Reference number: FS/2013/0010

FINANCIAL SERVICES – preliminary hearing – third party rights – s 393 Financial Services and Markets Act 2000 – whether applicant identified in notice – yes

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ACHILLES MACRIS **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public in London on 24 February 2014

Javan Herberg QC, instructed by Clifford Chance LLP, for the Applicant

Paul Stanley QC, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. This decision relates to the question as to whether the Applicant ("Mr Macris") was identified in a Decision Notice given by the Authority to JP Morgan Chase Bank NA on 18 September 2013. The question has been dealt with as a preliminary issue in accordance with Rule 5(3) (e) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules").

2. On 18 September 2013 the Authority gave JP Morgan Chase Bank NA ("the Bank") a decision notice (the "Decision Notice") which notified the Bank that it had decided to impose on it a financial penalty of £137,610,000 as a result of trading losses incurred by the Bank's Synthetic Credit Portfolio ("SCP"), a trading portfolio housed within the Bank's Chief Investment Office ("CIO"). Those losses are stated to have amounted to US$6.2 billion by the end of 2012 and to have occurred as a result of what became known as the "London Whale" trades, which were conducted in the SCP. The Decision Notice had been preceded by a warning notice and followed by a final notice ("the Final Notice"), both on the same day, the abbreviated period being as a result of an agreed settlement with the Bank which involved it receiving a 30% discount on the financial penalty otherwise payable and agreeing not to exercise its right to refer the Decision Notice to the Tribunal.

3. Mr Macris had a role in the management structure of the SCP, his job title being International Chief Investment Officer and he was approved by the Authority under Section 61 of the Financial Services and Markets Act 2000 ("the Act") to hold the Controlled Function CF 29 (significant management) at the Bank from 1 November 2007 to 13 July 2012. He was based in London.

4. Mr Macris complains that the Authority, in promulgating the Warning Notice, Decision Notice and Final Notice has included reasons which identify him and are clearly and obviously prejudicial to him and which he has had no opportunity to contest. He has referred that matter to the Tribunal under s 393(11) of the Act.

5. Section 393 is designed to give third parties certain rights in relation to warning and decision notices given to another person in respect of whom the Authority is taking regulatory action. Where a warning notice has been given, s 393(1) provides that a third party prejudicially identified in the Notice must be given a copy of the notice by the Authority, unless (which is not the case here) he has been given a separate warning notice in respect of the same matter. He must be given a reasonable period within which he may make representations to the Authority.

6. Section 393(4) gives third party rights in relation to a decision notice. It provides as follows:

> "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 regulator giving the notice, is prejudicial to the third party,

A copy of the notice must be given to the third party."

7. In this case neither a copy of the Warning Notice nor the Decision Notice was given to Mr Macris as the Authority took the view that neither notice identified him. In those circumstances s 393(11) comes into play. This provides:

> "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 is based on a reason of the kind mentioned in subsection (4); or
>
> (b) any opinion expressed by the regulator giving the notice in relation to him."

8. Mr Macris accordingly made his reference pursuant to s 393(11).

9. As Mr Macris had not previously seen the Decision Notice he has based his complaint on the Final Notice which is materially in the same form as the Decision Notice, and the hearing of this preliminary issue has proceeded by reference to the Final Notice.

10. The Authority does not dispute that if Mr Macris has been identified in the Final Notice then the matter in question is prejudicial to him in that it includes serious criticism. The only issue therefore to be determined on the preliminary issue is whether Mr Macris is identified in the relevant sense and manner, as provided for in s394(4).

The Final Notice

11. The Final Notice is a lengthy document, running to 62 pages. Mr Herberg helpfully summarised the findings made against the Bank in the Final Notice as to the trading activities and management of the SCP as follows:

(1) the employment of a high risk trading strategy;

(2) a failure to properly vet and manage that trading strategy;

(3) a failure properly to respond to information which should have alerted the Bank to the risk which was present in the SCP;

(4) a failure properly to value the Bank's positions within the SCP;

(5) mismarking of the SCP; and

(6) a failure to be open and co-operative with the Authority about the extent of the losses generated by the SCP as well as other serious and significant issues regarding the risk situation in the SCP.

12. As Mr Herberg observed, the findings against the Bank involve trading strategies and conduct by traders within the SCP on the one hand and responses (and failure to respond) by those responsible for managing the SCP.

13. The Final Notice is specific about the levels of management which it criticises. Paragraph 4.3 of the Final Notice provides:

> "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."

14. The Final Notice contains a definitions section in paragraph 3. "CIO" is defined as the Chief Investment Office of the Bank, "SCP" is defined as the Synthetic Credit Portfolio, the "Firm" is defined as JP Morgan Chase Bank NA and the "Group" is defined as JP Morgan Chase & Co, the parent company of the Bank. The terms "SCP management", "CIO London management", "CIO Senior Management" and "Firm Senior Management" are not defined. These terms do not in fact refer to any particular body that can be identified in the Bank's corporate structure chart. Mr Macris contends that the term "CIO London management" has been intentionally employed by the Authority to refer to him, specifically and uniquely and does so consistently throughout the Notice. The Authority has not denied that, although Mr Stanley contends that as the question to be determined is whether Mr Macris has been identified in the Final Notice it is irrelevant to ask the question as to who the Authority had in mind when referring to this term, although Mr Stanley submits that each of the terms used in paragraph 4.3 are deliberately vague and could consist of one or more people.

15. Mr Herberg referred to a number of serious allegations in the Final Notice. I set out the relevant paragraphs as follows:

> "4.101 In mid-March 2012, as the SCP failed to reduce its [Risk Weighted Assets] CIO London management suggested offsetting some of the risk of the positions either with the Investment Bank or a third party. This was a cause for concern to traders on the SCP, who were aware that the Investment Bank was counterparty to some of their positions. SCP management explained in an email to CIO Senior Management the belief that the settling of these positions with the Investment Bank would cause a *"permanent loss"* to the SCP of around $350 million, because each side of the trade would have to agree a price. This email should have caused CIO Senior Management to seek to understand whether there was a price variance within the Firm of around $350 million (where the SCP and the Investment Bank held the opposite sides of the same trades) and if so, the reason for the variance. However CIO Senior Management missed this opportunity to seek further information, believing the matter to relate to paranoia about the Investment Bank. CIO London management contacted the Investment Bank to complain about the allegation of leaking prices. On hearing the allegations an individual at the Investment Bank immediately identified that there might be a mismarking issue at the heart of the dispute saying:

> *"what I see is an accusation that the Investment Bank, with someone leaking the position of CIO, is acting against CIO [and] mismarking the books to damage CIO"*

He noted that if CIO's allegation was true he would need to "fire a lot of people" and stated that he would ask his senior valuation team "to take a look [at] the marks and see if there is anything that is being done inappropriate". This reaction should have prompted CIO London management to make sure CIO's house was in order from a marking perspective. A logical inference to be drawn from the situation, if the Investment Bank's marks were correct, was that the mismarking problem may lie with CIO. However CIO London management did not take further action, assuming that the problem lay with the Investment Bank.

4.102 Following the publication of the Wall Street Journal article on 6 April 2012, the Firm's Senior Management requested a *"full diagnostic"* on the SCP by Monday 9 April. CIO London management informed CIO Senior Management that they were unsure how big the losses in the SCP might be at the end of the second quarter, because the figure was *"highly dependent on the marks"*. CIO Senior Management were later told by SCP management that the losses should not exceed $200 million *"if we exclude very adverse marks to our book"*. This email should have heightened CIO Senior Management's focus on how the SCP was being marked because it highlighted the subjectivity in the SCP's marking process given the nature of the instruments and reminded CIO Senior Management of how crucial the marks were to the SCP's profitability or lack thereof.

4.137 On 28 March 2012, the Firm attended a quarterly supervisory meeting with the Authority. The meeting was attended by various CIO personnel, including SCP management and CIO London management. The SCP was discussed with the Authority as part of a dialogue regarding CIO's London business as a whole.

4.138 When discussing the SCP, those at the meeting did not inform the Authority that:

(a) CIO Senior Management had ordered traders on the SCP to stop trading: SCP management and CIO London management had received notification by email of this on 26 March 2012.

(b) The SCP had increased significantly in notional size: information provided to the Authority which dealt with portfolio changes contained no data about the substantial changes in the size of the SCP. Both SCP management and CIO London management had received an email on 27 March 2012 setting out that the total notional size of the SCP on 26 March 2012 was $131 billion.

(c) The SCP had suffered $298 million of losses in the year to date: information provided showed year to date losses of $170 million for February 2012 month-end. SCP management and CIO London management had received an email on 27 March 2012 indicating that the estimated losses on the SCP to date were in fact $298 million, a

figure which already exceeded the year to date losses provided to the Authority by $128 million and the estimated losses provided for March month-end by $70 million.

(d) The SCP had breached its [Credit Spread Widening] and [Value at Risk] risk limits in the first quarter of 2012: SCP management and CIO London management were aware of these breaches in advance of the meeting.

(e) The reduction in [Value at risk] for the SCP was due extensively to the new [Value at Risk] model: information provided indicated a reduction in average daily mark to market [Value at Risk] for CIO from approximately $92 million in January to $48 million by 16 March 2012. The Authority were not informed that the change in [Value at Risk] methodology for he SCP was the main driver of the reduction.

4.139 The Authority expected pro-active notification of these matters as part of its on-going supervisory relationship with the Firm and the Firm was obliged to provide it under Principle 11. The Firm's representatives failed to notify the Authority of these matters in the period from January 2012 and in particular at the meeting on 28 March 2012.

4.140 On 10 April 2012, the Firm, based on information provided by CIO London management instigated a discussion with the Authority as a result of the article in the Wall Street Journal. The discussion was initiated by an email stating, *inter alia*:

> *"We use credit-related instruments to hedge [CIO's portfolios] against a stress credit environment. The activity noted in the story is simply a balancing of those credit-related investments to reduce the impact of our hedge"*.

4.141 In continuation of that discussion, at 5pm the same day, there was a conference call with the Authority which CIO London management led. The participants on the call gave the Authority the following information:

(a) There had been no material changes to the SCP since the meeting on 28 March 2012.

(b) The newspaper articles did not recognise that the SCP's position in the IG9 index were part of a larger position that was *"broadly a hedge of the firm's exposures outside CIO"*.

(c) [Value at Risk] had been reduced from $115million in the first quarter of 2009 to $58 million in April 2012, in part as a result of the IG9 positions in the SCP. Yet again, those at the meeting did not explain that part of this reduction was attributable to a change in [Value at Risk] calculation methodology.

4.142 The Authority was not informed that:

(a) The SCP had suffered adjusted losses of $705 million in the first quarter of 2012: CIO London management had received an email dated 9 April 2012 providing them with updated loss figures.

(b) The SCP was expected to lose a significant amount of money that day, such that it would push the year to date losses in the portfolio beyond $1 billion: CIO London management had received this information from traders on the SCP orally prior to the call.

(c) The SCP was currently in breach of its stress loss limits; CIO London management was notified of these breaches by email on 4 April 2012.

(d) The SCP was considered by CIO London management to be *"in crisis mode"* and parts of the SCP's trading strategy had resulted in the SCP having *"almost total loss of hedging effectiveness"*.

4.143 The Authority considers that the tone of the call was deliberately reassuring; CIO London management must have appreciated that by not providing the information set out above, the message delivered to the Authority was not an accurate reflection of the state of the SCP. As a result the Authority has concluded that (by virtue of the conduct of CIO London management) the Authority was deliberately misled by the Firm."

16. Mr Herberg referred to a number of places in the Final Notice where he contends the term "CIO London management" is described as having performed acts as an individual, for example; paragraph 4.25 where the statement "CIO London management sent an email" and the references in paragraph 4.138(a)(c) to emails being received, meetings or conference calls being attended (paragraphs 4.137 and 4.141) or giving explanations or other communications (paragraphs 4.101, 4.102 and 4.140) and being aware of facts (paragraph 4.138(d), all quoted in paragraph 15 above.

The legal test under s 393

17. The meaning of s 393 has been considered by this Tribunal's predecessor, the Financial Services and Markets Tribunal, in two cases, *Sir Philip Watts v FSA* (FIN/2004/0024) and *Jan Laury v FSA* (FIN/2007/0005).

18. Sir Philip Watts concerned a situation similar to that in the present case in that the Authority had issued settled Final Notices against Sir Philip's employer, Shell, but did not give Sir Philip, the then chairman of Shell, third party rights. Sir Philip contended that he was prejudicially identified in the Notice.

19. The Final Notice issued to Shell made allegations of corporate wrongdoing, namely market abuse, against Shell. At no point in the Final Notice did it attribute Shell's conduct to any particular named or unnamed individual or indeed any management body or committee of Shell; the final notice throughout refers to Shell's conduct and behaviour.

20. Nevertheless, Sir Philip claimed third party rights. He contended that even if he was not explicitly identified in the 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: see paragraph 10 of the decision. In essence, Sir Philip complained that notwithstanding the fact he was not identified by name in the final notice or by his job title as chairman of Shell, he was implicitly referred to.

21. The Tribunal rejected this argument. Its conclusion on the construction of s393(4) as set out in paragraph 49 of the decision was as follows:

> "… 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."

Expanding on this in its reasons, in the same paragraph, in relation to the interpretation of the word "matter" as used in s 393(4) the Tribunal held:

> "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."

and emphasised that identification had to be in the Notice itself in the following terms:

> "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)."

22. The Tribunal dealt with Sir Philip's arguments to the contrary in the following manner in paragraph 50 of the decision:

> "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 or a person. For the purpose of identification within s.393 FSMA, we agree with him that one must look at the matter as defined in the relevant notice."

23. As to whether this outcome was fair the Tribunal stated in paragraph 52:

"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."

24. The Tribunal therefore accepted that the criticisms in the notice were made purely at the level of the corporate body concerned, that is Shell: see paragraph 56 of the decision.

25. The Tribunal appreciated that it may be necessary to look at the issue afresh in the light of further experience in its observations at the conclusion of its decision in paragraphs 57 to 59 as follows:

"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 is 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."

26. Both Mr Stanley and Mr Herberg accepted the fundamental point made in *Watts*, namely that the person concerned has to have been identified in the notice. The dispute between the parties in this case centres around the extent to which a "decoding" process by reference to external material in relation to an individual who it is said has been identified in the notice is properly part of the process of establishing whether a person has been identified in the notice otherwise by express naming.

27. In my view the starting point is to ascertain from the notice whether an individual has been made the subject of prejudicial comment in the notice. Sir Philip Watts failed on his reference because the Tribunal rejected his argument that although

he was not picked out and criticised in the notice he was entitled to the statutory rights because he was identifiable by reference to publicly available sources as the individual responsible for the matters complained of, and the reason the Tribunal rejected that argument was because the criticisms in the notice were all directed at Shell as a corporate body, not against any particular individual whose actions were attributed to Shell.

28. The Tribunal in *Watts* did accept that a person can be identified other than by name: see paragraphs 58 and 59 of the decision quoted in paragraph 25 above. In *Laury* the Tribunal explained that there was no inconsistency between the view that s393 operates only where a person is identified in a notice, and resort to external source is not permissible for that purpose, and the view that such a person may be identified otherwise than by express naming. The Tribunal stated in paragraph 17 of its decision:

> "As I understand it, there is no true inconsistency. If the managing director is the subject of criticism in the notice, the description "managing director" is itself a sufficient identification and there is no need to go to outside sources to discover his or her name. What one is not allowed to do is to add material from external sources to the material in the notice in order to identify an individual as impliedly the subject of criticism."

29. In my view the reference to it being impossible to add material from external sources is made in the context of establishing whether an individual as opposed to a corporate body has been made the subject of criticism and whether in that scenario an individual has been *impliedly* criticised. This decision, as was the case in *Watts*, was dealing with the question of whether the criticisms in the notice were directed at an individual rather than a corporate body. In both cases the person identified from the notice as having been the subject of criticism was the firm not any particular individual, even though in *Laury*, the notice had identified failings in particular departments of the Firm of which Mr Laury had been an employee.

30. Both *Watts* and *Laury* recognise that reference to external sources will be necessary to confirm the identity of an individual who has been identified in the notice, using the example of a person referred to by job title. The Tribunal had nothing to say about what it was permissible to refer to in order to complete this confirmation process or the question as to whether ease of confirmation of identity was a factor in deciding whether a person had been identified in the notice.

31. Mr Stanley in his submissions did rely on the question of how easy it was to identify a person from the description given in the notice as a relevant factor in determining whether an individual had been identified. He submitted:

(1) Since the question is whether a person is identified in the notice and not by reference to material external to it, the relevant question is whether the ordinary reader of the notice – not someone with knowledge of facts or matters which it does not contain – would understand it as identifying an individual. There will often be some class of people who may, because they have private knowledge about the background facts, be able to infer

that a notice probably refers to some individual. But that is not what s 393 has in view;

(2) That is consistent with the purpose that s 393 serves, which relates to what will be understood by general readers of a notice;

(3) Similarly, the question is not whether, by researching material external to the notice, the ordinary reader would be able to infer that the Authority probably had a particular individual in mind. The requirement is that the individual should be identified in the notice, not that he should be identifiable from it; and

(4) A person may be identified in the notice by name or in some other way (for example by reference to a specific job title or description). But to be so identified, the person in question must be unambiguously and individually identified *by the description itself*, not by the description in conjunction with other information. A reference to a group of which the individual is a member does not identify the individual unless it is clearly a reference to each member of the group individually.

32. In my view these submissions fail to deal with the important distinction that I have drawn in paragraphs 29 and 30 above between the identification of an individual, as opposed to a Firm or other collective body, and the confirmation of who that individual actually is if he is not identified by name in the notice. That latter process is not part of the test as to whether an individual had been identified in the notice and neither *Watts* nor *Laury* suggest otherwise.

33. It is important to look at the purpose of s 393. In my view it is not, as Mr Stanley suggests in his submissions summarised above, to protect an individual from adverse comment from readers of the notice who might, through a decoding process, be able to work out who a particular individual referred to in the notice but not named actually is, notwithstanding the fact that being identified in such a notice will, when that notice is published, cause him to be subject to such comment.

34. The question as to whether an individual has been identified or not is not to be determined by the question as to whether an ordinary reader of the notice, or even a reader with special knowledge of the firm and the roles of the people who work in it, would be able to identify who the unnamed individual was who was being criticised. The knowledge of outsiders reading the notice is only relevant in helping to establish whether the particular individual who it is thought it might be, is actually that person rather than some other person. Therefore, if there is some ambiguity about the position and the external evidence cannot determine whether it was one individual rather than another who might equally fit the description then it cannot be said that any particular individual has been identified. So, if for example, the notice referred to "a managing director of the company" and the Companies House records showed that there were two managing directors, then the notice will not have identified either of them.

35. The true purpose of s 393 is to give third parties whom the Authority is proposing to criticise the opportunity to answer those criticisms before they are

published. The section gives a right to make representations in private and it is not acceptable to say that because the individual referred to cannot be easily established by reference to external sources, therefore ordinary readers of the notice will not be able to see that he has been criticised and therefore his rights can be dispensed with.

36. This principle was fully recognised in *Watts* where the Tribunal stated in paragraph 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 is s.393(4) may be, sections 393-4 are plainly intended to deal with the same kind of situation."

37. Therefore in this case Mr Macris will be entitled to counter the criticisms in the Final Notice before the Tribunal if he can show that they are directed at him and him alone regardless of whether the ordinary reader of the notice would be able to establish that the criticisms refer to him.

38. Mr Herberg at a number of points in his submissions used the phrase "singling out" as an aid to establishing whether an individual had been identified in the notice. Mr Stanley was critical of this, referring to paragraph 57 of *Watts*, quoted in paragraph 25 above, where the Tribunal indicated that it would not put such a gloss on the words of the statute. However, the same paragraph indicates that elaboration of the phrase may be appropriate when there is more experience of working through the provision in practice. In my view, the phrase is helpful in emphasising the point that a particular individual has to be the focus of the criticism in the notice for him to be identified, as opposed to a Firm or a body of individuals within the Firm.

Approach to be taken

39. In the light of these principles in my view the correct approach to be taken in order to establish whether Mr Macris has been identified in the Final Notice through the description "CIO London management" is to answer the following questions:

(1) Are the references in the Final Notice to CIO London management references to an individual, ascertained by reference solely to the terms of the Notice itself?

(2) If so, can those references be regarded as referring to anyone other than Mr Macris?

40. For the purpose of answering the second question above recourse may be made to external material to confirm that the individual identified in the Final Notice by the description could in fact only be Mr Macris, that second stage being no different to

the situation envisaged in *Watts* where an individual is referred to in the notice as, for instance, the "chairman of the company".

41. I now turn to consider the two questions set out above in turn.

Question 1

42. I start with paragraph 4.3 of the Final Notice which is set out in full in paragraph 13 above. As Mr Herberg observed, this paragraph separates out four levels of management which are plainly overlapping as follows:

(1) SCP Management who *managed* the SCP traders;

(2) CIO London management who *managed* SCP management;

(3) CIO Senior management in New York to whom CIO London management *reported*; and

(4) Firm Senior management to whom CIO Senior management *reported.*

The paragraph also refers to the fact that CIO London management "represented the most senior level of management for the SCP in London".

43. Mr Herberg submits that by separating out the levels of management to that level of detail, it is clear that CIO London management, is Mr Macris alone, in other words this process has "singled out" an individual and references to CIO London management can only be understood, given the description of that term in the Final Notice, as a reference to Mr Macris.

44. Mr Stanley submits that CIO London management is referred to impersonally as a "level of management" at a geographical location and the reader would not know whether it consisted of one person or several. He submits the same as true of the other references to levels of management in that paragraph so that the levels are described in terms which are deliberately vague and could be referred to a body consisting of one or more people. He submitted that the reference to CIO London management reporting upwards was consistent with one or more persons having a direct reporting line to the superior level.

45. In my view the drafting of paragraph 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 paragraph 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 paragraph 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 emails 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 paragraph 16 above.

47. Mr Stanley submitted that a group might be described as having "sent an email" or "led a meeting"; as a matter of practical reality a reader would understand that these are actions which might well be done, perhaps by an individual, but on behalf of a group, or by one or more individuals who belonged to a group. I reject this submission. In my view if it were the case that the actions concerned were carried out by an individual on behalf of a group in the manner described then the Notice would have said so; without this embellishment the natural impression the reader would take knowing how large corporations operate, would be that in the Final Notice the actions concerned were described in such a way as that they could not be taken to be anything other than the actions of a particular individual.

48. I have also referred earlier to the fact that the term "CIO London management" is not defined in the Final Notice, although many other technical terms are. In my view this is telling; an accurate definition could not be given in terms which did not describe an individual performing the relevant functions rather than a collective body.

49. On this basis, I conclude on the first question that the actions and omissions attributed in the Final Notice to CIO London management were acts and omissions of an individual. On the basis of my analysis of the relevant legal principles, an individual has been identified in the Final Notice, that individual being whoever it is fits the description of CIO London management.

Question 2

50. As I have previously concluded, it is permissible at this stage, having found that a particular individual has been "singled out" to refer to external sources to confirm the identity of the individual "singled out". As I have stated previously it is 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 Mr Macris.

51. In my view the evidence on this aspect compellingly points to the conclusion that the individual "singled out" is Mr Macris. The evidence consisted of witness statements from Mr Macris himself, but also from Mr Jorge Villon, a former employee of the CIO in London who worked with Mr Macris in the CIO with Mr

Macris, and Mr Didier Chapet, who worked at another major financial institution in the City of London who undertook business with the CIO and knew how its organisation and structure operated. This evidence was unchallenged, the Authority not wishing to cross-examine the witness concerned. Mr Macris's own evidence confirms that he was the most senior person in CIO in London, reporting to the global head of CIO, Ina Drew in New York, who is the most senior management figure in CIO and who reported directly to Jamie Dimon, the Chairman and Chief Executive Officer of JP Morgan Chase & Co.

52. This evidence is consistent with the various organisational charts of the Bank's Chief Investment Office to which I was referred. The charts show this office's organisation and reporting lines with an individual in each box and their direct reports. At no point is there any reporting to a collection of individuals.

53. There is also evidence independent of Mr Macris and those who have been associated with him. As Mr Macris describes in his witness statement, the "London Whale" incident was the subject of an in-depth investigation by a committee of the U.S. Senate, culminating in a public hearing at which Mr Macris was named and a written report (the "PSI Report") which is accessible on the internet and which contains many references to him. Mr Macris exhibited the PSI Report to his witness statement, and it is clear that it included references to communications involving Mr Macris which were referenced in the Final Notice as having been made or sent by "CIO London management". For example, the quote attributed to an "individual at the Investment Bank" set out in paragraph 4.101 of the Final Notice and quoted in paragraph 15 above, appears verbatim in the PSI Report, in the context of a conversation reported between Mr Macris and the same individual. As Mr Macris states in his witness statement any reader of the Final Notice can simply cross-refer to passages in the PSI Report to confirm the identification of him made in the Final Notice.

54. It follows from my reasoning on the approach to be taken that the evidence submitted by the Authority, in the form of a witness statement from its employee, Ms Michelle Poku, to the effect that the press had not worked out the identity of Mr Macris themselves until prompted by him, is not relevant to the questions I have identified.

Conclusion

55. I therefore conclude that the individual identified in the Final Notice as CIO London management cannot be anyone other than Mr Macris and the preliminary issue is decided in his favour.

56. As the reference may now proceed, I direct that the Authority shall send or deliver its statement of case and other documents required pursuant to paragraph 4 of Schedule 3 to the Rules no later than 28 days after the release of this decision, with both parties having liberty to apply for any further or amended directions.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 10 April 2014