PRESS SUMMARY

Financial Conduct Authority (Appellant) v Macris (Respondent) [2017] UKSC 19
On appeal from [2015] EWCA Civ 490

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Wilson, Lord Sumption, Lord Hodge

BACKGROUND TO THE APPEAL

In 2012 Mr Macris was the International Chief Investment Officer of JP Morgan Chase Bank NA and, in that capacity, head of the bank's Chief Investment Office ("CIO International"). Part of CIO International's function was to manage a portfolio of traded credit instruments called the Synthetic Credit Portfolio. The Financial Conduct Authority ("FCA") is responsible for the statutory regulation of the United Kingdom's financial markets, deriving its powers from the Financial Services and Markets Act 2000 ("the Act"), as amended by the Financial Services and Markets Act 2012.

Over the course of 2012 the Synthetic Credit Portfolio made losses of $6.2 billion and, following an investigation, the FCA concluded that the loss was caused by, amongst other things, a high risk trading strategy, weak management of that trading and an inadequate response to information which should have alerted the bank to the problems. The FCA agreed a regulatory settlement with the bank, under which it paid a penalty of £137,610,000.

The provisions of the Act governing the imposition of penalties provide for three successive notices to be given to a person or firm under investigation, all of which include extensive reasons for the FCA's actions. Where a regulatory settlement is agreed before service of these notices, the usual procedure is to draft them in identical terms and serve them simultaneously. That practice occurred in this case on 18 September 2013. Where such notices contain material discreditable to particular individuals not party to the settlement, the Act makes provision under section 393 to protect these persons from unfair prejudice. When the notice "*identifies*" such a person, they must be given a copy of the notice, to enable them to make representations to the regulator and take the matter before the Upper Tribunal.

These notices did not identify Mr Macris by name or job title, but there were multiple references to "*CIO London management*", a category to which he belonged He was not supplied with a copy of the notice served on the bank or given an opportunity to make representations. He brought a claim before the Upper Tribunal, which heard as a preliminary issue the question of whether he was entitled to be notified under section 393. The Upper Tribunal upheld the complaint on the basis that the references to "*CIO London management*" would be taken by a reader with relevant experience to refer to the most senior individual involved. The Court of Appeal agreed in the result, but based their reasoning in part on an analogy with the law of defamation. This led them to conclude that persons who operated in Mr Macris' field would reasonably have been able to identify Mr Macris from statements made in the notice in conjunction with publicly available material. The FCA appealed to the Supreme Court.

JUDGMENT

By a majority of 4 to 1, the Supreme Court allows the FCA's appeal. Lord Sumption gives the lead judgment, with which Lord Neuberger and Lord Hodge agree. Lord Neuberger adds a concurring judgment and Lord Wilson gives a dissenting judgment. Lord Mance writes a judgment concurring with the majority in the outcome of the appeal, but agreeing with Lord Wilson on the issue of law.

REASONS FOR THE JUDGMENT

Lord Sumption holds that a person is identified in a notice under section 393 "*if he is identified by name or by a synonym for him, such as his office or job title*". In the case of a synonym it must be apparent from the notice itself that it could only apply to one person and that person must be identifiable from information which is either in the notice or publicly available elsewhere. However, resort to information publicly available elsewhere is permissible only where it enables one to interpret (as opposed to supplement) the language of the notice. It is not permissible to resort to additional facts about the person so that if those facts and the notice are placed side by side it becomes apparent that they refer to the same person **[11]**.

Lord Sumption gives five reasons: (i) section 393 defines what fairness requires in the context of notices issued by the FCA **[12]**; (ii) 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 **[13]**; (iii) 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 **[14]**; (iv) the relevant audience for publication is the public at large, not a specific industry sector specially familiar with the third party or his business **[15]**; and (v) the suggested analogy with the law of defamation is not helpful given its different purpose to that of section 393 of the Act **[16]**.

Lord Neuberger points out that the wider the scope of section 393(1)(a), the more constraining it will be on the FCA's activities; but the narrower it is the greater the number of individuals who will be at risk of being harmed by notices without any recourse **[23]**. The question to be asked is: does the notice identify the individual in question? The statutory language appears to stipulate that the person must be identified in the notice, not that he must be identifiable as a result of the notice **[25]**. Lord Neuberger describes the test as whether the individual is "*named in the notice, or the description in the notice must be equivalent to naming him*". An individual is "*identified*" in a document if: (i) his position or office is mentioned, (ii) he is the sole holder of that position or office, and (iii) reference by members of the public to freely and publicly available sources of information would easily reveal the name of that individual by reference to his position or office **[26]**.

Lord Neuberger also points to a number of problems if a wider meaning is adopted: (i) it would be a matter of subjective assessment as to how wide a scope to give it; (ii) it could self-evidently lead to disputes; (iii) it could lead to some odd consequences; (iv) it would place the FCA in difficulty from the outset; and (v) it could still lead to arbitrary outcomes **[28]**.

Lord Wilson dissents on the ground that the majority's approach does not strike a fair balance between individual reputation and regulatory efficiency **[44]**. The central issue of construction in the appeal relates to the appropriate constituency – whether it is ordinary readers or ordinary market operators who would conclude that the individual to whom the notice refers is the applicant **[59]**. The answer is by reference to the particular sort of damage which a wrong criticism of an individual by a notice is likely to cause him: that from within the sector of the market in which he operates **[60]**. Lord Wilson agrees in essence with the formulation of Lord Mance: the key question being are the words in the notice such as would reasonably lead an operator in the same sector of the market who is not personally acquainted with the applicant, by reference only to information in the public domain to which he would have ready access, to conclude that the individual referred to in the notice is the applicant **[63]**? However, in his application of that test, Lord Mance concludes that CIO London management did not equate with or identify Mr Macris, and that no information had been shown to exist in the public domain which, when read with the notice, identified him with CIO London Management. **[39]**. On this basis, Lord Mance agrees with the majority in the outcome of the appeal.

References in square brackets are to paragraphs in the judgment