Article written by Shail Patel on Tuesday 6th February 2018.

FCA v Grout [2018] EWCA Civ 71: Anonymous or Synonymous?

The Court of Appeal confirms the restrictive approach to third party rights under FCA Notices adopted by the Supreme Court in *Macris v FCA* [2017] UKSC 19

The Issue – Third Party Rights

When the Financial Conduct Authority publishes a notice setting out its case against a regulated firm, it is invariably necessary for it to refer to the deeds and intentions of third parties; be they directors, managers, employees, or contractors. After all, a firm can only act by the agency of humans.

Under sections 393 and 394 of FSMA, where such a notice

(a) identifies a person (``the third party'') other than the person to whom the notice is given, and (b) in the opinion of the regulator giving notice, is prejudicial to the third party, a copy of the notice must be given to the third party.

If a third party is entitled to the notice under these provisions, he can make representations to the FCA and indeed the Upper Tribunal.

Two issues arise.

The narrow issue is: when is a third party "identified" such that he acquires such rights? Must he be named? Or will something else do?

The wider issue engaged by that narrow issue is: when should the need for regulatory efficiency give way to rights of individual fairness and due process?

Macris v FCA [2017] UKSC 19

The present case and *Macris* both arose out of enforcement action against JP Morgan Chase arising out of the collapse of a synthetic credit portfolio ("**SCP**"). Mr Macris was "CIO" of the unit. Mr Grout was a trader in the unit.

In *Macris* in March 2017 the Supreme Court laid down an undoubtedly narrow test for what constitutes "identification" so as to create third party rights. Lord Sumption stated (para 11):-

In my opinion, a person is identified in a notice under section 393 if he is identified by name or by a synonym for him, such as his office or job title. In the case of a synonym, it must be apparent from the notice itself that it could apply to only one person and that person must be identifiable from information which is either in the notice or publicly available elsewhere. However, resort to information publicly available elsewhere is permissible only where it enables one to interpret (as opposed to supplementing) the language of the notice.

Similarly Lord Neuberger thought it necessary for the third party to show that:

(i) his position or office is mentioned, (ii) he is the sole holder of that position or office, and (iii) reference by members of the public to freely and publicly available sources of information would easily reveal the name of that individual by reference to his position or office.

Mr Grout's Argument

By the time Mr Grout reached the Court of Appeal the Supreme Court had decided *Macris*. This was an unpromising start, but undeterred, he argued that even the narrow *Macris* test was met because:-

1. References in the notice to "*the traders on the SCP"* were really to 'each and every' such trader and thus necessarily referred to Mr Grout.

2. There were references in the notice to the conduct of "*one of the traders"*, i.e. a single trader, which along with publicly available information, identified Mr Grout.

3. There were references in the notice to the mental states of individual traders which again, along with publicly available information, identified Mr Grout.

The CA's Decision

The Court of Appeal did not agree.

Lord Sumption's test required the reference to be "*synonymous*" with the third party. "*The traders on the SCP*" was not a synonym for Mr Grout. Indeed Longmore LJ thought (without deciding the point) that the expressions "*all the traders on the SCP"* or "*each and every trader"* would still have failed to satisfy the test.

As to "*one of the traders"*, this was deliberately vague and could be described as "*anonymous"* rather than "*synonymous*". It was also relevant that where a trader was singled out, it was in a section prejudicial to CIO Management (indeed on one view Mr Macris) but not to the trader referred to.

The third argument was also rejected; the fact that an individual must have a mental state does not mean a reference to the mental states of various individuals was enough to identify a particular one (following *Macris* at para 17).

Further, to adopt Lord Neuberger's test (above), as Mr Grout was not the sole holder of the position of "trader" it was unnecessary to move on to stage (iii) of the test and look at publicly available information. If it had been appropriate to do so however Longmore LJ thought it unlikely that "Joe public" would have recalled the details of articles in the FT some months earlier, let along known the details of investigations in the USA.

Accordingly, applying the *Macris* test, Mr Grout's case failed.

Some Thoughts

Firstly, in *Macris* Lord Wilson dissented on the basis that the majority decision paid too little regard to third party rights. Lord Mance also advocated a wider approach than the majority. Nevertheless the *Grout* decision shows little appetite in the Court of Appeal to row back from the strictures of *Macris*. For now, regulatory efficiency is the dominant factor, and in most cases it will be relatively easy for the FCA to avoid engaging third party rights.

Secondly Mr Grout's case plainly suffered from him being one of a number of "traders". What if there were only two? What if there were two and each such trader applied to intervene simultaneously? One can envisage situations where the literalist *Macris* approach makes little common sense.

Thirdly, where 'third parties' are Approved Persons or Senior Managers, the dynamic could well be different. With the FCA's stated intent of pursuing individual wrongdoers, they will increasingly be "first parties" and not "third parties". Case management of parallel proceedings against firms and individuals will become a key factor for their representatives.

Finally the somewhat lukewarm approach to third party procedural rights stands to be contrasted with the more robust approach to the rights of respondents; see my article on *Burns v FCA* [2017] EWCA Civ 214 here.