

# Supreme Court rules on test for identification in respect of third party rights under s393 of the Financial Services and Markets Act 2000 ("the Act")

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On 22 March 2017, the Supreme Court delivered its long awaited judgment in *FCA v Macris* [2017] UKSC 19 which determined what it means to be identified in an Enforcement Notice issued by the FCA.

S393 of the Act contains provisions for protecting third parties against unfair prejudice. Subsection (1) provides:

*"If any of the reasons contained in a warning notice to which this section applies relates to a matter which:*

*(a) Identifies a person ("the third party") other than the person to whom the notice is given, and*

*(b) In the opinion of the regulator giving the notice, is prejudicial to the third party,*

*a copy of the notice must be sent to the third party."*

The purpose of the procedure under s393 is to enable the third party believed to be affected to make representations to the regulator within a reasonable period of time and before the notice is made public.

## Background

In September 2013, the FCA issued a fine against JP Morgan Chase Bank NA ("JPM") for the sum of £137.6m in respect of losses in its Synthetic Credit Portfolio arising from what was termed "London Whale" trades. The FCA set out its findings in warning, decision and final notices issued to JPM ("Notice"), all of which were issued at the same time after agreement was reached with JPM regarding the time and term of the notices.

In 2012, Mr Achilles Macris ("Mr Macris") was JPM's International Chief Investment Officer. In that capacity, he was head of a unit of JPM called the Chief Investment Office or CIO International. The function of CIO International was to manage the firm's excess deposits, including a portfolio of trade credit instruments called the Synthetic Credit Portfolio and Mr Macris's own functions were "controlled functions" which meant that he had to be approved by the FCA as a suitable person to carry on those functions.

In the Notice, the FCA made certain findings in respect of "CIO London management". Mr Macris contended that such references within the Notice were clearly identifiable as references to him personally and that the FCA had failed to provide him with a copy of the notice prior to publication thus enabling him to exercise third party rights.

Mr Macris referred the matter to the Upper Tribunal which considered, as a preliminary issue, whether the references in the Notice to CIO London management identified an individual. The Tribunal found that Mr Macris had been identified by the Notice.

The FCA appealed the decision to the Court of Appeal who also concluded that it was possible to identify Mr Macris from the references in the Notice to CIO London management.

The Court of Appeal drew an analogy between directive under s.393 FJMA with publication on the law of defamation, namely, as regard the words used: "Are they such as reasonably in the circumstances would lead persons acquainted with the Claimant to believe that he was the persons referred to?"

The FCA appealed the decision of the Court of Appeal to the Supreme Court.

In a majority judgment by the Supreme Court, (Lord Sumption gave the leading judgment with whom Lord Neuberger and Lord Hodge agreed) the court found that Mr Macris had not been identified by the Notice thus overturning the decisions of the Upper Tribunal and the Court of Appeal.

## Reasoning of the Supreme Court

The appeal turned on the meaning of "identities" and the evidential question the Supreme Court had to determine was "what

*were the background facts relevant for this purpose?"*

It was held that the test of identification to be adopted requires express identification by name or by a synonym for an individual such as his/her office or job title. Further, in the case of a synonym, it must be apparent from the notice itself that it could only apply to one individual who is identifiable from the notice itself or publicly available information elsewhere. Lord Neuberger expanded on Lord Sumption's statement by explaining that an individual will be identified in a document if (i) his/her position or office is mentioned, (ii) he/she is the sole holder of that position or office, and (iii) reference by members of the public to freely and publicly available sources of information would easily reveal the individual by reference to that position or office. In order to satisfy the test, any research or investigation by the public should not require detective work or be a result of "jigsaw identification". The Court of Appeal's interpretation of the test including the reference to the law of defamation was rejected.

Lord Mance was clearly concerned by the narrowness of the test adopted by Lords Sumption, Neuberger and Hodge identifying the fact that their approach led to a narrower definition than even the FCA had sought, and extended this so that information available to both the public generally and to a specific sector of the public was allowed to be used and did not require the use of information to be limited to interpretation of the notice.

The fifth panel member Lord Wilson delivered a dissenting judgment stating that he would have dismissed the appeal by the FCA and on his construction of the word "identifies" he aligns himself more closely with Lord Mance but argued that there should be an ordinary market operator test. He stated *"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 applicant, 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 applicant?"*

In Lord Wilson's view his test struck a balance between the individual's reputation and regulatory efficiency which was recognised by the FCA in its Notice of Appeal.

## Comment

This long awaited decision is important for all involved with the regulatory processes and it is concerning that the outcome of this appeal results in an apparent failure to strike a fair balance between the individual and the regulator. That balance is now perceived to be weighted heavily in favour of the FCA. It is hoped that the FCA will take extra care in drafting its notices in order to try to strike a fair balance between the individual's reputation and regulatory efficiency in accordance with what its accepted understanding of s393 as stated in its notice of appeal in this matter.

The FCA's approach to the issue of notices will come under greater scrutiny in circumstances where it results from agreement with the regulated firm, especially in light of the enhanced responsibility and accountability of induction under the Senior Manager Regime. What clearly needs to be guarded against is Notices being heavily critical of individuals in circumstances where those individuals have had no input or say in the matter. This is what s.393 is intended to guard against and it is hoped that the FCA's enforcement function will think very carefully about identification of individuals, notwithstanding the fact that the Supreme Court meeting could be said to relieve the FCA of some of that burden.

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