

## UK Supreme Court Hands FCA Advantage In Identity Cases

By **Mark Taylor**

*Law360, London (March 22, 2017, 9:33 PM GMT)* -- The U.K. Supreme Court's decision Wednesday to vindicate the Financial Conduct Authority's claim that it did not identify a former JPMorgan Chase & Co. executive in a controversial penalty notice is a shot in the arm for the British regulator but could strip away rights of other individuals facing future action, lawyers say.

Overtuning decisions made in lower courts, a panel of Supreme Court judges ruled against JPMorgan Chase & Co. executive Achilles Macris, who claimed he had been improperly identified when the regulator stung the bank over the \$6 billion "London Whale" derivatives trading dispute. The FCA had argued it did not flaunt identification guidelines in its report published alongside the \$172 million fine slapped on the bank in 2013.

The Supreme Court's ruling could boost the regulator's hand and stoke its aggression in future cases, lawyers say, as several other traders face similar disputes.

"Here the scales have been tipped firmly in favor of the FCA," said Alison Geary, counsel in WilmerHale's U.K. investigations and criminal litigation practice. "There is an element of 'all for the sake of a horseshoe nail.' Finding a definition of who is identified that provides certainty to the FCA was done at great cost to individuals, who are left without means to challenge extremely serious allegations against them."

She said the judgment skewed the delicate balance between the need for the FCA to move forward with its investigations and the rights of those individuals who are the subject of them.

"It's a sign of a shift toward a less restrained enforcement and a regrettably less balanced due process and fairness to the individuals," a lawyer with knowledge of matters but who asked not to be named told Law360. "I think it's a bad day for British justice."

The agency faced major embarrassment and a serious dent to future enforcement actions if it had lost the appeal, which centered on how much detail it can provide in its decision notices before it has to notify individuals and give them a chance to respond.

"This judgment of the Supreme Court will be a relief for the FCA," said Chris Dyke, lawyer at criminal and regulatory law firm Corker Binning. "The overturned Court of Appeal decision exposed the tension between the FCA's desire to quickly settle regulatory investigations into financial institutions and its public criticism of the employees of those companies necessitated by those settlements."

The enforcement decision did not name Macris, as the FCA details what it said were flaws "permeating all levels of the firm" all the way to senior management at JPMorgan over the operations of the bank's Chief Investment Office.

But Macris sued the FCA over the ruling, claiming that the FCA's references to "CIO London management" clearly referred to him. Macris had run JPMorgan's CIO International unit and oversaw the trading group where the London Whale loss took place.

Macris won in both the High Court and the Court of Appeal, before the Supreme Court overturned the earlier rulings.

The regulator has found it difficult to fully explain what went wrong within firms without triggering third-party rights, said Guy Wilkes, partner at Mayer Brown International, and former head of the FCA department that investigated Macris.

"This has meant that some recent enforcement notices may have appeared bland and lacked the detail necessary to fully inform the reader," Wilkes told Law30.

Under the Financial Services and Markets Act, passed in 2000, the FCA has a duty to allow individuals identified in its disciplinary action notices against companies to make representations to the regulator before the notices are published, to protect these so-called third parties from unfair prejudice.

The FCA's previous enforcement practice was often to take enforcement action against individuals after it had settled with the firm, Wilkes said.

"Following the April 2014 tribunal decision, and to avoid third-party rights difficulties, the FCA changed its approach by taking action wherever possible against firms and individuals simultaneously," he said, adding that the decision will give the FCA more flexibility in how it can run cases in the future.

The authority faces several other challenges, including from Christian Bittar, the former Deutsche Bank trader and co-defendant among the Euribor six, and the decision is likely to have significant consequences for those due next.

Wilkes said he believes it is likely that most if not all of those cases will now fail, with significant costs implications for many of those claimants.

"Those individuals will find they have less leverage to apply in their negotiations with the FCA, as they have less power to influence any case against the firm for which they once worked," he said.

The decision, however controversial, will add clarity to some of the existing confusion around possible identification of individuals subject to enforcement, lawyers said.

"The judgment will be seen by many as bringing a measure of clarity to the issue, though of course it will still be open to individuals to apply on the basis that in the particular facts of the case they have been identified," said David McCluskey, partner in the corporate crime and fraud group at international law firm Taylor Wessing LLP. "The more widely the details of the case are publicised, the higher that risk must be."

He repeated claims it would be a huge help to the FCA, which faced the prospect of a long line of similar applications. "It also faced the prospect of having to fundamentally reorganise the way it conducts its investigations," McCluskey said.

The FCA had previously argued it faced a "huge regulatory burden" if the test required to judge whether an individual had been unfairly named was higher than that used in common law for defamation; it also faced enormous costs.

“The time and resources required to deal with the interventions and representations of a potentially very large pool of individuals would have been a very heavy burden for the FCA and could have significantly slowed the speed of regulatory enforcement,” said Dyke.

--Additional reporting by Alex Davis, Melissa Lipman and Stewart Bishop. Editing by Rebecca Flanagan and Emily Kokoll.

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