

# Financial Conduct Authority v Macris

The Supreme Court establishes test for "identification" in respect of third party rights under s393 of the Financial Services and Markets Act 2000.

On 22 March 2017 the Supreme Court handed down its judgment in the long-awaited decision of *FCA v Macris* [2017] UKSC 19, defining what it means to be "identified" in a Financial Conduct Authority ("FCA") Enforcement notice and in doing so, overturned the decisions of the Upper Tribunal and the Court of Appeal.

## Key Points

- A person is identified in a notice under s393 if they are identified by name or by "a synonym", such as his or her office or job title, e.g. Chairman of the Board.
- If a synonym, it must be clear from the notice itself that the synonym could only apply to that one person.
- Publicly available information may be used to identify the individual if such information is known to the public generally or is easily discoverable.
- Reference can only be made to information external to the notice to interpret the language of the notice, not to deduce the identity of the individual.

## Third Party Rights

Under section 393 of the Financial Services and Markets Act 2000 ("FSMA"), if an individual is prejudicially identified in an FCA warning or decision notice, he or she is entitled to various "third party rights". These rights include the right to be provided with a copy of the notice, the provision of a reasonable time period within which to make representations in respect of any criticisms of them in the notice, and by section 394, the right to request disclosure of relevant material held by the FCA.

Adverse comment by the FCA can severely damage an individual's reputation, and these protections are designed to ensure that any individuals who are prejudicially identified in an Enforcement notice are given an opportunity to respond to criticisms aimed at them before the FCA's findings are made public.

## Background

In September 2013 the FCA fined JP Morgan Chase Bank NA (the "**Bank**") £137.6 million in respect of losses in its Synthetic Credit Portfolio arising from the so-called "London Whale" trades. The FCA set out its detailed findings in warning, decision and final notices issued to the Bank (the "**Notice**").

At the time, Mr Macris was head of Chief Investment Office International at the Bank and had regulatory oversight of the Synthetic Credit

Portfolio. In the Notice the FCA made certain adverse findings in respect of "CIO London management". Mr Macris argued that such references within the Notice were clearly identifiable as references to him personally, and that the FCA had not provided him with third party rights prior to publication. Mr Macris therefore referred the matter to the Upper Tribunal of the Tax and Chancery Chamber (the "**Upper Tribunal**").

## Upper Tribunal

The Upper Tribunal considered, as a preliminary issue, whether references in the Notice to "CIO London management" identified an individual. In doing so the Upper Tribunal set out the test for identification as follows:

1. Were references to "CIO London management" references to an individual, ascertained solely by reference to the terms of the Notice itself?
2. If so, can those references be regarded as referring to anyone other than Mr Macris?<sup>1</sup>

The Upper Tribunal found that Mr Macris had been identified in the Notice.

The FCA appealed the decision to the Court of Appeal.

<sup>1</sup> *Financial Conduct Authority v Macris* FS/2013/0010; [2014] All ER (D) 196 (Apr).

## Court of Appeal

The Court of Appeal confirmed that the test needs to be applied in two stages:

1. Accepting the first stage of the Upper Tribunal's identification test, whether the notice is to be construed as referring to a 'specific person', other than the subject of the notice. That question was to be answered solely by reference to the content of the notice.
2. At the second stage, whether the notice 'identified' that specific person. That question was to be answered taking account of "information that was external to the notice itself".<sup>2</sup>

Applying this two stage test the Court of Appeal held that it was possible to identify Mr Macris from the references to "CIO London management" in the Notice.

The FCA again appealed the decision.

## The Supreme Court

In a change of approach, the Supreme Court rejected the Court of Appeal's test, and in so doing, found that Mr Macris had not been identified in the Notice.

Lord Sumption (with whom Lord Neuberger and Lord Hodge agreed), stated instead that the test requires express identification by name, or alternatively by "synonym" provided that such synonym can only refer to one individual who is identifiable from the notice itself, or publicly available information (if that information is to interpret the notice).

Lord Neuberger expanded on this stating that an individual will be identified in a document if (i) his position or office is mentioned, (ii) he is the sole holder of that position or

*"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. In the case of a synonym, 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".*

**Lord Sumption, para 11**

office, and (iii) reference by members of the public to freely and publicly available sources of information would easily reveal the name of that individual by reference to his position or office. Furthermore, in order to satisfy the test, any research or investigation by the public should be straightforward and simple, and not require any detective work, or be a result of "jigsaw identification".

### Lord Mance

Lord Mance's test for "identification" differed from the majority:

*"The test of identification should have regard to information generally available publicly, without inquiry of those with direct knowledge of the*

*company involved or detailed investigation, to those in the relevant financial world in which the matter occurred. A notice will, in my view, 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". [37]*

Lord Mance therefore broadened the test set out by Lords Sumption, Neuberger and Hodge, and aligns more closely with that of the Court of Appeal.

In establishing the identity of an individual in a notice, Lord Mance allows information available to both the public generally and to a specific sector of the public to be used, and does not require the use of such information to be limited to interpretation of the notice.

However, even applying this broader test, Lord Mance found that Mr Macris had not been identified in the Notice.

### Lord Wilson, dissenting

In a dissenting judgment, Lord Wilson stated that he would have dismissed the FCA's appeal. His construction of the word "identifies" pursuant to s393 differs to Lords Sumption, Neuberger and Hodge, aligning more closely with Lord Mance.

Lord Wilson argued that there should be an ordinary market operator test, revising Lord Mance's test:

*"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?" [63]*

<sup>2</sup> *Financial Conduct Authority v Macris* [2015] EWCA Civ 490 at [54].

Lord Wilson's view was that his alternative test would strike a balance between individual reputation and regulatory efficiency, which, as recognised by the FCA in argument, was the intention of s393 FSMA.

## Conclusion

- A person need not be named in a warning, decision or final notice.
- A person will be identified if the regulator uses a synonym for them provided that it is clear from information available within the notice itself that the synonym is for one person, or it is clear from easily available public information (such as 'Chairman of X Board') that the synonym refers to said individual.
- It is not permissible to use information only available to a small number of individuals, or by reference to an industry unless that information is used to interpret the language of the notice.

## Comment

The decision is an important one for all who are concerned with the fairness of regulatory processes. Whilst regulators have to be able to reach settled outcomes with firms in enforcement cases, even when investigations with individuals, are pending, protecting individuals' reputations and not prejudging issues should be paramount.

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