Press Summary

27 March 2024

Tom Hayes (Appellant) v R (Serious Fraud Office) (Respondent)

Carlo Palombo (Appellant) v R (Serious Fraud Office) (Respondent)

Judges: Lord Justice Bean, Lord Justice Popplewell, Mr Justice Bryan

Important note on this press summary

This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court [2024] EWCA Crim 304 is the only authoritative document. The judgment is a public document and will be available online at The National Archive and at: https://www.judiciary.uk/judgments/.

Under the London Interbank Offered Rate (LIBOR) and the EU Interbank Offered Rate (EURIBOR) schemes, panel banks were required to submit at 11:00 each morning their assessment of the rate at which money could be borrowed from other banks in specific currencies and for specific periods known as "tenors". For LIBOR, each submission had to answer the question "at what rate could the bank borrow funds by asking for and accepting inter-bank offers in a reasonable market size just prior to 11 a.m.?": this was known as the LIBOR question. A similar though not identical question applied to EURIBOR submissions.

The Appellants, Mr Hayes and Mr Palombo, both traders for major banks at all material times, were alleged to have dishonestly conspired with others to manipulate LIBOR and EURIBOR, respectively, to benefit their banks' trading positions.

Mr Hayes was interviewed by the Serious Fraud Office, made some admissions of dishonesty and agreed to plead guilty. However, he later withdrew from the agreement, claiming that he had only made the admissions in order to avoid extradition to the USA.

In a pre-trial ruling upheld by this court in Mr Hayes' case, and in further rulings at each Appellant's trial, it was held as a matter of law that the LIBOR and EURIBOR Codes or Instructions on their proper interpretation required a panel bank to make an honest and genuine assessment of the lowest rate at which the relevant bank would be able to borrow, and did not permit panel banks to consider their own commercial advantage in making that assessment.

Mr Hayes stood trial in the Crown Court at Southwark in 2015. He was convicted by the jury of conspiracy to defraud. The Court of Appeal, Criminal Division ("the CACD") dismissed his

appeal against conviction. The Court reaffirmed the ruling that the LIBOR Code on its proper interpretation required a genuine and honest assessment without regard to personal advantage. In a subsequent appeal brought by two other LIBOR traders, Jay Merchant and Jonathan Mathew, the CACD rejected the argument that a LIBOR submission could be chosen from within a range of permissible interest rates in order to give a trading advantage to traders at the bank. The Court again held that Mr Hayes' case had been rightly decided.

Mr Palombo stood trial as one of a number of defendants in the Crown Court at Southwark in 2019 and was convicted by the jury of conspiracy to defraud. His appeal against conviction was dismissed by the CACD in 2020. The Court held (as it had done in a pre-trial appeal by another trader, Christian Bittar), that the EURIBOR scheme, like the LIBOR Code, did not permit panel banks to have regard to commercial advantage when making their submissions.

On 27 January 2022, the United States Court of Appeals for the Second Circuit ("the Second Circuit") allowed appeals against conviction by Matthew Connolly and Gavin Black, financial traders who had each been convicted of wire fraud and bank fraud in relation to US dollar LIBOR manipulation in New York.

On 6 July 2023, the Criminal Cases Review Commission (CCRC) referred Mr Hayes' case to this court (having previously refused to do so) on the single ground 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' own case, and conclude that this renders his conviction unsafe". On 12 October 2023, the CCRC also referred Mr Palombo's case in similar terms.

Mr Hayes and Mr Palombo's present appeals against their convictions were heard together on 14, 15 and 18 March 2024.

On a reference by the CCRC the Court of Appeal is generally confined to the ground(s) given by the Commission, save that section 14(4B) of the Criminal Appeal Act 1995 confers a residual discretion on the Court to consider other grounds.

The Court of Appeal must follow its own previous decisions on issues of law, save in very limited circumstances. This is the doctrine of precedent. It requires an appellant to show that substantial injustice would be caused if they were not permitted to reopen the previous decisions of this court, particularly decisions given in their own cases, on the same points of law which are sought to be advanced again.

In accordance with US law, the court in *Connolly and Black* treated the interpretation of the obligations under the LIBOR Code as an issue of fact for the jury. This meant that the prosecution in each trial had to call sufficient evidence to satisfy the jury that LIBOR could not be reasonably interpreted as allowing commercial advantage.

By contrast, in English law it is well-established that the interpretation of commercial contracts or regulatory documents resembling legislation is an issue of law, for a judge to determine. The Second Circuit decision in *Connolly and Black* did not therefore cast doubt on the correctness of the previous decisions of this court as a matter of English law.

The CACD has previously considered the arguments that LIBOR and EURIBOR allowed a 'range' of valid submissions, but has repeatedly rejected this approach as wrong. LIBOR required the submission of what the individual bank 'could' borrow, which must mean the

cheapest rate available to it, as this Court had already confirmed in its previous decisions. EURIBOR similarly required the 'best' (i.e. cheapest) rate at which cash could be borrowed or lent. A single figure, not a range of figures, had to be submitted. While the assessment was subjective and could legitimately vary between submitters and between banks, each submitter was still required to give their honest and genuine assessment. In any case, this court is bound by its own previous decisions in which the same point was consistently determined.

Mr Hayes argued in this appeal that whether trading advantage could be considered in making LIBOR submissions should have been left to the jury to decide as a question of fact, as in *Connolly and Black*. This argument could have been raised by Mr Hayes in the previous appeal in 2015, which it was not, and there is no good reason to allow it to be raised now. *Connolly and Black* is not, and could not be, relevant to the issue of whether in an English criminal trial the meaning of LIBOR is a matter of law for the judge or of fact for the jury. The CCRC Reference does not suggest that this was a basis on which this court might reconsider its five previous decisions.

It is also, in any event, without merit given that the LIBOR and EURIBOR codes were binding contracts, resembling legislation. Asking a jury to decide on the meaning of such documents could result in inconsistent decisions. The jury in these cases could not address whether the submissions were, or would be, an honest and genuine assessment without being given an answer to the question "an assessment of what?" The answer to that question depended upon the true construction of the LIBOR and EURIBOR Definitions.

Mr Hayes further argued that the trial judge was wrong to direct the jury that taking trading positions into account was prohibited under LIBOR, and therefore any agreement to procure submissions to advantage his trading position left only the question of dishonesty to be decided by the jury. It was suggested that all elements of the indictment, including whether he deliberately disregarded the proper basis for LIBOR submissions, should have been determined before any question of dishonesty. This ground is again unrelated to the CCRC reference. It is also significant that it was not raised as an issue in the previous appeal in 2015. It is likely that the reason for this was because of the particular difficulties for the defence arising from the indisputable documentary evidence showing that what Mr Hayes was seeking to do, to move the LIBOR rate, was accompanied by attempts to maintain secrecy, as well as his frank admissions of dishonesty in the scoping interviews. Both carried the clear implication that he knew what he was doing was not permitted by LIBOR. There was no misdirection in Mr Hayes' case.

Mr Palombo argued that his conviction is unsafe because the indicted conspiracy to defraud was incompatible with the requirements for legal certainty. However, permission to appeal on the same point had already been sought and refused by the CACD in Mr Palombo's appeal in 2020. This Court correctly found then, and in the case of *R v Barton*, that the offence of conspiracy to defraud does not lack certainty, and the Court is bound to follow those decisions.

Accordingly both appeals are dismissed. The Appellants will have 14 days in which to submit any application for a point of law of general public importance to be certified and for permission to appeal to the UK Supreme Court.