Financial Services and Markets Act 2000 - market abuse – breach of listing rules – preliminary hearing – third party rights – section 393 FSMA – identification of third party – prejudice to third party – test to be applied

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

SIR PHILIP WATTS

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal: WILLIAM BLAIR QC (Chairman)
DR. NUALA BRICE

Sitting in London on 25 July 2005

Mr David Pannick QC Mr Martyn Hopper and Mr Pushpinder Saini, instructed by Herbert Smith for the Applicant

Lord Grabiner QC and Mr Javan Herberg instructed by the Financial Services Authority, for the Respondent

DECISION

1. This is a preliminary hearing held under rule 13 of the Financial Services and Markets Tribunal Rules 2001. It raises an important point as regards the rights of third parties in market abuse cases brought by the Financial Services Authority under the powers contained in the Financial Services and Markets Act 2000 ("FSMA"). These powers are new, and as this case illustrates, potentially far reaching. Among other things, the outcome may affect the way that corporations and the regulatory authorities deal with each other in such cases.

2. Specifically, the issue depends on the meaning of s. 393 of the FSMA. This is the section giving rights to third parties when action under the "notice procedure" applicable in market abuse cases is taken by the FSA. In brief, a third party who is identified prejudicially must be given a copy of the notice, and is entitled to challenge the reasoning in it so far as it is prejudicial to him. In this case, the relevant notice is a decision notice issued by the FSA on 13 August 2004 against two companies belonging to the Royal Dutch/Shell group.

3. The issue in the case is whether the Applicant has been identified or not. The FSA argues that the notice does not identify him at all, and so he is not entitled to invoke the s. 393 rights. More broadly, it argues that its notice made allegations of corporate wrongdoing against the Shell group, not against the Applicant personally. The Applicant on the other hand argues that properly construed s. 393 requires one to look to matters outside the terms of the notice. When that is done, he says that he has clearly been identified for the purposes of s. 393, and should have been accorded the rights given to a third party.

The factual background

4. The case arises out of the problems that engulfed the Royal Dutch/Shell group in 2004 relating to the group's oil and gas reserves. The basic facts are not in dispute. The problems began (in a public sense at least) on 9 January 2004, when Shell announced a recategorisation representing 3.9 billion 'barrels of oil equivalent' of its proved hydrocarbon reserves. This was 20% of its proved reserves at that date. Following the announcement, Shell's share price fell 7.5%. In mid-April, after further adjustments, Shell announced that the total recategorisation was about 4.3 billion 'barrels of oil equivalent'.

5. The affair prompted action by the regulatory authorities on both sides of the Atlantic. In Britain, an investigation by the Financial Services Authority into alleged misstatements of Shell's proved hydrocarbon reserves was begun on 23 April 2004. Shell's stock is traded in New York as well as London, and at the same time as the FSA investigation, the US securities regulator, the Securities and Exchange Commission, was taking its own action.

6. On 29 July 2004, Shell issued a terse announcement. It said that it had reached agreement in principle with the regulators. Without admitting or denying the findings or conclusions, it agreed to the issuance of a finding by the FSA that Shell had breached the market abuse provisions of FSMA, as well as the Listing Rules made under the same Act. A similar agreement was reached with the SEC in relation to the US federal securities laws.

7. Shell agreed to pay a penalty of £17 million, the largest fine ever imposed by the FSA. The amount paid in respect of the SEC action was even higher. Shell agreed to pay a $120 million civil penalty, and an additional $5 million to developing a comprehensive internal compliance program.

8. So far as the FSA action was concerned, the penalty was levied by way of the notice procedure laid down in the relevant provisions of Part XXVI of the FSMA. These involve a warning notice, followed by a decision notice, culminating in a final notice, which in this case was issued on 24 August 2004. These notices could have been contested by Shell, but because of the agreed settlement were not. It was aptly described at the hearing as a "concertinaed" procedure.

Sir Philip Watts' objections

9. However this way of proceeding was strongly contested by Shell's former Chairman, who has brought this reference to the Tribunal. Sir Philip Watts KCMG (the "Applicant") joined Shell in 1969. He rose to become Chairman of the Committee of Managing Directors (CMD) in July 2001, and so in effect was Chairman of the Royal Dutch/Shell group of companies. But he resigned on 3 March 2004 in connection with the reserves issue.

10. The Applicant was given written notice of the FSA's investigation on 27 May 2004 as an additional subject of the investigation for the purposes of section 170(2) FSMA. He says, and the Tribunal accepts, that he was subject to extensive adverse comment in the media. When he learned of the proposed settlement, he asserted through his solicitors his rights as a third party under s.393 FSMA. He was understandably concerned to protect his reputation against what he considered (and considers) to be wholly unjust criticism. He said that even if he was not explicitly identified in the relevant notice, he was entitled to the statutory rights of a third party if he was identifiable by reference to publicly available sources as the individual responsible for the matters complained of.

11. It is clear that his objections are not only to criticism which he feels is directed at himself. He disagrees with the findings made against Shell in the various notices we have referred to above. To quote from his Reference Notice, "had the FSA completed its investigation and/or afforded the Applicant his right to make representations before issuing its Decision against Shell, the FSA's findings would have been shown to be fundamentally flawed". The result is that whilst the group's former Chairman disputes these findings, the Shell group itself, doubtless anxious to draw a line under a damaging affair as quickly as possible, does not.

12. In any event, the FSA disagreed that Sir Philip was a third party for these purposes. It wrote to his solicitors on 23 August 2004 saying that, "We … carefully considered whether your client was a third party under section 393. Even taking into account publicly available material, we are satisfied that your client is not identified for the purposes of section 393". It refused to supply copies of the notices in advance.

13. On 16 September 2004, the Applicant filed the present Reference pursuant to section 393(11) FSMA. This is the provision which gives a person who alleges that a

copy of the notice should have been given to him, but was not, the right to refer the alleged failure to the Tribunal.

The preliminary hearing

14. Given the dispute as to whether s.393 applies to the Applicant, the parties (sensibly in our view) asked the Tribunal to deal with this question at a preliminary hearing. By an order made on 9 November 2004 at the parties' request, the Tribunal directed that there be a preliminary hearing pursuant to Rule 13 of the Financial Services and Markets Tribunal Rules 2001 to determine the question:

> "Whether the Authority should, by virtue of section 393(4) FSMA, have provided to the Applicant a copy of the Decision Notice dated 13 August 2004 addressed to The "Shell" Transport and Trading Company, plc ("STT") and The Royal Dutch Petroleum Company NV ("RDP") ("the Decision Notice") on the basis that any of the reasons contained therein related to a matter which
> (a) identified the Applicant; and
> (b) in the opinion of the Authority was prejudicial to the Applicant".

15. The hearing was fixed for December 2004, but the Tribunal was happy to accommodate the parties' request that it be put over until March 2005, and again to 25 July 2005, when it took place before us. We should add that because the preliminary hearing raises a point of law, the facts not being in issue at this stage, the Tribunal has not on this occasion sat with lay members.

The statutory framework

16. The statutory framework is well summarised in the Applicant's Reference Notice. If the FSA *proposes* to take action against a person in respect of market abuse and breach of the Listing Rules (as it did against Shell), it is required to give that person a warning notice under sections 126(1) and 92(1) of the FSMA. Similarly, if the FSA *decides* to take action against a person in respect of market abuse and breach of the Listing Rules (again as it did against Shell), it is required to give that person a decision notice under sections 127(1) and 92(4) of the FSMA.

17. After receiving a decision notice, the person to whom it is given may refer the matter to the Tribunal under sections 127(4) and 92(7) of the FSMA. Shell of course did not do so since matters were proceeding consensually. In the absence of a reference to the Tribunal, the FSA gives the person concerned a final notice under section 390(1) of the FSMA. In the present case, this was given to Shell on 24 August 2004.

18. The position as regards third parties affected by warning and decision notices is dealt with in sections 392-394 of FSMA. As the Applicant rightly puts it in the Reference Notice, the purpose of section 393 is to ensure fairness where there is some wrong-doing alleged on the part of a third party who is not himself the subject of action by the FSA. The Reference Notice also cites the explanation given by Lord Bach (the Minister who introduced the amendments which became section 393) during the passage of the legislation through Parliament as reported in *Hansard*. Quoted so far as relevant in full, he said:

> "The new clause on third party rights … rationalises the existing provisions dealing with the rights of third parties identified in warning or decision notices in a way that is prejudicial to them. These provisions were designed to deal with cases where there is some wrong-doing alleged on the part of a third party who is not himself the subject of action by the FSA. For instance, in disciplinary cases under Part XIV, it was felt that action might be taken against a firm for reasons which implied that there has been some failing by one of its directors or employees; or in market abuse cases, where other parties might well be involved in the transactions giving rise to the allegation that market abuse has been engaged in.
>
> The provisions give third parties, who are identified in prejudicial terms in the reasons for a warning or decision notice, the right to receive a copy of the notice, and to make representations or refer the matter to the tribunal in the same way as the person who is the subject of the FSA's proposed action. We took the view that although these rights create an administrative burden for the FSA, they are necessary to give the third party the right to defend himself against any implied blame arising from the reasons given for the action."

These passages were also placed before us by the FSA. At the hearing, there was a dispute as to whether the Tribunal might legitimately have regard to this explanation in construing section 393, and we shall deal with that part of the argument later.

Sections 392-4 FSMA

19. Section 393 is designed to fit third party rights into the warning and decision notice procedure described above. The way the scheme works is as follows. Where a warning notice has been given, s. 393(1) provides that a third party prejudicially identified must be given a copy of the notice by the FSA. He need not be given a copy if he himself has received a separate warning notice. He must be given a reasonable period within which he may make representations to the FSA.

20. If the procedure continues, the next step will be the issue of a decision notice. Section 393(4) provides for third party rights in this regard. The outcome of this hearing turns on the correct construction of this subsection. It provides that:

> (4) If any of the reasons contained in a decision 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 decision notice is given, and
>
> (b) in the opinion of the Authority, is prejudicial to the third party,
>
> a copy of the notice must be given to the third party.

So as in the case of the warning notice, a copy of the decision notice must be given to the third party. The dispute between the Applicant and the FSA is how a third party is identified for these purposes. To flag up the issue, the Applicant places emphasis on the words "relates to a matter which identifies a person" to argue that the process of identification has to take place outside the four corners of the decision notice.

21. Again, the third party need not be given a copy if he himself has received a separate decision notice. This is the effect of s. 393(6), which provides that:

> (6) Subsection (4) does not require a copy to be given to the third party if the Authority –
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> (a) has given him a separate decision notice in relation to the same matter; or
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> (b) gives him such a notice at the same time as it gives the decision notice which identifies him.

22. Once the decision notice is issued, the primary recipient (in the present case Shell) may refer the matter to the Tribunal. Section 393 extends the right of reference to the Tribunal to the third party to whom a copy of the decision notice has been given so far as it affects him. This is the effect of subsection (9), which provides that:

> (9) A person to whom a copy of the notice is given under this section may refer to the Tribunal –
>
> (a) the decision in question, so far as it is based on a reason of the kind mentioned in subsection (4); or
>
> (b) any opinion expressed by the Authority in relation to him.

23. A person who contends that he *should* have been given a copy of the decision notice under section 393(4) but was not, also has a right to refer the matter to the Tribunal. This is the provision invoked by the Applicant in the present case. Subsection (11) provides that:

> (11) A person who alleges that a copy of the notice should have been given to him, but was not, may refer to the Tribunal the alleged failure and–
>
> (a) the decision in question, so far as it is based on a reason of the kind mentioned in subsection (4); or
>
> (b) any opinion expressed by the Authority in relation to him.

24. The final step relates to evidence. Section 394 FSMA deals with the right of someone to whom a notice is given (in other words the primary recipient) to have access to the material on which the FSA relied in taking the decision which resulted in the notice. The recipient must also be given access to any secondary material which might undermine that decision. Section 393(12) extends this right to third parties. It provides that s. 394 "applies to a third party as it applies to the person to whom the notice … was given, in so far as the material which the Authority must disclose under that section relates to the matter which identifies the third party".

25. Two points may be made as regards these procedures. First, the effect of a reference under subsection (9) may be that no final notice can be issued until the third party's reference has been determined by the Tribunal, or otherwise resolved. Second, where the third party is not given a copy of the decision notice—the situation on which subsection (11) is predicated— in practice he will not learn of the reasoning until the final notice is published by the FSA. In other words, he will be unable to exercise his rights to refer the *decision* notice to the Tribunal until after the publication of the final notice. This explains the timing of the Reference in the present case.

26. The relief sought by the Applicant in his Reference (which we set out without comment on our part) is as follows. He asks that the Tribunal (1) should find that the Applicant was identified and prejudiced by the Final Notice and should have been given a copy of the Decision Notice, (2) should make findings on the evidence available to the FSA as at the date of the Decision Notice and such other evidence it becomes aware of from the Applicant during the course of the proceedings, and (3) should direct that the FSA amend the reasons stated in the Final Notice to reflect the Tribunal's findings on the evidence.

The Applicant's argument

27. Mr Pannick QC, counsel for Sir Philip Watts, told us that he had three main points. First, on the correct construction of the statutory language in s. 393(4), the warning notice and the decision notice contained reasons which related to matters which identified the Applicant to his prejudice. He said that those reading the notices would understand that they were criticising the conduct not of some faceless company, but the conduct of those individuals in the company who were seen as responsible for the conduct of which the FSA was complaining.

28. Second, the refusal of the FSA to serve copies on the Applicant and to give him an opportunity to respond was manifestly unfair in that he was implicitly criticised by the final notice without having had a prior opportunity to persuade the FSA not to arrive at such critical conclusions.

29. Third, the unfairness to the Applicant was magnified by the fact that when the final notice against Shell was issued, the FSA was still considering the role of the Applicant and what, if any, action it should take against him. Mr Pannick argued that it cannot be consistent with the statutory provisions for the FSA part way through its investigation to issue formal findings against Shell, therefore pre-judging issues that are of direct relevance to the FSA's continuing consideration of the role of the third party.

30. On behalf of the Applicant, he invited the Tribunal to declare that the FSA was obliged to serve him with copies of the warning notice under section 393(1) and the decision notice under section 393(4), and to give directions for the hearing of the remaining issues in the Reference.

The FSA's argument

31. In response, Lord Grabiner QC, counsel for the FSA, argued that a threshold condition for the applicability of s. 393 is the requirement that the relevant notice "identifies a person" who seeks to exercise third party rights. The Applicant failed at this first hurdle, he said, because at no point did the decision notice issued against Shell identify the Applicant.

32. The criticisms in the notice were directed at Shell as a corporate entity, and not at Sir Philip or any other individual. Fairness to a third party, he said, does not require third party rights to be accorded where the identification of the individual and/or prejudicial comment arises externally to the notice, and is not endorsed by it.

33. The FSA he said was entitled to proceed first against the corporate entity, and subsequently against individually named officers or directors of that company,

consistently with doing justice to them in accordance with section 393. Shell is a giant multinational corporation operating in public markets all across the world, and the notion that the FSA would be discharging its regulatory function in a sensible or correct fashion by waiting until it had concluded enquiries against individuals potentially to be criticised before issuing the final notice vis-à-vis the corporate entity was unjustified.

34. On behalf of the FSA, he invited the Tribunal to answer the preliminary issue in the negative, and to dismiss the Applicant's reference pursuant to rule 13(2) of the Tribunal Rules.

The parties' arguments on the construction of s. 393(4)

35. Under these broad points, the main dispute between the parties was as to the construction of s. 393(4) FSMA, which provision we have set out above. The basic arguments on each side turned on the wording. The Applicant's principal point is that the section applies if "any of the reasons contained in a decision notice to which this section applies *relates to a matter which identifies a person* other than the person to whom the decision notice is given". The draftsman, it is argued, has been careful to differentiate between the "reasons" appearing on the face of a notice, and the "matters" to which those reasons relate which must, by definition, be a wider class of facts than the "reasons" themselves. Otherwise, the draftsman would have drafted the subsection with the exclusion of the words "relates to a matter". On the FSA's construction, those words are otiose.

36. It is immediately clear that this way of reading the subsection raises the question of how the "matter" is to be ascertained. The Applicant's contention is that the correct approach involves three factual stages. First, the FSA must consider the "reasons" given for the decision to take the action. This means looking at the terms of the decision notice itself. Second, it must consider the "matter" or matters to which those "reasons" relate. Third, it must consider whether those matters (not the decision notice) identify the third party. He says that when considering the scope of the matters outside the notice which may identify a third party, the FSA is required to take a commonsense approach. This does not require it to embark upon an extensive inquiry into materials outside the public domain, but to ask itself the simple question whether by reference to publicly available sources and on the facts of the particular case, the applicant is identified.

37. In answer, the FSA contends that that it is not permissible for resort to be had to external sources which may have identified an individual and argue that, by proxy, the notice identifies such individuals. By requiring that the reasons contained in the decision notice "relate to a matter which identifies" the third party, s. 393(4) does not bring within its scope matters which are external to the decision notice. The words "relates to a matter" ensure that the tests for identification and prejudice focus not only upon material which is part of the reasons contained in the decision notice, but also upon other material contained in it (background facts, proposed action, and so forth) which may not amount to part of the reasons. It argues that the words "relates to a matter" are a mechanism for describing the collectivity of the reasons referred to in the opening words of the subsection. Identification (and prejudice) should be assessed not only in respect of individual reasons (as might be implied from the words "any of the reasons" alone), but also as against the totality of the reasons contained in the decision notice.

The purpose of s. 393

38. Because the warning and decision notice procedure created by FSMA is capable of prejudicing parties other than the direct recipients of the notices, the purpose of sections 393 FSMA is to provide certain rights to third parties as defined in the section. As was pointed out to us, there are parallels in common law procedures, arising for example in the case of Department of Trade and Industry investigations under the Companies Acts. *In re Pergamon Press Ltd* [1971] 1 Ch 388, it was held that DTI inspectors are under a duty to act fairly, and to give anyone whom they propose to condemn or criticise in their report a fair opportunity to answer what is alleged against them. Whatever the precise effect of s. 393(4) may be, sections 393-4 are plainly intended to deal with the same kind of situation.

39. We have set out above the explanation given by Lord Bach during the passage of the legislation through Parliament. Both parties took the position that s. 393 was unambiguous, but in so far as it was ambiguous, argued that Lord Bach's comments supported their respective interpretations. At the hearing however, Mr Pannick QC strongly urged that *Hansard* was not admissible as an aid to interpretation in this instance. He cited two decisions of the House of Lords subsequent to *Pepper v. Hart* [1993] AC 593 for a narrow reading of that case, namely *R v Sec'y of State for the Environment, ex parte Spath Holme Ltd* [2001] 2 AC 349, and *Robinson v Sec'y of State for Northern Ireland* [2002] NI 390.

40. Neither party has suggested any ground other than ambiguity as a possible justification for referring to statements made in Parliament for the purpose of construing s. 393. Since (as we shall explain) we have concluded that the section is not ambiguous, we accept the submission of Mr Pannick QC that we are not entitled to pay regard to what was said by Lord Bach in Parliament in construing it, and we have not done so.

41. We would only comment that in our view, it was perfectly appropriate for the Applicant to have drawn attention to Lord Bach's comments, and for the FSA subsequently to have provided the full version of them to the Tribunal. In many respects, FSMA creates novel law. It does so for example in the notice procedure, and in the market abuse provisions, both of which arise on this Reference, and indeed in the role of the Tribunal. Many of its provisions were the subject of Parliamentary debate, and were (unusually) scrutinised by a Joint Committee of both Houses of Parliament. Where appropriate, these deliberations can be useful background material in understanding the Act, and we see nothing in the cases cited to us as inhibiting their production in proceedings in the Tribunal for that purpose. Whether they can be used as an aid to construction of individual provisions depends on whether the conditions set out in *Pepper v Hart* are satisfied, and as indicated, we accept that they are not in this case.

The effect of the Applicant's construction

42. The FSA asserts that if the Applicant's interpretation of s. 393 is the proper one, it would be faced with a "potentially massive and administratively impracticable task in considering whether to serve warning notices and decision notices on third parties pursuant to section 393". The Applicant responds that these concerns are misplaced, and that in any event, the Tribunal's role is not to consider what may or may not happen in other cases. Our role is to construe the statute and to apply it to the particular and unique facts of this Reference. As a judicial tribunal, we must not be diverted by consequentialist arguments.

43. Of course, we accept the Applicant's point as to the role of the Tribunal, or indeed any tribunal tasked with statutory construction, and in any case we would not be prepared take assertions of administrative inconvenience at face value. But we think that it is legitimate to consider how the Applicant's construction of these provisions would in fact work.

44. We begin by noting that it is common ground between the parties that the Applicant is not identified by name in the decision notice issued to Shell. Nor is he identified as, for example, the Chairman of the group. His point is that he is *implicitly* referred to. It would be an unfair result, he argues, if serious reputational damage could be done to a third party who was well known to be a person implicitly referred to by the matters set out in a decision notice, but because he was not expressly identified within the notice itself, would have no right to make representations prior to publication of the notice.

45. The crux of his case was that the duty to give a copy of the notice to a third party is not confined to instances where the third party is named or otherwise identified in the decision notice itself. The test is whether the reasons relate to an external matter which itself identifies the third party. As Mr Pannick QC put it, if the FSA chooses to make critical findings against a company, it must accept that it is thereby making critical findings against the person or persons known to be responsible for the conduct which the Authority is impugning. It is said that s. 393(4)(a) reflects the principle that accusing a company of misconduct or to say that it had a certain state of mind is to employ a legal fiction. A company is an abstraction which can only act through individuals. In support, reference is made to the well known judgment of Viscount Haldane LC in *Lennards Carrying Company Limited v Asiatic Petroleum Company Limited* [1915] AC 705, 713.

46. The FSA says that the result of this approach would be that where a notice was served on a company complaining of corporate behaviour, it might have to serve copies on the entire board of directors and other senior management, or other members of management who had been externally identified in relation to the behaviour complained of, even though they were not referred to in the notice itself. To do that, it says, it would have to inform itself about external comment made in relation to the "matter" to see whether third parties had been identified as responsible for the corporate failings alleged. This duty could extend to comment made anywhere in the world, whether in the press, or in reports, and so on. Only then could it decide whether any of the reasons contained in the relevant notice related to such a matter so as to trigger the third party procedure.

47. The Applicant ripostes that there was a range of steps that the FSA could have taken to avoid such a result, and gives three examples. First, it was open to the FSA to issue a warning notice to the Applicant at the same time as it issued its notice to Shell. Second, it could have delayed the issue and publication of any final notice against Shell until the conclusion of its investigation and any proceedings against individuals involved, as has been done in some other cases. However the Tribunal notes that whilst either of these courses could have been taken as regards the Applicant, this leaves the possibility of implicit references to other parties that might necessitate the kind of exercise the FSA has talked about.

48. A more convincing example was the third one given by the Applicant, which was that the FSA "could have formulated its findings in relation to Shell in terms that did not

identify or prejudice the Applicant. The findings could have been kept at a much higher level of generality appropriate to a finding of collective corporate wrongdoing". But once one accepts that this is a possible course, it is hard to argue at the same time that since a company can only act through individuals, by making critical findings against a company, the FSA is necessarily making critical findings against the individuals known to be responsible for the conduct in question. There is also force in the point made by Lord Grabiner QC that a higher level of generality would not have satisfied the Applicant's complaint, because on his argument, matters extraneous to the decision can be taken into account, which he says have inevitably led to him being identified.

The Tribunal's conclusions on the meaning of s. 393

49. As we have said, the issue turns on the construction of s. 393(4) FSMA. Whilst paying tribute to the clear and helpful way in which the argument was presented by Mr Pannick QC on his behalf, the Tribunal is unable to accept the Applicant's interpretation of this provision. Agreeing with the FSA on this point, our view is that the subsection properly construed affords third party rights to a person who is identified in the decision notice, not as the Applicant argues, to a person who is identified in the "matter" to which the reasons in the decision notice relate as ascertained by looking at external sources. Our reasons are as follows.

(1) In agreement with the FSA's submission, we consider that the term "matter" as used in s. 393 relates to the decision which the FSA has taken as described in the decision notice (or warning notice where applicable), and not to a wider context in which the individual may by identified or criticised. Put shortly, it refers to the matter as defined in the relevant notice.

(2) This construction is consistent with other instances where the term "matter" is used in FSMA, some of which were cited to us. For example, s. 127(4) ("if the Authority decides to take action against a person [for market abuse], that person may refer the matter to the Tribunal"); s. 208(4) ("if the Authority decides to … publish a statement … under s. 205 or … impose a penalty … under s. 206 the authorised person may refer the matter to the Tribunal"); s. 92(7) ("if the competent authority decides to take action against a person under section 91 [breach of the listing rules], he may refer the matter to the Tribunal"); s. 133(4) ("on a reference the Tribunal must determine what (if any) is the appropriate action for the Authority to take in relation to the matter referred to it"; s. 388(1)(e) ("A decision notice must … give an indication of (i) any right to have the matter referred to the Tribunal …"; see also s.390(1)). There is no reason to give the term "matter" a wider meaning in section 393.

(3) In the context of s. 393(4), we consider that the use of the term serves to make it clear that identification can be found from the entire notice, and not from the reasons alone, or one of them.

(4) This construction is supported by the view taken as to the meaning of the term "matter" by this Tribunal in *Parker v FSA*, 13 October 2004, which treats it as meaning the whole decision notice, including the reasons and the action proposed.

(5) Other provisions of s. 393 strongly suggest that the section envisages that identification will be in the decision notice. Subsection (6) provides that a copy need not be given to the third party under subsection (4) if the FSA issues him with a separate decision notice at the same time as it issues "*the decision notice which identifies him*". The same formula is used as regards warning notices in subsection (2), the language in subsection (1) to which it refers back being materially identical to that used in subsection (4).

(6) We do not accept Mr Pannick's point in this regard that the difference in the language used in subsections (4) and (6) assists his argument, rather than vice versa. Whilst it is true that the language is different in the subsections, the same process is being described in each, namely the identification of the third party, and there is no reason why there should be a different test in each instance.

(7) The FSA's construction is consistent with the important disclosure obligation in 393(12), which we explained above. This provision requires disclosure to the third party of material which would be disclosed to the primary recipient of the notice, "in so far as the material … relates to the matter which identifies the third party". It is difficult to see how disclosure could be measured except against the decision notice.

50. We have to say that we regard the contrary interpretation as a very artificial one. A company is (as the Applicant reminds us) an abstraction, but it is one which is basic to the law. 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. As Lord Grabiner put it, a "matter" cannot be said to be an identification source. A matter is simply an issue or a topic, not an identifier of a person. For the purpose of identification within s. 393 FSMA, we agree with him that one must look to the matter as defined in the relevant notice.

51. Arising out of this, the two points on fairness raised by Mr Pannick QC require careful consideration. The Applicant's case is that contemporaneous press reports show that the failings alleged in the decision notice issued to Shell were attributed to him, and that is how informed people would have understood the position at the time. Thus it is said that fairness required the FSA to serve copies of the notice on him, and give him an opportunity to respond before arriving at such critical conclusions.

52. It is possible both to sympathise with the Applicant's predicament, and to reject this submission. The purpose of s. 393 in our view is to ensure that third parties should not be identified and adversely criticised in a warning notice issued by the FSA without having had an opportunity to make representations in response. And if they are identified and criticised in a decision notice, they should have the right to challenge such criticisms in the Tribunal. We do not think that fairness requires third party rights to be accorded where the identification of the individual concerned arises externally to the notice.

53. The second point made as regards fairness is that when the final notice against Shell was issued, the FSA was still considering the role of the Applicant and what, if any, action it should take against him. Mr Pannick argued that it was unfair for the FSA part way through its investigation to issue formal findings against Shell, thereby pre-judging issues as regards the Applicant's role.

54. The Tribunal's view is that whether it is fair to take action in respect of alleged market abuse against a company, and subsequently against individuals in relation to the same issues, will depend on the facts of the particular case. Should it become relevant here, the question will have to be determined at the appropriate time, and so far as we are concerned is entirely open. But the hearing of the preliminary issue on the construction of s. 393(4) in relation to third party rights is not the appropriate time.

The outcome of the hearing

55. Mr Pannick QC rightly and sensibly accepts that if he is wrong on the statutory construction point, then the Reference must fail. We have ruled against him on that point, and the Reference does fail.

56. It is not in those circumstances necessary to deal in detail with the sections of the parties' skeleton arguments which analyse the five parts of the reasons given in the FSA's decision notice of 13 August 2004 addressed to the "Shell" Transport and Trading Company, plc and the Royal Dutch Petroleum Company NV which the Applicant asserts have identified him and caused him prejudice. These submissions were not the subject of extensive oral argument, though we have read and are grateful for them. We are satisfied that the decision notice does not identify the Applicant. The fundamental point is the same in the case of each of the five points cited by him, namely that the criticisms in it are made at the level of corporate personality, and are not made of individuals whether singularly or collectively.

57. There are two further points which arose in argument which we should deal with. In interpreting s. 393(4), the FSA suggested that the fundamental requirement as regards identification is that "the third party must be picked out, referred to or singled out in the notice". We would not adopt the superimposition of this kind of gloss on the words of the statute. The word "identifies" should stand without elaboration, at least until there is more experience of working through the kind of problems which the provision may throw up in practice.

58. The other point is this. The FSA rightly in our view conceded that identification can be effected, where a third party is referred to in a notice other than by an express naming of him. It gave as examples a reference to the "Chairman of the company", or a collective reference to "all of its directors", both of which are plainly sufficient for these purposes. In oral argument, it appeared to limit the concession to these examples, arguing that s. 393(4) does not apply unless the individual is identified in the notice either by name or by job description, though this was subsequently extended a little by another example relating to FSMA's financial promotion provisions.

59. The Tribunal does not accept such a limitation. Identification may obviously be by express naming, by job description, or by some collective reference to particular officers of the company, but in our view it does not necessarily have to be. Understandably, given the nature of their respective arguments the parties did not explore in detail the kind of further possibilities that may arise in practice. Suffice it to say that in our view the question in each case will simply be whether the person concerned is identified in the relevant notice. If so, the question will then be whether that person is prejudiced (the words of s. 393(4)(b) being, "… in the opinion of the Authority, is prejudicial to the third party"). As to prejudice, it was accepted by the FSA that the Tribunal is not confined to assessing whether in truth the Authority held the opinion that the matter was not prejudicial to the third party. Where the issue arises on a Reference, the assessment as regards prejudice has to be made by the Tribunal.

Decision

60. We therefore answer the preliminary question in the negative. Section 393(4) FSMA did not require the FSA to provide to the Applicant a copy of the Decision Notice dated 13 August 2004 addressed to Shell. We do not believe that there is any dispute that

the consequence of our finding is that the reference should be dismissed pursuant to rule 13(2) of the Tribunal Rules. We emphasise that though we have found against the Applicant on the construction of the statute, our decision involves no criticism of any kind against him. This hearing has not been about whether the factual basis upon which the market abuse allegations were settled with Shell was justified or not. It simply holds that the third party procedure in s. 393 FSMA does not apply to the Applicant.

61. The Reference is dismissed. Since we have dismissed rather than determined the Reference, we do not think that any further direction are required under s. 133 FSMA, but doubtless the parties will tell us if they think differently.

62. This decision is unanimous.

William Blair QC

Dr Nuala Brice

Date: 7 September 2005

FIN/2004/0024