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UK Supreme Court Confirms London Whale Notices Did Not Identify Achilles Macris

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In a previous blog I described how the UK *Financial Conduct Authority* is facing a number of challenges from individuals complaining that they are identifiable from regulatory notices addressed to their employers. By way of recap, under section 393 of the ***Financial Services and Markets Act 2000 ("FSMA")***, individuals are granted third party rights, meaning that if an FCA notice identifies and is prejudicial to someone other than the person to whom it is given, a copy of the notice should be given to them.

Both the Upper Tribunal and the Court of Appeal had found that Achilles Macris was identified by the "**CIO London Management**" label used in FCA notices to JP Morgan in respect of failings in a credit derivatives trading portfolio that lost the bank over $6 billion: the so-called "London Whale" trades.

The FCA appealed this decision to the Supreme Court. The decision has been eagerly awaited – if the Supreme Court agreed with the decisions of the tribunals below, the FCA would need to exercise far more caution as to the level of detail it included in future decision notices.

Supreme Court judgment

The FCA's appeal was **allowed** (with Lord Wilson dissenting). The Supreme Court focused on the interpretation of the wording a Sections 393(1) and (4) of FSMA and whether the London Whale Notices identified Achilles Macris. The FCA did not deny that there was information in the London Whale Notices that was prejudicial to Macris (the second limb of the tests set out in Sections 393(1) and (4)) but the FCA did not consider that the information given was sufficient to enable Macris to be identified.

The Supreme Court agreed. Lord Sumption gave the lead judgment and held that a person is identified in a notice under Section 393 of FSMA "*if he is identifiable by name or by a synonym for him, such as his office or job title".* In the case of a synonym it must be clear from the notice itself that it could only relate to that one individual and the person must be identifiable from the information contained within the notice or publicly available. However, caution must be exercised when applying this judgment in the future. Publicly available information is only permissible if it is used to identify an individual by *interpreting* the language of the notice. It cannot be used to *supplement* the information.

Lord Sumption's reasoning was that:

- section 393 defines what fairness requires in the context of notices issued by the FCA;
- it is clear from the provision that it must be the reasons contained in the notice which identify the third party and not an extrinsic source;
- the Act must be read in a manner which enables the FCA to ensure that a third party is not "*identified*" in the notice, when it does not know precisely what information is available elsewhere;
- the relevant audience for publication is the public at large, not a specific industry sector specially familiar with the third party or his business**;** and
- the suggested analogy with the law of defamation is not helpful given its different purpose to that of section 393 of the Act.

Lord Neuberger said that if Section 393(1) of FSMA is taken to have a wide scope, that would restrict the activities of the FCA. This must be balanced against the risks of a narrow definition – meaning that more individuals risk being identified in prejudicial notices, without the right to receive a copy of the notice and to make representations. Lord Neuberger ruled that the test is whether an individual is "*named in the notice, or the description in the notice must be equivalent to naming him".* If Section 393(1) was interpreted more widely, it would become open to subjective interpretation, leading to further disputes and putting the FCA in a difficult position.

Lord Wilson dissented on the grounds that he thought that there should be a fairer balance between individual reputation and "*regulatory efficiency*". But the majority agreed that the CIO London Management label did not pass the test of identifying Achilles Macris when read with publicly available information.

Both the FCA and affected individuals will need to be mindful of the detail of this judgment when future warning or decision notices are issued. It certainly does not allow for a 'wide' interpretation of Section 393(1). Provided individuals are not named, their position/office is not mentioned (if they are the sole holder of it), and they cannot easily be identified from a synonym alongside publicly available information there will be minimal grounds to challenge the FCA for a copy of the notice.

This judgment is also likely to impact upon the position of Mr Vogt (a former Deutsche Bank employee) discussed in a further previous blog post. The Upper Tribunal had decided that Mr Vogt could not be identified in an FCA notice. He sought permission to appeal and his application was stayed pending the Supreme Court decision in *Macris.*

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