[2017] UKUT 0428 (TCC)

Reference number: FS/2017/0008

FINANCIAL SERVICES– procedure-application to make reference out of time-whether Tribunal satisfied that in all the circumstances application should be granted-no-Rule 2 and Schedule 3 Paragraph 2 (2) Tribunal Procedure (Upper Tribunal) Rules 2008

Preliminary issue-whether if reference had been admitted applicant had third party rights -s 393 Financial Services and Markets Act 2000- whether applicant identified in notice-no-Supreme Court judgment in Macris considered

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

STEPHEN COOPER	**Applicant**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**The Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in public in London on 3 October 2017

The Applicant in person

Miss Priya Dave, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. On 10 May 2017 the Applicant ("Mr Cooper") made a reference to this Tribunal out of time in respect of his contentions that he was identified in a decision notice (the "Decision Notice") given by the Authority to WH Ireland Limited ("WHI") on or about 22 February 2016, that the reasons contained in the notice, which was followed on 22 February 2016 by a final notice (the "Final Notice"), are prejudicial to him and that he should have been given a copy of the relevant notices by the Authority.

2. 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.

3. 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.

4. 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
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> (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."

5. 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 was not the case in relation to Mr Cooper as there were no regulatory proceedings being taken against him at the time the Decision Notice was issued to WHI. In this case a copy of the Decision Notice was not given to Mr Cooper as the Authority took the view that the notice did not identify him. In those circumstances s 393(11) FSMA 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 –
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> (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."

6. Mr Cooper accordingly made his reference pursuant to s 393(11).

7. As Mr Cooper 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 the matters which are the subject of this decision has proceeded by reference to the Final Notice.

8. On 26 May 2017, the Tribunal directed that a hearing be held to determine the following two questions:

(1) whether to admit Mr Cooper's reference out of time; and

(2) whether Mr Cooper had been identified in the relevant sense and manner, as provided for in s 393 (4) of the Financial Services and Markets Act 2000 ("FSMA") in the Decision Notice.

9. This decision sets out the Tribunal's findings in relation to those two questions.

The Facts

10. Mr Cooper explained to me at the hearing how it was that his reference was filed nearly 14 months after expiry of the 28-day statutory time period from the giving of the notice of the decision in question. This time limit is to be found in paragraph 2 (2) of Schedule 3 to The Tribunal Procedure (Upper Tribunal Rules 2008) (the "Rules"). The Authority did not challenge Mr Cooper's evidence and I accept it. The following findings are made from that evidence and the other documentation that was provided to me at the hearing, including a witness statement from Mr Rupert Lowe, the former chairman of WHI.

11. Mr Cooper joined WHI as Compliance Director in February 2011 and was approved by the Authority to hold the controlled functions of CF 1 (Director) CF 10 (Compliance Oversight) and CF 11 (Money Laundering Reporting). He held those functions whilst a review of the market abuse systems and controls at WHI was conducted during 2013 by a skilled person pursuant to s 166 FSMA.

12. The skilled person's report identified weaknesses in WHI's ability to identify and mitigate risks associated with market abuse and in the ability of the compliance department to administer market abuse related systems and controls and made recommendations for improvement.

13. As a consequence of the findings of the skilled person's report, the Authority took regulatory action against WHI. The outcome of this action was a settlement with WHI, as set out in the Final Notice, pursuant to which WHI agreed that it had breached Principle 3 of the Authority's Principles for Businesses by failing to take reasonable care to organise and control effective systems and controls to protect against the risk of market abuse occurring during the period 1 January to 19 June 2013. The Authority imposed a financial penalty of £1,200,000 on WHI and subjected it to a restriction on its Corporate Broking Division of 72 days from the taking on of new clients.

14. One of the failings identified by the Authority in the Final Notice was deficient compliance oversight including monitoring and oversight of market abuse controls, the provision of management information, risk assessment and dealing with suspicious transactions.

15. Mr Cooper himself was made the subject of an investigation into his role as Compliance Director (CF 10) of WHI and was interviewed in that regard by the Authority in September 2014.

16. In June 2015, the Authority concluded its investigation into Mr Cooper. On 22 June 2015, the Authority wrote to Mr Cooper indicating that it was minded to issue him with a Private Warning. Mr Cooper was invited to make representations on that letter and he did so in a letter dated 10 September 2015.

17. On 18 December 2015, the Authority issued a Private Warning to Mr Cooper which was set out in a detailed letter of that date. In broad terms, the letter expressed concerns that Mr Cooper "may" have acted without due skill, care and diligence in carrying out his functions in relation to WHI's market abuse controls and the provision of inadequate management information in breach of Statement of Principle 6 of the Statements of Principle and Code of Practice for Approved Persons.

18. The letter described the status of the Private Warning according to the provisions in that regard set out in the Authority's Enforcement Guide. In particular, it stated that a private warning was not intended to be a determination by the Authority as to whether the recipient has breached the Authority's rules but that "private warnings, together with any comments received in response, will form part of the person's compliance history" and may influence the Authority's decision whether to commence action in relation to future breaches. Mr Cooper was informed that he was expected to disclose substance of the Private Warning in any future application for approved person status, both to the Authority and the proposed employer.

19. The use of Private Warnings has been the subject of much criticism. Indeed, the Authority itself stated in a consultation paper it issued in October 2016 entitled "our future Mission" that given the Authority's desire to be more transparent it would review the use of private warnings. It stated:

> "A private warning does not provide a determination that a breach has occurred and may give the impression that fair process has not been followed. Equally, many firms may appreciate that "private warnings" offer a quick and clear resolution to concerns which can be achieved more quickly than a full investigation."

The Authority has asked in this consultation whether private warnings are consistent with its desire to be more transparent.

20. Certainly, Mr Cooper had serious concerns with the process that led to the issue of the Private Warning and these were expressed robustly by his lawyers, Ashurst, in its response to the Private Warning on behalf of Mr Cooper in a letter dated 15 January 2016.

21. Ashurst expressed the view that it was plain from any fair reading of the Private Warning that the Authority had in no way mere unresolved suspicions, but had concluded that Mr Cooper had acted in breach of the relevant provisions and that those allegations would materially damage Mr Cooper's position in seeking future employment. In those circumstances, Ashurst requested the right to contest the Private Warning observing that a failure to allow him such a right would deny his legitimate expectation that he can properly contest the Authority's actions before an independent and impartial tribunal. They requested that the Private Warning be treated as a Warning Notice issued under the Authority's disciplinary powers in s 66 FSMA. Ashurst made it clear that if the Authority refused to take this course they had instructions to challenge the refusal. Alternatively, they requested that the Authority await and consider Mr Cooper's further representations and accede to his repeated suggestion that the Authority conclude the matter by deciding to take no action.

22. On 29 January 2016 Mr Cooper sent a very detailed letter making representations on the Private Warning. In particular, he complained that the Authority had raised a number of issues in relation to perceived failings in WHI's market abuse control environment the fault for which the Authority appeared to lay solely at his door. He also contended in any event that the relevant controls were effective and did the job that they were supposed to do.

23. Furthermore, Mr Cooper disputed that it was his responsibility (let alone his alone) to ensure the sufficiency of management information required by the Board and that it was and is the collective responsibility of the Board to ask him for such information that they required. He made a similar observation in relation to conflicts of interest, stating that compliance with the regulatory system was a collective responsibility of the Board and the front-line executive rather than his alone and that he had attempted to get the Chief Executive and Board to deal with the issues which they failed to do.

24. On 18 February 2016, the Authority wrote to Ashurst informing them that they were reviewing Mr Cooper's response to the Private Warning and that they were withdrawing the Private Warning pending their complete review of Mr Cooper's response.

25. Whilst these exchanges in relation to the Private Warning were taking place, the Authority was negotiating the settlement with WHI. There was a split amongst both the executive and the Board regarding the merits of a settlement with the Authority, the Chief Executive and some other board members being in favour and Mr Lowe and Mr Cooper being against. Those who wished to settle with the Authority prevailed. Mr Lowe was removed from the Board on 1 December 2015 and Mr Cooper was dismissed the next day. Both Mr Lowe and Mr Cooper said that they would have challenged the Authority's findings, as set out in the Final Notice, in many respects.

26. On 18 December 2015, in a letter that crossed with the letter setting out the Private Warning, Ashurst wrote to the Authority reminding them that Mr Cooper had not received a response to his letter of 10 September 2015 and stating that it assumed that in the meantime the separate investigation into WHI was proceeding. In that

context, Ashurst made reference to the recent Court of Appeal judgment in *Macris* concerning the circumstances in which a person is identified for the purposes of s 393 FSMA, stating that if and to the extent that any comments or material in any Notice being negotiated between WHI and the Authority makes any reference to Mr Cooper (applying the test set out in the *Macris* judgment regarding identification) he should be given a copy of the Notice and an opportunity to make representations. It was therefore clear from this letter that Ashurst, and presumably therefore Mr Cooper, were fully aware of the possibility that he might be able to assert third party rights should he believe that he had been identified in any relevant statutory notice issued to WHI.

27. The Authority responded to this letter on 18 December 2015 by enclosing a copy of the Private Warning sent to Mr Cooper on the same day and noting that it had taken account of Mr Cooper's position as regards whether he might have third party rights.

28. The Final Notice was issued on 22 February 2016. As mentioned at [13] above, the outcome was a finding that WHI breached Principle 3 because it failed to take reasonable care to organise and control effective systems and controls to protect against the risk of market abuse occurring during the period 1 January to 19 June 2013.

29. The Authority summarised the reasons for its findings in paragraph 2 of the Final Notice. Of particular relevance to Mr Cooper's reference are the summary findings in paragraph 2.3 as follows:

> "2.3. WHI failed to maintain an adequate control environment in respect of market abuse. This gave rise to a heightened risk of market abuse occurring and continuing undetected. These failings included:
>
> (1) weak market abuse controls to detect and mitigate against the risk of market abuse arising from how inside information was handled, personal account dealing and conflicts of interest;
>
> (2) deficient compliance oversight including monitoring and oversight of market abuse controls, the provision of MI, risk assessment and dealing with suspicious transactions;
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> (3) poor governance including a lack of clearly allocated responsibilities, reporting lines and accountability and, as Board packs were insufficiently detailed, a lack of market abuse MI and a lack of challenge and review of this by the Board and its committees; and
>
> (4) WHI did not have a formal way of identifying and recording what training had been given and to whom."

30. At paragraph 4.15 the Authority referred to the findings of the skilled person as follows:

"4.15. The Skilled Person identified weaknesses in both WHI's ability to identify and mitigate risks associated with market abuse and in the ability of the compliance department to administer market abuse related systems and controls. It identified particular weaknesses in the following areas:

(1) market abuse controls including the handling of inside information, PAD, DMA trading and wall-crossing, and the release of sales and research communications (documents prepared by the research team at WHI analysing particular financial instruments or markets);

(2) compliance oversight including a weak market abuse risk assessment, and the analysis of automated surveillance alerts;

(3) governance including formal oversight by the Board and management committees of market abuse systems and controls, the receipt of MI and market abuse policy documentation; and

(4) training and awareness including awareness of market abuse requirements across WHI."

31. At paragraph 4.23 (4) in contrast to the use of the term "compliance oversight" there was a reference to "the compliance department" when referring to the insufficiency of WHI's procedure for dealing with inside information and wall crossing as follows:

"the compliance department did not monitor calls made between staff and third parties to ensure that wall crossing was happening appropriately and/or whether market abuse was occurring…"

32. Under the heading "Compliance Oversight" paragraph 4.34 stated:

"A number of WHI's compliance oversight systems and controls were inadequate including those in respect of risk assessments, monitoring and surveillance, MI, and STRs. This limited WHI's ability to ensure that the market abuse risks inherent in its business activities were adequately mitigated."

33. In contrast to both paragraphs 4.23 and 4.34 there was the following reference to the "compliance department's oversight" at paragraph 4.39 as follows:

"WHI's compliance department's oversight was insufficiently thorough and should have overseen the broad range of trading, business and responsibilities undertaken by WHI, including monitoring of principal trading and client trading, approving and monitoring PAD, maintaining Insider Lists and research documents and ensuring compliance with its STR obligations."

34. At paragraph 4.42 there was a reference to the "compliance oversight process" as follows:

"An important part of the compliance oversight process is to use MI to identify potential risks, forecast problems and determine how to mitigate risks."

35.

36. There was another reference to the "compliance department" at Paragraph 4.69 as follows:

> "The training in place for compliance staff was insufficient: no additional formal market abuse training was provided to compliance staff over and above the online training provided to all staff. Further, the compliance department monitoring team responsible for undertaking daily market abuse monitoring activities had limited experience."

37. Mr Cooper was at the relevant time a member of the Board of WHI. There are numerous references in the Final Notice to what the Authority found to be failings of the Board. In particular, the Authority made the following findings under the heading "Governance" at paragraphs 4.57 to 4.59, which also contain references to the "compliance department":

> "4.57. During the Relevant Period there were three meetings of WHI's Board. However, there was little documented discussion of market abuse matters and where there was discussion the action taken (if any) was not recorded.
>
> 4.58. In these meetings and the Board packs which preceded them, potentially significant market abuse issues were raised. However, there is no evidence that a plan was put in place to deal with the issues, and nor did the Board request further MI from the compliance department. For example, after receiving significant indications of concern about market abuse in the January 2013 Board meeting the Board did not ask the compliance department to report on market abuse issues or present the Board with a plan for dealing with the issues raised.
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> 4.59. The Authority is concerned that the Board did not identify the MI, such as a formal report on market abuse from the compliance department, it expected to receive to be presented at every Board meeting. Without such MI and a lack of formal record of discussion, challenge, and resolution, the Board was not able to fully discharge its oversight responsibility for market abuse."

38. When it comes to identify WHI's failings in terms of breaches of Principle 3 the Final Notice does so in terms of corporate failings at paragraph 5.2 to 5.4 as follows:

> "5.2. Principle 3 requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
>
> 5.3. WHI breached Principle 3 because it failed to organise and control its affairs in respect of market abuse responsibly and effectively.
>
> 5.4. On the basis of the facts and matters set out above, WHI failed to maintain an appropriate control environment in respect of market abuse and this gave rise to a substantive risk of market abuse occurring. The control environment was inadequate because:
>
> > (1) Market abuse policies, procedures and controls were either not in place or were inadequate to identify, prevent or mitigate the risk of market abuse. Specifically, WHI did not:

(a) have a comprehensive procedure in place for handling inside information to prevent the risk that inside information could be communicated improperly and to ensure that the disclosure of inside information was appropriately recorded and controlled;

(b) put in place clear and consistent rules for PAD;

(c) ensure that PAD was accurately registered and monitored; and

(d) put in place a policy to address how conflicts of interest were to be dealt with or record all actual or potential conflicts of interest.

(2) Oversight of WHI's systems and controls was not sufficient to allow WHI to fully understand the market abuse risks in its business activities and to mitigate those risks. In particular:

(a) there was no risk assessment or risk management framework to consider market abuse risks;

(b) WHI was overly reliant on an automated trade monitoring system which was not adequately set up and the exception reports generated by the monitoring system were not promptly or adequately reviewed or investigated;

(c) no MI was provided to the Board at all until May 2013 and, even after that date, the MI provided to the Board did not specifically consider the risks of market abuse; and

(d) the STR procedure was inadequately detailed and STRs were not logged, escalated or reported to the Board where appropriate.

(3) WHI failed to address and alleviate the risk of market abuse. More specifically:

(a) a lack of Terms of Reference or specific role in respect of market abuse for Board and the Compliance and Risk Committee meant that WHI was less able to engage with market abuse risks and issues; and

(b) the Board was not provided with MI relating to market abuse for most of the Relevant Period and even when market abuse issues were raised it did not give them adequate consideration.

(4) Training at WHI was inadequate because:

(a) the training programme in place at WHI for all staff was insufficient in scope and detail and in some cases the required programmes were not conducted leading to a risk that employees did not understand the risks of market abuse; and

(b) compliance department staff were not adequately trained, which meant they were constrained in their ability to identify potential market abuse, and were not sufficiently clear as to what their responsibilities were and how they were to discharge their duty to mitigate market abuse.

> (5) In addition, with regard to conflicts of interest as set out in paragraphs 4.33 – 4.36 (and summarised at paragraph 5.4(1)(d) above), WHI failed to comply with SYSC in relation to its failure to keep and regularly update a conflicts of interest register or record (SYSC 10.1.6R), and establish and implement an effective conflicts of interest policy which identified the circumstances which constituted or may have given rise to a conflict of interest and specified the procedures to be followed and measures to be adopted in order to manage such conflicts (SYSC 10.1.10R(1) and (SYSC 10.1.11R)."

39. On 1 March 2016 Ashurst wrote to the Authority in response to its letter of 18 February 2016, noting that the Private Warning had been withdrawn pending the Authority's further review of Mr Cooper's response.

40. Ashurst then referred to the fact that the Authority had issued the Final Notice and expressed concern that it was issued without Ashurst having had an opportunity to make comments on it and without due consideration being given to Mr Cooper's third party rights. Ashurst expressed the view that the references in the Final Notice to "compliance oversight", "compliance department's oversight" or "oversight by the central compliance function" were words as would, by application of the Court of Appeal's test in *Macris*, identify Mr Cooper as an individual because he held the CF 10 compliance oversight function and that the words used in the Final Notice would reasonably in the circumstances lead persons acquainted with Mr Cooper or who operated in his area of the financial services industry to believe that Mr Cooper was the person prejudicially affected by the matters stated in the reasons contained in the Final Notice.

41. Ashurst therefore contended that Mr Cooper should have been given third party rights pursuant to s 393 FSMA. The letter concluded as follows:

> "In the circumstances, we must reserve all of our rights in relation to the matters referred to in this letter, including those of our client under section 393 and 394 of the Act. In the circumstances, the FCA should confirm within 14 days that it will take no further action against Mr Cooper….
>
> Alternatively, if the case is not dropped altogether, we would repeat our demand that the FCA affords our client the opportunity to challenge your assertions in proceedings by way of your proceeding to serve a Warning Notice as set out in our letter of 15 January 2016. Again, we require information within 14 days of the date of this letter, or our client reserves the right to seek a judicial review of his position."

42. This letter was written at a time when the period during which Mr Cooper had the right to make a reference based on an allegation of third party rights in relation to the Final Notice was still running.

43. The Authority replied to this letter on 9 March 2016, expressing its disagreement with Ashurst's view that Mr Cooper had third party rights in relation to the Final Notice. It then said:

> "If you believe that it [sic] did have third party rights, you will need to refer the matter to the Upper Tribunal."

44. In relation to Ashurst's demand that the Authority withdraw the Private Warning by 16 March 2016 the Authority stated that it was unlikely that it would have reached a definitive view on the disposition of the Private Warning by that date.

45. Bearing in mind involvement of Ashurst, who are experienced lawyers in this field, I infer that at this time Mr Cooper was aware of his right to refer the matter to the Tribunal and that there was a time limit for doing so. Mr Cooper told me at the hearing that at this time he did not focus on the time limit, although his lawyers had told him about it. He said he was "not as aware as I should have been about the 28 day rule." He said that he was focused on his own personal investigation and was "punch drunk" and reached the view that there "may be some retribution" if he opened up a route to the Tribunal in circumstances where the Authority still had the Private Warning under consideration. Mr Cooper therefore concluded that he would not make a reference at this stage.

46. It was not until 10 October 2016 that the Authority, in a very terse letter, wrote to Ashurst with its conclusions having reviewed Mr Cooper's response to the Private Warning. It simply said:

> "we confirm that we will not reinstate the Private Warning, and that this has been withdrawn."

47. Mr Cooper's reaction to the Authority's response was to make a complaint to the Authority about the Private Warning process and the length of time that investigation against him had taken. In summary, his complaint was:

> "
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> - the FCA's investigation took too long, at considerable expense;
> - the FCA should not have issued a Private Warning that was, in effect, a prohibition order, I requested but did not have the opportunity to challenge the FCA's views at the RDC; this highlights the lack of a fair process of challenging the Private Warning procedures; and
> - that the FCA has not apologised for putting me through such a disruptive and destructive process"

48. In addition, Mr Cooper indicated in his letter that he was unhappy that the Authority disagreed with his assessment that the Final Notice prejudiced him and that the Authority had suggested the only way to challenge this was before the Tribunal.

49. On 4 November 2016, the Authority's complaints team wrote to Mr Cooper setting out its understanding of the complaint. The letter stated that the complaints team was unable to consider the third party rights issue:

> "because the Scheme prevents us from investigating a matter which we consider could reasonably have been dealt with in another way. Specifically, section 393 (11) of the Financial Services and Markets Act 2000 provides a route to refer to the Upper Tribunal the FCA's decision not to grant you third party rights in respect of a warning notice."

50. On 8 November 2016 Mr Cooper replied to this letter in some detail. In relation to the third party rights issue he said, "my complaint at the moment is about the procedure that led to my identification and the dismissive treatment I received at this stage, not the fact that I was identified, yet." He went on to say that the Tribunal route "is impractical and therefore procedurally unfair and possibly ridiculously cumbersome for some employees, particularly in the compliance departments of small firms unless they put their lives on hold and can fall back on resources of time money and patience." Nevertheless, he went on to say that depending on matters unfolded in the months ahead, "I may consider this as a course of action, as I have come this far."

51. On 22 March 2017, Mr Cooper, who had been chasing the Authority for a response to the complaint, asked the Authority in an email whether the delay might have been caused by the Authority awaiting the Supreme Court's judgment in the *Macris* case. Mr Cooper expressed the view that the judgment, which had been released on that day, strengthened his case.

52. On 13 April 2017, the Authority's complaints team wrote to Mr Cooper with its conclusions on the complaint, apologising for the fact that it had taken so long to do so. The complaint was partially upheld in that it was accepted that the Authority took too long to confirm to Mr Cooper that the Private Warning would not be reissued and that it should have acknowledged that in its letter to him but it was not accepted that the investigation of the case against him up to that point was unreasonably delayed. The Authority stated that the review of the use of Private Warnings mentioned in the Mission Consultation released in October 2016 prompted the decision not to reissue the Private Warning. Therefore, the reason for the delay was the review of the policy on Private Warnings but it was inappropriate to have told Mr Cooper that before the formal consultation process had begun. The letter did not accept that there had been any improper motive for the issue of the Private Warning as Mr Cooper had alleged and that the decision to issue the Private Warning was a reasonable one in the circumstances and in line with the published policy at the time.

53. Mr Cooper was not satisfied with the outcome and referred his complaint to the Complaints Commissioner in a letter dated 24 April 2017. He asked the Complaints Commissioner solely to consider whether the Authority had been fair with him in its issue, withdrawal and communications concerning the Private Warning.

54. At some point thereafter, Mr Cooper took the decision to refer the question of his third party rights to the Tribunal and, as previously mentioned, his reference was made on 10 May 2017. Mr Cooper observed that this was 27 days after the Authority's decision of 13 April 2007 regarding his complaint. It would therefore appear that he rationalised in his own mind that it was acceptable for the statutory 28-day period be calculated in this case by reference to the Authority's conclusions in relation to the outstanding matters regarding the Private Warning.

55. On 22 June 2017, the Complaints Commissioner wrote to Mr Cooper with his decision on the complaint. He reached the conclusion that the decision to issue a Private Warning was a reasonable one to reach and the complaint was not upheld.

The law and the factors to be considered when considering whether to extend time

56. The most recent decision in this Tribunal on an application for an extension of time of this type was *Robert Hill v The Pensions Regulator* [2016] UKUT 0480 (TCC). In that decision, the Tribunal summarised the relevant factors to be taken into account at [21] to [24] as follows:

> "21. The approach to be taken by this Tribunal in considering an application for an extension of time of this type, which may be granted pursuant to the power to extend time contained in Rule 5(3)(a) of the Rules, was set out by this Tribunal in *Martin-Artajo v Financial Conduct Authority* [2014] UKUT 0340 (TCC) at [31] to [51] of the Decision. I need not set out the relevant passages in full again but the approach to be taken, which does not appear to be in dispute, can be summarised as follows:
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> (1) In exercising its power to extend time the starting point is the overriding objective of the Rules which requires the Tribunal to consider whether in all the circumstances it is fair and just to extend time: see [32] to [35] of the Decision;
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> (2) As set out by Morgan J, sitting in the Upper Tribunal, in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) there are five questions which as a general rule a Tribunal is to ask itself when considering whether to extend time, namely:
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> (a) What is the purpose of the time limit?
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> (b) How long was the delay?
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> (c) Is there a good explanation for the delay?
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> (d) What will be the consequences for the parties of an extension of time? and
>
> (e) What will be the consequences for the parties of a refusal to extend time?
>
> (3) The time limit concerned must be given great respect and there must be strong factors in favour of departing from it. Time limits should be respected unless there are good reasons not to and time limits are there for a reason: generally speaking, the parties are entitled to finality (see [40] of the Decision).
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> 22. In the past, the Tribunal has also taken into account the merits of the reference in deciding whether or not to extend time. However, as the Tribunal recently held in *Koksal v The Financial Conduct Authority* [2015] UKUT 603 (TCC), taking account of the recent judgment of the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, the merits of the case should only be a factor to be weighed in the balance where the case is either obviously hopeless (in which case there is no point extending time) or so overwhelmingly strong that there is no realistic prospect of there being a defence to it.
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> 23. Since *Data Select* was decided, CPR rule 3.9 has changed and provides that on an application for relief from any sanction imposed for a failure to comply with any rule

> the court must consider the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders. Furthermore, as the Regulator submits, the Court of Appeal has recently confirmed that the Tribunal Rules are to be complied with in like manner to the CPR and that the stricter approach taken by the courts to compliance with procedural rules heralded in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and clarified in *Denton v TH White Ltd* [2014] 1 WLR 3926 applies equally in the Tribunals: see *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 at [37] to [38].
>
> 24.In the light of *BPP*, as the Regulator submits, I should accord "significant weight" as part of my consideration of the overriding objective to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders."

57. In practice, bearing in mind the facts of this case, I am able to make my decision primarily by reference to the factors in *Data Select*.

Extension of time – Discussion

58. I now turn to consider whether I should extend time in the light of the facts found and the principles I have identified above. I do so by carrying out a balancing exercise in respect of those factors that tend to favour the grant of an extension and those which do not, giving appropriate weight to the various factors in the light of the facts found and coming to a conclusion as to whether as a result of that balancing exercise it is fair and just to grant an extension. I start by considering the five questions identified in *Data Select*.

The purpose of the time limit

59. Miss Dave correctly summarised the reason for the time limit in respect of the filing of a reference in cases of this nature as follows:

> (1) In relation to references generally (whether by the subject of the notice or a third party) the Authority needs to be able to take decisions, including decisions about whether to close an investigation (or some aspect of it), and how best to deploy investigation teams. Such decisions need to be taken in the light of accurate information about any aspects of the matter that are likely to be considered by the Tribunal. The file on this investigation has been closed for a considerable period of time.
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> (2) In relation to a reference by a third party (or alleged third party), interested parties (particularly WHI as the subject of the Final Notice in this case) are potentially affected and they are entitled to know where they stand and to take action accordingly. It is not uncommon for subject such as WHI to be facing related civil claims.
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> (3) The Tribunal's task may be made harder where there is delay in making a reference.

(4) It is in the public interest that the position should be clear, so that the market knows what regulatory action has been taken and when that action can be regarded as definitive.

(5) It is in the interests of consumers that the position should be clear, so that, for example, redress exercises and past business reviews can be undertaken without delay.

60. Miss Dave submits that some flexibility may be needed to cater with cases where an alleged third party is not aware of the notice or of his right to challenge it. Once that person is aware of the notice of his right to challenge it, as Mr Cooper must have been in this case by 1 March 2016 at the latest, there is no reason why he should not be expected to proceed with reasonable dispatch, and the 28-day period allows perfectly adequate time the necessary decisions and action to be taken. In principle, therefore, the time limit in the Rules should be enforced. It is a precise limit, and not a vague target.

61. I shall deal with the impact on the Authority if the time limit were not respected later. However, as the clear purpose of the time limit is to ensure finality of litigation the Authority has a clear interest in there being certainty on this point.

62. In this particular case, the potential impact on WHI is a significant factor. It appears there are no open issues relating to that investigation, such as other outstanding references by third parties. WHI would have the right to be joined to Mr Cooper's reference as an interested party. It is likely that it would do so because Mr Cooper indicated that if his reference were to be admitted, he would want the Tribunal to explore whether the findings made in the Final Notice are correct. Even if that did not involve a change the terms of the Final Notice, it is possible that the Tribunal could make findings which are at variance to the Final Notice and WHI clearly has an interest in those findings. The process may well therefore involve WHI in unexpected expense and effort a long time after it had assumed the matter had been closed. I have no evidence of any potential civil claims in this case that could be relevant.

63. As far as the position of the Tribunal is concerned, although the delay is a significant one, it is not so long that the fact that evidence may have become stale is a material issue in this case.

64. As far as the market is concerned, the length of time since the Final Notice was issued without there having been any third party references would certainly have left it to believe that the matter had been definitively settled.

65. I had no evidence of any potential consumer detriment were the time limit not to be respected.

66. Therefore, on balance, the factors under this head in this particular case tend towards a decision that the time limit should be respected.

The length of the delay

67. The delay in this case (nearly 14 months) is substantial on any view. It was caused by Mr Cooper's conscious decision not to make a reference until after the conclusion of his and Ashurst's correspondence with the Authority in relation to the Private Warning and his subsequent complaint and cannot therefore be regarded as having been unavoidable. Where there is a delay of this length, there will need to be a compelling reason to extend time. In this case, therefore, the length of the delay is a strong factor tending against a decision to extend time.

The explanation for the delay

68. As I have found at [45] above, Mr Cooper made a deliberate decision after the Final Notice had been given not to make a reference within the statutory time limit, despite being aware of that limit. As appears from the evidence, he took that decision because he wished to endeavour to clear his name (and therefore overcome what I accept were serious obstacles that the Private Warning had created for him in pursuing other employment opportunities) first through continuing to challenge the Private Warning and then subsequently through his complaint about the process that led to the Private Warning being given.

69. As regards his comment that there "may be some retribution" if he made his reference, it is clear that again, deliberately, Mr Cooper took the decision that he did not wish to do anything that might cause the Authority to reinstate the Private Warning.

70. It would therefore appear that Mr Cooper was seeking to "hedge his bets". He wished to achieve his objectives through the withdrawal of the Private Warning and a recognition that it should never have been given, but his fall-back position was still to make a reference, albeit that it would obviously then be made out of time. So much is clear from his comment in his letter of 8 November 2016 to the complaints team that "at the moment" his complaint was about the procedure that led to his identification and that in effect the Tribunal route was undesirable because of its complications and potential cost implications.

71. There is nothing unreasonable in Mr Cooper deciding that he should "hedge his bets" on that basis. However, where he did not act reasonably was in failing to have made his reference in time and not seeking to have it stayed whilst the Authority continued to consider the question of the Private Warning. The filing of a reference notice is not an onerous task and can be completed relatively easily. I cannot see that the mere fact of making a reference could reasonably be expected to have led to the Authority being antagonised to the point that it influenced the way it dealt with the Private Warning issue if, as he should have done, Mr Cooper explained that the making of the reference was a protective measure. There was no good reason why he should keep the Authority in the dark about his intentions because by so doing he has given the Authority plenty of ammunition to resist the making of the reference at this late stage.

72. In my view, the reasonable course of action to have taken at the time the Final Notice was issued was either to have made a reference and asked for a stay, or have explored with the Authority whether it would consent to an extension of time to file a reference whilst the position on the Private Warning became clearer and ask the Tribunal to approve such an extension. That course of action may well have prompted the Authority to deal with the Private Warning issue rather more speedily in order to limit any delay in respect of the reference. If the Authority was difficult on that point he could have applied to the Tribunal on his own for an extension of time. The decision in the *Martin-Artajo* case, where the Tribunal made the same point, would have been available to Mr Cooper and Ashurst at the time the decision was made not to make the reference but there is no evidence that what was said in that case was taken into account in the decision-making process.

73. Notwithstanding what I have said at [72] above, I might well have looked sympathetically at the issue had Mr Cooper delayed the making of the reference only up to the point at which the Authority made its decision not to reinstate the Private Warning. As I have said, that letter was terse and Mr Cooper's complaint about it and the length of time it took to emerge was upheld to a significant extent. At that point, the reference would only have been out of time for half of the length of time that it ultimately was. Mr Cooper should therefore have reviewed his strategy in relation to the making of a reference at that point but he made a conscious decision to continue to pursue the issues through the complaints scheme. Although a seven-month delay is still highly significant, the Authority must bear some responsibility through what was found by its Complaints Scheme to be an unreasonable delay in informing Mr Cooper of the outcome of the reconsideration of the Private Warning. Also, at this point although Mr Cooper still had concerns about the process that had led to the Private Warning it would no longer appear on his compliance record and there was no other regulatory action pending against him. Therefore, if he still had concerns about any prejudice to his employment prospects that was caused by the Final Notice plainly he should have made the reference at that stage.

74. Furthermore, the Authority's letter of 4 November 2016 made it clear that Mr Cooper's complaint regarding the identification issue could not be addressed by the complaints scheme and that was another trigger point that should have led Mr Cooper to reconsider whether it was now appropriate to make his reference.

75. Finally, on this factor, Mr Cooper stated in his reference notice that another reason for the delay in making the reference was because he was awaiting the judgment of the Supreme Court in the *Macris* case, but it was another 54 days after the release of that judgment before the reference was made, notwithstanding Mr Cooper's view that the reasoning in that judgment strengthened his own case.

76. My overall conclusion on this factor is that there was no good explanation for the long delay of nearly 14 months which occurred in relation to the making of this reference and this is a strong factor tending against extending time in this case.

The consequences for the parties of an extension of time

77. Should an extension of time be granted, Mr Cooper will have the opportunity for the first time to make representations on the Final Notice, subject to it being determined that he has been identified in that notice.

78. As the Tribunal observed at [46] to [50] of the decision in *Martin-Artajo*, the Tribunal is an integral part of the regulatory scheme under FSMA designed to ensure that regulatory action is preceded by fair process. In this case, Mr Cooper has not been given the opportunity of making representations prior to the issue of the Final Notice so that, assuming he is held to have been identified in the Final Notice, then Mr Cooper would, if time were not extended, have had no opportunity at all of making representations on the criticisms he says were made of him in the Final Notice.

79. There is also a public interest in the Authority's decision being as accurate as possible and this will be more likely to be achieved if those decisions are properly tested.

80. The lack of opportunity for Mr Cooper to make representations and the role of the Tribunal as an integral part of the regulatory scheme designed to produce quality decision-making are therefore relevant factors that I should take into account. By admitting the reference, I will be assisting with respect to the public interest in the accuracy of administrative decision-making. This is particularly so in the case of settled notices such as the Final Notice, where it is often the case that the firm has a strong interest in disposing of the matter and moving on whereas an individual who feels that he has been unfairly criticised will not have had the opportunity of making representations as to the correctness of the findings made in the Final Notice. That is clearly a factor here because Mr Cooper made it clear that he was opposed to the settlement and did not believe that it was appropriate for WHI to have agreed to the findings that it did. It is also a factor that the investigation made against him personally resulted in the unsatisfactory outcome of the issue of a Private Warning that was subsequently withdrawn and I have much sympathy with Mr Cooper's concerns regarding the whole Private Warning process which appears to have been recognised by the Authority in its recent consultation paper.

81. However, should the reference be admitted the Authority will have to reopen its file on the matters which were the subject of the Final Notice and will therefore have to devote resources that it might have allocated elsewhere to dealing with the matter. There are no other outstanding proceedings relating to the subject matter of the Final Notice, such as other third party references. This is therefore a powerful point and finality of litigation, particularly after such a long delay, is normally to be given strong weight.

82. There are therefore strong points on both sides in relation to this issue; as a result, I regard it as broadly neutral in this particular case.

The consequences for the parties of a refusal to extend time

83. If time is not extended, Mr Cooper will have no opportunity to challenge the criticisms he says are made of him in the Final Notice, bearing in mind the outcome of his personal investigation and that he was not given the opportunity of making representations as a third-party under s 393 FSMA in the course of the proceedings taken against WHI.

84. Miss Dave submits that the loss of the right to make a reference is always a consequence when a time limit is not respected and allowing Mr Cooper to make a reference approximately 14 months after the Final Notice was published would make it difficult to resist any such late references. The time limit would effectively become meaningless, making finality and action taken by the Authority difficult to achieve.

85. Again, there are strong points on each side on this factor. As a result, I regard it as broadly neutral in this case.

Conclusion on the time limit issue

86. Applying the overriding objective in the light of all of the factors considered above, I have concluded that the balancing exercise comes out in favour of not granting an extension of time for the following reasons:

(1) The importance of the time limit in relation to the principle of finality must be recognised, and there are no strong factors which lessen that importance in this case;

(2) The delay is a very long one and there is no good reason for it; and

(3) The consequences for the parties of either the granting of an extension or the refusal of such extension are broadly neutral in this case and do not outweigh factors (1) and (2) above

87. I therefore conclude that it is in the interests of justice that time for the making of the reference is not extended and the reference cannot therefore be admitted.

88. I am conscious that Mr Cooper may well regard my decision on the extension of time issue as another example of him being shut out from an opportunity to challenge what he regards as unjustified criticisms of his behaviour and which he says are preventing him from pursuing his career. He also has some justified criticisms as to the way that the Authority has handled his investigation, but I cannot for that reason alone depart from the well-established principles that govern the question as to whether I should extend time.

89. However, in case it is of some comfort, the position is that the Private Warning having been withdrawn and not forming part of his compliance record, there should be no question of him being regarded as having any personal culpability in that regard. The able way Mr Cooper made his submissions to me is an indication that he has still much to offer in terms of future employment.

90. Furthermore, although I have decided not to admit the reference and in that regard it is not necessary for me to consider whether Mr Cooper has in fact been identified in the Final Notice, in recognition of the skill with which Mr Cooper presented his case, the fact that the issues were fully argued and also because this is the first case when the issue has had to be considered since the Supreme Court's judgment in *Macris* I will now proceed to deal with the identification issue, although not to the same level of detail as I might have done had it been a live issue.

The law relating to the identification issue

91. I have set out at [4] and [5] above the provisions of s 393 FSMA which are relevant to the question of identification. The leading authority on the construction of these provisions is now the Supreme Court's judgment in *FCA v Macris* [2017] UKSC 19.

92. In that case, Mr Macris complained that without giving him an opportunity to make representations the Authority published a notice imposing a penalty on his former employer, JP Morgan Chase Bank NA, for various irregularities in the conduct of its business, in terms which identify him as the person responsible.

93. The irregularities concerned losses incurred by the Bank's Synthetic Credit Portfolio ("SCP"), a trading portfolio housed within the Bank's Chief Investment Office ("CIO"). Based in London, Mr Macris had a role in the management structure of the SCP, his job title being International Chief Investment Officer.

94. Following an investigation, the Authority concluded that the losses were caused by a high-risk trading strategy, weak management of that trading and an inadequate response to important information which should have alerted the Bank to the problems. It also concluded that the Bank had withheld significant information from the Authority while the losses were being incurred.

95. The Upper Tribunal considered whether Mr Macris had been identified for the purposes of s 393 FSMA and therefore should have been given third party rights.

96. The Tribunal referred to paragraph 4.3 of the Final Notice given to the Bank which provided:

> "4.3 The Firm is a wholly owned subsidiary of the Group. CIO operates within the Firm in both New York and London. The traders on the SCP were managed by SCP management, which in turn were managed by CIO London management. CIO London management represented the most senior level of management for the SCP in London, reporting directly to CIO Senior Management in New York, which in turn reported to Firm Senior Management. CIO also had its own Risk, Finance and VCG functions, which were control functions relevant to the SCP and other portfolios within CIO. The wider control functions within the Group included Internal Audit, Compliance and the Group's Audit Committee."

97. The Tribunal found that there was no such body on the Bank's structure chart as "CIO London management". Mr Macris had contended that the term had been

intentionally employed by the Authority to refer to him, specifically and uniquely, and did so throughout the Final Notice, which the Authority did not deny.

98. The Tribunal found as a fact that the acts and omissions attributed in the Final Notice to CIO London management were the acts and omissions of an individual and that individual was whoever it was fitted the description of CIO London management.

99. The Tribunal stated that the correct approach to be taken in order to establish whether Mr Macris had been identified in the Final Notice through the description "CIO London management" was to answer the following questions:

> (1) Are the references in the Final Notice to CIO London management references to an individual, ascertained by reference solely to the terms of the Notice itself?
>
> (2) If so, can those references be regarded as referring to anyone other than Mr Macris?

100. For the purpose of answering the second question, the Tribunal held that recourse may be made to external material to confirm that the individual identified in the Final Notice by the description could in fact only be Mr Macris. Having applied the test, the Tribunal concluded that Mr Macris had been identified.

101. The Authority appealed to the Court of Appeal. The Court of Appeal approved the two-stage approach formulated by the Tribunal but did not agree that there could be ex post facto unlimited reference to external material to identify the third party.

102. The Court of Appeal reformulated the second stage of the test 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?"

103. The Court of Appeal held that if the Tribunal had applied that test, it would nevertheless have concluded that Mr Macris had been identified and therefore upheld the Tribunal's decision.

104. The Supreme Court, by a majority, rejected the Court of Appeal's approach. Lord Sumption (with whom Lord Neuberger and Lord Hodge agreed) gave the leading judgment. He referred at [8] to the fact that there were many references in the Final Notice to conduct by "CIO London management" but observed that Mr Macris was not the only manager in CIO in London and that on the basis of the notice alone, therefore, "CIO London management" could have referred to a number of people other than him. In making that observation, Lord Sumption did not refer to the Tribunal's finding that "CIO London management" did not exist as a management body but was described in the Final Notice as "the most senior level of management for the SCP in London".

105. Lord Sumption then reformulated the test for identification at [11] in the following terms:

> "This appeal turns on the meaning of "identifies" and on the meaning of the notice to which that word is being applied. Both are questions of law, although the answers may be informed by background facts. The essential question before us is what background facts may be relevant for this purpose. In my opinion, a person is identified in a notice under section 393 if he is identified by name or by a synonym for him, such as his office or job title. In the case of a synonym, it must be apparent from the notice itself that it could apply to only one person and that person must be identifiable from information which is either in the notice or publicly available elsewhere. However, resort to information publicly available elsewhere is permissible only where it enables one to interpret (as opposed to supplementing) the language of the notice. Thus a reference to the "chief executive" of the X Company may be elucidated by discovering from the company's website who that is. And a reference to "CIO London Management" would be a relevant synonym if it could be shown to refer to one person and that person so described was identifiable from publicly available information. What is not permissible is to resort to additional facts about the person so described so that if those facts and the notice are placed side by side it becomes apparent that they refer to the same person. I reach this conclusion for the following reasons."

106. This is clearly a much narrower test than that formulated by the Court of Appeal. In giving his reasons for his conclusion Lord Sumption said at [12] of his although s 393 covers the same ground as the general obligation imposed by public law to give those affected sufficient notice to enable them to make representations to protect their legitimate interests "it does so in a more limited way". At [13] Lord Sumption said that reference to extrinsic sources of information is legitimate only so far as it is necessary in order to understand what the notice means.

107. Lord Sumption also justified a narrow reading of s 393 in the light of the practicalities of the Authority carrying out concurrent investigations into a number of individuals and entities in respect of the same matter. He said at [14] of the judgment:

> "Third, it is necessary to read section 393 in the light of the practicalities of performing the Authority's investigatory and disciplinary functions. It is common for notices to be served on different parties to the same investigation at different times. The possibility is expressly envisaged in section 393 itself. The role of the firm or of the various individuals involved may take more or less long to investigate. Or, as happened in this case, one of them may settle before the others. Once the facts relating to one person or firm under investigation are ascertained or admitted and are found to justify criticism or sanctions, there will often be no proper reasons for withholding that information from the market. Yet there will almost always be people in the know, who will realise when they read the notices which individuals are encompassed by apparently anodyne collective expressions such as "management" or who is likely to have been responsible for particular failings of the firm. The facts, or enough of them, may be well known within the firm. They may be deduced by those who know enough about the firm's procedures or organisational structure or the business methods of the "third party" in question. Even for those who are further from the scene, the internet is a fertile source of information and gossip for those who are willing to

> go to some trouble to discover his identity. The Authority will not necessarily know what if any further information about the business, the facts or the individuals involved may be available to knowledgeable outsiders or discoverable from publicly available sources. In those circumstances it must be able to ensure, by the way in which it frames its own notices, that a third party is not "identified" in the notice, even if he or she is identifiable from information elsewhere. The present case is a good illustration of the problem. The Court of Appeal considered that the information relevant for the purpose of identifying Mr Macris included the US Senate Report, which identified him by name. On that footing, once the Senate Committee had published his report, it would have been impossible for the Authority to serve the notice on JP Morgan as part of the settlement process, without serving a copy on Mr Macris at a comparatively early stage of the investigation of his role, when it would not necessarily know the relevant facts or have formulated any criticisms."

108. Therefore, applying this test to the facts, Lord Sumption concluded at [17] that the question was whether the terms of the notice itself would have conveyed to a reasonable member of the public without extrinsic information that the term "CIO London management" was a synonym for Mr Macris. Lord Sumption said "Plainly it would not."

109. Lord Neuberger, in agreeing with Lord Sumption, said at [25] and [26]:

> "25. Because there are powerful policy arguments pointing in opposite directions, it seems to me that it is justified, indeed requisite, to have particular regard to the wording of the relevant statutory provision. Section 393(1)(a) states that section 393 applies where "any of the reasons contained in a … notice … relates to a matter which … identifies a person". In other words, the question to be asked is: does the notice identify the individual in question? The language used appears to stipulate that the person must be identified in the notice, not that he must be identifiable as a result of the notice. A literal reading could therefore be said to suggest that the notice must expressly mention the individual by name, as opposed to rendering that individual capable of being identified as a result of information to which one reader, all readers or a specific group of readers of the notice may be able to get access. In my view, that would be too narrow a meaning to give the section.
>
> 26. An equally natural, but more realistic interpretation is that, in order for the section to apply to an individual, either he must be named in the notice, or the description in the notice must be equivalent to naming him. On this basis, a reference to the Chairman of the Board of a United Kingdom-registered company would "identif[y]" the individual concerned, as it would be easy for anyone to find out his name. (And, depending on the facts, the same might be the case with a reference to the Chairman of the Board of a foreign-registered company). It is true that even that form of identification would require the reader to have some outside knowledge, but as a matter of ordinary language, I would accept that an individual is "identified" in a document if (i) his position or office is mentioned, (ii) he is the sole holder of that position or office, and (iii) reference by members of the public to freely and publicly available sources of information would easily reveal the name of that individual by reference to his position or office."

110. It appears that although Lord Sumption did not specifically say so in his judgment, that there is still a two-stage approach to the question of identification. The starting point is to ascertain whether the references in the notice which the applicant contends potentially identify him can properly be construed as references to an individual. That is apparent from Lord Sumption's observations at [8] of the judgment that "CIO London management" could have referred to a number of people other than Mr Macris and therefore could not be regarded as a synonym for any particular individual, in that case Mr Macris, although Lord Sumption did not specifically deal with the Tribunal's findings that "CIO London management" did not exist as a body and that the way that the term was used in the Final Notice demonstrated that it was being used as a reference to a particular individual.

111. The starting point for Lord Neuberger's test must implicitly be the answering of the question as to whether an individual has been identified within the terms of the notice by reference to a position or office of which he is the sole holder. Consequently, reference to a collective body (even it would seem on the basis of Lord Sumption's judgment a body which did not exist but was used as a device to disguise the identity of an individual) would not be sufficient to identify any particular individual who might fit the description of a member of that body and might be identified by reference to freely and publicly available sources of information that would reveal his membership of that body.

112. Against that background, I turn to consider the basis on which Mr Cooper contends that he has been identified in the Final Notice on the basis of the application of the Supreme Court's test.

Identification – Discussion

113. Mr Cooper seeks to distinguish *Macris* on the facts. He submits that whilst Mr Macris was held by the Supreme Court not to be the only manager to whom the J P Morgan Final Notice could have referred to, in the Final Notice given to WHI, Mr Cooper was the only person to whom the term "compliance oversight" could have referred to.

114. Mr Cooper observed that he held the controlled function of "compliance oversight", that is CF 10, and there was no one else who held that post. That information was and remains in the public domain on the Authority's public register.

115. Mr Cooper referred me to SUP 10A.7.8 of the Authority's Handbook which states:

> "the compliance oversight function is the function of acting in the capacity of a director or senior manager who is allocated the function set out in SYSC 3.2.8R …."

116. Mr Cooper contrasts this with the provisions of SYSC 3.2.7 which refers to "the compliance function". Among other things, that provision states that "a compliance function" should be staffed by an appropriate number of staff and adequately resourced. SYSC 3.2.8 then provides that a firm "must allocate to a director or senior

manager the function of… having responsibility for oversight of the firm's compliance…" In Mr Cooper's submission, the result is to draw a clear distinction between the compliance function and the "compliance oversight function", the former being a reference to a body and the latter clearly to an individual. Mr Cooper himself was the only person at the relevant time performing the "compliance oversight function" in his capacity as CF 10 and his identity could easily be verified by reference to the Authority's public register.

117. Miss Dave submits that the use of the term "compliance oversight" in the Final Notice was not as a synonym for any particular individual but was a reference to the compliance oversight process. She submits that the criticisms in the Final Notice were aimed at the failings in the process rather than those of anyone identifiable individual or his acts and omissions. There was no statement in the Final Notice of the office or job description of any particular individual.

118. Miss Dave observes that Mr Cooper himself did not believe that he had sole responsibility for compliance oversight and relies on the statements that Mr Cooper made in his letter 29 January 2016, referred to at [22] and [23] above. Miss Dave also relies on *Jan Laury v FSA* (2007) where the predecessor tribunal to this Tribunal held that criticisms in a Final Notice of a firm's compliance arrangements could not be regarded as criticisms of the firm's compliance officer who was responsible for those arrangements and thus the compliance officer did not have third party rights. The Tribunal observed at [19 (2)] of its decision:

> "where a particular function or particular department of a firm is referred to as having failings, it does not necessarily follow that a particular individual can be inferred to have been at fault, even if that individual was the head of the Department or the person responsible for that function. Such a person may have competently and firmly advised and warned those to whom he reported, and may have been ignored or overruled. Or he may have competently instructed and supervised those under his direction, only to be let down by them."

119. Mr Cooper made his submissions skilfully and powerfully. However, with regret I must reject them.

120. I do accept that if the term "compliance oversight function" had been used in the Final Notice then that would be construed as referring to a particular individual when read in the context of the notice, namely the person holding the CF 10 function as referred to in SUP 10A 7.8. I am assuming that the test for identification assumes that the audience to whom the Final Notice is directed has some knowledge of the regulatory system and that the system provides for individuals performing particular functions to be approved by the Authority. On that basis, applying Lord Neuberger's test, an individual's position would have been mentioned, Mr Cooper was the sole holder of that position and reference to freely and publicly available sources of information, namely the Authority's public register would easily reveal Mr Cooper's name by reference to his position. Therefore, had that been the case here I would have distinguished the reasoning in *Jan Laury* in so far as "particular function" could properly be referring to the holder of a particular function prescribed by the Authority's rules.

121. However, at no point in the Final Notice is there a reference to the "compliance oversight function". What there is are references to "compliance oversight" without qualification or "compliance oversight systems and controls" or "compliance department" or the "compliance department's oversight" or "compliance oversight process". None of those references can be regarded as a synonym for Mr Cooper, on the basis of Lord Sumption's test, nor is there any reference to a position or office, on the basis of Lord Neuberger's test. Therefore, Mr Cooper's claim for third party rights must fall at the first hurdle because it seems to me that there is no reference to any particular individual holding a position but rather references to processes carried out through the firm in which a number of individuals would have been involved. That conclusion is reinforced by the way the failings of WHI are summarised at paragraphs 5.2 to 5.4 of the Final Notice, as set out at [38] above. To that extent I accept Ms Dave's submissions.

122. For the same reasons, the references to the Board in the Final Notice cannot be said to identify Mr Cooper notwithstanding the fact that he was a member of the Board. The Board is a term used to refer to the directors of the firm collectively and applying Lord Neuberger's test Mr Cooper was just one of the members of that collective body and not the sole holder of the position of director.

Conclusion

123. Therefore, had I admitted the reference out of time I would have decided the preliminary issue against Mr Cooper and thus would have dismissed the reference.

124. I appreciate that as a result of this decision, Mr Cooper will continue to believe that he has been the victim of serious injustice at the hands of the Authority. As I have explained above, I have considerable sympathy with him as regards the Private Warning issue. As regards the identification issue, those who work in his sector of the industry may continue to regard Mr Cooper as having some responsibility for the failings identified in the Final Notice, failings which he hotly disputes and which he has not had the opportunity to contest either through the Authority's administrative decision-making process or this Tribunal. He finds himself in the position described by Lord Sumption at [14] of the judgment in *Macris*, as set out at [107] above. Unfortunately, that is not a situation that this Tribunal can redress; the Tribunal must apply the law as it has been interpreted in *Macris* unless and until it is changed by Parliament. Notwithstanding that, as I have previously mentioned, there has been no finding by the Authority that Mr Cooper has been personally culpable in relation to the failings which it found in respect of WHI in the Final Notice.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 6 November 2017