WHITE & CASE

Insight: Litigation

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FSA not required to compensate banks for damages caused by wrongly granted injunctions

The Supreme Court last week issued its judgment in *The Financial Services Authority v. Sinaloa Gold plc (and others) and Barclays Bank plc*[1]. The decision confirms that, whereas private parties seeking an injunction must normally undertake to compensate third parties who may be affected by a wrongly granted injunction (referred to as a "cross-undertaking in damages"), there is no such general rule for public authorities enforcing the law. A cross-undertaking in damages should be required from a public authority only if particular circumstances justify this.

This means a third party – such as a bank – which receives notice of a freezing order from a public authority is only likely to recover costs of complying with the order, not any other losses suffered as a result (*e.g.*, money spent defending claims against it by the party whose assets are frozen).

This case is also a reminder of the risks of adopting boilerplate wording. The Financial Services Authority (the "**FSA**") obtained a freezing order using standard wording suggested in an annex to the English rules of procedure (the "**CPR**"). Lengthy legal proceedings ensued when the FSA tried to revise the order, after realising the undertakings in this standard wording were far wider than those it had intended to give.

Summary

This insight:

- Explains when a party seeking an injunction is usually required to give a cross-undertaking in damages and what this is;
- Sets out the relevant background to the Supreme Court's decision; and
- Provides a brief analysis of the decision and its implications.

Cross-undertakings in damages

The English courts usually expect a party applying for an injunction to give a cross-undertaking in damages in favour of the party against whom it seeks an injunction (the "**respondent**"). This means the applicant must undertake to pay any damages suffered by the respondent which the court considers were reasonably foreseeable as a result of the injunction being granted (though the respondent must mitigate its losses).

1 [2013] UKSC 11.

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The English courts can also require a cross-undertaking in damages in favour of third parties. The CPR contain boilerplate wording for such an undertaking, and applicants seeking a freezing injunction are generally required to offer an undertaking on similar terms. This is because applicants must persuade a judge that granting an injunction is just and convenient, and will not harm innocent third parties.

Public bodies acting to enforce the law – rather than for their own financial benefit – have long been considered an exception to these rules, for public interest reasons. The courts have often granted freezing injunctions without requiring a cross-undertaking in damages from these bodies.

However, it was unclear how this special status sat with the principle that the courts should fully protect innocent third parties affected by a freezing order. The Supreme Court's decision offers further guidance on the degree of protection available to innocent third parties in these circumstances.

Factual background

The case arose after the FSA brought proceedings against Sinaloa and other parties for carrying out regulated activities without proper FSA authorisation. To prevent further dealings by these parties, the FSA successfully sought an injunction freezing their assets, which included several bank accounts with Barclays.

To obtain this freezing injunction, the FSA gave undertakings to the court using the standard wording from the CPR. As a result, it inadvertently offered a cross-undertaking in damages to third parties, not just an undertaking to pay reasonable costs incurred by a third party in identifying whether it held any of the respondent's assets.

When the FSA applied to the High Court to have this cross-undertaking in damages removed from the freezing order, Barclays intervened and defeated the FSA's application. But, in the Court of Appeal, Barclays was unsuccessful. It therefore appealed to the Supreme Court.

The Supreme Court's decision

The Supreme Court decided unanimously that the FSA could remove the terms of the injunction granting a cross-undertaking in damages to third parties.

There were two stages to the Court's reasoning. First, the Court found there was no general rule that the FSA should be required to give a cross-undertaking in damages. Its main reason was to avoid deterring public interest claims by public bodies enforcing the law (such as the FSA), which do not enjoy the same degree of choice in deploying their assets as private litigants acting in their own interests.

Second, the Court considered there were no particular circumstances indicating a cross-undertaking in damages should be required in this case. Even if the FSA failed to take appropriate steps to prevent unlawful activity, it had no statutory or common law responsibility to innocent third parties who suffered loss as a result. This suggested requiring a cross-undertaking in damages in favour of third parties was not appropriate.

The Court considered, however, that an undertaking to pay the reasonable costs of a third party for complying with an order would not dissuade public interest claims in the same way as a cross-undertaking in damages. The FSA conceded it would pay the reasonable costs incurred by Barclays in complying with the freezing order.

Implications of this decision

The Supreme Court's decision confirms that limited protection is available to banks (or other parties holding assets on others' behalf) who receive notice of freezing orders from public authorities enforcing the law. Banks or other third parties are unlikely to recover more than the reasonable costs of complying with these orders, but must likely foot the bill for any further losses themselves.

The case is also a salutary reminder that parties seeking an injunction should carefully consider what relief they seek and what undertakings they offer. Had it considered the implications of the boilerplate language in the order which it sought, the FSA could have avoided a lengthy legal battle.