[2016] UKUT 302 (TCC)
Reference number: FS/2014/0002

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

JULIEN GROUT **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MARK WHITE (MEMBER)

Sitting in public in London on 2 June 2016

Richard Lissack QC and Farhaz Khan, Counsel, instructed by Signature Litigation 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 Grout") 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 Grout joined the CIO as a Vice President in November 2009. He was based in London. He had a role as a trader in the instruments bought and sold by the SCP. In that position, he was junior to a more senior trader, Mr Bruno Iksil who was Mr Grout's immediate supervisor. Mr Iksil was directly responsible for the management of the portfolio of the SCP, reporting to Mr Javier Martin-Artajo, the Managing Director of the CIO for the Europe, Middle East and Africa region, who in turn reported to Mr Achilles Macris, the International Chief Investment Officer.

4. Mr Grout 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. By a reference notice dated 23 May 2014 Mr Grout 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 Grout 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 Grout accordingly made his reference pursuant to s 393(11).

9. As Mr Grout 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. On 26 June 2015 the Tribunal directed the hearing of three preliminary issues in accordance with Rule 5 (3) (e) of the Rules 2008, namely (i) whether Mr Grout was identified by the Decision Notice, (ii) whether he was prejudiced by the notice and (iii) whether he is entitled to the relief which he seeks in his reference. The Tribunal also directed Mr Grout to serve on the Authority a statement of the grounds on which he seeks to make his case on these issues and directed the Authority to indicate whether it contests any of those grounds and if so, the basis on which it contests the matters concerned.

11. The Authority disputes that Mr Grout was identified by the Decision Notice. The Authority also disputes that even if Mr Grout is found to have been identified in the Final Notice that those matters in the Final Notice that identify him are prejudicial to him. Mr Grout has not made clear what relief he will ultimately seek but has stated that he seeks a fair opportunity to defend himself by answering what is alleged against him in the Final Notice. Mr Grout denies all the allegations in the Final Notice that may be said to be directed at him and does not accept that all the references which he contends identify him in the relevant sense and manner provided by 393 (4) of the Act correctly describe behaviour on his part. The Authority accepts that if it is found that Mr Grout has rights under s 393 of the Act then he will have the right to a hearing to determine whether the opinions expressed in the Final Notice about him are substantiated.

12. Accordingly, this decision deals with the question as to whether the matters included in the Decision Notice identified Mr Grout in the relevant sense and manner, as provided for in s 393 (4) of the Act and, if so, whether those matters are prejudicial to Mr Grout.

The Final Notice

13. The Final Notice is a lengthy document, running to 62 pages. The findings made against the Bank in the Final Notice as to the trading activities and management of the SCP were summarised at [11] of this Tribunal's decision in *Macris v The Financial Conduct Authority* (2014) 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.

14. 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.

15. The Final Notice contains a large number of references to the conduct of those who are described in the Final Notice as "traders on the SCP". That term is sometimes prefaced with the definite article. There are also occasional references to the behaviour of "a trader on the SCP" and one instance (at paragraph 5.12 of the Final Notice) to behaviour of "the SCP traders". The Appendix to this decision sets out a schedule, helpfully prepared by Mr Grout's instructing solicitors, of substantially all of the references in the Final Notice to traders. Nowhere in the Final Notice are traders identified by name or in any other way.

16. A number of the failings found by the Authority in the Final Notice in relation to the valuation of the Bank's positions within the SCP and the mismarking of the SCP are attributed to the conduct of traders. The summary of the Authority's reasons for the action it took against the Bank set out at section 2 of the Final Notice contains a number of references in this regard as follows.

17. At paragraph 2.2 the FCA found that flaws in the Bank's marking and valuation control process for the SCP meant that the Bank failed to price certain positions within the SCP accurately in 2012. It then found:

> " As losses began to mount during 2012, those flaws allowed traders on the SCP to conceal them through mismarking the SCP's positions. At month-end in February

2012, a substantial amount of trading was undertaken on the IG9 10 year index. One of the purposes of part of this trading was to *"limit the damage"* to the SCP."

18. At paragraph 2.8 the Authority found:

> "From 2007, at the direction of SCP management, the traders on the SCP's approach to marking the SCP's positions was such that they provided an estimate of what they, the traders, thought the position was worth, rather than necessarily picking the mid of what the market thought the positions were worth. In February and March 2012 as the SCP began to lose substantial amounts of money, traders on the SCP began to mark their positions in a noticeably favourable manner. At the direction of SCP management, they priced the positions at the most beneficial end of the bid-ask spread. This had the effect of making the SCP appear more profitable and enabled the traders to conceal the scale of the losses arising in the SCP from CIO Senior Management."

19. At paragraph 2.10 the following additional findings regarding mismarking were made:

> "By March 2012, it was clear to the traders on the SCP that the adverse market moves were continuing against the SCP's positions. In order to conceal this from CIO Senior Management, traders on the SCP continued to mark aggressively. By mid-March, they had gone further and, at the direction of SCP management, deliberately mismarked the SCP in order to conceal what one trader believed to be genuine losses. On 16 March 2012, the traders calculated that the losses appeared to be understated by almost $500 million, based on their estimation of market mid-prices. Nonetheless on that day the portfolio only showed a loss of $4 million in its internal reporting to CIO Senior Management."

20. The Authority also found that flaws within CIO's Valuation Control Group meant that the Bank failed to detect the mismarking in a timely manner. It then found at paragraph 2.12 as follows:

> "These flaws enabled interference with the month-end valuation process conducted by CIO VCG, a process which was intended to act as a control over the way traders on the SCP marked the portfolio. In February 2012, traders on the SCP deliberately sought to narrow the distance between their estimation of the portfolio's worth and CIO VCG's assessment, by seeking to influence the independent prices used by CIO VCG."

21. Section 4 of the Final Notice sets out the detailed facts and matters on which the Authority relied in making its findings.

22. Paragraph 4.3 sets out how the traders on the SCP fitted into the management structure which applied to the SCP as follows:

> "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 return 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."

23. Under the heading "Mismarking of the SCP" there were a number of detailed findings the essence of which were summarised at paragraph 4.55 as follows:

> "In the first quarter of 2012 the marks became more aggressive, in February 2012 traders on the SCP subverted the month-end valuation control process, and by March 2012 traders on the SCP and SCP management concealed losses from CIO Senior Management by mismarking the SCP."

24. The Authority found that these activities had an impact on the profit and loss figures of the SCP. The following finding was made at paragraph 4.66:

> "During April 2012 the instruction by SCP management to conceal unexplained losses from CIO Senior Management developed into a reverse engineering of the profit and loss figures. Traders on the SCP were given a headline profit and loss number by SCP management and together with SCP management would move the prices to match."

25. There were also findings of market misconduct against traders on the SCP. At paragraph 4.76 the following finding was made:

> "The Authority concludes that at month-end in February 2012, traders on the SCP (with the knowledge of SCP management) entered into transactions on the IG 9 10 year index, in particular on 29 February 2012. One of the purposes of part of this trading was to *"limit the damage"* to the SCP. This could have been achieved if the market price of the index moved closer to the SCP's mark. The size of positions meant that a small movement in price had a large effect on the profit and loss position. The size and manner of the trading had the potential to affect the price of the IG 9 10 year index at a time when the SCP stood to benefit from a lower price. Taken as a whole this constituted a failure to observe proper standards of market conduct."

26. Section 5 of the Final Notice set out the Authority's findings as to which of its regulatory provisions had been breached by the Bank. The Authority found at paragraph 5.4 (c) that the Bank had failed to act with due skill, care and diligence in breach of Principle 2 of the Authority's Principles for Businesses because, inter-alia, it:

> "failed to price certain positions held in the SCP accurately and failed to prevent or detect mismarking in a timely manner….as a result of (i) the subversion of the valuation control process in February 2012 by the traders on the SCP; (ii) the traders on the SCP and SCP management concealing losses….".

27. Finally, Section 6 of the Final Notice set out the application of the Authority's penalty policy in relation to the breaches found to have occurred on the part of the Bank. The Authority, in assessing the seriousness level of the breaches considered whether any of the breaches were committed deliberately and found at paragraph 6.13 (d) that:

> "The valuation control process was… subverted by the traders on the SCP with the intention of concealing losses at month end."

28. By reference to the passages in the Final Notice referred to above, as well as those set out in the attached Appendix, Mr Grout contends that the reference to "traders on the SCP", whether prefaced with the definite article or not, is a collective (that is plural), generic, class, or group term which identifies each of the individuals within it, and in particular Mr Grout himself who was one of those traders at the relevant time.

The legal test under s 393

29. It was common ground that the question as to whether Mr Grout has been identified in the Decision Notice falls to be answered in accordance with the construction put on s 393 of the Act by the Court of Appeal in its judgment in *FCA v Macris* [2015] EWCA Civ 490, [2016] 2 All ER 265, in particular at [45] where Gloster LJ said the approach to the test contained in s 393 is as follows:

> "Are the words used in the 'matters' such as would reasonably in the circumstances lead persons acquainted with the claimant/third party, 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?"

30. That test has been interpreted in three decisions of this Tribunal, namely *Bittar v FCA* [2015] UKUT 0602 (TCC), *Ashton v FCA* [2016] UKUT 0005 (TCC) and *Vogt* v *FCA* [2016] UKUT 0103 (TCC). Mr Stanley helpfully summarised the approach to be taken in applying the test in his skeleton argument and we did not take Mr Lissack to disagree with his summary, although he had additional submissions which we deal with at [43] to [56] below.

31. The test is glossed by the proviso identified by Gloster LJ at [46]– [49] of *Macris*, namely that there must be a "specific reference to "a person" in the "matter" to which the reasons relate", to quote the relevant words in s 393 (4), that is a "separate reference to a specific person", as per Gloster LJ at [46] of *Macris*. That requirement was referred to by Gloster LJ at [49] as a ""key or pointer" to a separate person, other than the recipient of the notice, by whatever description" in the text of the reasons. Mr Stanley submitted, and I accept his submission, that whether there is a "key or pointer" in the notice must be established without regard to any specialist knowledge on the part of the reader of the notice.

32. Accordingly, there are two stages to the inquiry: see *Bittar* at [20] to [21].

33. The first stage (answering the question whether there is a "pointer") is to consider whether the relevant statements in the notice that are said to identify the third party refer to "a person" other than the person to whom the notice was given. That stage is to be carried out without recourse to external material.

34. The second stage (answering the question whether the "pointer" is a pointer to the third party) includes reference to external material, but as circumscribed by the Court of Appeal in *Macris* at [50] and [51] where it was held that the material must be limited to that which objectively would be known by persons acquainted with the third party, or persons operating in the relevant area of the financial services market, it being unrealistic to disregard what already is known to the market over and above the information stated in the notice. Such persons are referred to as "relevant readers".

35. The question is essentially one of fact. It is objective. The burden of proof lies on the third party: see *Bittar* at [26].

36. The crux of the question is what "relevant readers would reasonably know and conclude", not whether it is possible to deduce the third party's identity from publicly available sources: see *Bittar* at [24].

37. The test proceeds by looking at information in the public domain (which of course includes those matters that relevant readers would know when the notice is promulgated): see *Bittar* at [23].

38. The inquiry is "not referring to knowledge that can only be obtained by extensive investigation of available sources, such as the type of enquiries that a thorough investigative journalist would undertake": see *Bittar* at [23].

39. A relevant reader is someone working in the relevant sector, which does not include those who "observe or comment on it or advise market participants": see *Vogt* at [27]. It does not include "lawyers and staff with responsibility for or interest in regulatory affairs", who are not to be regarded as working in the relevant area or acquaintances: see *Vogt* at [38].

40. A relevant reader is a hypothetical one. Although evidence as to what would or would not be known by such a person may be admissible, actual evidence as to what conclusions such a person drew is of limited value, and the Tribunal is entitled to take into account its own specialist knowledge in this regard: see *Vogt* at [31] to [34] and *Bittar* at [29]– [31].

41. If reliance is placed on evidence about matters such as job positions and titles, however, proper evidence of those matters must be produced: see Vogt at [41 to [42].

42. The term "acquaintance" connotes a person who although they might have met the person in question from time to time is "more in the category of someone who knew of him because of his position in the market rather than a person who had deep personal knowledge of him and his affairs": see *Bittar* at [33]. It therefore excludes those who actually participated in relevant events, close friends, or someone who sat next to the person at work: see *Bittar* at [34]. So, for instance, those who work in a person's "immediate team" are not "acquaintances", although other colleagues may be, as may counterparties and customers.

43. Mr Lissack made further submissions on the approach to be taken at the first stage of the enquiry, and in particular the extent to which the requirement that there must be

a "key or pointer" to a specific person in the text of the reasons in the notice can be satisfied where the notice makes reference, as is the case here with its many references to "traders on the SCP", to a group of individuals.

44. I was referred to *Knupffer v London Express Newspaper Limited* [1944] UKHL 1, a defamation case where the House of Lords held that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. By way of example of the operation of this principle Lord Atkin stated that a defamatory statement made of a firm, or trustees, or the tenants of a particular building is not actionable if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. He observed that the reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement. An example of a statement that would give rise to such difficulty given by Lord Atkin was a statement that "all lawyers are thieves." He said that it was necessary to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class.

45. Mr Lissack argues here that "traders on the SCP" was not a large or indeterminate number of persons described by some general name and the reasons in the Final Notice identified a group of persons identified by the collective description "traders on the SCP" with the result that each of the members of that group had been identified.

46. Mr Lissack also seeks to derive assistance from *Sir Philip Watts v FSA* (FIN/2004/0024) a case decided by this Tribunal's predecessor, the Financial Services and Markets Tribunal.

47. That case 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.

48. 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.

49. 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.

50. The Tribunal rejected this argument. In essence, the Tribunal held that it was not sufficient that the notice contained facts from which it could be inferred that some particular person must be being criticised. A notice which only contained criticism of the corporate entity which was the recipient of the notice (Shell in that case) from which it could be inferred that the chairman of the company was also being criticised was insufficient to identify any specific individual.

51. Nevertheless, as Mr Lissack submits, the Tribunal observed in *Watts* that an individual is capable of being identified otherwise than by name. Having said at [56] that the "fundamental point" in that case was that the criticisms in the notice were made at the level of corporate personality and "are not made of individuals whether singularly or collectively" it said at [58] and [59] of the decision:

> "58… 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…"

52. As Mr Lissack submitted, the Court of Appeal in *Macris* approved the reasoning in these passages: see [57] and [58] of the judgment. Mr Stanley referred me to [52] of *Macris* where Gloster LJ appeared to emphasise the need for there to be a reference to a "particular individual", and not to a "body of people" but in our view what Gloster LJ had in mind here was whether the "body of people" could be regarded as the alter ego of the recipient of the notice. She was considering in this paragraph whether the reference in paragraph 4.3 of the Final Notice to "CIO London management" was in context clearly a reference to a particular individual rather than a body that could be regarded as in context the recipient of the notice itself, so that in so far as there were criticisms in the notice directed at "CIO London management" these were properly to be regarded as criticisms directed at the firm which was the recipient of the notice rather than at any particular separate individual. That was the distinction made in *Watts* and it is clear from that decision, and as recognised at [57] and [58] of *Macris*, that a reference to individuals collectively could result in identification of a particular individual who was a member of the collective concerned whereas references which were properly construed as references to the corporate body itself rather than any group of individuals working for it would not be sufficient to identify any particular individual. As is clear from *Macris* the question is whether the references to the collective can be regarded on the facts of the case as a "key or

pointer" to a separate person, other than the corporate body that was the recipient of the notice. In other words, should the reference to the collective be simply regarded as a proxy for the recipient of the notice?

53. It follows from this analysis that the only exercise to be undertaken at stage one is to ascertain solely from the words used in the notice itself whether there is a "key or pointer" to a person or persons separate from the recipient of the notice itself who, although not referred to by name, can be identified by reference to a description, such as a job title. Where, as in this case, the references in the notice which are said to criticise a separate individual are references to a "body of people" it is necessary to ascertain whether the way the references are being used in the reasons in the notice amount only to criticisms of the corporate entity which is the recipient of the notice. If that were the case, any criticism of particular individuals can merely be inferred from the criticism of the entity itself and, as Watts established, would not be sufficient to identify a person separate from the recipient of the notice.

54. Therefore, in our view Mr Lissack went further than is permissible in his submission that a person can be identified at stage one by reference to his membership of a group where the relevant reader would know who the members of that group were. In that regard he relies on the statement at [80] of *Ashton* where this Tribunal gave the example of an allegation of a conspiracy to manipulate the market made against "the members of Firm A's London Money Markets Derivatives Desk" and said that if relevant readers would know who those persons were then each of the members of the group concerned would have been identified.

55. However, the remarks in *Ashton* were made in the context of stage two of the test and not stage one. The example assumed that the phrase "members of… The London Money Markets Derivatives Desk" had been found at stage one to be a reference to each of the individuals who was a member of that body as opposed to that body being the alter ego of the firm. The relevant reader and what he is assumed to know does not come on to the scene until the third party has passed through stage one of the test.

56. It therefore follows that the submissions that Mr Lissack made on *Knupffer* are only relevant in the context of the inquiry at stage two; clearly if the collective referred to consists of a large or indeterminate number of persons then it is going to be more difficult at stage two for the relevant reader to be satisfied that the individual who claims to have third party rights was being spoken of when the criticisms of which he complains were made. There is clearly a world of difference between a statement that all City Traders are involved in the activity of mismarking positions and concealing losses and allegations which appear in a final notice that a group of traders, known by the relevant reader to be small in number, have been mismarking the positions of a particular portfolio of the firm for whom they work.

57. Nor do we accept Mr Stanley's submission that just because there are collective references in a notice to a loosely defined collective group those references cannot be construed as being references to a separate person. That submission loses sight of the

fundamental distinction to be drawn, namely whether there are references to corporate wrongdoing or the wrongdoing of particular individuals.

58. Therefore, the way the collective body and its actions is described in the notice is crucial to this exercise. So in *Macris* itself, this Tribunal held, and the Court of Appeal found that it was entitled to do so, that the phrase "CIO London management", on a proper construction of the wording of the Final Notice was not a reference to a body that can be regarded as an alter ego for the firm itself but was in context clearly a reference to a particular individual, who turned out to be Mr Macris, the person who, as described in paragraph 4.3 of the Final Notice, was the most senior level of management for the SCP in London.

59. As we indicated during the hearing, the exercise of determining whether references in a notice concerned relate to a separate individual or to only to the recipient of the notice can be compared to looking at a spectrum. It is a question of degree.

60. At one end of the spectrum the description used will clearly amount to a "key or pointer". That was the case in *Bittar*, where the notice referred to the actions of "Manager B".

61. There will be cases in the middle where attempts are made to disguise the fact that in reality an individual is being referred to. That was clearly the case in *Macris* with its references to a non-existent body of persons which in reality was a reference to a particular individual when read in the context of the notice. Likewise, in *Ashton* the notice attributed a number of actions to "Firm A" but this Tribunal found at [74] of its decision that the matters attributed to "Firm A" were not, on the facts, kept at a level of generality appropriate to a finding of collective corporate wrongdoing and the term was clearly used to describe the actions of a particular individual or individuals. Consequently, in the relevant notice in that case the Authority had used a term which attempted unsuccessfully to describe the actions of a corporate entity rather than, as was the case in reality, of any particular individual.

62. At the other end of the spectrum there is the example of *Watts* where there was no reference in the reasons contained in the notice to any separate body or individual other than Shell, the recipient of the notice, so that it is clear that the notice made findings purely of systemic failings on the part of Shell.

63. Our task in this case in relation to the first stage of the inquiry will be to ascertain where on the spectrum the various descriptions of "traders on the SCP" lie.

Evidence and findings of fact

64. We now turn to the evidence, aside from the Final Notice, which it is contended assists the knowledge of relevant readers in the identification from matters contained in that notice of Mr Grout. This evidence is of course only relevant to the second stage of the test and will only become relevant if we decide that the first stage of the test is passed.

65. We had two witness statements filed by Mr Graham Huntley, a partner in Signature Litigation LLP, Mr Grout's solicitors. The facts and matters referred to by Mr Huntley in his statements were derived from him having acted for Mr Grout. The evidence in these witness statements was unchallenged.

66. The first witness statement was filed in support of Mr Grout's successful application for an extension of time to make his reference and contains little of relevance to the preliminary issue, other than a description of Mr Grout's role in CIO which we described in the introduction to this decision at [3] above.

67. Mr Huntley explains in his second witness statement something of how the SCP was structured and its trading strategy. According to his evidence, the SCP was made up of a large Strategic Book, containing a portfolio of credit default swaps (CDS) which was the book managed by Mr Iksil on a day-to-day basis and a number of smaller "tactical" books (which would contain other securities such as equities, in addition to credit securities, and had a notional value significantly lower than the Strategic Book). The Strategic Book was used by the CIO to assist its overall financial position, the strategy for the trading of which was agreed at a senior level of the Bank.

68. Traders on the SCP would on a daily basis enter into transactions with a small number of market makers, comprised of leading investment banks, each of which had 2 to 4 traders who would deal with the SCP. Trading activity in CDS contracts was at the relevant time concentrated on a small number of market participants and the CIO was a dominant figure in the CDS market and was often a key source of liquidity for certain trades.

69. In those circumstances, in our view the other market participants who dealt with the SCP would be fully aware of who were the traders on the SCP and that the SCP was part of the CIO as well. They would also have known the respective roles of the traders and their reporting lines. We were shown a structure chart of the CIO prepared as at March 2012 which showed Mr Iksil as head of Strategic Credit for the CIO, reporting to Mr Javier Martin-Artajo, the Head of Europe and Credit & Equity for the CIO. This chart also showed there were three individuals who reported to Mr Iksil, namely Mr Eric de Sangues, Mr Grout and Mr Luis Buraya.

70. This organisation chart was published in the online version of the Financial Times on 22 March 2013 in an article which was published shortly after the report of the US Senate Permanent Committee on Investigations on the operations of the SCP. We refer in more detail to that report and the article below. This was a very specialist area of the market and a small number of significant players in it, of which the Bank held a dominant position. Therefore, the identity and roles of all the traders on the SCP and their reporting lines would be known to other market participants such as the market-makers mentioned above. They would therefore have known that Mr Iksil was responsible for the trading activities of the SCP on a day-to-day basis and managed the other three more junior traders mentioned in the chart. They would also have known through their dealings with the individual traders as to what areas of the SCP's operation each of them focused on. Relevant readers who read the Final Notice would

therefore have been aware that the only persons who fitted the description of "traders on the SCP" were these four individuals.

71. Therefore, relevant readers would have known, through their day-to-day dealings with Mr Grout, that both he and Mr Iksil were conducting substantial amounts of trading in CDS contracts for the Strategic Book and how much each was involved in those activities as opposed to the other traders. They would also know, as mentioned above, that Mr Grout was acting under the direction of Mr Iksil. Mr Huntley's evidence was also that it is generally normal practice with respect to the trading of CDS portfolios that the front office (that is the traders trading the portfolios on a day-to-day basis) would have some involvement in marking or would assist in the process of marking the CDS book. This evidence is essentially an assertion based on what Mr Grout would have told Mr Huntley and is uncorroborated by other evidence, but there is nothing in the other material that we have seen which would indicate that Mr Grout's dual role in both trading and marking was unusual and the Authority did not seek to contradict that so we are prepared to accept Mr Huntley's evidence on that point.

72. There was, in addition, a considerable amount of press comment and other material in the public domain at the time of the publication of the Final Notice as to the operations of the SCP and the roles of particular individuals in relation to it, including in particular Mr Iksil and Mr Grout. In our view all of this material, which we refer to below, is of the type that would have been read by the relevant reader.

73. The large losses incurred as a result of the trading activities of the SCP attracted the attention of US investigatory and regulatory authorities. In May 2012 the FBI opened an investigation and in the same month the SEC announced that it was commencing an investigation into the appropriateness and completeness of the Bank's financial reporting with respect to the CIO.

74. The Bank carried out its own internal investigation and a report of the findings of that investigation were published in January 2013. There is much detail in this report as to the activities of the traders on the SCP but they were not named due to concerns expressed in the report about UK privacy laws. Nevertheless, it was easy to identify Mr Iksil because the report referred to "one trader" who the report said was referred to in various press articles as the "London Whale" and those articles identified that person as Mr Iksil.

75. The Bank's report confirms that estimating the value of each position in the SCP was the responsibility of "one of the junior traders". It reported that the trader concerned exercised judgment and "often in consultation with another trader" assigned a value to each position. His role was also described as including the drafting "often together with another trader" an explanation for the daily gains or losses on the portfolio.

76. The report also states that at the direction of a "more senior trader" the "relevant trader" may not have always assigned a value to positions which reflected fair value

assessments but concluded that there was "no evidence that others beyond three of the SCP traders were aware of or part of this directive."

77. On 15 March 2013 the US Senate's Permanent Subcommittee on Investigations published its report entitled "JP Morgan Chase Whale Trades: a case history of derivatives risks and abuses" (the "PSI report"). This report, in contrast to the Bank's internal report identified all relevant employees by name.

78. Both Mr Iksil and Mr Grout are mentioned extensively in the PSI Report in terms that are prejudicial to them. By contrast, there are only a very small number of references to the other two traders; Mr Buraya is mentioned three times in the report and Mr de Sangues twice. It is clear that the allegations of wrongdoing made in the report against the SCP traders is focused almost entirely on Mr Iksil and Mr Grout. Consequently, in the Executive Summary of the report, in the description of the CIO and the roles of the Bank's employees concerned, Mr Iksil is described as the head trader and his dubbing as the "London Whale" is mentioned. The report says that he "oversaw several other CIO traders including Julien Grout." The other two traders are not mentioned at this point.

79. The Executive Summary of the PSI Report has a section headed "Hiding Losses", a key allegation which is made against traders on the SCP in the Final Notice. At Page 5 of the PSI Report after stating that the CIO began in the first quarter of 2012 to assign more favourable prices to its credit derivatives than the previously used midpoint prices in order to minimise reported losses it is stated:

> "The data indicates that the CIO began using more favorable valuations in late January and accelerated that practice over the next two months. By March 15, 2012, two key participants, Julien Grout, a junior trader charged with marking the SCP's positions on a daily basis, and his supervisor, Bruno Iksil, head trader in charge of the SCP, were explicit about what they were doing. As Mr. Grout told Mr. Iksil in a recorded telephone conversation: "I am not marking at mids as per a previous conversation." The next day, Mr. Iksil expressed to Mr. Grout his concerns about the growing discrepancy between the marks they were reporting versus those called for by marking at the midpoint prices: "I can't keep this going…. I think what he's [their supervisor, Javier Martin-Artajo] expecting is a re-marking at the end of the month…. I don't know where he wants to stop, but it's getting idiotic."
>
> For five days, from March 12 to 16, 2012, Mr. Grout prepared a spreadsheet tracking the differences between the daily SCP values he was reporting and the values that would have been reported using the midpoint prices. According to the spreadsheet, by March 16, 2012, the Synthetic Credit Portfolio had reported year-to-date losses of $161 million, but if midpoint prices had been used, those losses would have swelled by another $432 million to a total of $593 million. CIO head Ina Drew told the Subcommittee that it was not until July 2012, after she had left the bank, that she became aware of this spreadsheet and said she had never before seen that type of "shadow P & L document""

80. In the main part of the PSI Report, at page 104 the following is stated:

> "During the period examined by the Subcommittee, the daily task of marking the SCP book with the fair value of its credit derivatives fell to a junior CIO trader, Julien Grout, who performed the task with assistance from the head Synthetic Credit Portfolio manager Bruno Iksil. Late in the afternoon each business day, Mr. Grout determined the daily marks for each of the SCP's holdings and then used a series of computer programs to generate an estimate of the SCP's overall daily profit or loss, known as the "P & L Predict." He also often drafted a short explanation of the day's gains or losses and included that explanation in the P & L Predict as well. At the end of the business day in London, Mr. Grout sent an email with the P & L Predict to a designated list of CIO personnel in both London and New York."

81. These passages clearly cover the same ground as the passages in the Bank's report referred to at [75] and [76] above. Putting the passages from the two reports together, the clear conclusion is that what is being said is that there was one trader involved in preparing the valuations designed to conceal losses and that that trader was Mr Grout. It does not appear that there is any reference in either report which would indicate that either of Mr de Sangues or Mr Buraya, had a prominent role in this regard and the Bank's report makes it clear that no one other than the traders on the SCP were the subject of Mr Iksil's direction regarding how valuations were to be calculated. Mr Buraya, however, appears to be aware of the practice; this appears from one of his chats with Mr Iksil which was reproduced in the FT article referred to at [85] below where he refers to a profit and loss calculation containing prices that were "stupid".

82. As mentioned above, the PSI Report generated significant press comment. On 15 March 2015 the Huffington Post in its online edition published an article under the headline "Julien Grout, Former JP Morgan Junior Trader, Challenged The London Whale". The first two paragraphs of the article stated:

> "Julien Grout was nowhere to be seen in the Senate hearing room on Friday. But behind the scenes, this largely unknown figure had much to do with why his former bosses at JP Morgan Chase were sitting there uncomfortably, answering often- hostile questions from lawmakers on how traders lost $6.2 billion on seemingly reckless derivatives trading.
>
> A former bank trader, Grout is party to much of the correspondence and telephone conversations that Senate investigators presented as crucial evidence substantiating a key finding in their report released late Thursday: Top management was directly involved in concealing information that pointed to staggering losses within the London office of a JP Morgan unit known as the Chief Investment Office."

83. The article then explains how Mr Grout raised alarms internally about the size of the positions being taken and mentioned that he had "maintained a private spreadsheet tracking the difference between the daily losses the trading unit was reporting to headquarters in New York and what he calculated to be the real losses." The article characterises Mr Grout's role as a "junior trader in charge of the CIO's grunt work."

84. The article ends with some further detail as to Mr Grout' s role as follows:

"The French citizen, who was responsible for tracking and reporting the valuation of the team's trades, is believed to be one of the first JP Morgan bankers to sound the alarm bell over losses from the desk's derivative bets in January 2012.

Two months later, as the trades spiralled out of control, Mr Grout said in a phone call with Bruno Iksil that "we are lagging", according to the US Senate's report. He went on to predict that the final outcome of the unit's trading strategy would be "a big fiasco" and "big drama when, in fact, everybody should have… seen it coming a long time ago".

At the time, the banker set up a private spreadsheet that showed the difference between daily losses the trading unit was reporting to the CIO's headquarters in New York and his calculation of the real losses."

85. On 22 March 2013 the Financial Times in its online edition published an article commenting on the PSI Report. The whole focus of the article was on the mismarking issue. As previously mentioned, the article set out the Bank's organisation chart of the business area containing the SCP with the four traders highlighted with their reporting lines. There is set out the text of a chat between Mr Iksil and Mr Grout in which Mr Grout is clearly seen to be agreeing to use valuation levels directed by Mr Iksil. The article also quotes an extract from the letter sent by the Bank to Mr Martin-Artajo terminating his employment in which it is said that Mr Martin-Artajo "directed Bruno Iksil and/or Julien Grout to show modest daily losses in the marking of the Book rather than marking the Book in a manner consistent with the standard policies and procedures of [the Bank] …".

86. On 9 August 2013, a sealed complaint was filed against Mr Grout by the US Department of Justice (the "DOJ Complaint") which was followed shortly after on 14 August 2013 by a similar complaint filed by the SEC (the "SEC Complaint").

87. In the DOJ Complaint, Mr Grout is said, among other things, to have conspired with others to falsify books, records and accounts of the Bank. Particular reliance is placed on allegations that Mr Grout manipulated and inflated the value of positions in the SCP to conceal losses. The SEC Complaint makes similar allegations.

88. We were shown various press articles commenting on these charges. These were based on a press release issued by The Department of Justice in which a quote from a DOJ lawyer appears in which it is said that Mr Grout "deliberately and repeatedly lied about the fair value of billions of dollars of assets on JP Morgan's books in order to cover up massive losses that mounted month after month at the beginning of 2012, which ultimately led JP Morgan to restate its losses by $660 million." Reference is made to the spreadsheet maintained by Mr Grout.

89. A short time after filing of the complaints and the related press comment, on 18 September 2013 the Final Notice was published.

Discussion

Stage one of the Macris test

90. We start by considering whether Mr Grout has satisfied us that in relation to the passages which he complains of in the Final Notice an individual or individuals have been identified who are separate from the Bank.

91. Mr Stanley accepts that there are pointers to an individual at paragraphs 2.10, 4.61, 4.63, 4.65 and 4.134 of the Final Notice where there are references to the actions of "one trader" or "one of the traders". He accepts that if any one of these references can by reference to external material of a type which relevant readers would have read and which was in the public domain at the time of the publication of the Final Notice be established to be to Mr Grout then he has been identified in the relevant sense and manner provided in section 393 (4) of the Act. It would follow that if any of those references were prejudicial to Mr Grout then he would have third party rights in relation to them.

92. Mr Stanley also accepts the possibility of a person being identified as a separate person where there is a reference in the notice to a group of individuals of which the alleged third party is one. However, he submits that if the class concerned is defined in such a way that not all are being pointed at then there is no pointer to any particular individual. He submits that is the case here where the collective term is being used. He submits that the collective references here are at the *Watts* end of the spectrum and is no different to the position had, for example, instead of the use of the term "traders on the SCP" or "the traders on the SCP" the term "the SCP" alone or the term "the Firm" been used and we should therefore read the Final Notice as if either of those terms had been used instead.

93. Mr Stanley submits that it is improbable that the Authority was saying that all the traders were involved in all of the particular matters described in the Final Notice which were attributed to the collective group. The right way to read those references is that it was the SCP or the Bank that did the matters complained of and there was no key or pointer to any separate individual. In his submission the only way that stage one of the test could be passed in this case was if the notice was read such that references to the collective was in all circumstances reference to all the traders and not just one or more of them. The term is being used loosely, it was undefined in the notice and the indications were that the Authority was not intending to criticise all of them. Mr Lissack's submission was that where there is a reference to the collective the correct reading was that the alleged act or omission was by one of the collective but not none of them such that it must be the case that there was a pointer to all of them. Mr Stanley's response to this submission is that it demonstrates that readers of the notice would not understand the references to "traders on the SCP" as meaning all of them.

94. We divine from Mr Stanley's submissions that he is making two key separate points. The first point is that in the context of this particular notice the use of the collective term (whether it be "the traders on the SCP" or "traders on the SCP") is to be construed as a reference to the failings of the Bank as a whole rather than of any particular individual or individuals and the second point is that because the notice does not suggest that every trader was involved in all of the particular actions described then there cannot be key or pointer to any of them.

95. We reject both points. As regards the first point, we have no doubt that the findings against the Bank in relation to the actions of those who are described as either "traders on the SCP" or "of the traders on the SCP" go further than merely being findings of misconduct against the Bank itself at a corporate level. What the Final Notice does is single out those individuals who personally carried out the activities described in the Notice and attribute those actions to them collectively. What is not being described are purely findings of systemic corporate failings from which failings of particular individuals could only be inferred, as was the position in *Watts*. There are direct and clear references here to the failings of particular individuals.

96. We have no doubt that on a proper consideration of the Final Notice as a whole in the context in which the phrases in question are used it can clearly be said that they do constitute references to a separate person or persons.

97. In our view the matters attributed to "traders on the SCP" or "the traders on the SCP" are not, on the facts, kept at a level of generality appropriate to a finding of collective corporate wrongdoing. It is clear that the Authority intended to refer and did refer, to the actions of specific individuals when it attributed the actions concerned to the collective term used. It is no different in principle to the example given in *Watts* of identification by use of job title or position, in that case "the board of directors"; in this case "the traders on the SCP" or "traders on the SCP". The fact that they are performing a less senior role, which Mr Stanley seemed to suggest might make a difference, in our view makes no difference at all and we see no reason in principle to restrict the ability to identify individuals by job description where what is being described in the notice concerned is clearly the actions of particular individuals and not merely by inference.

98. As regards Mr Stanley's second point we cannot accept that the statute intended that identification could be avoided simply by use of a collective term used to disguise whether actions were of a single individual or some or all of them with the effect that none of the members of the group could be identified unless the notice clearly indicated that all of the individuals who were members of the group had carried out the actions concerned.

99. There are, as we have found, a number of references in the Final Notice to the actions of "the traders on the SCP." On the basis that we have found that such a reference cannot be taken to be merely a reference to the Bank itself these references must be regarded as identifying all the individuals who fit the description. It would appear that the intention was to use this term as opposed to "traders on the SCP" to describe actions which all of the group engaged in whereas the latter term was used when describing actions undertaken by one or more but not all of the traders.

100. However, the first reference to "the traders on the SCP" is in paragraph 2.8 of the Final Notice where the finding in relation to the approach of the traders to marking the SCP's positions was that "they" (meaning all of them) provided an estimate of what they thought the position was worth, rather than necessarily picking the mid of what the market thought the positions were worth. This was followed by a

reference to "traders on the SCP" beginning to mark their positions in a noticeably favourable manner and that this "enabled the traders to conceal the scale of the losses arising in the SCP…". This paragraph, in the summary section of the Final Notice, therefore gives the clear impression that all the traders followed the same approach to marking, even though the notice then goes on to describe particular actions of mismarking which, by use of the phrase "traders on the SCP" rather than "the traders…" may be taken to describe the actions only of one or more but not all of the traders.

101. Furthermore, as we have observed, at paragraphs 5.4 (c) (ii) and 6.13 (d) of the Final Notice, there are findings as to concealment of losses which are clearly directed at all the traders. In those circumstances, in our view the reader of the Final Notice, reading that document alone, would conclude that the findings as to mismarking and the concealment of losses was a general finding applying to all of the traders, and in addition the notice gave particular examples which were findings against one or more but not all of the traders.

102. We therefore conclude that the first stage of the *Macris* test is satisfied and that there is a "key or pointer" to particular individuals separate from the Bank in the Final notice, namely those who answer the description of a "trader on the SCP".

Stage two of the Macris test

103. Mr Stanley submits that reference to the material available when the Final Notice was published is not sufficient to identify Mr Grout. This material indicated that Mr Grout had been in various ways involved with the SCP, notably in relation to way the portfolio was marked. The JP Morgan internal report does not take matters any further because it was anonymised and whilst other material might lead readers to speculate that some of the criticisms in the Final Notice might involve activities in which Mr Grout would have been involved, to rely on that material would essentially fall into the error identified by the tribunal in *Watts.*

104. Mr Stanley submits that since it can hardly be said that every reference to "traders" is a reference to Mr Grout nor that criticism is of "traders" are a criticism of all the SCP traders, Mr Grout needs to show that specific instances the Final Notice would be understood as being directed at him specifically. All the evidence adduced really shows is that in the light of the publicly available information relevant readers might think it possible that some aspects of the Final Notice related to him. That, in Mr Stanley's submission, falls some way short of establishing identification.

105. Given the prominence of Mr Iksil's name in the market, Mr Stanley submits that relevant readers would certainly understand that many references to "traders" did not refer to Mr Grout, and that many of them were likely to refer to Mr Iksil. Relevant readers would certainly not approach the Final Notice with any preconception or predisposition to understand reference to "traders" as being to Mr Grout. If, looking at the material, the relevant reader was in doubt which of Mr Iksil or Mr Grout was being referred to in any particular instance it cannot be said that Mr Grout was identified. Although the publicly available information at the time of the publication

of the Final Notice did indicate that Mr Grout had a role in relation to marking it made it clear that others (and in particular Mr Iksil and Mr Martin-Artajo) had critical roles in determining what marks should be applied. It was also clear from material that both Mr Buraya and Mr de Sangues had a role in relation to valuation. Relevant readers would not therefore have inferred that any reference to traders carrying out valuations was a reference to Mr Grout. In summary, Mr Stanley submits, relevant readers would not have understood references to "traders", either generally or in any particular case, to concern Mr Grout specifically. They would have been understood as generic references to an ill-defined group which might or might not include Mr Grout in any particular case. That, Mr Stanley submits, does not amount to identification.

106. In our view there can be no doubt that relevant readers would have known at the time of the publication of the Final Notice that Mr Grout was one of "the traders on the SCP" referred to in the Final Notice. This is both because of our findings at [69] above and also the article in the Financial Times referred to at [85] above.

107. Relevant readers would also have known that Mr Grout was junior to Mr Iksil, as was apparent from the Financial Times article and the Huffington Post Article referred to at [82] to [84] above. Also, as a result of our findings at [70] and [71] above and reading together the Bank's internal report with the PSI Report, the relevant reader would have concluded that Mr Grout was responsible on a day-to-day basis for estimating the value of each position in the SCP and that it was alleged that Mr Grout may not always have assigned a value which reflected the fair value. There was nothing in any of the material available to the relevant reader that we have seen that would suggest that anyone other than Mr Grout was in that position. This follows from our findings at [76] above and is reinforced by our finding at [78] above as to the limited roles of the other two traders on the SCP.

108. The passages from the PSI Report referred to at [79] above would have confirmed the allegations that Mr Grout under Mr Iksil's direction was marking positions otherwise than at fair value. As we found at [81] above, putting together the Bank's internal report and the passages from the PSI Report that we refer to, the relevant reader would have the clear conclusion that there were allegations that it was Mr Grout who was involved in preparing the valuations designed to conceal losses.

109. Therefore, when the relevant reader comes to read the Final Notice, his knowledge as to the particular allegations directed at Mr Grout having been refreshed by the recent publication of the DOJ Complaint and the SEC Complaint and the associated press comment, as we found at [88] above, in our view he would reasonably make the following conclusions as to certain of the passages in that Final Notice.

110. First, in relation to paragraph 2.8, the relevant reader would have concluded that Mr Grout, under the direction of Mr Iksil, began in March 2012 to mark positions in a noticeably favourable manner which had the effect of concealing the scale of the losses arising in the SCP from CIO Senior Management.

111. Secondly, in relation to paragraph 2.10, the relevant reader would have concluded that the Authority had made a finding that Mr Grout under direction from Mr Iksil was marking positions aggressively and deliberately mismarked the SCP in order to conceal what "one trader" believed to be genuine losses.

112. Thirdly, in relation to paragraph 2.12, relevant readers would have concluded that the Authority had made a finding that Mr Iksil and Mr Grout together sought to influence the independent prices used by the CIO's Valuation Control Group.

113. Fourthly, in relation to paragraph 4.55, relevant readers would have concluded that the Authority's allegations against "traders on the SCP" contained in this paragraph were findings that Mr Grout under the direction of Mr Iksil had "subverted the month-end valuation control process and "concealed losses from CIO Senior Management by mismarking the SCP."

114. Fifthly, in relation to paragraph 4.76 and 5.8, relevant readers would have concluded that Mr Grout was one of the "traders on the SCP" who the Authority found had entered into transactions which constituted a failure to observe proper standards of market conduct, in the context of the notice as a whole, that reference being one from which a relevant reader could reasonably conclude that Mr Grout amongst others was being talked about.

115. Finally, for the reasons we have given in relation to our conclusions on Stage one of the *Macris* test, relevant readers would have concluded that because of the findings in paragraphs 5.4 (c) (ii) and 6.13(d) the Authority had found that all the traders to some degree were involved in the alleged mismarking and subversion of the valuation process with the intention of concealing losses.

116. It follows from that analysis that we must reject Mr Stanley's submissions. In our view Mr Grout has satisfied us that the specific instances referred to at [110] to [115] above are directed at him specifically and the relevant reader would know more than that it was possible that some aspects of the Final Notice related to him. In our view by reference to the external material the relevant reader would have gone much further than that and would reasonably conclude that the persons referred to included Mr Grout.

117. From that external material and their own knowledge as to the personnel involved with the SCP and their roles, relevant readers would also have understood the respective roles of Mr Iksil and Mr Grout and therefore have concluded that the findings in the Final Notice as to mismarking and the concealment of losses involved findings as to behaviour on the part of Mr Grout. For the reasons we have given, relevant readers would not have reasonably concluded that Mr Buraya and Mr de Sangues had a prominent role in relation to those matters although relevant readers may have concluded that they knew what was going on.

118. We therefore conclude that Mr Grout has satisfied us that references in the Final Notice to "the traders on the SCP" and "traders on the SCP" identify him in the relevant sense and manner, as provided for in s 394 (4) of the Act.

119. We make no conclusions at this stage as to whether the references to "a trader" or "one of the traders" would be reasonably believed by the relevant reader to be a reference to Mr Grout or any of the other traders. We had no specific submissions on those matters but it is open to Mr Grout to make submissions in that regard on the substantive hearing of the reference.

Prejudice

120. Mr Stanley is correct in his submission that prejudice depends on the extent of identification, and what passages the identification relates to. He is also correct that a number of the passages which refer to traders on the SCP contain nothing prejudicial at all. In particular, Mr Stanley submits that in the five places in the Final Notice where there is a reference to "a trader" or "one of the traders" contain nothing prejudicial at all. He submits that had those passages included Mr Grout's name they would not have been prejudicial to him.

121. Taken in isolation the passages concerned do not appear on the face to be prejudicial, but that may not be the case when read in the context of the whole paragraph in which they appear, which is alongside other passages which may be prejudicial. As we did not hear submissions on this point and because, as mentioned below, we have found some passages that are clearly prejudicial, we come to no conclusion on this point at this stage and leave it to be determined on the hearing of the substantive reference.

122. Mr Stanley, however, does accept that if we conclude (as we have done) that references to the collective terms "traders on the SCP" and "the traders on the SCP" are to be read as references to Mr Grout then the Final Notice clearly does contain passages which are prejudicial to Mr Grout. Mr Lissack is correct in his submission that prejudice in this context means no more than criticism. It is quite clear that in relation to the passages referred to at [110] to [115] above that those passages do contain criticism of the behaviour of the persons identified and accordingly since we have found that Mr Grout has been identified in those passages he has clearly been prejudiced by them.

123. We have not undertaken the exercise of examining every reference to "traders on the SCP" or "the traders on the SCP" to determine whether each is to be regarded as prejudicial to Mr Grout and we did not receive detailed submissions with regard to each of those references. We suspect that a considerable number will not be prejudicial but having found that a significant number of references are prejudicial and that therefore Mr Grout's reference will proceed in our view the appropriate course is for this issue to be dealt with in detail in the pleadings.

Conclusion

124. We conclude that the matters included in the Decision Notice identified Mr Grout in the relevant sense and manner, as provided in s 394 (4) of the Act, certain of those matters are prejudicial to Mr Grout and the preliminary issue is decided in his favour.

125. The parties have previously agreed that these proceedings should be stayed pending the judgment of the Supreme Court in *Macris*. The stay was lifted to the extent of permitting the preliminary issue to be determined but they now remain stayed until the release of the Supreme Court's judgment.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 07 JULY 2016

APPENDIX

Para No.	Reference to the traders
2.2	"As losses began to mount during 2012, those flaws **allowed traders on the SCP to conceal them through mismarking the SCP's positions**. At month-end in February 2012, a substantial amount of trading was undertaken on the IG9 10 year index. One of the purposes of part of this trading was to "limit the damage" to the SCP."
2.8	"From 2007, **at the direction of SCP management, the traders on the SCP's approach to marking the SCP's positions was such that they provided an estimate of what they, the traders, thought the position was worth**, rather than necessarily picking the mid of what the market thought the positions were worth. In February and March 2012 as the SCP began to lose substantial amounts of money, **traders on the SCP began to mark their positions in a noticeably favourable manner**. At the direction of SCP management, they priced the positions at the most beneficial end of the bid-ask spread. This had the effect of making the SCP appear more profitable and **enabled the traders to conceal the scale of the losses arising in the SCP from CIO Senior Management**."
2.9	The IG9 10 year index was the biggest contributor to the profit and loss in the SCP. As February 2012 month-end approached, **traders on the SCP, with the knowledge of SCP management, engaged in substantial trading in that index,** in particular on 29 February. One of the purposes of part of this trading was to "limit the damage" to the SCP. This could have been achieved if the market price of the index moved closer to the SCP's mark.
2.10	By March 2012, **it was clear to the traders on the SCP** that the adverse market moves were continuing against the SCP's positions. **In order to conceal this from CIO Senior Management, traders on the SCP continued to mark aggressively**. By mid-March, **they had gone further**

	and, **at the direction of SCP management, deliberately mismarked the SCP in order to conceal what one trader believed** to be genuine losses. On 16 March 2012, **the traders calculated** that the losses appeared to be understated by almost $500 million, based on **their estimation** of market mid-prices. Nonetheless on that day the portfolio only showed a loss of $4 million in its internal reporting to CIO Senior Management.
2.11	Shortly thereafter, **CIO Senior Management began to engage with** the trading problems arising in **the SCP and its traders were ordered** to stop trading. The SCP's true losses continued to be concealed from CIO Senior Management by mismarking, although the reported losses within the SCP by that date were substantial and there had been further risk limit breaches.
2.12	These flaws enabled interference with the month-end valuation process conducted by CIO VCG, a process which was intended to act as a control over the way **traders on the SCP marked** the portfolio. In February 2012, **traders on the SCP deliberately sought** to narrow the distance between their estimation of the portfolio's worth and CIO VCG's assessment, by seeking to influence the independent prices used by CIO VCG.
2.17	However, the valuation validation review which was undertaken failed to uncover the extent of the valuation problems present in the SCP. Work undertaken by the Firm's Corporate Controller's office did not adequately analyse all of the relevant issues and relied partly on **information obtained** from SCP management**, traders on the SCP** and CIO VCG personnel, the people whose valuations the Firm was assessing.
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.
4.15	However, **traders on the SCP noted** that $5 billion of the reduction could be achieved by changing the methodology used to calculate RWA (a project SCP management had been working on since 2011). In particular **they** identified that a $1 billion reduction in RWA would result from the proposed remodelling of the way Value at Risk ("VaR") was calculated for the SCP.
4.18	On 19 January 2012, the SCP suffered a loss of $50 million as a result of Eastman Kodak filing for bankruptcy. **CIO Senior Management were told by the traders on the SCP that the SCP was not well positioned for this credit default event**, **because the traders believed that certain of the protection the SCP had against this default had expired in December**

	2011 and had not been renewed.
4.20	Market conditions caused the SCP to continue to lose money during January 2012. By 26 January 2012**, traders on the SCP believed** the year to date losses to be around $100 million and anticipated a further $300 million in losses might be forthcoming.
4.21	Selling the protection earned premiums, which helped offset the cost of buying protection on the high yield indices, **and traders on the SCP believed that this would also assist in balancing the SCP within an RWA reduction plan**.
4.22	The strategy was duly implemented with no objection from CIO Senior Management. By the end of January 2012, **traders on the SCP had increased** its notional positions in the IG9 10 year index by $20 billion, **despite noting concern about the increasing size to SCP management**: "[T]he control of the drawdown now is generating issues that make the book only bigger in notionals...[T]he notionals become scary and [the] upside is limited unless we have really unexpected scenarios. In the meantime we face larger and larger drawdown pressure versus the risk due to notional increase".
4.23	Nonetheless, the strategy was pursued during February and March 2012, despite ever increasing losses. By the end of February, the SCP had reported $180 million of year to date losses, **more than half the estimated maximum loss that traders on the SCP had forecast in January 2012 for the entire year**. By the end of March the reported losses had increased to $568 million, although the actual figure may have been hundreds of millions of dollars higher (see paragraphs 4.63 to 4.65 below). At the same time, the notional size of the SCP had increased to $157 billion by 30 March 2012.
4.25	Thereafter CIO Senior Management **ordered the traders on the SCP to stop** trading, **due to a loss of faith in the traders' abilities** to achieve the SCP's objectives. On 30 March 2012, CIO London management **sent an email** entitled "synthetic credit - crisis action plan".
4.26	The SCP's very large position in parts of the credit derivatives market made it more vulnerable to market moves and served to make its positions obvious to other market participants. On 6 April 2012 an article published in the Wall Street Journal (-London Whale' Rattles Debt Market") drew attention to the size of the SCP's position in the IG9. The market reacted to the speculation about the SCP's positions and on 10 April 2013, the first trading day after the article appeared, the SCP recorded mark to market losses of $412 million, **although traders on the SCP had estimated earlier in the day** that the losses that day could be in the region of $700 million.
4.33	On 10 January CIO Risk also **notified traders on the SCP** and SCP management that the SCP's VaR had increased by approximately 25% between 21 December 2011 and 9 January 2012 due to its increased positions, and that the SCP alone was now using $93 million of CIO's $95

	million VaR limit.
4.44	**Forwarding the results on to SCP management and traders on the SCP**, CIO Risk noted: "We got some CRM numbers and they look like garbage as far as I can tell, 2-3x what we saw before. They came from the technology guy running the process, so probably [Quantitative Research] has not even reviewed the results".
4.47	The CRM figures were part of a broader picture that could have led to an earlier appreciation of **the risks being run by traders on the SCP**. Although the CRM figures were investigated, the Firm's ultimate response demonstrates the inadequacy of the monitoring of that risk within CIO.
4.51	Firm Senior Management has indicated that risk limits are generally set at a low level deliberately, in order to trigger breaches of the limit and therefore encourage debate about the cause of the limit breach. However the Authority has found no evidence to indicate any such debate or analysis was routine for the SCP. In fact, instead of operating as warning signs of a potential and growing problem, **CIO Senior Management's approach to risk measurements allowed the traders on the SCP to take increasingly risky positions.**
4.55	This section (paragraphs 4.55 to 4.70) sets out facts relevant to the method by which the positions on the SCP were marked on a daily basis. In the first quarter of 2012 the marks became more aggressive, in February 2012 **traders on the SCP subverted** the month-end valuation control process, and by March 2012 **traders on the SCP** and SCP management concealed losses from CIO Senior Management by mismarking the SCP.
4.57	The SCP was required to be marked to market on a daily basis. **This process was undertaken each day by traders on the SCP** in order to provide a profit and loss estimate to CIO Senior Management, CIO London management and SCP management. **The marks were inputted into the Firm's internal systems** in order to produce reports for this purpose. At the end of every month the marks were tested by CIO VCG, in order to verify the valuations ascribed to the positions and enter those valuations into the Firm's books and records.
4.58	**Traders on the SCP were permitted to mark a complex derivatives portfolio worth billions of dollars**. The Firm's expectations were that the **traders on the SCP would seek to comply with the requirements of US GAAP and the Firm considered the traders on the SCP to have sufficient trading and marking experience**. However, **the traders were unfamiliar with the relevant US GAAP provisions** and the marking standards it imposed. The Firm **never provided the traders on the SCP with any formal training, guidance or documented policy as to how the SCP should be marked**. **They were not directed** to use relevant independent data sources.

4.59	**SCP management directed traders on the SCP to mark their positions** such that they did not necessarily pick the mid of what the market thought the positions were worth (which was described by SCP management as ***"pressing F9 like a monkey")*** but instead provided **an estimate of what they, the traders, thought the positions were worth.**
4.60	In February 2012, the aggregate difference between mid-market prices and the SCP's marks began to increase significantly. **Traders on the SCP began to mark their positions more aggressively** (moving away from the mid towards the more favourable end of the bid-ask spread). CIO VCG recognised the differences but did not notice this as a trend and therefore **did not challenge the traders effectively**.
4.61	**Traders on the SCP provided additional broker runs to CIO VCG** which persuaded CIO VCG to reduce the difference between the SCP's marks and CIO VCG's own independent marks from at least $31 million to $11 million on 1 March 2012. **The traders considered** they were producing "better" broker quotes for CIO VCG to "justify" the marks. Although **traders on the SCP saw** CIO VCG as a control function, **one trader considered** that accepting CIO VCG's proposed adjustments to the marks was not **"the way things worked at CIO".** The CIO VCG process was flawed and in addition was easily subverted at February 2012 month-end.
4.62	In March 2012, as the losses on the SCP mounted, **SCP management gave a further direction as to how the SCP should be marked, telling traders on the SCP to ignore the losses arising on the portfolio through the underperformance of the trading strategy and only record those which could be explained by a particular market event. In essence, this amounted to an instruction to mismark the portfolio in order to conceal mark to market losses from CIO Senior Management**
4.63	Between 12 and 19 March 2012, **traders on the SCP kept a spreadsheet** recording the difference between the estimated mid-market prices and the marks that had been applied to the SCP, broken down into certain positions. One of the purposes of this spreadsheet was to inform SCP management of the size of the difference.....Nonetheless the profit and loss estimate produced by traders on the SCP that day showed a loss of only $4 million.
4.63	... On 12 March 2012, this spreadsheet showed that the difference amounted to $203 million. By 16 March 2012, the difference had risen to $498 million, **and one trader had formed the view that this amount was now an actual loss that should be reported**. Nonetheless the profit and loss estimate **produced by traders on the SCP that day** showed a loss of only $4 million.
4.64	On 20 March 2012, the difference between the mid-market prices and the marks being applied to the SCP was so large, that the bid-ask spreads **began to give traders on the SCP a "headache"**. In order to keep within the bid-ask spread, **the traders on the SCP showed** a loss of $40 million. Had the full difference been reported on 20 March 2012, **according to the spreadsheet maintained by the traders on the SCP**, the year to date loss for the SCP would

	have been over $500 million.
4.65	On the last trading day of March 2012, **traders on the SCP were aware that, as usual, the marks they ascribed to the SCP that day would be reviewed by CIO VCG**. Given the increased scrutiny over the SCP following **CIO Senior Management's instruction to stop trading**, the profit or loss figure for the day was also of particular interest to CIO Senior Management. SCP **management instructed one of the traders to remain in the office, after the close of the London markets, in order to review the prices in the New York market in the hope of getting "any better numbers".** The marks to be applied were the subject of repeated discussions involving SCP management, who requested that the loss shown on the SCP should be as low as possible. The losses reported to CIO Senior Management at March 2012 month-end were $138 million for the day and $583 million for the year. This did not however include the hundreds of millions of dollars of losses **concealed from CIO Senior Management by traders on the SCP, at the instruction of SCP management.**
4.66	During April 2012 the instruction by SCP management to conceal unexplained losses from CIO Senior Management developed into a reverse engineering of the profit and loss figures. **Traders on the SCP were given a headline profit and loss number by SCP management and together with SCP management would move the prices to match.**
4.67	On Friday 6 April 2012, the article published in the Wall Street Journal highlighted the size of the Firm's positions in the IG9 10 year index, creating further sensitivity to market moves. Activity in the US markets on Monday 9 April 2012 indicated that the SCP might suffer a massive loss as a result. The SCP was not marked again until Tuesday 10 April (owing to the Easter Monday Bank Holiday in the UK) at which point **traders on the SCP could no longer conceal** the losses in full.
4.68	In the early afternoon of Tuesday 10 April 2012 **it appeared to traders on the SCP that the losses that day alone might amount to $600-700 million**. An estimated range of $400-600 million was communicated to CIO London management as the result for the day. Instead, a loss of $5 million was initially reported. A senior risk officer, who was unaware of that report, was informed by SCP management that the reason for the estimated range was dislocation in the market. The senior risk officer then told SCP management to reflect the market price and the losses arising therefrom. Subsequently**, SCP management directed the traders on the SCP to show a $400 million loss for the day.** However, this figure still did not include the losses **concealed by traders on the SCP** since mid-March and was more favourable than the expectation provided to CIO London management earlier that day. The explanation given for the difference was that market prices had improved during the day.
4.71	This section (paragraphs 4.71 to 4.77) describes trading at month-end in February 2012. **Traders on the SCP sold** significant quantities of protection on the IG9 10 year index, in particular on 29 February 2012 (with the majority of the trading conducted after the close of trading in

	London and before the end of the trading day in New York).
4.72	**Traders on the SCP** were protection sellers on this index, so a lower price for the index would have a positive effect on their mark to market profit and loss.
4.73	On Monday, 27 February 2012, **traders on the SCP sold an approximately $1 billion notional amount of the IG9 10 year index, approximately $2 billion on 28 February and approximately $7.2 billion on 29 February. Between 27 February and the London close on 29 February, the trades were in general executed at declining prices (ranging from 121 to 113 basis points).** After the London close and towards the end of the New York trading day on 29 February, **traders on the SCP sold approximately $4.6 billion worth of protection at a price of 113.5 basis points in under three hours (primarily in response to bids from other market participants).**
4.74	As at the close of trading on Friday, 24 February 2012 the difference between the market price of the IG9 10 year index (as recorded by Bloomberg) **and the mark ascribed by traders on the SCP** was 3.19 basis points (118.69 (Bloomberg) vs. 115.5 (SCP)). By close of trading on Wednesday, 29 February 2012, the Bloomberg price had moved from 118.69 to 114.22, a move of 4.47 basis points. The difference between the market price (as recorded by Bloomberg) and the marks was 1.72 basis points (114.22 (Bloomberg) vs. 112.5 (SCP)). This fall in the market price reduced the SCP's mark to market losses by around $155 million. **Traders on the SCP marked the position at February month-end at 112.5 basis points**. The difference between the market price and the marks reduced by $51 million.
4.76	The Authority concludes that at month-end in February 2012, **traders on the SCP (with the knowledge of SCP management) entered into transactions on the IG9 10 year index**, in particular on 29 February 2012. One of the purposes of part of this trading was to "limit the damage" to the SCP. This could have been achieved if the market price of the index moved closer to the SCP's mark. The size of positions meant that a small movement in price had a large effect on the profit and loss position. The size and manner of the trading had the potential to affect the price of the IG9 10 year index at a time when the SCP stood to benefit from a lower price. Taken as a whole this constituted a failure to observe proper standards of market conduct.
4.79	At month-end **the marks used by traders on the SCP were assessed by CIO VCG**. The role of CIO VCG was to ensure that the positions held by CIO were marked at fair value at the end of each month in accordance with US GAAP. This consisted of ensuring that positions were marked at an observable market rate within an applicable threshold.
4.84	In sourcing inputs to demonstrate observable market rates for the SCP, CIO VCG was susceptible to influence from information **supplied by traders on the SCP**. **CIO VCG would speak to traders on the SCP** prior to month-end to obtain market colour. **CIO VCG would also discuss** the results of its price testing **with traders on the SCP**, including proposed adjustments. If

	traders felt any of the independent prices were incorrect, **they would provide further evidence**, for example additional broker quotes, in order to "justify" their marks. CIO VCG did not automatically accept the additional quotes, save where the broker quotes reflected a recently traded price for a product. The Authority has seen no evidence that **CIO VCG would challenge traders on the SCP** as to why other broker quotes provided were a better demonstration of observable market rates than the independent prices sourced by CIO VCG.
4.85	For the February 2012 valuation, **prices from 1 March 2012 were supplied by traders on the SCP and used by CIO VCG**, even though this was after the month-end. This was the point at which the market prices were the most favourable to the SCP's positions... In addition (as set out at paragraph 4.61), the control process performed by CIO VCG was subverted at February 2012 **month-end as a result of improper trader influence**.
4.86	CIO VCG routinely obtained independent prices for indices from Markit, (an independent third party pricing service). CIO VCG would obtain independent prices from Markit, but to the extent that **additional evidence was provided by traders on the SCP it could be used by CIO VCG** to overwrite the Markit price and replace it with one of the **trader supplied** broker prices in the price testing spreadsheet.
4.87	An average of broker quotes was used for tranche pricing. When **additional evidence was provided by traders on the SCP** it could be included by CIO VCG in the averaging process.
4.100	During March 2012, **traders on the SCP** and SCP management had become **increasingly paranoid** that losses were arising because market participants were giving indicative prices to CIO which were not representative of the price at which the market participants were in fact willing to transact. **Traders on the SCP and SCP management believed** that the Investment Bank had been leaking their positions to the market and deliberately "framing" prices against them (a subsequent investigation by Compliance in London concluded this belief was erroneous).
4.101	In mid-March 2012, as the SCP failed to reduce its RWA, 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.
4.107(b)	In establishing the valuation validation exercise, various work streams were put into place including... (b) a review, **conducted by the Corporate Controller's office, of the valuations assigned by traders and CIO VCG to the positions in the SCP at March 2012 month-end**...
4.111	The review by the Controller's office u**sed information obtained from traders on the SCP**, SCP management, CIO VCG and CIO Finance. The analysis noted that although the month-end marks for 30 March 2012 were aggressive relative to the bid-ask spread, they were predominately within the thresholds used by CIO VCG and were within the range of reasonable fair values for the instruments in question. As a result, the analysis

	concluded the marks were consistent with US GAAP.
4.112	There were flaws in the review by the Controller's office. First, **it relied on explanations for the valuations provided by traders on the SCP**, including the timing difference between the close of the London and New York markets, general market volatility in late March and early April, intra-day volatility which was said to cause significant differences between maximum and minimum prices, dislocation in the market, and a lack of confidence as to how independent consensus pricing was determined. In retrospect **the reliance placed on the traders' explanations** was too great.
4.123(a)	There was a difference of $767 million between the IB VCG valuation of the SCP's positions and **the traders on the SCP's marks.**
4.123(b)	There was a difference of $568 million between Internal Audit's valuation of the SCP's positions and **the traders on the SCP's marks.**
4.123(c)	Internal Audit identified that, had the thresholds been applied appropriately by CIO VCG, **the traders' valuation of the SCP** should have been reduced by $307 million.
4.124	The Regulatory Filing was made on the basis that the SCP had been **valued by the traders on the SCP** and CIO VCG in accordance with US GAAP.
4.128	...As a result of a complaint by SCP management about the Investment Bank allegedly leaking the SCP's positions to other market participants, prior to 10 May 2012 **Compliance in London had listened to a crucial call between traders on the SCP and SCP management**, subsequently discovered to be about mismarking in order to conceal losses on the portfolio. Compliance in London had considered the discussion in the call to relate to how losses were being communicated, rather than suggesting that losses were being concealed.
4.129	Following the Regulatory Filing, the Firm commenced a further review of information relating to the SCP. The Firm commissioned a management task force review into the losses incurred by CIO**. This included an extended review of relevant communications and interviews with traders on the SCP and SCP management.** When the further reviews commenced after 10 May 2012, Compliance in London were involved and soon after notified the task force review of the relevant telephone call.
4.131	Firm Senior Management did not inform the Group's Audit Committee of the details of the work undertaken to ascertain the legitimacy of the valuation of the SCP by the Investment Bank or the details of Internal Audit's review. **Nor were the Audit Committee made aware of trader involvement in the valuation process or the migration of the marks to the advantageous end of the bid-ask spread.**
4.134	**The Firm also interviewed traders on the SCP and SCP management in the period after the Regulatory Filing was made. One trader** was interviewed on 14 and 15 June and other relevant personnel were interviewed about the marking process towards the end of June 2012. The results of these interviews together with the documentary and tape recorded

	evidence **led the Firm to conclude that it could not rely on the traders' integrity which compromised the reliability of the marks.**
4.138(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.
4.142(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.**
4.145	On 23 May 2012, the Authority informed the Firm that its "appetite for further surprises was close to zero". In late May and early June the Authority continued to meet with the Firm to discuss the SCP. Many of the meetings related to ensuring that the risks inherent in the portfolio were being adequately controlled. As to valuation issues, in a meeting on 6 June, **the Firm indicated to the Authority that traders on the SCP had been "marking to where they observed".**
4.146	On 20 June 2012 Firm Senior Management met with the Authority to discuss the Firm's internal investigation into CIO. By this stage, the Firm's task force review committee had been notified of potential problems regarding marking within the SCP (including the evidence noted by Compliance in London and referred to at paragraph 4.128), and **the Firm's legal advisors had begun to conduct interviews with traders on the SCP**.
5.4(c)(ii)	The Firm failed to price certain positions held in the SCP accurately and failed to prevent or detect mismarking in a timely manner (in the first quarter of 2012) (see paragraphs 4.55 to 4.70 and 4.78 to 4.98) as a result of.... (ii) **the traders on the SCP and SCP management concealing losses**;
5.6(b)(i)	In particular, t**he Firm from 2007...(i) failed to provide traders on the SCP with any formal training, guidance or documented policy as to how the Firm expected them to mark their positions...**
5.8	By virtue of the **actions of traders on the SCP and with the knowledge of SCP management**, on 29 February 2012, the Firm engaged in a substantial amount of trading by selling protection on the IG9 10 year index. The Authority considers that one of the purposes of part of this trading was to "limit the damage" to the SCP. This could have been achieved if the market price of the index moved closer to the SCP's mark. The size and manner of the trading had the potential to affect the price of the IG9 10 year index at a time when the SCP stood to benefit from a lower price (see paragraphs 4.71 to 4.77). As a result of these matters the Firm failed to observe proper standards of market conduct.
5.12	The failings set out above are particularly serious because they **demonstrate shortcomings from the SCP traders through to Firm Senior Management**. Further, there were multiple issues and breaches, including flaws in the CIO VCG process, that pre-existed the problems in

	the first quarter of 2012.
6.13(a)	In assessing the seriousness level, the Authority takes into account various factors which reflect the impact and nature of the breach, and whether it was committed deliberately or recklessly. DEPP 6.5AG(11) lists factors likely to be considered 'level 4 or 5 factors'. Of these, the Authority considers the following factors to be relevant: (a) Whether the breach revealed serious or systemic weaknesses in the firm's procedures or in the management systems or internal controls relating to all or part of the firm's business (DEPP 6.5A.2G(11)(b)). The nature of the breach is relevant to this factor (DEPP 6.5A. 2G(7)(a),(b),(c),(d)). The nature of the breaches is particularly serious given the significant number of breaches in this case, some of which continued for a number of years. **The most serious breaches (in 2012) involved failings throughout the Firm, <u>from traders on the SCP</u> through SCP management, CIO London management and CIO Senior Management to the Firm's Senior Management.** These breaches therefore revealed serious weaknesses in the Firm's procedures, management systems and internal controls relating to part of the Firm's business. During 2012, the Firm's Senior Management and CIO Senior Management became aware of serious warning signs indicating operational failures and control weaknesses.
6.13(d)	(d) Whether the breach was committed deliberately (DEPP 6.5A.2G(11)(f)). The mismarking (Principle 2) and market misconduct (Principle 5) were deliberate breaches. One of the purposes of part of the February month-end trading was to "limit the damage" to the SCP. This could have been achieved if the market price of the index moved closer to the SCP's mark. The SCP was mismarked in order to conceal mounting losses, at the instruction of SCP management. **The valuation control process was also subverted by the <u>traders on the SCP</u> with the intention of concealing losses at month-end.**