[2016] UKUT 0005 (TCC)
Reference number: FS/2015/0010 & 11

FINANCIAL SERVICES – preliminary hearing – third party rights – s 393 Financial Services and Markets Act 2000 – whether applicant identified in notice – no

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CHRISTOPHER ASHTON **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
JOHN WOODMAN
(TRIBUNAL MEMBER)

Sitting in public in London on 27 October 2015

Sara George, Partner, Stephenson Harwood 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 Ashton") was identified in two decision notices issued by the Authority. The first notice is that given by the Authority to UBS AG ("UBS") on 11 November 2014 (" UBS Notice") and the second notice is that given by the Authority to Barclays Bank PLC ("Barclays") on 20 May 2015 ("Barclays Notice").

2. The UBS Notice notified UBS that the Authority had decided to impose on it a financial penalty of £233,814,000 as a result of serious misconduct by UBS through, among other things, its failure to take reasonable care to organise its affairs responsibly and effectively with adequate risk management systems in relation to its G10 spot FX (foreign-exchange) voice trading operations in Zürich. The UBS Notice found that these failings allowed attempts to be made to manipulate foreign exchange rates and to trigger clients' stop loss orders for UBS's own benefit and the potential detriment of certain of its clients and other market participants and the inappropriate sharing of confidential information with traders at other firms, including specific client identities and information about clients' orders.

3. The Barclays Notice notified Barclays that the Authority had decided to impose on Barclays a financial penalty of £284,432,000 as a result of serious misconduct by Barclays through its failure to take reasonable care to organise its affairs responsibly and effectively with adequate risk management systems in relation to its London voice trading and sales operations in the FX market. The Barclays Notice found these failings allowed attempts to be made to manipulate foreign exchange rates and to trigger clients' stop loss orders for Barclays own benefit and the potential detriment of certain of its clients and other market participants and the inappropriate sharing of confidential information with traders at other firms, including specific client identities and information about clients' orders.

4. Although we were not given specific details in this case, the decision notices would each have been preceded by a warning notice and followed by a final notice, both on the same day, the abbreviated period being as a result of an agreed settlement with the relevant bank which involved it receiving a 30% discount on the financial penalty otherwise payable and the bank concerned agreeing not to exercise its right to refer the decision notice to the Tribunal.

5. Mr Ashton is a former employee of Barclays, holding the position of Global Head of G10 Voice Spot FX in London at some time during the period which is relevant for the purposes of this decision.

6. Mr Ashton complains that the Authority, in promulgating the warning notices, decision notices and final notices issued to the two banks concerned, has included reasons which identify him and are prejudicial to him and which he has had no opportunity to contest. By separate reference notices, both dated 5 June 2015, Mr Ashton has referred those matters to the Tribunal under s 393 (11) of the Financial Services and Markets Act 2000 ("FSMA").

7. 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.

8. 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."

9. In this case neither a copy of the relevant warning notices nor the decision notices concerned were given to Mr Ashton as the Authority took the view that none of the notices 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 it 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."

10. Mr Ashton accordingly made his references pursuant to s 393(11).

11. As Mr Ashton had not previously seen the decision notices he has based his complaint on the final notices which are presumed to be materially in the same form as the decision notices concerned, and the hearing of this preliminary issue has proceeded by reference to the final notices. References to the "UBS Notice" and the "Barclays Notice" in this decision should therefore be construed accordingly.

12. On 26 June 2015 the Tribunal directed the hearing of three preliminary issues in accordance with Rule 5(3) (e) of the Tribunal Procedure (Upper Tribunal) Rules 2008, namely (i) whether Mr Ashton was identified by the UBS Notice or the Barclays Notice, (ii) whether he was prejudiced by the notice concerned and (iii) whether he is entitled to the relief which he seeks in his references. The Tribunal also directed Mr Ashton 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.

13. The Authority does not accept that even if Mr Ashton is found to have been identified in the notices, that each and every matter in the relevant notice that identifies him is prejudicial to him. Neither does it accept that the remedies sought by Mr Ashton are in all respects within the jurisdiction of the Tribunal. Because of our findings on the identification issue, it is not necessary to deal with those issues in this decision.

The UBS Notice

14. The UBS Notice is a lengthy document dealing with misconduct by UBS over a period in excess of five years. For the purposes of this decision we are primarily concerned with the provisions in the UBS Notice which make findings in relation to an example of what is said to be UBS's attempts to manipulate the fixing of the rate determined by the European Central Bank for the exchange rate between Euros and US dollars.

15. At paragraph 4.14 of the UBS Notice the Authority refers to the use of chat rooms as a means of communication between traders at different banks in the following terms:

> "4.14. It was common practice during most of the Relevant Period for G10 spot FX traders at firms to use electronic messaging services, such as chat rooms, to communicate with traders at other firms. Whilst such communications are not of themselves inappropriate, the frequent and significant flow of information between traders at different firms increases the potential risk of traders engaging in collusive activity and sharing, amongst other things, confidential information. It is therefore especially important that firms exercise appropriate control and monitoring of such communications."

16. The following example of an attempt to manipulate the fix was given at paragraph 4.39 and 4.40 of the UBS Notice as follows:

> "4.39. An example of UBS's involvement in this behaviour occurred on one day within the Relevant Period when UBS attempted to manipulate the ECB fix in the EUR/USD currency pair. On this day, UBS had net client sell orders at the fix which meant that it would benefit if it was able to move the ECB fix rate lower. The chances of successfully manipulating the fix rate in this manner would be improved if UBS and other firms adopted trading strategies based upon the information they shared with each other about their net orders.
>
> 4.40. In the period between 12:35pm and 1:08pm on this day, traders at four different firms (including UBS) inappropriately disclosed to each other via a chat room details about their net orders in respect of the forthcoming ECB fix at 1:15pm in order to determine their trading strategies. The other three firms are referred to in this Final Notice as Firm A, B and C. UBS then participated in the series of actions described below in an attempt to manipulate the fix rate lower.
>
> (1) At 12:36pm, Firm A disclosed that it had net sell orders for the fix. At 12:37pm, Firm A disclosed that these net sell orders were EUR200 million. At 12:40pm, Firm A updated this figure to EUR175 million.

(2) At 12:36pm, UBS disclosed that it had net sell orders for the fix of EUR200 million. At 12:44pm, UBS disclosed that its net sell orders had increased to EUR250 million. Since UBS needed to sell Euros at the fix it would profit to the extent that the fix rate at which it bought Euros was lower than the average rate at which it sold Euros in the market.

(3) At 12:36pm, Firm B disclosed that it had net sell orders for the fix of EUR100 million and that another of its offices also had net sell orders.

(4) At 12:48pm, Firm A disclosed that its net sell orders had reduced to EUR100 million, but that it was *"...hopefully taking all the filth out for u..."*. The Authority considers that this statement referred to Firm A having netted off part of its net sell orders with smaller buy orders held by third parties, which might otherwise have traded in the opposite direction to UBS at the ECB fix. This is an example of Firm A *"clearing the decks"*.

(5) At 1:02pm, Firm A disclosed that it had sold EUR25 million to a client in a transaction separate to the fix but would remain EUR25 million short *("lose... shet [i.e. 25 million] though natch dont buy")*. The Authority considers that this statement referred to Firm A's intention not to buy this amount of Euros in the market immediately, but to take advantage of the anticipated downwards rate movement at the fix by only buying when the rate had dropped.

(6) In response, UBS disclosed that it had also sold EUR25 million to a client in a separate transaction. UBS inappropriately revealed the identity of the client to the chat room using a code known to the chat room participants. Firm B indicated that these short positions should be held for 12 minutes (i.e. until the ECB fix).

(7) At 1:03pm, Firm A disclosed that it had been trading in the market and its net sell orders at the fix had been reduced to EUR50 million *("i getting chipped away at a load of bank filth for the fix... back to bully [i.e. 50 million]... hopefully decks bit cleaner")*. The Authority considers this to refer to trades between Firm A and other market participants, whose buy orders might otherwise be traded in the opposite direction to UBS and Firm A at the fix. This is a further example of Firm A *"clearing the decks"*.

(8) At 1:04pm, UBS disclosed that it still had net sell orders for EUR200 million at the forthcoming ECB fix. UBS also stated that it had a separate short position of EUR50 million. At 1:05pm, Firm B disclosed that it also had a short position of EUR50 million.

(9) At 1:07pm, Firm C disclosed that it had net buy orders of EUR65 million at the forthcoming ECB fix. Firm C subsequently netted off with Firm A and Firm B, such that at 1:08pm Firm C disclosed that it only had EUR10 million left to buy in the opposite direction at the fix. This is an example of *"leaving you with the ammo"*. Firm B advised Firm C to *"go late"* (i.e. buy later when the rate would be lower).

(10) At 1:14pm, Firm B copied into the chat a comment made by UBS at 12:04pm that day describing an earlier fix as *"the best fix of my ubs career."*

> Firm B then said *"chalenge [sic]"* and Firm C added the comment *"stars aligned"."*

Footnotes referred to in the UBS Notice in the quotations set out above have been omitted in setting them out in this decision.

17. The basis of Mr Ashton's reference in respect of the UBS Notice is that Firm A as referred to in this passage is Barclays, that the quotes attributed to Firm A in those passages are his words and that from the notice and the information in the public domain at the time of the issue of the notice a relevant reader of the notice would reasonably conclude that references to Firm A in this passage are in fact references to Mr Ashton who had thus been identified in the UBS Notice.

The Barclays Notice

18. The Barclays Notice is a lengthy document dealing with misconduct by Barclays over a period of more than five years. For the purposes of this decision we are primarily concerned with the provisions in the Barclays Notice dealing with two matters, first an example of Barclays' attempt to manipulate the fix and secondly an example of an attempt to trigger a client stop loss order.

19. As with the UBS Notice, the Barclays Notice explains that traders would communicate with each other through chat rooms. Paragraph 4.52 of the Barclays Notice provides as follows in this respect:

> "4.52. This type of behaviour was typically facilitated by means of traders at different firms communicating through electronic messaging services (including chat rooms). These traders formed close, tight-knit groups or one-to-one relationships based on mutual benefit and often with a focus on particular currency pairs. Entry into some of these groups or relationships and the chat rooms used by them was closely controlled by the participants. Certain groups described themselves or were described by others using phrases such as *"the players"* or similar. In one group, a chat room participant referred to himself and others in the chat room as *"the 3 musketeers"* and commented *"we all die together"."*

20. Paragraph 4.55 then gives a typical example of how information obtained in a chat room would be used as follows:

> "4.55. These traders used this information to determine their trading strategies and depending on the circumstances to attempt to manipulate the fix in the desired direction. They did this by undertaking a number of actions, typically including one or more of the following (which would depend on the information disclosed and the traders involved):
>
> > (1) Traders in a chat room with net orders in the opposite direction to the desired movement at the fix sought before the fix to transact or *"net off"* their orders with third parties outside the chat room, rather than with other traders in the chat room. This maintained the volume of orders in the desired direction held by traders in the chat room and avoided orders being transacted in the opposite direction at the fix. Traders within the market have referred to this process as *"leaving you with the ammo"* or similar.

(2) Traders in a chat room with net orders in the same direction as the desired rate movement at the fix sought before the fix to do one or more of the following:

(a) Net off these orders with third parties outside the chat room, thereby reducing the volume of orders held by third parties that might otherwise be transacted at the fix in the opposite direction. Traders within the market have referred to this process as *"taking out the filth"* or *"clearing the decks"* or similar;

(b) Transfer these orders to a single trader in the chat room, thereby consolidating these orders in the hands of one trader. This potentially increased the likelihood of successfully manipulating the fix rate since that trader could exercise greater control over his trading strategy during the fix than a number of traders acting separately. Traders within the market have referred to this as *"giving you the ammo"* or similar; and/or

(c) Transact with third parties outside the chat room in order to increase the volume of orders held by them in the desired direction. This potentially increased the influence of the trader(s) at the fix by allowing them to control a larger proportion of the overall volume traded at the fix than they would otherwise have and/or to adopt particular trading strategies, such as trading a large volume of a currency pair aggressively. This process was known as *"building"*.

(3) Traders increased the volume traded by them at the fix in the desired direction in excess of the volume necessary to manage the risk associated with the firms' net buy or sell orders at the fix. Traders within the market have referred to this process as *"overbuying"* or *"overselling"."*

21. Paragraphs 4.57 and 4.58 then give an example of Barclays' attempts to manipulate the fix as follows:

"4.57. An example of Barclays' involvement in this behaviour occurred on one day within the Relevant Period when Barclays attempted to manipulate the WMR fix for a particular currency pair. On this day, Barclays had net buy orders for a particular currency pair at the fix which meant that it would benefit if it was able to move the WMR fix rate upwards. The chances of successfully manipulating the fix rate in this manner would be improved if Barclays and other firms adopted trading strategies based on the information they shared with each other about their net orders. Information they shared with each other about their net orders.

4.58. In the period between 10:06am and 3:52pm on this day, traders at five different firms (including Barclays) inappropriately disclosed to each other through chat rooms details about their net orders in respect of the forthcoming 4pm WMR fix in order to determine their trading strategies. The other four firms are referred to in this Final Notice as Firms A, B, C and D. Barclays then participated in the series of actions described below in an attempt to manipulate the fix rate higher.

(1) At 10:06am, Barclays commented in a chat room with Firms A and B that it had a net buy order for the WMR fix for USD150 million. Barclays disclosed that the order was for another Barclays desk which was rebalancing its portfolios

at month-end (*"…my rebal guys are paying me for 150…"*). Firm A replied stating *"first of my fixings is a buy but guess long way to go"*. Since Barclays and Firm A each needed to buy USD at the fix each would profit to the extent that the fix rate at which it sold USD was higher than the average rate at which it bought USD in the market.

(2) At 10:54am in a one-to-one chat, Firm C asked Barclays what its internal model was suggesting for the month-end fixes later that day. Barclays replied *"weak…sell"* (i.e. sell USD and buy the quote currency), but added that others in the market held the opposite view. Firm C replied *"so fck knows"*. Barclays added that it needed to buy USD160 million for the fix (i.e. buy USD and sell the quote currency) for another Barclays desk which was rebalancing its portfolios at month end and that this comprised a relatively significant amount (*"i lose 160…to the rebalancing guys…usually they 4 mil usd…today 160")*. Firm C replied *"mmm…interesting"*.

(3) At 12:45pm, Firm A noted to Barclays and Firm B that its order to buy USD at the fix had increased. Barclays responded *"i think gotta chill but so far i 160…if we find thats the way ofg it…then game on"*. Firm B commented *"COME ON!!!!!…i liking this…i just askin my guy…if i got anything yet"*. Firm A added *"i fancy it today"* and Barclays noted that if they were all buying USD *"i wud fancy it tohahah"*.

(4) At 1:27pm in a chat room in which Firm D was a participant, Barclays repeated that it needed to buy USD160 million for the forthcoming WMR fix. Barclays noted that while its internal model suggested selling USD, other signals in the market suggested buying USD and that it needed to buy USD160 million in any event.

(5) At 3:28pm, Barclays and Firms A and B discussed the forthcoming WMR fix and the amounts they needed to trade. Barclays stated that it needed to buy USD200 million for the fix, Firm A USD150 million and Firm B USD70 million. Firm B noted that it was also aware of another USD200 million buy fix order. At 3:42pm, Firm B noted that the amount it needed to buy for the fix had increased to USD220 million.

(6) At 3:45pm, Firm B commented to Barclays and Firm A *"boooyyyys…so we alot"*. Firm B also disclosed that an inter-dealer broker was looking to trade an additional USD135 million at the WMR fix and asked whether they wanted to trade (*"…wants to do another 135…we want any of it"*).

(7) At 3:46pm, Barclays disclosed that the amount it needed to buy in the market for the fix had increased to USD400 million and encouraged Firm B to trade with the inter-dealer broker (*"u do that")*. Firm B subsequently confirmed that it had agreed to the broker trade and as a result it now needed to buy USD360 million (*"ok…360")*. This is an example of Firm B *"building"*.

(8) At 3:47pm, Firm A asked *"so how [*much*] we got to buy in total"*. Barclays replied *"400 me"* and Firm A said "*200*". Firm B then stated *"if we get this 75 bid i will love u both forever"*.

(9) At 3:51pm, Firm D asked if Barclays was *"the otehr way"* (i.e. buying USD and selling the quote currency in the market) and disclosed to Barclays that it would be selling USD125 million in the market for the 4pm WMR fix. Barclays told Firm D that it needed to buy USD430 million. It stated that it would prefer to trade this amount at the fix (than match the USD125 million that Firm D wanted to trade), but would match with Firm D if it was unable to trade through an inter-dealer broker (*"wud rather do the 430 but will match with u if u cant offload in broker*").

(10) At 3:52pm, Firm D indicated that the situation had changed and it needed to buy USD80 million in the market for the fix (*"complet fl;ip now…i lose 80 odd…fkin joke*"). Barclays responded "*cool…suits*"."

22. Paragraphs 4.66 to 4.71 of the Barclays Notice sets out an attempt to trigger a client stop loss order as follows:

"4.66. During its investigation, the Authority identified instances of Barclays attempting to trigger client stop loss orders. These attempts involved inappropriate disclosures to traders at other firms concerning details of the size, direction and level of client stop loss orders. The traders involved would trade in a manner aimed at manipulating the spot FX rate, such that the stop loss order was triggered.

4.67. An example of Barclays' involvement in this behaviour occurred on one day within the Relevant Period when Barclays attempted to trigger a client stop loss order. On this day, a client had placed a stop loss order to buy GBP77 million at a rate of 95 against another currency. The triggering of this order would result in Barclays selling GBP77 million to the client. Barclays would profit from the stop loss order if the average rate at which it bought GBP in the market was lower than the rate at which it sold GBP to the client pursuant to the stop loss order.

4.68. In the period between approximately 10:37 and 11:37, Barclays attempted to trigger the client stop loss order. During this period, Barclays inappropriately disclosed, through chat rooms, the details of the client stop loss order to traders at other firms and provided commentary to them regarding Barclays' attempts to trigger the stop loss order. The other firms are referred to in this example as Firms X, Y, and Z.

(1) At 10:38, Firm X asked Barclays and Firms Y and Z if they had any stop loss orders ("*u got…stops ?"*). Barclays responded that it had a stop loss order for "80 quid" at a level of 95. Barclays noted it was *"primed like a coiled cobra…concentrating so hard…[as if] made of wax…[haven't] even blinked*".

(2) At 10:46, the rate increased to 84 and Firm X commented *"…is higher sint it"*. Barclays responded *"watch out…will be soon"*. The FCA considers this to be a reference to the intention on the part of Barclays to attempt to manipulate the rate to trigger the stop loss order. Firm X responded that it did not believe that Barclays could trigger the stop loss order.

(3) As a first attempt, between approximately 10.46 and 10.49 Barclays purchased GBP66 million at rates between 78 and 95. Barclays then placed an order to buy GBP5 million up to 97, which was above the best offer price prevailing in the market at that time which was 95. This order resulted in

Barclays buying GBP2 million at 95 and GBP3 million at 96, before the rate fell back lower.

(4) At 10:49, Firm X commented *"hope that was a o.t"* (i.e. a one-touch order). The FCA considers this to be a reference to the stop loss order at 95 which if it had been a one-touch order would have been executed. Firm Y also stated "i was just about to say that". Barclays replied *"errr…long some…here"*. The FCA considers this to be a reference to Barclays buying the currency pair but not being able to trigger the stop loss order by trading at a rate of 97 and thereby selling GBP to the client. Hence it is left with a "long" position.

(5) At 10:51, Firm X told Barclays *"we pick up a seller…guy i like…and just above the print u need*". Barclays responded (*"ok…ta")*.

(6) At approximately 10:58, the rate increased to 94. As a second attempt, Barclays placed an order to buy GBP10 million up to 97. Again this was above the best offer price prevailing in the market at that time, which was 95. This order resulted in Barclays buying GBP10 million at 95, following which the rate fell to 85 and Barclays noted *"fooooooooooookkkkk*". By approximately 11:09, the rate had fallen to 78, by which time Barclays had reduced its long position by selling GBP and noted it was *"dead"*. The FCA considers this to be a reference to Barclays not being able to trigger the stop loss order and incurring a loss on the long position it had established as a result of the rate falling.

(7) Barclays also confirmed to the other firms that the stop loss order would not be triggered until the rate reached 97 and that it had been unable to achieve this ("*…cudnt get the 97 print…despite trying super hard*"). Barclays noted that there were *"algos galore at 96"*. The FCA considers this to be a reference to selling interest from algorithms at a rate of 96 which Barclays perceived had prevented the rate from going higher.

(8) The third and final attempt took place approximately 20 minutes later. At approximately 11:37, transactions occurred in the market at rates 94-96 and the prevailing best offer rate increased to 97. Firm X noted *"attemot number 3"*. Barclays then placed an order to buy GBP2 million at up to 97. As a result of this order, Barclays bought GBP1 million at 96 and at 97. The purchase at 97 enabled Barclays to execute the stop loss order. Barclays then confirmed this to the other firms (*"done*").

(9) Barclays' purchase of GBP1 million at 97 was the only trade at that rate on the trading platform at that time. The currency pair did not trade at this rate again until approximately 16:00.

4.69. Barclays then executed the stop loss order by selling GBP77 million to the client at a rate of 96.5. Barclays' trading was aimed to manipulate the spot rate for the currency pair such that the stop loss was triggered. Barclays' trading in this example generated a loss equivalent to USD63,845.

4.70. Following the triggering of the stop loss order, Firm X commented, ironically, that Barclays would have "one happy cleitn !". Barclays responded "he shud be as he wants minimal protection and really cud have been done with 96 print…but we held

him in"). The FCA considers "held him in" to be a reference to Barclays not executing the stop loss order for the client when the currency pair traded at 96.

4.71. Although Barclays did not execute the stop loss order at 95 or 96, Barclays traded in a manner that was intended to move the rate to 97. Therefore, as noted by the other firms, instead of holding the client in, Barclays attempted to trigger the stop loss order. At 11:39, Firm Y responded to Barclays: "hahahah…hardly [Barclays]…thats not holding him in…gd work though". Firm X concurred: "helkd him in…with a lot of cursingf…u tried to carve him…and eventually succeeded". Firm Z stated that Barclays' comment about holding the client in "might have to go in the quote book". Barclays responded "hehe"."

Footnotes referred to in the Barclays Notice in the quotations set out above have been omitted in setting them out in this decision.

23. The basis of Mr Ashton's reference in respect of the Barclays Notice is that the quotes attributed to Barclays in the passages above are his words and from the notice and information in the public domain at the time of the issue of this notice the relevant reader of the notice would reasonably conclude that references in these passages to Barclays are in fact references to Mr Ashton who had thus been identified in the Barclays Notice. We return to this issue and that identified at [17] above in relation to the UBS Notice when considering the question that we need to determine, namely whether the matters included in the UBS Notice and the Barclays Notice identified Mr Ashton in the relevant sense and manner, as provided for in s 394 (4) FSMA, but before doing so we turn to the legal test to be applied in order to determine that issue.

The legal test under s 393

24. It is common ground that the question as to whether Mr Ashton has been identified in the UBS Notice or the Barclays Notice falls to be answered in accordance with the construction put on s 393 FSMA by the Court of Appeal in its judgment in *Financial Conduct Authority v Macris* [2015] EWCA 490.

25. In his judgment in *Macris*, Longmore LJ emphasised that the question as to whether the reasons contained in a decision notice relate to matters which identify a person who is not named in the notice "is largely, if not entirely, a question of fact": see [66] of the judgment.

26. In determining that question of fact Gloster LJ, in approving the approach of this Tribunal in this respect, said that the issue should be approached in two stages. The first stage is to ask whether the relevant statements in a notice said to "identify" the third party are to be construed in the context of the notice alone, and without recourse to external material, as referring to "a person" other than the person to whom the notice was given. In that regard, it was not sufficient that the notice contained facts from which it could be inferred that a particular person was being criticised - for example criticism of the corporate entity which was the recipient of the notice from which it could be inferred that the chairman of the company was also being criticised: see [40] of the judgment. Gloster LJ expanded on this point at [49] of the judgment as follows:

> "[T]he mere fact that a statement criticising a corporate recipient of a notice might be read by persons in the relevant financial market as criticising by implication ... a particular employee, as casting a slur upon them, would not be sufficient to make such a person a "third party" for the purposes of section 393.... [T]here has to be some sort of "key or pointer", as referred to the Court of Appeal in *Morgan*, in the statement contained in the "matters" in the notice."

27. At the second stage the Court of Appeal held that it was legitimate to have regard to external material to identify the "person" referred to in the notice. The question was therefore to what information reference might be made.

28. In that regard, the Court of Appeal rejected the broad approach of this Tribunal, which held that there could be ex post facto unlimited reference to external material to identify the third party, in favour of a narrower test. Gloster LJ, drawing on an analogy with the test applied by the authorities relating to defamation proceedings in determining whether a person can be identified as the subject of a defamatory statement, formulated the test at [45] as follows:

> "As I have already said, it is clear that it has to be the "matter" or "matters" referred to in the relevant notice which "identifies" the third party. But, as in the defamation cases, that does not mean that the third party has to be mentioned by name. As long as the relevant description in the "matters" (whether by reference to an office, a job description or simply "Mr X") can properly be construed as a reference to an individual person, i.e. a "he" or a" she" or, if a corporate entity, an "it"), then it seems to me that the correct test for identification is the simple objective one applied in the defamation cases adapted for the purposes of this case, viz:
>
> > "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 promulgation of the Notice that he is a person prejudicially affected by matters stated in the reasons contained in the notice?""

29. At [51] of the judgment, Gloster LJ emphasised the objective nature of the test as follows:

> "The objective test, which I have formulated, clearly limits external material to what, objectively, persons acquainted with the claimant/ third party, or persons operating in the relevant area of the financial services industry, might reasonably have known as at the date of the promulgation of the relevant notice. That is a workable test. As Mr Herberg submitted, by the time the Authority served the Notice it would have been well aware of the information publicly available to the relevant sector of the market. It follows that I reject Mr Stanley's arguments to the contrary that, only if Mr Macris could have been identified from the "matters" exclusively contained in the Notice, would he have been "identified" for the purposes of section 393. I reject that approach. It is not consistent with the language of the Act or with the ordinary every-day meaning of the word "identifies". It is also unrealistic because, in effect, it pays no regard to knowledge which persons acquainted with the third party, or persons operating in the relevant area of the financial services market, might well have over and above the information which they read in the notice, which necessarily would contribute to their

> ability to identify the third party. If, as Mr Stanley submitted, the purpose of the third party procedure is to ensure the fair treatment of the reputation of third parties by the Authority, then in my view it is unrealistic to disregard what already is known to the market over and above the information stated in the notice. Mr Stanley's approach would require the court to perform the artificial task of asking the wholly hypothetical question whether, putting on one side the knowledge available to the market, the third party could be identified by what was stated in the notice alone."

In our view this passage gives a clear indication on two points. First, the test proceeds by looking only at information that was in the public domain at the time the notice was published and second, it 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. In our view the test focuses on the knowledge that could be reasonably expected to have been obtained by well-informed market participants in the relevant area by the time of the publication of the notice and retained by them without having to do an extensive forensic exercise to remind themselves of what they read previously, even though they might seek to refresh their memory by reference to material they had seen before. We refer to such persons in this decision as "relevant readers".

30. The crux of the matter is therefore what relevant readers would reasonably know and conclude; not whether it is logically possible to deduce the person's identity from publicly available material. In our view when referring to persons operating in the third party's area of the financial services industry what Gloster LJ meant by that description was, as stated at [54] of her judgment, "market participants" which mean those working directly in the relevant sector, not those who observe or comment on it from a different perspective. As Gloster LJ said at [54] of her judgment it is necessary to examine:

> "…the information which objectively an acquaintance/market participant might reasonably have known as at the date of the promulgation of the relevant notice to identify the third party, e.g. the name of the actual person who discharged the office of "managing director" or "CIO London management", or who was the "Mr X" as described in the notice…"

31. Therefore in this case our task is twofold. First, we have to decide whether, despite the reference only to Firm A (in the UBS Notice) and Barclays (in relevant passages from the Barclays Notice) rather than any separate individual, nevertheless there is a "key or pointer" to a separate individual in the relevant notice.

32. Second, assuming the first question is answered in Mr Ashton's favour, we need to examine the information falling within the description set out at [30] above made available to us and determine whether from it a relevant reader would identify Mr Ashton from the relevant passages in the respective notices.

33. As Mr Stanley submitted, the burden of proof is on Mr Ashton to demonstrate that the evidence leads to the conclusion that Mr Ashton has been identified in the relevant notice.

34. In referring to the defamation authorities in quotations from Gatley on Libel and Slander, 12th edition 2013 at [44] of *Macris,* Gloster LJ emphasised the requirement in those cases that extrinsic evidence be given to connect the libel with the claimant, evidence from which it would be reasonable to deduce that the defamatory words "implicated" the claimant; the same quotation also observed that for this purpose witnesses can be called to testify that they understood, from reading the libel in the light of the facts and circumstances narrated and described, and their acquaintance with and knowledge of the claimant, that he was the person referred to.

35. In this case, Mr Stanley observes that unlike the position in *Macris* itself, Mr Ashton has adduced no evidence from any individual who has concluded that Mr Ashton is identified in either notice or that relevant readers formed that belief. Whilst such evidence would be helpful to a degree, its assistance is limited because the test is objective, that is what objectively an acquaintance or market participant might reasonably have known, so that it is clear that the test is applied by reference to a hypothetical person rather than an actual acquaintance or market participant whose evidence is adduced. That is because such an individual may have some very specialised knowledge not available to the wider class of acquaintance or market participant that it would not be reasonable to expect that the wider class would possess. In any event, in relation to any particular individual the Tribunal would have to assess his evidence by reference to the objective test.

36. It appears to us that the purpose of the test laid down by the Court of Appeal is to make it clear that the question as to what is reasonably known to the relevant reader does not depend on the knowledge of any particular acquaintance or market participant who might have read the available material at the time the notice in question was published. Consequently, in our view the focus of the evidential assessment must be on the notices themselves and the information publicly available at the time of the publication of the relevant notice that it is contended leads to the conclusion that Mr Ashton has been identified in the notice concerned.

37. Whether the available material would reasonably lead a relevant reader to conclude that the person in question was identified in the notice must be determined by reference to the particular circumstances of the case, including the nature of the market in question and what material might reasonably be expected to have been read by the relevant readers. We therefore approach the issue on the basis that the relevant reader is assumed to have such a level of interest in the subject matter concerned and such a level of knowledge and understanding that would be reasonably expected of a relevant reader considering the particular evidence that the Tribunal is asked to review.

38. In making that assessment we are of the view that as a specialist tribunal we are entitled to draw upon our own specialist knowledge of how the markets operate and what is of interest to relevant market participants operating in those markets. We do, however, accept that we must be careful not to draw on that specialist knowledge in the abstract by reference to material that is not before us; we must use that expertise purely in the context of the evidence that is before us. That is why the quality of that evidence is the paramount factor; that evidence will inevitably be selective and there

may be a wider range of material that could have been made available to us. Our task is to assess whether in all the circumstances the evidence we have is sufficient.

39. We have considered how "close to home" an acquaintance or market participant could be and still qualify as a relevant reader for the purposes of the test. Ms George suggested a very wide class of persons would qualify as "acquaintances" so that any person having acquaintance with Mr Ashton (that is having slight knowledge of him and who had engaged with or been aware of him) in a professional capacity would be included.

40. Although there is no specific guidance on this issue from *Macris,* it appears to us that the use of the term "acquaintance" indicates someone who although they might have met the person in question from time to time was 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.

41. Thus the references to persons "acquainted with" the person concerned or those who work in the same area does not include those with intimate knowledge of the relevant events (for instance, those who actually participated in any particular set of transactions, or who have advised the person about them) or those with special personal knowledge of him professionally (such as someone who sat next to the person at work). We would extend that category to those who worked in Mr Ashton's immediate team and who he reported to but not, for instance, to those who worked in Barclays outside Mr Ashton's own team. However, in our view relevant readers would include Mr Ashton's counterparties in other leading banks operating in the same area as well as the customers and counterparties of his business unit.

Evidence and findings of fact

42. We turn now to the evidence, aside from the UBS Notice and the Barclays Notice themselves, which it is contended assists the knowledge of relevant readers in the identification from matters contained in those notices of Mr Ashton.

43. We were surprised that Mr Ashton did not himself file a witness statement. This would have been useful in establishing his employment history and the nature of his position within Barclays at the time the events which are the subject of this decision occurred. Although Ms George in her submissions made various statements about Mr Ashton's position she was of course not in a position to give evidence and we have therefore had to establish the position by reference to such material that was made available to us in documentary form.

44. At sometime during the period which is relevant to this decision Mr Ashton became the head of Barclays G10 FX voice spot trading desk. He was also a trader at Barclays in respect of high volume trading in the Euro. Barclays is clearly a leading investment bank in the foreign exchange market and we therefore accept that Mr Ashton was a highly visible and well-known figure in the foreign exchange market. This is illustrated by the prominence he is given in the media coverage of the Authority's and the US Authorities' investigations into alleged manipulation of

foreign exchange rates by leading global investment banks, including Barclays and UBS.

45. We accept therefore that relevant readers would have known the information summarised at [44] above at the time of publication of both the UBS Notice and the Barclays Notice. We also accept that relevant readers are likely to have read the material described at [46] to [72] below.

Other Information relevant to both notices

46. On 1 November 2013 an online publication called Watchdog Magazine reported that Mr Ashton, who was identified as head of voice spot trading at Barclays, had been suspended along with two other currency traders. The article linked this action to news stories which had recently broke over an "insider trading group known as "the cartel"… allegedly using internet chat rooms to manipulate the market".

47. On 2 January 2014 Bloomberg carried a report under the heading "Forex Market Investigation: Collusion in the chat rooms?". The report mentioned how traders participated in online chat rooms as follows:

> "As they check prices and complete deals, some traders participate in as many as 50 online chat rooms. Messages from salespeople and clients appear on their monitors, get pushed up by new ones, and vanish from view. Now regulators from Bern, Switzerland, to Washington are examining evidence that a small group of senior traders at big banks had something else on their screens: details of each other's client orders. Sharing that information may have helped dealers at JP Morgan Chase, Citigroup, UBS, Barclays, and others manipulate prices to maximise their profits, say five people with knowledge of the probes who asked not to be identified because the matter is pending.
>
> At the center of the enquiries are instant-message groups with names such as The Cartel: The Bandit's Club: One Team, One Dream; and The Mafia, in which dealers exchanged information on client orders and agreed how to trade at the fix, according to the people familiar with the investigations."

48. The report also referred to the fact that spot currency trading was conducted in a small and close knit community, many of whom lived in close proximity to each other as well as the fact that at least 12 foreign exchange traders had been suspended or put on leave by a number of banks as a result of internal investigations. It was stated that none of the traders or their employers had been accused of wrongdoing.

49. More specific detail was given regarding The Cartel as follows:

> "One focus of the investigation is the relationship of three senior dealers who participated in The Cartel-JPMorgan's Richard Usher, Citigroup's Rohan Ramchandani, and Matt Gardiner, who worked at Barclays and then UBS – according to the people with knowledge of the probe. Some of the traders interviewed for this story say they eagerly sought entry to The Cartel's chat room because of the influence is exerted. Usher, Ramchandani, and Gardiner, along with at least two other dealers over the years, would discuss their customers trades' and agree on exactly when they

planned to execute them to maximise their chances of influencing the fix, two of the people say.

Usher was the moderator of The Cartel, according to people with knowledge of the matter, who say the chat room died when he quit RBS in 2010. He revived the group with the same participants when he joined JPMorgan the same year as chief currency dealer in London, they say. Ramchandani is head of European spot trading at Citigroup. Gardiner joined Standard Chartered in London as assistant chief currency dealer. He previously worked at UBS in Zürich and was co-chief dealer with Chris Ashton at Barclays in London.

Usher, Ramchandani, and Gardiner were put on leave by their employers after the FCA opened its inquiry in October, according to people with knowledge of the matter. Ashton, now global head of spot trading at Barclays, has been suspended, along with five other spot traders at the bank in London and New York. Ashton and Ramchandani declined to comment. Gardiner didn't return messages left on his mobile phone…. "

50. On 10 January 2014 an online publication, Forex Live, repeating material previously reported in the Financial Times regarding "The Cartel", reported:

"One specific chatroom, whose group was known alternately as the Mafia or the Cartel, was used by some of the most influential traders in London. Among them are Mr Usher, a former Royal Bank of Scotland trader who went to JPMorgan, as head of spot foreign exchange trading in 2010, Mr Ramchandani, Citigroup's head of European spot trading, Matt Gardiner, who recently joined at Standard Chartered after working at UBS and Barclays, and Chris Ashton, head of voice spot trading at Barclays. All of these senior traders are on leave. Neither they, nor Mr O'Riordan, has been formally accused of any wrongdoing and none could be reached for comment.

Regulators are looking into allegations that traders might have used chat rooms to get a view about overall order flows and to use this information to build up positions just ahead of and during the fix. By buying and selling a currency before the fix, a trader can try to influence the final fix price to profit from the whole range of client orders he is handling that day."

51. On 16 February 2014 the Financial Times published a detailed article under the heading "Forex in the spotlight".

52. The article referred to the fact that nine banks, among them Barclays and UBS, had suspended, placed on leave or fired up to 21 traders and that none of the traders had been formally accused of any wrongdoing. It observed that the investigations were at an early stage and had yet to uncover much hard evidence. The article mentioned that the traders range from junior staff to global business leaders. It also referred to The Cartel as follows:

"A handful of the most senior traders are under particular scrutiny for their membership in a specific chatroom known ultimately as the Mafia or the Cartel, a powerful group that was widely respected in the trader community."

53. At the heart of the article was a diagram showing an inner circle describing the "Cartel" chat room, which was said to "include" the four traders named in the circle,

one of which was Mr Ashton, who was reported to have been placed on leave in November 2013. There was a note to the effect that Mr Ashton had only been part of the chat room for a relatively short time. The diagram had an outer circle containing the names of those traders who had been placed on leave, suspended or fired amid banks' internal investigations.

54. On April 7, 2014 USA Today published an article under the heading "Banks caught in widening foreign-exchange claims". This article repeated previous reports regarding the existence of "The Cartel". The article referred to 12 banks being the subject of a federal law suit, including Barclays and UBS. It mentioned that the suit alleged that members of "The Cartel" included Richard Usher, Rohan Ramchandani, Matt Gardiner, who is described as the former Barclays head of spot trading, Mr Ashton, who was described as the former head of Barclays voice spot trading globally and Neil O'Riordan, UBS's co- global head of emerging market spot trading.

55. The UBS Notice was published on 12 November 2014 alongside similar notices issued to a number of other banks. It had been expected that Barclays would be included in that number but their settlement with the Authority was delayed until they had completed negotiations to settle with the US regulators as well.

56. The Financial Times published an article on 13 November 2014, shortly after the publication of the UBS Notice, under the heading "Forex traders at heart of "Cartel" chat rooms". As well as referring to The Cartel the article referred to chat rooms more generally, remarking that "certain chatroom participants used code words to evade detection by their banks' compliance monitoring systems".

57. The article also referred to Mr Ashton, in the context of him being invited to join "The Cartel", remarking that he was only a member for seven months before leaving in August 2012 and that he was not part of the "well-acquainted trio of Mr Usher, Mr Ramchandani and Mr Gardiner."

58. This article did not directly link Mr Ashton to any of the matters referred to in the UBS Notice and we were referred to no other information in the public domain at all around the time the UBS Notice was issued that did so.

Other Information relevant only to the Barclays Notice

59. The information referred to at [46] to [58] above would clearly be in the public domain at the time the Barclays Notice was issued and available to relevant readers at that time. In addition, we were referred to further information that would also have been available at the time the Barclays Notice was published.

60. On 20 May 2015 the Financial Times carried an article which reported the outcome of the Authority's and the US authorities' investigations against Barclays. In relation to Mr Ashton it said the following:

> "At least six Barclays employees involved in the misconduct are no longer employed at the bank and four more have been fired in the past month, including Chris Ashton, its London-based head of voice spot-trading, according to people close to the case."

61. Later on in the article it said:

> "Mr Ashton is the most senior Barclays trader caught up in the scandal. He was a member of the powerful network of senior forex traders at the centre of the alleged collusion who called themselves "the Cartel".”

62. The Financial Times published another article on the same day under the heading "If you ain't cheating, you ain't trying".

63. This article again referred to Mr Ashton's admission to “the Cartel” when he became Barclays’ main Euro trader in 2011. It also referred to various matters mentioned in the Barclays Notice, including the reference to "building ammo".

64. There was also a detailed reference to the client stop loss order example given at paragraphs 4. 67 to 4.68 of the Barclays Notice but in doing so it simply referred to an exchange between "traders at Barclays and three other firms" without mentioning Mr Ashton in this context.

65. The New York State Department of Financial Services concluded a settlement with Barclays on 20 May 2015 and published a consent order (“ Consent Order”) on the same day containing details of its findings against Barclays.

66. The Consent Order stated that the misconduct described in it was not confined to a small group of individuals but involved more than a dozen employees, who acted with the knowledge and oversight of some senior desk managers, and spread geographically across numerous countries, including offices of Barclays in New York and London. It also referred to the fact that certain FX traders at Barclays routinely participated in multi-bank chat rooms and often had a multiple chat rooms open at the same time.

67. The Consent Order referred specifically to the chat room known as "The Cartel", referring to two traders from Barclays being members of it at different times and to Mr Ashton's desire to join it, although he was not mentioned by name.

68. The following statement was contained at paragraph 21 of the consent order:

> "On January 6, 2012, one Barclays trader, who was also a Head of the FX Spot desk in London, attempted to manipulate the ECB fix by unloading EUR500 million right at the fix time, stating in the Cartel chat room "i saved 500 for last second" and in another chat room "I had 500 to jam it".”

69. The trader referred to in the above quotation, because of the job description given to him, is likely to be Mr Ashton but this example does not feature in the Barclays Notice.

70. Other examples of alleged manipulation are given at paragraphs 27 to 30 of the Consent Order as follows:

> "27. An additional tactic for reducing the risks involved in seeking to manipulate market prices was for the traders at the various banks on a multi-bank chat to agree to

stay out of each other's way around the time of the fix, and avoid executing contrary orders while an effort to push prices was being deployed. Traders would also cooperate with price manipulation efforts by seeking to "clear the decks" of contrary orders early, in order not to dilute the deployment of the full "ammo" nearer to the fix, as part of an effort to move prices beyond the narrow range that would be maintained by a more routine, even execution of orders.

28. For example, in a June 28, 2011 chat with a trader from HSBC, a Barclays trader reported that another trader was building orders to execute at the fix contrary to HSBC's orders but Barclays assisted HSBC by executing trades ahead of the fix to decrease that other traders orders: "He paid me for 186 ... so shioud have giot rid of main buyer for u".

29. In another discussion on a multi-bank chat, on December 1, 2011, with a trader from Citigroup, a Barclays trader indicated "If u bigger. He will step out of the way... We gonna help u."

30. On February 15, 2012, a Barclays trader worked to clear the decks in advance of the ECB fix to assist his fellow Cartel member at UBS, stating "hopefully taking all the filth out for you [UBS Cartel member] and "hopefully decks bit cleaner". Despite having net sale orders of only EUR 54 million, this trader ended up engaging in a series of matching trades, including buying EUR 196 million to assist his fellow Cartel member."

71. The example given at paragraph 30 of the Consent Order is the same as that given at paragraph 4.40 of the UBS Notice.

72. Finally, paragraphs 73 and 74 of the Consent Order refers to disciplinary action taken by Barclays as follows:

"73. A number of Barclays employees that were involved in the wrongful conduct discussed in this Order, including a director on the FX Spot trading desk in London, a director on the FX Spot trading desk in New York, a director on the Emerging Markets desk in New York, a managing director in FX Hedge Fund Sales in New York, a director in FX Real Money Sales in New York, and an assistant vice president in Fx Hedge FX Sales in London, are no longer employed at the Bank.

74. As a result of the investigation, four Barclays employees have been terminated in the last month: the Global Head of FX Spot trading in London, an assistant vice president on the FX Spot trading desk in London, a director on the FX Spot trading desk in London and the director on the FX Spot trading desk in New York."

Discussion: The UBS Notice

73. Mr Stanley submitted that there was no "key or pointer" to a separate individual in the UBS Notice such that the first stage of the test in *Macris* could be said to be satisfied. He submitted that in relation to the passages that Mr Ashton complains are prejudicial to him there is merely criticism of a corporate entity, namely Firm A. He

relies on *Sir Philip Watts v Financial Services Authority (2005)* where the Tribunal observed that if the findings were kept at a level of generality appropriate to a finding of collective corporate wrongdoing it was hard to argue at the same time that since the company can act only through individuals, by making critical findings against a company, the Authority is necessarily making critical findings against the individuals known to be responsible for the conduct in question: see paragraphs[48] and [50] of the decision.

74. In our view the matters attributed to Firm A in the UBS Notice are not, on the facts, kept at a level of generality appropriate to a finding of collective corporate wrongdoing. The term "Firm A" is clearly used to describe the actions of a particular individual or individuals. We accept Ms George's submission that by using direct quotes it is clear that the Authority intended to refer, and did refer, to a specific individual in the UBS Notice when it attributed those words to "Firm A". It could quite easily have used the term “Trader A" instead and there could be no doubt that such attribution would be to a particular individual rather than the corporation generally on whose behalf he was acting. In our view the situation is no different simply because the Authority chooses to use a term which purports to indicate the actions of a corporate entity rather than of any particular individual.

75. We therefore accept that the first stage in the *Macris* test is satisfied in relation to the UBS Notice.

76. Turning now to the second stage of the test, the relevant passages in the UBS Notice tell the relevant reader that the example given of an attempt to manipulate the fix occurred via communications made between traders at four different firms (including UBS). There are a number of specific quotations attributed to the trader described as "Firm A".

77. The process by which Ms George arrives at her contention that the relevant reader of the UBS Notice would reasonably conclude that the individual described as Firm A is Mr Ashton is as follows.

78. She places particular emphasis on the relevant reader’s knowledge of the existence of the chat room known as "The Cartel". She submits that relevant readers would have been aware of the existence of The Cartel due to the extensive press coverage given to it, in particular in the articles referred to at [46] to [57] above. From that press coverage, she submits, relevant readers would have been aware that Mr Ashton was a member of The Cartel and would be aware of his prominence in the market. It seems to us that it is inherent in Ms George's submissions that the relevant reader would assume that the communications referred to in the UBS Notice took place in The Cartel. She submits that any reference in a regulatory notice concerning the foreign exchange investigation to a four-member inter-bank chat room is - on account of this extensive reporting - sufficient to identify The Cartel and thus those individuals identified by the media coverage as the members of this group.

79. Ms George submits that the test in *Macris,* adopting as it did an analogy with the law of libel, also adopted the principle that if there was a reference in a document

to a group of individuals by description each one of the group has a cause of action because the allegations are made against every member of the group. She relies on *Knuppfer v London Express Newspaper Limited* [1944] AC 116 in this respect. Therefore, by analogy, as the communications concerned are those that took place in The Cartel all the members of that group, including Mr Ashton, have been identified.

80. We accept that the test as formulated at [45] of *Macris* does envisage that person can be identified for the purposes of s 393 by reference to his membership of a group where the relevant reader would know who the members of that group were. So for example, if there was an allegation of a conspiracy to manipulate the market made against "the members of Firm A's London Money Markets Derivatives Desk" and relevant readers would know who those persons were then it must be right that each of the members of the group concerned has been identified.

81. The actual position is more complex in this case than the example given above. Particular quotes are attributed to particular individuals identified purely by being referred to either as UBS, Firm A, Firm B, and Firm C. Assuming that there is nothing distinctive in the quotes attributed to any particular individual that would enable him to be distinguished by a relevant reader from any of the other individuals to whom quotes have been attributed (and we have no evidence on this point) it would not be possible for the relevant reader to say which member of the group made any particular quote appearing in the passage concerned. Mr Stanley submits that this would be insufficient to identify any particular individual for the purposes of s 393 and the question to be asked is whether there was anything in any particular passage that was attributed to an individual which the relevant reader would say were the words of Mr Ashton as opposed to those of any other individual participating in the chat room at the relevant time.

82. There is some force in Mr Stanley's submission on this point and we are inclined to think that he is right, although it is clear that the general statement at the beginning of paragraph 4.40 of the UBS Notice that "traders at four different firms (including UBS) inappropriately disclosed to each other via a chat room details about their net orders in respect of the forthcoming ECB fix at 1:15 pm in order to determine their trading strategies" is prejudicial to all of the members of the group.

83. In the event we have not found it necessary to decide that point definitively. We have concluded that there is insufficient evidence for us to be satisfied that Mr Ashton has been identified in the UBS Notice for the following reasons.

84. First, in our view the relevant reader would not reasonably conclude that what is being described at paragraph 4.40 of the UBS Notice is a conversation that took place in The Cartel. Both the notice itself at paragraph 4.14 and the press coverage that we were referred to make it clear that there were numerous chat rooms in which such conversations took place. There is no indication in the UBS Notice as to when this particular conversation took place. It could be at any particular point between 1 January 2008 and 15 October 2013. The Bloomberg article referred to at [47] above indicated that some traders participate in as many as 50 online chat rooms.

85. Second, even if the relevant reader believed this was a conversation that took place in The Cartel, there was nothing to lead him reasonably to conclude that it took place at a time when Mr Ashton was a member of it. The press reports indicate that Mr Ashton was only a member for a period of seven months during 2011 and 2012. There is nothing to suggest in these reports that there were only four banks that were represented in it. The Bloomberg article of 2 January 2014 makes it clear that there were at least two other dealers over the years in addition to the three individuals who were named in it. One of these individuals, Matt Gardiner, had previously been employed at Barclays and was said to be a member during that employment so it could appear to relevant reader that even if he thought that there was a Barclays trader who was a member at the time of the conversation it could have been at a time when Mr Gardiner was at Barclays and participating in The Cartel.

86. Ms George relies heavily on the Financial Times article of 16 February 2014 referred to at [51] to [53] above. However, there was nothing in this article to suggest that the only chat room being investigated by regulators was The Cartel or that its membership was confined at all times during the relevant period to the four individuals mentioned in the inner circle on the diagram referred to. The article made it clear that membership merely "included" the four named individuals. It made no mention of a trader from UBS being a member at the relevant time. The article also made it clear that none of the traders it had named had been accused of any wrongdoing.

87. The article from USA Today referred to at [54] above makes it clear that the investigation was more wide ranging than an investigation into the banks represented in The Cartel.

88. As we have observed, there was no press report at the time of the publication of the UBS Notice making any observation to the effect that any matters in the UBS Notice related to communications made through The Cartel or linking Mr Ashton to any such communications.

89. For all these reasons we must reject Ms George's submissions as recorded at [78] above. Mr Ashton has produced no evidence that any relevant reader had made the assumptions implicit in Ms George's submissions and in our view it is not reasonable to conclude that such a reader would have done so in the light of the many uncertainties as to who might have participated in the conversation recorded in paragraph 4.40 of the UBS Notice that would be apparent to any reader of the notice. Neither, as we have observed, was there any evidence before us that a relevant reader would have come to the conclusion that the quotes attributed to Firm A were to be attributed to Mr Ashton. In short, there was nothing in the UBS Notice or the other material that we have been referred to that would lead a relevant reader reasonably to conclude that Mr Ashton was a participant in the conversation recorded at paragraph 4.40 of the UBS Notice.

Discussion: The Barclays Notice

90. For the reasons we gave at [74] above we accept that the first stage in the *Macris* test is satisfied in relation to the Barclays Notice. Thus, in our view, quotations attributed to "Barclays" in paragraphs 4.57 and 4.58 and 4.66 to 4.71 of the Barclays Notice as set out above must be regarded as referring to the actions of a specific individual rather than the actions of a corporate entity.

91. Turning now to the second stage of the test, Ms George relies on the material that we have analysed in relation to the UBS Notice as well as the additional information referred to at [59] to [72] above. Again, she put much emphasis on The Cartel and Mr Ashton's participation in it. She submits that by May 2015, having regard to the totality of the external material that was in the public domain at the time that the Barclays Notice was published, the relevant reader could be in no doubt that the single most important allegation made by global regulators in the foreign exchange investigation to date concerned The Cartel and the single most visible character in the investigation, as far as Barclays is concerned, was Mr Ashton. From this information she deduces that by the time of the Barclays Notice the very use of interbank communications as referred to in the notice was sufficient, by itself, to allow any relevant reader to identify Mr Ashton in the Barclays Notice as the person making the relevant communications referred to. In particular, she submits, the quotations cited in paragraph 4.68 of the Barclays Notice, which refers to an interbank chat between a trader at Barclays and three other traders at three different banks, was, when considered in the context of the blanket media coverage of the four member Cartel which was reported to include Barclays and Mr Ashton, sufficient to allow the relevant reader to identify him.

92. For the reasons we gave in respect of the UBS Notice, in our view the relevant reader would not reasonably conclude that the communications referred to in the Barclays Notice were communications that took place in The Cartel, or if they did, that they were at a time when Mr Ashton was a participant in that group.

93. The passages in paragraphs 4.52 and 4.55 of the Barclays Notice are of course generic and do not relate to the activities of any particular individual. We were presented with no evidence that any relevant reader linked them to Mr Ashton. The communication recorded at paragraphs 4.57 and 4.58 of the notice is clearly indicated to be one involving traders at five different firms which immediately distinguishes it from the chattering referred to at paragraphs 4. 66 to 4.71.

94. Neither in our view does any of the press articles we were shown which were published when the Barclays Notice was published alter that position. None of the articles link the quotations to Mr Ashton, or even to The Cartel, although they referred to him as having been "caught up in the scandal." In our view that statement would be insufficient to lead a relevant reader to be satisfied that the quotations were those of Mr Ashton when read with the other material.

95. The statement contained at paragraph 21 of the Consent Order set out at [68] would in our view lead a relevant reader to conclude that it refers to the behaviour of Mr Ashton because of the description of his job title but this was not an incident referred to in the Barclays Notice and therefore cannot be regarded as relevant to the

identification issue which must be tested by reference to the material in that notice. In our view a relevant reader who read this statement would not reasonably conclude from that statement that the quotations that were contained in the Barclays Notice were those of Mr Ashton as opposed to any other Barclays trader involved at the relevant time, which, as we have said before, could well have been at a time when Mr Ashton was not a participant in The Cartel.

96. The statement contained at paragraph 30 of the Consent Order set out at [70] above might well have linked Mr Ashton to the quotations in the UBS Notice but obviously it was made too late to have any relevance to that notice. For the reasons we have given above, in our view a relevant reader would not have sufficient evidence reasonably to be satisfied, even if he had remembered the quote from the UBS Notice at the time he read the Consent Order and now linked it to Mr Ashton (which must be doubtful) that the other quotations in the Barclays Notice are also quotations of Mr Ashton and thus identify him.

97. For all these reasons, we must reject Ms George's submissions as recorded at [91] above. We therefore conclude that there was nothing in the Barclays Notice or the other material that we had been referred to that would lead a relevant reader reasonably to conclude that it was Mr Ashton who made the quotations attributed to Barclays in the Barclays Notice at the relevant paragraphs set out above.

Conclusion

98. Our overall conclusion is that Mr Ashton has been unable to satisfy us that any of the words used in the UBS Notice or the Barclays Notice are such as would reasonably in the circumstances lead persons acquainted with him professionally, or who operate in his area of the financial services industry, to believe as at the date of promulgation of the respective notices that he is a person prejudicially affected by matters stated in any of the reasons contained in those notices. Consequently, Mr Ashton has not been identified in those notices in the relevant sense and manner, as provided for in s 393(4) FSMA.

99. Consequently, we must dismiss both of the references.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 12 JANUARY 2016