Client Update

FCA v Macris: UK Supreme Court Clarifies the Test for Identifying Third Parties in FCA Enforcement Notices

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In an important recent decision for the UK Financial Conduct Authority ("FCA"), the United Kingdom's highest court, the Supreme Court, has significantly narrowed the grounds on which a third party will be deemed to have been "identified" by the FCA in the context of a warning or decision notice, giving rise to third-party rights under section 393 of the Financial Services Markets Act 2000 ("FSMA").

THIRD-PARTY RIGHTS: SECTION 393 FSMA

Under section 393 FSMA, if a warning or decision notice prejudicially identifies a third party, the FCA is required to provide that third party with a copy of the notice and with the opportunity to make representations to the FCA prior to the publication of the final notice. The third party also has the right to refer any adverse comment to the Upper Tribunal (Tax and Chancery) (the "Upper Tribunal") and, by section 394 FSMA, request disclosure of relevant material held by the FCA. An individual that considers his or her third-party rights have been breached through the publication of a final notice may refer the matter to the Upper Tribunal.

BACKGROUND

In 2013, the FCA issued a warning notice, decision notice, and final notice to JPMorgan Chase Bank, N.A. ("JPM"). The notices concerned the bank's Chief Investment Office ("CIO"), which had managed the synthetic credit portfolio ("SCP") that suffered losses of $6.2 billion in 2012 (through trades known as the "London Whale" trades). During the relevant period, Mr. Achilles Macris had been the Head of CIO International.

The notices did not mention Mr. Macris by name, but referred to "CIO London management", which was described within the Bank's hierarchy as being "the

most senior level of management for the [SCP] in London". In particular, the notices referred to "CIO London management" as having deliberately misled the FCA. Mr. Macris was not provided with a copy of the notices or granted third party rights.

Mr. Macris referred the final notice (the "Notice") to the Upper Tribunal on the basis that he had been prejudicially identified by the term "CIO London management" and that the FCA had failed to grant him third-party rights in breach of section 393 FSMA.

UPPER TRIBUNAL DECISION

On 11 April 2014, the Upper Tribunal held that, despite not being identified by name, Mr. Macris had been identified for the purposes of section 393 FSMA.[1] The Upper Tribunal articulated a two-part test:

- First, the references in the relevant notice must refer to an individual (which must be clear from the terms of the notice itself); and
- Second, a specific individual must be identified in the notice, which may be ascertainable through "external material".

THE COURT OF APPEAL DECISION

On 19 May 2015, the Court of Appeal upheld the decision of the Upper Tribunal on appeal by the FCA.[2] The Court of Appeal also formulated a two-part test:

- First, it is necessary to determine whether the terms of the notice refer to a specific individual (for example, through a job title); and
- Second, it is necessary to determine whether the notice identified a specific individual. It would be sufficient if the notice would reasonably lead a person "acquainted" with the third party, or who operated in the same field as the third party in the industry (and therefore would have the requisite specialist knowledge of the relevant circumstances), to identify the individual. In reaching this conclusion, the Court of Appeal held that it would be permissible to have recourse to "external material".

[1] *Macris v FCA* FS/2013/0010; [2014] All ER (D) 196 (Apr).

[2] *FCA v Macris* [2015] EWCA Civ 490.

The Court of Appeal held that the references in the Notice to "CIO London management": (i) referred to an individual; and (ii) that members of Mr. Macris' industry were able to identify that individual as Mr. Macris.

SUPREME COURT DECISION

On 22 March 2017, the Supreme Court allowed the appeal of the FCA, ruling that Mr. Macris had not been identified. In doing so, the majority of the Supreme Court adopted a significantly narrower test for identifying third parties in FCA notices.

Lord Sumption (with whom Lord Hodge and Lord Neuberger agreed) provided the leading judgment, holding that a third party would be deemed to have been identified only if he was "identified by name or by a synonym for him, such as his office or job title". For a third party to be identified by a synonym, it must (i) be apparent from the notice itself that the synonym could only apply to "one person"; and (ii) be possible for the person to be identifiable from "information which is in the notice or publicly available elsewhere".

The Supreme Court made clear, however, that recourse to publicly available information will only be permissible where it enables one to "interpret" the language of the notice, rather than "supplement" it.[3] Further, and crucially, the individual's identity must be discernible to a member of the general public, rather than (as the Court of Appeal had ruled) a member of the same industry. Lord Neuberger expanded on the leading judgment, stating that any investigation by the public should be "straightforward and simple", and not "require any detective work".

Both Lord Mance and Lord Wilson (the latter dissenting) argued for alternative formulations of the "identification" test, providing separate judgments that sought to strike a greater balance between regulatory efficiency and protection of individual rights. Lord Mance, whilst concluding that Mr. Macris had not been "identified" in the Notice, argued that "A notice will…only identify an individual if it does so to persons operating in that world, unacquainted with the particular individual or his company, though familiar with information generally available publicly to operators in that world".

Lord Wilson delivered a dissenting judgment, arguing that the proper test is whether an "ordinary operator" in the same sector of the market, with access to information freely available in the public domain, would be able to identify an

[3] *FCA v Macris* [2017] UKSC 19 at 11 per Lord Sumption.

individual in a notice. Lord Wilson emphasised that the market sector in which the individual operates is where FCA criticism is likely to cause him or her greatest damage.

ANALYSIS

The Supreme Court judgment will be welcomed by the FCA. The previous lower court decisions were considered by the FCA to present significant practical difficulties, which required them to exercise considerable caution in the drafting of notices. The decision has, however, raised concerns in the financial services sector that individual rights will not be properly protected and individuals will find themselves unfairly or unduly exposed as a result of the Supreme Court's decision with no recourse to challenge allegations raised against them in the FCA's notices.

Whilst the case does represent a potentially significant limitation of third-party rights under section 393 FSMA, it should also be remembered that in Serious Fraud Office investigations that are resolved by Deferred Prosecution Agreements with associated statements of fact, any non-parties that might be identified do not have any rights to receive notice or make representations.

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Please do not hesitate to contact us with any questions.