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Case Numbers: UT-2023-000014-17

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: The Rolls Building, London EC4A 1NL

FINANCIAL SERVICES - third party rights reference - preliminary issue - effect of FCA giving a Final Notice to the subject of a Decision Notice who has not referred the matter to the Tribunal where a third party has made a reference in relation to the Decision Notice - ss 390, 391 & 393 FSMA

Heard on: 22 May 2022
Judgment date: 9 June 2022

Before

JUDGE TIMOTHY HERRINGTON

Between

BANQUE HAVILLAND SA (1)
EDMUND LLOYD ROWLAND (2)
VLADIMIR BOLELYY (3)

Applicants

-and-

THE FINANCIAL CONDUCT AUTHORITY

The Authority

DAVID JOHN ROWLAND

Third Party Rights Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For the First Applicant: Jason Mansell, Counsel, instructed by Kingsley Napley LLP

For the Second Applicant: Simon Pritchard, Counsel, instructed by Peters & Peters LLP

For the Third Applicant: Rhys Meggy, Counsel, instructed by Hickman & Rose

For the Third Party Rights Applicant: Graham Robeson, representative

For the Authority: James Purchas, Counsel, instructed by the Financial Conduct Authority

DECISION

Introduction

1. This decision relates to a preliminary issue directed to be heard by the Tribunal in respect of a third party reference made by Mr David Rowland pursuant to s 393 (9) of the Financial Services and Markets Act 2000 ("FSMA"). Mr David Rowland has been identified in separate Decision Notices given by the Authority to Banque Havilland S.A., Mr Edmund Rowland, Vladimir Bolelyy and Mr David Weller. Mr David Rowland has made his reference on the basis that the Decision Notices contained statements that are prejudicial to him.

2. The Decision Notices have been issued by the Authority in relation to what the Authority alleges is improper advice given by Banque Havilland in a presentation which it is alleged recommended manipulating trading strategies which could be a criminal offence, had it taken place in the UK. The Authority alleges that Mr Edmund Rowland, Mr Bolelyy and Mr Weller are culpable in relation to that matter. The Authority seeks a substantial financial penalty from Banque Havilland and financial penalties from each of Mr Edmund Rowland, Mr Bollelyy and Mr Weller as well as prohibition orders under s 56 FSMA against those three individuals.

3. Banque Havilland, Mr Edmund Rowland, and Mr Bolelyy (together the "Applicants") have referred their Decision Notices to the Tribunal and their references will be heard in due course. These references will be heard together with the third party reference of Mr David Rowland. Mr Weller has not referred his Decision Notice. On 6 March 2023 the Authority issued Mr Weller with a Final Notice setting out the regulatory action the Authority had decided to take as set out in Mr Weller's Decision Notice, but that Final Notice has not yet been published.

4. Mr David Rowland contends that the Authority was not permitted to give the Final Notice to Mr Weller pending the outcome of his third party reference. He contends that because the Upper Tribunal's decision on the various references (including his own third party reference) may be inconsistent with the Final Notice, which in essence repeats the matters set out in Mr Weller's Decision Notice, a Final Notice cannot properly be issued to Mr Weller or published prior to the Tribunal determining his reference in relation to Mr Weller's Decision Notice. He contends that by issuing the Final Notice the Authority has pre-determined the Tribunal's assessment of Mr Rowland's third-party reference and circumvented the statutory role of the Tribunal and Mr David Rowland's statutory rights under s 393 FSMA. His objective is to ensure that Mr Weller's Final Notice is issued in a form and manner consistent with the findings of the Tribunal on determining the references of the Applicants and himself.

5. Mr David Rowland asks the Tribunal to quash the Final Notice on the basis that it is a nullity or, if it has no such power, to request the Authority to rescind the Final Notice. Although they have no direct interest in this particular point, the Applicants support Mr David Rowland's position and the Tribunal has permitted them to make submissions to the Tribunal on the issue.

6. The Authority contends that on a proper construction of s 390 FSMA, the Authority may issue a Final Notice when it has determined to take the action to which the Decision Notice relates and the subject has not made a reference to the Tribunal, whether or not a third party has made a reference under s 393 FSMA. It says that construction is consistent with both the language of ss 390(1), (2) and (2A) FSMA and a purposive construction of those provisions, having regard to the relevant regulatory interests as between the FCA and the subject of the Decision Notice and the legitimate reputational interests of the third party.

The statutory framework and relevant case law

7. Section 390 of FSMA deals with when a Final Notice or a Further Decision Notice must be issued in relation to regulatory action taken by the Authority on the conclusion of the relevant regulatory or judicial proceedings. It provides (so far as relevant):

> "(1) If a regulator has given a person a decision notice and the matter was not referred to the Tribunal within the time required by the Tribunal Procedure Rules, the regulator must, on taking the action to which the decision notice relates, give the person concerned and any person to whom the decision notice was copied a final notice.
>
> (2) If a regulator has given a person a decision notice and the matter was referred to the Tribunal, the regulator must, on taking action in accordance with any directions given by –
>
> (a) the Tribunal, or
>
> (b) a court on an appeal against the decision of the Tribunal,
>
> give that person and any person to whom the decision notice was copied, the notice required by subsection (2A).
>
> (2A) The notice required by this subsection is –
>
> (a) in a case where the regulator is acting in accordance with a direction given by the Tribunal under section 133(6)(b), or by the court on an appeal from a decision by the Tribunal under section 133(6), a further decision notice, and
>
> (b) in any other case, a final notice.
>
> […]
>
> (5) A final notice about a penalty must –
>
> (a) state the amount of the penalty;
>
> (b) state the manner in which, and the period within which, the penalty is to be paid;
>
> (c) give details of the way in which the penalty will be recovered if it is not paid by the date stated in the notice.
>
> […]
>
> (7) In any other case, the final notice must –
>
> (a) give details of the action being taken;
>
> (b) state the date on which the action is to be taken.
>
> […]"

8. Section 391 of FSMA contains detailed provisions in respect of the publication of Warning, Decision and Final Notices. The relevant provisions in relation to the subject matter of this decision are subsections (4) and (6) which provide as follows:

> "(4) The regulator giving a decision or final notice must publish such information about the matter to which the notice relates as it considers appropriate.
>
> […]
>
> (6) The FCA may not publish information under this section if, in its opinion, publication of the information would be –
>
> > (a) unfair to the person with respect to whom the action was taken (or was proposed to be taken),
> >
> > (b) prejudicial to the interests of consumers, or
> >
> > (c) detrimental to the stability of the UK financial system."

9. Section 393 of FSMA applies to certain types of Warning and Decision Notices issued by the Authority and does apply in relation to all Warning and Decision Notices relevant to the references which are the subject of these proceedings. So far as relevant, s 393 of FSMA provides as follows:

> "(1) If any of the reasons contained in a warning 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 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.
>
> (2) Subsection (1) does not require a copy to be given to the third party if the regulator giving the notice –
>
> > (a) has given him a separate warning notice in relation to the same matter; or
> >
> > (b) gives him such a notice at the same time as it gives the warning notice which identifies him.
>
> […]
>
> (4) If any of the reasons contained in a decision notice to which this section applies relates to
>
> a matter which –
>
> > (a) identifies the person ('the third party') other than the person to whom the 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.
>
> […]

(6) Subsection (4) does not require a copy to be given to the third party if the regulator giving the notice –

(a) has given him a separate decision notice in relation to the same matter; or

(b) gives him such a notice at the same time as it gives the decision notice which identifies him.

(7) Neither subsection (1) nor subsection (4) requires a copy of a notice to be given to a third party if the regulator giving the notice considers it impracticable to do so.

(8) Subsections (9) to (11) apply if the person to whom a decision notice is given has a right to refer the matter to the Tribunal.

(9) A person to whom a copy of the notice is given under this section may refer to the Tribunal –

(a) the decision in question, so far as it is based on a reason of the kind mentioned in subsection (4); or

(b) any opinion expressed by the regulator giving the notice in relation to him.

(10) The copy must be accompanied by an indication of the third party's right to make a reference under subsection (9) and of the procedure on such a reference.

(11) A person who alleges that a copy of the notice should have been given to him, but was not, may refer to the Tribunal the alleged failure and–

(a) the decision in question, so far as it is based on a reason of the kind mentioned in subsection (4); or

(b) any opinion expressed by [the regulator giving the notice] 4 in relation to him.

(12) Section 394 applies to a third party as it applies to the person to whom the notice to which this section applies was given, in so far as the material [to which access must be given] 5 under that section relates to the matter which identifies the third party.

[…]"

10. It is convenient to mention the powers of the Tribunal on determining a reference, because these powers have a bearing on whether, following the determination of a reference, the notice to be issued by the Authority on conclusion of the relevant proceedings should either be a Final Notice or a Further Decision Notice.

11. Section 133(5) to (7) FSMA, following amendments made by the Financial Services Act 2012, now provide as follows:

"(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.

(6) In any other case, the Tribunal must determine the reference or appeal by either-

(a) dismissing it; or

> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6)(b) are limited to findings as to-
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision.
>
> (7) The decision-maker must act in accordance with the determination of, and any direction given by the Tribunal."

12. It can be seen that there is a distinction between the powers of the Tribunal on what is described as a "disciplinary reference" and other references. Pursuant to s 133 (7A) FSMA "disciplinary reference" includes a decision to impose a financial penalty on a person. The term does not include a reference to impose a prohibition order under s 56.

13. Thus, in relation to the references which are the subject of these proceedings, the reference made by Banque Havilland is a disciplinary reference, because the sanction sought by the Authority is simply a financial penalty. In relation to the individual Applicants, the references are both disciplinary and non-disciplinary references, in that the Authority seeks both a financial penalty and a prohibition order. That would have been the case in relation to Mr Weller had he referred his decision to the Tribunal.

14. In relation to disciplinary references, the Tribunal has a full merits jurisdiction in that its powers under s 133 (5) enable it to give to the Authority such directions as it considers appropriate such as, in relation to a financial penalty, to impose no penalty at all or a penalty of a different amount intended for by the Authority.

15. In relation to "non-disciplinary references", the powers of the Tribunal as set out in s 133(6) are more limited. The jurisdiction may be characterised as a supervisory rather than a full jurisdiction. That means that, unless the Tribunal believes the references to have no merit and therefore dismisses them, its powers are limited to remitting the matter to the Authority with a direction to reconsider their decisions in accordance with the findings of the Tribunal.

16. That is why s 390 (2A)(a) provides that where the Tribunal is giving a direction on the determination of a disciplinary reference in accordance with s 133 (5), the Authority must issue a Final Notice to complete the proceedings which must reflect the directions given by the Tribunal when determining the reference.

17. In contrast, where the Tribunal makes a direction on the determination of a non-disciplinary reference, in accordance with s 133 (6) (b), the Authority has to consider whether it wishes to continue to take regulatory action in the light of findings of the Tribunal. If it wishes to do so, clearly no Final Notice can be issued, and the Authority must issue a Further Decision Notice, which will give rise to a further right of reference to the Tribunal: see s 390 (2A)(b). If the Authority does not wish to make a further decision in relation to the subject matter of the original notice, then it will issue a notice of discontinuance of the regulatory proceedings to the subject of those proceedings.

18. The question as to whether a third party reference made under s 393 (9) FSMA is a non-disciplinary reference is problematic. As set out above, s 133 (5) makes it clear that a reference

made under s 393 (11), that is one where a reference is made because a third party contends that he was not given third party rights in respect of a Decision Notice when he should have been, is treated the same way as a disciplinary reference, that is the Tribunal has a full merits jurisdiction and can give directions to the Authority as to the appropriate action to take.

19. Section 133 is silent on the question as to whether a reference made under s 393 (9), which is the position in this case, is to be treated as a non-disciplinary reference. Section 133 (7A) lists the types of reference which are to be regarded as disciplinary references, with the consequence that all other references are to be treated as non-disciplinary references. As the list does not include a reference made under s 393 (9) the implication is that such a reference is to be regarded as a non-disciplinary reference. The Tribunal referred to this anomaly in *One Insurance Limited v FCA* [2017] UKUT 0210 (TCC) where it said at [65] to [68]:

> "65.On the face of it, a reference made pursuant to s 393 (9) is not a disciplinary reference and therefore, by default, the powers of the Tribunal in determining that reference are limited to those provided for in s 133(6). It is difficult, however, at first sight to see the logic for this different treatment. It is not immediately apparent why Parliament was content to entrust the Tribunal with exercising discretion as to whether it was appropriate to amend a notice, having carried out the balancing exercise referred to at [64] above, in a case where the third party was given a copy of the notice in accordance with s 393 (9), but not where there was a failure to do so.
>
> 66.It may be that the answer to this is that in a situation where s 393 (9) applies, the Authority will have already carried out that balancing exercise by concluding that notwithstanding the fact that the decision contains material which is in its opinion prejudicial to the third party, it considers that including the prejudicial material is necessary in the context of the regulatory message which the notice seeks to convey. In those circumstances, the intention may have been that the Tribunal's powers should be limited to making findings of fact and law and then remitting the matter to the Authority for it to determine what is the appropriate action to take in the light of those findings.
>
> "67.In his submissions, Mr Stanley [Counsel for the Authority] expressed the view that there appeared to be a lacuna because it was not explicit whether a reference under s 393 (9) is "disciplinary" or "supervisory." He therefore submitted that the question depended on the power being exercised in the notice itself, so that if the decision in the notice would give rise to a disciplinary reference on the part of the subject of the notice (as it did in this case in relation to the One Call Decision Notice which sought to impose a financial penalty) then the third party reference should also be treated as if it were a disciplinary reference, giving the Tribunal power to make directions pursuant to s 133 (5). In a case where the notice would give rise to a non-disciplinary reference on the part of the subject of the notice, as would have been the situation in this case had Mr Radford referred the decision to make him subject to a prohibition order pursuant to s 56 FSMA, Mr Stanley submitted that the position was that the third party reference should also be treated as a non-disciplinary reference with the result that the Tribunal's powers were limited as provided for in section 133 (6).
>
> 68.However, aside from the fact that to arrive at Mr Stanley's interpretation it is necessary to do considerable violence to the wording of s 133 (5), in my view Mr Stanley's position lacks logic as well. If, for example, a decision notice seeks to prohibit an individual performing functions for an authorised person on the basis that he has acted in accordance with improper instructions given by a third party, and the third party contends that it did not give improper instructions, why should the third party's reference be treated as a non-disciplinary reference when, if the situation was that the Authority decided to impose a financial penalty on the individual instead of making a prohibition order, it would be treated as a disciplinary reference? As far as the third party is concerned, there is no difference in the two situations; in both cases he is seeking the Tribunal to assess the evidence and determine whether the finding of

> wrongdoing against him is correct or not. Therefore, why should in one case the Tribunal have the power to direct the Authority to amend the notice if the allegations turn out to be incorrect, but in the other case it only has the power to ask the Authority to reconsider its decision?"

20. These observations were made in a decision on a preliminary issue and a final determination of the point was left for the substantive hearing of the reference, which did not in fact occur because the reference was subsequently withdrawn.

21. As we shall see, this point is material in the context of my consideration of the parties' submissions as to the interpretation of s 390 and s 393 and accordingly I return to it later.

22. In this case, the point raised by Mr David Rowland as to the proper interpretation of s 390 and whether it precludes the issue of a Final Notice before a third party reference in respect of the relevant Decision Notice has been determined is a pure point of statutory construction. Mr Purchas helpfully referred me to the opinion of the House of Lords in *R(Quintavalle) v Secretary of State for Health* [2003] 2 AC 687.

23. Lord Bingham said this at [8]:

> "The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

24. Lord Millett said at [38]:

> "The question is one of statutory construction. In construing a statute the task of the court is to ascertain the intention of Parliament as expressed in the words it has chosen. The Parliamentary intention is to be derived from the terms of the Act as a whole read in its context. Once it has been ascertained, the court must give effect to it so far as the legislative text permits."

25. In carrying out this task, I can derive some assistance from what was said in the Supreme Court in its judgment in *Macris v FCA* [2017] 1 WLR 1095.

26. At [12] Lord Sumption observed that 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. He did, however go on to say that "it does so in a more limited way". He said:

> "So far as it concerns notice of potential criticisms, the section defines what fairness requires in the context of warning and decision notices issued by the Authority."

27. It is clear from this passage that Lord Sumption believed that the limited purpose of s 393 was to enable a third party who has been the subject of criticisms in a Warning or Decision Notice to respond to those criticisms.

28. This was echoed by Lord Neuberger at [21]:

> "The purpose of including such a provision in the 2000 Act is clear. The interests of the addressee of a notice who is accused of failings, and those of a third party such as an employee of the addressee, who may be identifiable as responsible for, or implicated in, the alleged failings, are by no means necessarily aligned. Thus, it may well be that an employer would want to try and curtail any publicity about the alleged failings by quickly negotiating and paying a penalty, even if there may be grounds for challenging the allegation in whole or in part. But this may often not suit the employee, who might well feel that, in the absence of the Tribunal exonerating him, his reputation, and therefore his future employment prospects, could be severely harmed or even ruined."

29. Similarly, in the present case Mr Weller has decided he wished to accept the outcome in his Decision Notice, pay a financial penalty and accept a prohibition order. A swift conclusion in his case clearly suits him in order to put the matter behind him. It will also assist the Authority in achieving its statutory objectives. The Authority will consider that it is in the public interest that because its findings as to the fitness and properness of Mr Weller are no longer being challenged, the prohibition order that it has decided should be made against him should be implemented as soon as possible. Therefore, when construing s 390 and s 393 it is necessary to the extent possible to adopt a construction which strikes a fair balance between the need to ensure effective and efficient regulation and the need to protect the third party's legitimate right to have an effective opportunity of challenging the criticisms made of him in the Decision Notice.

30. Lord Sumption also recognised the need to balance the objective of treating the third party fairly against the need to ensure the efficient conduct of the Authority's investigation and disciplinary functions. He said this at [14]:

> "…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…"

31. This point was also recognised by Lord Wilson who at [43] endorsed the Authority's suggestion that, when providing for "third party rights" in s 393 Parliament probably intended "an approach which could strike a fair balance between individual reputation and regulatory efficiency".

32. Lord Sumption recognised that a third party could only suffer prejudice as a result of criticisms made of him in a Decision Notice where the information concerned was published. He said at [15]:

> "…the combination of information in the notice with other information can prejudice a third party only if the notice is published. Publication is not automatic. Where the Authority decides to publish, it does so in order to serve the public interest in the proper performance of its functions and the protection of those who use the financial services industry. This is reflected in the Authority's *Enforcement Guide* (2016), section 6.2.16 of which states:
>
> "Publishing notices is important to ensure the transparency of FCA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action.""

33. The Applicants and Mr Rowland seek support for their contentions from the obiter remarks of the Financial Services and Markets Tribunal in *Sir Philip Watts v FCA* (2005). In that case Sir Philip contended that the Authority had incorrectly not given him third party rights in relation to a Decision Notice issued against his employer, Shell, and accordingly that he had a right of reference under s 393 (11] . The Tribunal said this at [25]:

> "Two points may be made as regards these procedures. First, the effect of a reference under subsection (9) may be that no final notice can be issued until the third party's reference has been determined by the Tribunal, or otherwise resolved. Second, where the third party is not given a copy of the decision notice—the situation on which subsection (11) is predicated— in practice he will not learn of the reasoning until the final notice is published by the FSA. In other words, he will be unable to exercise his rights to refer the decision notice to the Tribunal until after the publication of the final notice. This explains the timing of the Reference in the present case."

34. The Applicants and Mr Rowland also base their case on the interpretation of the term "matter" as used in s 390(1). Mr Pritchard submitted that in this case, a Decision Notice was given to Mr Weller and "the matter" was referred to the Tribunal by Mr David Rowland when he referred the "decision in question" (using the words of s 393 (9)).

35. I return to that submission later, but at this stage it is helpful to set out how the term "matter" has been interpreted in previous judicial decisions.

36. In *Jabre v FSA* FIN 2006/0006 the Tribunal said at [28] that it is "the allegations made in the decision notice and the circumstances on which these are based that fall to be considered and evaluated. They comprise the matter referred".

37. In *FCA v Hobbs* [2013] Bus LR 1290 at [32] the Authority is recorded as having accepted that ""[t]he matter" includes the facts and evidence referred to in the decision notice on the basis of which the Authority concluded that the person in question was not a fit and proper person and that a prohibition order was appropriate."

38. In the recent decision in *Markou v FCA* [2023] UKUT 00101 (TCC) the Tribunal said at [136]:

> ""Matter" has a broader meaning: it is the allegations in the statutory notices and which were before the RDC, and the circumstances, evidence and facts on which they are based. This accords with procedural fairness and statutory regime by which a party is first given a Warning Notice of the proposed action by the Authority and may make representations on the facts and issues raised before the RDC makes its decisions and gives its reasons as contained within the Decision Notice. At each stage, the regulated person makes an informed decision whether to contest the matter contained in the warning notice before the RDC or to contest the matter contained in the Decision Notice in a reference to the Tribunal knowing clearly what the allegation is."

Jurisdiction of the Tribunal

39. I turn first to the question as to whether the issue of a Final Notice to Mr Weller has in any way affected the jurisdiction of the Tribunal to consider Mr David Rowland's third party reference which was made in relation to Mr Weller's Decision Notice.

40. Even though the Applicants contend that the Authority was wrong to have issued the Final Notice, they do not seek to argue that the effect of its issue was to preclude the Tribunal considering Mr David Rowland's reference. Neither does the Authority make that argument.

41. As the Tribunal found in *Carrimjee v FCA* [2015] UKUT 0079 at [98] a Final Notice is not a judicial decision and the doctrine of res judicata does not apply. Whilst Mr Weller's Final Notice reflects the final determination of the issues between Mr Weller and the Authority that were the subject of his regulatory proceedings they do not bind any third party.

42. That principle is well illustrated by the recent proceedings taken by the Authority against Julius Baer International Bank Limited ("JBI") and three former employees of the Julius Baer Group ("the Individuals"). The Authority alleged that JBI had acted without integrity in relation to certain trading arrangements which the Authority said resulted in serious financial crime. It sought a substantial financial penalty against JBI. The Authority alleged that JBI acted without integrity as a result of the actions of the Individuals. The Authority also instituted separate regulatory proceedings against the Individuals, seeking prohibition orders against them on the basis that they acted without integrity as a result of their involvement in the matters which were the subject of the regulatory proceedings against JBI. The Authority essentially relied on the same facts and matters in the regulatory proceedings against JBI in the regulatory proceedings against the Individuals.

43. JBI did not seek to refer its Decision Notice to the Tribunal, thereby accepting that it acted without integrity, based on the actions of the Individuals.

44. The Individuals referred their separate Decision Notices to the Tribunal contending that they did not act without integrity. When their Decision Notices, in accordance with the Authority's usual policy, were published they bore the usual legend indicating that the findings in the Decision Notices were provisional and were being challenged in the Tribunal.

45. The Individuals were concerned that the publication of JBI's Final Notice prior to their references being determined was prejudicial to them as the impression could be given to a reader of the Final Notice that the Authority had made definitive findings against the Individuals.

46. The Individuals did not argue that because the findings set out in the Final Notice against JBI were based on findings made by the Authority that the Individuals had acted without integrity, the effect of the Final Notice was also to predetermine their own references and undermine their contentions that they did not act without integrity, a matter that was to be determined in the Tribunal in respect of their own references. Their concern was the prejudice that might be perceived to arise as a result of the publication of the Final Notice.

47. In order to meet that legitimate concern, the Tribunal directed that the Final Notice, when published, be endorsed as follows:

> "This Final Notice has not been the subject of any judicial finding. It includes criticisms of [the Individuals]. These individuals have each received Decision Notices in relation to such criticisms. They dispute many of the facts and the characterisation of their actions in this Final Notice, and they have referred their Decision Notices to the Upper Tribunal for determination. The Upper Tribunal will determine whether to dismiss the respective references or remit them to the Authority with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal. The Tribunal's decision in respect of the individuals' references will be made public on its website."

48. It seems to me that the position is no different in this case. The Decision Notices issued to each of the Applicants, and now published by the Authority, contain legends which indicate that the matters referred to in them are disputed and are the subject of proceedings in the Tribunal. The Authority has made it clear that if the Final Notice against Mr Weller is published, it would only be published with a similar legend, clarifying that a reference has been made to be Tribunal, that the Authority's findings have not been considered judicially and are the subject of consideration by the Tribunal insofar as they concern Mr David Rowland, and that the Tribunal's judgment will be publicly available in due course.

49. If the Final Notice is published bearing such a legend, in my view it cannot be assumed by any reasonable reader of the Final Notice that the Tribunal would not be able, if it felt appropriate, to reach a decision which is inconsistent with the Authority's criticisms of Mr David Rowland, as set out in Mr Weller's Decision Notice.

50. If the Tribunal does make a decision which is at variance with what is contained in that Decision Notice, it will have to make directions as to how that inconsistency is publicised in a way that does not prejudice Mr David Rowland.

51. Therefore, contrary to Mr Robeson's submissions, there can be no question of the Authority having pre-determined the Tribunal's assessment of Mr Rowland's third-party reference and circumvented the statutory role of the Tribunal and Mr David Rowland's statutory rights under s 393 FSMA by issuing the Final Notice. Assuming, as discussed later, Mr David Rowland's reference is a non-disciplinary reference, the Tribunal has the jurisdiction to make findings of fact and law under s 133 (6A) FSMA as well as to make other findings as set out in that provision.

52. In my view, all of the Applicants and Mr David Rowland are in exactly the same position. The Applicants are challenging the findings in their respective Decision Notices, and Mr David Rowland is challenging the findings in Mr Weller's Decision Notice as well as the findings in the other Decision Notices, as a third party. The fact that the Authority may or may not have "jumped the gun" in issuing a Final Notice to Mr Weller does not affect the position. The fact that the Authority has published Decision Notices in relation to the Applicants which contain statements prejudicial to them in no way undermines their references, and the position is no different with Mr David Rowland. He is challenging the criticisms made of him in the Decision Notices. The fact that a Final Notice has been issued to Mr Weller has no impact on his reference. It has been issued in order to bring to an end the regulatory proceedings against Mr Weller. It has no effect on the position as between the Authority and any other person.

53. Indeed, although it is the practice of the Authority to set out in detail the reasons for the regulatory action concerned in a Final Notice there is no legal requirement that it should do so. The practice is no doubt a hangover from the days when Decision Notices were not published so that a Final Notice might be the first opportunity for the public to know the reasons why the Authority was taking particular action. Where the action to be taken is the imposition of a financial penalty, all the Final Notice needs to state is the amount of the penalty and how it is to be paid and recovered: see s 390 (5). Where the action is the imposition of a prohibition order, all that needs to be stated is details of the order and the date on which it takes effect: see s 390 (7).

54. A Final Notice in those terms, addressed to Mr Weller, and copied to Mr David Rowland, as required by s 390, would not cause any prejudice to Mr David Rowland because it would not contain any remarks which are prejudicial to him. That reinforces the point that the focus

is on what is said about Mr David Rowland in the Decision Notice, which is the document that he can have reviewed in the Tribunal and the Final Notice is irrelevant, whether or not it contains any detail about the reasons for the regulatory action being taken against Mr Weller and whether or not any of those reasons contain criticisms of Mr David Rowland.

55. It follows from that conclusion that, strictly speaking, I do not need to determine the question as to whether or not the Authority acted lawfully in issuing the Final Notice prior to Mr David Rowland's reference being determined.

56. Indeed, even if I were to take the view that the Final Notice was not lawfully issued, there is nothing that this Tribunal can do about it. The Tribunal is a creature of statute, in this case the Tribunals, Courts and Enforcement Act 2007, and only has such jurisdiction as Parliament has chosen to give it by statute.

57. Under FSMA, there are numerous provisions giving the Tribunal jurisdiction in relation to specified decisions made by the Authority. However, what is contained in the relevant provisions of FSMA is exhaustive of the Tribunal's jurisdiction in relation to decisions made by the Authority under the powers given to the Authority in that statute. In many cases FSMA gives the Tribunal jurisdiction over challenges to decisions made by the Authority and contained in Decision Notices. No jurisdiction is given in relation to matters contained in Final Notices or, most importantly, as to whether a Final Notice has been lawfully issued. The Tribunal has no general judicial review function. There are limited rights to commence judicial review proceedings in the Tribunal and to deal with judicial review applications which are transferred to it by the Administrative Court, but none of those powers relate to the lawfulness or otherwise of the issue of Final Notices.

58. Accordingly, the Tribunal has no jurisdiction to quash a Final Notice or issue an injunction to prevent the Authority issuing such a notice. Those are matters that would have to be addressed in the Administrative Court.

59. In those circumstances, it is very tempting to go no further and express no view on the matter. However, the parties urged me to express a view, in full knowledge that my view cannot set a precedent. At the very best, it appears it might be within the spirit, if not the letter of the provisions of s 133A (5) FSMA which give the Tribunal the power, on determining a reference, to make recommendations as to the Authority's "regulating provisions or its procedures". Of course, this is a decision on a preliminary issue, and is not a decision which results in the determination of a reference.

Whether the statutory scheme envisages the issue of a Final Notice before any third party reference made in respect of the relevant Decision Notice has been determined

60. As previously indicated, this is a question of pure statutory construction and I approach the issue by reference to the legal principles discussed at [22] to [38] above.

61. The Authority's position on the construction of the words used in s 390, when read together with s 393 and taking account of the purpose of these provisions, is as follows:

> (1) Section 390 makes provision for the final stage of regulatory action between the relevant regulator and the subject of the regulatory decision, by way of the issuance of a Final Notice. Subsections 390 (1) and (2) identify when the FCA must provide a Final Notice or a Further Decision Notice, while ss 390(3)-(8) address the contents of the Final Notice.

(2) On a natural reading of the provisions as a whole, it is clear that s 390 (1) applies where there has been no reference by the person to whom a Decision Notice was given, i.e. the subject of the regulatory action to be taken. The words "the matter was not referred" follow immediately on from the phrase "a regulator has given a person a decision notice". That interpretation is supported by the subsequent reference to "the person concerned", which again indicates that the preceding clause (including the reference to the matter being referred to the Tribunal) is focused on the subject of the Decision Notice.

(3) The implications of that construction are clear. If the subject of the Decision Notice has not referred the matter, the FCA must, on taking the action to which the Decision Notice relates, give that person a Final Notice. If the subject has referred the Decision Notice, the matter awaits the Tribunal's decision and its directions under s 390 (2A).

(4) This construction is further reinforced by the language of s 390(2A). The purpose of that provision is to determine what happens in the event that the matter is referred within the meaning of s 390(2), with s 390(2A) mandating, where the FCA is taking action in accordance with any directions given by the Tribunal, the issuance of either a Further Decision Notice or a Final Notice. This only makes sense if s 390(2) is intended to relate solely to a subject's reference. Otherwise, any third party reference in relation to a disciplinary Decision Notice which is not dismissed would lead to the case being remitted back to the FCA under s 133(6) for reconsideration and the issuance of a Further Decision Notice to the subject. But s 133(5) makes clear that this is not what is intended to happen in relation to disciplinary references, where it is for the Tribunal to determine the appropriate action for the FCA to take. If s 390(2) is solely concerned with a reference by the subject of a Decision Notice, it must follow that s 390(1) is equally solely concerned with a reference by the subject.

(5) Consideration of the purpose of s 390 (1) supports this construction. It would permit the issuance of a Final Notice to the subject of the regulatory action and finally determine the legal position as between the regulator and the subject of the Decision Notice in circumstances where the subject of the Decision Notice has determined not to contest the decision to take action further. There is a strong public interest in achieving such finality in respect of regulatory action. That is to the benefit of (i) the subject of the Decision Notice, who achieves legal certainty, (ii) the FCA, which achieves regulatory efficiency, and (iii) the wider public, which receives the benefit of the regulatory action taking effect to protect consumers and/or the integrity of the UK financial system.

(6) The alternative would be to place the legal status of the subject of the Decision Notice in limbo pending the outcome of potentially lengthy proceedings to resolve a third party reference on what might be a narrow issue of limited relevance to the decision against him and to which he is not a party (because he has specifically chosen not to make a reference). That would be to the prejudice of:

> (i) the interests of the subject of the Decision Notice (in this case, Mr Weller), who has made a conscious decision not to contest the proceedings further;
>
> (ii) the FCA, in delaying the resolution of the regulatory action; and
>
> (iii) most significantly, the wider public, with potentially serious adverse consequences for the protection of consumers and the integrity of the UK

financial system; in that regulatory action taken against a person for the purposes of protecting consumers and/or the integrity of the UK financial system could not take effect pending the outcome of potentially lengthy proceedings to resolve a third party reference, the purpose of which is to provide fair protection in relation to a third party's reputational interests in relation to criticisms made of them.

(7) A third party has no legitimate interest in preventing the issuance of a Final Notice to another person. The provision of a Final Notice to Mr Weller under s 391 is an administrative step taken in his own separate regulatory proceedings, in respect of which Mr David Rowland has no freestanding interest.

(8) The contents of a notice (of whatever kind) can prejudice a third party only if the notice is published. That is because the third party rights regime under FSMA is intended to protect the legitimate reputational interests of third parties. The mere fact that a Final Notice has been issued cannot prejudice the legitimate reputational interests of a third party, since publication does not follow automatically. Whether or not a Final Notice is issued to Mr Weller does not therefore engage Mr David Rowland's legitimate interests.

(9) Mr David Rowland's legitimate interest in relation to Mr Weller's Decision Notice is limited to the reputational implications of the publication of criticisms expressed about Mr David Rowland in the Decision Notice. That interest is protected by:

(i) The statutory scheme governing publication of Decision and Final Notices, which requires the FCA to publish such information about the matter to which the notice relates as it considers appropriate (subject to considerations of fairness and in relation to which the FCA's established practice is to solicit and consider representations (as it did in this case)).

(ii) The ability of Mr David Rowland to seek a direction from the Tribunal preventing publication pending the outcome of his third party reference.

(iii) The endorsement that will accompany the Final Notice if published before the Tribunal's determination of Mr David Rowland's third party reference.

(iv) Mr David Rowland's ability to pursue his reference to the Tribunal of the criticisms of him and, if the Tribunal agrees, to have a public judgment in his favour.

(v) Possible further directions from the Tribunal following the Tribunal's judgment.

62. The position of the other parties on the question of statutory construction can be summarised as follows:

(1) The effect of s 393 (9) (a) FSMA (which is the relevant provision in this case) gives Mr David Rowland the right to refer the "decision in question", that is the decision contained in Mr Weller's Decision Notice, so far it is based on reasons which are prejudicial to him.

(2) The careful wording of s 390 (1) FSMA distinguishes between (i) a person given a notice (in this case Mr Weller) and (ii) person given a copy of the notice (in this case Mr David Rowland) because of the requirement to give the person entitled to third party rights a copy of the relevant Decision Notice. If Parliament had intended s 390 (1) to be concerned only where the person given a notice refers it to the Tribunal then Parliament would have said so, for example by saying in the first part of s 390(1) "if [the Authority] has given the person a decision notice and the matter was not referred to the Tribunal *by that person…"*

(3) By ss 390(2), (2A), where a decision notice has been given "and the matter was referred to the Tribunal" the Authority must, "on taking action in accordance with any directions given by [amongst others] the Tribunal", give that person and any person to whom the Decision Notice was copied either: (i) a Further Decision Notice, or (ii) a Final Notice. The type of notice depends on whether the reference falls within the remit of s 133(6). The question therefore arises as to whether the reference of a third party alone amounts to a reference of the "matter" so as to engage this provision rather than the provisions of s 390 (1).

(4) In this case, a Decision Notice was given to Mr Weller and "the matter" was referred to the Tribunal by Mr David Rowland when he referred the "decision in question" (using the words of s 393 (9)). This is clear since Mr David Rowland's right to make a reference concerns the Decision Notice "so far as it is based on" reasoning that identifies him and is prejudicial. Such reasoning must form part of "the matter" of the Decision Notice because that phrase is wide enough to encompass both the allegations in the Decision Notice and the circumstances on which those are based (which therefore includes the reasoning).

(5) Accordingly, in this case Mr David Rowland has referred "the matter" to the Tribunal and s 390 (2) is applicable. The Authority's obligation to give a Final Notice will arise only when the Authority is "taking action in accordance with any directions" given by the Tribunal at the conclusion of Mr David Rowland's reference.

(6) This construction is entirely consistent with what the Tribunal explained in *Watts v FSA,* as quoted at [33] above. It means that, in practice, a reference made by a third party given a copy of a Decision Notice may delay (or even stop) the issuance of a Final Notice, but there is nothing problematic about that – Parliament has decided that third parties should be afforded the right to make references to the Tribunal and, consistent with that, finality, in Final Notices, should only be possible once the reference is complete.

(7) The Julius Baer example does not assist the Authority because the third parties in that case did not refer the matter to the Tribunal. The Individuals referred their own Decision Notices and, by virtue of s 393 (6) those Individuals have no separate third party rights.

63. Despite Mr Purchas's powerful arguments on behalf of the Authority in support of the construction he advances, I have concluded that the statutory scheme does not envisage the issue of a Final Notice to the subject of a Decision Notice until any third party reference in respect of that Decision Notice has been determined by the Tribunal. That is the case whether or not the subject of the Decision Notice has referred the matter to the Tribunal.

64. I now set out my reasons for that conclusion.

65. As Mr Purchas fairly conceded, the wording of ss 390 (1) and (2) FSMA is, if read in isolation, capable of bearing both meanings contended for by the parties. The expression alighted on by Mr David Rowland and the Applicants - "the matter was not referred" - admits of two interpretations. On the Authority's interpretation, the question is whether the matter was referred to the Tribunal by the subject of the Decision Notice. On Mr David Rowland's interpretation, the question is whether there has been a reference by any party, including any relevant third party, in relation to the matter.

66. Mr Purchas seeks support for his construction by reference to the implications of a contrary interpretation which he says would "create a miasma of confusion". He gives the following example by reference to the Decision Notice in respect of Banque Havilland SA ("the Bank"):

> (1) The Bank's reference is a disciplinary reference: s 133 (7A)(k) FSMA. The Tribunal will in due course determine what (if any) is the appropriate action for the FCA to take and will issue directions accordingly (s 133 (5) FSMA), following which the FCA will issue a Final Notice (s 390 (2A)(b)) or no notice at all if the Tribunal directs that no action is to be taken.
>
> (2) On the other parties' proposed construction of s 390 (2), his third party reference of the Bank's Decision Notice would (if successful) lead to a Further Decision Notice being given to the Bank as required by s 390 (2A)(a), because the Tribunal's jurisdiction in relation to Mr David Rowland's reference (which is not a disciplinary reference as defined by s 133(7A)) is to dismiss it or give directions under s 133 (6)(b).
>
> (3) So one could end up on such a basis in the position, even if the cases were co-case managed, of a Final Notice being issued to the Bank and at the same time a requirement arising for the Authority to issue a Further Decision Notice to the Bank in respect of precisely the same issues, by virtue of Mr Rowland's third party reference.
>
> (4) That is plainly not what was intended by Parliament. It raises the absurd possibility of yet further references of a disciplinary Further Decision Notice issued to the Bank as a result of Mr David Rowland's third party reference of the Bank's original Decision Notice, even after the Tribunal's determination of the appropriate action in the Bank's own reference.

67. Mr Purchas makes a number of powerful points regarding the strong public interest in achieving finality, as summarised at [62 (5)] above. I accept that a contrary construction has the potential to create an unsatisfactory state of limbo in a situation where the subject of a Decision Notice is willing, on the basis of the findings in his Decision Notice, to accept a Final Notice even in circumstances where there is an outstanding third party reference. There could also be prejudice to the public where there would inevitably be a delay in implementing the action set out in the Decision Notice.

68. It also follows from my conclusions in respect of the jurisdiction of the Tribunal where the Authority has issued a Final Notice before the third party reference has been determined, that, at least in the case before me, there is no prejudice to the legitimate interests of the third party as a consequence of that action. As Mr Purchas and my analysis of the authorities set out above demonstrates, the purpose of s 393 is to enable a third party to address the reputational implications of the publication of the criticisms expressed about him in a Decision Notice. I do not disagree with anything said by Mr Purchas in his submissions on this point, as summarised

at [62 (9)] above. It is entirely consistent with the conclusions I have come to on the jurisdiction question.

69. However, it appears to me that Parliament envisaged that the findings of the Tribunal following the determination of a third party reference could have an impact on the final outcome of the regulatory action proposed against the subject of the associated Decision Notice.

70. Mr Purchas's example, as set out at [67] above demonstrates how the requirement to issue a Further Decision Notice following the determination of a third party reference could be a pointless exercise as far as the Bank was concerned. That would certainly be the case as far as the Bank was concerned if the Tribunal's findings on the third party reference were immaterial to a finding that in the round the imposition of a financial penalty was justified. However, in that case, the conclusion that the third party reference should be allowed, could result in the issue of a Further Decision Notice so as to correct criticisms in the original Decision Notice that the Tribunal found not to be justified, which would then be reflected in a Final Notice. Clearly, there would be no further reference to the Tribunal in a situation where the Tribunal had found a financial penalty to be justified.

71. However, there may be cases where the outcome would be different.

72. In my view, because s 393 (9) envisages that a third party may refer "the decision in question" so far as it relates to reasons which are prejudicial to the third party, it envisages that a finding of the Tribunal in relation to the criticisms made of the third party could undermine the decision as a whole. I gave an example of such a situation at [68] of *One Insurance,* as set out at [19] above.

73. Connected with this point is whether a reference under s 393 (9) is a non-disciplinary reference, thus engaging the more limited powers of the Tribunal under s 133 (6) and (6A) when it determines the reference rather than the wider power to give such directions as it considers appropriate under s 133 (5). I questioned in *One Insurance,* in the passage set out at [19] above, the logic of such a third party reference being a non-disciplinary reference when a third party reference made under s 393(11) was clearly stated not to be such.

74. In the light of the submissions made in this case, I can see a clearer reason for this dichotomy, although I do not do so with any great confidence, bearing in mind the opaqueness of these provisions.

75. In the case of a reference made under s 393 (11), it is quite likely to be the case in a case settled between the Authority and the subject of a Decision Notice that a third party will only become aware of the possibility of exercising third party rights after the Final Notice has been published. That was certainly the position in both *Macris* and *Watts* where the potential third party contended, contrary to the position taken by the Authority, that he had been identified in the relevant Decision Notice and, because criticisms were made of him in the Decision Notice, he had the right to make a third party reference.

76. In these circumstances, the option of issuing a Further Decision Notice to the subject of the Decision Notice is no longer possible because of the issue of the Final Notice. Therefore, the Tribunal is given wider discretion as to what to do on the determination of the reference. For example, if the Tribunal considers that public statements should be made by the Authority referring to the fact that the Final Notice contains unwarranted criticisms of the third party, it could give directions to that effect.

77. It therefore seems to me that in relation to s 393 (9), Parliament envisaged that at the time of the making of the reference the ability to issue a Final Notice to the subject of the Decision Notice would not yet have arisen because the Authority had recognised that there were third party rights, which, on the issue of the Decision Notice, could give rise to a potential reference by the third party, who would have been made fully aware of those rights.

78. In that situation, if the Tribunal made findings regarding the criticisms made of the third party which were at variance with those made in the Decision Notice, it would be for the Authority to consider what action to take in the light of those findings on remittal of the matter to the Authority on the determination of the reference.

79. If the Authority accepted the Tribunal's findings but those findings did not affect the appropriateness of the regulatory action proposed against the subject of the Decision Notice, it could amend the original findings through the issue of a Further Decision Notice. In those circumstances, the subject may realise that there was no point in making a further reference to the Tribunal and, on the assumption that the third party was content with what was now said about him, the matter could proceed to the issue of a Final Notice, incorporating any changes following from the determination of the Tribunal on the third party reference.

80. If the Tribunal's findings had the potential to undermine the regulatory action proposed against the subject of the Decision Notice, the Authority may decide nevertheless to continue regulatory action by issuing a Further Decision Notice and in those circumstances, the subject may well decide to refer the matter to the Tribunal.

81. As has been shown in the two *Carrimjee* cases, the legislation clearly envisages a further reference to the Tribunal when the Tribunal makes findings which are at variance with the findings in a Decision Notice but the Authority nevertheless decides to proceed with regulatory action through the issue of a Further Decision Notice.

82. These examples provide strong support for the construction proposed by the Applicants and Mr David Rowland.

83. Although it is correct that what a third party can refer to the Tribunal is more limited than what the subject of a Decision Notice can refer, I accept the submission that on a third party reference, the third party is referring some of the reasons the Authority is relying on to justify the regulatory action it wishes to take and that these reasons form part of the "matter" which is capable of being referred to the Tribunal. That conclusion is consistent with the authorities referred to above at [36] to [38] which demonstrate that "matter" has a broad meaning. A subject of a Decision Notice may decide to refer only some of the issues determined in a Decision Notice but that does not mean that the "matter" has not been referred to the Tribunal.

84. Therefore, in my view, the language of s 393 (9), when read together with that of s 390 (1) and my analysis of what happens when a third party reference is determined by the Tribunal, leads to the conclusion that if the third party refers the matters that he is entitled to refer under s 393(9) then there has been a reference of the "matter" as that term is used in s 390. That is because the "matter" embraces all or any of the circumstances, evidence and facts on which the findings in the Decision Notice are based.

85. This construction explains why s 390 (1) makes no reference to the matter having been referred by the subject of the Decision Notice. As Mr Pritchard submitted, Parliament appears to have deliberately omitted those words, and I see no reason to imply them in order to make sense of the provision. Further support for this construction is provided by the requirement in

s 390 to give any person who was given a copy of the Decision Notice also to be given a copy of any Final Notice which is issued at the end of the process, which of course includes a person who has been given third party rights.

86. Therefore, contrary to Mr Purchas's submissions, I do not consider that the natural meaning of the wording of s 390 leads to the conclusion that the section only applies to the subject of the Decision Notice and has no application to third parties.

87. If s 390 had no application in circumstances where there had been a third party reference but no reference by the subject of the Decision Notice, it is not clear what is supposed to happen on the determination of a third party reference.

88. On the basis of my analysis, it is clear that where no Final Notice has been issued, either a Final Notice or a Further Decision Notice can be issued as appropriate which can take account of the findings of the Tribunal in respect of the third party reference.

89. If a Final Notice had been issued, whilst the Tribunal has wide powers if the reference was made under s 393 (11), as discussed above, its powers are much more limited in relation to a reference made under s 393 (9) which is a non-disciplinary reference. It is not clear what further steps it is envisaged that the Authority can take in the absence of the power to issue a Further Decision Notice or amend a Final Notice. For example, it is not clear whether the Tribunal would have the power to direct the Authority to publish particular statements as it does in relation to a reference made under s 393 (11). That may become a live issue in this case because the Authority has issued a Final Notice to Mr Weller.

90. Section 390 must therefore be regarded as setting out exhaustive provisions as to the procedures to be followed following the issue of a Decision Notice and how determinations of references are to be implemented. In the absence of any specific provisions dealing with third party references it must be envisaged that the provisions of s 390 apply to third party references in the same way that they apply to substantive references.

91. I do not consider that this conclusion is inconsistent with anything said by the Supreme Court in *Macris* and, in particular, in the passages referred to above. It is also consistent with the obiter remarks in *Watts* quoted at [33] above, although I accept that the point was not fully argued in that case.

92. *Macris* was concerned with the question of identification, and the issue the Supreme Court grappled with was the question of balancing the legitimate interests of the potential third party against the need for regulatory efficiency. That balancing exercise therefore only arose in that context.

93. The Supreme Court said that it found it a difficult case to determine, and one of the reasons why it did was perhaps because it recognised that if Mr Macris had been given third party rights as he contended he should have been, it would have resulted in a considerable delay in the resolution of the regulatory proceedings taken against his employer. That clearly seems to have been envisaged by Lord Neuberger in the passage referred to at [28] above, where he referred to the fact that the employer's desire for a swift acceptance of the position may not suit the employee.

94. Parliament must therefore be assumed to have accepted the consequences of providing third party rights and the possible delay to the determination of regulatory proceedings that could result. That may have led the Authority in the *Macris* case to ensure that Mr Macris was

not identified and may have influenced the Supreme Court in striking the balance between the legitimate interests of the third party and regulatory efficiency. There were differing views in the court as to where that line should be drawn.

95. As I have accepted, there may be strong policy reasons for adopting the approach to these matters contended for by the Authority. I am mindful of the fact that if the approach that I have endorsed is followed, then it may lead to the Authority making every effort to avoid giving third party rights, which may skew the balance against the legitimate interests of a potential third party.

96. The Authority has in effect made strong points as to what the law ought to be as a matter of policy, but of course it is my role to interpret the law as it is.

97. Every case under s 393 seems to give rise to difficulties of interpretation and this case is no exception. The Authority may therefore wish to consider whether it is appropriate to lobby Parliament for the law to be clarified. The alternative is of course for the matter to be tested in the Administrative Court if the Authority believes that its interpretation of the legislation is the correct one and, as I have indicated, there are clearly more than respectable arguments in support of their position.

Conclusion

98. The references, including Mr David Rowland's reference, can now proceed to a hearing and I understand that the parties will be liaising with a view to directions being made for the preparation of the hearing and the listing of the references which are to be heard together.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

Release date: 09 June 2023