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SUPREME COURT RULES IN FAVOUR OF FCA ON THIRD PARTY RIGHTS

Financial Conduct Authority v Macris [2017] UKSC 19

Individuals (including senior managers) concerned about their identification in regulatory enforcement action against their employer should be aware of an important Supreme Court decision. The decision relates to Section 393 of the Financial Services and Markets Act 2000 (FSMA), which provides rights to third parties prejudicially identified in a warning notice or decision notice.

A number of individuals have brought proceedings against the FCA, claiming that the FCA breached their rights by indirectly identifying them in FCA notices without due process. The Supreme Court decision provides clarity on the meaning of "identified" for these purposes.

The Supreme Court adopted a narrow interpretation of "identified", which will be a welcome relief for the FCA given the potential implications of an adverse decision on the FCA's conduct of investigations.

BACKGROUND

Section 393 of FSMA provides that third parties prejudicially identified in a warning notice or a decision notice must be given a copy of the notice and an opportunity to make representations on the notice. The purpose of the provision is to protect third parties against unfair prejudice, recognising the adverse effect that a notice could have on an individual's reputation and employment prospects.

The issue is one of importance for the FCA, as it has significant implications for the conduct of FCA investigations. There is a tension for the FCA between: (i) publishing detailed enforcement notices which refer to the conduct of specific individuals; and (ii) affording rights to third parties which may slow down the FCA's enforcement process.

There is often also a conflict between the interests of the firm and those of the individual. In most cases, the firm is likely to want to agree a settlement with the FCA as soon as possible, whereas it may be in the individual's interests to challenge an allegation which he or she believes is unfair.

FINANCIAL CONDUCT AUTHORITY V MACRIS

The key issue in the case was whether Mr Macris was identified in the enforcement notices issued to JP Morgan in relation to the "London Whale" trades. Mr Macris was not mentioned in the notices by name or job title but there were multiple references to "CIO London management". Mr Macris claimed that these references were sufficient to identify him for the purpose of Section 393, FSMA.

The Upper Tribunal and the Court of Appeal held that Mr Macris was identified in the notices. The Court of Appeal considered that the relevant audience for the purpose of assessing whether Mr Macris was identified was "persons acquainted with Mr Macris, or who operated in his area of the financial services industry".

SUPREME COURT JUDGMENT

By a majority of four to one, the Supreme Court ruled that Mr Macris was not identified. The Court adopted a narrower interpretation of the meaning of "identified". A person is only identified where his or her name, or a synonym for that person (for example, his or her job title) is used. If a synonym is used, it must be apparent from the notice itself that the reference could only apply to one person and that person must be identifiable from the notice or publicly available information. Reference to publicly available information is only permissible where it enables the reader to interpret (rather than supplement) the notice.

Crucially, the Court emphasised that the relevant reader for these purposes is the public at large, not those persons who have special knowledge of the matter (for example, by virtue of their employment). A test which centred on the knowledge of a smaller group of people would have given rise to difficulties as to where to draw the line in each case.

The Court gave a number of reasons for this decision, one of which was the practicalities of conducting regulatory investigations.

One judge (Lord Wilson) dissented on the grounds that the Court's decision did not strike a fair balance between individual reputation and regulatory efficiency. He referred to the policy arguments and the potential unfairness that could be suffered by individuals such as Mr Macris.

COMMENT

This is an important judgment, not only for the FCA but for other individuals whose cases are currently before the Upper Tribunal. A number of cases were stayed pending the outcome of the Supreme Court appeal.

The FCA has until now adopted the practice of using generic references (such as "Trader A" or "Firm A") when referring to third parties in notices. While each case will need to be assessed on its own facts, it is difficult to see how these generic references could amount to identification for the purposes of the Supreme Court test (unless they can be interpreted from publicly available information).

It appears that the FCA may be changing its approach to identifying third parties in notices. According to a recent Bloomberg article, the FCA has stated that it is planning to conduct shorter investigations and to issue concurrent enforcement notices against firms and senior managers. The FCA reportedly stated that "there should be less need for individuals to be referenced with synonyms and alphabetical proxies: we should be able to name people".

It remains to be seen how this apparent change in approach will take effect in practice. Either way, senior managers need to be aware.

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