Milbank

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CONTACTS

Charles Evans
Partner
+44-20-7615-3090
cevans@milbank.com

William Charles
Associate
+44-20-7615-3076
wcharles@milbank.com

Rebecca Norris
Associate
+44-20-7615-3042
rnorris@milbank.com

Litigation & Arbitration Group Client Alert:

FCA Enforcement Notices: UK Supreme Court Judgment Limits Third Party Rights

In support of its policy of credible deterrence, the Financial Conduct Authority ("**FCA**") has frequently referred to the lessons to be learned from its final notices and, in recent years, it has included some details of the particular misconduct for which the firm in question is being disciplined. This has resulted in a number of claims by individuals who have asserted that they have been identified in a final notice, prejudiced thereby, and denied their rights under section 393 of the Financial Services and Markets Act 2000 ("**third party rights**").

In a highly significant judgment handed down on 22 March 2017, the UK Supreme Court has substantially narrowed the circumstances in which third parties, who have been identified and criticised in enforcement notices issued by the FCA, are afforded third party rights. In a decision which was not unanimous, the majority held that section 393 conferred rights on a third party only "*if he is identified by name or by a synonym for him, such as his office or job title*" in the relevant notice.[1]

It is, however, evident from the individual judgments that there were differing views amongst the Supreme Court Justices and a number of them could see the merits of a less restrictive test.

THE *"LONDON WHALE"* TRADES AND THE FCA DECISION NOTICE

In the wake of trading losses in 2012 said to amount to US$6.2 billion, the FCA issued JP Morgan Chase Bank, N.A. (the "**Bank**") with a Decision Notice on 18 September 2013 and imposed a financial penalty of £137,610,000. The Decision Notice, which was the result of an agreed settlement, was preceded by a Warning Notice and followed by a Final Notice, both on the same day (the "**Notices**").[2]

The trading losses in question resulted from what became known as the "*London Whale*" trades, which were conducted in the Bank's Synthetic Credit Portfolio ("**SCP**"), which was managed within the Bank's Chief Investment Office ("**CIO**").

[1] *Financial Conduct Authority v Macris* [2017] UKSC 19, at 11.
[2] The Notices were, so far as relevant, in materially identical terms.

As well as criticising certain trading strategies and conduct by traders, the FCA found fault with various levels of management within the Bank, in particular "*CIO London management*" which, although not defined in the Decision Notice, was said to "[represent] *the most senior level of management for the SCP in London, reporting directly to CIO Senior Management in New York, which in turn reported to Firm Senior Management.*"[3]

In the relevant period, Mr Macris held the position of International Chief Investment Officer, based in London, and had responsibilities in relation to the SCP. In bringing his complaint against the FCA, Mr Macris contended that the term "*CIO London management*" was used in the Notices specifically and uniquely to refer to him, and that he was thereby "*identified*" (and prejudicially so). In those circumstances, he argued that the FCA's failure to provide him with copies of either the Warning Notice or the Decision Notice, before the Final Notice was published, and to give him an opportunity to make representations, infringed his third party rights.

THE STATUTORY FRAMEWORK

Section 393 FSMA provides that, where a warning notice or decision notice "*identifies*" and is, in the relevant authority's opinion, prejudicial to a third party, then that third party must be given a copy of the notice, access to underlying evidence and an opportunity to make representations.

However, the requirement to provide copies of either notice does not apply when the third party has been issued with a separate notice in relation to the same matter.[4]

THE UPPER TRIBUNAL JUDGMENT

In finding in favour of Mr Macris on the preliminary issue of whether he was "*identified*" in the Notices, the Upper Tribunal formulated a two-stage test to decide if third party rights are engaged:

> "*(1) Are the references in the Final Notice to CIO London management references to an individual, ascertained by reference solely to the terms of the Notice itself?*
>
> *(2) If so, can those references be regarded as referring to anyone other than Mr Macris?*"[5]

Further, whilst the first question fell to be determined solely by reference to the terms of the Notices, the Judge held that "[f]*or the purpose of answering the second question above recourse may be made to external material to confirm that the individual identified in the Final Notice by the description could in fact only be Mr Macris...*".[6]

[3] Paragraph 4.3 of the Final Notice.
[4] S.393(2) and (6) FSMA.
[5] *Achilles Macris v The Financial Conduct Authority* 2014 WL 1219801, at 39.
[6] *Ibid.*, at 40.

Applying this test, the Judge found first that, on the terms of the Final Notice itself, the acts and omissions attributed to CIO London management were acts and omissions of an individual and, therefore, an individual had been identified therein.[7] As to the second question, having considered various pieces of "*external material*", including witness statements, organisational charts and an investigation report by a committee of the U.S. Senate[8] in which Mr Macris was named, the Judge concluded that the individual identified in the Final Notice "[could] *not be anyone other than Mr Macris*".[9]

THE COURT OF APPEAL JUDGMENT

The FCA appealed the Upper Tribunal's decision. The Court of Appeal also found in favour of Mr Macris, but criticised some aspects of the Upper Tribunal's test.[10]

In particular, Lady Justice Gloster held that the second stage of the test was defective because it appeared to permit unlimited reference to external material (including *ex post facto* material), and did not relate the test to any particular *type* of reader.[11]

Accordingly, the Court of Appeal re-formulated the second stage of the test as follows:

"*Are the words used in the* [Notice] *such as would reasonably in the circumstances lead persons acquainted with the claimant/third party, or who operate in his area of the financial services industry, and therefore would have the requisite specialist knowledge of the relevant circumstances, to believe as at the date of the promulgation of the Notice that he is a person prejudicially affected by matters stated in the reasons contained in the* [N]*otice.*"[12]

[7] E.g. *ibid.*, at 46: "*…CIO London management is stated in the notice to have performed actions such as having conversations, attending meetings and sending emails which can only be taken in the context in which these events are described, as being the actions of an individual rather than a body of persons.*"

[8] See the report of the United States Senate Permanent Subcommittee on Investigations, "*JP Morgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses*", dated 15 March 2013.

[9] *Achilles Macris v The Financial Conduct Authority* 2014 WL 1219801, at 50 to 55.

[10] *The Financial Conduct Authority v Macris* [2015] EWCA Civ 490, at 52 to 54.

[11] *Ibid.*, at 50: "[the Judge in the Upper Tribunal]…*went wrong in his articulation of what he regarded as the relevant tests… That was because he did not relate the second stage of such tests to what, objectively, persons acquainted with the claimant/third party, or who operated in his area of the financial services industry, might have reasonably known as at the date of the promulgation of the Notice. In my judgment, there cannot be* ex post facto *unlimited reference to external material to identify the third party.*"

[12] *Ibid.*, at 45. The Court of Appeal also held, drawing parallels with authorities from defamation proceedings, that the claimant/third party does not need to be mentioned by name in order to be "*identified*".

Pending the outcome of the FCA's appeal to the Supreme Court, this formulation of the test has been applied by the Upper Tribunal in several claims brought against the FCA for alleged infringement of third party rights.[13]

THE SUPREME COURT DECISION

The Supreme Court overturned the decision of the Court of Appeal by a majority of 4 to 1, finding in favour of the FCA. However, on the issue of law (*i.e.*, the test for a third party to be "*identified*" for section 393), the majority was 3 to 2, with Lord Mance agreeing with Lord Wilson's dissenting judgment in this respect.

In his lead judgment, Lord Sumption (with whom Lord Neuberger and Lord Hodge agreed) delineated the application of section 393 as follows:

> "*...a person is identified in a notice under section 393 if he is identified by name or by a synonym for him, such as his office or job title.*"[14]

As to the standard for assessing identification by a "*synonym*", Lord Sumption held that "*it must be apparent from the notice itself that it could apply to only one person and that person must be identifiable from information which is either in the notice or publicly available elsewhere. However, resort to information publicly available elsewhere is permissible only where it enables one to interpret (as opposed to supplementing) the language of the notice.*"[15]

Applying this to Mr Macris, the majority held that the reference in the Notices to "*CIO London Management*" was not "*a relevant synonym*", and that, therefore, he had not been identified for the purposes of section 393.

It is clear that reaching a conclusion on this issue was not straightforward for several of the Justices. As Lord Neuberger observed, "*there are powerful policy arguments pointing in opposite directions...*" and there could be more than one reasonable view.[16]

However, clarity and the practicalities of the FCA's investigatory and disciplinary functions were powerful considerations for the majority. For example, Lord Sumption noted that the FCA "*will not necessarily know what if any further information about the business, the facts or the individuals involved may be available to knowledgeable outsiders or discoverable from publicly available sources. In those circumstances* [the FCA] *must be able to ensure, by the way in which it frames its own notices, that a*

[13] E.g. *Christian Bittar v FCA* [2015] UKUT 0602 (TCC); *Christopher Ashton v FCA* [2016] UKUT 0005 (TCC); *Joerg Vogt v FCA* [2016] UKUT 0103 (TCC); *Julien Grout v FCA* [2016] UKUT 0302 (TCC).
[14] *The Financial Conduct Authority v Macris* [2017] UKSC 19, at 11.
[15] *Ibid.*: in this regard, Lord Sumption gave the example of "*a reference to the 'chief executive' of the X Company* [being] *elucidated by discovering from the company's website who that is*" as information that interprets, rather than supplements, the language of the notice.
[16] *Ibid.*, at 25.

third party is not 'identified' in the notice, even if he or she is identifiable from information elsewhere."[17]

THE DISSENTING JUDGMENTS

Lord Sumption's formulation, therefore, represents a significant narrowing of the tests described by the Upper Tribunal and the Court of Appeal: in fact, as Lord Wilson observed in his dissenting judgment, "*Lord Sumption favours a construction of section 393 which appears to narrow the field of those upon whom it confers third party rights even more than the* [FCA] *itself argues to be correct.*"[18]

Lord Wilson favoured a wider test, on which he agreed, in essence, with Lord Mance (although they differed on the result):

> "*Are the words in the notice such as would reasonably lead an operator in the same sector of the market who is not personally acquainted with the* [third party], *by reference only to information in the public domain to which he would have ready access, to conclude that the individual referred to in the notice is the* [third party]*?*"[19]

Lord Wilson, therefore, held that the test should involve assessing whether "*ordinary market operators*", rather than simply "*ordinary readers*", would conclude that an individual had been identified. His reasoning focused on the "*particular sort of damage*", which an unjustified criticism of an individual in an FCA notice would be likely to cause him – namely, damage to his "*ability to remain in his employment, or to find other employment in that sector, or otherwise to continue to earn his livelihood in the industry.*"[20]

Importantly, Lord Wilson also drew attention to the risk of the inconsistent treatment of individuals across FCA notices.[21] In particular, he noted that, whereas the Notices contained an allegation that Mr Macris deliberately misled the FCA, when the FCA came subsequently to issue notices to Mr Macris (after an investigation into his con-

[17] *Ibid.*, at 14; Lord Neuberger's judgment contains similar considerations at 28.
[18] *Ibid.*, at 49.
[19] *Ibid.,* at 63.
[20] *Ibid.,* at 60.
[21] This risk was also acknowledged by Lord Neuberger, who explained that *"*[t]*he interests of the addressee of a notice who is accused of failings, and those of a third party such as an employee of the addressee, who may be identifiable as responsible for, or implicated in, the alleged failings, are by no means necessarily aligned… it may well be that an employer would want to try and curtail any publicity about the alleged failings by quickly negotiating and paying a penalty, even if there may be grounds for challenging the allegation in whole or in part…*[but] *the employee…might well feel that, in the absence of the Tribunal exonerating him, his reputation, and therefore his future employment prospects, could be severely harmed or even ruined." Ibid.*, at 21.

duct), that allegation was not included.[22] This risk of inconsistency does not sit comfortably with either the FCA's stated aim of ensuring the "*transparency*" of its decision-making, or with the risk of individuals "*being harmed by notices without any recourse.*"[23]

CONCLUSIONS: WHAT DOES IT NOW MEAN TO BE 'IDENTIFIED' FOR SECTION 393?

The Supreme Court's judgment is likely to limit significantly the cases in which third party rights arise.

Based on the test as formulated in Lord Sumption's lead judgment, it seems clear that an individual will only be 'identified' in a warning notice, decision notice or final notice for these purposes if:

- he or she is specifically named in any such notice; or
- a synonym for that individual appears in any such notice (e.g. his or her job title or office), provided that it must be clear from the notice itself that the synonym could apply only to one person and that person must be identifiable from information which is either in the notice or readily available to the public elsewhere (e.g. where a notice refers to the "*Chief Executive*", checking a company's website to identify the individual holding that position); and
- it is not permissible to use publicly available information to supplement (as opposed to interpreting) the language of the notice in order to ascertain the identity of the individual in question.

Ultimately, the question at the heart of this appeal was where to draw the line. Although the Supreme Court's judgment is clear where the line should be drawn, some will question whether it strikes a fair balance between individual reputation and regulatory efficiency.

[22] *Ibid.*, at 61.
[23] *Ibid.*, at 15 (citing the FCA's *Enforcement Guide* (2016), section 6.2.16); and per Lord Neuberger at 23.

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LONDON
10 Gresham Street, London EC2V 7JD

Tom Canning	tcanning@milbank.com	+44-20-7615-3047
Charles Evans	cevans@milbank.com	+44-20-7615-3090
Julian Stait	jstait@milbank.com	+44-20-7615-3005

NEW YORK
28 Liberty Street, New York, NY 10005

Wayne M. Aaron	waaron@milbank.com	+1-212-530-5284
Antonia M. Apps	aapps@milbank.com	+1-212-530-5357
Thomas A. Arena	tarena@milbank.com	+1-212-530-5828
George S. Canellos *Global Head of Litigation*	gcanellos@milbank.com	+1-212-530-5792
James G. Cavoli	jcavoli@milbank.com	+1-212-530-5172
Scott A. Edelman *Firm Chairman*	sedelman@milbank.com	+1-212-530-5149
Christopher J. Gaspar	cgaspar@milbank.com	+1-212-530-5019
David R. Gelfand	dgelfand@milbank.com	+1-212-530-5520
Joseph S. Genova	jgenova@milbank.com	+1-212-530-5532
Robert C. Hora	rhora@milbank.com	+1-212-530-5170
Atara Miller	amiller@milbank.com	+1-212-530-5421
Sean M. Murphy	smurphy@milbank.com	+1-212-530-5688
Daniel Perry *Practice Group Leader*	dperry@milbank.com	+1-212-530-5083
Tawfiq S. Rangwala	trangwala@milbank.com	+1-212-530-5587
Stacey J. Rappaport	srappaport@milbank.com	+1-212-530-5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1-212-530-5651
Jed M. Schwartz	jschwartz@milbank.com	+1-212-530-5283

Alan J. Stone	astone@milbank.com	+1-212-530-5285
Errol B. Taylor	etaylor@milbank.com	+1-212-530-5545
Fredrick M. Zullow	fzullow@milbank.com	+1-212-530-5533

WASHINGTON, DC
International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

David S. Cohen	dcohen2@milbank.com	+1-202-835-7517
Andrew M. Leblanc	aleblanc@milbank.com	+1-202-835-7574
Michael D. Nolan	mnolan@milbank.com	+1-202-835-7524
Aaron L. Renenger	arenenger@milbank.com	+1-202-835-7505

LOS ANGELES
2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019

Robert J. Liubicic	rliubicic@milbank.com	+1-424-386-4525
Jerry L. Marks	jmarks@milbank.com	+1-424-386-4550
Mark C. Scarsi	mscarsi@milbank.com	+1-424-386-4580