**Hilary Term**
**[2017] UKSC 19**
*On appeal from: [2015] EWCA Civ 490*

# JUDGMENT

# Financial Conduct Authority (Appellant) *v* Macris (Respondent)

**before**

**Lord Neuberger, President**
**Lord Mance**
**Lord Wilson**
**Lord Sumption**
**Lord Hodge**

## JUDGMENT GIVEN ON

## 22 March 2017

**Heard on 13 October 2016**

| *Appellant* | *Respondent* |
| --- | --- |
| Jonathan Crow QC<br>Paul Stanley QC<br>(Instructed by The Financial Conduct Authority) | Javan Herberg QC<br>Ben Jaffey<br>(Instructed by Clifford Chance LLP) |

**LORD SUMPTION: (with whom Lord Neuberger and Lord Hodge agree)**

1. Mr Achilles Macris's complaint is that without giving him a chance to make representations in his own defence, the Financial Conduct Authority has published a notice imposing a penalty on his former employer for various irregularities in the conduct of its business, in terms which identify him as the person responsible. The question at issue on this appeal is whether the notices in question did in fact identify him. This may look like a small point but, for reasons which I shall explain, it has significant implications for the conduct of the Authority's investigatory and disciplinary functions.

2. The Financial Conduct Authority is responsible for the statutory regulation of the United Kingdom's financial markets. This includes protecting and enhancing the integrity of the United Kingdom financial system and ensuring the stability and orderly functioning of financial markets. The Authority's powers are derived from the Financial Services and Markets Act 2000 ("the Act"), as amended by the Financial Services Act 2012.

3. JP Morgan Chase Bank NA is authorised under the Act to carry on regulated investment activities. In 2012 Mr Macris was the Bank's International Chief Investment Officer. In that capacity, he was the head of a unit of the Bank in London called the Chief Investment Office (or "CIO International"). The function of CIO International was to manage the firm's excess deposits, including a portfolio of traded credit instruments called the Synthetic Credit Portfolio. Mr Macris's own functions were "controlled functions" for the purpose of section 59 of the Act, which meant that he had to be approved by the Authority as a suitable person to carry on those functions.

4. In July 2012, the Bank announced that the Synthetic Credit Portfolio had lost $5.8 billion in the first half of the year, a figure which rose to $6.2 billion by the end of the year. Following an investigation, the Authority concluded that the loss was caused by a high risk trading strategy, weak management of that trading and an inadequate response to important information which should have alerted the Bank to the problems. It also concluded that the Bank had withheld significant information from the Authority while the losses were being incurred. Together, these failings were found to have undermined trust and confidence in UK financial markets. A regulatory settlement was agreed with the Bank, under which it paid a penalty of £137,610,000.

5. 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: a warning notice describing the action which the Authority is provisionally minded to take and inviting representations (section 207); a decision notice describing the action that it has decided to take after considering any representations and informing the recipient of his right to refer the matter to the Upper Tribunal (Tax and Chancery) (section 208); and a final notice describing the action that it is taking once the decision notice has become final, ie after it has been reviewed by the Upper Tribunal or the time for applying for such a review has expired (section 390). The normal form of these notices is a brief statement of the action proposed, followed by a fairly extensive narrative entitled "Reasons". Where a regulatory settlement is agreed before the service of any of these notices, they must still be given, but the practice is to draft them in identical terms and serve them simultaneously. In this case the three notices were all served on the Bank on 18 September 2013. The Authority is not required to publish a warning notice to the world, but it is required to publish a decision notice and a final notice. It did so in this case on the following day, 19 September 2013.

6. Notices recording disciplinary action proposed to be taken against an authorised firm will almost inevitably contain implicit or explicit criticisms of those responsible for the irregularities in question and possibly of other persons involved. These are referred to in the Act as "third parties". Section 393 contains provisions for protecting them against unfair prejudice. Subsection (1) provides:

> "If any of the reasons contained in a warning notice to which this section applies relates to a matter which -
>
> > (a) identifies a person ('the third party') other than the person to whom the notice is given, and
> >
> > (b) in the opinion of the regulator giving the notice, is prejudicial to the third party,
>
> a copy of the notice must be given to the third party."

The object of this procedure is to enable the third party to make representations to the regulator. Subsection (3) requires a copy notice served on a third party to specify a reasonable period of time within which he may do so. Subsection (4) contains a corresponding provision relating to decision notices. The object here is to enable the third party to take the matter before the Upper Tribunal, as subsection (9) entitles him to do. These procedures need not be followed if a corresponding notice in

relation to the same matter has been given to the third party in his own right: see subsections (2) and (6).

7. Mr Macris was not supplied with a copy of the notice served on the Bank or given an opportunity to make representations. As an "approved person" he was personally under investigation along with his employer. But he was not party to the settlement with the Bank, and the investigation of his conduct was still in progress at the time. Ultimately, in February 2016, Mr Macris reached his own regulatory settlement. A final notice in relation to him was published on 9 February 2016, in which he was found to have been party to the withholding of information from the Authority and on one occasion to have misled it. A penalty of £762,900 was imposed on him.

8. The Authority does not deny that if Mr Macris was identified in the warning and decision notices served on the Bank, there were statements in those notices which were prejudicial to him. Their case is that he was not identified. It is common ground that he was not identified by name or job title. But there were many references to conduct by "CIO London management" or similar expressions. Mr Macris was not the only manager in CIO International in London. On the basis of the notice alone, therefore, "CIO London management" could have referred to a number of people other than him. His case is that those who were active in the relevant markets would have known that it referred to him. In support of this case, he produced two witness statements in the Upper Tribunal, neither of which was challenged. One was from a senior manager formerly employed in CIO International in London, who said that it was clear to him that "CIO London management" referred to Mr Macris. This was because of the knowledge that he had acquired as a manager in the same unit. In particular, he knew that Mr Macris was the head of that unit and was not in the habit of sharing his responsibilities with others. The other witness was a senior sales representative dealing in credit instruments for another bank in London. He said that he drew the same conclusion because he knew about Mr Macris's position and working methods from his dealings with CIO International. In addition, Mr Macris relied on the fact that some five months before the service of the notices on the Bank, a US Senate Committee had published a report on the losses in the Bank's Synthetic Credit Portfolio, which described his role in the incurring and treatment of those losses, identifying him by name. This report was available on the internet. It was said that if read side by side with the Authority's notices the Senate Committee report would enable anyone to deduce who was being referred to as "CIO London management".

9. The Upper Tribunal directed the hearing as a preliminary issue of the question whether Mr Macris was entitled to be treated as a third party for the purposes of section 393 of the Act. Judge Herrington upheld Mr Macris's complaint and held that he was. He referred at para 13 of his judgment to para 4.3 of the final

notice, which described the position of CIO International in the Bank's hierarchy in the following terms:

> "4.3 The Firm is a wholly owned subsidiary of the Group. CIO operates within the Firm in both New York and London. The traders on the SCP were managed by SCP management, which in turn were managed by CIO London management. CIO London management represented the most senior level of management for the SCP in London, reporting directly to CIO Senior Management in New York, which in turn reported to Firm Senior Management. CIO also had its own Risk, Finance and VCG functions, which were control functions relevant to the SCP and other portfolios within CIO. The wider control functions within the Group included Internal Audit, Compliance and the Group's Audit Committee."

The judge then referred at para 16 to a number of places where the notices referred to acts as having been performed by an individual (eg "CIO London management sent an e-mail"). The essence of his reasoning appears at paras 45 and 46 of his judgment:

> "45. In my view the drafting of para 4.3 is inconsistent with how a corporation would describe the hierarchy of its governing bodies. Collective bodies are *responsible* for the management of particular business units rather than managing them themselves and the bodies concerned would appoint named individuals to carry out the actual management in clearly defined reporting lines. What therefore comes across clearly from para 4.3 of the Final Notice is a description of the reporting lines of particular individuals to their line managers. The paragraph also discloses the fact that SCP management would manage rather than be purely responsible for the management of the individual traders who would therefore each say that their line manager was whoever was identified as SCP management. It is not the practice that an individual trader would report to a collection of individuals; it is the hallmark of good management that there can be no confusion over which individual a person reports to - he needs to know who his boss is and so he does not get conflicting messages. The reference to CIO London management being the most senior level of management for the SCP in London is also significant; again a reader with experience of how large corporations operate would take such a reference as being to the most senior individual concerned.

> 46. This initial impression that the reader would take from para 4.3 is reinforced by the fact that CIO London management is stated in the notice to have performed actions such as having conversations, attending meetings and sending e-mails which can only be taken in the context in which these events are described, as being the actions of an individual rather than a body of persons. This is clearly apparent from the references Mr Herberg referred me to as set out in para 16 above."

10. In the Court of Appeal Gloster LJ delivered the leading judgment, Patten LJ agreeing with her generally and Longmore LJ agreeing "to the extent that it is a question of law". Gloster LJ declined (paras 52, 60) to adopt Judge Herrington's reasoning but agreed with him in the result, namely that the references to "CIO London management" were references to "an individual, ascertained by reference solely to the terms of the notice itself" (para 52). She also considered (para 53) that the evidence adduced by Mr Macris and publicly available material such as the US Senate Committee report entitled the judge "to conclude, on an objective basis, that persons acquainted with Mr Macris, or who operated in his area of the financial services industry, would reasonably have been able to identify Mr Macris from the statements made in the notice." Gloster LJ's view that the relevant audience was "persons acquainted with Mr Macris, or who operated in his area of the financial services industry" was based on an analogy, which she regarded as persuasive, between disclosure under section 393 of the Act and publication in the law of defamation. In the latter context, she drew attention after the hearing to the statement in the current edition of *Gatley on Libel and Slander*, 12th ed (2013), paras 7.1, 7.2:

> "The question in all cases is whether the words might be understood by reasonable people to refer to the claimant, subject to the qualification that where the words are published to persons who have special knowledge the issue will be decided by reference to what reasonable persons possessing that knowledge would understand by them. … The test of whether words that do not specifically name the claimant refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the claimant to believe that he was the person referred to?"

11. This appeal turns on the meaning of "identifies" and on the meaning of the notice to which that word is being applied. Both are questions of law, although the answers may be informed by background facts. The essential question before us is what background facts may be relevant for this purpose. In my opinion, 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 apply to only 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 supplementing) the language of the notice. Thus a reference to the "chief executive" of the X Company may be elucidated by discovering from the company's website who that is. And a reference to "CIO London Management" would be a relevant synonym if it could be shown to refer to one person and that person so described was identifiable from publicly available information. What is not permissible is to resort to additional facts about the person so described so that if those facts and the notice are placed side by side it becomes apparent that they refer to the same person. I reach this conclusion for the following reasons.

12. The starting point is that section 393 covers the same ground as the general obligation imposed by public law to give those affected sufficient notice to enable them to make representations to protect their legitimate interests. But it does so in a more limited way. So far as it concerns notice of potential criticisms, the section defines what fairness requires in the context of warning and decision notices issued by the Authority.

13. Secondly, although the word "identifies" is not elaborated, it is clear from the language that it is the reasons contained in the notice which must identify the third party and not some extrinsic source. Reference to extrinsic sources of information is legitimate only so far as it is necessary in order to understand what the notice means.

14. Third, it is necessary to read section 393 in the light of the practicalities of performing the Authority's investigatory and disciplinary functions. It is common for notices to be served on different parties to the same investigation at different times. The possibility is expressly envisaged in section 393 itself. The role of the firm or of the various individuals involved may take more or less long to investigate. Or, as happened in this case, one of them may settle before the others. Once the facts relating to one person or firm under investigation are ascertained or admitted and are found to justify criticism or sanctions, there will often be no proper reasons for withholding that information from the market. Yet there will almost always be people in the know, who will realise when they read the notices which individuals are encompassed by apparently anodyne collective expressions such as "management" or who is likely to have been responsible for particular failings of the firm. The facts, or enough of them, may be well known within the firm. They may be deduced by those who know enough about the firm's procedures or organisational structure or the business methods of the "third party" in question. Even for those who are further from the scene, the internet is a fertile source of information and gossip for those who are willing to go to some trouble to discover his identity. The Authority will not necessarily know what if any further information about the business, the facts or the individuals involved may be available to

knowledgeable outsiders or discoverable from publicly available sources. In those circumstances it must be able to ensure, by the way in which it frames its own notices, that a third party is not "identified" in the notice, even if he or she is identifiable from information elsewhere. The present case is a good illustration of the problem. The Court of Appeal considered that the information relevant for the purpose of identifying Mr Macris included the US Senate Report, which identified him by name. On that footing, once the Senate Committee had published his report, it would have been impossible for the Authority to serve the notice on JP Morgan as part of the settlement process, without serving a copy on Mr Macris at a comparatively early stage of the investigation of his role, when it would not necessarily know the relevant facts or have formulated any criticisms.

15. Fourth, the combination of information in the notice with other information can prejudice a third party only if the notice is published. Publication is not automatic. Where the Authority decides to publish, it does so in order to serve the public interest in the proper performance of its functions and the protection of those who use the financial services industry. This is reflected in the Authority's *Enforcement Guide* (2016), section 6.2.16 of which states:

> "Publishing notices is important to ensure the transparency of FCA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action."

The relevant audience for this purpose is accordingly the public at large. The fact that some specific sector of the public at large may, like Mr Macris's witnesses, have special additional information enabling them to identify a third party is not relevant.

16. Finally, I do not regard the suggested analogy with the law of defamation as helpful. The law imposes strict liability for the publication of a defamatory statement which reflects on the claimant, even if the defendant did not intend it to refer to the claimant and had no reason to believe that others would connect it with him. The test is whether those to whom the statement was published would reasonably suppose him to be the person referred to. That will commonly depend on who it was published to and what knowledge they had of him. In that context, extrinsic evidence is naturally available to connect the perception of the claimant among those to whom the defamatory statement was published with the person referred to in it. Section 393 of the Act has an entirely different purpose. It applies where the Authority knows of the third party and intends to refer to his actions, but only where it actually identifies him in the notice.

17. I do not accept, any more than the Court of Appeal did, the judge's view that because reporting lines lead to individuals, any reference to "management" must be

to an individual. Nor do I accept Mr Macris's argument that because the notices referred to actions such as making statements, attending meetings or sending e-mails, which must have been done by individuals, a single individual is meant, as opposed to any of a number of individuals comprised within the term "the firm", "CIO" or "CIO management". The real question is whether the terms of the notice itself would have conveyed to a reasonable member of the public without extrinsic information that any of these terms was a synonym for Mr Macris. Plainly it would not. I would therefore allow the appeal and declare that Mr Macris was not a third party for the purposes of section 393 of the Financial Services and Markets Act 2000.

**LORD NEUBERGER:**

18. I agree with the judgment of Lord Sumption, and I add a few observations of my own because there is no doubt that the case for giving a wider meaning to section 393(1)(a) of the Financial Services and Markets Act 2000, as explained by Lord Mance and Lord Wilson, has considerable force.

19. The point raised on this appeal centres around the effect of the word "identifies" in section 393(1)(a), and it is, at least in my view, difficult to resolve. Section 393(1)(a) is a good example of Parliament enacting a provision whose general purpose is clear, but, because there can be more than one reasonable view as to the provision's scope, the resolution of that issue has effectively been assigned to the courts. I do not say this by way of complaint. In some cases, Parliament may consider that it is better for the legislature to lay down a rule in fairly unspecific terms in a statute, and then leave it to the courts to determine the precise extent and reach of the rule by reference to specific sets of facts. This appears to be such a case.

20. As is clear from reading the judgments of Lord Sumption and Lord Wilson, resolution of the point at issue has significant implications both for the conduct of the Financial Conduct Authority's functions and for individuals who, while they are not named in a warning notice (under section 387) or a decision notice (under section 388), may have their reputations harmed as a result of the publication of such a notice. Section 393 is plainly intended to enable at least some such individuals to be served with a copy of the notice concerned, to refer it to the Upper Tribunal and to challenge some or all of the contents of the notice, rather than leaving any challenge to the notice in the sole hands of the party against whom it is primarily issued, presumably normally the employer of the individual concerned, as in this case.

21. The purpose of including such a provision in the 2000 Act is clear. The interests of the addressee of a notice who is accused of failings, and those of a third party such as an employee of the addressee, who may be identifiable as responsible

for, or implicated in, the alleged failings, are by no means necessarily aligned. Thus, it may well be that an employer would want to try and curtail any publicity about the alleged failings by quickly negotiating and paying a penalty, even if there may be grounds for challenging the allegation in whole or in part. But this may often not suit the employee, who might well feel that, in the absence of the Tribunal exonerating him, his reputation, and therefore his future employment prospects, could be severely harmed or even ruined.

22. In this case, the addressee of the Notice, JP Morgan Chase Bank NA, was Mr Macris's employer, and it did indeed pay a substantial penalty to the Authority, no doubt with a view to putting an end to any proceedings on the Notice. Mr Macris received a separate notice and contested before the Tribunal the allegations in the notice served on him (which were substantially identical to those in the Notice served on the Bank, which is the Notice to which he claims section 393 applies). While some of the allegations against Mr Macris were upheld, the more serious ones, including one which at least implied that he had not been honest in certain respects, were rejected. Had he not been served with his own notice, Mr Macris would not have been able to challenge the Notice served on the Bank, unless he had been "identifie[d]" in that Notice.

23. That brings me to the question of the scope of the section. The wider the scope of section 393(1)(a), the more constraining it will be on the Authority's activities, as Lord Sumption explains in para 14 above. But the narrower the scope of the provision, the greater the number of individuals who will be at risk of being harmed by notices without any recourse, as Lord Wilson describes in paras 60 and 61 below.

24. On this appeal, it is not suggested on behalf of Mr Macris that an individual should be within the scope of section 393 simply because he could show that one person could identify him from the terms of the notice. On the other hand, the Authority accepts that section 393 cannot be limited to cases where the individual concerned is mentioned by name in the notice. There is no entirely satisfactory logical basis for justifying any particular conclusion as to the precise point at which one draws the line between these two extremes.

25. Because there are powerful policy arguments pointing in opposite directions, it seems to me that it is justified, indeed requisite, to have particular regard to the wording of the relevant statutory provision. Section 393(1)(a) states that section 393 applies where "any of the reasons contained in a … notice … relates to a matter which … identifies a person". In other words, the question to be asked is: does the notice identify the individual in question? The language used appears to stipulate that the person must be identified in the notice, not that he must be identifiable as a result of the notice. A literal reading could therefore be said to suggest that the notice

must expressly mention the individual by name, as opposed to rendering that individual capable of being identified as a result of information to which one reader, all readers or a specific group of readers of the notice may be able to get access. In my view, that would be too narrow a meaning to give the section.

26. An equally natural, but more realistic interpretation is that, in order for the section to apply to an individual, either he must be named in the notice, or the description in the notice must be equivalent to naming him. On this basis, a reference to the Chairman of the Board of a United Kingdom-registered company would "identif[y]" the individual concerned, as it would be easy for anyone to find out his name. (And, depending on the facts, the same might be the case with a reference to the Chairman of the Board of a foreign-registered company). It is true that even that form of identification would require the reader to have some outside knowledge, but as a matter of ordinary language, I would accept that 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.

27. Apart from the notice having to mention the position or office, that test has two essential features. The first is that it involves assessing the identifiability of an individual by reference to what members of the public generally know or could discover. A test that was satisfied by reference to a specific and smaller group would give rise to difficulties as to where one should draw the line as a matter of principle, and also as to how in practice the Authority could know whether or not an individual satisfies the statutory test. The second essential feature is that, in order to satisfy the test, any research or investigation should be straightforward and simple, as would be the case in relation to identifying who chairs the board of a UK-registered company. In order to qualify, any investigation process should not require any detective work; and so jigsaw identification, ie "correctly identifying someone as a result of relating separate snippets of information" (*Donald v Ntuli* [2011] 1 WLR 294, para 55), would not do. Similarly, the fact that Mr Macris could be identified by reference to a publicly available US Senate Committee report would not do because a member of the public would not know of that report, and anyway would not think of referring to it for the purpose of identifying Mr Macris as the individual referred to in the Notice in this case.

28. Lord Wilson makes out a strong case as to the potential for unfairness if this conclusion is right, and his powerfully expressed views have caused me considerable doubts as to whether indeed it is. However, his solution appears to me to give rise to problems which support adhering to the conclusion I have expressed. First, if a wider meaning than that which I have suggested is given to section 393(1)(a), it would be a matter of subjective assessment as to how wide a scope to give it. Secondly, any wider definition, unless it is very much wider than anyone has

so far suggested, could self-evidently lead to disputes. Thirdly, a wider meaning could lead to some rather odd consequences. Fourthly, a wider definition would put the Authority in a difficulty from the start. Fifthly, a wider definition could still lead to arbitrary outcomes.

29. Lord Wilson's suggested formulation in para 63 is plainly reasonable and indeed it is attractive. However, like the formulation suggested by the Court of Appeal, it seems to me to manifest the first and second problems I have just identified, and it also serves to demonstrate the third, fourth and fifth problems.

30. First, if section 393(1)(a) has a wider application than I have suggested, there is no logical or principled reason for excluding from, or indeed including in, its scope an individual who could be identified by a person who is "personally acquainted with [him]", to quote from Lord Wilson's test. Secondly, there could also easily be disagreements, which would have to be resolved, as to whether, on disputed or agreed facts, a particular person falls within that expression. Thirdly, as the facts of this case show, it may well be that Mr Macris could only have satisfied Lord Wilson's test because of the happenstance that he had been identified in a published US Senate Committee report on various problems encountered by the Bank. Fourthly, these very facts highlight the difficulties which the Authority could face if one gives section 393(1)(a) a wide meaning. Fifthly, even on Lord Wilson's test, where a group of two people is identifiable from a Notice, it could be damaging to both of them if they could not clear their names, yet unless one of them could be identified, neither of them would be within the section.

**LORD MANCE:**

31. This is a difficult case. But, ultimately, I am in broadly the same position as Lord Wilson on the issue of law. However I find myself, not without hesitation, arriving at the same conclusion about the outcome of this appeal as Lord Sumption and Lord Neuberger when I apply this test to the facts of this case.

32. On the question of law, it is tempting to take the very broad view that it is unfair if a person like Mr Macris is not given the opportunity to address criticisms in a final decision notice directed, as this was, to Mr Macris's current employers, JP Morgan Chase Bank NA, in terms which future employers might be able to ascertain by due diligence or investigation were in reality critical of Mr Macris. But that would make the task of the Authority very difficult indeed, and is not in my opinion the intention or effect of the language of section 393 of the Financial Services and Markets Act 2000.

33. On the other hand, I consider that Lord Sumption and Lord Neuberger take too narrow a view of the third party protection which the Act intended. They take a narrower approach than even the Authority advances as its primary case, a narrower approach than any previous court addressing the issue has ever considered appropriate. They do not go to the absolute extremity of a requirement that the third party should be named. But they require either naming or what is described as a "synonym". In Lord Sumption's words (para 11),

> "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 apply to only 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 supplementing) the language of the notice."

This is what one may call a dictionary approach. But a notice is not issued into a vacuum, of which the only occupant is a dictionary. The dictionary is one aspect of publicly available information, and, once it is permissible to look at that aspect of publicly available information to supply the identity of a person who is being criticised in a notice, I am unclear why this should not, for example, also be permissible to show that a generic description such as "CIO London management" in a notice in fact describes only one person. In my view, the correct analysis is, rather, along the lines of the Authority's primary case, viz that a matter (only) "identifies" a person if the identity of the person is apparent from the terms in which the matter is described or explained, read in the light of information generally or publicly available in the financial world (as distinct from information available only to persons acquainted with the person or his company).

34. Judge Timothy Herrington in the Upper Tribunal treated section 393 of the 2000 Act as involving a two-stage test. First, the decision notice must direct criticism at a particular individual or the members of a particular group of individuals. Second, that satisfied, such individual or individuals could be identified for the purposes of section 393 by external material, "regardless of whether the ordinary reader of the notice would be able to establish that the criticisms relate to" the individual in question (para 37). It was "not a question of whether any particular type of reader could identify the individual concerned but simply whether there is information in the public domain that incontrovertibly links the description in the Final Notice" to, in this case, Mr Macris (para 50). Judge Herrington considered (in my view, probably incorrectly) that this analysis was consistent with that adopted by an earlier Financial Services and Markets Tribunal decision in *Watts v Financial Services Authority* FIN/2004/0024 (unreported) 7 September 2005. Judge

Herrington attached no significance to the fact that the British press had not in fact worked out the identity of Mr Macris until by his present claim he prompted them.

35. The Court of Appeal considered that "Whether the relevant 'matters' 'identify a person' for the purposes of section 393 is in one sense a unitary question", a proposition with which I agree, but went on to adopt Judge Herrington's two-stage approach as logical. It disagreed with the breadth of Judge Herrington's approach at the second stage of his two-stage approach. It said that "there cannot be *ex post facto* unlimited reference to external material to identify the third party", and that identification could only be made by reference to information "which objectively would be known by persons acquainted with the third party, or persons operating in the relevant area of the financial services market" (para 50). It is notable, however, that, in the next paragraph of its judgment, the Court of Appeal referred to what such persons "might reasonably have known". Further, in para 51, after noting, correctly in my view, that the failure of the press to identify Mr Macris before his present claim was of some evidential relevance, the Court of Appeal only upheld the judge's conclusion on the basis that "had he applied the objective test [which the Court of Appeal] formulated, [he] would have been entitled to conclude on the evidence before him, that despite the fact that the press had not previously latched on to the matter, the relevant sector of the financial market would nonetheless have appreciated that it was Mr Macris who was identified in the Notice as 'CIO London management'". Once it had concluded that Judge Herrington had applied the wrong test, it was for the Court of Appeal itself to apply the right test, not to consider whether a judge applying the correct text might reasonably have arrived at the same result or would have been entitled to do so.

36. Section 393 gives rights which go beyond any which would arise at common law under principles discussed in *In re Pergamon Press Ltd* [1971] Ch 388. It is not therefore surprising that these are carefully delimited. The use of the words "which … identifies a person" contrasts with the use elsewhere in the statute of the word "identifiable" (Schedule 2, paragraph 14(2) and Schedule 11B, paragraph 8(3)). Some assistance in understanding section 393 may also be obtained from section 230A, albeit only added with effect from 24 January 2013. This, in the context of the Ombudsman Scheme introduced by Part XVI of the Act, provides that:

> "(3) Unless the complainant agrees, a report of a determination published by the scheme operator may not include the name of the complainant, or particulars which, in the opinion of the scheme operator, are likely to identify the complainant."

The ambit of this provision may be regarded as confirming the limited scope of the third party protection intended under section 393.

37. On the question whether a notice is directed at a particular person, the Tribunal said in *Watts*, at para 50, in the context of a decision notice directed simply at Shell, that:

> "There is no reason in our view why a market abuse allegation directed at a company must necessarily be taken to impute criticism to particular individuals. We doubt whether undertaking the threefold steps which are said to be required, and looking at 'publicly available sources' to see whether any and if so which individuals were identified, would be a workable process."

In the present case, I consider (contrary to the conclusion reached by Judge Herrington) that the criticism directed in the report to "CIO [*ie Chief Investment Office*] London Management" cannot by itself necessarily be taken to relate to any particular individual or individuals. However, it must relate to one or more of a group of individuals making up CIO London management. I also consider (contrary to the view taken in both courts below) that a notice cannot be said to identify an individual merely because persons acquainted with him or his company could do so. Otherwise, it would be necessary in almost every case for a third party notice to be given. The test of identification should have regard to information generally available publicly, without inquiry of those with direct knowledge of the company involved or detailed investigation, to those in the relevant financial world in which the matter occurred. A notice will, in my view, only identify an individual if it does so to persons operating in that world, unacquainted with the particular individual or his company, though familiar with information generally available publicly to operators in that world.

38. In the present case, the matter to which the Notice related consisted of the circumstances in which the Bank incurred losses as "the result of what became known as the 'London Whale' trades" (para 2.1), and the Notice assigned responsibility for this matter in certain respects to "CIO London management". If there was publicly available information making clear that CIO London management equated with Mr Macris or that he was the person who within CIO London management had managed the London Whale trades, I would regard that as sufficient identification of him to trigger section 393(1) and (4).

39. The courts below relied both on evidence from two witnesses closely acquainted with Mr Macris and on the US Senate Report into the "London Whale" matter. The two witnesses in question had worked with Mr Macris in, or done business with, the CIO and had detailed knowledge of the CIO's organisation and structure. They were speaking on the basis of specialist knowledge which was, in my view, irrelevant to identification. As to the Report, Judge Herrington said that it

"is accessible on the internet and … contains many references to [Mr Macris]" (para 53), and noted that it showed that some of the communications referred to in the Notice as involving CIO London management were in fact with Mr Macris. In disagreement with Lord Wilson on this point, I do not consider that it follows that CIO London management equated with Mr Macris, or that he was the only relevant individual in CIO London management or that the criticisms directed generically at CIO London management were being directed at him. Although it was "accessible on the internet", I am also left uncertain whether it and its contents have been shown to constitute publicly available information in a United Kingdom context.

40. For these reasons, I agree that this appeal should be allowed.

**LORD WILSON: (dissenting)**

41. I find myself in respectful disagreement both with the majority of the court and, on a more limited yet important aspect referable to the disposal of this particular appeal, also with Lord Mance.

42. In its Notice of Appeal the Authority suggested that, when providing for "third party rights" in section 393 of the Act, Parliament probably intended "an approach which could strike a fair balance between individual reputation and regulatory efficiency".

43. I indorse the Authority's suggestion.

44. The court's decision today does not strike a fair balance.

45. In para 1 of his judgment Lord Sumption observes that the point raised by the appeal "has significant implications for the conduct of the Authority's investigatory and disciplinary functions".

46. I agree with Lord Sumption's observation. But does it not betray a lack of balance? Does the point not also have significant implications for individuals wrongly criticised in warning and decision notices given by the Authority to others?

47. In its Notice of Appeal the Authority stated as follows:

> "The issue in the appeal is whether the test formulated by the Court of Appeal is correct. The Authority does not seek to argue (as it did in the Court of Appeal) that identification for these purposes is limited to names or designations that function as proper nouns. But the Authority submits, as it did in the Court of Appeal, that a person is identified in a notice only if the terms of the notice would reasonably lead the ordinary reader (that is, the reader with a general understanding of financial affairs and aware of publicly and widely available background material, but without specific or special knowledge of the underlying facts of the matter to which the notice and its reasons relate) to conclude that the notice unambiguously identifies the applicant as a person mentioned in the notice."

I will refer to the Authority's suggested test as the "ordinary reader test".

48. In its written case, echoed in the oral submissions of Mr Crow QC on its behalf, the Authority suggested that, while the court might wish to consider whether an individual was identified only if named in the notice, or perhaps also if referred to by his formal job title, the "correct test" was its ordinary reader test.

49. In order to ensure that the Authority's functions are workable, Lord Sumption favours a construction of section 393 which appears to narrow the field of those upon whom it confers third party rights even more than the Authority itself suggests to be correct. But I say that his construction "appears" to narrow the field because I confess that I find it - indeed it follows that I find the whole basis of the court's decision today - slightly hard to understand. My perplexity, which I trust that readers of our judgments will not share, arises in the following way:

> (a) Both in para 11 and in the final paragraph of his judgment (para 17) Lord Sumption stresses the need for a "synonym" before an unnamed person will be identified within the meaning of the section.
>
> (b) In explaining his agreement with Lord Sumption, Lord Neuberger therefore undertakes, at para 26, a conventional analysis of what, in this context, a synonym means. He suggests that the person's position or office must be mentioned, that he must be the sole holder of it and that, by reference to freely available sources of information, the public must be able easily to discover his name as being the holder of it.

(c) As Lord Mance suggests at para 33, the above may be called a "dictionary approach".

(d) In para 11, however, Lord Sumption proceeds to explain his use of the word "synonym".

(e) So he says that a reference to "CIO London management" would be a synonym if it referred to one person who was identifiable from publicly available information. But can "CIO London management" be described as a position or office?

(f) Lord Sumption also says that resort to publicly available information is permissible in order only to interpret, and not to supplement, the language of the notice. How obvious is this distinction?

(g) He also says that it is impermissible to resort to additional facts about the person so that, if they are placed alongside the notice, it becomes apparent that they refer to the same person. How clear is the meaning of this prohibition?

50. The question raised by section 393(1) and (4) of the Act is whether "any of the reasons contained in a … notice … relates to a matter which - (a) identifies a person …" The cumbersome terminology was borrowed from the predecessor of the section, namely section 70(4) of the Financial Services Act 1986 ("the 1986 Act"). But the surplus words are swiftly and conveniently banished in section 393(2)(b) and (6)(b) of the Act, where it is made clear that it is simply the notice which has to identify the person.

51. In the Upper Tribunal Judge Herrington, who prior to his appointment had been Chair of the Authority's Regulatory Decisions Committee and so brought to the issue an arresting level of expertise, suggested that the question whether a notice identified an applicant for third party status should be answered in two stages:

(i) By reference only to the terms of the notice, do the matters of which the applicant complains refer to an individual? If so,

(ii) Is there information in the public domain which incontrovertibly demonstrates that the individual is the applicant?

52. The Court of Appeal agreed that the question should be answered in two stages and that the judge's formulation of the question at the first stage was correct. The Authority says that it now "agrees that a two-stage approach may be helpful … and it broadly agrees with the formulation of the first question".

53. The Court of Appeal held that the judge's formulation of the question at the second stage was too broad; and no one now contends otherwise. The Court of Appeal proceeded to reformulate that question as follows, at para 45:

> "Are the words used in the 'matters' such as would reasonably in the circumstances lead persons acquainted with the [applicant], 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?"

54. Unfortunately the Court of Appeal's mistaken reliance on the law of defamation led it to make two errors in its reformulation of the question at the second stage and to include in it one infelicity.

55. The first error was to include "persons acquainted with the [applicant]" in the notional constituency of those who would decide whether he was the individual to whom the notice referred. Persons acquainted with him would include persons well acquainted with him, such as members of his family and close colleagues at work; and they would be likely to know that he was indeed that individual in circumstances in which it would be absurd to describe him as having been identified in the notice. Thus, in the recent case in the tribunal of *Bittar v Financial Conduct Authority* [2015] UKUT 602 (TCC), Judge Herrington felt the need, at paras 33 and 34, to apply a heavy gloss to the Court of Appeal's reference to acquaintances so as to exclude those with close knowledge of the circumstances.

56. The second error was to define the decision for that constituency as being whether the applicant was a person prejudicially affected by matters in the notice. The decision for the constituency is, instead, whether the individual to whom the notice refers is the applicant. Whether, if so, matters in the notice are prejudicial to him is, instead, a matter for the Authority pursuant to section 393(1)(b) and (4)(b) of the Act.

57. The infelicity was to suggest that it was enough for that constituency to "believe". The verb is too weak. Although the composition of the constituency may not have been correctly identified in its ordinary reader test, the Authority is correct to suggest that, at the second stage, the constituency needs to "conclude" that the individual to whom the notice refers is the applicant.

58. But the kernel of the Court of Appeal's reformulation of the question at the second stage remains. It is that the relevant conclusion should be reached by "persons … who operate in his area of the financial services industry, and therefore would have the requisite specialist knowledge of the relevant circumstances".

59. It is at this point that the court should have addressed what is - in my view - the central issue of construction raised by the appeal. Does a notice identify a person for the purpose of section 393(1)(a) and (4)(a) of the Act if ordinary readers, as defined by the Authority in its suggested test, would conclude that the individual to whom the notice refers is the applicant? Or does it identify a person for that purpose if ordinary operators in the same sector of the market would reach that conclusion? Which, in other words, is the appropriate constituency - ordinary readers or ordinary market operators?

60. I answer the question by reference to the particular sort of damage which a wrong criticism of an individual in a notice given by the Authority is likely to cause to him. It is the reaction to the criticism of those who operate in the same sector of the market which is likely to cause him most damage; for it may prejudice his ability to remain in his employment, or to find other employment in that sector, or otherwise to continue to earn his livelihood in the industry. The predecessor to section 393 of the Act, namely section 70(4) of the 1986 Act, identified, at (b), the prejudice which the Secretary of State needed to perceive: it was prejudice "to that person in any office or employment". Although under section 393(1)(b) and (4)(b) of the 2000 Act the type of prejudice which the Authority needs to perceive is left open, there is nothing to indicate that in 2000 Parliament was any less concerned about prejudice in relation to employment than it had been in 1986.

61. Take the case of Mr Macris himself. In the warning and decision notices given to the bank on 18 September 2013, the Authority referred in detail to a telephone call on 10 April 2012 which it had conducted with "CIO London management". In fact it had conducted the call with (or primarily with) Mr Macris; and in these proceedings it has always accepted that, when referring in the notices to "CIO London management", it was referring to Mr Macris but in a way which (so it hoped) would avoid identifying him. In the notices the Authority concluded in relation to the telephone call "that (by virtue of the conduct of CIO London management) the Authority was deliberately misled by the Firm". The allegation that during the telephone call Mr Macris deliberately misled the Authority is, if

untrue, gravely damaging to him. But, in its later notices given to Mr Macris himself following its direct inquiry into his conduct, there is no such allegation. There is extensive reference to the same telephone call; and his conduct in the course of it is said to contribute to the conclusion that, as an approved person, he had failed to deal with the Authority in an open and cooperative way in breach of Statement of Principle 4 of the Authority's Statements of Principle for Approved Persons. But the more gravely damaging allegation against Mr Macris is not repeated. Yet, by contrast, there, in the published decision notice given to the bank, the allegation remains. Apparently Mr Macris, whose employment by the bank has long since been terminated, cannot challenge it in any way. He cannot sue the Authority for damages, whether in tort or otherwise, because it has not acted in bad faith: paragraph 25 of Schedule 1ZA to the Act. And, by the decision of the court today, he is not entitled to third party status under section 393 of the Act.

62. Nor would Mr Macris have been entitled to third party status by application of the Authority's ordinary reader test. I see no merit in the Authority's submission that, even if ordinary market operators were to conclude that he was the individual to whom the decision notice referred, Mr Macris should fail to secure third party status because ordinary readers would not reach a similar conclusion.

63. In my view the proper construction of the word "identifies" in section 393(1)(a) and (4)(a) of the Act requires that the question at the second stage of the inquiry should be answered by reference to the ordinary market operator test. But the test requires expansion in order to identify, and in particular to limit, the information to which the operator should refer. In essential agreement with Lord Mance at para 37, I would expand it as follows:

> "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?"

64. It is easy to pick holes in my formulation of the above question. In their application to particular facts, its references to the same sector, to personal acquaintanceship and to ready access to information might all give rise to debate. But, for my part, I am unpersuaded that it would be impossible for the Authority satisfactorily to address that question; for it will not have reached the stage of giving a notice before having conducted a profound examination of the relevant circumstances.

65. Above all, however, my formulation would, if I may say so, have better struck, as between individual reputation and regulatory efficiency, the fair balance which the Authority has correctly identified to have been Parliament's intention.

66. Were I correctly to have formulated the question at the second stage of the inquiry, the answer to it would be "yes, the individual referred to in the notices is Mr Macris". There is no doubt that the two deponents in support of Mr Macris, each of whom knew him and had worked with him, could not have contributed to an affirmative answer. But there was also the report of the US Senate Permanent Subcommittee on Investigations dated 15 March 2013 and entitled "JP Morgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses". As Judge Herrington said, the report was the subject of an in-depth investigation; was readily accessible on the subcommittee's website; and contained many (in fact more than 80) references to Mr Macris. It had generated significant press attention. By cross-reference to the report, the ordinary market operator would readily conclude that the references in the notices to "CIO London management" were references to Mr Macris. When, for example, the notices referred to the despatch by "CIO London management" of an e-mail on 30 March 2012, the subcommittee report referred to its despatch by "Achilles Macris". I do not share the concern of Lord Mance, expressed at para 39, that the report might not have been readily available to market operators in the UK; and I agree with the qualified acknowledgement by Lord Neuberger, at para 30, that it would provide an affirmative answer to my formulation of the question.

67. Nor do I join my colleagues in concluding that Mr Macris fails even to pass the first stage of the inquiry, which requires him to establish that, by reference only to the terms of the notices, the Authority's criticisms of "CIO London management" refer to an individual. The Authority secured permission from the Court of Appeal to challenge the tribunal's conclusion that Mr Macris had passed the first stage; but its challenge failed. In its Grounds of Appeal to this court there was no suggestion of any aspiration to mount a further challenge in this respect. Indeed in my view, had permission to do so been sought, it would have been refused; it does not raise a point of general public importance. I consider that, although good arguments relevant to the inquiry at the first stage have run both ways, it is no longer open to the Authority to dispute the passage of Mr Macris through it.

68. So I would have dismissed the appeal.