VAT, seeking to halt a sale of business at an independent valuation to a new company. Finally, the Court of Appeal in *United States Securities and Exchange Commission v Manterfield* [2009] EWCA Civ 27, [2009] Lloyd's Rep FC 203 applied the line of authority including *Kirklees*, *In re Highfield* and *Lloyd-Wright* when endorsing the exercise of the judge's discretion to dispense with the giving of a cross-undertaking by the United States Securities and Exchange Commission. The Commission was seeking a freezing order in aid of Massachusetts proceedings brought in the interest of investors generally to recover assets obtained by Manterfield in the course of a fraudulent investment scheme involving the sale of "limited partnership interests" in an unregistered fund.

28. Presenting the present appeal for Barclays, Mr Richard Handyside QC did not mount a direct attack on *Hoffmann-La Roche* itself. Rather he submitted that it was distinguishable because it concerned enforcement of an apparently valid executive order in relation to which the only defence was that the order was invalid, and that the later authorities referred to in the preceding paragraph had read it too broadly. Mr Handyside did however also refer to Professor Zuckermann's article, which was avowedly critical of the decision in *Hoffmann-Roche*. Professor Zuckermann's reasons included Lord Wilberforce's, and he also argued that a cross-undertaking can encourage greater care before interfering with a citizen's liberty. He questioned the weight placed in *Hoffmann-La Roche* on the presumption of validity of the relevant law. Mr Handyside submits that the same criticism applies, a fortiori, to the weight placed by Hoffmann J on the apparent

strength of the complaint of misleading advertising on which the injunction was based in *Tobyward*.

29. There is considerable general force in this particular criticism of *Hoffmann-La Roche*. The purpose of a cross-undertaking in favour of a defendant is to cover the possibility of loss in the event that the grant of an injunction proves to have been inappropriate. To refuse to require a cross-undertaking because it appears, however strongly, unlikely ever to be capable of being invoked misses the point. The remoteness of the possibility of loss might indeed be thought to be a reason why the public authority would be unlikely to be inhibited from seeking injunctive relief by fear that public funds may be exposed to claims for compensation. I note that, although Lord Diplock attached some significance to the strength of the Crown's case in *Hoffmann-La Roche*, he did not confine his comments on the difference between private litigation and law enforcement action to cases where the Crown's case was founded on apparently well-founded legislation; on the contrary: see paragraph 24 above.

30. In any event, however, this particular criticism does not impinge on the general distinction drawn in *Hoffmann-La Roche* and subsequent cases between private litigation and public law enforcement action. In private litigation, a claimant acts in its own interests and has a choice whether to commit its assets and energies to doing so. If it seeks interim relief which may, if unjustified, cause loss or expense to the defendant, it is usually fair to require the claimant to be ready to accept responsibility for the loss or expense. Particularly in the commercial context in which freezing orders commonly originate, a claimant should be prepared to back its own interests with its own assets against the event that it obtains unjustifiably an injunction which harms another's interests.

31. Different considerations arise in relation to law enforcement action, 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. Other than in cases of misfeasance in public office, which require malice, and cases of breach of the Convention rights within section 6(1) of the Human Rights Act 1998, it remains the case that English law does not confer a general remedy for loss suffered by administrative law action. That is so, even though it involves breach of a public law duty. In the present context, the fact that an injunction is discharged, or that the court concludes after hearing extended argument that it ought not in the first place to have been granted, by no means signifies that there was any breach of duty on the public authority's part in seeking it.

32. As I have said, Mr Handyside does not take issue with this general distinction, and the appeal has been argued accordingly. Mr Handyside does,

however, take issue with the way in which *Hoffmann-La Roche* has been interpreted as indicating that public authority claims to interim injunctions should be approached. *Hoffmann-la Roche* has been understood at first instance as involving a usual or normal rule that a cross-undertaking will not be required from the Crown. Mr Handyside submits that this understanding goes further than justified. In *Hoffmann-La Roche,* only Lord Reid spoke of a general rule according to which special circumstances or reason must exist before a cross-undertaking should be required from the Crown. Lord Morris was silent. But Lord Diplock said that the practice of exacting an undertaking "ought not to be applied as a matter of course" and should, "on the contrary…. be considered in the light of the particular circumstances of the case". This was a more neutral formulation, but still indicates a need to identify particular circumstances before a cross-undertaking is required. Lord Morris and Lord Cross focused on the particular circumstance that the only defence involved a challenge to the validity of an apparently valid order. However, I do not regard that as a satisfactory demarcation of any distinction between public and private claims: paragraph 29 above.

33. For reasons indicated in paragraph 31 above, there is in my view a more general distinction between public and private claims. Ultimately, there is a choice. Either the risk that public authorities might be deterred or burdened in the pursuit of claims in the public interest is accepted as a material consideration, or authorities acting in the public interest must be expected generally to back their legal actions with the public funds with which they are entrusted to undertake their functions. That latter approach could not be adopted without departing from *Hoffmann-La Roche,* and *Hoffmann-La Roche* draws a distinction between public and private claims which depends upon accepting the former approach. *Hoffmann-La Roche* stands at least for the proposition that public authority claims brought in the public interest require separate consideration. Consistently with the speeches of Lord Reid and Lord Diplock (and probably also of Lord Cross), it indicates that no cross-undertaking should be exacted as a matter of course, or without considering what is fair in the particular circumstances of the particular case. A starting point along these lines does not appear to me to differ significantly from the practice subsequently adopted at first instance: see paragraph 27 above. I accept its general appropriateness.

34. Mr Handyside further submitted that, in whatever sense *Hoffmann-La Roche* is understood, it concerned only the protection of defendants. The present appeal concerns the protection of third persons, who, unless the contrary is shown, are to be taken as having no involvement in the breach of the law alleged against the defendants. The present appeal certainly proceeds on the basis that Barclays had no such involvement. However, the distinction which Mr Handyside suggests does not in my opinion hold good. Speaking generally, a cross-undertaking in relation to a defendant protects against the event that no injunction should have been granted, either when it was granted or in the light of the defendants' ultimate

success at trial. While it is possible to conceive of a case in which an injunction was wrongly granted on the material then available, but the defendant is at trial found to have breached the law, it is unlikely that the cross-undertaking would then be enforced. A cross-undertaking in relation to third persons protects against the event that an innocent third person, without involvement in whatever breach of the law is alleged against the defendant, suffers loss or expense through the grant of the injunction, whether this should or should not have occurred. In either case, therefore, it is loss caused by the grant of an injunction in circumstances where the person incurring the loss is essentially innocent that is covered by the cross-undertaking.

35. Finally, Mr Handyside submits that no sensible distinction can exist between a cross-undertaking in respect of costs, which the FSA has accepted that Barclays should receive (paragraphs 6 and 7 above), and the cross-undertaking in damages, which is at issue on this appeal. The FSA has, he submits, in effect, undermined its own case by conceding the former. This is not convincing. First, the appeal raises an issue of general principle, which cannot be resolved by a concession in a particular case. Second, there is to my mind a pragmatic basis for a distinction between specific costs and general loss. The rationale of *Hoffmann-La Roche*, that public authorities should be able to enforce the law without being inhibited by the fear of cross-claims and of exposing financially the resources allocated by the state for their functions, apply with particular force to any open-ended cross-undertaking in respect of third party loss. It does not apply in the same way to a cross-undertaking in respect of third party expense. Even in a private law context, this distinction may sometimes be relevant to bear in mind. So Neuberger J thought in *Miller Brewing Co v Mersey Docks & Harbour Co* [2004] FSR 5, 81 paragraphs 44-45 (paragraphs not touched by criticism levelled at the actual decision in Mr Gee's work on Commercial Injunctions, paragraph 11.015, into which it is unnecessary to go).

The present case

36. The present case resembles *Hoffmann-La Roche*, *Kirklees*, *Tobyward* and *Lloyd-Wright.* It is a case of a public authority seeking to enforce the law by the only means available under the governing statute. The FSA was acting under its express power to seek injunctive relief conferred by section 380(3). It was acting in fulfilment of its public duties in sections 3 to 6 of FSMA to protect the interests of the UK's financial system, to protect consumers and to reduce the extent to which it was possible for a business being carried on in contravention of the general prohibition being used for a purpose connected with financial crime. I therefore approach this appeal on the basis that there is no general rule that the FSA should be required to give a cross-undertaking, in respect of loss suffered either by the defendants or by third parties. It is necessary to consider the

circumstances to determine whether a cross-undertaking should be required in this particular case.

37. The circumstances include some further background considerations. First, there is no general duty in English public law to indemnify those affected by action undertaken under legislative authority. Innocent third parties may be affected in situations ranging from the Victorian example of trains run on an authorised railway line (*Hammersmith and City Railway Company v Brand* (1869) LR 4 HL 171) to the erection of a barrier on a pavement (*Dormer v Newcastle-upon-Tyne Corp* [1940] 2 KB 204) to police closure of a street following an incident. Secondly, if one focuses attention on acts for which fault might be alleged to attach to the FSA, the FSA will be liable in the unlikely event of a misfeasance in public office or in the event that its conduct amounts to a breach of the Human Rights Act Convention rights. But there is no basis in FSMA for treating the FSA as having a wider statutory or common law responsibility even to innocent third parties. Thus, thirdly, if the FSA were to fail to take appropriate steps to shut down unlawfully conducted activity, innocent third persons might suffer loss, but they could have no claim against the FSA. Fourthly, even in a case of positive action taken by the FSA affecting innocent third persons, the general protective duties and objectives of FSMA could not involve under FSMA or at common law any assumption of responsibility towards or any liability for breach of a duty of care enforceable at the instance of third persons: see e.g. *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057, *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853 and *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181. Paragraph 19 of Schedule 1 to FSMA in any event provides expressly that they do not.

38. The present appeal concerns the fourth situation, in that the FSA was taking positive action to shut down what it alleged to be unlawful activity. An interim injunction obtained in such a situation may cause innocent third persons loss. They clearly could not complain about loss arising from an unlawful scheme being closed down. But, if the scheme proved after all to be lawful, they might be seen to have sustained loss which they should not in a perfect world have suffered. However, the FSA has powers under Part IV of FSMA allowing it without any application to the court to freeze the assets of an authorised person, in a way which could equally cause loss to innocent third persons. If the exercise of a Part IV freezing power should subsequently transpire to have been inappropriate, no basis exists upon which such third persons could claim to be indemnified in respect of such loss. Indeed paragraph 19 of Schedule 1 to FSMA would again clearly exclude the FSA from any risk of liability: see paragraph 12 above. There would be an apparent imbalance, if the FSA were required to accept potential liability under a cross-undertaking when it addresses the activities of unauthorised persons

and has therefore to seek the court's endorsement of its stance in order for a freezing order to issue.

39. The Respondent sought also to gain assistance from paragraph 19 of Schedule 1 to FSMA. A cross-undertaking is colloquially described as being "in damages", and liability under it is measured on ordinary damages principles. But it is clear that it does not involve a liability for damages in a conventional legal sense. The cross-undertaking is to the court. Liability under it, when the court in its discretion determines that the cross-undertaking should be enforced, is in a sum assessed by the court, albeit using similar principles to those by which it measures damages. Accordingly, it is common ground that paragraph 19 cannot directly apply to prevent the FSA from being required to give, or from enforcement of, a cross-undertaking. On the other hand, as the Court was told without contradiction, the enactment of paragraph 19 was not based and did not follow upon any consideration of the possibility that the FSA might be required to give a cross-undertaking before being granted an injunction under section 380(3). That possibility was, so far as appears, not in the legislator's mind, one way or the other.

40. In *Lloyd-Wright* (paragraph 27 above), Morritt J considered in a context paralleling the present a predecessor to paragraph 19 which existed in the form of section 187(3) of the Financial Services Act 1986. He rejected a submission of the Securities and Investment Board that this prevented the court from requiring a cross-undertaking. But he went on (p 214h):

> "Rather, it seems to me to be a clear pointer in the exercise of the discretion, which the court undoubtedly has, to indicate that no such cross-undertaking should be required where the designated agency is, in fact, seeking to discharge functions exercisable pursuant to a delegation under the 1986 Act. It seems to me that that is a matter which, in the exercise of my discretion, I should take into account in concluding that no cross-undertaking should be required."

It is unnecessary on this appeal to express any view on the correctness of treating paragraph 19 as a clear pointer in a context where that paragraph cannot ex hypothesi apply.

41. In the light of the factors identified in paragraphs 36 to 38, there is on any view no reason to move away from the starting position, which is that the FSA should not have to give any cross-undertaking in order to obtain an injunction under section 380(3). HHJ Hodge QC considered that such a cross-undertaking in favour of innocent third parties should be required "as a matter of course", from

the moment when any freezing order was first granted on an ex parte basis (para 66). The Court of Appeal was in my view right to disagree and substituted for the undertaking as originally given an undertaking in the limited form (i.e. excluding the italicised words) indicated in paragraphs 6 and 7 above. I would therefore dismiss this appeal.

Further observations

42. A further word is appropriate regarding the positions at the initial stage, where injunctive relief is sought on an ex parte (or 'without notice') basis, and at the later stage, when the matter comes before the court on notice to both parties as well perhaps as to third persons, such as Barclays. Normally, there would only be a very short period before an on notice hearing could occur, and normally one would expect any third person affected by an injunction to become aware of this risk, even if not given formal notice of the injunction by the FSA. Loss could in theory be sustained by either a defendant or a third person in that short period. But any cross-undertaking required as a condition of the grant of interim injunctive relief on a without notice basis would have to be in general and unqualified terms, and therefore be of the kind which could cause most concern to a regulator worried about risk and resource implications.

43. The present appeal concerns the position of the FSA at the without notice and on notice stages. The starting position at each stage should in my view be that no cross-undertaking should be required unless circumstances appear which justify a different position. Any inhibition on the part of a public authority about giving an undertaking is likely to be greater, rather than less, at a without notice stage. To require a blanket undertaking in favour of third parties at that stage would provide no incentive to third parties to come forward and identify any real concerns that they might have. The better approach is in my view to regard the starting position, that no cross-undertaking should be required, as being as applicable at the without notice stage as it is at the on notice stage. A defendant or a third party who is or fears being adversely affected by an injunction obtained under section 380(3) can and should be expected to come forward, to explain the loss feared and to apply for any continuation of the injunction to be made conditional on such cross-undertaking, if any, as the court may conclude should in all fairness be required to meet this situation.

44. Finally, whenever the court is considering whether to order an interim injunction without any cross-undertaking, it should bear in mind that this will mean that the defendant or an innocent third party may as a result suffer loss which will be uncompensated, even though the injunction later proves to have been unjustified. This consideration was rightly identified by Neuberger J in *Miller Brewing* at paragraph 40.

Conclusion

45. For the reasons given in paragraphs 1 to 41, I would dismiss this appeal.