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Litigation & Arbitration Group Client Alert: When Can a Third Party Be Said to Have Been Identified by the FCA for the Purposes of Section 393 FSMA 2000?

In seeking to achieve its enforcement objective of "*credible deterrence*", the Financial Conduct Authority ("**FCA**") has, in recent years, included in its final notices examples of the particular misconduct for which the firm in question is being disciplined. However, this approach has resulted in the individuals involved claiming that they have been identified and prejudiced and that their rights to make representations prior to publication of the relevant notice under section 393 of the Financial Services and Markets Act 2000 ("**FSMA**") have been infringed. In the recent case of *Christian Bittar v FCA*,[1] the Upper Tribunal gave guidance as to when a third party (such as an individual trader) can be said to have been "*identified*" for these purposes.

Mr Bittar, a former employee of Deutsche Bank AG ("**Deutsche Bank**"), contended that he had been prejudicially identified by the decision notice[2] issued to Deutsche Bank on 23 April 2015 in relation to LIBOR and EURIBOR related misconduct (the "**Deutsche Bank Decision Notice**").[3] In ruling in favour of Mr Bittar, the Upper Tribunal applied the Court of Appeal's judgment in *FCA v Macris*[4] *which deter-*

[1] [2015] UKUT 0602 (TCC).

[2] The decision notice would have been preceded by a warning notice and followed by a final notice (the "**Deutsche Bank Final Notice**"), both on the same day by virtue of the fact that Destuche Bank entered an agreed settlement with the FCA, a condition of which was that Deutsche Bank did not exercise its right to refer the Decision Notice to the Tribunal. Mr Bittar, in fact, based his arguments on the Final Notice, on the basis that its content is materially the same as the Decision Notice.

[3] Mr Bittar held the position of Manager of the Money Market Derivatives desk in London during the time period relevant for the purposes of the Deutsche Bank Decision Notice.

[4] [2015] EWCA Civ 490.

mined the information to which reference can be made in order to determine whether a third party has been "*identified*" by the FCA in a regulatory notice for the purposes of section 393 FSMA.

BACKGROUND

Section 393 FMSA provides that, where a warning or decision notice (the "**Notice**") issued by the FCA "*identifies*" a third party and is prejudicial to that third party, the third party must:

(a) be given a copy of the Notice; and

(b) be given at least 28 days within which to make representations to the FCA in relation to the Notice.[5]

On 19 May 2015, in *Macris*, the Court of Appeal held that, when determining whether an individual has been "*identified*" within the meaning of section 393 FSMA, it is legitimate to have regard to material external to the Notice. However, the Court of Appeal rejected the argument that there could be unlimited reference to external material in favour of a narrower, objective test:

> "*Are the words used in the "matters" such as would reasonably in the circumstances lead persons acquainted with the…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 promulgation of the Notice that he is a person prejudicially affected by matters stated in the reasons contained in the* [N]*otice?*"[6]

However, in the wake of the Court of Appeal's decision, there remained a lack of clarity as regards the practical application of this test.

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The issue to be determined by the Upper Tribunal was whether, in the light of the decision in *Macris*, Mr Bittar had been identified, for the purposes of section 393 FSMA, in the Deutsche Bank Decision Notice.[7]

[5] This does not apply when the third party in question has been issued with a separate decision notice in relation to the same matter (section 393(6) FSMA).

[6] *FCA v Macris* [2015] EWCA Civ 490, paragraph 45 per Gloster LJ.

[7] It had already been conceded by the FCA that, if he was found to have been identified, that identification would be prejudicial to Mr Bittar (and also that he would, therefore, be entitled to the relief sought) (see paragraphs 10-11 of *Bittar v FCA*).

In determing this issue, the Upper Tribunal gave the following helpful guidance in interpreting the Court of Appeal's test:

(a) the test proceeds by looking only at information that was in the public domain at the time the Notice was published and that "*could reasonably be expected to have been obtained by well-informed market participants in the relevant area*" [8] (referred to by the Upper Tribunal as "*relevant readers*");

(b) the Court of Appeal's reference, in *Macris*, to "*persons acquainted with the…third party*" includes "*those who work in the same area*" as the third party but does not include "*those with intimate knowledge of the relevant events (for instance, those who actually participated in any particular set of transactions, or who have advised the person about them) or those with special personal knowledge (such as a very close friend, someone who sat next to the person at work, a spouse)*";[9]

(c) the test does not permit the use of knowledge that could only be obtained by extensive investigation, such as the type of enquiries that a thorough investigative journalist would undertake;[10] and

(d) when seeking to demonstrate that section 393 FSMA has been engaged, it is not necessary for the third party to adduce any evidence that relevant readers had, in fact, identified him or her in the Notice.[11]

Whilst this clarification is welcome, it is clear, as the Upper Tribunal acknowledged, that the question of whether a third party has been identified will be wholly dependent upon the circumstances of each individual case, "*including the nature of the market in question and what material might reasonably be expected to have been read by the relevant readers*".[12] This results in a fluid, and somewhat circular, approach where the relevant reader must be "*assumed to have such a level of interest in the subject matter concerned and such a level of knowledge and understanding that would reasonably*

[8] *Bittar v FCA* [2015] UKUT 0602 (TCC), paragraph 23, lines 32-33 and 36-37.

[9] *Ibid.*, paragraph 34. The Upper Tribunal clarified that, in Mr Bittar's case, relevant readers included Mr Bittar's counterparties in other leading banks operating in the same area, the customers and counterparties of his business unit and those who worked within Deutsche Bank outside Mr Bittar's own team. However, they did *not* include individuals who worked in Mr Bittar's own team or to whom he reported.

[10] *Ibid.*, paragraph 23, lines 28-32. However, reference could be made to information that would be retained by relevant readers without them "*having to do an extensive forensic exercise to remind themselves of what they read previously, even though they might seek to refresh their memory by reference to the material they had seen before*" (lines 34-36).

[11] *Ibid.*, paragraph 28.

[12] *Ibid.*, paragraph 30, lines 1-5.

be expected of a relevant reader considering the particular evidence that the Tribunal is asked to review".[13]

Adopting this approach, the Upper Tribunal considered the information contained in the Deutsche Bank Final Notice regarding Mr Bittar's role within the Bank, the information already available in the media in relation to Mr Bittar and the information contained in other regulatory notices published at the same time as the Deutsche Bank Final Notice. The Upper Tribunal concluded that Mr Bittar had been identified within the Deutsche Bank Decision Notice for the purposes of section 393 FSMA.

CONCLUSION

The test set out in *Macris* clearly requires careful consideration of the specific facts of each individual case in order to determine whether any third party rights have been engaged and, therefore, leaves the door open for future challenges by third parties. Consequently, the recent cases involving individuals who have claimed their third party rights have been breached will be of some concern to the FCA given the difficulties they present in the context of the provision of details of misconduct in regulatory notices. The FCA will, no doubt, be hoping that the Supreme Court will adopt a more restrictive interpretation of section 393 FSMA when it determines the FCA's appeal in *Macris* in 2016.

[13] *Ibid.*, paragraph 30, lines 5-9.

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