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FORMER TRADERS TOM HAYES AND CARLO PALOMBOS' LIBOR AND EURIBOR CONVICTIONS UPHELD BY THE COURT OF APPEAL

May 01, 2024

R V TOM HAYES & CARLO PALOMBO [2024] EWCA 304

On 27 March 2024, the Court of Appeal (Bean & Popplewell LJJ, Bryan J) dismissed the appeals against conviction following referrals of the appeals to the Court of Appeal by the Criminal Cases Review Commission (CCRC). Referrals were necessary for the Court to entertain the appeals as both men had previously appealed their convictions and had had those appeals dismissed.

This Note considers the events leading to that decision, the reasons why the court came to that decision and what may happen next.

THE CCRC REFERENCE

Mr Hayes had, in 2017, sought to persuade the CCRC to refer his conviction on four principal grounds including grounds supporting the propositions that the LIBOR submitted figure on any given day did not need to exclude the submitting bank's commercial interests and that the LIBOR submitted figure was routinely submitted with a view to the submitting bank's commercial interests. In December 2021, the CCRC declined to make a reference to the Court of Appeal having concluded that the grounds put forward did not give rise to a real possibility that Mr Hayes' conviction would be overturned.

By that time there had been a total of 5 appeals to the Court of Appeal in different cases which all determined that these issues of the commercial interests of LIBOR and EURIBOR were impermissible in submitting the relevant rates.

On 27 January 2022, the US Court of Appeals for the Second Circuit granted appeals against the conviction and sentence of Matthew Connolly and Gavin Black for wire fraud and bank fraud relating to US dollar LIBOR manipulation. The CCRC in the UK interpreted that decision as deciding that making LIBOR submissions influenced by a bank's own derivatives traders, for the benefit of the bank's derivatives trading positions, could comply with the LIBOR definition on its proper construction and operation, and that submissions which did so were not for that reason anything

other than genuine or honest. On 27 October 2022, Mr Hayes' indictment in the US was dismissed, following this decision.

On 6 July 2023 the CCRC referred Mr Hayes' case to the Court of Appeal Criminal Division (CACD) under sections 9 and 14 of the CAA 1995. This followed consideration of submissions in connection with *Connolly and Black* on behalf of Mr Hayes (21 November 2022, 30 March 2023) and the SFO (27 February 2023). The referral was on the basis that:

"There is a real possibility that the Court of Appeal will prefer the findings of the US appeal court in *Connolly and Black* regarding the definition and proper operation of LIBOR to those which were reached in Mr Hayes's own case, and will conclude that this renders his conviction unsafe."

On 12 October 2023 the CCRC referred Mr Palombo's case to the CACD following "a comparison of the evidence and legal directions in his case against the evidence, legal directions, and CCRC referral reasoning in Mr Hayes's case" in the context of the analogy between LIBOR and EURIBOR.

LIBOR AND EURIBOR

LIBOR was a benchmark representing the rate at which a bank could borrow money in London at 11am each business day. It was one of the main, if not *the* main benchmark used for many types of financial transactions (including consumer loans and mortgages, many forms of commercial lending, and derivatives). It was operated by the British Banking Association (BBA), a trade association representing the interests of the banking industry operating in London. It was subject to the jurisdiction of England and Wales.

The BBA's document "Instructions to BBA LIBOR Contributor Banks" provided: "An individual BBA LIBOR Contributor Panel Bank will contribute **the rate at which it could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size just prior to 1100**." (emphasis added)

EURIBOR was established to provide financial institutions participating in Euro denominated transactions with a benchmark comparable to those found in other money markets, including LIBOR. It was devised by the European Banking Federation and administered under Belgian Law.

The EURIBOR definition, under Article 6 of the EURIBOR Code of Conduct 1999, was distilled by the Court of Appeal so that it's definition was the rate which the panel banks were required to submit being "**to the best of their knowledge, the rate at which euro interbank term deposits are being offered within the EMU zone by one prime bank to another at 11.00 a.m. Brussels time ("the best price between the best banks")**". (emphasis added). Unlike LIBOR, this was an estimate of the cost of borrowing for prime banks generally, not the submitting panel bank. There was no further definition of who was included as a prime bank or "best" bank.

CONNOLLY AND BLACK

On 17 October 2018, Connolly and Black were convicted by a jury in the Federal Court for the Southern District of New York before Chief District Judge Colleen McMahon on counts of conspiracy to commit wire fraud and substantive counts of wire fraud in relation to the submission of rates for USD LIBOR.

On 27 January 2022, the Second Circuit gave judgment quashing their convictions. In allowing the appeals, the Second Circuit set out that: "Finding that the evidence was insufficient as a matter of law to permit a finding of falsity, we reverse the judgments of conviction." Critically, the entire judgment was based on the insufficiency of evidence as the Government had failed to adduce sufficient evidence on the case that it set out to prove. The Court did not make any determination that what the appellants did could not amount to an offence according to US law.

THE ARGUMENTS

Mr Hayes sought to argue that:

1. The judge's direction to the jury that there was an absolute legal prohibition on commercial considerations in the LIBOR setting process was wrong in law. The relevant legal obligation on the submitter was to give an "honest" and/or "genuine" assessment of the LIBOR rate: his or her honest opinion. Whether and when a submitter was in breach of that obligation was a question of fact, dependent on the state of mind of the person involved. There was no basis for a direction to a jury that a submission could be neither "genuine" nor "honest" as a matter of law, simply because the submitter had considered commercial interests in determining the borrowing rate to be submitted.

2. The judge was wrong to direct the jury that, as a consequence of the legal prohibition on commercial considerations, if the Appellant agreed to procure submissions which were intended to advantage his trading then the sole remaining issue was dishonesty. The prosecution was required to prove each element of the indicted agreement, including that the Appellant agreed to the deliberate disregard of the proper basis for the submission of LIBOR rates and as a result agreed to the submission of rates which were false or misleading. Those factual issues were always in dispute, and the jury should have been directed to consider and resolve those factual questions before the issue of dishonesty could arise.

Mr Palombo argued:

1. The definition and proper operation of EURIBOR was, by analogy with LIBOR, correctly characterised by the Second Circuit in *Connolly and Black*. Insofar as the case against Mr Palombo proceeded on the basis that he had agreed with others to procure EURIBOR submissions which were "false or misleading" for the reason that 'trader-influenced' submissions were necessarily false or misleading, that approach was flawed.

2. The judge's direction to the jury that there was an absolute legal prohibition on commercial considerations in the EURIBOR submission process withdrew important matters of fact from the jury. The relevant legal obligation on the submitter was to give an assessment of the EURIBOR rate which was to the "best of their knowledge". Whether and when a submitter was in breach of that obligation was a question of fact, dependent on establishing the actual state of mind of the submitter and was not to be pre-empted and restricted by legal directions.

3. Mr Palombo's conviction is unsafe because the indicted conspiracy to defraud was advanced on a basis that is incompatible with the requirements of legal certainty at common law and/or under Article 7 of ECHR.

THE COURT'S DECISION

Notwithstanding the length of the Judgment, the Court of Appeal rejected each of the arguments in emphatically blunt terms.

The Court determined that neither of Mr Hayes' Grounds of Appeal related to the reasons for the CCRC making its reference in his case and that only the first Ground raised by Mr Palombo did so. This was important because the legislation (under the Criminal Appeal Act 1995 (CAA 1995), as amended) provides that "*the appeal may not be on any ground which is not related to any reason given by the Commission for making the reference*" although the Court has a discretion, in appropriate cases, to "*give leave for an appeal to be on a ground relating to the conviction, verdict, finding or sentence which is not related to any reason given by the Commission for making the reference.*"

In the light of the fact that there had been no less than five decisions of the Court of Appeal relating to the same principal points raised in this Appeal, the Court also considered the extent to which it was bound by the doctrine of precedent ("*stare decisis*") which binds the court to follow a previous decision of the Court, save in limited circumstances.

The Court rejected Mr Palombo's first Ground in emphatic terms holding that the test to be applied (applying the LIBOR and EURIBOR Definitions) was not whether a submission was appropriate because it fell within a range of submissions. The definitions required, as a matter of law, the submission of a single figure which represented the best or cheapest rate at which the submitting bank (LIBOR) or prime banks (EURIBOR) could borrow. As the Court stated: "*The question being asked is for a single figure which is clear as a matter of objective interpretation: the lowest rate at which the/a bank could borrow.*"

The Court rejected the notion that the LIBOR and EURIBOR could be plucked from a range of available rates (as the definitions required a single figure), and that the figure could take into account any trading advantage to the submitting bank. In rejected that argument the Court observed that such a submission "*would bake into the system an ability for panel banks to boost*

their profits at the expense of non-panel banks, which obviously cannot have been intended. The absurdity is avoided by the fact that there is no range, in the sense relied on."

The Court then considered the decision in *Connolly and Black* in the US and rejected the submissions made in that decision and effectively the five previous decisions of the Court of Appeal. In doing so, the Court emphasised that the decision in *Connolly and Black* had nothing to do with any conclusion of law, or construction of LIBOR as an issue of law, but, rather, was founded only upon the insufficiency of the evidence to prove the case.

Notwithstanding the CCRC reference, the Court concluded (at paragraph 116):

> *"…the conflict which the CCRC perceived there to be between Connolly and Black and the previous LIBOR and EURIBOR decisions of this court simply does not exist. It is not necessary for the purpose of addressing the question of construction, as a matter of English law as the lex fori, for us to express any view on whether Connolly and Black was correctly decided, and it would not be appropriate to do so. Nor is it a question of addressing whether its reasoning is persuasive in relation to the correctness of the previous decisions of this court. It simply has nothing to say about that, because it was addressing a different question, namely the sufficiency of evidence."*

That reasoning was sufficient to deal with that particular issue but the Court added that, even if they had taken a different position, the doctrine of *stare decisis* would have preventing it from allowing the appeal. The fact that the US Court was not addressing the same issue and that its reasoning was neither relevant nor persuasive meant that there was no basis for the residual discretion to depart from a previous decision to be engaged.

The Court rejected all the other Grounds finding that a) they were not related to the reasons for the CCRC reference and did not pass the test required to enable it to give leave to appeal on any of those Grounds; and b) that there was no basis to depart from the doctrine of precedent created by the five previous decisions of the Court.

In setting out its reasoning, the Court observed that while compliance with LIBOR or EURIBOR was not, at the relevant time a regulated activity, failure to comply with their provisions could, and indeed did, give rise to regulatory consequences for the institutions involved.

The Court referred to the case of *R v Spens* (involving the take-over by Guinness of Distillers) and the effect of breaching the City Code on Take-Overs and Mergers ("the Take-over Code") in which the Court of Appeal approved a previous decision which set out that "*the Code sufficiently resembles legislation as to be likewise regarded as demanding construction of its provisions by a judge. Moreover, the Code is a form of consensual agreement between affected parties with penal consequences. A further and almost overriding consideration is that if the judge's construction were not the governing influence, the inevitable danger of inconsistency in juries' findings on the meaning*

of the Code would arise with possibly disastrous consequences. The very policy of the law militates, in our opinion, against that result."

The Court equated that position to the present case saying (at paragraph 128):

> *"LIBOR and EURIBOR come within both limbs of the exception identified in Spens. They are binding agreements; and like the Take-over Code, they sufficiently resemble legislation as to be regarded as demanding construction of their provisions by a judge. Moreover, they fall within the rationale expressed in the concluding paragraph, that the policy of the law militates against the interpretation being left to juries because of the potentially disastrous consequences of inconsistent decisions."*

Finally, in rejecting Mr Hayes's Grounds of Appeal, the Court pointed out aspects of the evidence in his case including: the secrecy that he used in trying to move the LIBOR rate; his frank admissions of dishonesty in interview; the fact that he was, on one occasion, trying to influence how LIBOR would be fixed over an eight week period (when he could not have known how it would, in fact, move in that period) and how he was proposing to stagger drops in the LIBOR rate, so as to prevent a dramatic drop in three weeks times which would have attracted suspicion.

WHAT NEXT?

Mr Hayes and Mr Palumbo have publicly stated that they intend to appeal to the Supreme Court and there has been some commentary in the mainstream media about the difficulties of mounting an Appeal in a criminal case to the Supreme Court.

The position is governed by Sections 33 and 34 of the Criminal Appeals Act 1968, as amended. In essence, these provide that an appeal to the Supreme Court can be made against a decision of the Court of Appeal. Applications for permission to appeal to the Supreme Court must first be made to the Court of Appeal within 28 days of the Court of Appeal's decision. If permission is refused, application can be made to the Supreme Court within 28 days of the refusal.

Appeals to the Supreme Court are subject to the following two conditions: (1) Permission to appeal in a criminal case will only be granted if the Court of Appeal certifies that a point of law of general public importance is involved in the decision of that court; and (2) Permission is granted either by the Court of Appeal or by the Supreme Court. This permission will only be granted if it appears to the Court of Appeal or to the Supreme Court that the point ought to be considered by the Supreme Court.

So before the Supreme Court can entertain an appeal, the Court of Appeal must certify that a point of law of general public importance is involved in the decision. There has been much debate in the media on this issue, although in the view of this author, much of that debate has been emotional rather than analytical.

If any appeal is to be mounted, the application period for submitting the basis expired 28 days from 27 March 2024. It is by no means clear what "the point of law of general public importance" is in this case which has now been the subject of six Court of Appeal decisions and where the reference giving rise to the present appeal was found to be made on an erroneous understanding by the CCRC.

DECLARATION OF INTEREST

Mukul Chawla KC was Leading Counsel instructed by the Serious Fraud Office in *R v Tom Hayes*. Mukul conducted that trial for the prosecution together with the associated appeals, one pre Trial (*R v H* [2015] EWCA CRIM 46), and the other which followed his conviction (*R v Hayes* [2015] EWCA Crim 1944; 2018 1 Cr. App. R. 10.) As Leading prosecuting Counsel, Mukul was also responsible (with others) for the drafting of the indictment in that case. That indictment was essentially replicated in the LIBOR and EURIBOR manipulation trials that followed.

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