

Scandals, appeals, crowdfunding: what next for Tom Hayes?

Robert Dougans and Nikoletta Beneki

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Following a number of high-profile prosecutions in the late 1980s, City regulators subsequently opted for a lighter touch. Between 2000 and 2008 there were no prosecutions for insider trading, with the Financial Services Authority (FSA) preferring civil and regulatory remedies to criminal sanctions.



Such "light-touch" regulation created a markedly different environment to that in the United States, even before the crash, where Martha Stewart, Conrad Black and Enron's management faced being lead off in handcuffs and also had to fend off civil litigation and regulatory sanctions.

Following the financial crisis the FSA (now the Financial Conduct Authority) came under increasing pressure to take a firmer stance. Since 2008, the FCA has secured 28 convictions for insider trading and has stepped up investigations of other alleged misfeasance.

The Libor manipulation scandal (suggesting that a clique of bankers manipulated or fabricated a key benchmark rate underpinning numerous transactions) proved too great for the FCA to ignore. Despite the large number of people who must, logically, have been involved in rigging this benchmark over a number of years, only Tom Hayes, a former Citigroup trader, has faced prosecution in the UK for his role in the scandal.

In August 2015, Hayes was found guilty of conspiracy to defraud by trying to manipulate the Libor rate. Allegedly he created a brokers' network and bribed fellow traders to fix rates. He was sentenced to 14 years in prison. Hayes appealed both his conviction and his sentence. In December 2015, the Court of Appeal denied the appeal against his conviction, but reduced the sentence to 11 years. In March 2016, the Court of Appeal refused him permission to appeal to the Supreme Court.

Since then, Hayes has announced plans to bring his case to the Criminal Cases Review Commission on the basis of new evidence. He has set up a crowdfunding campaign, aimed at attracting contributions from bankers, to raise £150,000 to cover the legal fees for this further appeal.

The financial crisis left banks unwilling both to lend and to pay reasonable interest on deposits, and so crowdfunding has grown in popularity among investors and entrepreneurs alike. Crowdfunding has bankrolled litigation before. For example, English typist Lesley Kemp employed it to pay court fees in her successful defence of a libel claim brought by Qatar-based Kirby Kearns. Hayes' even more ambitious use of crowdfunding has, however, led lawyers to focus on the regulatory issues involved in crowdfunding litigation.

Types of crowdfunding

The main types of crowdfunding are:

1. Donation-based crowdfunding, where the investors donate money without receiving anything in return.
2. Reward-based crowdfunding, where the investors expect a nominal return.
3. Loan-based or peer-to-peer lending, which can take various forms, the most common of which are based on revenue participation and revenue interest.
4. Equity-based crowdfunding, where the investors are offered a share in the fundraising company, usually a start-up.

Regulation of crowdfunding

Crowdfunding platforms are regulated by the Crowdfunding Association (UKCFA), which has released a code of conduct. Those crowdfunding platforms involved in making loans or equity investments will generally need to be regulated by the FCA. Moreover, crowdfunding platforms, which invite bystanders to engage in investment activity, are likely to be considered to be engaging in financial promotion, so that their content will need to be approved by an authorised person.

A crowdfunding platform will require FCA authorisation if it carries on regulated activities within the UK. In general, equity-based and loan-based crowdfunding platforms will fall under the FCA authorisation regime. Operating without the necessary authorisation constitutes a criminal offence, punishable by a prison term of up to two years, unlimited fines and, potentially, a liability to compensate the investors for any losses.

Equity-based crowdfunding platforms will usually need FCA authorisation to enable them to operate (unless an exemption applies), and will need to adhere to the FCA's rules. Similarly, loan-based crowdfunding platforms need to obtain an FCA licence, since a crowdfunding platform is intended to connect an investment (the lender) with a credit loan (the borrower). Loanbased crowdfunding platforms are not considered to be as risky as equity-based ones and are accordingly more lightly regulated.

Happily for Hayes, soliciting crowdfunding as a simple gift requires no such regulation. Accordingly, although crowdfunding a legal defence fund may at first cause a law firm's compliance partner some concern, it actually presents few of the issues outlined above.

What may prove more complicated is the fate of any unused funds. Paul Chambers (the "Twitter joke trial" defendant) channelled his fund to a trust set up by two experienced lawyers which made specific provision for the use of surplus funds. Kemp curtailed her fundraising once specific targets had been met.

The FCA shows it has teeth

The Financial Services Act 2012, passed following the Libor scandal, created a new offence of making false or misleading statements in benchmark setting. If a similar scandal erupts, prosecutions should be easier. Until then, it does seem unjust that a (comparatively) low-ranking employee has been the only person to face prosecution in the UK concerning a well-documented conspiracy which must have involved many senior bankers over a number of years. Guilty or not, Hayes looks like a scapegoat. Although his fate does suggest that the FCA has begun to show it has teeth, it remains unclear whether those teeth are capable of devouring the largest prey.