[2016] UKUT 103 (TCC)

Reference number: FS/2015/0007

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

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JOERG VOGT **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
GARY BOTTRIELL (TRIBUNAL MEMBER)

Sitting in public in London on 16 December 2015

Sara George, Partner Stephenson Harwood LLP, for the Applicant

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

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DECISION

Introduction

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

2. The Decision Notice notified the Bank that the Authority had decided to impose on it a financial penalty of £226,800,000 as a result of serious misconduct by the Bank through, amongst other things, its attempted manipulation of two benchmark interest rates, namely LIBOR and EURIBOR (referred to in this decision together as "IBOR") and by exercising improper influence over IBOR submissions. Although we were not given specific details in this case, the Decision Notice would have been preceded by a warning notice ("the Warning Notice") and followed by a final notice ("the Final Notice"), both on the same day, the abbreviated period being as a result of an agreed settlement with the Bank which involved it receiving a 30% discount on the financial penalty otherwise payable and agreeing not to exercise its right to refer the Decision Notice to the Tribunal.

3. Mr Vogt is a former employee of the Bank who worked in Frankfurt, Germany, as a money market trader and latterly as Head of Global Finance Pool Trading during the period which is relevant for the purposes of this decision. One of Mr Vogt's responsibilities was to make EURIBOR rate submissions on behalf of the Bank.

4. Mr Vogt complains that the Authority, in promulgating the Warning Notice, Decision Notice and Final Notice, has included reasons which identify him and are prejudicial to him and which he has had no opportunity to contest. By a reference notice dated 22 May 2015 he has referred that matter to the Tribunal under s 393(11) of the Financial Services and Markets Act 2000 ("FSMA").

5. Section 393 of FSMA is designed to give third parties certain rights in relation to warning and decision notices given to another person in respect of whom the Authority is taking regulatory action. Where a warning notice has been given,s 393(1) provides that a third party prejudicially identified in the notice must be given a copy of the notice by the Authority, unless (which is not the case here) he has been given a separate warning notice in respect of the same matter. He must be given a reasonable period within which he may make representations to the Authority.

6. Section 393(4) gives third party rights in relation to a decision notice. It provides as follows:

> "If any of the reasons contained in a decision notice to which this section applies relates to a matter which –
>
> (a) identifies a person ("the third party") other than the person to whom the decision notice is given, and
>
> (b) in the opinion of the regulator giving the notice, is prejudicial to the third party,

a copy of the notice must be given to the third party."

7. In this case a copy of the Decision Notice was not given to Mr Vogt as the Authority took the view that the notice did not identify him. In those circumstances s 393(11) comes into play. This provides:

> "A person who alleges that a copy of the notice should have been given to him, but was not, may refer to the Tribunal the alleged failure and –
>
> (a) the decision in question, so far as 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."

8. Mr Vogt accordingly made his reference pursuant to s 393(11).

9. As Mr Vogt had not previously seen the Decision Notice he has based his complaint on the Final Notice which it is assumed is materially in the same form as the Decision Notice, and the hearing of this preliminary issue has proceeded by reference to the Final Notice.

10. On 26 June 2015 the Tribunal directed the hearing of three preliminary issues in accordance with Rule 5(3)(e) of the Tribunal Procedure (Upper Tribunal) Rules 2008, namely (i) whether Mr Vogt was identified by the Decision Notice, (ii) whether he was prejudiced by the notice and (iii) whether he is entitled to the relief which he seeks in his reference. The Tribunal also directed Mr Vogt to serve on the Authority a statement of the grounds on which he seeks to make his case on these issues and directed the Authority to indicate whether it contests any of those grounds and if so, the basis on which it contests the matters concerned.

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

12. Accordingly this decision deals solely with the question as to whether the matters included in the Decision Notice identified Mr Vogt in the relevant sense and manner, as provided for in s 394(4).

The Final Notice

13. The Final Notice is a lengthy document dealing with misconduct by the Bank over a period of nine years. For the purposes of this decision we are primarily concerned with the provisions in the Final Notice which make findings that the Bank breached Principle 5 of the Authority's Principles for Businesses by attempting to

manipulate and improperly influence IBOR rates. In particular, paragraph 2.6 of the Final Notice records that over at least 5 years, across a range of LIBOR currencies and EURIBOR, the Bank's Money Markets Derivatives and Pool Trading desks engaged in a course of conduct to manipulate the Bank's IBOR submissions and improperly influence other banks' IBOR submissions in order to profit.

14. Paragraph 2.7 of the Final Notice describes what the Authority found to be the Bank's approach in relation to EURIBOR as follows:

> "Deutsche Bank's misconduct in relation to EURIBOR exemplifies the seriousness of the misconduct and its potential to have a significant impact on the markets. Deutsche Bank used a three pronged approach in an attempt to maximise the impact on EURIBOR. For example, certain Traders would engage in one or more of the following types of conduct: (i) influence Deutsche Bank's Submitters to alter Deutsche Bank's EURIBOR submission; (ii) contact other Panel Banks and request that they put in different EURIBOR submissions; and (iii) on occasion offer or bid cash in the market to create the impression of an increased or reduced supply in order to influence other Panel Banks to alter their EURIBOR submissions."

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

> "**LIBOR and EURIBOR**
>
> 4.6. LIBOR is the most frequently used benchmark for interest rates globally, referenced in transactions with a notional standing value of at least USD 500 trillion.
>
> 4.7. During the Principle 5 Relevant Period, LIBOR was published for ten currencies and fifteen maturities. However, the large majority of financial contracts use only a small number of currencies and maturities. For example, JPY, USD and GBP LIBOR are widely used currencies and one, three and six months are commonly used maturities.
>
> 4.8. LIBOR was during the Principle 5 Relevant Period published on behalf of the BBA and EURIBOR is published on behalf of the EBF. LIBOR (in each relevant currency) and EURIBOR are set by reference to the assessment of the interbank market made by a number of Panel Banks. The Panel Banks were selected by the BBA and EBF and each bank contributes rate submissions each business day. Both LIBOR and EURIBOR require the contributing banks to exercise their subjective judgement in evaluating the rates at which money may be available in the interbank market when determining their submissions.
>
> 4.9. Interest rate derivative contracts typically contain payment terms that refer to benchmark rates. LIBOR and EURIBOR are by far the most prevalent benchmark rates used in OTC interest rate derivatives contracts and exchange traded interest rate contracts.
>
> 4.10. Both LIBOR and EURIBOR have definitions that set out the nature of the judgment required from Panel Banks when determining their submissions:

• Between 1998 until February 2013 (the end of the Principle 3 Relevant Period), the LIBOR definition published by the BBA was as follows *"the rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for then accepting interbank offers in reasonable market size just prior to 11:00am London time"*.

• Since 1998, the EURIBOR definition published by the EBF has been as follows*: "The rate at which Euro interbank term deposits are offered by one prime bank to another prime bank within the EMU zone at 11am Brussels time"*.

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

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

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

LIBOR and EURIBOR at Deutsche Bank

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

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

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

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

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

4.19. At Deutsche Bank in London, Derivatives Traders and Money Market Traders were part of GFFX. The USD, JPY and GBP LIBOR Derivatives Traders would sit amongst the Money Market Traders who typically acted as Deutsche Bank Submitters. For the majority of the Principle 5 Relevant Period, Money Market Traders (including those who were also Submitters) and Derivatives Traders of the same currency would sit either next to or directly behind each other on the trading floor (with the exception of EUR and CHF for which the Money Market Traders were located in Frankfurt and the Derivative Traders in London). Money Market Traders and Derivatives Traders were actively encouraged by Managers to share information about currencies and markets. Although Traders were subject to Deutsche Bank's general policies and procedures concerning compliance standards, Managers placed no specific limitations on what the Traders could or should discuss regarding LIBOR and EURIBOR."

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

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

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

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

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

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

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

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

• On 4 April 2006, Derivatives Trader B made the following JPY LIBOR request, *"…could u set 1m at 8bps [0.08] pls? thanks"*. Submitter A responded *"done mate"*. Derivative Trader B replied the following day, *"Thanks mate… the 1m back to 7bps [0.07] today pls"* to which Submitter A responded *"affirmative"*. Deutsche Bank's JPY submissions exactly matched these requests.

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

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

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

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

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

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

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

17. Paragraphs 4.35 to 4.37 of the Final Notice give examples of what the Authority found to be improper trading to benefit the trading positions held by the Bank's derivatives traders as follows:

"4.35. On occasions, Deutsche Bank EURIBOR Submitters would bid or offer in the cash market in response to requests from Derivative Traders for favourable submissions. The primary motivation was to influence the EURIBOR submissions of

other Panel Banks and therefore move the final EURIBOR rate to benefit Deutsche Bank's derivative positions.

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

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

Manager B: "*thanks* [Submitter C]…"

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

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

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

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

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

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

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

> "EURIBOR" means Euro Interbank Offered Rate.
>
> "GFFX" means the Global Finance and FX Forwards Department of Deutsche Bank's Investment Bank.
>
> "IBOR" is a generic reference to both EURIBOR and LIBOR together.
>
> "LIBOR" means London Interbank Offered Rate.
>
> "Money Market Trader" means a Deutsche Bank employee with responsibility for trading cash and managing the funding needs of the bank.

> "Manager" means a Deutsche Bank employee with direct line management responsibility over Derivatives Traders and/or Submitters (e.g. a head of desk and above).
>
> "Panel Bank" means a contributing bank, other than Deutsche Bank, with a place on the BBA panel for contributing LIBOR submissions in one or more currencies, or a place on the EBF panel for contributing EURIBOR submissions.
>
> "Pool Trading Desk" means the desk within GFFX which comprised Deutsche Bank's Money Market Traders.
>
> "Principle 5 Relevant Period" means January 2005 to December 2010.
>
> "Submitter" means a Deutsche Bank employee with responsibility for making Deutsche Bank's LIBOR or EURIBOR submissions.
>
> "Trader" means a Deutsche Bank employee trading cash or interest rate derivatives.

19. The significance of these definitions and the way they are used in the body of the Final Notice was highly relevant to this Tribunal's decision in *Christian Bittar v FCA* [2015] UKUT 602 (TCC). In that case the Tribunal decided that "Manager B", as referred to in some of the extracts from the Final Notice set out above, had been identified in the relevant sense and manner, as provided for in s 394(4) FSMA, as Mr Bittar, who at the relevant time was the Manager of the Bank's Money Markets Derivatives Desk in London.

20. The basis of Mr Vogt's reference in respect of the Final Notice is that the quotes attributed to "Submitter C" at paragraphs 4.28 and 4.36 of the Final Notice are his words in communications he had with Mr Bittar and that from the Final Notice and the information in the public domain at the time of the publication of the Final Notice a relevant reader of the Final Notice would reasonably conclude that references to Submitter C in these passages are in fact references to Mr Vogt who had thus been identified in the Final Notice. Mr Vogt contends that these passages, as well as those in paragraphs 2.6, 2.7, 4.26 and 4.27 of the Final Notice are prejudicial to him.

The legal test under s 393

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

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

23. In determining that question of fact Gloster LJ, in approving the approach of this Tribunal in this respect, said that the issue should be approached in two stages. The

first stage is to ask whether the relevant statements in a notice said to "identify" the third party are to be construed in the context of the notice alone, and without recourse to external material, as referring to "a person" other than the person to whom the notice was given. In that regard, it was not sufficient that the notice contained facts from which it could be inferred that a particular person was being criticised - for example criticism of the corporate entity which was the recipient of the notice from which it could be inferred that the chairman of the company was also being criticised: see [40] of the judgment. In this case the Authority concedes that the first stage of the test is met; it accepts that the use of the term “Submitter C” in the Final Notice is a pointer to a separate person other than the Bank.

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

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

> “Are the words used in the "matters" such as would reasonably in the circumstances lead persons acquainted with the claimant/third party, or who operate in his area of the financial services industry, and therefore would have the requisite specialist knowledge of the relevant circumstances, to believe as at the date of promulgation of the Notice that he is a person prejudicially affected by matters stated in the reasons contained in the notice?”

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

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

> market over and above the information stated in the notice. Mr Stanley's approach would require the court to perform the artificial task of asking the wholly hypothetical question whether, putting on one side the knowledge available to the market, the third party could be identified by what was stated in the notice alone."

In our view this passage gives a clear indication on two points. First, the test proceeds by looking only at information that was in the public domain at the time the notice was published and second, it is not referring to knowledge that can only be obtained by extensive investigation of available sources, such as the type of enquiries that a thorough investigative journalist would undertake. In our view the test focuses on the knowledge that could be reasonably expected to have been obtained by well-informed market participants in the relevant area by the time of the publication of the notice and retained by them without having to do an extensive forensic exercise to remind themselves of what they read previously, even though they might seek to refresh their memory by reference to material they had seen before. We refer to such persons in this decision as "relevant readers".

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

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

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

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

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

31. In this case, Mr Stanley observes that unlike the position in *Macris* itself, Mr Vogt has adduced no evidence from any individual who has concluded that Submitter

C refers to him or that relevant readers formed that belief. Whilst such evidence would be helpful to a degree, its assistance is limited because the test is objective, that is what objectively an acquaintance or market participant might reasonably have known, so that it is clear that the test is applied by reference to a hypothetical person rather than an actual acquaintance or market participant whose evidence is adduced. That is because such an individual may have some very specialised knowledge not available to the wider class of acquaintance or market participant that it would not be reasonable to expect that the wider class would possess. In any event, in relation to any particular individual the Tribunal would have to assess his evidence by reference to the objective test.

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

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

34. In making that assessment we are of the view that as a specialist tribunal we are entitled to draw upon our own specialist knowledge of how the markets operate and what is of interest to relevant market participants operating in those markets. We do, however, accept that we must be careful not to draw on that specialist knowledge in the abstract by reference to material that is not before us; we must use that expertise purely in the context of the evidence that is before us. That is why the quality of that evidence is the paramount factor; that evidence will inevitably be selective and there may be a wider range of material that could have been made available to us. Our task is to assess whether in all the circumstances the evidence we have is sufficient.

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

36. Although there is no specific guidance on this issue from *Macris*, it appears to us that the use of the term "acquaintance" indicates someone who although they might have met the person in question from time to time was more in the category of someone who knew of him because of his position in the market rather than a person who had deep personal knowledge of him and his affairs.

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

38. We do not accept Ms George's submission that the test is so wide that it embraces, as she put it, "lawyers and staff with responsibility for, or any interest in, regulatory affairs." Such persons, in our view, are not those who we referred to at [27] above as operating in the third party's area of the industry but are akin to those who observe or comment on the industry from a different perspective or advise market participants.

Evidence and findings of fact

39. We turn now to the evidence, aside from the Final Notice itself, which it is contended assists the knowledge of relevant readers in the identification from the Final Notice of Submitter C as Mr Vogt.

40. Unfortunately, Ms George's skeleton argument and her oral submissions contained numerous statements of a factual nature which were not made good by any evidence that was before us. In particular, sweeping statements were made such as Mr Vogt being "one of the most visible and well-known figures in the euro money market" and the German Labour Court proceedings in which he was involved being "reported on widely and were keenly followed by those not just in investment and retail banks, but the financial services more generally…" without any evidence to back them up.

41. Ms George also made a number of statements about Mr Vogt's various job titles and roles over the years he was employed by the Bank which were unsupported by evidence.

42. We were therefore surprised Mr Vogt himself did not file a witness statement setting out his employment history and the nature of his position in the Bank at the time the events which are the subject of this decision occurred.

43. We have therefore only taken into account facts that can be clearly established from the documentary evidence before us. As far as Mr Vogt is concerned, we can accept that he was first employed by the Bank in 1991, that he was a money market trader based in Frankfurt, that his responsibilities included making and determining the Bank's EURIBOR submissions (although there is no evidence that he alone performed the determination role) and that when the Bank purported to terminate his employment in February 2015 he was a Managing Director and Head of Pool Trading in Frankfurt. We accept that relevant readers would have known this information when reading the Final Notice.

44. As appears from the certified translation of the judgment of the local Labour Court ("the German Labour Court") we were shown and which we refer to in more detail below, on 12 February 2013 the Bank put to Mr Vogt allegations that there was at least a strong suspicion that he had conducted numerous improper communications with the Bank's traders in which he had at least appeared or purported to be willing to take derivatives trading positions of traders into account when determining EURIBOR submissions.

45. On 22 February 2013, in a letter received by Mr Vogt on 25 February 2013, the Bank terminated Mr Vogt's employment without notice and with immediate effect.

46. Mr Vogt challenged his dismissal in the German Labour Court by a statement of claim received by the court on 5 March 2013. The German Labour Court's judgment records at pages 5 and 6 the basis of Mr Vogt's claim as follows:

> "The Plaintiff alleges that he did not exchange any inadmissible communications contrary to duty with the traders of the Defendant, but rather that the communications presented by the Defendant constituted normal communications between two traders about market expectations, market assessment, interest rate risk and interest rate expectations. The aim was to establish whether the market assessment and the positions were identical with or opposed to each other. The communications with the Defendant's trader, Mr. Bittar, had not been about the Defendant's contribution. He had not asked Mr. Bittar about his preferences in relation to the EURIBOR reference rate submission. In addition, the communications, which were in English, had been taken out of context. He was not a native speaker. Also, he claims, there was a so-called traders' language.
>
> According to the Plaintiff, the determination of the EURIBOR reference rate had only represented a very small, negligible part of his activity.
>
> He had not been aware that he was not allowed to communicate with traders working at the Defendant in connection with the assessment of the EURIBOR interest rate contributions. It was unclear to him on what prohibition the Defendant based its allegation. He claims that, until July 2012, there had been no rules governing the determination of the EURIBOR interest rates at the Defendant. There had been no controls, records or appropriate manuals with corresponding instructions. For example, the Defendant had not informed him of the relevant market factors that the Defendant considered it was important to take into account when determining the reference rates. Had he not exchanged those communications, he would have overlooked relevant market factors. He further claims that the information about positions (cash and

> derivatives) also constituted market-relevant information and could thus not be ignored when evaluating and assessing the relevant market factors. Money market derivatives and currency swap markets influenced the pricing on the money market and there was a reciprocal effect on reference rates.
>
> According to the Plaintiff, the Defendant had expected that its positions would also be taken into account in connection with the Plaintiff's submission of the reference rates. Mr Cloete and Mr Nicholls had given instructions to closely exchange, communicate, and coordinate trading positions with the trader Mr. Bittar."

47. We observe from these passages that Mr Bittar was identified by name as a trader with whom Mr Vogt, in his capacity as a submitter of EURIBOR submissions, had what were alleged to be inappropriate communications in relation to the determination of those submissions.

48. The judgment makes reference to the fact that more details regarding the communications between Mr Vogt and "the traders" can be found in the petition to the German Labour Court filed by the Bank on 16 May 2013.

49. The Bank's position on Mr Vogt's claim was referred to in the judgment as follows:

> "The Defendant claims that it had neither tolerated nor promoted the improper communication. In particular, it had not instructed the Plaintiff to coordinate and exchange the trading positions with Mr. Bittar. The EURIBOR guidelines served the purpose of fixing in writing the requirements that had been applicable at the Defendant until then in order to ensure the required market conformity of the EURIBOR submissions."

50. The judgment was delivered on 11 September 2013. The German Labour Court decided that the termination of Mr Vogt's employment was invalid because although there were facts indicating the Mr Vogt acted in breach of his duties, termination was disproportionate and he should have been given a warning before he was dismissed. The court took into account that the Bank had not, at the time of the relevant communications, implemented any written rules for the determination of EURIBOR or rules as to whether and, if so, what type of communication was permitted between submitters and traders.

51. It is not clear to us the extent to which the full written judgment and the Bank's petition would have been generally available both at the time they were created and at the time of the publication of the Final Notice. It would have been helpful for us to have been provided with evidence, such as expert evidence from a German lawyer, as to how such documents could be accessed by the public. We were told that the proceedings themselves were held in open court and that an abbreviated judgment was read out in open court in the presence of the parties and attending media but we had no evidence of this.

52. What is clear, however, is that the German Labour Court issued a press release on 11 September 2013 publicising the judgment against Mr Vogt and the three other Bank employees who had been dismissed by the Bank for the same reasons as Mr

Vogt and who likewise had successfully challenged their dismissals in the German Labour Court.

53. A version of the press release was issued in English, although it has not been well translated. Essentially the press release summarises the position of the Bank and the conclusions of the judgments as described at [49] and [50] above. There was no reference in the press release to Mr Vogt's conversations with Mr Bittar which were recorded in the judgment.

54. There is a link at the top of the press release to what appears to be the court's website. It is not clear whether by following this link the reader would be taken to the full judgment and we make no findings on that point.

55. Also on 11 September 2013, the German TV channel ARD aired a documentary programme called "Plusminus" on the subject of the Bank and the IBOR investigation. We were shown extracts from this documentary as well as still photographs taken from the film and had a transcript in English of the sound of relevant extracts broadcast.

56. What we saw were some general remarks by the presenter about the international interest rate investigations into various banks and clips of what appear to be a senior Bank manager expressing regret at what had happened and recognising that the system had to change. Reference was then made to the Bank having dismissed seven traders and against the background of the film showing Mr Vogt and three other bank employees attending the German Labour Court the presenter referred to the court proceedings and the result. There were also two clear images of Mr Vogt in the courtroom and we accept that anyone who knew him would recognise him from the images. The matter of the court proceedings only occupied a small part of the programme.

57. The presenter referred to the fact that at that stage the Bank had not been disciplined other than to receive a reprimand from its German regulator for lax supervision of its employees.

58. We were referred to a number of press articles, all but one of which were in German without translations, which were published shortly after the judgment of the German Labour Court and which referred to the proceedings. These articles all appear to be at a high level of generality and not all of them mention Mr Vogt by name.

59. One later article, published in Die Zeit on 12 December 2013, referred to the fact that the German Labour Court's files were available and it would appear that they had been inspected. However, neither this or any of the other articles gave any report of the conversations between Mr Bittar and Mr Vogt which were referred to in the judgment or the petition filed by the Bank.

60. The petition filed by the Bank referred to Mr Vogt's responsibilities as a submitter in the following terms:

> "From at least 2001 until 2012, the Plaintiff was one of several EURIBOR submitters employed by the Defendant. In this highly paid and, in view of the importance of IBORs, leading and responsible position, it was the Plaintiff's responsibility to determine the relevant submissions on behalf of the Defendant, which submissions were then to [sic] reported to Thomson Reuters as the calculation agent."

61. The petition also sets out a number of conversations between Mr Bittar and Mr Vogt, indicating offers from Mr Vogt to Mr Bittar to make submissions in a particular way, although none of the conversations detailed includes those between Mr Bittar and Submitter C as they appear in the Final Notice. In one of the communications, Mr Bittar refers to Mr Vogt as "Mein Herr" which, as we discuss below, Ms George regards as significant. Mr Bittar's words to Mr Vogt in a conversation reported to have taken place on 27 September 2006 were stated as follows:

> "On 27 September 2006, the meanwhile terminated trader Christian Bittar wrote the following to the Plaintiff:
>
> "Mein Herr, how are u positioned in 3mth libor over October dates? I'm hoping to get high fixings, is that ur way?"
>
> The Plaintiff replied:
>
> DO U WANT A HIGH OCT06 FUT FIX OR A HIGH 3ME FIX? JUST TO CLARIFY"
>
> Mr Bittar replied:
>
> "We desperately need a HIGH 3mth libor fix – >low october…"
>
> The Plaintiff replied:
>
> JUST ONE QUICK NOTE…I CANT SEE OCT106 REALLY FIXING BELOW 52. … MAYBE I AM WRONG BUT ITs NOT EXAC[T]LY MY VIEW FOR A HIGH 3ME FIX. BUT WE WILL CLEARLY SUPPORT U IN UR INT."

62. Simultaneously with the Final Notice, two US Regulators published details of settlements with the Bank. We accept that relevant readers are likely to have been aware of these as well as the Final Notice and will be aware in general terms of their contents.

63. The Bank agreed to a consent order ("the Consent Order") issued by the New York State Department of Financial Services ("NYSD") on 23 April 2015. Paragraph 11 of the Consent Order described the behaviour of the bank which was the subject of the Consent Order as follows:

> "The misconduct described in this Order was not confined to a small group of individuals; it involved more than two dozen employees, including those in senior management positions, and spanned geographically across numerous countries, including offices in New York, London, Frankfurt, and Tokyo. The misconduct

occurred within the Global Finance and Foreign Exchange ("GFFX") Unit, which consisted of Global Finance and FX Forwards ("GFF") Unit and Foreign Exchange ("FX") Unit. GFF employed traders in both the Pool Trading group and the Money Market Derivatives ("MMD") group."

64. Paragraph 24 of the Consent Order describes a communication between the Head of the London Money Market Derivatives desk (who, it has been established, was Mr Bittar) and a submitter as follows:

> "For example, on October 2, 2006, the Head of the London Money Market Derivatives desk wrote to a submitter, "mein herr, if [supervisor's] fixings in the 3 mth have rolled off, wud it be possible to put a higher 3 mth fixing?" The submitter, "SURE, ANY SPECIFIC DATE OR EVERYDAY TILL THE OCT06 FIX?" The Head of the London Money Market Derivatives desk specified, "every day please!"

It is Ms George's case that the "submitter" referred to is Mr Vogt.

65. The Consent Order also referred to the German Labour Court proceedings and their outcome but Mr Vogt was not named.

66. The US Department of Justice also published a settlement agreement with the Bank, effected through a Deferred Prosecution Agreement ("DPA") on 23 April 2015. The Statement of Facts attached to the DPA quotes a number of communications between the Bank's traders and submitters including the following at paragraphs 62 to 64 of the statement:

> "62. Meanwhile on September 27, 2006, Trader-3 also asked that DB's EURIBOR submitters in Frankfurt would support his position by stating in an electronic chat:
>
> Trader-3: Mein Herr how are u positionned in 3 mth libor over october dates? I'm hoping to get high fixings, is that ur way?
>
> Submitter-4: DO U WANT A HIGH OCT06 FUT FIX OR A HIGH 3ME FIX? JUST TO CLARIFY
>
> Trader-3: we desperately need a HIGH 3mth libor fix – >low october…
>
> Submitter-4: MAYBE I AM WRONG BUT ITs NOT EXACTLY MY VIEW FOR A HIGH 3ME FIX.BUT WE WILL CLEARLY SUPPORT U IN UR INT.
>
> Later that day, Submitter-4 confirmed, "I got ur point. We will see where the spread comes in [] Will fix high ahead of oct06 xpiry."
>
> 63. Likewise, Trader-3 reiterated his request to DB's EURIBOR submitters the next day on September 28, 2006, in an electronic chat, only getting a partial accommodation:
>
> Trader-3: Mein herr,pleassseee todont forget high 3mth and high 6nth libor plsssssssss
>
> Submitter-4: Today [Senior Manager-6] has got the other side in 3m. We wants it low. 6m we are in different. So cld fix high as you want.

Trader-3: Thank you

64. Subsequently, however, Submitter-4 agreed to keep Trader-3's requests in mind moving forward. For example, on October 2, 2006, Trader-3 made additional requests of Submitter-4 for an extended period, noting, in an electronic chat, that he was only asking for movements that did not interfere with the Frankfurt traders' preferences for EURIBOR movements:

> Trader-3 : mein herr, if [Senior Manager-6] fixings in the 3m have rolled off,wud it be possible to put a higher 3mth fixing?
>
> Submitter-4: Sure, any specific date or everyday till the oct06 fix?
>
> Trader-3: every day please!"

67. It is common ground that the relevant reader could identify Trader 3 as Mr Bittar. The quote at paragraph 62 of the statement of facts is substantially the same as that contained in the Bank's petition to the German Labour Court, as set out at [61] above so that someone who had read both documents would have identified Submitter 4 as Mr Vogt. Neither of these quotes appears in the Final Notice.

68. We were shown no press articles referring to Mr Vogt following the publication of the Final Notice or the US Notices.

Discussion

69. The process by which Ms George arrives at her contention that the relevant reader of the Final Notice would reasonably conclude that the individual described as "Submitter C" in that notice was Mr Vogt is as follows:

> (1) Mr Vogt was a money market trader and Head of the Pool Trading desk at the Bank, based in Frankfurt;
>
> (2) The Authority singles out "Submitter C" in the Final Notice;
>
> (3) "Submitter" is defined in the Final Notice someone "with responsibility for making Deutsche Bank's LIBOR or EURIBOR submissions";
>
> (4) Commonly cited chats in the Final Notice and the Department of Justice's statement of facts enable "Submitter C" to be identified as "Submitter 4" in the Department of Justice's statement of facts;
>
> (5) The Department of Justice's statement of facts refers to "Submitter 4" as "the Bank's EURIBOR submitter in Frankfurt";
>
> (6) There is a commonly cited chat in the Department of Justice's statement of facts and the Bank's petition to the German Labour Court. The German Labour Court petition assigns that chat to Mr Vogt, allowing "Submitter 4" in the Department of Justice's statement of facts to be identified as Mr Vogt, together with what was said in open court during the public hearings and reported in the media; and

(7) In the chats referred to above Mr Bittar consistently refers to Mr Vogt as "mein herr."

70. Ms George submits that the congruence between the details and chats cited in the Final Notice, the notices issued by the US Regulators, the German Labour Court proceedings and their widespread media reporting - coupled with the market knowledge of the relevant reader - is sufficient to allow any relevant reader to identify Mr Vogt.

71. We reject these submissions. As we have already mentioned, we accept that the relevant reader is likely to have read the Final Notice and relevant parts of the US Notices referred to above. Simply by reading those notices together, and bearing in mind there was no press coverage at the time these notices were issued which referred to the passages in the Final Notice that Mr Vogt complains of as being conversations between Mr Bittar and Mr Vogt, in our view there is nothing in that material from which the relevant reader could conclude that Submitter C was Mr Vogt.

72. Although a "Submitter" is defined in the Final Notice as someone with responsibility for making LIBOR and EURIBOR submissions, there was no evidence that Mr Vogt was the only person with such responsibility; indeed the Final Notice contains details of chats between other submitters and Mr Bittar. In any event it appears that determining the submissions to be made only formed a small part of Mr Vogt's duties. That being the case, although the relevant reader would have been able to identify the other party to the chats as Mr Bittar there was nothing to lead the relevant reader reasonably to conclude that Submitter C was Mr Vogt. Nor do we accept that by simply reading the relevant chats in the Final Notice and those in the Department of Justice's statement of facts the relevant reader would reasonably conclude that Submitter C, as referred to in the Final Notice, is the same person as Submitter 4 as referred to in the Department of Justice's statement of facts.

73. The only basis on which the connection could be made would be by reference to the German material. In that regard, the relevant material was in the public domain some months before the Final Notice was issued. Therefore, not only would the relevant reader have had to have seen the German material but he would have had to have remembered it and used it to come to the conclusion that the chats in the Final Notice and the Department of Justice's statement of facts were conversations between Mr Bittar and Mr Vogt.

74. In relation to the material concerned we are not satisfied that the relevant reader, even one resident in Frankfurt, would have read the judgment. Indeed we are not even satisfied that the evidence demonstrates that it was easily accessible. Nor would it be expected that the relevant reader would have been in open court to hear the judgment being delivered. Even if he had read the judgment in detail and would have learned that Mr Vogt had various conversations with Mr Bittar which were alleged to be inappropriate communications in relation to the determination of EURIBOR submissions, there was nothing in the judgment that would lead the relevant reader reasonably to conclude that when he came to read the Final Notice some months later that the conversations referred to in the Final Notice between Mr Bittar and Submitter C were conversations between Mr Bittar and Mr Vogt, as opposed to conversations

with any other person responsible for making submissions. It is more likely that the only material that the relevant reader was likely to read would be the court's press release, which, as we have found at [53] above, made no reference to the conversations between Mr Bittar and Mr Vogt as detailed in the judgment.

75. Neither, in our view, would the position change had he seen the television programme referred to at [55] to [57] above. This programme, which only briefly dealt with the court proceedings, referred to the issues at a high level of generality and in reality gave no more information about the proceedings than is contained in the press release issued by the court.

76. As we also found, none of the other press articles issued at the time of the judgment or thereafter made reference to any conversations between Mr Bittar and Mr Vogt. Therefore, the only material that links conversations between them and the chats recorded in the various regulatory notices is the chat recorded in the petition made by the Bank to the German Labour Court referred to at [61] above. In our view it would be fanciful to suggest that it would be likely that the relevant reader would take the trouble of going behind the judgment itself so as to read the underlying documents, including the petition. As Mr Stanley submitted, the suggestion that the relevant reader would have read such material is pure speculation. In any event, there was no evidence before us as to the extent to which such material was publicly available. This is simply not the kind of material that one would expect the relevant reader to have looked at.

77. Neither do we believe the use of the term "mein herr" in the various conversations is of any assistance. It is a term that could quite easily have been used between any two German speaking individuals who were predominantly communicating in English.

78. Accordingly, as Mr Stanley submitted, without the material from the petition, all the German Labour Court proceedings would have told relevant readers was that Mr Vogt was one of a number of employees of the Bank who had succeeded in establishing that his dismissal by the Bank was disproportionate under German law. That comes nowhere near demonstrating that Mr Vogt was "Submitter C" or any other submitter in the Final Notice. It would simply have shown that there were a number of candidates for the Submitter C role.

79. In summary, the process envisaged by Ms George is not one that a relevant reader, as opposed to a diligent investigative journalist, would undertake. This is not, as Mr Stanley correctly submitted, the process envisaged by the Court of Appeal's test in *Macris* and in any event there was no evidence that any person had undertaken this exercise in this particular case.

80. For all these reasons, we conclude that there was nothing in the Final Notice or the other material that we were referred to that would lead a relevant reader reasonably to conclude that it was Mr Vogt who was referred to as Submitter C in the Final Notice.

Conclusion

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

82. It therefore follows that we must dismiss the reference.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 26 February 2016