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Supreme Court rules that London Whale rogue trader was not personally identified by implication in FCA notice to firm it had authorised

The Financial Conduct Authority v. Achilles Othon Macris
[2017] UKSC 19

Article by David Bowden

Executive speed read summary

Mr Macris was a senior manager at JP Morgan Chase Bank NA in London. Bruno Iksil reported to Mr Macris. The bank incurred trading losses of $6.2billion by the end of 2012 because of Mr Iksil's trades. The FCA issued in turn a warning notice, decision notice and final notice to the firm. The firm agreed a regulatory settlement with the FCA and paid a financial penalty of £137,610,000. These notices referred to 'CIO London Management'. Mr Macris said that these notices by implication referred to him personally. Mr Macris said that under s393 of the Financial Services and Markets Act 2000, the FCA's notices to the firm 'identified' him and that he should have had the opportunity to make representations before the FCA's decision notice was published. The Upper Tribunal allowed Mr Macris's appeal ruling that the individual identified in the Final Notice as CIO London management could not be anyone other than Mr Macris. The FCA's appeal to the Court of Appeal was dismissed. On final appeal to the Supreme Court, the FCA's appeal was allowed by a majority. The majority ruled that resort to publicly available information was only permissible where it enables one to interpret rather that supplement the language of a FCA notice. Although Mr Macris could be identified from a US Senate Committee Report, if the FCA had been required to give Mr Macris representation rights it would be impossible for the FCA to serve the notice on the firm as part of an early settlement process, without serving a copy on Mr Macris when the FCA would not necessarily know all the relevant facts or formulated criticisms. Lord Sumption JSC in the majority rules that the relevant audience for publication is the public at large rather than a narrower specific industry sector especially familiar with Mr Macris or the firm he worked for. Lord Mance JSC agrees with the result reached by the majority because he concludes that 'CIO London management' did not equate with or identify Mr Macris. Lord Wilson JSC dissents but Lord Neuberger PSC rules that Lord Wilson's approach gives rise to more problems than it solves. Lord Neuberger's rules that any investigation process should not require any detective work and that jigsaw identification will not suffice.

The Financial Conduct Authority v. Achilles Othon Macris
[2017] UKSC 19 22 March 2017
Supreme Court of the United Kingdom (Lords Neuberger PSC, Mance, Wilson, Sumption & Hodge JJSC)

What are the facts?

The losses were stated to have amounted to $6.2 billion by the end of 2012. They were reported in the press as the 'London Whale' trades.

The Financial Conduct Authority ('FCA') issued a warning notice, a decision notice, and a final notice to an investment bank, JP Morgan Chase Bank NA, informing it that the FCA was imposing a fine as a result of losses incurred in a trading portfolio. Mr Macris had a role in the management structure of the portfolio.

The Firm is a wholly owned subsidiary of the J P Morgan Chase & Co. The Firm operated a Chief Investment Office in both London and New York. The Synthetic Credit Portfolio ('SCP') was a trading portfolio within the CIO's London operations whose trading related to credit instruments especially credit default swap indices. The Notices related to trading conducted by SCP traders. They focused particularly on events in late 2011/early 2012 and on decisions taken by the London Whale during that period which resulted in huge losses for the Firm.

What authorisations did the firm have?

The firm held a variety of FCA permissions including:

- Managing investments and holding client money,
- Advising and arranging deals in investments,
- Arranging, safeguarding and administration of assets, and
- Dealing in investments as agent or principal

What authorisations did Mr Macris have?

At the time of the London Whale trades, Mr Macris held these 2 authorisations:

- **CF29** Significant management, and
- **CF30** Customer

How did Mr Macris put his case that the Notices identified him by implication?

Although the notices did not name Mr Macris personally, he argued that there were references to a part of the bank's management structure which identified him. Mr Macris said that he should be given third party rights in relation to the notices under s.393 of the Financial Services and Markets Act 2000.

What does section 393 of the Financial Services and Markets Act 2000 provide?
Section 393 of the Act provides as follows:

'*(1) 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 given to the third party.
(2) Subsection (1) does not require a copy to be given to the third party if the regulator giving the notice —
(a) has given him a separate warning notice in relation to the same matter; or
(b) gives him such a notice at the same time as it gives the warning notice which identifies him.
(3) The notice copied to a third party under subsection (1) must specify a reasonable period (which may not be less than 14 days) within which he may make representations to the regulator giving the notice.
(4) If any of the reasons contained in a decision 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 decision 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 given to the third party.
….
(7) Neither subsection (1) nor subsection (4) requires a copy of a notice to be given to a third party if the regulator giving the notice considers it impracticable to do so.
…
(9) A person to whom a copy of the notice is given under this section may refer to the Tribunal—
(a) the decision in question, so far as it is based on a reason of the kind mentioned in subsection (4); or
(b) any opinion expressed by the regulator giving the notice in relation to him.
…
(11) A person who alleges that a copy of the notice should have been given to him, but was not, may refer to the Tribunal the alleged failure and—
(a) the decision in question, so far as it is based on a reason of the kind mentioned in subsection (4); or
(b) any opinion expressed by the regulator giving the notice in relation to him.
….
(14) Any person to whom a warning notice or decision notice was copied under this section must be given a copy of a notice of discontinuance applicable to the proceedings to which the warning notice or decision notice related.'

What notices did the FSA serve on the firm?
On 18 September 2013 the FCA issued these 3 notices:

- a warning notice ('the Warning Notice'),
- a decision notice ('the Decision Notice'), and
- a final notice ('the Final Notice') to the firm.

On 19 September 2013 the 62 page Final Notice was published - www.fca.org.uk/publication/final-notices/jpmorgan-chase-bank.pdf .

What financial penalties did the FCA impose?
These Notices notified the Firm that the FCA had decided to impose on it a financial penalty of **£137,610,000** as a result of large losses incurred by the London Whale in a trading portfolio managed by the Firm.

On 9 February 2016, the FCA imposed on Mr Macris personally a financial penalty of **£792,900**. This was because he had breached **APER 4** as in the FCA's view his conduct had fallen below the standards expected of those working in the financial services industry. The FCA also felt he had failed to deal with it in an '*open and cooperative way'* and to disclose appropriately any information regarding CIO International of which the FCA would reasonably expect notice. Mr Macris no longer holds any personal authorisations from the FCA.

What application did Mr Macris make to the Upper Tribunal?
Mr Macris complained that the FCA in promulgating the 3 Notices had included reasons which identified him and were '*clearly and obviously prejudicial to him'*. He said he had received no opportunity to contest these allegations. Mr Macris referred that matter to the UT under s 393(11) of FiSMA.

What issues did the Upper Tribunal have to resolve?
The UT dealt with one question as a preliminary issue in under Rule 5(3)(e) of the Tribunal Procedure (Upper Tribunal) Rules 2008. This issue was whether Mr Macris was identified in the FCA Decision Notice dated 18 September 2013 given to JP Morgan Chase Bank NA.

What ruling did the Upper Tribunal make?
The matter was heard by Upper Tribunal Judge Timothy Herrington in the Upper Tribunal and on 10 April 2014 it decided the preliminary issue in Mr Macris's favour - **[2014] UKUT B7 (TCC).** UTJ Herrington ruled that '*I therefore conclude that the individual identified in the Final Notice as CIO London management cannot be anyone other than Mr Macris'*.

The UT proposed this 2 stage test:
- 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? And
- If so, can those references be regarded as referring to anyone other than Mr Macris?

The UT said to answer this 2nd question '*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'.*

On what grounds was an appeal made by the FCA to the Court of Appeal?
The FCA made these submissions to the Court of Appeal:
- the two stage test formulated by UT was wrong as a matter of law because the test prescribed by FiSMA was a unitary test,
- even if the UT's test had been correct, its application of it was not, and
- the test used in libel proceedings to determine whether a statement is defamatory of or refers to, an individual is inappropriate because the FiSMA s393 test is a narrower test by design.

What ruling did the Court of Appeal make?
On 19 May 2015 the Court of Appeal (Longmore, Patten and Gloster LJJ) unanimously dismissed the FCA's appeal - **[2015] EWCA Civ 490.** Gloster LJ ruled that the provisions of section 393(1)/(4) of FiSMA were '*straightforward if somewhat linguistically cumbersome'*. She said that the '*word "*identifies*" is an ordinary English word which, in the absence of any express or implied provision in the statute, should be given its ordinary meaning*'.

On the correct test, Gloster LJ ruled that '*logically the first stage of the identification process is to ask whether the relevant statements in a notice said to "*identify*" the third party'* were to be '*construed in the context of the notice alone, and without recourse to external material*'. She said that '*the critical issue between the parties was to the extent to which, if at all, at the second stage of the process of identification, it was legitimate to have regard to external material to identify the "*person*" referred to in the notice, and, if so, by reference to what information*'.

She referred to various authorities on this in '*Gatley on Libel and Slander*'. On this she ruled that '*there is no reason why the approach to determining the question whether a "*matter*" "*identifies*" a person for the purposes of section 393 of FiSMA should be any different in principle from the approach to the question whether an allegedly defamatory statement, which refers to an individual person*'. However she qualified this by adding that '*given the requirement in the statutory language of section 393 of there having to be a specific reference to "a person" in the "*matter*" to which the reasons relate'* that it was '*not sufficient in the context of section 393 to amount to identification*'.

However she cautioned that the reference to '*external material'* had '*the potential to give rise to confusion*'. She said there was '*a real distinction'* between the 1st stage of the process (ascertainment that there is indeed a reference in the relevant notice to a specific person) and the '*information which objectively*' an acquaintance or market participant '*might reasonably have known as at the date of the promulgation of the relevant notice to identify the third party'*.

What was the issue for the Supreme Court?
There was only 1 issue on this appeal. This is what is the meaning of the words '*any of the reasons contained in [a notice] relates to a matter which identifies a person*' in section 393(1)/(4) of FiSMA?

Have there been any other rulings from a court or tribunal raising similar points?
Yes. This point has arisen in 4 other FCA cases since the September 2013 Notices were first given in the London Whale case:

- *Christian Bittar* - **FS/2015/0006,**
- *Joerg Vogt* - **FS/2015/0007 - [2016] UKUT 103 (TCC)** – 26 February 2016 – Upper Tribunal (UTJ Timothy Herrington and lay member Gary Bottriell),
- *Philippe Moryoussef* - **FS/2015/0009,**
- *Julien Grout:*
  - *Regina (Julien Grout) v. FCA* - **[2015] EWHC 596 (Admin) –** 9 March 2015 – High Court, QBD, Males J,
  - *Julien Grout v. FCA* - **[2016] UKUT 302 (TCC) –** 7 July 2016 – Upper Tribunal (UTJ Timothy Herrington and lay member Mark White), and
- *Steward Ford, Mark Owen & Peter Johnson v. FCA* - **[2016] UKUT 41 (TCC) –** 1 February 2016 – Upper Tribunal and **[2015] UKUT 0220 (TCC)** (UTJ Roger Berner in both cases).

What ruling did the majority of the Supreme Court give?
Lord Mance JSC frankly acknowledges that this was '*a difficult case'* and so by a majority of 4 to 1, the Supreme Court allowed the FCA's appeal. The majority judgment is given by Lord Sumption JSC and Lord Neuberger PSC adds concurring comments. Lord Hodge JSC (who visibly switched during Mr Crow's closing submissions in reply at the hearing) concurs with Lord Sumption's judgment.

Lord Sumption JSC rules that a person is identified in a s393 notice '*if he is identified by name or by a synonym for him, such as his office or job title*'. He says that in the '*case of a synonym it must be apparent from the notice itself that it could only apply to one person and that person must be identifiable from information which is either in the notice or publicly available elsewhere'*. He notes that '*there will almost always be people in the know, who will realise when they read the notices which individuals are encompassed by apparently anodyne collective expressions such as "*management*" or who is likely to have been responsible for particular failings of the firm*'.

Lord Sumption says that resort to information publicly available elsewhere is '*permissible only where it enables one to interpret (as opposed to supplement) the language of the notice'*. He rules that it is not permissible to resort to '*additional facts'* about the person so that if those facts and the notice are placed '*side by side'* it then becomes '*apparent that they refer to the same person'*. He correctly notes that '*the internet is a fertile source of information and gossip for those who are willing to go to some trouble to discover his identity*'.

Although Mr Macris could be identified by reference to a publicly available report form the US Senate, Lord Sumption rules that '*it would have been impossible for the Authority to serve the notice on JP Morgan as part of the settlement process, without serving a copy on Mr Macris at a comparatively early stage of the investigation of his role, when it would not necessarily know the relevant facts or have formulated any criticisms'*. In support of his conclusions Lord Sumption refers to the FCA's own '*Enforcement Guide'* which states at section 6.2.16 that '*Publishing notices is important to ensure the transparency of FCA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action*.'

Lord Sumption gives these 5 reasons for reaching this conclusion:

- FiSMA section 393 defines what fairness requires in the context of FCA issued notices,
- it is clear from s393 that it must be the reasons contained in the notice itself which identify the third party and not some extrinsic source,
- FiSMA Act must be read in a manner which enables the FCA to ensure that a third party is not '*identified*' in the notice, when the FCA does not know precisely what information is available elsewhere,
- the relevant audience for publication is the public at large, not a narrower specific industry sector specially familiar with the third party or his business, and
- the Court of Appeal's suggested analogy with the law of defamation is not helpful given its different purpose to that of section 393 and that defamation imposes strict liability for the publication of a defamatory statement.

Lord Neuberger PSC makes a number of additional comments in his judgement noting that the wider the scope of section 393(1)(a) is, the more constraining it will be on the FCA's activities, whilst the narrower it is the greater the number of individuals who will be at risk of being harmed by notices without any recourse. Lord Neuberger prefaces his comments by noting that whilst the '*general purpose'* of FiSMA s393 was '*clear*', the '*resolution of that issue has effectively been assigned to the courts'*.

Lord Neuberger's test is simply '*Does the notice identify the individual in question?*' He rules that the statutory language appears to stipulate that the person must be '*identified'* in the notice, not that he must be '*identifiable*' as a result of the notice. Lord Neuberger's view is that '*any investigation process should not require any detective work*' and that '*jigsaw identification'* (being correctly identifying someone as a result of relating separate snippets of information) will '*not do'*.

On Lord Neuberger's test, the question is whether the individual is '*named in the notice, or the description in the notice must be equivalent to naming him'*. Lord Neuberger says that an individual is '*identified*' in a document if these 3 criteria are satisfied:

- his position or office is mentioned,
- he is the sole holder of that position or office, and
- 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.

Lord Neuberger disagrees with Lord Wilson's dissent saying that '*his solution appears to me to give rise to problems which support adhering to the conclusion I have expressed'*. He then points to these 5 problems if a wider meaning were to be adopted, noting that it would:

- be a matter of subjective assessment as to how wide a scope to give it,
- self-evidently lead to disputes,
- lead to some odd consequences,
- place the FCA in difficulty from the outset, and
- still lead to arbitrary outcomes.

What was the approach of Lord Mance JSC?
Lord Mance JSC's approach is more nuanced and he is careful to say that he found himself *'not without hesitation*' arriving at the same conclusion as the majority. He notes that FiSMA s393 '*gives rights which go beyond any which would arise at common law*' under the principles laid out in *Re Pergamon Press* **[1971] Ch 388**. Lord Mance rules that the key question is whether the words in the FCA notice '*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*'.

When Lord Mance JSC applies his test however he concludes that '*CIO London management'* did not '*equate with or identify Mr* Macris'. His view too is that no information had been shown to exist in the public domain which, when read with the notice, identifies Mr Macris with CIO London Management. Consequently Lord Mance JSC applying his test agrees that the FCA's appeal should be allowed and agrees in the result arrived at by the majority.

What reasons did Lord Wilson JSC give for dissenting?
Family law practitioner Lord Wilson JSC dissents. His more brusque approach is to attempt to '*strike a fair balance between individual reputation and regulatory efficiency*'. He notes the UTJ Herrington had been the Chair of the FSA's Regulatory Decisions Committee before being appointed to the bench and so brought an '*arresting level of expertise'* to this which was the prompt for Lord Wilson to agree with the Upper Tribunal's findings and reasons.

For Lord Wilson the outcome of the appeal depends on deciding who is the '*appropriate constituency'*. There are 2 options – '*ordinary readers'* or '*ordinary market operators'* who would conclude that the individual to whom the FCA notice refers is Mr Macris. Lord Wilson then confuses his reasoning by saying that the answer to this question is to be decided by '*reference to the particular sort of damage which a wrong criticism of an individual by a notice is likely to cause him'*.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.