



Neutral Citation Number: [2025] EWHC 2201 (Pat)

Case No: HP-2022-000029

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**  
**PATENTS COURT**

Rolls Building, Fetter Lane  
London EC4A 1NL

1 September 2025

**Before :**

**MICHAEL TAPPIN KC**  
**(sitting as a Deputy Judge of the High Court)**

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**Between :**

**(1) SANDOZ AG**  
**(2) SANDOZ LIMITED**  
**(3) HEXAL AG**  
**(4) SALUTAS PHARMA GMBH**

**Inquiry**  
**Claimants**

**- and -**

**(1) BAYER INTELLECTUAL PROPERTY GMBH**  
**(2) BAYER AG**  
**(3) BAYER PLC**

**Inquiry**  
**Defendants**

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**Jeffrey Chapman KC and Gillian Hughes (instructed by Pinsent Masons LLP) for Sandoz**  
**Daniel Jowell KC, Miles Copeland and Kyra Nezami (instructed by Allen Overy Shearman**  
**Sterling LLP) for Bayer**

Hearing date: 22 July 2025

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**Approved Judgment**

I direct that no official shorthand note shall be taken of this judgment and that copies of the version as handed down may be treated as authentic.

This judgment was handed down at 10.30 am on 1 September 2025 by circulation to the parties' representatives by email and release to The National Archives.

## The Deputy Judge:

1. This is an application by the Inquiry Defendants (“Bayer”) to strike out, or for summary judgment in respect of, a claim by the Inquiry Claimants (“Sandoz”) for an account of profits under cross-undertakings given by Bayer when obtaining interim injunctions against Sandoz.

## Background

2. Bayer was the proprietor of a patent for the compound rivaroxaban (sold by Bayer under the name Xarelto) and an SPC based on that patent which expired on 1 April 2024. It was also the proprietor of EP(UK) 1845961 (“the Patent”) which covered the use of rivaroxaban once daily. The Patent was granted on 22 April 2015 and was due to expire on 18 January 2026. Oppositions to the Patent were rejected by the Technical Board of Appeal of the EPO on 27 October 2021.
3. In October 2022 Sandoz commenced proceedings for revocation of the Patent. That claim, together with claims by other generic pharmaceutical companies, was tried before HHJ Hacon in February 2024. After trial, but before judgment was handed down, Sandoz and other companies indicated their intention to launch once-daily rivaroxaban in the UK on expiry of the SPC, i.e. on 2 April 2024. Bayer sought interim injunctive relief against Sandoz and the other companies, which was granted by HHJ Hacon for reasons given in his judgment of 27 March 2024: [2024] EWHC 711 (Pat).
4. The order made by HHJ Hacon on 27 March 2024 contained a cross-undertaking by Bayer in the following terms:

“If the Court later finds that this Order has caused loss to any of the First to Seventh, Ninth and Tenth Respondents or any of their respective Group Companies (as defined below) and decides that any such respondent (or their respective Group Company) should be compensated for that loss, [Bayer] will comply with any Order the Court may make and will be jointly and severally liable for any monetary award relating to such loss.”

Sandoz AG and Sandoz Limited were the Sixth and Seventh Respondents and Hexal AG and Salutas Pharma GmbH were Group Companies.

5. On 12 April 2024 HHJ Hacon handed down his trial judgment, finding the Patent invalid: [2024] EWHC 796 (Pat). On that date, HHJ Hacon also made an order extending the injunctions until 29 April 2024 to allow Bayer time to seek permission to appeal from the Court of Appeal. That order contained a cross-undertaking from Bayer in materially identical form to that in the order of 27 March 2024.
6. On 29 April 2024 Arnold LJ granted permission to appeal and extended the injunctions until the conclusion of the appeal. The appeal was heard on 16 May 2024 and at the conclusion of the hearing the Court of Appeal announced that the appeal was dismissed and the injunctions were discharged, and made an order to that effect.

7. It follows that Sandoz was restrained by the injunctions from dealing in once-daily rivaroxaban for the period from 2 April 2024 to 16 May 2024 and was entitled to seek compensation pursuant to the cross-undertakings given by Bayer.
8. The Court of Appeal handed down its judgment giving its reasons for dismissing the appeal on 24 May 2024: [2024] EWCA Civ 562. On that date the Court of Appeal made an order including the following provision:

“There shall be an inquiry as to the damages caused to the Respondents as a consequence of the interim injunctions based on the Patent, pursuant to the Appellants’ cross-undertakings.”
9. On 21 June 2024 HHJ Hacon made an order containing directions for service of points of claim and responses thereto in the damages inquiry that had been ordered by the Court of Appeal. Those directions were then stayed by consent pending Bayer’s application for permission to appeal to the Supreme Court. Once that application was refused, a revised timetable for directions was agreed.

### **Sandoz’s Points of Claim**

10. On 28 March 2025 Sandoz filed its Points of Claim. That pleading contains a conventional claim for loss of profits as a result of the interim injunctions. It alleges that, but for the injunctions, Sandoz would have supplied rivaroxaban to customers and gives particulars of losses amounting to about £3.9M.
11. However, the Points of Claim make it clear that the claim for loss of profits is only Sandoz’s alternative, fall-back position, and allege that such a remedy would not provide Sandoz with an adequate remedy in the circumstances. The Points of Claim state that Sandoz’s principal pleaded case is for an account of the profits that Bayer made as a result of the injunctions.
12. Paragraph 26 of the Points of Claim says this:

“The assessment of damages under the cross-undertakings ... is to be made on the same basis as that on which damages for breach of contract would be assessed if the undertakings had been a contract between [Bayer] and [Sandoz] that [Bayer] would not prevent [Sandoz] from doing that which they were restrained from doing by the terms of the Injunction. On their proper construction, the cross-undertakings therefore permit the Court to make any monetary order that would have been available if the claim under the cross-undertakings was for breach of such contract.”
13. Paragraph 27 of the Points of Claim alleges:

“The circumstances of this case are exceptional such as would justify an account of profits for breach of contract and accordingly an account of profits under the cross-undertakings.”
14. As Sandoz’s submissions made clear, the reference to the circumstances being exceptional such as to justify an account of profits for breach of contract is a

reference to the exceptional remedy for breach of contract identified by the House of Lords in *Attorney General v Blake* [2001] 1 AC 268.

15. Particulars of the matters relied on as constituting exceptional circumstances are given in paragraphs 27.1 – 27.10 of the Points of Claim. Paragraphs 27.1 – 27.5 contain an allegation that Bayer obtained the grant of the Patent on the basis of false and misleading claims which it made deliberately and dishonestly. Sandoz’s skeleton argument summarised the matters relied on in support of this allegation in this way:

“(1) Bayer dishonestly made false and misleading claims to the EPO on matters relating to the requirements of non-obviousness and inventiveness. Bayer’s false claims included understating the half-life of rivaroxaban and making untrue statements as to the results of the Phase I trials and reaction to the suggestion of including a once daily dosing trial in the Phase II trials.

(2) Bayer dishonestly failed to disclose prior art which would have revealed that its claims in support of the Patent were false, including a poster (the “Harder poster”) which reported that the half-life of rivaroxaban was as much as double that which Bayer had claimed in its evidence and argument in the EPO proceedings.”

16. Sandoz’s skeleton argument summarised paragraphs 27.6 – 27.9 of its Points of Claim thus:

“Sandoz’s case is that, in addition to Bayer’s dishonest behaviour in obtaining the Patent from the EPO..., Bayer acted wrongfully in seeking to defend the validity of the Patent in the English proceedings and obtaining the interim injunctions. The matters which Sandoz relies on in this regard are set out at paragraphs 27.6 to 27.9 of its POC and include the following:

(1) Bayer sought to defend the validity of the Patent despite knowing that the Patent had been obtained from the EPO and maintained by the TBA on the basis of its false claims and misrepresentations as to inventiveness and non-obviousness and deliberate and dishonest failures to disclose prior art.

(2) Bayer applied for and successfully obtained the 27 March and 12 April Injunctions (the “Injunctions”) with the intention of enriching itself by extending its monopoly in respect of rivaroxaban and its ability to obtain higher prices for Xarelto.

(3) Bayer also knew that: (i) the effect of the Injunctions would be to cause irremediable losses and prejudice to generic companies (such as Sandoz) and others (including the NHS, which was not party to the cross-under takings); and (ii) any compensatory damages exposure to the respondents on the cross-under takings would be much less than the additional profits available to Bayer as a result of the Injunctions.”

17. Paragraph 27.10 of the Points of Claim asserts that: “Compensatory damages are inadequate in these exceptional circumstances.” Paragraph 28 is a wrap-up paragraph.

### **Bayer’s application**

18. Bayer’s application is to strike out Sandoz’s pleaded claim for an account of profits (specifically, the final sentence of paragraph 26 and the whole of paragraphs 27 and 28 of the Points of Claim) pursuant to CPR 3.4(2)(a) or the court’s inherent jurisdiction, or for summary judgment on that claim.
19. Bayer contends that (1) the terms of its cross-undertakings do not permit Sandoz to advance a claim for an account of profits, and (2) even if they do, the circumstances pleaded by Sandoz cannot justify the award of an account of profits.
20. There was no material dispute as to the principles to be applied on this application. Sandoz reminded me that on a strike out application the facts stated in the relevant statement of case must be assumed to be true, that an application to strike out should not be granted unless the court is certain that the claim is bound to fail, and that while a claim may be struck out as not being a valid one in law, it is not appropriate to strike out a claim in a developing area of law as decisions as to novel points of law should be based on actual findings of fact – see e.g. the *Standard Chartered* case [2025] EWHC 698 (Ch) at [13].
21. In relation to summary judgment I was reminded of the well-known statement of the approach to be adopted by Lewison J in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) at [15]. Bayer highlighted what Lewison J said in point (vii) of his summary:
 

“it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better.”
22. I was also reminded that even if a claim has no real prospect of success there may be compelling other reasons for a trial of the claim (CPR 24.3(b)). Sandoz referred me to examples of such reasons given by Waksman J in *Crossley v Volkswagen* [2021] EWHC 3444 (QB) at [15], namely (1) if the application concerns a developing area of law it may be desirable for the disputed legal questions to be determined against the background of facts found at trial rather than hypothetical facts and (2) where there will be a trial anyway because summary judgment will not dispose of the whole case, and particularly if there is likely to be evidence concerning the same or similar factual matters as those traversed in the application.

**Do the cross-undertakings permit Sandoz to advance a claim for an account of profits?**

23. It was common ground that I need to construe the cross-undertakings to determine their legal effect, having regard to their language and to their purpose. As Warren J said in *Apex Frozen Foods v Ali* [2007] EWHC 469 (Ch) at [15]:

“... The starting point must surely be the true construction of the particular undertaking in question. That is to be judged against the background and purpose of the undertaking which is required by the court to be given in order to ensure that a mechanism is available to make good any detriment suffered by a defendant against whom injunctive relief is obtained when it is subsequently established that there should not be an injunction. ...”

24. In *Lilly Icos v 8pm Chemists* [2009] EWHC 1905 (Ch) at [8]-[10], Arnold J explained matters as follows:

“A cross-undertaking in damages is normally required as a condition for the grant of an interim injunction. Its purpose is to ensure that the parties affected by the injunction are compensated if it later turns out that the injunction was wrongly granted. This purpose is fundamental to the courts’ approach to the grant or refusal of interim injunctions, particularly since *American Cyanamid Co v Ethicon Ltd (No.1)* [1975] A.C. 396; [1975] R.P.C. 513. It follows that the cross-undertaking is a very important means of ensuring that justice is done.

The basic principle applicable to an inquiry under a cross-undertaking is that the cross-undertaking should be enforced in accordance with its terms. In the case of a cross-undertaking expressed in terms such as those set out above, this involves two questions. First, has the order or carrying it out caused loss to the beneficiaries of the cross-undertaking...? Secondly, if so, should the beneficiaries be compensated for that loss?

It follows that the court’s primary task is to compensate the beneficiaries, not to punish the parties that obtained the injunction or to require those parties to make restitution of any benefits that they may have gained as a result of the injunction. It has been held that aggravated damages may be awarded on a cross-undertaking (*Columbia Picture Industries v Robinson* [1987] Ch. 38) and it has been suggested that exemplary damages may be available (see *Smith v Day (No.2)* (1882) L.R. 21 Ch. D. 421 at 428 and *Digital Equipment Corp v Darkcrest Ltd* [1984] Ch. 512 at 516), but no such claim is raised in the present cases.”

25. In *Abbey Forwarding v Hone (No. 3)* [2014] EWCA Civ 711 the Court of Appeal did not approve of the suggestion made by Arnold J elsewhere in his judgment in *Lilly Icos* (and a similar suggestion by Norris J in *Les Laboratoires Servier v Apotex* [2008] EWHC 2347 at [7]) that the award being made under a cross-undertaking was one of equitable compensation. However, it did not call into question the passages quoted above. McCombe LJ said at [63] that a court:

“is compensating for loss for which the defendant “should be compensated” (to apply the words of the undertaking). Labels such as “common law damages” and “equitable compensation” are not, to my mind, useful. The court is compensating for loss caused by the injunction which was wrongly granted.”

26. Similarly, in *Dr Reddy’s Laboratories v Warner-Lambert* [2023] EWCA Civ 73 Arnold LJ said at [93]:

“The purpose of cross-undertakings is to enable parties who have suffered loss as a result of orders having been made which it turns out should not have been made to obtain compensation.”

27. In the present case the cross-undertakings, like those being considered in *Apex*, *Lilly Icos*, *Servier*, *Abbey* and *Dr Reddy’s*, provided that if the court found that the relevant injunction “has caused loss” to Sandoz and decided that Sandoz “should be compensated for that loss” then Bayer would comply with “any Order the Court may make”. They added that Bayer “will be jointly and severally liable for any monetary award relating to such loss.”
28. In my judgment the construction of the cross-undertakings, having regard to their purpose as explained in the cases cited above, is clear. Bayer undertook to comply with any order the court might make to compensate Sandoz for loss it had suffered as a result of the injunctions, and to be jointly and severally liable for any monetary award that the court made to that end. Bayer was not undertaking to disgorge profits it made as a result of the injunctions.
29. I do not accept the construction urged on me by Sandoz, namely that so long as the court decided that Sandoz had suffered loss for which it should be compensated, Bayer had undertaken to comply with any order the court might make, even if that was not an award of compensation for that loss. That would be inconsistent with the purpose of a cross-undertaking which, as explained in the cases cited above, is to ensure that a party which has suffered loss as a result of an injunction which it turns out should not have been granted is compensated for that loss.
30. Sandoz submitted that, under a cross-undertaking, the court assesses monetary relief as if there had been a contract in which the applicant agreed not to prevent the respondent from doing that which the injunction prevented him from doing. Therefore, it submitted, the court had the power to make any monetary award which the court could make for a breach of such a contract. So, if the circumstances were exceptional within the meaning of *Blake*, then an account of profits could be awarded under the cross-undertaking.
31. The starting point for this argument was the dictum of Lord Diplock in *Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 at 361 that:
- “...if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry as to damages at which principles to be applied are fixed and clear. The assessment is made on the same basis as that on which damages for breach of contract would be

assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction”.

32. That dictum was considered by McCombe LJ in *Abbey*. He started at [31] by saying:

“Of course, the injunction creates no contract and that gives rise to certain uncontroversial propositions. ... The undertaking is given to the court and not to the enjoined party. Non-performance of the undertaking is a contempt of court, not a breach of contract. The undertaking is, in effect the “price” which the applicant for the injunction pays in return for the grant of the injunction. It is designed to protect the enjoined party from loss arising from the injunction, which is caused by the order, and which the court decides ought to be paid by the party who obtained it. The application of contractual principles is, therefore, “by analogy”, which one sees from the very case to which Lord Diplock referred, namely *Smith v Day*.”

33. Having analysed a number of cases, McCombe LJ concluded at [63]:

“In the result, therefore, and perhaps not surprisingly, I reach the conclusion that the law as to the recoverability of loss suffered by reason of a cross-undertaking is as stated by Lord Diplock in his dictum in the *Hoffmann-La Roche* case, but with this caveat. Logical and sensible adjustments may well be required, simply because the court is not awarding damages for breach of contract. It is compensating for loss for which the defendant “should be compensated” (to apply the words of the undertaking). Labels such as “common law damages” and “equitable compensation” are not, to my mind, useful. The court is compensating for loss caused by the injunction which was wrongly granted. It will usually do so applying the useful rules as to remoteness derived from the law of contract, but because there is in truth no contract there has to be room for exceptions.”

34. The application of contractual principles of assessment by analogy (with any logical and sensible required adjustments) does not justify treating matters as if there were in fact a contract between the applicant and the respondent. That is illustrated by *Dr Reddy’s Laboratories v Warner-Lambert* [2021] EWHC 2182 (Ch) where Zacaroli J rejected an argument that there were “implied terms” that the applicant would not take certain further steps in addition to not preventing the respondent from doing the acts prohibited by the injunction. He said at [69] that:

“The problem with NHS EWN’s implied term argument is that it overstates the contractual basis of a claim under a cross-undertaking. In *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 (upon which McCombe LJ relied in *Abbey Forwarding Ltd v Hone* (No 3) [2015] Ch 309 (above)), Lord Diplock merely said that the assessment of damages under a cross-undertaking is made “upon the same basis” as that upon which damages for breach of contract would be assessed. McCombe LJ himself, in the passage quoted above at [47], merely said that the court would usually assess damages “applying the useful rules as to



remoteness derived from the law of contract”, albeit that because there was no contract in fact there would be exceptions.”

35. A similar point emerges from the judgment of Jacob LJ in *SmithKline Beecham v Apotex* [2006] EWCA Civ 658. In that case SKB had given a cross-undertaking in favour of certain Apotex group companies which were respondents to the application for an interim injunction, but not two Canadian companies which later claimed to have suffered loss as a result of the injunction. The Court of Appeal considered two bases on which a claim for compensation for the losses of the Canadian companies was advanced. The first was a claim in restitution. At [33]-[44] Jacob LJ rejected the contention that a third party could have a claim in restitution in respect of benefits accruing to a “wrongful” injunctor. While it was not necessary to his decision, he then went on to reject the proposition that a party to a “wrongful” injunction had a claim in restitution independent of the cross-undertaking.

36. The second basis advanced was that the Apotex companies which were subject to the injunction could make a third party claim for losses suffered by the Canadian companies, relying on the *Linden Gardens* line of cases. Jacob LJ rejected that saying, at [86]-[88]:

“86. I think the argument fails for two reasons. First there is in fact no contract between the parties. The undertaking is given to the court - it is to compensate the parties identified in the undertaking. That is all. Second, even if there really had been a contract between the parties, the principles expounded in the cases do not and could not be expanded to cover this kind of third party loss.

87. The first reason is incapable of much elaboration. Lewison J put it elegantly as follows, at paras 82-83:

“82. ...The principle [in the cases relied upon] is predicated on a breach of contract. No cause of action arises at all unless B has broken his promise. If B has not broken his promise, discussion of what the cause of action might encompass if he had done is pointless. So the first question must always be: what has B promised to do?

83. In the present case, GSK promised to abide by any order of the court requiring them to compensate the defendants (or the ‘Apotex parties’ as defined) for any loss that they had suffered. They did not promise to pay the defendants for loss that other people had suffered.”

88. Putting it another way, the argument converts what is only a principle of assessment of compensation for breach of contract into both a notional breach of a notional contract and a method of assessment of breach. The cases relied upon are only about what damage can be claimed following a breach of contract.”

37. This illustrates the limits of the application of contractual principles of assessment of damages by analogy. The court does not simply treat matters as if there had been a contract between the parties, in which the applicant promised the

respondent not to prevent them from doing the acts prohibited by the injunction, and then ask what remedies the respondent would have if there had been such a contract. On the contrary, the remedies are limited by the terms of the cross-undertaking. In *SKB v Apotex* that meant that SKB had no liability to third parties even if a third party claim would have been available had there in fact been a contract. Similarly, in the present case the remedies available are limited, by the terms of the cross-undertakings, to compensation for loss suffered by Sandoz. The terms of the cross-undertakings exclude the remedy of an account of profits even if one would have been available had there in fact been a contract.

38. Sandoz pointed out that, as recognised by Arnold J in *Lilly Icos* citing *Columbia v Robinson*, it has been held that aggravated damages are available under a cross-undertaking. In *Columbia v Robinson*, the individual defendants (but not the corporate defendants) were awarded aggravated damages because of the excessive and oppressive way in which the *Anton Piller* order had been executed, leading to “contumely and affront” (see pp.87-88). Similarly, in *Abbey*, damages were awarded for upset and stress as part of general damages aimed to provide realistic compensation – see e.g. Vos LJ at [150]. Aggravated damages can be awarded under a cross-undertaking because their purpose is to compensate the respondent for injury to their feelings and dignity. The availability of aggravated damages under a cross-undertaking does not mean that a non-compensatory remedy is available.
39. I should address two other cases cited by the parties. Bayer referred me to the judgment of Lewison J in *Wake Forest v Smith & Nephew* [2009] EWHC 45 (Pat). In that case the respondent to an interim injunction application argued that the cross-undertaking should extend to a claim for disgorgement of profits made by the applicant which would not have been made in the absence of the injunction. Lewison J rejected that, saying:

“18. The grant of an injunction is, of course, conditional on the giving of a cross-undertaking by the claimant seeking the injunction. Two questions arise in relation to the cross-undertaking. The first is whether the cross-undertaking should extend to a claim for disgorgement of profits made by the claimants which would not have been made in the absence of the injunction. Mr Mellor puts this point in one of two ways. First, he says that such a claim is maintainable on the form of the conventional wording of the cross-undertaking. Secondly, he says, if it is not, that then the conventional wording should be altered.

19. As to the first way of putting the case, I express no concluded view, although I believe that the decision of the Court of Appeal in the *SmithKline Beecham Plc v Apotex Europe Ltd* [2007] F.S.R. 6 case is authority against that proposition. So far as the second is concerned, I decline to vary the standard form of undertaking. My principal reason for declining to do so is that it is by no means clear to me that it would be just to transfer a profit made by the claimant to the enjoined defendant. If the claimant has made a profit which it would not have made but for the injunction, there may be other people to whom it would be more just that those profits should be returned, either other potential competitors with the defendant or customers who, as things turn out, may have been overcharged.”

40. Bayer submitted that in rejecting the respondent's first submission by reference to *SKB v Apotex*, Lewison J must have had in mind what Jacob LJ said in [86]-[88] (quoted above). Sandoz submitted that Lewison J must instead have been referring to Jacob LJ's rejection of an independent claim for restitution. It is not possible to be sure about which party is correct, and in any event Lewison J said that he was expressing no concluded view on the matter. I do not think that *Wake Forest* advances matters either way.
41. Sandoz relied on what Norris J said in *Servier* at [8]:
- “Second, proceeding on the footing that the enquiry on the cross undertaking is to be conducted according to the principles applicable to contractual damages, I should record that the form of the case before me has meant that I have not been called upon to consider whether it is appropriate to depart from the conventional contractual basis of assessment and instead to apply the exceptional “restitutionary” basis of assessment in contract considered in *Attorney General v Blake* [2001] 1 A.C. 268; 2000] 3 W.L.R. 625 HL. Where what is found to be a wrongful extension of patent protection results in a benefit to the patent holder which exceeds and outstrips the loss which is occasioned to the generic company whose market entry is delayed then it seems to me that “restitutionary damages” might be called for (notwithstanding the rejection by the Court of Appeal in *SmithKline Beecham Plc v Apotex Europe Ltd* [2007] F.S.R. 6 of the argument for a general restitutionary claim based on unjust enrichment and enforceable by parties and non-parties alike).”
42. However, as can be seen, this was *obiter*, and there is nothing to indicate that there had been any argument on the point. Norris J set out the approach which he actually applied in *Servier* at [5], including:
- “5. The principles of law sufficient to enable me to quantify compensation in this case may be shortly stated:
- (a) The undertaking is to be enforced according to its terms. In the instant case (as in many others) it is that Servier will comply with any order the court may make “if the court...finds that this Order has caused loss to the defendants.” The question for me is therefore: what loss did the making of the Order and its continuation until discharge cause to Apotex?
- (b) The approach is therefore essentially compensatory and not punitive; ...”
43. Norris J's summary of principles in [5] was approved by the Court of Appeal in *AstraZeneca v KRKA* [2015] EWCA Civ 484 at [12] (Kitchin LJ, with whom Longmore and Floyd LJJ agreed). Sandoz pointed out that Kitchin LJ went on to set out [7]-[9] of *Servier*, but at [16] he said that [7]-[8] of *Servier* had no bearing on the appeal before him and that he would say no more about them. I do not see how that can be regarded as an implicit approval of what Norris J said in [8].
44. With all due respect to the view expressed, *obiter*, by Norris J in *Servier*, in my judgment it is clear that under the cross-undertakings given by Bayer, Sandoz's

remedy is limited to compensation for the loss it has suffered as a result of the injunctions. While my decision does not depend on it, that conclusion is consistent with the Order made by the Court of Appeal that there should be “an inquiry as to the damages caused to [Sandoz] as a consequence of the interim injunctions”.

## Conclusion

45. In my judgment, for the reasons explained above, the paragraphs of Sandoz’s Points of Claim seeking an account of profits disclose no reasonable grounds for bringing such a claim and should be struck out under CPR 3.4(2)(a). I do not agree with the suggestion by Sandoz that I should not strike out the claim because it is in a developing area of law. On the contrary, with the exception of the *obiter* suggestion of Norris J in *Servier*, which has not been taken up, all the authorities are consistent. I am certain that Sandoz’s claim for an account of profits under the cross-undertakings is bound to fail.
46. Similarly, Sandoz has no real prospect of success on its claim for an account of profits, and so summary judgment should be granted unless there is some other compelling reason why the claim should be disposed of at trial.
47. Sandoz pointed out that another claimant on the inquiry, namely STADA, had pleaded in its Points of Claim, in support of an argument that damages should be assessed liberally, that Bayer was well aware of the risk of the Patent being revoked, but nonetheless pressed ahead with its applications for injunctions having made a calculation that the commercial advantage to Bayer would outweigh the risk of having to pay significant compensation on the cross-undertakings. Sandoz submitted that it would therefore in any event be necessary to examine similar facts at the inquiry to those raised by Sandoz’s account of profits claim, and that amounted to a compelling reason why the claim should be disposed of at a trial.
48. I do not agree. The matters pleaded by STADA do not include matters which are relied on by Sandoz as amounting to exceptional circumstances entitling it to an account of profits. There is no allegation by STADA of dishonesty by Bayer in obtaining the Patent nor of seeking to defend the Patent knowing that it had been obtained by dishonest means. Even if it may be necessary for the inquiry to address the matters raised by STADA when considering whether damages should be assessed liberally (a matter on which I express no view), that is not a reason for permitting Sandoz to advance far more extensive allegations at the inquiry in support of a claim that has no real prospect of success.
49. Sandoz also indicated that it intended to plead the matters set out in paragraph 27 of its Points of Claim in support of an argument that its loss should be assessed liberally, and so those matters would arise in any event at the inquiry. I did not hear argument about whether Sandoz should be permitted to plead those matters in support of such an argument (a matter on which, again, I express no view). However, even if it is, I do not regard that as a compelling reason for disposing of the account of profits claim at a trial rather than now. The account of profits claim has no real prospect of success, and if it proceeds to trial it will undoubtedly increase the complexity of the inquiry.

50. As Bayer has succeeded in its application on the basis of the first ground which it advanced, it is not necessary to consider the second ground, namely whether the matters pleaded by Sandoz could amount to exceptional circumstances such as to justify the award of an account of profits.