The FCA's identity crisis is over: The UK Supreme Court confers stricter interpretation of identification in *Financial Conduct Authority v Macris*

In the recent Supreme Court case *Financial Conduct Authority v Macris* [1], the Financial Conduct Authority (**FCA**) successfully appealed against a Court of Appeal decision that warning and decision notices which it gave to a bank and subsequently published as a final notice had identified the respondent, for the purposes of section 393 of the Financial Services and Markets Act 2000.

The notices issued by the FCA to the bank following a regulatory settlement did not name the respondent, but referred to "CIO London management". The respondent (the bank's International Chief Investment Officer) claimed that the notices clearly identified him as a third party within the meaning of Section 393, meaning that he should have been given a copy of the notices, to allow him to make representations about matters which were prejudicial to him. The Court of Appeal had originally agreed with the respondent that the notices identified him, finding that publicly available material entitled the judge to conclude, on an objective basis, that persons acquainted with the respondent, or who operated in his area of the financial services industry, would reasonably have been able to identify him from the statements made in the notices.

In overturning the Court of Appeal judgment, the Supreme Court decided that the key question in determining whether Section 393 is triggered was whether the terms of the notice would have conveyed to a reasonable member of the public, without extrinsic information, that any of the terms was a synonym for the respondent. In the instant case, they plainly would not. Consequently, the respondent was not a third party for the purposes of Section 393.

In making its decision the court considered four factors:

1. The court decided that Section 393 was more limited than the general obligation imposed by public law to give those affected sufficient notice to enable them to make representations to protect their legitimate interests.

2. Although the word "identifies" in Section 393 was not elaborated upon, it was clear that it was the reasons contained in the notice which had to identify the third party, not some extrinsic source. References to extrinsic sources of information were legitimate only so far as it was necessary in order to understand what the notice meant.

3. It was necessary to read Section 393 in light of the practicalities of performing the FCA's investigatory and disciplinary functions. The FCA would not necessarily know what, if any, further information might be available to knowledgeable outsiders or discoverable from publicly available sources. It had to be able to ensure, by the way in which it framed its own notices that a third party was not "identified" in the notice, even if he or she was identifiable from information elsewhere.

4. When the FCA decided to publish, it did so in order to serve the public interest in the proper performance of its functions and the protection of those who used the financial services industry. The relevant audience for that purpose was the public at large and it was irrelevant that some specific sector of the public might have additional information enabling them to identify a third party.

1 [2017] UKSC 19

It is perhaps interesting to note that Lord Wilson, dissenting in his judgement, believed the Court's decision did not strike a fair balance between individual reputation and regulatory efficiency. In alignment with the Court of Appeal's original decision, Lord Wilson considered the key question when considering whether Section 393 has been triggered should be whether the words in the notice would reasonably lead an operator in the same sector of the market unacquainted with the applicant (and not a reasonable member of the public), to conclude, by reference only to information in the public domain, that the individual referred to in the notice was the applicant.

The Supreme Court decision will have a material impact on firms and individuals who may be involved in FCA or PRA investigations.

For individuals, the decision is undoubtedly bad news. It will mean those who are implicitly criticised in an FCA or PRA notice, but not expressly identified, will be unable to object to the form of the notice even though their identity may readily be worked out by acquaintances or the press. The lack of opportunity for individuals to make their case to the FCA at the decision notice stage means that the best chance they have to influence the FCA's decision making may be when they are interviewed as a witness. Individuals may therefore need to be more proactive in getting their story across at interview.

For firms the picture is more mixed. For those firms that are trying to reach a settlement with the PRA or FCA, not having to worry about disgruntled former employees with third party rights will make things easier. However it is not just individuals who may be entitled to third party rights: firms can be as well. Firms implicitly criticised in FCA notices (perhaps because they are counterparties or service providers to the subject) may not enjoy third party rights, but their role may be well known in the market.

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