[2015] UKUT 0602 (TCC)

Reference number: FS/2015/0006

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

CHRISTIAN BITTAR **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
SUE DALE (TRIBUNAL MEMBER)

Sitting in public in London on 1 October 2015

Andrew Hunter QC, instructed by K&L Gates LLP, for the Applicant

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

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DECISION

Introduction

1. This decision relates to the question as to whether the Applicant ("Mr Bittar") was identified in a decision notice ("the Decision Notice") given by the Authority to Deutsche Bank AG ("the Bank") on 23 April 2015.

2. The Decision Notice notified the Bank that the Authority had decided to impose on it a financial penalty of £226,800,000 as a result of serious misconduct by the Bank through, amongst other things, its attempted manipulation of two benchmark interest rates, namely LIBOR and EURIBOR (referred to in this decision together as "IBOR") and by exercising improper influence over IBOR submissions. Although we were not given specific details in this case, the Decision Notice would have been preceded by a warning notice ("the 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 Bittar is a former employee of the Bank, holding the position of Manager of the Money Markets Derivatives ("MMD") desk in London during the period which is relevant for the purposes of this decision.

4. Mr Bittar complains that the Authority, in promulgating the Warning Notice, Decision Notice and Final Notice, has included reasons which identify him and are prejudicial to him and which he has had no opportunity to contest. By a reference notice dated 12 May 2015 he has referred that matter to the Tribunal under s 393(11) of the Financial Services and Markets Act 2000 ("FSMA").

5. Section 393 FSMA 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, s393(1) provides that a third party prejudicially identified in the notice must be given a copy of the notice by the Authority, unless 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. Mr Bittar has been under investigation by the Authority and was given a warning notice in respect of some of the matters referred to in the Final Notice, but the process under which he may make representations on that notice has been stayed and accordingly the Final Notice was issued prior to any separate decision notice being issued to Mr Bittar.

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. Section 393(6) FSMA does not require a copy of a decision notice to be given to the third party if he has been given a separate decision notice in relation to the same matter which, as explained above, because of the stay in respect of Mr Bittar's own regulatory proceedings has not occurred. In this case a copy of the Decision Notice was not given to Mr Bittar as the Authority took the view that the notice did not identify 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 Bittar accordingly made his reference pursuant to s 393(11).

9. As Mr Bittar had not previously seen the Decision Notice he has based his complaint on the Final Notice which it is assumed 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 Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"), namely (i) whether Mr Bittar 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 Bittar 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 has conceded the second and third issues and accordingly this decision deals solely with the question as to whether the matters included in the Decision Notice identified Mr Bittar in the relevant sense and manner, as provided for in s 394(4).

The Final Notice

12. The Final Notice is a lengthy document dealing with misconduct by the Bank over a period of nine years. For the purposes of this decision we are primarily concerned with the provisions in the Final Notice which make findings that the Bank breached Principle 5 of the Authority's Principles for Businesses by attempting to manipulate and improperly influence IBOR rates. In particular, paragraph 2.6 of the Final Notice records that over at least 5 years, across a range of LIBOR currencies and EURIBOR, the Bank's MMD and Pool Trading desks engaged in a course of

conduct to manipulate the Bank's IBOR submissions and improperly influence other banks' IBOR submissions in order to profit. It is further stated in this paragraph :

> "This misconduct was routine and involved instances of collusion with a number of external parties and trading activity designed to maximise the potential impact of the misconduct on the IBOR rates. Managers at [the Bank] were central to this misconduct. There was a culture within GFFX to increase revenues without proper regard to the wider integrity of the market."

13. In order to put the provisions in the Final Notice into context it is helpful to set out the background to the findings made in the notice which are relevant to this decision. These are set out in paragraphs 4.6 to 4.19 as follows:

> "**LIBOR and EURIBOR**
>
> 4.6. LIBOR is the most frequently used benchmark for interest rates globally, referenced in transactions with a notional standing value of at least USD 500 trillion.
>
> 4.7. During the Principle 5 Relevant Period, LIBOR was published for ten currencies and fifteen maturities. However, the large majority of financial contracts use only a small number of currencies and maturities. For example, JPY, USD and GBP LIBOR are widely used currencies and one, three and six months are commonly used maturities.
>
> 4.8. LIBOR was during the Principle 5 Relevant Period published on behalf of the BBA and EURIBOR is published on behalf of the EBF. LIBOR (in each relevant currency) and EURIBOR are set by reference to the assessment of the interbank market made by a number of Panel Banks. The Panel Banks were selected by the BBA and EBF and each bank contributes rate submissions each business day. Both LIBOR and EURIBOR require the contributing banks to exercise their subjective judgement in evaluating the rates at which money may be available in the interbank market when determining their submissions.
>
> 4.9. Interest rate derivative contracts typically contain payment terms that refer to benchmark rates. LIBOR and EURIBOR are by far the most prevalent benchmark rates used in OTC interest rate derivatives contracts and exchange traded interest rate contracts.
>
> 4.10. Both LIBOR and EURIBOR have definitions that set out the nature of the judgment required from Panel Banks when determining their submissions:
>
> • Between 1998 until February 2013 (the end of the Principle 3 Relevant Period), the LIBOR definition published by the BBA was as follows *"the rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for then accepting interbank offers in reasonable market size just prior to 11:00am London time"*.
>
> • Since 1998, the EURIBOR definition published by the EBF has been as follows*: "The rate at which Euro interbank term deposits are offered by one prime bank to another prime bank within the EMU zone at 11am Brussels time"*.

4.11. The definitions were therefore different. LIBOR focused on the contributor bank itself and EURIBOR made reference to a hypothetical prime bank. However each definition required submissions related to funding from the contributing banks. The definitions did not allow for consideration of factors unrelated to borrowing or lending in the interbank market.

4.12. LIBOR and EURIBOR are important to Derivatives Traders and Money Market Traders because they impact on the value of transactions within their trading books. Both benchmark rates affected Traders' payment obligations pursuant to certain contracts underlying their derivatives transactions. The Traders therefore stood to profit or reduce losses in respect of certain trades as a result of movements in LIBOR and EURIBOR. Traders monitored the exposure of their trading positions on a daily basis. Traders commonly referred to the determination of a floating rate contractual amount referenced to LIBOR or EURIBOR on a particular day as a "fixing".

4.13. During the Principle 5 Relevant Period it was commonplace that the P&L of Derivatives and Money Market Traders' books was a factor in the determination of the size of their bonuses and opportunities for advancement.

LIBOR and EURIBOR at Deutsche Bank

4.14. In the Principle 5 Relevant Period, Deutsche Bank contributed by way of daily rate submissions for the purpose of the calculation of LIBOR rates in several currencies including USD, JPY, GBP and CHF and also to EURIBOR.

4.15. Deutsche Bank typically assigned responsibility for making LIBOR and EURIBOR rate submissions to certain Money Market Traders who formed the Pool Trading Desk. The CHF and EURIBOR Submitters were based in Frankfurt whilst the USD, JPY and GBP Submitters were based in London. Between at least December 2006 and November 2009, the responsibility for the submission of JPY LIBOR rates was delegated to Derivatives Traders.

4.16. At Deutsche Bank, Money Market Traders were responsible for managing the funding needs of the bank and therefore executed intrabank and interbank borrowing and lending transactions. Money Market Traders at times used derivative products referenced to LIBOR and EURIBOR to hedge their cash trades.

4.17. Money Market Traders also traded derivative products referenced to LIBOR and EURIBOR to generate additional profit for Deutsche Bank. These trades were not carried out for the purpose of hedging cash trades or reducing risk exposure on the money market books and were captured in separate proprietary trading books.

4.18. Derivatives Traders who formed the MMD Desk executed derivative transactions referenced to LIBOR and EURIBOR to make markets for their clients or as part of a speculative proprietary trading strategy to generate profit for the bank.

4.19. At Deutsche Bank in London, Derivatives Traders and Money Market Traders were part of GFFX. The USD, JPY and GBP LIBOR Derivatives Traders would sit amongst the Money Market Traders who typically acted as Deutsche Bank Submitters. For the majority of the Principle 5 Relevant Period, Money Market Traders (including those who were also Submitters) and Derivatives Traders of the same currency would sit either next to or directly behind each other on the trading floor (with the exception

of EUR and CHF for which the Money Market Traders were located in Frankfurt and the Derivative Traders in London). Money Market Traders and Derivatives Traders were actively encouraged by Managers to share information about currencies and markets. Although Traders were subject to Deutsche Bank's general policies and procedures concerning compliance standards, Managers placed no specific limitations on what the Traders could or should discuss regarding LIBOR and EURIBOR."

14. Paragraphs 4.22 to 4.28 of the Final Notice give some examples of what the Authority found to be misconduct on the part of the Bank's derivatives traders and also on the part of employees who were responsible for the Bank's LIBOR or EURIBOR submissions as follows:

"4.22. Derivatives Traders routinely made requests to Submitters with the goal of influencing Deutsche Bank's JPY, CHF, USD, LIBOR and EURIBOR submissions during the Principle 5 Relevant Period. In respect of GBP LIBOR requests were made to Submitters on occasion.

4.23. Derivatives Traders were motivated by profit and sought to benefit their (and thus Deutsche Bank's) derivative trading positions by attempting to influence the final benchmark rates. The final benchmark rates affected the Derivatives Traders' payment obligations pursuant to the contracts underlying their derivatives transactions such that the Derivatives Traders stood to profit or reduce losses as a consequence of movements in the final benchmark rates resulting from Deutsche Bank's submissions.

4.24. Improper requests took place over a number of years and typically involved one, three and six month maturities. This misconduct involved at least 29 Deutsche Bank individuals including Managers, Derivative Traders and Submitters, primarily based in London but also in Frankfurt, Tokyo and New York.

4.25. In addition to written requests, Derivatives Traders often made oral requests. These included in person requests in London by Derivative Traders sitting in close proximity to the Submitters and requests made via the telephone. In USD LIBOR oral requests were openly communicated and more commonplace than written requests.

4.26. Deutsche Bank Submitters on occasions solicited requests from Derivatives Traders in advance of submitting the daily benchmark rates. For example, on 26 September 2005, in relation to USD LIBOR, Manager A emailed Derivatives Trader A asking *"libors any requests"* to which Derivative Trader A responded *"HIGH FREES [THREES], LOW 1MUNF [MONTH]"*. The following day, Manager A and Derivatives Trader A engaged in a similar exchange, "libor requests?" *"LOW 1 MUNF [MONTH]….SAME AS YEST…"*.

4.27. Deutsche Bank's Submitters routinely took the requests into account when making JPY, CHF, USD LIBOR and EURIBOR submissions and on occasion when making GBP LIBOR submissions.

4.28. The following are examples of Derivative Traders' requests:

• On 4 April 2006, Derivatives Trader B made the following JPY LIBOR request, *"…could u set 1m at 8bps [0.08] pls? thanks"*. Submitter A responded *"done mate"*. Derivative Trader B replied the following day, *"Thanks mate… the 1m back to 7bps*

[0.07] today pls" to which Submitter A responded *"affirmative"*. Deutsche Bank's JPY submissions exactly matched these requests.

• On 25 July 2008, Derivatives Trader C called Submitter B. He asked, *"…can we have like 76 [2.76] today for three Swissy [CHF]?"* Submitter B replied *"Yeah, yeah sure"*. Later in the call Derivative Trader C explained, *"…just today we have two yards [2 billion] threes so even if you could put six and a half [2.765] that would be nice …Today for three month, like a high very high three month but then a low one month, that's very good"*. Submitter B confirmed he would do as requested. On 25 July 2008, Deutsche Bank's three month CHF submission was 2.765, a rise of 1.5 basis points from the previous day. Deutsche Bank's one month CHF submission was 2.27, a fall of one basis point from the previous day.

• On 1 April 2005, Derivatives Trader A requested, *"COULD WE PLS HAVE A LOW 6MTH FIX TODAY OLD BEAN?"*. Deutsche Bank's six month USD LIBOR submissions on 13 June 2005 was 3.375 down from 3.39 the previous day. On 15 May 2008, the same Derivatives Trader asked, *"Low 1mth today pls shag, paying on 18 bio."* On 15 May 2008 Deutsche Bank's USD submission was 2.48 one basis point lower than the previous day.

• On 29 December 2006, Manager B and Submitter C had the following exchange:

Manager B: "*…COULD I BEG YOU FOR A LOW 3M [EURIBOR] FIXING TODAY PLEASE..THANT WOULD BE THE BEST XMAS PRESENT* ;)"

Submitter C: "*…BE A PLEASURE, NO PROBS WE HAVE NOTHING ON THE OTHER SIDE HERE. WILL PUT IN 71 [3.71] AT LEAST MAYBE WE CLD [could] PUT IN 70 [3.70]…"*

Manager B: *"LOW AS POSSIBLE AS WE HAVE 2.5 YARDS [2.5 billion] ON IT TODAY, SO WOULD BE VERY HELPFULL"*

On 29 December 2006, Deutsche Bank's three month EURIBOR submission was 3.70 a 3 basis point drop from the day before."

15. Paragraphs 4.35 to 4.41 of the Final Notice give examples of what the Authority found to be collusion and trading activity in an attempt to improperly influence the IBOR submissions of other banks as follows:

"**Improper trading to benefit the trading positions held by Deutsche Bank derivatives traders**

4.35. On occasions, Deutsche Bank EURIBOR Submitters would bid or offer in the cash market in response to requests from Derivative Traders for favourable submissions. The primary motivation was to influence the EURIBOR submissions of other Panel Banks and therefore move the final EURIBOR rate to benefit Deutsche Bank's derivative positions.

4.36. On those occasions, Submitters were willing to offer cash at lower rates than they would normally do so to attempt to influence the EURIBOR submissions of other Panel Banks. This is illustrated in the following exchange on 19 March 2007 between Submitter C and Manager B:

• Submitter C: "*FYG* [Broker Firm 1] *DOWN TO 3.89 IN THE 3M AS WELL. WE ARE OFFERING AGRESSIVELY"*.

Manager B: "*thanks* [Submitter C]…"

Submitter C*: "HAVE JUST GUIVEN [GIVEN] … AT 87.5"*

Manager B: "*oh my god! we don't want this to cost u money, do it only if it makes sense as well for you – dont wanna be annoying*".

Submitter C: *"NO WORRIES, I WLD OFFER AT 88.5 ANYWAY SO ITS 1 bp [basis point] GIVE AWAY. THAT'S EUR 6K. SO NOTHING TO WORRY ABOUT. AND WE GOT HIS SCREEN DOWN WHICH IS QUIETE IMPORTANT. 1/10 IN THE 3M FIX IS WORTH IT"*.

4.37. On 20 June 2007, Submitter E set out to Manager B that he would offer one month cash in the market to try and get the one month EURIBOR fixing to come down.

• Manager B: "[*Submitter E] my friend – we really need the 1mth fixing to come down if you could do anything"*

Submitter E: *"SURE MAT E..WE TRY BEST HERE ...OFFERING AT MOM IN 1M FOR U TO GET IT HOPEFULLY LOW FOR TOM [TOMORROW] … [SUBMITTER F] WILL ALSO OFFER LOW TO THE BROKERS AND WILL ALSO SEND LOW 1M FIXING ON GOING FORWARD..WE WILL DO OUR BEST MATE"*

Instances of collusion with other Panel Banks: EURIBOR

4.38. At various times between at least June 2005 and April 2007, Manager B colluded with other Panel Banks. He routinely made requests to External Traders for high or low EURIBOR submissions. Manager B sought to influence the submissions of other Panel Banks with the aim that the final published EURIBOR rate would improve the profit or reduce the loss of his trading positions.

4.39. The majority of the requests were made to External Trader A at Panel Bank 1, who Manager B also enlisted to make requests on his behalf to External Traders at other Panel Banks. Manager B was aware that External Trader A was carrying out his instructions and that in doing so would increase the chances of EURIBOR being manipulated to benefit the trading positions of Deutsche Bank for which Manager B was responsible.

4.40. An instance of this collusion related to the 7 September 2006 EURIBOR fix when Manager B attempted to obtain a low one month EURIBOR fix:

• On 6 September 2006, Manager B contacted External Trader A and requested a low one month EURIBOR submission: *"I seriously need your help tomorrow on the 1mth fix*". He also asked him to pass on the request, *"and ask at [Panel bank 2] but don't say it's from me*".

• On 7 September 2006, Manager B reminded External Trader A: *"I'm begging u pleasssssssssssssseeeeeeeee I'm on my knees"*. Manager B repeated his request: *"can*

u beg the [Panel Bank 2] guy as well?" The External Trader replied: *"ok I'm telling him"*.

• External Trader A passed on Manager B's requests for a low one month submission to the submitter at Panel Bank 1 and to an External Trader at Panel Bank 2.

• On 7 September 2006, after the day's EURIBOR rates were published, the following exchange took place between Manager B and External Trader A:

Manager B: *"3.08 !! thaaaaaaaaaaaaaanks"*

External Trader A: *"u see u see"*

4.41. A further instance of this collusion related to the 13 November 2006 EURIBOR fix when Manager B attempted to obtain a low one month and three month EURIBOR fix:

• On 7 November 2006, Manager B contacted External Trader A, making a request for a low one month and a low three month, stating: *"the most important is Monday"* [i.e. Monday 13 November 2006].

• On 10 November 2006, Manager B contacted External Trader A, *"begging"* him to procure a one month submission of "36" [3.36] from Panel Bank 1, as well as from Panel Bank 2.

• External Trader A made a request to the submitter at Panel Bank 2 on 10 November 2006. The submitter responded positively to External Trader A *"of course we will put in a low fixing"*.

• On 10 November 2006 External Trader A also contacted an External Trader at Panel Bank 2 saying, *"Dude, I need a very low fixing on the 1m Monday…we have the whole world against us…"*.

• On 13 November 2006, which Manager B described as *"the big day"*, Manager B and External Trader A engaged in the following conversation:

Manager B: *"man, will you call [Panel Bank 2], please?"*

External Trader A: *"yes, and [Panel Bank 3]"*

Manager B: *"don't tell them that it's for me, because they hate me"*

External Trader A: *"of course not"*

Manager B: *"I am beeeeeeeeegging you"*

• Following that exchange on 13 November 2006, External Trader A passed requests to External Traders at Panel Bank 2 and Panel Bank 3 for a low one month submission. The External Traders at these Panel Banks agreed to act on those requests. External Trader A then followed up by reminding the submitter at Panel Bank 1. The submitter at Panel Bank 1 replied: *"no problem. I had not forgotten. The brokers are going for 3.372, we will put in 36 [3.36] for our contribution"* External Trader A sent Manager B a copy of Panel Bank 1's reply. Manager B replied *"I love you"*."

16. In relation to the Bank's systems and controls the Authority made the following finding in paragraph 4.65 of the Final Notice:

> "4.65. In addition Deutsche Bank failed to respond effectively to other warning signs regarding the conduct of traders on the MMD desk. On 18 February 2010, Deutsche Bank's forensic audit function submitted to the Management Board a formal report into aspects of the operation of the MMD desk unrelated to IBOR which also mentioned cultural and conduct issues, some involving Derivatives Trader A and Manager B. The concerns in the report about trader behaviour did not result in any increased scrutiny of their trading practices."

17. The capitalised terms used in the extracts from the Final Notice set out at [13] to [16] above are defined in paragraph 3.1 of the Final Notice. For the purposes of this decision the most relevant which are not self-explanatory are as follows:

> "EURIBOR" means Euro Interbank Offered Rate.
>
> "External Trader" means an employee of a Panel Bank trading interest rate derivatives.
>
> "GFFX" means the Global Finance and FX Forwards Department of Deutsche Bank's Investment Bank.
>
> "IBOR" is a generic reference to both EURIBOR and LIBOR together.
>
> "LIBOR" means London Interbank Offered Rate.
>
> "MMD Desk" means the Money Markets Derivatives desk comprised of Derivatives Traders which sat within GFFX.
>
> "Money Market Trader" means a Deutsche Bank employee with responsibility for trading cash and managing the funding needs of the bank.
>
> "Manager" means a Deutsche Bank employee with direct line management responsibility over Derivatives Traders and/or Submitters (e.g. a head of desk and above).
>
> "Panel Bank" means a contributing bank, other than Deutsche Bank, with a place on the BBA panel for contributing LIBOR submissions in one or more currencies, or a place on the EBF panel for contributing EURIBOR submissions.
>
> "Pool Trading Desk" means the desk within GFFX which comprised Deutsche Bank's Money Market Traders.
>
> "Principle 5 Relevant Period" means January 2005 to December 2010.
>
> "Senior Manager" means an individual within Deutsche Bank who is more senior than a Manager, for example one with responsibility to oversee a business area.
>
> "Senior Management" means one or more Senior Managers.
>
> "Submitter" means a Deutsche Bank employee with responsibility for making Deutsche Bank's LIBOR or EURIBOR submissions.

"Trader" means a Deutsche Bank employee trading cash or interest rate derivatives.

The significance of these definitions and the way they are used in the body of the Final Notice in the context of this decision is that Mr Bittar contends that market participants who read the notice and were familiar with the Bank's foreign exchange or money market derivatives operations would conclude that "Manager B" is in fact Mr Bittar. We return to this issue when considering the question that we need to determine, namely whether the matters included in the Decision Notice identified Mr Bittar 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

18. It is common ground that the question as to whether Mr Bittar has been identified in the Decision 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.

19. As Mr Stanley observed, 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.

20. 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.

21. 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.

22. 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, held at [45] that the correct test for identification was a "simple objective one" 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 promulgation of the Notice that he is a person prejudicially affected by matters stated in the reasons contained in the notice?"

23. 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"

24. We therefore accept Mr Stanley's submission that the crux of the matter is what relevant readers would reasonably know and conclude; not whether it is logically possible to deduce the person's identity from publicly available material. We therefore reject Mr Hunter's submission that a financial journalist could come within the class of persons that Gloster LJ had in mind when referring to persons operating in the third parties area of the financial services industry. In our view what she meant by that description was, as she stated at [54] of the 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 the 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…"

25. Therefore in this case our task is to examine the information falling within this description made available to us and to determine whether from it a relevant reader would identify "Manager B" as described in the Final Notice as Mr Bittar.

26. As Mr Stanley submitted, the burden of proof is on Mr Bittar to demonstrate that the evidence leads to the conclusion that Mr Bittar has been identified in the Final Notice.

27. 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.

28. In this case, Mr Stanley observes that unlike the position in *Macris* itself, Mr Bittar has adduced no evidence from any individual who has concluded that Manager B refers to him or that relevant readers formed that belief. Nevertheless, Mr Stanley accepts that limited assistance would be derived from a parade of witnesses all testifying that they believed Manager B was Mr Bittar. 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.

29. 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 Final Notice itself and the information publicly available at the time of the publication of the Final Notice that it is contended leads to the conclusion that Mr Bittar is Manager B as referred to in the Final Notice.

30. Whether the available material would reasonably lead a relevant reader to conclude that other 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.

31. 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.

32. There was argument before us as to how "close to home" an acquaintance or market participant could be and still qualify as a relevant reader for the purposes of the test.

33. 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.

34. Thus we accept the Authority's contention that 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 (such as a very close friend, someone who sat next to the person at work, a spouse). We would extend that category to those who worked in Mr Bittar’s immediate team and who he reported to but not, for instance, to those who worked in the Bank outside Mr Bittar's own team. However, in our view relevant readers would include Mr Bittar’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

35. We turn now to the evidence, aside from the Final Notice itself, which it is contended assists the knowledge of relevant readers in the identification from the Final Notice of Manager B as Mr Bittar.

36. Mr Bittar filed a witness statement, which was unchallenged, and which describes his employment history with the Bank. He was an employee of the Bank from 15 November 1999 until 20 December 2011 when he was dismissed. Between 2005 and March 2010 he was based in London as a senior trader in interest rate based (primarily EURIBOR) derivatives. From February 2006 he held the position of "Managing Director" (connoting that he was a London "desk head"). In September 2009 he was promoted to the position of Global Head of Short End Derivatives Trading (also known as "MMD trading") and, on 1 March 2010, he was transferred by the bank to its Singapore Branch in order to perform this function.

37. We were shown a copy of an internal organisation chart for GFFX which was dated October 2009. This consists of two pages. The first page shows the name of the Global Head of GFFX, David Nicholls, in a box at the top of the chart, also describing his position. The reporting lines of the various business units for which Mr Nicholls was responsible are shown under this box. Each of the six business units concerned is named in a box, the two which are relevant for the purposes of this decision are "Pool Trading" and "MMD Trading", the former being the desk which traded in cash instruments and the latter in derivatives. The Pool Trading Desk shows a series of boxes each containing the name of the three managers within this desk, Mike Curtler, Rupert Labrum and Thierry Barbieux together with their direct reports. Amongst the latter were the employees responsible for submitting the Bank's IBOR submissions (defined as "Submitters" in the Final Notice). Under the MMD Trading box Mr Bittar is shown in a box with the names of his direct reports beneath him.

38. The second page of the chart shows more detail regarding MMD Trading; Mr Bittar is shown in a box as Global Head, MMD Trading and beneath that box are four boxes for the desks in five locations, London, New York, Sydney, Tokyo and Asia/ Pacific. Mr Bittar is shown to be also head of the London desk.

39. Clearly this chart shows the position as it was some time after the events concerning Manager B detailed in the Final Notice, which are described as having occurred in 2006 and 2007.

40. Mr Bittar has been the subject of considerable media attention since being dismissed by the Bank in the period prior to the publication of the Final Notice as follows.

41. In January 2013, an article in Bloomberg Business under the heading "Fired Deutsche Bank trader loses $53 million" said the following about Mr Bittar:

> "Deutsche Bank AG's Christian Bittar, one of the firm's best-paid traders, lost about 40 million euros ($53 million) in bonuses after he was fired for trying to rig interest rates, three people with knowledge of the move said.
>
> The lender dismissed Bittar in December 2011, claiming he colluded with a Barclays Plc trader to manipulate rates and boost the value of his trades in 2006 and 2007, said the people, who requested anonymity because they weren't authorized to speak

publicly. His attempts to rig the euro interbank offered rate and similar efforts by derivatives trader Guillaume Adolph over yen Libor are the focus of the bank's probe, the people said. Both traders declined to comment for this story.

"Upon discovering that a limited number of employees acted inappropriately, we sanctioned or dismissed those involved and clawed back all of their unvested compensation," Deutsche Bank spokesman Michael Golden said in a statement. "To date we have found no link between the inappropriate conduct of a limited number of employees and the profits generated by these trades."

Bittar, who joined Deutsche Bank in 2001, was a proprietary trader specialising in short-term derivatives contracts and entitled to a percentage of the profit from his trades, the people said. The bonuses Deutsche Bank pays its staff typically vest over a three-year period.

After the lender started to scale back its proprietary-trading operations in 2008, Bittar was named head of money markets derivatives trading in 2010 and moved to Singapore. He now works for Bluecrest Capital Management LLP, Europe's third-biggest hedge fund with $30 billion under management."

42. We were also provided with evidence relating to the Bank's trading with Barclays. In particular, we were referred to the Authority's Final Notice issued to Barclays Bank Plc on 27 June 2012 in respect of findings against Barclays in relation to the manipulation of LIBOR and EURIBOR. That notice contains references to communications between "Barclays Trader E" and external traders at other banks, including references to specific dated communications between "Barclays Trader E" and "an external trader" at "Panel Bank 1". On 18 July 2012, the Financial Times published a report stating that "Trader E" was Philippe Moryoussef and that the communications referred to in the notice were with counterparts at Soc Gen, HSBC, Deutsche Bank, and Credit Agricole.

43. The Guardian ran the same story on 25 January 2013 under the heading "sacked Deutsche Bank trader loses £34m bonuses over Libor scandal" and commented:

"A former star derivatives trader at Deutsche Bank has been stripped of about £34m in bonuses after he was fired for alleged involvement in a conspiracy to manipulate Libor inter-bank interest rates.

Christian Bittar, who was dismissed in December 2011, is believed to have received some of the biggest bonuses ever awarded by the German bank. A portion of these payouts were deferred, however, which has allowed the bank in effect to block some €40m in staggered bonus instalments.

Bittar had been a top trader with the investment banking arm of Deutsche Bank built up by Anshu Jain, who is now joint chief executive."

44. On 4 February 2013 a German publication, Speigel Online International, also carried a report (in English) on the same lines. It stated:

"Deutsche Bank trader Christian Bittar is accused of having colluded with a ring of Barclays traders headed by Philippe Moryoussef. The members of this group did their

best to nudge the EURIBOR in a direction that suited their purposes. Bittar wasn't just any trader at Deutsche. For years, he was apparently one of the bank's largest sources of revenue.

There are different opinions about whether, and how well, Jain knew Bittar, who reported to David Nicholls, who in turn reported to Alan Cloete. Within the bank hierarchy, Cloete stood directly under Jain, who later promoted him to the expanded management board. Jain reportedly regularly saw Bittar during meetings in the trading rooms.

Massive bonus

Oddly enough, it was during the crisis year of 2008 that Bittar celebrated his greatest success. He reportedly earned over €500 million for the bank. Despite this coup, however, his employer suffered a pretax loss of €5.7 billion in 2008.

Bittar's profits didn't meet with unrestrained delight at Deutsche. He was contractually entitled to a certain percentage of the profit from his trades, and in 2008 these bonuses are said to have amounted to over €50 million. A Deutsche Bank committee that monitors payments to senior executives approved Bittar's bonus and forwarded it to the management board, which discussed the matter in early 2009. Board members reportedly complained that the current situation made it impossible to approve such a large bonus without drawing the ire of the public. It was ultimately decided to spread the bonus over a number of years.

Internal Audit Found Nothing Wrong

Jain commissioned an internal auditing group to investigate whether everything had been done according to the book in Bittar's trading area, but the auditors found no irregularities. It wasn't until 2010, when investigators from US agencies came knocking, that the bank probed allegations of LIBOR manipulation. According to the bank, this ongoing investigation has provided no indication of a connection between the massive profits generated by the trading operation and "the inappropriate behavior of a limited number of employees". Nevertheless, in 2011 Bittar and at least one other suspected trader were fired--and the bank kept about €40 million of Bittar's unpaid bonuses."

45. The size of Mr Bittar's bonus also drew the attention of another German publication, the Local, which on 13 February 2013 commented that "the extraordinary amount is unusual - €50 million more than the €14 million former Bank head Josef Ackerman earned in his best year."

46. Mr Bittar was issued with a Warning Notice by the Authority on 15 May 2014 in which it proposed to impose a financial penalty of £10 million on Mr Bittar on the basis that he was knowingly concerned in the Bank's contravention of Principle 5 through the making of improper requests to Submitters and other banks which were high or low relative to the submissions that should have been made. The Authority also proposed to prohibit Mr Bittar from carrying on any regulated activity for any regulated firm on the grounds of his alleged dishonesty and lack of integrity.

47. Section 391(1)(a) FSMA prohibits the publication of a Warning Notice, although s 391(1)(c) permits the Authority to publish a statement containing brief particulars of a warning notice that it has issued without identifying the person to whom it has been issued. Accordingly following the issue of the Warning Notice on 15 May 2014 the Authority issued a statement which contained the following summary of the reasons why the Authority issued the Warning Notice:

> "The [Authority] considers that the individual, who was a trader at a bank, was knowingly concerned in the contravention of Principle 5 by the bank by reason of significant failings in relation to an interbank interest rate benchmark.
>
> In particular, the [Authority] considers that the individual:
>
> - dishonestly attempted to interfere with the interbank interest rate benchmark submissions of the bank by making requests to the bank's submitters for the purpose of benefiting trading position; and
>
> - dishonestly attempted to interfere with the interbank interest rate benchmark submissions of other panel banks by making requests to traders and other panel banks for the purpose of benefiting trading positions knowing it was improper to do so"

48. Despite the requirement of confidentiality, the details of the Warning Notice became public knowledge. Bloomberg Business published an article on 6 June 2014 which contained the following statement:

> "Britain's markets regulator is seeking to fine former Deutsche Bank AG trader Christian Bittar about 10 million pounds ($17 million) for trying to rig benchmark interest rates, its largest ever penalty against an individual, said a person with knowledge of the situation."

49. The Final Notice, issued at the same time as similar notices were given to other leading banks, generated considerable publicity when it was published on 23 April 2015. The Authority issued a press release to accompany the Final Notice. At the same time the Department of Justice in the United States announced through a press release a settlement with the Bank pursuant to which the Bank entered into a Deferred Prosecution Agreement and DB Group Services UK Limited ("DBGS"), a subsidiary of the Bank, entered into a Plea Agreement pursuant to which these entities admitted to manipulating LIBOR submissions. The press release contained a link to these agreements which had as an annex a statement of facts which described in some detail the structure of the relevant trading desks within GFFX. In particular, the statement attached to the plea agreement referred to a particular individual as "Trader-3" who is described as:

> "the most profitable derivatives trader at [the Bank] during the relevant period, who in 2009 became the head of the [Bank's] London MMD desk, also traded a substantial volume of financial products tied to US LIBOR despite primarily being a Euro Trader"

50. There were two further references to Trader-3 in the respective statements of facts as follows:

> "Trader-3, who became the global head of MMD in London in 2009, was a significant trader of EURIBOR-based derivative products at the Bank. Trader-3's trading profits earned him substantial performance bonuses, including a bonus of nearly 90 million pounds sterling in 2008. Trader-3's profits also gave him substantial influence at the bank and in the industry generally… Although Trader-3 and Trader-10 traded derivative products tied to a number of benchmark rates and currencies, including USD-LIBOR, the majority of their trading was in EURIBOR-based instruments."
>
> "Trader-3, who was not a DBGS employee, became the global head of MMD in London in 2009, was a significant trader of EURIBOR-based derivative products at [the Bank]."

51. Paragraph 68 of the statement of facts attached to the Deferred Prosecution Agreement contains a quote from a conversation between a submitter and Trader-3 which has a significant overlap with the extracts from a conversation between Submitter B quoted at paragraph 4.36 of the Final Notice set out at [15] above. The relevant passage at paragraph 68 of the statement of facts is as follows:

> "In addition to manipulating [the Bank's] EURIBOR submission, Submitter-4, another [Bank] EURIBOR pool trader, informed Trader-3, in an electronic chat, that he was "offering aggressively" in order to further lower the upcoming three month EURIBOR fix to benefit Trader-3's trading positions. To do so, Submitter-4 purposefully offered Euros at excessively low or high rates in the market in an effort to influence the price of cash, and thereby influence the rates that Contributor Panel banks would submit for EURIBOR. [The Bank's] Euro pool traders occasionally engaged in this conduct in efforts to influence an upcoming EURIBOR fixing. In this instance, Submitter 4 acknowledged offering cash and one full bp below where he otherwise would have in an attempt to influence the three month EURIBOR in a downward direction. Submitter -4 wrote to Trader-3: "No worries, I wld offer at 88.5 anyway so its 1bp give away [ ] 1/10 in the 3m fix is worth it."

52. The New York State Department for Financial Services ("NYSD") also entered into a settlement agreement with the Bank on 23 April 2015 and published the consent order implementing the settlement at the same time.

53. This consent order contains two quotations attributed to the "Head of the London Money Market Derivatives Desk" at paragraphs 24 and 25 as follows:

> "24. For example, on October 2, 2006, the Head of the London Money Market Derivatives desk wrote to a submitter, "mein herr, if [supervisor's] fixings in the 3 mth have rolled off, wud it be possible to put a higher 3 mth fixing?" The submitter, "SURE, ANY SPECIFIC DATE OR EVERYDAY TILL THE OCT06 FIX?" The Head of the London Money Market Derivatives desk specified, "every day please!"
>
> 25. Similarly, on January 29, 2007, a submitter wrote to the Head of the London Money Market Derivatives desk, "HI, DO YOU STILL NEED A LOW 1M EURIBOR? HOW LONG DO YOU NEED THESE LOW 1M FIXINGS? The Head of the London Money Market Derivatives desk replied, "hi-yes please; all through march, I need the libor/eonia spread to tighten""

54. Paragraph 64 of the statement of facts annexed to the Deferred Prosecution Agreement contains details of the same conversation, the words attributed in the NYSD consent order to the “Head of the London Money Market Derivatives desk” being attributed to Trader-3.

55. The NYSD’s press release accompanying the consent order starts with the striking quotation set out at the second bullet point of paragraph 4.40 of the Final Notice in bold type, quoted at [15] above, before giving details of the settlement. This statement is attributed to "a London desk head" with the other party to the conversation (described as External Trader A in the Final Notice) being described as "an external banker at Barclays".

56. In addition, the quotation set out at paragraph 4.37 of the Final Notice, quoted at [15] above, also appears verbatim at paragraph 44 of the NYSD consent order, attributed again to "a London desk head", with the other party being described as "a submitter".

57. A third US regulator, the CFTC, made an order on 23 April 2015 recording a settlement with the Bank. The order also contains detail regarding the same matters and was publicised with a press release. At page 9 of the order the strategy of the Pool Trading and MMD desks is described as follows:

> "Deutsche Bank’s merger of Pool Trading and MMD desks proved successful and resulted in significant profits for the bank. For example, throughout the relevant period, the Pool Trading and MMD desks together utilized a basis spread trading strategy (*i.e.*, trading the spread between two or more tenors) to generate profits. By mid-2008, during the global financial crisis, rates among the different tenors of LIBOR and Euribor began to widen dramatically. The Global Senior Manager and the London manager of the MMD desks (“London MMD Manager"), one of the most senior, highly regarded and highly compensated derivatives traders at Deutsche Bank, recognized the basis spread trading strategy as a way to generate significant profits off of the turbulent interest rate markets, and Deutsche Bank’s traders entered into massive derivatives basis trading positions based upon the bet that the spread between tenors would continue to widen."

58. As a footnote to the above passage, the order records:

> "The London MMD Manager relocated to Deutsche Bank’s Singapore office in March 2010, where he became the Global manager of MMD.”

59. More or less contemporaneously with the publication of the Final Notice, on 24 April 2015 Bloomberg Business published an article under the heading "This is the Trader behind some of Deutsche Bank’s most embarrassing messages" which contained the following statement:

> “Among the Deutsche Bank AG traders whose e-mails were made public when the lender was fined a record $2.5 billion for rigging Libor, one stands out.
>
> Identified only as Trader Three by the U.S. Department of Justice, he was Deutsche Bank’s most profitable derivatives trader, earning a bonus of almost 90 million pounds

($136 million) in 2008 alone. He was responsible for the majority of the requests for skewed Euribor submissions, the U.S. Commodity Futures Trading Commission said Thursday.

That trader is Christian Bittar, according to two people with knowledge of the situation, who asked not to be identified because they weren't authorized to speak publicly. The proprietary trader, who specialized in short-term and derivatives contracts, left Deutsche Bank in 2011. He was interviewed by the U.K.'s Serious Fraud Office in recent months, according to another person familiar with the matter. Bittar hasn't been charged with any offense."

Submissions

60. Mr Hunter made three principal submissions as to why the references in the Final Notice to "Manager B" would reasonably in the circumstances lead persons acquainted with Mr Bittar or persons operating in the IBOR sector, having the knowledge acquired from the evidence referred to above, to identify Manager B as Mr Bittar.

61. First, Mr Hunter submits, the Final Notice itself provides a substantial level of information about "Manager B". In particular:

(1) "Manager" is defined in the notice as a person having direct line management responsibility over Derivatives Traders and/or Submitters (a head of desk or above) in contrast to "Senior Manager" which is defined as an individual more senior than a Manager, for example one with responsibility to oversee a business area. This reveals to any person acquainted with the Bank (who would know the London office structure chart referred to at [37] and [38] above) that Manager B can only be one of three individuals, Mr Bittar, Mr Curtler or Mr Labrum.

(2) Statements in paragraphs 4.28, 4.36, 4.37, 4.38, 4.39, 4.40 and 4.41 of the Final Notice reveal that "Manager B" was Mr Bittar, as unlike other Managers, Mr Bittar's focus was on proprietary trading of Euro interest rate derivatives. That information alone would lead anyone acquainted with the Bank and Mr Bittar to realise that Manager B was Mr Bittar.

(3) Paragraph 4.65 of the Final Notice reveals that "Manager B" worked on the MMD desk and anyone acquainted with Mr Bittar would know that there was only one "Manager", as defined in the Final Notice, on the MMD desk during the relevant period as shown on the organisation chart referred to at [37] and [38] above.

(4) Accordingly, even before one looks at any of the external material, the Final Notice itself provides information regarding "Manager B" which would lead a person acquainted with Mr Bittar to identify "Manager B" as referring to Mr Bittar.

62. Second, Mr Hunter submits, the US regulatory notices, which were expressly referred to by the Authority in its press release accompanying the Final Notice, were publicly available when the Final Notice was published. The US notices contained verbatim quotations that were also included in the Final Notice and provided a simple and convenient means to identify the parties to the communications concerned. Mr Hunter submits that it is clear from the Final Notice and the three US regulatory notices published together on 23 April 2015 that the codes "Manager B", "Trader-3","London desk head", "Head of the London Money Market Derivatives Desk" and "London MMD Manager" are all describing the same individual, and that person can only be Mr Bittar.

63. Third, Mr Hunter submits that by reason of the publication of the Barclays Final Notice in 2012 and the following press reports, persons with knowledge in the IBOR sector in April 2015 would have known (1) that "Trader E" in the Barclays notice was Mr Philippe Moryoussef; (2) that "the external traders" with whom he was alleged to have communicated regarding EURIBOR were counterparts at four named Panel banks, one of which was the Bank; and (3) the person Mr Moryoussef communicated with at the Bank was Mr Bittar, this being the stated reason for Mr Bittar's dismissal. Against that background, the Authority included in the Final Notice five of the same communications attributed in the Barclays notice to "Trader E" and "an external trader", attributing them to "External Trader A" and "Manager B". Mr Hunter submits that the inclusion of these references would lead a person with market knowledge of the relevant sector to realise that "External Trader A" was Philippe Moryoussef. That would in turn lead such a person to conclude that “Manager B” must be Mr Bittar as Mr Bittar is the only Bank trader alleged to have communicated with Mr Moryoussef about EURIBOR and that was the stated reason for the Bank dismissing Mr Bittar.

64. Mr Stanley submits that Mr Bittar has produced no evidence to demonstrate that any single person (even one with specialised knowledge) has concluded that Manager B refers to him, let alone that relevant readers formed that belief. Nor has he produced any evidence that the press, although he concedes it has paid great attention to his position, has reached such a conclusion. Instead Mr Bittar relies on a process of logic by which notices are read forensically and specifically with a view to identifying particular individuals rather than as relevant readers would read them. In Mr Stanley’s submission that was not the approach envisaged by the Court of Appeal in *Macris.* The background knowledge that Mr Bittar seeks to attribute to relevant readers is a mosaic of scraps gleaned from a variety of carefully selected publications.

65. Mr Stanley also submits that it was not open to Mr Hunter to advance the arguments summarised at [61] above as it was not pleaded in Mr Bittar's statement of case that he was the only person who was a desk head at MMD.

66. We reject Mr Stanley's submission regarding the pleadings. Mr Bittar's statement of case provides that it is to be read in conjunction with his reference notice, paragraph 7 of which clearly refers to the material to be derived from the Final Notice itself. Moreover, in our view, paragraphs 22 to 25 of the statement of case, although combining points regarding the Final Notice and the US regulatory notices together, quite clearly refer to the details regarding Manager B in the Final Notice.

67. As we observed at [24] and [25] above, our task is to put ourselves in the shoes of the relevant reader and determine whether the material available to such a person at the time of the publication of the Final Notice would reasonably lead such a person to the conclusion that Mr Bittar had been identified in that notice.

68. We start from the position that a relevant reader, such as a person who at the relevant time held a similar position to Mr Bittar in another bank, would be familiar in broad terms with his employment details. Our experience tells us that in this specialised area of the market, in common with other specialised sectors of the financial services industry, all the main players will be familiar with the background of their counterparts in other banks, the positions they fill and how they fit into the structure of the relevant business unit. Thus in our view the broad details regarding Mr Bittar's employment described at [36] above would be known to a relevant reader and remembered by him at the time he read the Final Notice, notwithstanding Mr Bittar's dismissal in 2011. Indeed, due to Mr Bittar's prominence in the market relevant readers would also have been aware of the fact of his dismissal and have reason to have his name in mind at the time the Final Notice was issued due to the ongoing press interest, as described at [77] and [78] below.

69. Mr Hunter relied to a degree on the internal organisation chart referred to at [37] above. We accept Mr Stanley's submission that even if a relevant reader was aware of that chart, it was only available in 2009. Therefore the chart could not assist with the position as at 2006 and 2007 which is when the relevant matters concerning Manager B described in the Final Notice occurred. Nevertheless, in our view the relevant reader would, for the reasons we have given at [68] above, have known that Mr Bittar had been a London desk head in relation to the trading of interest rate based derivatives since 2006 and that he dealt primarily in EURIBOR related derivatives. Since he was the head of desk, relevant readers would also have known that he would be the direct line manager of the other derivatives traders at that desk.

70. With this information in mind, in our view there is no doubt that when reading the Final Notice the relevant reader would conclude that Manager B was Mr Bittar for the following reasons.

71. First, the definition of "Manager" makes it clear that it is a person who has "direct line management responsibility" over either Derivatives Traders or Submitters and that such a person is a head of desk or above.

72. Second, the relevant reader would also be aware that Manager B was not a "Senior Manager" as defined because such a person was defined as one who had responsibility to oversee a business area. A relevant reader would have known that Mr Bittar did not have those responsibilities.

73. Third, the paragraphs in the Final Notice referred to by Mr Hunter, as described at [61] above reveal that Manager B's focus was on the proprietary trading of EURIBOR linked instruments. These provisions also make it clear that Manager B was both a Derivatives Trader and a Manager of Derivatives Traders as distinct from

Managers on the Pool Trading Desk who were responsible for managing Money Market Traders, as defined in the Final Notice.

74. Fourth, as the definitions in the Final Notice make clear, "Submitters" with whom Manager B is recorded as having had conversations regarding EURIBOR submissions, were part of the Pool Trading Desk so it is clear again from the Final Notice that Manager B, having been identified as a Derivatives Trader, operates outside of that desk and must be the Manager of the MMD Desk, as described below.

75. Fifth, paragraph 4.65 of the Final Notice also makes it clear that Manager B works on the "MMD Desk" which is defined as the money markets derivatives desk within GFFX, clearly separate from the Pool Trading Desk.

76. Consequently, it is inevitable that the relevant reader, knowing that Mr Bittar was a London desk head and that the desk of which he was the head at the relevant time was the Money Market Derivatives desk, would conclude that Manager B could not be anyone other than Mr Bittar.

77. Other information in the public domain at the time of the Final Notice and which would be known to the relevant reader at the time the Final Notice was published reinforces this conclusion. It is our experience that prominent market participants in specialised sectors have a keen interest in what their counterparts at other banks might be earning, and would be particularly keen to know who is the best paid of their counterparts and how much he earned. The publicity regarding Mr Bittar's "massive" bonus, described as one of the biggest ever awarded by the Bank, and how he came to lose it would be closely followed by relevant readers, the size of investment bankers' bonuses always being a matter of great interest to the financial press.

78. As indicated by the press comment in January 2013, referred to at [41] to [45] above, the publicity regarding Mr Bittar's loss of his bonus also made reference to the position he held within the Bank which when read with the Final Notice would confirm that Manager B was Mr Bittar. The publicity regarding Mr Bittar's warning notice in May 2014 would also tend to keep Mr Bittar's name in the mind of the relevant reader as at the time he read the Final Notice.

79. Furthermore, there are a number of striking quotations attributed to Manager B in the Final Notice, particularly those set out in paragraph 4.40, as quoted at [15] above, which indicate a singular style of communication which would be familiar to those with whom he dealt.

80. We therefore reject Mr Stanley's submission that there was insufficient evidence that relevant readers would know or recall regarding the details of Mr Bittar's job title at the relevant time. Whilst they might not have remembered his precise job title, they would have been aware that he was the head of the money market derivatives desk in London, responsible solely for the direct line management of the traders on that desk and consequently the person referred to as Manager B in the various conversations with Submitters and counterparts at other banks described in the Final Notice.

81. It follows that we need not consider Mr Hunter's additional submissions as regards the material in the US regulatory notices and the previous publicity regarding Mr Moryoussef, but for completeness we shall deal with them briefly.

82. We reject Mr Stanley's submission that the relevant reader would not have read the US regulatory notices in detail and would not have carried out a detailed comparison of those documents with the Final Notice.

83. In view of the fact that all the notices were issued simultaneously and the Authority's press release accompanying the Final Notice contained a link to the US regulatory notices, we conclude that it is likely that a relevant reader, whilst not reading all the US material cover to cover, would be likely to read the accompanying press releases and the relevant passages in the statements of fact, notably the quotes, which were not particularly long. If they had done so, for the reasons given by Mr Hunter, the material concerned would have led them to reinforce their view that "Manager B" and the various descriptions contained in the US notices, as referred to at [62] above are all describing the same individual and that person can only be Mr Bittar.

84. Indeed it is clear from *Macris* itself that of the Court of Appeal expected the relevant reader to be aware of this type of material: see [53] of the judgment where the court contemplated that relevant readers would be aware of the US Senate report which expressly referred to Mr Macris by name.

85. As regards the material concerning Mr Moryoussef, we accept Mr Stanley's submission that to identify Mr Bittar through this route does require a process of forensic investigation which is not envisaged by the test in *Macris*. The original publicity regarding Mr Moryoussef following the issue of the Barclays notice was some three years before the issue of the Final Notice and we would not have expected the relevant reader to have retained in his mind the details of the Barclays notice and to have made the link between Mr Moryoussef and Mr Bittar by the time of the publication of the Final Notice, notwithstanding the further publicity in 2013.

Conclusion

86. We therefore conclude that the matters included in the Decision Notice identified Mr Bittar in the relevant sense and manner, as provided in s 394 FSMA and the preliminary issue is decided in his favour.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 10 November 2015