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Identification of Third Parties in FCA Notices

Several recent UK cases have considered the extent to which third parties may be identified in public disciplinary notices issued by the Financial Conduct Authority to financial institutions. UK financial services legislation allows the regulator to refer to matters which would identify a third party, without naming that individual, in a notice provided that the regulator affords the individual certain rights. This note discusses various recent decisions and discusses the implications for regulated firms, individuals working in those firms and for the regulator.

Statutory Protection of Third Parties' Identities & the *Ashton* Facts

The UK Financial Services and Markets Act 2000[1] gives a third party (whether a person or an entity) who has been identified in a notice issued to a regulated firm or another individual certain rights. In particular, the Financial Conduct Authority ("FCA") must, if a notice identifies a third party and the FCA considers such identification is prejudicial to the individual, give the third party a copy of that notice, together with all relevant material which the FCA relied upon in making its decision and any secondary material which might undermine that decision. If this is not done, the third party may refer the matter to the Upper Tribunal.

These protections are designed to provide prejudicially identified individuals with an opportunity to challenge or respond to any criticisms against, or opinions about, them before the FCA publishes its findings.

In 2015, Christopher Ashton made a reference to the Upper Tribunal, alleging that he was prejudicially identified in two decision notices issued by the FCA to UBS and Barclays but was not provided with copies of the notices prior to their publication and, therefore, was denied the opportunity to contest their content. Mr Ashton is a former employee of Barclays Bank plc where, at the relevant time, he held the position of Global Head of G10 Voice Spot FX in London. On 12 January 2016, the Upper Tribunal published its decision in *Christopher Ashton v FCA*[2] in which it found that Mr Ashton was not an identifiable third party in either of the decision notices issued to UBS (in November 2014) or to Barclays Bank (in May 2015), in connection with FX spot trading.

The *Macris* Identification Test

In *FCA v Macris*[3], the Court of Appeal upheld Mr Macris' complaint that he had been prejudicially identified in the FCA's Final Notice to JPMorgan Chase dated 19 September 2013 in relation to the London Whale case. The Court of Appeal stated that the question of whether a notice identifies a person is to be determined by the application of a two-stage test.

[1] Sections 393 and 394

[2] [2016] UKUT 0005 (TCC)

[3] *The Financial Conduct Authority v Macris* [2015] EWCA Civ 490

The first test is whether the relevant statements in the notice identify, without reference to extraneous material, a third party. The Court held that a reference to a descriptive noun, such as a title (e.g. "chairman"), office (e.g. "CIO London Management"), or job description (e.g. "Trader A") is sufficient.

Where the FCA uses quotations in a notice, these are generally attributable to people, as are acts or omissions where it is clear that the criticism is directed against a person (e.g. *"the Firm failed to be open and co-operative with the [FCA]…and on one occasion (by virtue of the conduct of CIO London Management) deliberately misled the [FCA]."*). Of course, criticism of a company's activities can be directed at the level of the corporate personality without necessarily imputing criticism of particular individuals, either singularly or collectively[4].

The second test is whether the relevant extracts of the notice are *"such as would reasonably in the circumstances lead persons acquainted with the claimant / third party, or who operate in his area of the financial services industry, and therefore would have the requisite specialist knowledge of the relevant circumstances, to believe as at the date of the promulgation of the Notice that he is a person prejudicially affected by matters stated in the reasons contained in the notice."*[5]

The Upper Tribunal in *Ashton* provided some useful guidance on this second stage.

In particular, it carved out certain categories of person from the concept of "acquainted with" which is limited to those persons who *"knew of [the third party] because of his position in the market"* and extends to people who work(ed) in the third party's regulated firm but outside his team. It does not include persons who have *"deep personal knowledge of [the third party] and his affairs"* or those *"with intimate knowledge of the relevant events…or those with special personal knowledge of him professionally (such as someone who sat next to the person at work)."* Nor does it include persons who work(ed) in the third party's *"immediate team and who he reported to"*. The Upper Tribunal said that those who operate in the relevant area of the financial services industry, i.e. "market participants," means those persons *"working directly in the relevant sector."*

The Upper Tribunal also limited the necessary knowledge to that information which relevant readers would either know already or could conclude following limited research and *"without having to do an extensive forensic exercise."*

Applying *Macris* to *Ashton*

The Upper Tribunal found that the first stage of the *Macris* test was satisfied in respect of both notices – both notices having included quotations from instant messages clearly referring to the actions of a specific individual.

Applying the second stage of the *Macris* test, however, the Upper Tribunal concluded that there was insufficient evidence that Mr Ashton had been identified in the either the UBS or Barclays Notice.

The Upper Tribunal determined that a relevant reader would not reasonably conclude that the quotations from the UBS Notice were, in fact, extracts from the chat room known as 'The Cartel'. Both the UBS Notice and contemporaneous press coverage made it clear that *"there were numerous chat rooms in which such conversations took place."*

[4] See, for example, *Sir Philip Watts v The Financial Services Authority* (FIN/2004/0024)

[5] *The Financial Conduct Authority v Macris* [2015] EWCA Civ 490, per Gloster LJ at 45

Even if a relevant reader believed that the conversations took place in The Cartel chat room, there was nothing in the extracts which would reasonably lead him to conclude that the conversations took place during Mr Ashton's seven-month membership of The Cartel. In addition, UBS was one of four firms participating in the chats quoted by the FCA; the other three were identified only as "Firm A", "Firm B" and "Firm C." The Upper Tribunal concluded that it would not be possible for a relevant reader to conclude that "Firm A" was Barclays, let alone to identify the employee as Mr Ashton.

Further, at the time that the UBS Notice was published, there were no press reports linking the extracts either to The Cartel or to Mr Ashton.

The Upper Tribunal came to the same decision, for similar reasons, in respect of the Barclays Notice.

Comparing *Ashton* with other recent decisions

Applying the *Macris* test two months' earlier in *Christian Bittar v FCA*[6], the Upper Tribunal found that Mr Bittar had been prejudicially identified in a final notice issued against Deutsche Bank AG in April 2015 concerning the attempted manipulation of the LIBOR and EURIBOR benchmarks. Mr Bittar, a former-Deutsche Bank employee, was Manager of the Money Markets Derivatives desk in London during the relevant period.

The Deutsche Notice contained various references, and attributed numerous quotations, to an individual described as "Manager B." Crucially, it also contained a number of job descriptions such as "MMD Desk," "Money Market Trader," "Manager," "Senior Manager," "Submitter" and "Trader."

The Upper Tribunal determined that it was clear from the definitions and conversations quoted in the Deutsche Notice that "Manager B" had to be a Manager of the MMD Desk. The Upper Tribunal also commented on the fact that the Deutsche Notice contained a link to the US regulator's notices which would likely be read by a relevant reader – reinforcing the conclusion that "Manager B" was Mr Bittar.

[6] [2015] UKUT 602 (TCC)

What's Next?

The FCA's appeal in *Macris* is due to be heard by the UK Supreme Court later this year. The decision should provide further clarification on the FCA's required approach, under FSMA, in identifying third parties in its enforcement notices - with potential implications to the FCA's conduct of its investigations and, in particular, the speed at which its investigations may progress.

CONTACTS

Barney Reynolds
London
+44 20 7655 5528
barney.reynolds@Shearman.com

Jo Rickard
London
+44 20 7655 5781
josanne.rickard@Shearman.com

Thomas Donegan
London
+44 20 7655 5566
thomas.donegan@Shearman.com

Susanna Charlwood
London
+44 20 7655 5907
susanna.charlwood@Shearman.com

9 APPOLD STREET | LONDON | UK | EC2A 2AP